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**ADR-Advantages, Disadvantages and Techniques
The Smoothest (Mostly) Road of “Yes”
Or At Least to Cloture**

ARBITRATION**David T. López**

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ADVANTAGES, DISADVANTAGES AND TECHNIQUES OF ARBITRATION IN EMPLOYMENT CASES

The Basics: What Is Arbitration and How Does It Work?

Arbitration takes place when parties in a dispute enter into an agreement to have one or more arbitrators render a decision, rather than having a suit filed in court and have the decision made by a jury and a judge. Arbitration is a creature of contract, and the parties create it and determine its procedures by agreement, subject to applicable laws.

General legal principles are set forth in the Federal Arbitration Act, Chapter 9 of Title 1 of the United States Code (FAA), but the provisions of the Act do not apply to employees engaged in foreign or interstate commerce, 9 U.S.C. § 1. When the FAA does not apply, general provisions are set forth in Chapter 171 of the Texas Civil Practice and Remedies Code, in particular Subchapter C.

Arbitration commonly arises from a contract clause in a contract, or if there is no such clause, parties can enter into an agreement to arbitrate after a particular conflict arises.

Subject to applicable laws, the parties can specify the terms of the arbitration procedure or they can adopt in the agreement the procedures and rules of an organization that provides arbitration services.

The arbitration can be conducted by a sole arbitrator, but in some cases the parties agree to have three arbitrators, two chosen by the opposing parties and the third chosen by the two arbitrators chosen by the parties. The determination of the number of arbitrators, the manner of selection and appointment, and the procedural details are set forth by the administering organization or *ad hoc* by the parties. The parties' agreement or the administering organization provide for filing fees, payment to the arbitrators, and any related costs. An arbitral award as

rendered by the arbitrators on motions or after hearing is enforceable by court action, subject to strict limitations on challenge to enforcement and on the possibility of appeal.

Different principles and considerations apply to international arbitrations, those that involve disputes between parties in different nations. An international convention commonly referred to as the New York Convention provides that an international arbitration award may be enforced in the courts of the countries that signed the convention—practically all nations—regardless of where the arbitration is held and determined.

ADVANTAGES

Fashioning and Controlling the Process

Since arbitration is a contract created by the parties in conflict, the parties have considerable discretion in determining how the arbitration will be conducted. Within the limits of the applicable law and the rules of an administering institution, if any, the parties have considerable discretion in where, when, by whom and how the arbitration will proceed.

The contract language that forms the arbitration determines how much control the parties will have over the process and how that control will be exercised. In the employment context, that usually will be in an arbitration clause of an employment contract, or a written agreement signed by an individual at the commencement of his or her employment. General contract principles apply, with some consideration given to the particular circumstances of an employment agreement. The applicable language can be detailed, or it might set forth only basic provisions that leave the details to an administering institution and the institution's rules. If there is not an employment contract or an employee's agreement to waive the right to sue in court and have a jury, the parties can enter into an arbitration agreement at the time a conflict arises, even after the employment has been terminated.

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