TO ARBITRATE OR NOT ARBITRATE, THAT IS THE SECOND QUE$$TION

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In my first article on the subject of ADR (alternative dispute resolution), I discussed the concept of mediation, a fancy name for a settlement conference, where a "neutral," oftentimes a retired Judge, meets with you, your "opponent," and all counsel, to try and resolve your dispute and keep a small fire from becoming a large conflagration. But what if that effort fails?

One of your options … and it may not be an option … is to resolve your dispute through arbitration (a private trial). At an arbitration, which can last several hours or several days, the arbitrator (if and when I have a choice, I generally prefer to use a retired judge as the arbitrator) listens to opening statements, receives evidence (i.e., documents and witnesses' and parties' testimony), listens to closing arguments and then issues an arbitration award. Eventually the award can be converted into a court judgment by virtue of a fairly simple motion.

You might be required to attend arbitration because a document, such as a purchase and sale agreement, associate agreement or shareholder's agreement, *requires* you to attend arbitration in lieu of going to court for a trial on your issues. The arbitration provision might read something like this:

> "The parties agree that any dispute in law or in equity arising between them, out of this agreement or any resulting transaction, which is not settled through mediation, shall be decided by binding arbitration. The arbitration shall be conducted by a retired Judge at either JAMS (Judicial Arbitration Mediation Service), Judicate West or ADR Services, Inc., and shall be conducted in the county where the practice is located. The arbitration, including any discovery (i.e., depositions) in connection therewith, shall be conducted in accordance with the arbitration rules of the company selected to conduct the arbitration. The arbitrator shall have the authority to award the prevailing party his/her/its attorney's fees and costs consistent with the applicable provision(s) set forth herein."

Even in the absence of a contractual arbitration provision, you and your opponent can always agree to voluntarily attend arbitration in order to avoid a dreaded lawsuit.

There are generally two types of arbitration – binding and nonbinding. Depending upon the amount involved in the dispute, I generally prefer binding arbitration.

A binding arbitration results in an award that, with few exceptions, is truly the final word on the subject. It is not appealable and can only be overturned by a court in rare circumstances, such as proving that the arbitrator colluded with one of the parties -- a truly uphill battle.

A nonbinding arbitration results in an award that can be viewed as a "first bite at the apple." The "second bite" comes when and if the losing party (generally) asks a court for a "real" trial in

court. The request must be made in writing within a specified period of time after the arbitrator issues his/her award. If such a request is made, the court then schedules a trial for some date in the future.

Two of the biggest disadvantages to a nonbinding arbitration are (1) there are no jury trials; and (2) the parties have no appeal rights, in the event that they believe that the arbitrator made a mistake in the law or the application of the facts to the applicable law. In other words there is no “big brother” looking over the arbitrator’s shoulder.

One of the biggest advantages to arbitration, binding and nonbinding, is the ability to control the date and time of the arbitration, because counsel and the arbitrator schedule the arbitration hearing on a date that is convenient to everyone’s calendars. Arbitrators don’t schedule more than one arbitration at a time so there won’t be any calendar conflicts or waiting in line until your case is “called.”

In a trial court, you and many other parties and counsel show up in court for trial on the scheduled date. However, you may be subject to one or more trial continuances because there is “no room at the inn,” meaning that there are too many trials scheduled on the same date as yours. Trial delays oftentimes result in unnecessary trips to the courthouse and increased attorney’s fees because your counsel will need to prepare for the trial multiple times.

Finally, the decision on whether to include an arbitration provision in one or more of your contract documents is yours, in consultation with your counsel. Taking the pros and cons discussed herein into consideration should help you make an informed decision.