

Mediation: What It Can Offer to Malaysia

(Advanced Dispute Resolution for the Global Economy)

by

Hon. Richard Faulkner,* J.D., LL.M., F.C.I.Arb., Dip. Intl. Comm. Arb.

“Our litigation system is too costly, too painful, too destructive, too inefficient for a truly civilized people.”

“ The notion that most people want black-robed judges, well dressed lawyers and pine paneled courtrooms as a setting to resolve their disputes is not correct. People with problems, like people with pain, want relief, and they want it as quickly and inexpensively as possible.”

**Warren Burger
Chief Justice
United States Supreme Court**

"The wise man learns from his mistakes. The truly wise man learns from the mistakes of others."

Ancient Proverb.

CONTENTS

- I. Introduction
- II. The Deficiencies of Litigation.
- III. Mediation (and Conciliation) Defined.
- IV. The Advantages of Mediation and Conciliation.
- V. Mediation is Beneficial to the Government.
- VI. Mediation's Benefits to Businesses and Individuals.
- VII. The Foundation.
- VIII. Conclusion.
- Appendix 1 The Texas Alternative Dispute Resolution Act of 1987.
- Appendix 2 The Alternative Dispute Resolution Pledge
- Appendix 3. The 1998 Federal Alternative Dispute Resolution Act.

* Richard Faulkner is an attorney, mediator and arbitrator based in Dallas, Texas. He has served as a Trial Judge, a Professor of Alternative Dispute Resolution Law and as a Neutral in over 2,500 cases. He is admitted to practice before the Supreme Court of the United States, the United States Court of International Trade, the United States Court of Appeals for the Fifth Circuit, United States District Courts in Texas and Louisiana and the Supreme Court of the State of Louisiana.

He holds a Juris Doctorate in Civil Law from Loyola University School of Law, a Master of Laws in Admiralty from Tulane University Graduate School of Law and a Diploma in International Commercial Arbitration. He is the author of twenty papers on mediation, arbitration or dispute resolution systems design, a member of the Board of Editors of the CCH Journal of Alternative Dispute Resolution Law and a frequent lecturer on mediation and arbitration in North America and the United Kingdom.

He has trained mediators and arbitrators throughout the United States, is an International Commercial Arbitration Tutor for the North American Branch of the Chartered Institute of Arbitrators and taught mediation in the United Kingdom at the University of Glamorgan.

He may be contacted by telephone at (214) 361-0810, telefax at (214) 361-2343, email at national@mindspring.com or snail mail at National ADR, 6116 North Central Expressway, Suite 250, Dallas, Texas 75206, United States of America.

I. Introduction

Businesses today are faced with meeting the challenges of a global economy in the Twenty First Century. The competition is no longer just located in Kuala Lumpur, but in Dallas, Kansas City, Moscow, Beijing, Manila, Paris, Munich and London. The old techniques of prior decades no longer suffice for successfully solving the problems foisted upon our clients by the world economy and a plethora of often ambiguous and even contradictory legislation. Our contemporary reality is that well meaning people who have never engaged in any significant business transaction, much less a major international transaction, have regulated and legislated hobbles on businesses in ways unknown to many of your international competitors. Your clients and their businesses must now succeed in the global economy. Today, they and you must be more innovative, more creative and far more imaginative than was previously necessary to successfully negotiate the challenges posed by the international marketplace. It is imperative that such imagination and creativity also extend to navigating our various legal systems.

Our world continues to become more interdependent. Thus the opportunities for misunderstandings, mistakes and misperceptions have grown exponentially. Frequently businesses which have never engaged in significant national or international business have become active in global commerce. Every entity with an Internet web site now reaches the entire world. The Internet in particular has propelled substantial numbers of previously local businesses into the international arena. Consequently, an increasingly large number of relatively unsophisticated people have suddenly been thrust into world commerce. They have little or no cross-cultural awareness. They are not only unaware of the potential benefits of alternative legal cultures and business methods, but are often extremely suspicious of those very same differences. Unless represented by sophisticated international law firms such as Houston's Vincent and Elkins or King and Spaulding or Dallas's Aiken, Gump or Haynes and Boone or London's Hammond Suddards or Freshfields, these businesses frequently stumble into totally unnecessary disputes. That is highly detrimental to the businesses, their business partners, their shareholders and their customers. Worst of all, it is frequently completely unnecessary and preventable.

Disputes are inevitable. Human nature ensures that they will occur. However, disputes need not be destructive. People have different interests, views, perceptions, recollections and understandings. When these differences are harmonized they can generate a synergy beneficial to everyone. If left unattended, they can degenerate into mutual recriminations, disruptions of business relationships and even litigation. The processes of mediation and conciliation are ideally suited to effectively and efficiently convert those disputes from a combat to be won, to a problem to be solved together. Consequently, every attorney and business should ensure that the use of mediation and conciliation constitute an integral part of their strategy for business, professional and global success.

Mediation has now become the dispute resolution method of choice for most sophisticated and knowledgeable businesses and attorneys throughout the United States. Arbitration is now a distant second and hybrid mechanisms such as Dispute Review Boards are increasing in use. Indeed, the assertion is beginning to be advanced that attorneys should have an ethical duty to ensure that we know, understand, employ and properly advise our clients of the many advantages available to them in the techniques and legislation providing for Alternative Dispute Resolution and the jurisprudence now interpreting it. Properly employed, mediation, including contractually mandatory mediation, can become the most effective method available to businesses and litigants for the vindication of their rights in virtually every context. Our clients increasingly know and understand that the courthouse has a number of serious deficiencies. They expect, indeed, they have the right to be advised of all of the available alternatives to traditional litigation. One law professor of this author's acquaintance recently stated in a public speech that in his view any attorney who does not properly explore the opportunities afforded by mediation for their client is committing legal malpractice.

II. The Deficiencies of Litigation.

Today everyone knows the serious and numerous defects of our various court systems. Those legitimate criticisms are regularly articulated in the halls of many of the world's legislatures, the American Congress, the Texas Legislature, Parliament, the chambers of our Courts, in "exposes" in the news media and frequently even in your own offices. A few of the most notorious and most vexing problems of our legal systems are:

1. **Delay.** Court proceedings are slow, cumbersome and often provide no one with an acceptable outcome. Many disputes frequently require decades of litigation to obtain a truly final decision.
2. **Expense.** Litigation is very expensive. Often both sides in litigation spend tens of thousands of dollars in attorneys' fees, expert witness fees, investigators' charges and court costs. This figure does not include the cost of the disruptions to the business or the internal cost of employees wasting time working on the litigation rather than performing their real profit producing jobs.
3. **Loss of Privacy.** Litigation is public and everyone can watch and learn about your businesses' or client's problem. Does your client really want everyone to know about their personal or business affairs? Do they, or you, really want their affairs permanently recorded in a public record, always on display to every curious person or worse, members of the media? We as lawyers often forget that our clients do not share our enthusiasm for public attention.
4. **No Day in Court.** Litigation is frequently decided by courts on technical reasons of interest and concern only to lawyers and judges. None of the parties ever has a real opportunity to tell their story or to fully present their case. Very few people ever actually get to go into Court and try their lawsuit. No one ever achieves true closure. We lawyers know that virtually all lawsuits are settled. Yet, how many of our clients are truly happy with those results? Most of the world's court dockets are still extremely congested and are becoming almost as slow and technical as the courts satirized by Charles Dickens.
5. **Nonspecialized Decision-Makers.** Courts and juries do not specialize in resolving business disputes. Yet, for more than 3000 years the techniques of mediation and conciliation have been known and used in communities throughout the world.
6. **No Comity of Judgements.** Even when a party obtains a judgment in one country it does not mean that it will be recognized in another country. For a variety of reasons, most constitutional and historical, the United States does not generally recognize and will not enforce the judgments of any other country. On the surface this would seem to be disastrous. However, through careful drafting of contracts this ostensible void has been very efficiently filled by the use of international arbitration under a variety of treaties and conventions. Sophisticated drafting also permits those businesses using adept counsel to avoid that American peculiarity frightening to every sane business person, the civil jury trial.

III. Mediation (and Conciliation) Defined.

Mediation is the least formal and by far the most commonly employed form of alternative dispute resolution. The Texas Alternative Dispute Resolution Act of 1987 defines mediation as follows:

- A. Mediation is a forum in which an impartial third person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among on them.
- B. A mediator may not impose his own judgment on the issues for that of the parties.

[Note: In the United States the terms and the techniques of mediation and conciliation are now used interchangeably.]

Mediation provides the parties a voluntary, non-binding, facilitated negotiation managed and directed by an experienced, trained neutral in a private confidential forum.

IV. The Advantages of Mediation and Conciliation.

Mediation offers numerous advantages to all parties in a dispute. The best known advantages of mediation are those of:

Speed. Litigation in Court, especially American Federal Courts, is frequently slow with the proceedings often lasting from 2 to 5 years. If there is an appeal, that time period can become 5 to 10 years, or even longer. A mediation is usually completed in a period of months and sophisticated Rules, such as those of the Nationwide Academy for Dispute Resolution or the Center for Public Resources, are designed to try to conclude the case within 90 days whenever possible. Once a dispute is settled, it is over.

Reduced Cost. Everyone saves money in legal expenses and costs by using mediation in place of litigation. A Study by the Institute for Civil Justice found that mediation was approximately 97.4% less expensive than litigation. Most mediations are scheduled within 60 days of the date the dispute is referred to mediation and completed in one or two days. Most mediators are also knowledgeable in the areas in dispute and many are even experts in the field. Consequently, they are able to learn and understand a party's case much faster than a nonspecialist Judge or jury.

Expert Assistance. Many mediators specialize in resolving particular types of disputes. Courts do not. Mediators generally know and understand the law applicable to the cases before them and have both the time and inclination to learn everything beneficial to the case that they are mediating. They are frequently sophisticated expert neutrals and guide their mediations accordingly. Mediators are "Agents of Reality" and can often direct the parties attention to issues that they would rather not deal with, but which may be critical in the context of a particular case. Often a mediator can focus on issues with a freedom and orientation unavailable to a party's executives or attorneys. When appropriate, a mediator may even propose his own suggestions for the settlement of a dispute.

A Full and Fair Hearing. Mediators always listen to the parties' case. Unlike a court, they will not dismiss a claim on technical legal grounds thereby depriving the parties of a hearing. The parties in every mediation will always have an opportunity to present their position and any evidence they believe that the mediator should know. This is true, even if that information is not technically admissible under the Rules of Evidence. A mediator will not prevent your client from telling their story by granting a Motion for Summary Judgment, as is often done in the courts. Your client or business may not "win", but they will always have had a real chance to explain their position and present their case. Many parties feel that the mediation process is "their day in court"!

Client Control. Many clients, particularly businesses are dismayed by the loss of control they experience in litigation. Critical issues are frequently determined on a commercially absurd time schedule formulated without their input and under "Rules" that no sane businessman would ever use to govern his affairs.

Privacy. Mediations are conducted with only the parties and counsel present. There is no public record of the proceedings and even the existence of the mediation is private, unless revealed in an action to enforce the settlement. Thus, there is no publicity of the proceeding and the parties can resolve their differences without interference from the media or others without a legitimate interest in the parties' dispute.

Complete Customized Relief. The parties control the resolution of their case. They are not subjected to the "mass justice" (injustice?) of the legal system. They can incorporate everything necessary to achieve all of the relief they believe that their situation requires. They may even settle their dispute on a basis that no court could ever mandate.

V. Mediation is Beneficial to the Government.

Mediation offers numerous benefits to governments. Prior to the adoption of the 1987 Texas Alternative Dispute Resolution Act, litigated cases frequently required six years or more to reach trial. That situation was unacceptable to the business community, the Bar and the public. The cost of correcting the situation in just Dallas County, Texas alone was projected to require the State of Texas to create and fund two additional Civil District Court's at an estimated cost of 2 million dollars per year. Texas has 465 counties. Soon after the passage of the A.D.R. Act the courts began aggressive implementation of court ordered mediations. Within two years the average age of the oldest cases on the Dallas court docket declined to slightly under four years. By 1992 the average age of the oldest cases actively on the court dockets was reduced to under two years. Today it is possible in many courts in Dallas County to bring a case to trial before a jury within one year from the date it is filed. In courts which aggressively use mandatory mediation, the few cases remaining unsettled after mediation can often now be tried to a jury verdict within six months from the date they were first filed in court!

The effective use of mediation in Dallas County has thus far saved the State of Texas approximately \$26,500,000.00. Similar savings have been achieved in Houston, San Antonio and Austin. The widespread use of mediation has also enhanced the general Texas business climate by ensuring that disputes are now efficiently and cost effectively resolved whenever possible. The State of Texas has also achieved a corollary benefit from the fact that many attorneys and businesses now first resort to privately conducted mediation to resolve their disputes. These private mediations are currently settling an estimated 92.4 percent of the cases mediated. Thus, only 7.6 percent of those cases are ultimately filed into the court system and require the expenditure of any public funds. Dallas court ordered mediations currently enjoy a settlement rate of about 84.7 percent. Consequently, even where parties do not wish to voluntarily proceed to mediation almost 85 percent of those cases settle in mediation. The experience of the United States District Courts is similar.

VI. Mediation's Benefits to Businesses and Individuals.

Litigation is expensive. It costs businesses and individuals much more than mere money. Every dispute includes certain transactional costs, disruption to relationships and lost business opportunities. One study in the insurance industry indicated that the average transactional cost savings of mediation, when compared with litigation was in excess of \$2,500.00 per case in "small cases" with under \$25,000.00 in dispute. In larger cases the savings frequently exceeded \$10,000.00 per case. In several death cases this author has personally mediated to settlement, the estimated and budgeted costs allocated for each case exceeded \$ 250,000.00. Both cases were settled in one day mediations for a mediation cost of \$4,000.00. The estimated mediation cost savings to the Dallas business community in 1996 was projected at \$22,750,000.00. Calculated over the 12.25 years of active mediation use in the Dallas area, the business community has saved approximately \$ 278,687,500.00 in unnecessary litigation related expenses. The cost savings to the entire Texas business economy are believed to now exceed \$1,000,000,000.00. This is significant to any business community. These results can be achieved in Malaysia too!

Damage to relationships. Disputes damage relationships. However, problems and disputes in every relationship are inevitable. Businesses spend fortunes advertising for customers. It costs money to obtain a customer. If a business is lucky, a satisfied customer will tell a friend. A dissatisfied customer will often tell at least ten people. Today, infuriated customers often set up Internet Web Sites and tell the world! Obtaining and keeping customers is critical to every business's success. Disputing with customers is not a recipe for success. It is axiomatic that unless forced to, no one who has had to sue another person ever does business with them again. One study of arbitration in the textile industry found that 17.46% of the companies that engaged in an arbitration with each other still continued to do business together. Preliminary information now indicates that almost 76% of those parties to disputes who resolve them through mediation will at least consider doing business with each other again. Mediation is ideal for repairing relationships.

Business Community and Support. One of the original problems facing organizations wishing to use mediation or other forms of A.D.R. was the fear of “appearing weak” or uncertain of the merits of their own case by suggesting mediation. These issues were straightforwardly addressed by the creation and use of the A.D.R. Pledge sponsored by the Center for Public Resources. Each subscribing company’s Chief Executive Officer and General Counsel have signed the Pledge and committed themselves to explore the use of certain A.D.R. techniques with any other signatory to the Pledge before resorting to litigation. Consequently, every signatory has empowered itself to always suggest the use of mediation or arbitration in every dispute by creating a mandatory corporate policy requiring it to do so. To date, 468 members of the Fortune 500 have signed the A.D.R. Pledge.

VII. The Foundation.

- 1. Education, Qualification and Ethics for Mediators.** Malaysia today is a major commercial country and significant participant in international commerce. The most advantageous incorporation into the business community of these “ancient”, but newly rediscovered techniques of dispute resolution will require the use of mediators trained to internationally accepted standards. Those mediators must know the underlying research and theoretical basis for successful mediation. They must also employ and consistently demonstrate their adherence to the strong ethical requirements imposed on all third party neutrals if these techniques are to be successful. Mediation requires the parties to have some faith and trust in the mediator. It is most successful when the parties know that they can completely trust and rely upon their mediators. Consequently, demonstrated competence and consistent adherence to a strong ethical code are essential.
- 2. Guarantees of Confidentiality.** Mediation is designed around the critical concept of privacy and confidentiality. Parties must be assured that nothing they say or discuss during a mediation with either the mediator or any party will be used against them in any later court or arbitration proceeding. A mediator must have the freedom to meet alone with the parties or any of them to generate the types of settlement statistics common in Texas. Confidentiality empowers the parties to freely generate and explore numerous options for possible settlements. It further restores to the parties the use of the ancient, simple, extremely effective, but often ignored settlement mechanism of the apology.
- 3. Education of Lawyers and Businesses.** Mediation must be known and recognized as available, cost effective and beneficial. This will require the education of the legal and business community. Some, very few, lawyers will not appreciate the potential threat to their incomes posed by A.D.R. That was certainly the experience in Texas. However, we are ethically required to place our clients’ interests ahead of our own. The ethical lawyers will continue to do so, just as they have always done. If past experience is any guide, once the efficiency and effectiveness of mediation is recognized in the business and legal community, those lawyers leading in its’ use will be well recognized for their foresight and amply rewarded for their efforts. Many lawyers in Texas today essentially devote their practice exclusively to Alternative Dispute Resolution.
- 4. Commitment to the Use of Mediation by Lawyers and Businesses.** As mediation is known to be available business will inevitably be drawn to use it. Today in the United States many businesses require their attorneys to regularly analyze every case they are assigned to determine when they can be sent into mediation. Many insurance companies actually impose monthly or quarterly quotas of cases to be sent to mediation by every one of their claims adjusters. Anyone familiar with the insurance industry knows it doesn’t do anything without carefully calculating the financial benefit available to it from every course of action.

The A.D.R. Pledge is yet another, but still only one example of businesses accepting mediation and attempting to use it whenever possible.

Today many trade associations and S(elf) R(egulating) O(rganizations) mandate the use of mediation and A.D.R. mechanisms for deciding all disputes between their members, as well as their members and the general public. It is now virtually impossible to open a brokerage or bank account in the United States without agreeing the use of mediation and arbitration instead of the courts for the resolution of all disputes with those businesses.

- 5. Acceptance by the Courts.** Mediation is effective. It settles disputes, even the most intractable cases. As the judiciary recognizes and accepts the benefits mediation offers the courts and the parties to litigation, they will discover, or even create, new ways for it to become available. They will eventually discover what the judges of Texas learned a decade ago. Ordering the parties in litigation to mediation with well trained, talented mediators will mean that almost 85% of those litigants will resolve their differences on a basis they can accept. And, as an additional benefit, more docket time will be freed to expedite the trial of those cases truly requiring the devotion of scarce judicial time and resources.

VIII. Conclusion.

Mediation has much to offer Malaysia. The eventual availability of a cadre of well trained, expert mediators will help all of the people and businesses of Malaysia resolve their disputes rapidly, efficiently and cost effectively. Every part of the community will benefit by the increased productivity of the economy and the legal system. The natural talent, ability, language skills and cross cultural sensitivity of the Malaysian people will inevitably lead to the further expansion of your economy into international commerce. The presence and ready availability of a pool of trained, experienced English speaking mediators and arbitrators in Malaysia will also grant you a significant competitive advantage in the ever evolving and expanding world of Internet "E Commerce".

The multiplicity of benefits of Alternative Dispute Resolution are yours, if you choose to avail yourself of them. We look forward to working with you when you do.

Appendix 1
The Texas Alternative Dispute Resolution Act of 1987.

Chapter 1121
S.B. No. 1436
AN ACT

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1 The Civil Practice and Remedies Code is amended by adding Title 7 to read as follows:

TITLE 7. ALTERNATIVE METHODS OF DISPUTE RESOLUTION

CHAPTER 154. ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

SUBCHAPTER A.

GENERAL PROVISIONS Sec. 154.001.

DEFINITIONS In this chapter:

- (1) "Court" includes an appellate court, district court, constitutional county court, statutory county court, family law court, probate court, municipal court, or justice of the peace court.
- (2) "Dispute resolution organization" means a Private profit or nonprofit corporation, political subdivision, or public corporation, or a combination of these, that offers alternative dispute resolution services to the public.

Sec. 154.002. POLICY

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.

Sec. 154.003. RESPONSIBILITY OF COURTS AND COURT ADMINISTRATORS.

It is the responsibility of all trial and appellate courts and their court administrators to carry out the Policy under Section 154.002.

Sections 154.004 to 154.020 reserved for expansion

SUBCHAPTER B.

ALTERNATIVE DISPUTE RESOLUTION PROCEDURES Sec. 154.021. REFERRAL OF PENDING DISPUTES FOR ALTERNATIVE DISPUTE RESOLUTION PROCEDURE.

- (a) A court may, on its own motion or the motion of a party, refer a pending dispute for resolution by an alternative dispute resolution procedure including:
 - (1) an alternative dispute resolution system established under Chapter 26, Acts of the 68th Legislature, Regular Session, 1983 (Article 2372aa, Vernon's Texas Civil Statutes);
 - (2) a dispute resolution organization;
 - (3) a non-judicial and informally conducted forum for the voluntary settlement of citizens' disputes through the intervention of an impartial third Party, including those alternative dispute resolution procedures described under this subchapter,
- (b) The court shall confer with the parties in the determination of the most appropriate alternative dispute resolution procedure.

Sec. 154.022. NOTIFICATION AND OBJECTION.

- (a) If a court determines that a pending dispute is appropriate for referral under Section 154.021, the court shall notify the parties of its determination.
- (b) Any Party may, within 10 days after receiving the notice under Subsection (a), file a written objection to the referral, 24 Texas Bar Journal January 1988
- (c) If the court finds that there is a reasonable basis for an objection filed under Subsection (b), the court may not refer the dispute under Section 154.021.

Sec. 154.023. MEDIATION.

- (a) Mediation is a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them.
- (b) A mediator may not impose his own Judgment on the issues for that of the parties.

Sec. 154.024. MINI-TRIAL

- (a) A mini-trial is conducted under an agreement of the parties.
- (b) Each Party and counsel for the Party Present the position of the Party, either before selected representatives for each party or before an impartial third Party, to define the issues and develop a basis for realistic settlement negotiations.
- (c) The impartial third Party may issue an advisory opinion regarding the merits of the case.
- (d) The advisory opinion is not binding on the parties unless the parties agree that it is binding and enter into a written settlement agreement.

Sec. 154.025. MODERATED SETTLEMENT CONFERENCE.

- (a) A moderated settlement conference is a forum for case evaluation and realistic settlement negotiations.
- (b) Each Party and counsel for the Party present the position of the party before a panel of impartial third parties.
- (c) The Panel may issue an advisory opinion regarding the liability or damages of the parties or both.
- (d) The advisory opinion is not binding on the parties.

Sec. 154.026. SUMMARY JURY TRIAL

- (a) A summary jury trial is a forum for early case evaluation and development of realistic settlement negotiations.
- (b) Each party and counsel for the party present the position of the party before a panel of jurors.
- (c) The number of jurors on the panel is six unless the parties agree otherwise.
- (d) The panel may issue an advisory opinion regarding the liability or damages of the parties or both.
- (e) The advisory opinion is not binding on the parties.

Sec. 154.027. ARBITRATION.

- (a) Nonbinding arbitration is a forum in which each Party and counsel for the party present the position of the Party before an impartial third party, who renders a specific award.
- (b) If the parties stipulate in advance, the award is binding and is enforceable in the same manner as any contract obligation. If the parties do not stipulate in advance that the award is binding, the award is not binding and serves only as a basis for the parties' further settlement negotiations.

SUBCHAPTER C - IMPARTIAL THIRD PARTIES

Sec. 154.051. APPOINTMENT OF IMPARTIAL THIRD PARTIES

- (a) If a court refers a pending dispute for resolution by an alternative dispute resolution procedure under Section 154.021, the court may appoint an impartial third party to facilitate the procedures.
- (b) The court may appoint a third party who is agreed on by the parties if the person qualifies for appointment under this subchapter.
- (c) The court may appoint more than one third Party under this section.

Sec. 154.052. QUALIFICATIONS OF IMPARTIAL THIRD PARTY

- (a) Except as provided by Subsections (b) and (c), to qualify for an appointment as an impartial third Party under this subchapter a person must have completed a minimum of 40 classroom hours of training in dispute resolution techniques in a course conducted by an alternative dispute resolution system or other dispute resolution organization approved by the court making the appointment.
- (b) To qualify for an appointment as an impartial third Party under this subchapter in a dispute relating to the parent-child relationship, a person must complete the training required by Subsection (a) and an additional 24 hours of training in the fields of family dynamics, child development, family law.
- (c) In appropriate circumstances, a court may in its discretion appoint a person as an impartial third Party who does not qualify under Subsection (a) or (b) if the court bases its appointment on legal or other professional training or experience in particular dispute resolution processes.

Sec. 154.053. STANDARDS AND DUTIES OF IMPARTIAL THIRD PARTIES

- (a) A person appointed to facilitate an alternative dispute resolution procedure under this subchapter shall encourage and assist the parties in reaching a settlement of their dispute but may not compel or coerce the parties to enter into a settlement agreement.
- (b) Unless expressly authorized by the disclosing Party, the impartial third party may not disclose to either party information given in confidence by the other and shall at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute.
- (c) Unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including the appointing court.

Sec. 154.054. COMPENSATION OF IMPARTIAL THIRD PARTIES.

- (a) The court may set a reasonable fee for the services of an impartial third Party appointed under this subchapter.
- (b) Unless the parties agree to a method of Payment, the court shall tax the fee for the services of an impartial third party as other costs of suit.

SUBCHAPTER D

MISCELLANEOUS PROVISIONS

Sec. 154.071. EFFECT OF WRITTEN SETTLEMENT AGREEMENT.

- (a) If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract.
- (b) The court in its discretion may incorporate the terms of the agreement in the court's final decree disposing of the case.
- (c) A settlement agreement does not affect an outstanding court order unless the terms of the agreement are incorporated into a subsequent decree.

Sec. 154.072. STATISTICAL INFORMATION ON DISPUTES REFERRED

The Texas Supreme Court shall determine the need and method for statistical reporting of disputes referred by the courts to alternative dispute resolution Procedures.

Sec. 154.073. CONFIDENTIALITY OF COMMUNICATIONS IN DISPUTE RESOLUTION PROCEDURES.

- (a) Except as provided by Subsections (c) and (d), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal Judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any Judicial or administrative proceeding.
- (b) Any record made at an alternative dispute resolution procedure is confidential, and the Participants or the third Party facilitating the Procedure may not be required to testify in any Proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.
- (c) An oral communication or written material used in or made a part of an alternative dispute resolution Procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure.
- (d) If this section conflicts with other legal requirements for disclosure of communications or materials, the issue of confidentiality may be presented to the court having Jurisdiction of the proceedings to determine, in camera, whether the facts circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure.

SECTION 2

The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted. Passed the Senate on May 14, 1987: Yeas 30, Nays 0: Senate concurred in House amendment on June 1, 1987: Yeas 31, Nays 0; passed the House, with amendment, on May 29, 1987: Yeas 147, Nays 0, one present not voting. Approved June 20, 1987. Effective June 20, 1987.

Appendix 2

The Alternative Dispute Resolution Pledge

Corporate Policy Statement
Alternative Dispute Resolution

COMPANY

We recognize that for many business disputes there is a less expensive, more effective method of resolution than the traditional lawsuit. Alternative dispute resolution (ADR) procedures involve collaborative techniques which can often spare businesses the high cost and wear and tear of litigation.

In recognition of the foregoing, we subscribe to the following statement of principle on the behalf of our company and its domestic subsidiaries.* In the event of a business dispute between our company and another company which has made or will then make a similar statement, we are prepared to explore with that other party resolution of the dispute through negotiation or ADR techniques before pursuing full-scale litigation. If either party believes that the dispute is not suitable for ADR techniques, or if such techniques do not produce results satisfactory to the disputants, either party may proceed with litigation.

Chief Executive Officer

Chief Legal Officer

Date

*Our major domestic operating subsidiaries are:

Appendix 3.
The 1998 Federal Alternative Dispute Resolution Act.

The Federal Arbitration Act of 1998

Public Law 105-315
105th Congress

To amend title 28, United States Code, with respect to the use of alternative dispute resolution processes in United States district courts, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Alternative Dispute Resolution Act of 1998".

SEC. 2. FINDINGS AND DECLARATION OF POLICY.

Congress finds that—

- (1) alternative dispute resolution, when supported by the bench and bar, and utilizing properly trained neutrals in a program adequately administered by the court, has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements;
- (2) certain forms of alternative dispute resolution, including mediation, early neutral evaluation, minitrials, and voluntary arbitration, may have potential to reduce the large backlog of cases now pending in some Federal courts throughout the United States, thereby allowing the courts to process their remaining cases more efficiently; and
- (3) the continued growth of Federal appellate court-annexed mediation programs suggests that this form of alternative dispute resolution can be equally effective in resolving disputes in the Federal trial courts; therefore, the district courts should consider including mediation in their local alternative dispute resolution programs.

SEC. 3. ALTERNATIVE DISPUTE RESOLUTION PROCESSES TO BE AUTHORIZED IN ALL DISTRICT COURTS.

Section 651 of title 28, United States Code, is amended to read as follows:

"Sec. 651. Authorization of alternative dispute resolution

- "(a) Definition.--**For purposes of this chapter, an alternative dispute resolution process includes any process or procedure, other than an adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, minitrial, and arbitration as provided in sections 654 through 658.
- "(b) Authority.--**Each United States district court shall authorize, by local rule adopted under section 2071(a), the use of alternative dispute resolution processes in all civil actions, including adversary proceedings in bankruptcy, in accordance with this chapter, except that the use of arbitration may be authorized only as provided in section 654. Each United States district court shall devise and implement its own alternative dispute resolution program, by local rule adopted under section 2071(a), to encourage and promote the use of alternative dispute resolution in its district.
- "(c) Existing Alternative Dispute Resolution Programs.--**In those courts where an alternative dispute resolution program is in place on the date of the enactment of the Alternative Dispute Resolution Act of 1998, the court shall examine the effectiveness of that program and adopt such improvements to the program as are consistent with the provisions and purposes of this chapter.

(d) Administration of Alternative Dispute Resolution Programs.--Each United States district court shall designate an employee, or a judicial officer, who is knowledgeable in alternative dispute resolution practices and processes to implement, administer, oversee, and evaluate the court's alternative dispute resolution program. Such person may also be responsible for recruiting, screening, and training attorneys to serve as neutrals and arbitrators in the court's alternative dispute resolution program.

(e) Title 9 Not Affected.--This chapter shall not affect title 9, United States Code.

(f) Program Support.--The Federal Judicial Center and the Administrative Office of the United States Courts are authorized to assist the district courts in the establishment and improvement of alternative dispute resolution programs by identifying particular practices employed in successful programs and providing additional assistance as needed and appropriate."

SEC. 4. JURISDICTION.

Section 652 of title 28, United States Code, is amended to read as follows:

Sec. 652. Jurisdiction

(a) Consideration of Alternative Dispute Resolution in Appropriate Cases.--Notwithstanding any provision of law to the contrary and except as provided in subsections (b) and (c), each district court shall, by local rule adopted under section 2071(a), require that litigants in all civil cases consider the use of an alternative dispute resolution process at an appropriate stage in the litigation. Each district court shall provide litigants in all civil cases with at least one alternative dispute resolution process, including, but not limited to, mediation, early neutral evaluation, minitrial, and arbitration as authorized in sections 654 through 658. Any district court that elects to require the use of alternative dispute resolution in certain cases may do so only with respect to mediation, early neutral evaluation, and, if the parties consent, arbitration.

(b) Actions Exempted From Consideration of Alternative Dispute Resolution.--Each district court may exempt from the requirements of this section specific cases or categories of cases in which use of alternative dispute resolution would not be appropriate. In defining these exemptions, each district court shall consult with members of the bar, including the United States Attorney for that district.

(c) Authority of the Attorney General.--Nothing in this section shall alter or conflict with the authority of the Attorney General to conduct litigation on behalf of the United States, with the authority of any Federal agency authorized to conduct litigation in the United States courts, or with any delegation of litigation authority by the Attorney General.

(d) Confidentiality Provisions.--Until such time as rules are adopted under chapter 131 of this title providing for the confidentiality of alternative dispute resolution processes under this chapter, each district court shall, by local rule adopted under section 2071(a), provide for the confidentiality of the alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications."

SEC. 5. MEDIATORS AND NEUTRAL EVALUATORS.

Section 653 of title 28, United States Code, is amended to read as follows:

Sec. 653. Neutrals

(a) Panel of Neutrals.--Each district court that authorizes the use of alternative dispute resolution processes shall adopt appropriate processes for making neutrals available for use by the parties for each category of process offered. Each district court shall promulgate its own procedures and criteria for the selection of neutrals on its panels.

“(b) Qualifications and Training.--Each person serving as a neutral in an alternative dispute resolution process should be qualified and trained to serve as a neutral in the appropriate alternative dispute resolution process. For this purpose, the district court may use, among others, magistrate judges who have been trained to serve as neutrals in alternative dispute resolution processes, professional neutrals from the private sector, and persons who have been trained to serve as neutrals in alternative dispute resolution processes. Until such time as rules are adopted under chapter 131 of this title relating to the disqualification of neutrals, each district court shall issue rules under section 2071(a) relating to the disqualification of neutrals (including, where appropriate, disqualification under section 455 of this title, other applicable law, and professional responsibility standards).”.

SEC. 6. ACTIONS REFERRED TO ARBITRATION.

Section 654 of title 28, United States Code, is amended to read as follows:

“Sec. 654. Arbitration

“(a) Referral of Actions to Arbitration.--Notwithstanding any provision of law to the contrary and except as provided in subsections (a), (b), and (c) of section 652 and subsection (d) of this section, a district court may allow the referral to arbitration of any civil action (including any adversary proceeding in bankruptcy) pending before it when the parties consent, except that referral to arbitration may not be made where—

- “(1) the action is based on an alleged violation of a right secured by the Constitution of the United States;
- “(2) jurisdiction is based in whole or in part on section 1343 of this title; or
- “(3) the relief sought consists of money damages in an amount greater than \$150,000.

“(b) Safeguards in Consent Cases.--Until such time as rules are adopted under chapter 131 of this title relating to procedures described in this subsection, the district court shall, by local rule adopted under section 2071(a), establish procedures to ensure that any civil action in which arbitration by consent is allowed under subsection (a)—

- “(1) consent to arbitration is freely and knowingly obtained; and
- “(2) no party or attorney is prejudiced for refusing to participate in arbitration.

“(c) Presumptions.--For purposes of subsection (a)(3), a district court may presume damages are not in excess of \$150,000 unless counsel certifies that damages exceed such amount.

“(d) Existing Programs.--Nothing in this chapter is deemed to affect any program in which arbitration is conducted pursuant to section title IX of the Judicial Improvements and Access to Justice Act (Public Law 100-702), as amended by section 1 of Public Law 105-53.”.

SEC. 7. ARBITRATORS.

Section 655 of title 28, United States Code, is amended to read as follows:

“Sec. 655. Arbitrators

“(a) Powers of Arbitrators.--An arbitrator to whom an action is referred under section 654 shall have the power, within the judicial district of the district court which referred the action to arbitration—

- “(1) to conduct arbitration hearings;
- “(2) to administer oaths and affirmations; and
- “(3) to make awards.

“(b) Standards for Certification.--Each district court that authorizes arbitration shall establish standards for the certification of arbitrators and shall certify arbitrators to perform services in accordance with such standards and this chapter. The standards shall include provisions requiring that any arbitrator—

“(1) shall take the oath or affirmation described in section 453; and

“(2) shall be subject to the disqualification rules under section 455.

“(c) **Immunity.**--All individuals serving as arbitrators in an alternative dispute resolution program under this chapter are performing quasi-judicial functions and are entitled to the immunities and protections that the law accords to persons serving in such capacity.”.

SEC. 8. SUBPOENAS.

Section 656 of title 28, United States Code, is amended to read as follows:

“Sec. 656. Subpoenas

“Rule 45 of the Federal Rules of Civil Procedure (relating to subpoenas) applies to subpoenas for the attendance of witnesses and the production of documentary evidence at an arbitration hearing under this chapter.”.

SEC. 9. ARBITRATION AWARD AND JUDGMENT.

Section 657 of title 28, United States Code, is amended to read as follows:

“Sec. 657. Arbitration award and judgment

“(a) **Filing and Effect of Arbitration Award.**--An arbitration award made by an arbitrator under this chapter, along with proof of service of such award on the other party by the prevailing party or by the plaintiff, shall be filed promptly after the arbitration hearing is concluded with the clerk of the district court that referred the case to arbitration. Such award shall be entered as the judgment of the court after the time has expired for requesting a trial de novo. The judgment so entered shall be subject to the same provisions of law and shall have the same force and effect as a judgment of the court in a civil action, except that the judgment shall not be subject to review in any other court by appeal or otherwise.

“(b) **Sealing of Arbitration Award.**--The district court shall provide, by local rule adopted under section 2071(a), that the contents of any arbitration award made under this chapter shall not be made known to any judge who might be assigned to the case until the district court has entered final judgment in the action or the action has otherwise terminated.

“(c) **Trial de Novo of Arbitration Awards.**—

“(1) **Time for filing demand.**--Within 30 days after the filing of an arbitration award with a district court under subsection (a), any party may file a written demand for a trial de novo in the district court.

“(2) **Action restored to court docket.**--Upon a demand for a trial de novo, the action shall be restored to the docket of the court and treated for all purposes as if it had not been referred to arbitration.

“(3) **Exclusion of evidence of arbitration.**--The court shall not admit at the trial de novo any evidence that there has been an arbitration proceeding, the nature or amount of any award, or any other matter concerning the conduct of the arbitration proceeding, unless--

“(A) the evidence would otherwise be admissible in the court under the Federal Rules of Evidence; or

“(B) the parties have otherwise stipulated.”.

SEC. 10. COMPENSATION OF ARBITRATORS AND NEUTRALS.

Section 658 of title 28, United States Code, is amended to read as follows:

“Sec. 658. Compensation of arbitrators and neutrals

“(a) **Compensation.**--The district court shall, subject to regulations approved by the Judicial Conference of the United States, establish the amount of compensation, if any, that each arbitrator or neutral shall receive for services rendered in each case under this chapter.

“(b) Transportation Allowances.—

Under regulations prescribed by the Director of the Administrative Office of the United States Courts, a district court may reimburse arbitrators and other neutrals for actual transportation expenses necessarily incurred in the performance of duties under this chapter.”.

SEC. 11. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out chapter 44 of title 28, United States Code, as amended by this Act.

SEC. 12. CONFORMING AMENDMENTS.

(a) **Limitation on Money Damages.**--Section 901 of the Judicial Improvements and Access to Justice Act (28 U.S.C. 652 note), is amended by striking subsection (c).

(b) **Other Conforming Amendments.—**

(1) The chapter heading for chapter 44 of title 28, United States Code, is amended to read as follows:

“CHAPTER 44--ALTERNATIVE DISPUTE RESOLUTION”.

(2) The table of contents for chapter 44 of title 28, United States Code, is amended to read as follows:

“Sec.

651. Authorization of alternative dispute resolution.

652. Jurisdiction.

653. Neutrals.

654. Arbitration.

655. Arbitrators.

656. Subpoenas.

657. Arbitration award and judgment.

658. Compensation of arbitrators and neutrals.”.

(3) The item relating to chapter 44 in the table of chapters for Part III of title 28, United States Code, is amended to read as follows:

44. Alternative Dispute Resolution.....651”.

Approved October 30, 1998.

LEGISLATIVE HISTORY--H.R. 3528:

HOUSE REPORTS: No. 105-487 (Comm. on the Judiciary).

CONGRESSIONAL RECORD, Vol. 144 (1998):

Apr. 21, considered and passed House.

Oct. 7, considered and passed Senate, amended.

Oct. 10, House concurred in Senate amendments.

<<NOTE: 28 USC 1 note.>>

<<NOTE: 28 USC 651 note.>>