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RESOLUTION OF DISPUTES IN THE *CORPUS JURIS SPATIALIS*: DOMESTIC LAW CONSIDERATIONS

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ABSTRACT

Space programs rapidly are shifting in emphasis from government sponsored activities to commercial ventures. Legal disputes regarding government regulations, interpretation of contracts, and liability for torts and other damages will multiply as the number of private entities participating in the arena of space expands. The successful commercialization of space largely will be dependent upon the existence of mechanisms for the prompt, predictable, effective, and economical resolution of these controversies.

The development of private dispute resolution procedures received little attention during the period in which space activities were dominated by governments. Thus, private entities must rely on traditional means, primarily litigation, to resolve disputes. Litigation, however, is costly, time consuming, and not necessarily suited to resolving controversies that often revolve around complex technological issues. Public and private space lawyers face a formidable challenge to examine the efficacy of existing dispute resolution mechanisms, and develop alternative procedures where appropriate.

This article examines the traditional method of litigation, vis-a-vis domestic United States law, with particular reference to efficacy and functionality in relation to potential disputes involving space ventures. The article further focuses attention on alternative dispute resolution (ADR) mechanisms, with particular reference to arbitration. Finally, recommendations are suggested for the drafting of ADR provisions in private agreements.

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INTRODUCTION

The commercialization of space inevitably will give rise to numerous disputes and legal claims. Commercial space programs necessarily are cost intensive and technologically complex, and disputes involving contract interpretation or other claims could significantly delay the completion or commercial operation of a venture. For example, contract disputes involving failure to deliver, or delivery of defective components, by a supplier of a critical part could substantially impact the completion or commercial operation of the project. If the aggrieved company is small, and dependent upon the timely, successful operation of the project, the result of the delay could be disastrous. The court system, through the traditional means of litigation, may not provide an expeditious and cost effective mechanism for resolution of these private disputes.

The American system of justice has been responsive to the needs of society for the prompt, efficient and effective resolution of disputes. As a result, a variety of reforms have been introduced to the Rules of Civil Procedure.[1] At the same time, alternative dispute resolution (ADR) mechanisms have been developed to narrow if not resolve disputes as a supplement to judicial intervention. The principle advantages of ADR revolve around efficacy and saving the parties both time and expenses: the dispute may be resolved more rapidly and satisfactorily than the court system could accomplish, and the expense of obtaining such resolution may be substantially lower than would be incurred by traditional litigation.

The primary forms of ADR are mediation and arbitration. Mediation generally may be defined as a voluntary, non-binding procedure in which the parties make a summary presentation to a neutral third party. The mediator seeks to find a solution to the dispute which is agreeable to both sides, but can only recommend a form of compromise and assist the parties in recognizing the strengths in the opponents position, the weaknesses in their own, and the benefits of a negotiated settlement. Arbitration and mediation may be very similar in their flexibility and range of agreements available to the parties concerning procedures and other matters. However, arbitrators generally are authorized to decide the merits of the controversy, and the decision of the arbitrator may be binding on the parties.

This article will provide an overview of alternative dispute resolution procedures, particularly arbitration, in United States domestic law. The potential benefits of ADR, specifically in relation to contractual disputes involving large, technologically complex systems such as a commercial space venture, will be identified and demonstrated by comparisons between arbitration and traditional litigation. Additional forms of alternative dispute resolution techniques briefly will be discussed. Finally, suggestions will be made for drafting ADR provisions in private agreements.

PRIMARY CHARACTERISTICS OF ADR

Traditional litigation generally is concerned with the assignment of fault and liability for damages. The focus of ADR, however, is more conciliatory than adversarial, emphasizing the development of a reasonable and practical solution which may better serve the true needs and desires of the parties rather than the allocation of fault. Thus, ADR facilitates the prompt, effective and efficient resolution of private controversies, while at the same time preserving the opportunity for the parties to maintain a business relationship for future dealings. This latter factor may be of significant concern, especially where the pool of potential suppliers of components or services may be limited. As such, the use of alternative forms of dispute resolution is worthy of serious

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1. *See, e.g.*, 17B A.R.S., Rule XVII(d), Uniform Rules of Practice for the Superior Court of Arizona (uniform interrogatories); Rule 26.1, Arizona Rules of Civil Procedure [hereinafter referred to as "ARCP"]. Rule 26.1, ARCP, commonly referred to as the "Zlaket Rules," provide, *inter alia*, for the mandatory disclosure of all relevant information within the possession of the parties, or which can be ascertained by reasonable investigation, within 40 days of the filing of an answer or other responsive pleading by a defendant; and limitations on the number of formal discovery requests which may be made without express authorization from the court.

consideration by parties and legal counsel involved in the commercial space industry.

While once viewed as an unenforceable means of divesting a court of its jurisdiction,[2] ADR now has been recognized as a valuable aid in the administration of justice. The characteristics of ADR were designed to address specific problems encountered with traditional litigation. In the absence of a compelling issue concerning public policy, or the desire to establish legal precedent for industry, the utilization of ADR substantially can minimize the drawbacks of litigation.[3]

ADR is available to parties in a variety of dispute settings. Both the Uniform Arbitration Act (UAA)[4] and the Federal Arbitration Act (FAA)[5] recognize the enforceability of agreements contained in private contracts to utilize an alternative dispute resolution process. Although the particular means of ADR which could be utilized generally are limited only by agreement of the parties, that agreement does not necessarily need to be contained within a contractual relationship. Courts have instituted procedures for ADR in almost all substantive areas of private endeavor.[6] Moreover, one of the attributes of ADR is its inherent flexibility, such that it is subject to the agreement of the parties. The text of both the FAA and the UAA defer to the agreement of the parties where such agreement differs or conflicts with the provisions of the acts.[7] Thus, the FAA and the UAA both recognize the right of the parties to agree to utilize ADR after a dispute has arisen.[8] There is no specific limitation on the parties which prevents them from altering or modifying the procedures utilized for ADR as may

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2. *Gates v. Arizona Brewing Co.*, 54 Ariz. 266, 95 P.2d 49 (1939); *J.T. Williams & Bro. v. Banning Mfg. Co.*, 154 N.C. 205, 70 S.E. 290 (1911); *but see Funk v. Funk*, 6 Ariz. App. 527, 529, 434 P.2d 529, 531 (1967), *cert. den.* 393 U.S. 829, 89 S.Ct. 95, 21 L.Ed.2d 100 (1968)(awards rendered through arbitration procedures may be considered valid by the courts).

3. Wainscott & Holly, *Alternative Dispute Resolution -- Current Trends and Practical Considerations*, in ALTERNATIVE DISPUTE RESOLUTION 69 (State Bar of Arizona 1993).

4. Uniform Arbitration Act, A.R.S. §§ 12-1501 *et seq.* [hereinafter referred to as the "UAA"].

5. Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, applies to maritime disputes and transactions involving interstate commerce [hereinafter referred to as the "FAA"]. Thus, the FAA, rather than the UAA, will apply to agreements involving commercial space ventures, except in limited circumstances where the substance of the agreement could be considered solely intrastate and not interstate commerce. Nevertheless, the provisions of the FAA and the UAA substantially are similar, and the case law relating to the UAA may be illustrative and instructive in the interpretation of the FAA. Additional rules and regulations may be applicable to particular contracts, such as the U.N. Commission on International Trade Law: Model Law on International Commercial Arbitration, 24 I.L.M. 1302 (1985), however, such international arbitration procedures are beyond the scope of this study. For a discussion of whether the U.S. should adopt the UNCITRAL on the federal level, or pre-empt arbitration as it relates to space law, see White, *Resolution of Disputes Arising in Outer Space*, in PROCEEDINGS OF THE 35TH COLLOQUIUM ON THE LAW OF OUTER SPACE 183, 189-91 (1993). It should be noted that parties may agree to utilize the provisions of the UNCITRAL Model Law whether or not is has been adopted in a particular jurisdiction. Moreover, it may be difficult to define what constitutes a "space law" dispute as distinct from a commercial dispute involving a space venture.

6. *See generally* 17B A.R.S. Uniform Rules of Procedure for Arbitration; 28 U.S.C. §§ 651 *et seq.* [hereinafter referred to as the "URPA"]. A.R.S. § 12-133, Rule 1(b), URPA, and Rule 3.10, Local Rules of Practice for the Superior Courts, Maricopa County, Arizona, provide for mandatory, non-binding arbitration for all cases in which the only relief sought is a monetary judgment of not more than $50,000.00. Thus, it may be considered that such a referral to arbitration is included in all contracts subject to such statute and rules by operation of law.

7. *See, e.g.*, FAA, 9 U.S.C. § 3; UAA, A.R.S. § 12-1503 (method of appointment of arbitrators); UAA, A.R.S. § 12-1504 (action by majority of arbitrators); UAA, A.R.S. § 12-1505 (manner of conduct of hearings); FAA, 9 U.S.C. § 9; UAA, A.R.S. § 12-1508 (procedures regarding the award); and UAA, A.R.S. § 12-1510 (attorney's fees and costs of arbitration proceedings).

8. FAA, 9 U.S.C. § 2; UAA, A.R.S. § 12-1501.

be appropriate under the circumstances, even during the course of the dispute resolution process.

The decision to utilize ADR, of course, must be made by the parties on the basis of the merits of each situation. As a matter of practice, clients are more willing to consider the inclusion of a binding ADR provision during the process of forming the contractual relationship rather than after a problem has caused them financial damage. Such a provision would enhance the relationship between the contracting parties, as it would signify a recognition that an adversary relationship would not necessarily result in the event of future misunderstanding or disagreement over the terms or performance of the contract, and an acknowledgement that the parties will seek a prompt, effective and economic resolution of any dispute which may arise therefrom. In addition, such a provision may enhance the benefits of goodwill during the course of performance of the contract, and also may encourage the parties to avoid disputes or at least attempt to resolve disputes which otherwise would have developed into litigation.[9]

As a matter of draftsmanship, no particular form is required to create an enforceable contract provision to submit disputes to ADR, provided that the intent of the parties adequately is expressed. The more complete the provision, of course, the more control the parties will maintain over the process. Gaps created by the absence of agreement on any specific matter may be filled by statute, court rule, or even private sources of ADR.[10]

A primary feature of ADR is the ability of the parties to prevent a private dispute from becoming a matter of public attention. Unlike litigation, the pleadings, exhibits and other documents utilized in ADR are not necessarily available for public inspection and dissemination by third parties, nor are hearings or other proceedings required to be open to the public. Thus, invocation of ADR may minimize the risk of adverse publicity which is inherent in traditional litigation. Moreover, the parties can agree to keep their dispute private, by placing a prohibition on the disclosure of information obtained during the ADR process. The avoidance of publicity together with the maintenance of confidentiality may promote goodwill and encourage the parties to be more candid in their disclosures to each other, as well as to the person or persons performing the function of arbitrator or mediator. In turn, the probability will be enhanced that the true interests and concerns of the parties will be understood, appreciated, and given appropriate consideration.[11] Moreover, the maintenance of confidentiality may have particular significance for aerospace and other high technology industries. Therefore, an agreement to maintain confidentiality may substantially contribute to enabling the parties to narrow the areas of contention, or even to negotiate an acceptable conclusion to the controversy.

Enforcement of Agreements to Arbitrate

Courts have recognized that strong policies favor arbitration of private disputes[12] and mandate the removal of arbitrable disputes from the courts.[13] These policies include the easing of congestion of courts, speeding resolution of disputes, and affording a more economical means for the

9. Wainscott & Holly, *supra* note 3, at 75-8.

10. The American Arbitration Association is but one example of private alternative dispute resolution services which are available independent of the court system. These services may have their own published rules of procedure, which may be incorporated by reference into an agreement to utilize ADR.

11. Wainscott & Holly, *supra* note 3, at 75-8, 109-12.

12. *Shearson American Express, Inc. v. McMahon*, 482 U.S. 220, 233, 107 S.Ct. 2332, 2341, 96 L. Ed.2d 185, 198 (1987); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11, 94 S.Ct. 2449, 2452-53, 41 L. Ed.2d 270, 275-76 (1974); *Blumenthal v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 910 F.2d 1049 (2nd Cir. 1990).

13. *See Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218, 105 S.Ct. 1238, 1241, 84 L. Ed.2d 158, 163 (1985); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 22, 103 S.Ct. 927, 940, 74 L. Ed.2d 765, 784 (1983); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, 87 S.Ct. 1801, 1806, 18 L.Ed.2d 1270, 1277 (1967).

disposition of cases.[14] Contractual agreements to submit disputes to arbitrate are binding and enforceable by the courts, and the role of the court in an action to compel arbitration is limited to a determination of whether a valid arbitration provision exists in the contract.[15] The provision will be enforced unless other grounds of contract avoidance exist,[16] such as lack of mutual consent; lack of consideration; fraud; duress; lack of capacity; mistake; failure to comply with reasonable expectations of parties; unconscionability; or violation of public policy.[17] Courts have invoked the doctrine of separability to determine grounds for avoidance, that is, the grounds must apply specifically to the arbitration clause itself, and not to the contract as whole.[18] Thus, the court may compel arbitration and stay litigation,[19] even where one of the parties denies the formation or enforceability of the contract as a whole.[20]

WAIVER OF AGREEMENTS TO ARBITRATE

Courts have considered the question as to whether, and under what circumstances, a provision to arbitrate may be waived by a party. There is some authority for the proposition that a party who materially breached the contract waived the right to arbitrate, at least where the arbitration clause itself was breached or repudiated.[21] Other authority, however, holds that neither repudiation nor rescission will vitiate an arbitration clause.[22] Generally, absent an express waiver, an arbitration provision will not be found to be waived unless the party engaged in conduct preventing, unreasonably delaying, or making arbitration impossible, or proceeding in disregard of arbitration.[23] The conduct creating a waiver must be inconsistent with utilizing arbitration.[24] Thus, a party may not seek to compel arbitration after a trial on the

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14. *See Gross v. James A. Recabaren, M.D., Inc.*, 253 Cal. Rptr. 820, 206 Cal. App.3d 771 (1988). The preference for arbitration is even stronger in the context of international business. *See David L. Threlkeld & Co. v. Metallgesellschaft Ltd. (London)*, 923 F.2d 245 (2d Cir. 1991), *cert. dis.* 112 S.Ct. 17, 115 L.Ed.2d 1094 (1991); *Carib Aviation & Marine Consultants, Ltd. v. Mitsubishi Aircraft Intern., Inc.*, 640 F.Supp. 582 (S.D. Fla. 1986).

15. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co., supra*, 388 U.S. at 403-04, 87 S.Ct. at 1806, 18 L.Ed.2d at 1277; *Stevens/Leinweber/Sullens v. Holm Dev. & Mgmt. Inc.*, 165 Ariz. 25, 28, 795 P.2d 1308, 1311 (1990).

16. FAA, 9 U.S.C. § 2; UAA, A.R.S. § 12-1501.

17. *See North American Van Lines v. Collyer*, 616 So.2d 177 (Fla. App. 1993); *United States Insulation, Inc. v. Hilro Constr. Co.*, 146 Ariz. 250, 253, 705 P.2d 490, 493 (1985).

18. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co., supra*, 388 U.S. at 403-04, 87 S. Ct. at 1806, 18 L. Ed.2 at 1277; *Smith v. Logan*, 166 Ariz. 1, 799 P.2d 1378 (Ariz. App. 1990); *Diersen v. Joe Keim Builders, Inc.*, 106 Ill. Dec. 534, 153 Ill. App.3d 373, 505 N.E.2d 1325 (1987), *app. den.* 113 Ill. Dec. 296, 116 Ill.2d 552, 515 N.E.2d 105 (1987).

19. *Contract Development Corp. v. Beck*, 155 Ill. Dec. 464, 210 Ill. App.3d 677, 569 N.E.2d 941 (1991); *Mills v. Robert W. Gottfried, Inc.*, 272 So.2d 837 (Fla. App. 1973). The FAA, 9 U.S.C. § 3, provides that the court may stay the "trial of the action," while the UAA, A.R.S. § 12-1502, permits the court to stay the "action or proceedings." For a discussion of the significance of these statutory differences in regard to discovery issues, see Wainscott & Holly, *supra* note 3, at 107.

20. *Giordano v. Witzer*, 558 F.Supp. 1261 (D.C. Pa. 1983).

21. *See Bolo Corp. v. Homes & Son Constr. Co.*, 105 Ariz. 343, 464 P.2d 788 (1970).

22. *U.S. Insulation v. Hilro Const. Corp., supra*, 146 Ariz. at 254-56, 705 P.2d at 494-96, *citing Heyman v. Darwins, Ltd.*, [1942] A.C. 356; *Riess v. Murchison*, 384 F.2d 727 (9th Cir. 1967); *In re Pahlberg*, 131 F.2d 968 (2nd Cir. 1942); *Batter Bldg. Materials Co. v. Kirschner*, 142 Conn. 1, 110 A.2d 464 (1954); *DeLillo Constr. Co. v. Lizza & Sons, Inc.*, 7 N.Y.2d 102, 195 N.Y.S.2d 825, 164 N.E.2d 95 (1959).

23. *See D.M. Ward Const. Co. v. Electric Corp. of Kansas City*, 15 Kan. App.2d 114 (1990).

24. *See Imperial Savings Assn. v. Winget*, 730 F.Supp. 1068 (D.C. Utah 1990). The issue of waiver properly is decided by the arbitrator. *See Brothers Jurewitz, Inc., v. Atari, Inc.*, 296 N.W.2d 422 (Minn. 1980).

merits, where such party failed to perfect an interlocutory appeal from a denial of an application to compel arbitration,[25] nor after a significant period has elapsed in the litigation process.[26] However, a waiver was not found where the plaintiff filed suit seeking both injunctive relief and an order to compel arbitration.[27]

COMPARISON OF ADR AND TRADITIONAL LITIGATION

Scheduling of hearings

The scheduling of traditional litigation largely is beyond the control of the parties, and delays are not uncommon. Moreover, the date of the trial or hearing set by the court's normal administrative process may not be convenient to the parties, witnesses, or counsel, and generally is determined by the pre-existing docket and calendar of the judge assigned to hear the case. The parties may take control over the pace of the proceedings through ADR, and agree that the hearing or other presentation of evidence will be scheduled for a specific date, or within a specified number of days following a particular event, such as the selection of the arbitrator or arbitrators. The use of ADR allows the parties to schedule the proceedings at their convenience and with reference to their needs and the particular context of the dispute, thereby lessening the burden imposed on the productivity of the parties and their key personnel and witnesses.

The selection of the judge, jury or arbitrators

In traditional litigation, the parties have little, if any, control over the selection of the trial judge, which generally is assigned by the clerk of the court in a random manner.[28] Similarly, the panel from which the jury is comprised is beyond the control of the parties, and several days can be expended by counsel in attempting to select a "favorable" jury.[29] Many potential jurors, frequently including those best qualified to serve for a particular case, will seek to have themselves disqualified out of a desire to avoid jury duty. The virtue of this process is that it is designed to result in an impartial trier of fact. However, it may also produce a jury containing individuals with little or no training, education, or experience relevant to the controversy between the litigants.

The parties may take firm command over this process through ADR. They can agree to a specific person or persons to hear and decide their dispute, or they can agree on a method by which the arbitrator or umpires will be selected. The parties can agree further that any persons selected shall have sufficient background, training or education or other specific qualifications to serve in such capacity. Frequently, arbitration provisions are drafted which allow both parties to select one arbitrator, and the two arbitrators designate a third arbitrator. Unless otherwise provided in the agreement, a majority of the arbitrators may render

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25. *Rancho Pescado, Inc. v. Northwestern Mut. L. Ins. Co.*, 140 Ariz. 174, 680 P.2d 1235 (Ariz. App. 1984).

26. *Bautch v. Red Owl Stores, Inc.*, 278 N.W.2d 328 (Minn. 1979).

27. *EFC Dev. Corp. v. F.F. Baugh Plumbing & Heating, Inc.*, 24 Ariz. App. 566, 540 P.2d 185, 188 (1975). See also text & notes 39-40, *infra*.

28. The parties always have the opportunity to challenge a particular judge on the grounds of bias or prejudice, or even to strike one or more judges from hearing the case without cause. Nevertheless, the parties may not usually designate the judge to hear the case, and a replacement judge selected by the court clerk may be worse, from a party's perspective, than the one successfully stricken or challenged for cause.

29. This task is magnified by the lack of information readily available to counsel concerning the individuals in the jury pool before they are brought into the courtroom, and limitations on the number of pre-emptory challenges, for which no cause must be established. Challenges for cause must be developed during the *voir dire* by the court and/or counsel, who seek to disqualify potential jurors for some perceived bias or prejudice against the client or its cause. Although private services to assist in jury selection, by psychological profiles and other methods, have become available, the considerable expense thereof may not be justified in the absence of a reliable measurement of their effectiveness.

decisions.[30] In the event the agreed upon selection process fails for any reason, the court may appoint the arbitrators.[31]

Authority of arbitrator

The authority of the arbitrators is defined by the agreement from which their power to act is taken,[32] and such agreement is interpreted broadly.[33] Subject to any limitations in the agreement, arbitrators have wide discretion, and arbitrators should act affirmatively to simplify and expedite proceedings[34] In addition, arbitrators have authority to decide questions of fact and law,[35] and are neither restricted to technical legal claims or theories, nor confined by general rules of evidence or procedure.[36] Moreover, arbitrators are not required to make findings or state reasons for an award,[37] nor can courts inquire as to whether the arbitrator made errors of law, unless the agreement of the parties requires the arbitrator to follow the rules of procedure or legal precedent.[38]

The parties can specify a particular form of award that must be used, or otherwise limit the authority of the arbitrator. Subject to contrary provisions in the agreement, the arbitrators can shape a remedy that fairly reflects the intent of parties. The authority of an arbitrator may extend to the issuance of an injunction if appropriate to the resolution of the dispute, even if a court of equity would not have issued such an order.[39] The authority of arbitrators to issue preliminary injunctions may not receive the same judicial deference. Nevertheless, the strong policies favoring arbitration are furthered by permitting the court to preserve the meaning of arbitration in appropriate cases by issuing a preliminary injunction to preserve the *status quo* pending completion of the arbitration process. "Arbitration can become a 'hollow formality' if parties are able to alter irreversibly the *status quo* before the arbitrators are able to render a decision in the dispute. [The courts] must ensure that the parties get what they bargained for -- a meaningful arbitration of the dispute."[40]

The binding nature vel non *of the resolution obtained by the ADR process*

Pursuant to the express text of the FAA, the court may enter a judgment confirming an arbitration award where the parties have so

30. UAA, A.R.S. § 12-1504. The FAA, 9 U.S.C. § 5, states that unless otherwise provided in the agreement of the parties, the arbitration shall be conducted before a single arbitrator.

31. FAA, 9 U.S.C. § 5; UAA, A.R.S. § 12-1503.

32. *See Byron Center Public Schools Bd. of Educ. v. Kent County Educ. Ass'n.*, 186 Mich. App. 29, 463 N.W.2d 112 (1990); *State v. Thomas Const. Co., Inc.*, 8 Kan. App.2d 283, 655 P2d. 471 (1982).

33. *Sindler v. Batleman*, 416 A.2d 238 (D.C. App. 1980).

34. *Ballantine Books, Inc. v. Capital Distributing Co.*, 302 F.2d 17, 21 (2d Cir. 1962).

35. *See Central Iowa Public Employee Council v. City of Des Moines*, 439 N.W.2d 170 (Iowa 1989); *Gaslin, Inc. v. L.G.C. Exports, Inc.*, 334 Pa. Super. 132, 482 A.2d 1117 (1984); *New Pueblo Constructors, Inc. v. Lake Patagonia Recreation Ass'n.*, 12 Ariz. App. 13, 467 P.2d 88 (1970).

36. *Cobus v. Dairyland Ins. Co.*, 656 P.2d 54 (Colo. App. 1982).

37. *Hembree v. Broadway Realty & Trust Co., Inc.*, 151 Ariz. 418, 728 P.2d 288 (1986).

38. *See Giant Markets, Inc. v. Sigma Marketing Systems, Inc.*, 313 Pa. Super. 115, 459 A.2d 765 (1983); *University of Alaska v. Modern Const., Inc.*, 522 P.2d 1132 (Alaska 1974).

39. *Painters Dist. Council No. 35 v. J.A.L. Painting, Inc.*, 11 Mass. App. 698, 419 N.E.2d 298 (1981); *Totem-Marine Tug & Barge, Inc. v. North American Towing, Inc.*, 607 F.2d 649 (C.A. La. 1979).

40. *Blumenthal v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 910 F.2d 1049, 1053 (2nd Cir. 1990), *citing Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 51 (1986); *Merrill Lynch v. Bradley*, 756 F.2d 1048, 1053-54 (1985); *Dean Witter Reynolds, Inc. v. Byrd, supra*, 470 U.S. at 221, 105 S.Ct. at 1242, 84 L.Ed.2d at 165.

agreed.[41] Thus, arbitrations conducted under the authority of the FAA are presumed to be non-binding. The UAA, however, does not contain this same presumption, and absent fraud or mistake, the award generally is final and conclusive.[42] Where the arbitration is binding, the court may enter an order confirming an arbitration award, and a judgment entered in conformity therewith is enforceable as any other judgment or decree[43] The court has no power on a motion to confirm to review the sufficiency of evidence[44] However, a court may refuse to confirm an arbitration award where the arbitrators exceeded their powers as defined in the agreement of the parties. It is presumed that the arbitrators decided only those issues which were contained in the submission agreement, and the award is binding unless the arbitration extended to matters beyond scope of submission[45] Nevertheless, unless limitations are clearly expressed in the agreement, courts appear reluctant to disturb arbitration awards on the basis that the arbitrators exceeded their authority.[46]

Limitations on discovery and the presentation of evidence

The rules of civil procedure provide various mechanisms by which evidence may be obtained and preserved in preparation for trial.[47] Despite the broad sweep of discovery, however, the adversarial nature of litigation affords an opportunity for the opponent to object to, hinder and often avoid the production of evidence. It is not uncommon for discovery disputes to remain unresolved for months, during which time the requested information is withheld and the entire litigation process may be delayed.

ADR provides the parties with the opportunity to place limitations on the use of discovery devices, such as restrictions on the number of requests for documents or interrogatories which may be propounded, the length of depositions, or the use of sworn statements rather than depositions of certain witnesses. The parties also may agree that

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41. FAA, 9 U.S.C. § 9. *See I/S Stravberg (O.H. Melina, Manager) v. National Metal Converters, Inc.*, 500 F.2d 424 (C.A.N.Y. 1974); *Varley v. Tarrytown Asso., Inc.*, 477 F.2d 208 (C.A.N.Y. 1973)(arbitration award will not be confirmed by the court in the absence of an express provision in the agreement, even where the agreement incorporated the rules of the American Arbitration Association); *see also Penn. Engineering Corp. v. Islip Resource Recovery Agency*, 710 F.Supp. 456 (1989), *recon. den.* 714 F.2d 634 (E.D.N.Y. 1989).

42. UAA, A.R.S. § 12-1512. Additional grounds for refusal to confirm an arbitration award include partiality of the arbitrator, FAA, 9 U.S.C. § 10(a)(2); UAA § 12(2); and conduct of the proceedings prejudicial to a party, FAA § 10(a)(3); UAA § 12(4).

43. FAA, 9 U.S.C. § 9; UAA, A.R.S. § 12-1514. Under the UAA, A.R.S. §12-1509, the arbitrators may modify an award to provide to clarification, or to correct a miscalculation or mis-description of persons or property, or to rectify an imperfect form of the award not affecting the merits of the controversy. Such authority is reserved to the court pursuant to the FAA, 9 U.S.C. § 11.

44. *See Matter of Arbitration Between InterCarbon Bermuda, Ltd.*, 146 F.R.D. 64 (S.D.N.Y. 1993); *Carabetta Builders, Inc. v. Hotz Corp.*, 30 Conn. App. 157, 619 A.2d 13 (1993); *Hyatte v. Quinn*, 180 Ill. Dec. 427, 239 Ill. App.3d 893, 607 N.E. 321 (1993).

45. *See Barletta v. French*, 34 Mass. App. Ct. 87, 607 N.E.2d 410 (1993); *Federal Kemper Ins. Co. v. Reager*, 810 F.Supp. 150 (E.D. Pa. 1992).

46. *See Pinnacle Group, Inc. v. Shrader*, 105 N.C. App. 168, 412 S.E.2d 117 (1992); *Gordon v. Sel-Way, Inc. v. Spence Bros. Inc.*, 438 Mich. 488, 475 N.W.2d 704 (1991); *Office & Prof. Employees Intern. Union, Local 2 v. Washington Metropolitan Area Transit Authority*, 724 F.2d 133, 233 U.S. App. D.C. 1 (1983); *Chillum-Adelphi Volunteer Fire Dept., Inc. v. Button & Goode, Inc.*, 242 Md. 509, 219 A.2d 801 (1966); *but see Local Joint Executive Bd. of Las Vegas v. Riverboat Casino, Inc.*, 817 F.2d 524 (9th Cir. 1987)(court may refuse to confirm award which is contrary to law or public policy).

47. *See generally* Federal Rules of Civil Procedure Rules 26-36 [hereinafter referred to as "FRCP"]. Discovery procedures authorized by state and federal rules of procedure include requests for production, interrogatories, physical and mental examinations, depositions, and requests for admissions.

responses to discovery requests shall be made within a period different than the 30 to 40 days typically provided by the rules of civil procedure.[48] An agreement to maintain confidentiality, coupled with limitations on discovery, substantially may reduce objections to discovery requests, and thereby contribute to the full and prompt disclosure of relevant evidence. Moreover, such limitations will remove the economic superiority frequently favoring one party in regard to the ability to generate or respond to discovery requests. Arbitrators have the power to compel the attendance of witnesses or the production of evidence, and may order depositions where a witness cannot be subpoenaed or will be unavailable to testify at a hearing.[49] In addition, the court may intervene and order discovery in exceptional or extraordinary circumstances.[50]

The parties also can set limits on the duration of presentations of evidence, and the number of exhibits and witnesses, particularly experts, which may be called by a party to testify.[51] Traditional litigation inherently is protracted, and may be further delayed as a matter of trial strategy by one side or the other. Although the rules of procedure require the parties to disclose their witnesses and exhibits in advance of trial,[52] the litigants have little influence over the number of witnesses called by their adversary to testify or over the length of time utilized by the opponent for direct or cross-examination of witnesses or other presentations of evidence. Prudent practice requires that all potential witnesses be contacted and interviewed, frequently at great expense to the parties. Agreements to limit presentations of evidence would obligate the parties to prepare their case in a more concise and direct manner, which often may result in the narrowing of the true areas of contention.

The role and functions of legal counsel

The nature of the adversarial system often results in counsel being viewed in the most negative and derogatory light by the opposing party. However, it is the adversarial system, and not the personality of the lawyer, which requires extensive investigation into litigants' personal lives, and the not infrequent attack on character, integrity and veracity. One of the primary features of ADR is the shift in emphasis from an adversarial setting to one which is more conciliatory and conducive to creative problem solving to address the specific needs and desires of the parties.

The role of the lawyer in ADR proceedings must shift accordingly, thereby eliminating much of the animosity otherwise inherent in the litigation process. Although the lawyer must remain a strong advocate for the rights of the client, ADR creates an opportunity to emphasize the functions of an attorney as an advisor and counselor as recognized by the Code of Professional Responsibility.[53] That is, traditional litigation stresses the function of the advocate, in which the protection and enforcement of the rights of the client are of paramount importance. ADR, on the other hand, places greater reliance of the role of the attorney as an advisor and counselor, to advise or assist the client in achieving an acceptable resolution to a problem, rather than to engage in esoteric arguments over principles designed to allocate fault.

Just as the arbitrator ultimately is seeking a solution which will satisfy both parties, if possible, rather than necessarily assigning fault, the lawyers should focus on creative dispute resolution techniques, which may best serve the needs of the

48. *See generally* Rules 26 - 36, FRCP; *see also* Rules 6(e), 26.1, ARCP.

49. FAA, 9 U.S.C. § 7; UAA, A.R.S. § 12-1507(B).

50. *See Coastal States Trading, Inc., v. Zenith Nav., SA*, 446 F.Supp. 330 (S.D.N.Y. 1977); *Levin v. Ripple Twist Mills, Inc.*, 416 F.Supp. 876 (E.D. Pa. 1976); *but see Stanton v. Paine Weber* 685 F.Supp. 1241, 1242 (S.D. Fla. 1988).

51. *But see* Rule 26.1, ARCP (limiting parties to one expert per issue).

52. 17B A.R.S., Rule V(a), Uniform Rules of Practice for the Superior Court of Arizona; *see also* Rule 26.1, ARCP.

53. Arizona Rules of Professional Conduct, Rule 42, Rules of the Supreme Court, at Preamble; ER 2.1, *et seq.*

client. The parties may contribute to this shift in emphasis by placing specific limitations on the functions of the lawyers in the ADR process. For example, restrictions placed on the presentation of evidence, such as the number of witnesses, the length of direct or cross-examination, the length of opening statements and closing arguments, and the use of hearing briefs and other memoranda, will de-emphasis the adversarial role of the lawyers. Moreover, restrictions of the functions and participation of attorneys may be a material consideration for a client to agree to include an ADR provision in a contract, as it provides an important means by which the parties may retain significant control over the legal process. The UAA, however, prohibits the parties from waiving their right to be represented by counsel during the arbitration process.[54]

Responsibility for the cost of the proceedings and legal fees

The assignment of costs in a judicial proceeding is subject to court rule or statute. Typically, the prevailing party will be awarded court costs,[55] which, while not necessarily unsubstantial, do not accurately reflect the true cost of litigation. In addition to the loss or damage suffered by the claimant giving rise to the litigation must be added the expense of legal representation, as well as more intangible, and often non-recoverable costs in terms of anxiety, time, and effort expended in advancing or defending against a claim. Many costs necessarily incurred, including expert witness fees, travel expenses, time lost by the parties and their key personnel, etc., are not recoverable under particular statutes.[56] The recovery of attorneys' fees incurred also may be subject to statutory limitation. In the commercial setting, courts often have authority to award attorneys' fees to the prevailing party.[57] Nevertheless, what constitutes the "prevailing party" may be subject to dispute,[58] and an award of fees may not necessarily equal the amount actually incurred by the party. Where, however, an enforceable contract contains a provision concerning an award of attorneys' fees, the same may be respected and given effect by the courts. ADR allows the parties to take this a step further, and agree in advance concerning liability for the payment of the costs of the proceedings, as well as the method and manner by which any award of attorneys' fees may be made.

ADDITIONAL FORMS OF ADR

A variety of mechanisms are available to parties as alternatives to traditional litigation, as well as arbitration or mediation. Many of these techniques are non-binding, while others are unilateral. While non-binding or unilateral ADR may appear to be of limited utility, their value in promoting the efficient administration of justice and enhancing the prospects for negotiated resolution should not be discounted. The utilization of such mechanisms may facilitate the resolution of a dispute by providing the parties with an evaluation of the relative strengths and weaknesses of their case, thereby contributing to informed and practical decisions concerning settlement or the procedures by which a binding resolution of the dispute may be achieved. The following discussion is not intended to be exhaustive, but will serve to illustrate the range of ADR available to the parties.[59]

One method which may be under-utilized is direct negotiations and discussions between the parties, with or without the assistance of counsel.

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54. UAA § 6.

55. A.R.S. § 12-341.

56. *See generally* A.R.S. § 12-311.

57. A.R.S. § 12-341.01.

58. *See McAlister v. Citibank (Arizona)*, 171 Ariz. 207, 829 P.2d 1253 (Ariz. App. 1992); *Waqui v. Tanner Bros. Contracting Co.*, 121 Ariz. 323, 589 P.2d 1355 (Ariz. App. 1979); *Altfillisch Const. Co. v. Torgerson Const. Co.*, 120 Ariz. 438, 586 P.2d 999 (Ariz. App. 1978). In *U.S. Insulation, Inc. v. Hilro Const. Co., supra*, the court held that a party which prevailed on an application to compel arbitration was not the "prevailing party" for an award of attorney's fees in advance of an arbitration award on the merits.

59. *See generally* Wainscott & Holly, *supra* note 3, at 78-80.

Although the initiation of direct discussions could be inferred as a sign of weakness, it more accurately should be viewed as a reasonable and practical business decision based on commercial reality and the inherent detriments of litigation. The immediate resort to litigation often is not cost effective, and the detriment in the potential perception of weakness must be balanced against the potential perception of belligerency that may result from the rapid service of legal process and the antagonism which likely will ensue between the parties. In addition, consideration must be given to the impact of filing suit on future business needs, not only with the opposing party, but within the industry at large. This factor may have particular significance where the number of participants in the industry is limited, and a reputation for litigiousness could have far reaching ramifications.

The commencement of direct negotiations certainly is not a guarantee that a satisfactory resolution of the dispute will be achieved. Nevertheless, such communications may narrow the areas of contention, or establish a somewhat less adversarial atmosphere in which other forms of ADR could be considered. Where negotiations have reached an impasse over a legal or factual dispute, it may be appropriate for the parties to utilize the services of a neutral evaluator. The evaluator will provide an independent and non-binding assessment of the merits of the dispute, and thereby contribute to the parties reassessing their positions, and the resumption of good faith negotiations. The structure of this method is a matter for the parties to decide, and they may defer such decisions to the evaluator.

A party may benefit by the unilateral utilization of a neutral evaluator as an aid in formulating positions for negotiations or litigation. Individual cases may justify the use of more structured evaluations, unilaterally or jointly by the parties, such as summary trials. These techniques involve the limited presentations of evidence before an individual or panel. These forms of ADR expose the parties to both the strengths and weakness of their case, and may include a non-binding decision. Although primarily a means to enhance the prospects for a satisfactory resolution through negotiated agreement of the parties, with or without the active participation of the evaluator, these forms of ADR could be made binding rather than advisory. Where a dispute is litigated, the unilateral use of these forms of ADR may be of great assistance in preparation for a trial on the merits.

The various features of ADR techniques may be combined and shaped as appropriate for the needs and desires of the parties. Additional techniques which can be used with a variety of ADR procedures are "baseball arbitration" and "high-low agreements." In a "baseball arbitration" the parties submit their best settlement offer to the umpire. Following appropriate presentations of evidence and/or argument, the evaluator renders a binding decision by approving the offer of one of the parties. The evaluator is not empowered to shape any remedy or alter the offers, but must resolve the dispute by choosing between them. A "high-low agreement," on the other hand, permits the arbitrator, evaluator, judge or jury, to render an independent decision. However, the parties agree in advance that such decision will not be less than nor exceed specified amounts. A decision within the agreed range will stand as rendered, while a decision outside the agreed parameters will be adjusted as appropriate.

One final method which should be mentioned is the inclusion of a liquidated damages provision in a contract. Although not generally perceived as an ADR technique, such a provision may substantially limit the issues in contention. A liquidated damage provision specifies the amount of damages to which a party may be entitled upon breach of the contract by the other party. Thus, the issues in dispute relate primarily to whether or not the contract has been breached. Such provisions are valid and enforceable where the nature of the transaction would make it difficult to accurately quantify damages upon breach, and the means for computing the damages is reasonably related to the expected harm.[60] However, a liquidated damages clause will not be given effect where it bears no relationship to the actual

60. *See Peters v. Richwell Resources, Ltd.*, 64 Wash. App. 424, 824 P.2d 527 (1992).

damages sustained and is in the nature of a penalty.[61]

DRAFTING CONSIDERATIONS

A contractual provision to utilize ADR could range from a simple statement that the parties agree to submit all disputes to arbitration, to a detailed, lengthy and complex agreement. The formulation of the ADR provisions should not be allowed to lead to disputes during the contracting state of the parties' relationship. Nevertheless, care must be taken to ensure that the needs and desires of the parties accurately are reflected. The simple agreement to submit disputes to arbitration will be supplemented by the provisions of the FAA or UAA as appropriate. Where, however, the parties desire to deviate from such procedures, such intent must be expressed within the agreement.

Counsel drafting an ADR provision must confer with the client on the following range of matters, including:

♦ whether the procedures are to be confidential

♦ whether the procedures are to be binding

♦ how many arbitrators will hear the dispute, what qualifications must they have, how will they be selected, and may a majority render a decision

♦ whether there should be limitations or restrictions on the scheduling of hearings

♦ are the arbitrators required to follow the rules of procedure, legal precedent, or custom and usage of the industry

♦ what limitations, if any, will there be on:

- the authority of the arbitrators to hear and decide issues of law or fact or to shape a remedy
- the use of discovery procedures
- the presentations of evidence, including length of hearing and number of witnesses
- the activities and functions of legal counsel

♦ whether a liquidated damage provision should be considered

♦ how shall responsibility for costs of the proceedings and attorneys' fees be allocated

♦ should decision on any of the foregoing be deferred or left to the discretion of the arbitrator

CONCLUSION

The use of alternative dispute resolution mechanisms in commercial space disputes may have substantial advantages over traditional litigation. The parties can maintain control over the cost, pace, and form of the proceedings, and obtain a result which meets their business needs and requirements rather than merely seek to allocate fault. ADR inherently is flexible, and a wide range of private agreement will be given effect by the courts. The benefits of ADR may have ramifications far beyond the immediate controversy between the parties, and extend to the maintenance of confidentiality, and promotion of goodwill and business relations. As such, serious consideration should be given to the use of ADR by counsel and parties involved in the commercial space industry.

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61. *See Wolin v. Walker*, 830 P.2d 429 (Wyo. 1992).