Court-Annexed Alternative Dispute Resolution

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Introduction

The American judicial system has experienced a dramatic increase in the number of cases - both civil and criminal - filed over the course of the past few decades. While politicians, commentators, and advocates for consumer and commercial interests argue over the cause, the fact is that this dramatic increase in new case filings has seriously hindered the American judicial system's ability to resolve dispntes quickly and efficiently.

As a result of this increase in case filings, the courts have become progressively backlogged, resulting in lengthy delays before trials can be held, particularly in civil cases, thereby further resulting in significantly increased costs to the parties to the disputes. The delays in any given case do not end upon completion of the trial. Instead, even more years of delay occur before a case passes through the various appellate courts; of course, further delays will occur if a case is remanded to a trial court for a new trial, followed then by more delays from further appeals.

The increased costs caused by these delays accrue to the community, the courts and the litigants. Certainly, the impact is felt most heavily by the parties to the disputes through increased legal fees and related expenses, lost time for the litigants — including executives and employees of companies involved in disputes, lost investment opportunities on the amounts paid for those legal fees and expenses, and significantly delayed investment opportunities to the injured parties on amounts ultimately awarded.

Leaders of the business community recognized these inefficiencies of the American judicial system years ago and fostered use of binding arbitration to resolve disputes arising from business dealings. The agreement to utilize binding arbitration was contained within their contracts. However, many disputes arise outside contractual relationships, and obtaining an agreement for binding arbitration (or any other alternative dispute resolution mechanism) is far more difficult to achieve once the accusations and affronts inherent in lawsuits are exchanged and the need for vindication arises.

The state courts in Texas have lead the American judicial system in the development and use of modern court-annexed alternative dispute resolution (ADR) to reduce these delays and costs of resolving disputes. The federal court system has recently developed its ADR program, with the result that all of the courts in Texas are now aggressively utilizing ADR to improve the courts' ability to resolve the cases being filed.

This article describes court-annexed ADR in Texas. It discusses the laws authorizing the courts to utilize ADR and describes the protections given to the parties when using ADR. The subject of contractual arbitration and other methods of private ADR are governed by different laws and are, therefore, outside the scope of this article.

The purpose of this article is to encourage readers to consider the use of court annexed ADR in other legal systems, not necessarily for the reasons used in the United States, but at least for the purpose of encouraging resolution of disputes by agreement, instead of by the force of a court's judgment.

Whatis Court-Annexed ADR?

Court-annexed ADR - alternative dispute resolution implemented upon order of a court while a lawsuit is pending - is a process formally adopted by the U.S. Congress and federal courts, and by the Texas legislature and Texas state courts, as a means of reducing the costs and delays before cases can be resolved by encouraging the parties to resolve their disputes by agreement early in the litigation process. If the parties to a dispute do not reach an agreement during ADR, the case will be resolved by the court following the normal litigation process, including trial.

The most common forms of court-annexed ADR are mediation, mini-trial, moderated settlement conference, summary jury trial, and non-binding arbitration. These categories are artificial, and the distinctions between them are not absolute. The form of alternative resolution mechanism actually implemented in any given case is infinitely variable, the only limitation being the constrained imagination of the parties, their attorneys, and the court. Following are summaries of the basic forms of court-annexed ADR:

A. *Mediation* - The most common form of court-annexed ADR, mediation is a forum in which an impartial person - the mediator - assists the parties to reach their own voluntary settlement. The process is one of assisted negotiation, with the mediator working to facilitate communication and understanding, exploring alternatives, and encouraging a mutually agreeable solution.

There is no required procedure to be followed during a mediation; instead, the mediator can select the procedure best suited to the parties' interests on a case by case basis. In general, two theories of mediation have developed. Both begin with a joint gathering of the parties and their counsel in the mediator's office. The mediator gives an introductory statement and explains the process. The parties or their attorneys are asked to discuss their respective positions and what they believe to be the relevant facts and applicable law. In a dispute involving an ongoing relationship between the parties, such as a business dispute or a family or neighborhood dispute, the mediator may then lead a joint discussion with the parties and their counsel concerning the disputed facts and issues, solicit options for possible solutions, and prompt the parties to a negotiated settlement. In these cases, there are usually many options for a possible solution, and development of these options often allows the parties to realize a mutually agreeable resolution while encouraging a continued relationship between the parties.

In disputes where there is not an ongoing relationship to be preserved, such as a personal injury or property damage lawsuit, the mediator may elect to separate the parties after the joint gathering and then engage in shuttle diplomacy, meeting with the parties separately to obtain a further exchange of information and to pursue a continued modification of the parties' respective positions until a settlement is reached. This procedure is especially useful where the only issue involved concerns a claim for money and where resolution of the dispute will be accomplished primarily through a continued exchange of offers and demands. In those cases, a settlement may be facilitated by separating the parties to avoid unnecessary emotional conflicts.

Mediation is not adjudicatory - there is no fact finding or legal decision-making except what each party determines for itself and for its own purposes. The mediator cannot impose his or her opinion or judgment on the parties. Instead, the parties retain full responsibility and control over resolution of the dispute.

B. *Mini-Trials* - In this ADR method, the parties present their respective positions to a representative of each party, an impartial third person, or both for the purpose of defining the issues and developing a basis for settlement negotiations. If the presentation is to an impartial third party, the parties (or senior management of a corporate party) are also present.

Evidentiary and procedural rules are typically waived, and the parties' respective attorneys usually present the evidence. The time for presenting the evidence is limited and agreed upon in advance. The impartial third person assists the parties in discussing settlement based upon the evidence provided, and may, if requested, provide his or her opinion on how a court and jury would decide the case. The opinion is not binding unless the parties agree otherwise.

One instance where a mini-trial may be helpful is in a commercial dispute where the attention of upper management may facilitate resolution of the problem. Requiring a high level manager with each party to participate in the mini-trial, either as the party representative or as a panel member hearing the matter, may bring a voice of reason to the dispute or focus the manager' s attention on the relative strength or weakness of his or her company's position.

C. *Moderated Settlement Conference* - A moderated settlement conference is similar to a mini-trial. The primary difference between the two is that the presentation in a moderated settlement conference is made to a panel of impartial third parties.

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D. *Summary Jury Trial* - A summary jury trial is, as the name suggests, an abbreviated trial of the dispute. The trial judge presides, and a panel of six jurors is called by the court. The attorneys present a summary of the testimony and any documents to the jury, and the jury issues a non-binding verdict.

The purpose of a summary jury trial is to learn on a non-binding basis what a jury (or at least the selected panel) would decide without suffering the lengthy delay before a trial can be scheduled and without incurring the time and expense of a full jury trial. It is mainly used in cases where the parties disagree on facts and need to determine how a jury would decide those facts at a trial. For that reason, the jurors are not told that the verdict is advisory and non-binding until after they provide their verdict. While the jurors are deliberating and after the verdict is reached, the parties and their attorneys (with the assistance of the trial judge, if necessary) continue their settlement discussions.

E. *Arbitration* - Arbitration is likely the most well-known ADR method, primarily in connection with a business dispute. It is, however, less commonly used in court-annexed ADR, and arbitration in court-annexed ADR differs from contractual arbitration in that the arbitrators' decision in court-annexed ADR is not binding unless the parties agree otherwise.

The arbitration hearing proceeds much like a trial, but without all of the evidentiary and procedural rules. The evidence and argument are presented to a single arbitrator or a panel of three persons. In cases involving scientific or technical issues, an arbitration can prove superior to a trial or another ADR method since an arbitrator can be selected on the basis of being an expert in the subject matter of the dispute.

Authority for Court-Annexed ADR

The State Courts

Court-annexed ADR started in Texas in 1983 with the creation of ADR Centers in the larger metropolitan areas. These Centers provide an information and referral program connecting the courts, the various government attorneys offices, lawyer referral and legal aid services, and other governmental and private service agencies. The Centers also provide a mediation and moderated settlement conference program, a victim/offender reconciliation project for juvenile criminal offenders, a police community assistance program, and a coordinating program for social service providers.

In 1987, the Texas legislature enacted the Texas Alternative Dispute Resolution Procedures Act that created a formal ADR process for the state courts. That program has been codified at Chapter 154 of the Texas Civil Practice and Remedies Code. In enacting the program, the legislature stated

> It is the policy of this state to encourage the peaceable resolution of disputes, with special consideration given to disputes involving the parent-child relationship, including the mediation of issues involving conservatorship, possession, and support of children, and the early settlement of pending litigation through voluntary settlement procedures.

Tex. Civ. Prac. & Rem. Code § 154.002 (Vernon 1997) (emphasis added). All ofthe state courts in Texas, both trial and appellate, have the responsibility to carry out this policy, and every state court in Texas is authorized to refer any civil case to resolution by any ADR method.

The state courts' powers to utilize ADR are broad, but not unlimited. A court may refer a case to ADR at any time in the trial or appellate process, and may continue to rule on matters pending completion of ADR. A court may order ADR sua sponte or on the motion of any party, and may appoint the impartial third party(ies) — the ADR provider(s). A court may not refer a case to ADR on less than ten days' notice.

A court may not refer a case to ADR if a party objects and the court finds there is a reasonable basis for the objection. However, a court may order ADR over the objection of one or even all of the parties if the court finds that there is no reasonable basis for the objection. Additionally, many courts will place cases that have not been through ADR at the end of the court's trial docket. The decision whether to refer a case to ADR is discretionary with the court, and, in making the decision, the court may consider the nature of the dispute, complexity of the issues, number of parties, extent of past settlement discussions, posture of the parties, whether sufficient discovery to evaluate the case has occurred, status of the case on the court's docket, whether a referral would be appropriate at that particular time, and any other appropriate factor. Importalltly, a court may not order the parties to settle nor even to negotiate in good faith — a court can only order the parties to participate in ADR. Likewise, an ADR provider cannot compel the parties to negotiate or coerce the parties into reaching an agreement.

The Federal Courts

In 1990, the United States Congress passed the Civil Justice Reform Act of 1990 requiring each federal district court — the general trial court — to implement a civil justice expense and delay reduction plan to "facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes." 28 U.S.C. § 471 (West 1993). Congress specifically required the federal district courts to consider, and allowed them to include in the civil justice expense and delay reduction plans, authorization to refer cases to ADR. This legislation gave the federal district courts express authority to utilize ADR in civil cases. By way of example, the federal district court having jurisdiction over the central and south Texas Gulf Coast — The United States District Court for the Southern District of Texas — has adopted its Cost and Delay Reduction Plan that included a new Local Rule 20 governing the use of ADR in civil matters. Under that rule, a judge in the Southern District of Texas may refer a case to ADR on his or her own initiative, at the request of any party, or pursuant to an agreement of the parties. The ADR methods recognized by the court are mediation, mini-trial, summary jury trial, and non-binding arbitration; the court may also approve any other ADR method the parties may suggest or the court believes is appropriate. The court will generally approve any agreement the parties may have to an ADR method, an ADR provider, or both, but the court has the authority to require another method or provider or even some other settlement initiative.

In the Southern District of Texas, the judge holds a scheduling conference in each civil case about three months after the case is filed. Before the conference, the attorneys must discuss between themselves and with their clients the appropriateness of ADR and the particular ADR method to be used. The attorneys must then advise the court of the results of their discussions concerning use of ADR, and the court will then usually issue an order referring the case to ADR as part of the attorneys' preparation of the case for trial. Any opposition to either the ADR referral or the ADR provider selected by the court must be made in writing within ten days of the court's referral order and must explain the reasons for the opposition.

Either the parties, or a representative with authority to negotiate a settlement, and all other persons necessary to negotiate a settlement, including insurance companies, must attend the ADR. The ADR provider's fee is determined by the parties and the provider, although the fee is subject to review by the court.

Educational Requirements for ADR Providers

On rare occasions - often only in a summary jury trial - a court will serve as the ADR provider. More often, the court will refer the case to an ADR provider such as a county-sponsored ADR provider, a dispute resolution organization; e.g., the American Arbitration Association, or, most commonly, an impartial third party.

The Texas Alternative Dispute Resolution Procedures Act requires that ADR providers complete a 40 hour specialized training program, with additional specialized training required for those providers involved in a dispute related to a parent-child relationship. Individual courts may require further training or qualification, and most courts maintain lists of approved ADR providers. The ADR provider is not required to be a lawyer, although most providers are practicing lawyers.

Under Local Rule 20 of the United States District Court for the Southern District of Texas, an ADR provider must have been licensed to practice law for at least ten years, currently be admitted to practice before the United States District Court for the Southern District of Texas, have completed the 40 hour specialized training program, and be approved by the court's standing panel on ADR providers. Local Rule 20 also states that the ADR provider is subject to disqualification on the same grounds as a judge. Those grounds include having a personal bias or prejudice concerning a party, having personal knowledge of disputed evidentiary facts concerning the proceeding, previously serving as a lawyer on the matter or being associated with a lawyer who served concerning the matter, having a financial interest in any party to or the subject matter of the controversy, being a party to the case or being related to a party to the case, having an interest that could be substantially affected by the outcome of the proceeding, or being a material witness to the case.

Enforcement

If the parties reach a settlement during ADR, they may sign a settlement agreement. A written settlement agreement may be enforced in the same manner as any other written contract, including suing for breach of contract or for specific performance. For that reason, a party who has signed a settlement agreement reached during ADR cannot unilaterally repudiate that agreement.
Alternatively, under court-annexed ADR, the parties may have their settlement incorporated into a final judgment of the court. A settlement incorporated into the court's final judgment may be enforced through any means available to enforce any other judgment of a court. But, a court may not enter a judgment based upon a settlement reached during ADR if one party objects or seeks to repudiate the settlement. For this reason, an ADR provider almost always requires the parties to sign a settlement agreement upon completion of a successful ADR.
In the Texas state courts, an agreement reached during ADR that is not incorporated into a final judgment of the court or reduced to writing and signed by all parties is not enforceable.

Costs

The cost of ADR is minimal compared to the cost of the continued prosecution and defense of a lawsuit that could be settled. Most ADR providers charge a fixed price based upon a one-day ADR session. That fee is paid in advance and shared equally by the parties. If the case settles, the parties can agree to any other sharing of that cost as they desire. There is, of course, no ADR provider's fee for a summary jury trial. The ADR provider's fee cannot be recovered by the prevailing party from any other party if the case is not settled.
In addition to the ADR provider's fee, the parties must pay their attorneys to prepare for and attend the ADR session. Most ADR sessions last no more than one day, although a summary jury trial is often limited to a half-day session and an arbitration, even a non-binding arbitration, can last somewhat longer. While this expense would not be incurred absent an ADR referral, a successful use of ADR early in a case ultimately saves the parties far greater amounts in attorney fees and expenses that would be incurred if the case were not settled.

Confidentiality

Court proceedings, including trials, are open to the public, but ADR sessions are generally confidential. A summary jury trial may be an exception to this general rule since that proceeding itself would be held in open court. Under Texas law, any statements made during ADR cannot be offered as evidence at trial if the case does not settle unless the disclosed information can be obtained from another source. Likewise, nothing disclosed to the ADR provider in confidence by any party can be disclosed by the ADR provider to the other party without the first party's consent. The ADR provider cannot be forced to testify concerning statements made during ADR or to disclose his or her notes from the ADR. Finally, an ADR provider will report to the court only whether the case did or did not settle.
Southern District Local Rule 20 simply states that all communications made during the ADR session are confidential and protected from disclosure, and do not constitute a waiver of any privilege or immunity. The extent of these confidentiality provisions is uncertain. Both laws state that communications during ADR are confidential; however, neither law provides any remedy if one of the parties publicly discloses information revealed during ADR. One possible interpretation of these laws, then, is that a mediator is prohibited from disclosing to anyone any information revealed during ADR, whether in confidence or not, and that any information disclosed during ADR, whether in confidence or not, cannot be used at trial if the case does not settle, unless that information can be confirmed from another source. There would be no prohibition against a party generally disclosing information revealed during ADR. However, there have been no reported court decisions in Texas construing these provisions. In any event, the parties can protect the confidentiality of a settlement reached during ADR by including a confidentiality clause in their settlement agreement.

Conclusion

The American public and business community have needed a mechanism for resolving disputes quickly and fairly, without the lengthy delay in obtaining a trial, before the legal fees and expenses exceed the amount in dispute, and before personal ego precludes reason and economic reality. Court-annexed ADR is the tool courts use to meet these needs. Parties using ADR are frequently able to resolve their disputes more quickly and at lower cost than in traditional litigation. Parties using ADR can also maintain confidentiality in resolving those disputes. Most importantly, parties using ADR can resolve disputes amicably, thereby maintaining an ongoing relationship, a result that may not be available with the command of a court's judgment.
Some of the world's largest industrial organizations are creating their own internal ADR procedures, and are educating their own employees to work as impartial third parties. These companies have discovered that many internal problems that would otherwise result in an expensive, protracted court battle can be resolved amicably if there is an impartial institution allowing a fair exchange between the parties.
ADR is not appropriate in every case, and there will always be cases that require court intervention and resolution. However, for those cases that can be resolved without a trial, ADR can save the parties time and money, and is highly conducive to a continued relationship between the parties.

Abkommen EG-USA über die gegenseitige Anerkennung

1. Gegenstand des Abkommens

Die Europäische Gemeinschaft und die Vereinigten Staaten von Amerika haben am 18. Mai 1998 in London ein "Abkommen über die gegenseitige Anerkennung" geschlossen. Das Abkommen ist - nachdem seine Ratifizierung auf beiden Seiten am 30. Oktober 1998 abgeschlossen ist - am 1. Dezember 1998 in Kraft getreten. Der Text des Abkommens ist im Amtsblatt der Europäischen Gemeinschaften vom 4. Februar 1999 (Nr. L 31 Seite 3) veröffentlicht worden. Im Folgenden soll ein Überblick über den Inhalt des Abkommens gegeben werden; eine umfassende Analyse und eine Bewertung seiner Bedeutung für die Praxis bleiben vorbehalten.
Die lapidare Bezeichnung des Abkommens erweckt den Anschein, daß es sich um eine breit angelegte Vereinbarung handelt, mit der die gegenseitige Anerkennung als generelles Prinzip für den Wirtschaftsverkehr zwischen der EG und den USA völkervertragsrechtlich verankert wird. Dies ist jedoch nicht der Fall. Das Abkommen betrifft lediglich die Anerkennung der Ergebnisse der "Konformitätsbewertungsverfahren" in einem bestimmten, eng begrenzten Produktbereich. Dennoch ist das Abkommen als ein nützliches Instrument zur Verbesserung des Marktzugangs im transatlantischen Warenverkehr und darüber hinaus vielleicht alsSchritt zu weitergehenden Vereinbarungen zwischen den Vertragsparteien zu begrüßen.

2. Inhalt des Abkommens

Zweck des Abkommens ist es festzulegen, "unter welchen Bedingungen eine Vertragspartei die Ergebnisse der Konformitätsbewertungsverfahren annimmt oder anerkennt, die von den Konformitätsbewertungsstellen oder -behörden der anderen Vertragspartei bei der Bewertung der Konformität mit den sektorspezifischen Anforderungen der einführenden Vertragspartei in den sektoralen Anhängen durchgeführt werden" (Art. 2). Durch die gegenseitige Anerkennung soll für die betreffenden Produkte hinsichtlich der Konformitätsbewertung ein "wirksamer Marktzugang" im Gebiet der jeweiligen anderen Vertragsparteien gewährleistet werden. Im Zusammenhang damit sieht das Abkommen außerdem bestimmte *Kooperationsmaßnahmen* vor. Für den Fall, daß es trotz der vorgesehenen Verfahren zu einer Behinderung des Marktzugangs kommt, sind die Vertragsparteien zur unverzüglichen Aufnahme von *Konsultationen* verpflichtet. Führen diese nicht zu einem "zufriedenstellenden Ergebnis", hat die Vertragspartei, die eine Behinderung des Marktzugangs geltend macht, das Recht, das Abkommen zu kündigen.
Das Abkommen besteht aus einem *"Rahmenabkommen"* und *sektoralen Anhängen*; diese betreffen sektorspezifische Anforderungen in den Bereichen Telekommunikationsendgeräte, elektromagnetische Verträglichkeit, elektrische Sicherheit, Sportboote, Gute Herstellungs-