

ALTERNATE DISPUTE RESOLUTION

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Although many disputes are resolved by a court order, there are two other processes widely used to resolve disputes: arbitration and mediation. Other alternatives are minitrial, moderated settlement conferences and summary jury trial. These alternate processes for settling disputes provide opportunities to promptly and effectively resolve disputes. Some of them are potentially binding, while most of them are not. The issue of whether a form of ADR is binding is usually the subject of an agreement between the parties.

Because litigation is a costly process and can also be very slow (depending on the size and scope of the court dockets), starting in the early 1980s the focus on settling disputes through mediation and arbitration led to the passage of legislation encouraging and facilitating the voluntary settlement of disputes.

Alternative Dispute Resolution Procedures Act

The Alternative Dispute Resolution Procedures Act¹ provides a court authority to refer a dispute to an alternative dispute resolution process after conference with the parties. In general, the resolution processes are non-binding unless the parties agree to be bound. If a settlement is reached, the parties may enter the settlement agreement into the court proceeding. If no settlement is reached, litigation proceeds as usual. However, in the case of arbitration, especially, there may be prior agreements between the parties that compel the parties to use arbitration as an exclusive and binding procedure.

Arbitration

Many contracts provide for the resolution of any disputes that arise through arbitration. The agreement may provide that the decision of the arbitrators is binding. That is, the parties may not appeal the decision, having waived that right. *Aguilar v. Abraham*, 588 S.W.2d 599, 601 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.). However, if there is fraud, mistake or misconduct, a court may review the award and arbitration process. *Grissom v. Greener & Sumner Construction, Inc.* 676 S.W.2d 709, 711 (Tex. App.—El Paso 1984, writ ref'd n.r.e.). Texas has both common-law arbitrations and statutory arbitrations pursuant to the Texas General Arbitration Act.² If the arbitration is made in connection with a lawsuit, the result must be filed with the court and entered as of record, as required by Texas Rules of Civil Procedure Rule 11.

¹ Texas Civil Practice and Remedies Code, Section 154.001 *et seq.*

² There is a federal Arbitration Act, but generally it does not apply to construction contracts, since most of those disputes do not involve interstate commerce.

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Exhibit 1 is typical of clauses that provide for alternative dispute resolution. After attempts by the parties to settle the dispute between themselves, this contract provides for binding arbitration upon the demand of either party, using the commercial rules of the American Arbitration Association (“AAA”). The AAA is a non-profit organization founded in 1926 to resolve disputes through voluntary dispute resolution procedures. AAA administrative fees for arbitrations are based on the value of the dispute, starting from \$950 for a claim up to \$10,000 to a cap of \$65,000. In addition to paying for the AAA procedural and administrative assistance, the parties will also need to pay the arbitrator(s) selected to resolve the dispute. Fees for arbitrators range from \$300 to \$500 per hour, and depending on the type of AAA process the contract requires the parties to use, there can be 1-3 arbitrators.

Pf course, a contract may provide for arbitration without specifying the use of AAA., but the contract must provide a method for appointing an arbitrator or arbitrators, and also set the procedural rules that will be used to actually conduct the arbitration. It is also common to insert a provision in arbitration clauses that require the parties to employ another ADR process, such as mediation, before resorting to the arbitration process.

An arbitration clause in a contract is enforceable and a party may obtain specific enforcement of the agreement.³ To be enforceable, the agreement for arbitration must show that it was the intention of the parties to submit the dispute to arbitrators and be bound by their decision. Once these showings are made, Texas courts will decline to resolve the dispute, and will order the parties to use arbitration as the sole method of resolution, as the contract dictates.

In an arbitration the dispute is presented before either one or three arbitrators appointed by the parties or from a list of AAA Arbitrators. Usually documents are produced and witnesses appear before the arbitrators at a hearing. Each side presents evidence to support its claim. Witnesses are asked questions by the arbitrators and the adverse party. Hearings are very similar to a hearing before a judge with the arbitrators determining the admissibility, relevance and materiality of evidence. Parties may agree to waive oral hearings and just present documentary evidence and briefs.

If the arbitration is non-binding and either party is dissatisfied with the result, the decision may be appealed to a court in the appropriate jurisdiction. However, if the arbitration clause mandates binding arbitration, there is no appeal to court, except in the limited circumstances noted above. It is permissible for the prevailing party to go to court to enforce the arbitration award – that is to get a court order compelling the losing party to pay the amount awarded, or to take whatever remedial action the arbitrators ordered.

³ *L.H. Lacy Co. v. City of Lubbock*, 559 S.W.2d 348, 353 (Tex. 1977).

Local governments are advised not to enter arbitration agreements. Usually a local government will want a jury of its taxpayers determining the outcome of any dispute. Furthermore, in many public work project disputes, the potential jury pool is usually aware of the project, and in many instances, is aware of the defective conditions that the dispute is meant to resolve. As a general rule, lawyers would rather “preach to the choir” and present the dispute about a public works project to a jury made up of the people who will be paying taxes for the next 20 years to pay for the defective construction, as opposed to an arbitrator or a panel of arbitrators. Indeed, in many small towns or counties, the arbitrator will often be an attorney, architect, or contractor from the nearest big city, and while that person may be more “objective” in that they are not directly involved in the dispute or the repercussions of the dispute, it is also possible that they will be more jaded, cynical, or subtly biased in favor of the party with whom the local government is in the dispute.

Finally, there is often no cost savings as the fees for the AAA and the arbitrators are in addition to the legal fees associated with litigation. It should also be noted that oftentimes there is little time savings by using arbitration, as the parties will usually want to engage in discovery, and will want to have an opportunity to submit written motions and briefing to the arbitrator.

Mediation

Since the 1980s mediation has become more and more popular for dispute resolution. The advantages of mediation are two-fold. It can be much less time consuming than either arbitration or litigation. Also, the process usually is much less expensive than other dispute resolution options. It is particularly helpful when the parties have a continuing business relationship. In a publication by the State Bar of Texas, the goals of mediation are noted to be:

- Facilitate communication and cooperation between the parties.
- Encourage the parties to exercise jointly the responsibility for making decisions about their lives.
- Discourage the parties from verbally attacking, judging, blaming, or punishing each other.
- Analyze the options for resolving the current disputes.
- Address the needs of all parties.
- If the dispute involves conservatorship possession, and support of children, design a plan tailored specifically to the needs of the children.
- Reach an agreement that the parties perceive as fair.
- Provide a model for future conflict resolution by the parties.⁴

⁴ *Handbook of Alternative Dispute Resolution : New Horizons for the Texas Justice System*, ch. 5, *Specialized Fields*, 92, State Bar of Texas 1987.

Since a mediation is relatively brief and informal, the cost is generally less than other procedures. While still requiring full investigation of the facts and a determination of the expectations of a party, sometimes mediation can resolve a dispute without the full discovery process required for a trial. The cost for a half-day mediation generally runs between \$1500 and \$2000 with the parties splitting the fee. Even a full day of mediation is usually under \$4,000, and each party will only pay half of that. Parties can also schedule mediation on short notice and on an as-needed basis, so this is potentially important if the dispute is holding up construction, for example.

Every county with a population of 150,000 or more must provide a settlement week.⁵ The court may refer a pending lawsuit to disposition during settlement week. The court appoints mediators to resolve disputes for a reasonable fee that is set by the court. It is the policy of many counties to require mediation prior to having a trial on the merits.⁶

Mediation is a private process in which a trained mediator facilitates communication between the parties to a dispute. The parties are represented by agents who possess authority to negotiate a settlement. Since a meeting by a quorum of a city council or county commissioners court or other public entity governed by a board invokes the Open Meetings Act, usually governmental entities are represented by someone who has knowledge of the entity's position on all issues in the dispute and also has knowledge of the parameter within which the entity is willing negotiate. However, final approval of the negotiated settlement from the mediation must be done by the governmental body at a meeting sometime shortly following the mediation itself, as discussed below.

Mediation is a flexible process, in which the mediator and parties can agree on any rules that will aid the parties in exploring the issues and resolving the dispute. Often the parties are asked to prepare an information sheet of some sort, which is provided to the mediator, but not to the other party, several days before mediation begins. See Exhibits 2 and 3.

Typically, the parties meet with the mediator and, after introductions, the attorney for each side briefly explains their case. The mediator asks question of the parties in order to determine what each side hopes to gain in a settlement. During the initial joint session, the parties may be asked if they wish to say something before going into the next phase of the mediation, but they may rely solely upon the representations make by their attorney.

Most mediators use a technique called caucusing in which each side is consulted privately. Everything a party tells the mediator in a caucus is confidential, unless the

⁵ Texas Civil Practice and Remedies Code, section 155.001 *et seq.*

⁶ Texas Civil Practice and Remedies Code, section 152.001 *et seq.*

party authorizes the mediator to disclose a specific offer or other information to the other side.

Information revealed in the mediation process is privileged and confidential, unless all parties agree otherwise, or as may be required by law. Nothing that is said in mediation may be used in a trial of the dispute if the mediation fails to settle the matter. No recordings or transcripts are made of the proceedings. The mediator assists the parties in assessing the benefits and risks and alternative available. The primary responsibility for the resolution of a dispute rests with the parties. If one party is unwilling or unable to participate meaningfully in the process, a mediator can postpone, recess or terminate the mediation process.

All mediation settlements are reduced to writing. See Exhibit 4. When a governmental entity is involved in a dispute, a settlement cannot be entered without deliberation and vote in an Open Meeting. However, if the person representing the public entity is of the opinion that the elements of the negotiated agreement will be satisfactory to the full board, the agreement may be reduced to writing at the mediation, presented to the full board in an executive session at a properly posted meeting, and, if acceptable, be deliberated and voted upon in the open portion of the public meeting.

In the legislation passed by the Texas Legislature about alternative dispute resolution, there was a declaration that: “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.”⁷

As our populace becomes more litigious the use of voluntary alternative dispute resolution has become commonplace.

⁷ Texas Civil Practices & Remedies Code, section 154.002.

EXHIBIT 1

Sample Arbitration Clause

Dispute Resolution: Any disputes controversies, or claims arising between the parties out of or relating to this Agreement, or the breach, termination or invalidity hereof, or of the rights and obligations created hereunder (collectively “Disputes”) shall be brought before a conciliation committee consisting of one executive representative of each party. The committee shall, within thirty (30) calendar days of being informed of the dispute, attempt to reach a resolution of such dispute. Should the conciliation effort fail to resolve such dispute within the 30-day period, the dispute shall be finally and exclusively settled by binding arbitration, upon appropriate demand of either of the parties. Following the exhaustion of the conciliation remedy provided above, any Dispute shall be so finally determined and settled by arbitration in accordance with the commercial rules of the American Arbitration Association, as such are in force at the time a demand for arbitration is made. The arbitration shall be heard and determined by a single arbitrator. The place of the arbitration shall be Austin, Texas.

The award, if monetary, shall be made and shall be payable in US dollars, free of any tax, offset or any other deduction. The parties agree that the award of the arbitral tribunal will be the sole and exclusive remedy between them regarding any and all claims and counterclaims presented to the tribunal, and judgment upon any arbitral award may be entered and enforced in any court of competent jurisdiction.

EXHIBIT 2

May 1, 2008

Via Facsimile

Austin, Texas 78701

Re: Cause No. xxxxxxxxxxxx; ABC. v. XYZ Corporation, et al.

Dear _____:

This will confirm that I am to serve as mediator in the above-referenced matter on Monday, June 2, 2008 beginning at 1:00 p.m. at the Travis County Courthouse, 98th Judicial District Court, 100 Guadalupe Street, 4th Floor, Room 412, Austin, Texas.

I am assuming that you will bring with you all persons with full authority to completely settle the case during the mediation. I am also assuming that the parties and their counsel are committed to a good faith effort to resolve the matter and are willing to devote adequate time for the process to work.

Prior to the mediation, I would like for you to send me a brief statement, as soon as possible to my telecopier number 512-320-5638, (no more than two pages) setting out your client's position and indicating what, if any, settlement offers or proposals have previously been made. If there are unique areas of law regarding this particular matter, please feel free to include this with your submission. Likewise, if there are any documents that you would like me to review, please send these along.

I am looking forward to working with you and hope we can resolve this matter.

Sincerely,

Myra A. McDaniel

MAM/cg

EXHIBIT 3

CONFIDENTIAL MEDIATION INFORMATION SHEET
Cause No.

MEDIATION DATE/TIME/LOCATION:

1. Please state the nature of plaintiff's claims and the defendant's defenses and counterclaims.
2. What relief is sought by the parties?
3. What are the primary disputed issues of law or fact in this case from your perspective?
4. What is the status of discovery?
5. What is the last demand/offer of each party?
6. Please state any special facts or circumstances which will impact the possibility of settlement.
7. Please identify the parties or representatives who will be attending mediation.

On behalf of my client, I request _____ to act as mediator in the above-referenced case and agree that the proceeding and any communications between a party and the mediator are confidential in accordance with §154.073 of the Texas Civil Practice and Remedies Code.

Submitted by:

Attorney for :

EXHIBIT 4

**DISPUTE BETWEEN
XYZ CORPORATION AND
ABC,**

MEDIATED SETTLEMENT AGREEMENT

RECITALS

WHEREAS, ABC has been employed as a _____ by XYZ Corporation (“XYZ”); and

WHEREAS, ABC and XYZ Corporation wish to enter into this Agreement and whereby XYZ agrees to provide ABC with the consideration described below in exchange for a mutual release of all complaints, claims or lawsuits that the Parties have, or may have, against each other arising on or before the date of this Agreement;

NOW, THEREFORE, for and in, consideration of the recitals set forth above, the agreements, promises and representation made by ABC and XYZ in this Agreement and other good and valuable consideration, the receipt and adequacy of which is hereby confessed and acknowledged, ABC and XYZ hereby mutually agree as follows:

AGREEMENT

I. DEFINITIONS

For the purposes of this Agreement, the following terms have the meanings specified or referred to in this Section “Agreement” refers to all portions of this document. “ABC” refers to _____ who is one of the Parties to this Agreement. “XYZ” refers to XYZ Corporation which is the other party to this Agreement. “The Parties” refers collectively to both parties to this Agreement, ABC and XYZ.

II. CONSIDERATION

- a. The Parties hereto agree to settle all claims and controversies between them, whether asserted or assertable in this dispute.
- b. The consideration to be given for this settlement is as follows”
 - i. ABC will retire from employment with XYZ. The date of retirement from XYZ will be May 1, 2008.

- ii. Payment to ABC by XYZ in the sum of \$52,000.00 total on or before May 31, 2008. This sum represents all amounts owed to XYZ as a result of ABC's employment with XYZ. ABC is not entitled to any additional funds or money or benefits other than those specified herein.
 - iii. Payment by XYZ to ABC of \$1500 for ABC's attorneys' fees on or before May 20, 2008.
 - iv. Payment of all federal income tax withholding, social security withholding or other taxes due upon payment of the consideration recited herein will be made by XYZ and withheld from the amount remitted to ABC.
- c. It is understood and agreed that this is a compromise of a disputed claim, and nothing contained herein shall be construed as an admission of liability by or on behalf of either party, all such liability being expressly denied.
 - d. The parties acknowledge that bona fide disputes and controversies exist between the Parties, both as to liability and the amount thereof, if any, and by reason of such disputes and controversies the Parties hereto desire to compromise and settle all claims and therefore enter into the following release:

III. GENERAL RELEASE

In consideration of the terms set forth in this Agreement, the sufficiency of which is acknowledged, the Parties, for themselves and their heirs, successors, assigns, executors and administrators, hereby release and forever discharge each other and their officers, agents, servants, employees, board members and assigns, of and from any and all manner of action or actions and causes of action, grievances, controversies, claims and demands, obligations, liabilities, suits, damages of every kind and character whatsoever, arising out of, as a result of, resulting from, or based upon or relating to actions, omissions, or events occurring before or on the date of the execution of this Agreement, including, but not limited to:

- a. Claims directly or indirectly arising out of ABC's employment with XYZ and ABC's retirement;
- b. any claims for compensation or benefits of any kind or nature;
- c. any claims of employment discrimination, including, but not limited to claims brought under Title VII of the Civil Rights Act of 1964, as amended; the Civil Rights Act of 1991, 42 U.S.C. § 1981; the National Labor Relations Act; the Age Discrimination in Employment Act of 1967; the Americans with Disabilities Act of 1991, 42 U.S.C. 12202 et seq.; The Rehabilitation Act of 1973, 29 U.S.C. Section 701; the Family Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.; the Fair Labor Standards Act of 1938; the Equal Pay Act of 1963; the Employee Retirement Income Security Act; the Consolidated

Omnibus Budget Reconciliation Act; the Texas Commission on Human Rights Act, Texas Labor Code, Title 2, Subtitle A, Ch.21; the Texas Whistleblower Act, Texas Government Code § 554.001 et seq.; Right of Remonstrance, Texas Constitution, art. I § 27; Right to present grievance, Texas Government Code, § 617.005; or

d. any claim pursuant to any other federal, state or local statute, executive order, constitutional provision, regulation or ordinance; or

e. any claims based upon contract expressed or implies; or

f. any claims based on tort, including personal injury, libel, slander, and/or defamation.

IV. ACKNOWLEDGMENTS AND UNDERSTANDINGS

a. Each signatory hereto hereby warrants and represent that:

i. Such person has authority to bind the Parties for whom such person acts.

ii. The claims, rights and/or interest which are the subject matter hereto are owned by the party asserting same, have not been assigned, transferred or sold, and are free of encumbrance.

b. This Agreement is made and performable in _____ County, Texas and shall be construed in accordance with the laws of the State of Texas.

c. This Agreement may not be assigned, i.e. given or transferred to, another person or entity, in whole or any part.

d. No verbal or written commitments or agreements shall have any force or effect if not contained in this Agreement.

e. The Parties agree that they will maintain as confidential the terms of this Settlement Agreement and that they will not disclose the terms of this Agreement to any person or entity except as may be compelled by law or by order of a court of competent jurisdiction or to accountants or attorney for business or tax return purposes.

f. If any portion of this Agreement is held to be invalid or unenforceable by any court of competent jurisdiction, the other provisions of this Agreement will remain in full force and effect.

APPROVED AS TO FORM AND SUBSTANCE, AND AGREED TO BY:

ABC

XYZ CORPORATON

Signature:_____

Signature:_____

Printed Name:_____

Printed Name:_____

Title:_____

APPROVED AS TO FORM ONLY:

Signature: _____

Printed Name: _____
Attorney for ABC

Signature: _____

Printed Name: _____
Attorney for XYZ Corporation