Part I: Trends In Alternative Dispute Resolution: Corporate America Turns To The Quicker, Cheaper Forms Of Dispute Resolution

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Alternative Dispute Resolution, or "ADR," has grown tremendously over the past few decades. Whether it involves arbitration, mediation, or one of the newer forms of ADR that have developed in recent years, people around the country are turning to ADR as a means of resolving their disputes in a quicker, less expensive, and more efficient manner than would be possible if they brought their grievances to a traditional court. One would be unwise today to enter into litigation without first exploring the possibilities of ADR, and the benefits it provides.

A Short History Of The Legal Genesis Of ADR

Prior to 1925, the judiciary expressed a hostile attitude towards ADR. This policy was carried over from the English common law, which refused to enforce irrevocable arbitration agreements because they were viewed as an attempt to oust the courts of jurisdiction. Then, in 1925, Congress passed the Federal Arbitration Act [FAA]. Under the FAA, the courts are now required to treat arbitration agreements as "valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of any contract." 9 U.S.C. § 2. The FAA also allows the courts to stay proceedings where the issue before it is covered by an arbitration agreement, and it directs courts to order parties to arbitrate where there is an arbitration agreement that has not been honored. 9 U.S.C. § 3 and § 4; *see also Sherk* v. *Alberto Culver Co.*, 417 U.S. 506, 511 (1974).

It is now a given that public policy favors arbitration, where appropriate (such as when there is an arbitration agreement). *See Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26 (1983). The rationale for this policy is that arbitration allows the parties to save time and money, while enabling the courts to clear their dockets. This modern tendency to favor arbitration applies at the state level as well. *See, e.g., Smith Barney Shearson, Inc. v. Sacharow*, 91 N.Y.2d 39, 49 (1997). With the court's blessing, the use of arbitration is rapidly growing in a number of areas. These include: commercial litigation, international law, domestic relations, attorney/client disputes, and employer/employee disputes [covered in Part II].

The power of Congress to enact the FAA was derived from the Commerce Clause in the United States Constitution. (U.S. Const. art.I § 8, cl.3). Under section 2 of the FAA, the statute may only be applied to "a written provision in any maritime transaction or a contract evidencing a transaction involving commerce" which contains an arbitration provision. Until a few years ago, there was some debate as to how to interpret this provision.

The Supreme Court resolved this debate in 1995 in *Allied-Bruce Terminex Co. v. Dobson*, 513 U.S. 265 (1995). The Court determined that the language of section 2 should be broadly construed. The Court held that the phrase "involving commerce" indicated that Congress intended to exercise its Commerce Clause powers to the fullest. Additionally, the court grappled with the interpretation of the phrase "evidencing a transaction."

The Supreme Court of Alabama had applied a "contemplation of the parties" test, meaning that if the parties did not contemplate that the transaction would involve interstate commerce, then the FAA would not apply even if the transaction did in fact involve interstate commerce. The Supreme Court rejected this analysis in favor of a "commerce in fact" test, meaning that the FAA would apply to any transaction that, in fact, involved interstate commerce even if the parties never intended that to be the case. As a result of this ruling, the scope of the FAA now extends to the outer limits of Congress' Commerce Clause power.

Once it is determined that the FAA applies, the FAA pre-empts all state laws. This is true even if the state has a law or policy against arbitration. In *Allied Bruce-Terminex Companies*, 513 U.S. at 272, the United States Supreme Court held that the FAA pre-empted an Alabama state law that restricted arbitration.

As long as the parties agree to arbitrate, the Supreme Court seems willing to apply the FAA to almost any type of dispute. The FAA has been applied to claims arising under the Sherman Act, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); the Securities Act of 1933, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); the Securities Exchange Act of 1934, *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987); and the civil RICO statute. *Id.*

Arbitration Pros & Cons

There are both advantages and disadvantages to resolving disputes through ADR. With regard to arbitration, the advantages are:

- it usually costs less than litigation;
- it results in a speedier resolution of the dispute;
- the result is final;
- confidentiality, if desired, can be maintained; and
- the parties have a role in the selection of a neutral arbitrator.

One disadvantage to arbitration is that the arbitrator's decision may at times be arbitrary, since arbitrators are generally permitted to disregard the law and the facts, although there has been a tendency in some courts to overturn arbitration awards where the arbitrator's award reflects a "manifest disregard of the law." Other disadvantages of arbitration are the lack of opportunity to appeal, and the risk of lengthy delays and increased costs in the absence of a strong arbitrator or arbitration panel.

Another disadvantage is the potential for prolonged adjournments, which happens particularly frequently when there are three member panels. Also, there is the risk that long-standing relationships, both business and personal, will be destroyed by the adversarial nature of the arbitration process. This concern prompts many would-be adversaries to turn to mediation instead.

Mediation Pros & Cons

Mediation has exploded in popularity over the last decade, at an even faster rate than arbitration. In mediation, the parties agree to attempt to settle their dispute in front of an impartial third person who tries to steer them towards an agreed-upon resolution. Among the most practical advantages of mediation are:

- it offers a convenient forum,
- often leads to an expedited resolution, and
- saves the parties money.

Furthermore, mediation is advantageous because the parties come to agreements throughout the process, from the selection of a neutral mediator to the final resolution of the dispute. As a result, they are usually more satisfied with the outcome than they would be if a third party, whom they had no hand in selecting, imposed a resolution on them. Mediation also provides an opportunity for creativity in finding resolutions. By allowing the parties to avoid the limitations of a "winner take all" system, they can work together to craft solutions that allow both sides to walk away feeling like they have won, or at the very least, achieved a reasonable settlement. Particularly, in commercial disputes, mediation is most advantageous because it frequently enables parties to preserve a mutually beneficial relationship.

The major disadvantage of mediation is that there is a lack of finality if an agreement is not reached. The mediator cannot compel a resolution, thus, the dispute may not get resolved in this manner. Sometimes parties are concerned about being perceived as "weak," in so far as negotiating posture is concerned if they agree to enter into mediation.

Continued Expansion Of ADR Venues

While ADR remains mostly voluntary except where there are pre-existing agreements between the parties, there are some states that now have compelled mediation for some kinds of cases. For instance, Arizona, Florida, Maine, and Pennsylvania all require parties to go to mediation to resolve either all or some types of domestic disputes (although Arizona and Florida allow for an exception where domestic violence is involved). Moreover, in Utah all civil litigants are required to view an ADR video before proceeding with their litigation, although participation in ADR remains voluntary.

Finally, litigants may wish to consider some of the other forms of ADR, which are less common than arbitration and mediation, but which continue to grow in popularity. These include evaluations, summary trials, mini trials, mock trials or mock arbitrations, and trial by private judge and jury. It behooves lawyers and clients to consider using ADR as a potential approach to resolving disputes, rather than automatically turning to the more frustrating and less satisfying traditional alternatives.

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