

ALL THINGS ARBITRATION

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Texas Tech University (B.A.), 1974
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Texas, 1977
U.S. Court of Appeals for the Armed Forces, 1979
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U.S. District Court, Northern District of Texas, 1981
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Biographical Information:

Currently serves as City Attorney for the Cities of Allen, Farmers Branch, Richardson, and Sachse

Currently serves as General Counsel for the Allen, DeSoto and Sachse Economic Development Corporations

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Recognized authority on all areas of economic development including Chapter 380 development agreements, tax abatement, tax increment financing and various other economic development structures

Regular speaker on Economic Development and Land Use for the University of Texas

Responsible for several major mixed use economic development projects including, The Villages at Allen, the Allen Event Center, the Watters Creek development in Allen and the KDC CityLine/State Farm Headquarters in Richardson, Texas

Special Litigation Counsel, Texas Municipal League Intergovernmental Risk Pool (TMLIRP)

United States Army, JAGC, 1977-1981

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Overview

Alternative Dispute Resolution (ADR) is the procedure for settling disputes without litigation, such as arbitration, mediation, or negotiation. ADR procedures are usually less costly and more expeditious. They are increasingly being utilized in disputes that would otherwise result in litigation, including high-profile labor disputes, divorce actions, and personal injury claims. One of the primary reasons parties may prefer ADR proceedings is that, unlike adversarial litigation, ADR procedures are often collaborative and allow the parties to understand each other's positions. ADR also allows the parties to come up with more creative solutions that a court may not be legally allowed to impose.

ADR has a storied, overwhelmingly informal history that stretches back to the earliest historical records. A testament to the willingness of civilized people to engage with one another, illustrious figures such as Solomon, Aristotle, and George Washington have all endorsed the use of ADR tactics as a viable alternative to formal court dispositions.

Its codifiable origins in the United States begin in 1925 with the passage of the United States Arbitration Act (known as the Federal Arbitration Act or FAA), which legitimized the use of ADR procedures as an alternative to trials by endowing agreements with legal and requisite authority, as well as giving courts the power to enforce them and refer cases to ADR processes.¹ The passage of the FAA led to the creation of the American Arbitration Association (AAA), a neutral and independent organization dedicated to the ethical, fair, and efficacious use of ADR tools in the American justice system.² Texas also has a storied history with ADR methods, especially arbitration. In fact, until 1969 the Texas Constitution had a provision that certified the legislature's ability to, "enact such laws as may be necessary for arbitration."³ ADR and arbitration are key elements of the justice system, both ancient and modern, and the continued use and expansion of such proceedings necessitates a full understanding of the rules, norms, and role they occupy in the justice system.

ADR Processes

There are a number of proceedings that can be initiated under the auspices of ADR. There are ten distinct types of ADR. Five types of ADR can be initiated only by agreement – minitrial, special-judge trial, expert panel, jury-determined settlement (JDS), and collaborative-law agreement.⁴ Minitrials and special-judge trials are similar to traditional adversarial proceedings. In the former, parties use abbreviated argumentation in front of an impartial third party, who then issues an advisory opinion or reaches a settlement. The latter is conducted like a trial, but with a

¹ Federal Arbitration Act (FAA), 9 U.S.C. §1 (2018); Michael McManus and Brianna Silverstein, *Brief History of Alternative Dispute Resolution in the United States* (2011), <https://www.cadmusjournal.org/article/issue-3/brief-history-alternative-dispute-resolution-united-states>.

² American Arbitration Association, *The American Arbitration Association: A Long History of Working With Government* (2010), <https://www.adr.org/adr-resources> (scroll and click the hyperlink with the aforementioned name).

³ L. H. Lacy Co. v. City of Lubbock, 559 S.W.2d 348, 351 n.4 (Tex. 1977); Tex. Const. art. XVI, §13 (repealed August 5, 1969).

⁴ *O'Connor's Texas Rules * Civil Trial* Ch.4A§2.1

retired judge presiding and reaching a verdict.⁵ An expert panel is self-explanatory, the experts rule on the evidence presented by either side in either a binding or an advisory opinion. A JDS is similar to a summary jury trial (see below), excepting that a JDS hands down a settlement decision, not a verdict. A collaborative-law agreement is limited in scope to family disputes. These five types of ADR cannot be forced on the parties by the court, the court can only order them if both parties agree to participate. The parties also have the discretion to stipulate if the results will be binding.

A further five types of ADR can be initiated by agreement, motion, or order – moderated settlement conference, early neutral evaluation, summary jury trial, mediation, and arbitration.⁶ A moderated settlement conference is intended to be a starting point for settlement negotiations. Parties present their arguments to and are asked questions by an impartial panel of third parties, who deliberate and provide a range of recommendations based on past conferences. Also designed to smooth negotiations, an early neutral evaluation is when an expert evaluator is presented with summaries of the parties' positions and provides a recommendation and/or facilitates further negotiations. A summary jury trial is a more informal version of an adversarial proceeding; the supervising court establishes guidelines for the various elements of a trial and ends with a discussion between the parties and the impaneled jury (usually 6 members), which results in a nonbinding advisory opinion on liability and/or damages.

Mediation is the most widely referred form of ADR. Mediation is much simpler and more informal than other types of ADR, involving only the two parties and an impartial mediator. The mediator sits with both parties and provides guidance on settling the dispute through reconciliation, damages, or other similar mechanisms. Mediation, along with arbitration and the aforementioned three types of ADR, can be initiated by agreement of both parties, motioned for by one party, or ordered unilaterally by the court.

Arbitration

A subset of ADR, arbitration is when the parties and their attorneys present their argument to a third party or panel who renders a specific award to settle the dispute.⁷ If the parties do not agree beforehand to be bound by the rendering of the arbitrator(s), arbitration operates like other §2.1 types of ADR.⁸ If the parties do want to be bound by the arbitration, the parties can either agree to settle a dispute by arbitration, a statute can force them to arbitrate, or they can contractually stipulate that they will resolve disputes by arbitration.⁹ There are a number of statutory schemes that clarify the processes and role of arbitration, both at the state and federal levels. These include the Texas Arbitration Act (TAA), Alternative Dispute Resolution Act (ADR Act), and the FAA. For further information on the legislative history of arbitration and a detailed breakdown of the provisions in arbitration legislation, please refer to K.B. Battaglini's paper

⁵ *Id*; Tex. Civ. Prac. & Rem. Code Ann. §151 (2015).

⁶ *O'Connor's Texas Rules * Civil Trial* Ch.4A §2.1

⁷ *Id* at §2.1(5)

⁸ *Id* at §2.1(5)(2)

⁹ *Id* at §2.1(5)(1)

Arbitration in Texas: History and Enforceability, available at <http://strongpipkin.com/publications.html>.

Arbitration & the Tax Code¹⁰

At the outset, it is vital to note a key difference between arbitration under the Tax Code versus other criminal or civil charges. Rather than arbitration being ordered by the court or included by the parties in a contract, property owners are guaranteed the right to binding arbitration through statute.

Property owners are guaranteed the right to choose arbitration as a remedy in the case of a dispute over the appraised value of either (1) the owner's homestead, or (2) an appraisal of under \$5 million. It is also not incumbent on the property owner to know they have this right; the appraisal review board is charged with providing, along with the notice of issuance of an order, notice of the owner's right to arbitration as a remedy and copies of the forms necessary to initiate arbitration proceedings. Property owners then have the option to decide between arbitration and filing a traditional appeal under §42.01 of the Tax Code. If the owner decides to pursue arbitration, they must file the appropriate paperwork provided by the appraisers and pay a deposit in an amount prescribed by the statute, determined by the characteristics of the property. The appraisal district then has 10 days to certify and submit the request to the comptroller, who is then responsible for appointing the arbitrator. The arbitrator sets the time, date, and location of the hearing and is responsible a final determination on the value of the property in question.

Appraisal review boards should be aware that the statute expressly forbids leniency in satisfaction of its requirements – anything less than strict adherence to the requirements of §41A, including the filing of an appeal and delinquent tax status, is a waiver of the right to arbitration. Additionally, the statute also gives the comptroller the right and responsibility to create rules for the administration and implementation of the arbitration process.

Arbitration & the Comptroller's Office

Per §41A of the Tax Code, the Texas Comptroller is the facilitator and all-around middleperson for the arbitration process between appraisal districts and property owners. As part of those responsibilities, it is incumbent upon the Comptroller to maintain the roll of arbitrators available in the county and connect the parties with an arbitrator upon receipt of an orderly request for arbitration.

The Comptroller limits its involvement to essentially administrative and support functions. It is barred by law from participating or advising either party on the arbitration proceedings.¹¹ The Comptroller is also subject to a strict set of rules regarding the appointment of arbitrators, leaving them little statutory latitude in how they are able to influence any arbitration proceeding. The purview of the arbitration process is mostly bestowed upon the disputing parties and the arbitrator designated to solve the dispute. The provisions in both the Tax and Administrative Codes do not seek to establish a strict procedure in the same way rules of criminal and civil court proceedings

¹⁰ All information in this section drawn from Tex. Tax Code Ann. §41A (2017).

¹¹ Tex. Admin. Code Ann. 34 §9.804(h) (2015).

are regulated. This is an intentional feature of ADR, as it is intended to be a less formal alternative to court proceedings. If arbitration was subject to the same ironclad rules as trials, that would defeat the point of providing an alternative to courts. There are some rules guiding the process, which will be discussed in the next section.

Nevertheless, the Texas Administrative Code outlines a decision tree for the Comptroller to follow when appointing an arbitrator in 34 §9.804(d). The power is, once again, vested primarily with the disputed parties. They are to first consult the registry of arbitrators kept on the Comptroller's website and seek to agree on one of the listed arbitrators. If they are unable or unwilling to do so, or if twenty days elapse, the Comptroller is charged with randomly selecting one for the parties within a further twenty days. This selection is subject to conflicts of interest outlined by 34 §9.804(d)(6) and the geographic preferences of the arbitrators. Conflicts of interest are of the usual variety – vested interest in the outcome of the proceedings or relation by affinity of the second degree or consanguinity of the third degree.¹² Unprofessionalism and conduct that creates conflicts of interest are also reasons for the disqualification of an arbitrator.

Statutory Procedures & Practices

Binding arbitration in cases involving taxation disputes are subject to two sets of procedural rules, found in Title 34 §9.804(e) of the Texas Administrative Code and Title 7 §§171.044-.051 of the Texas Civil Practices and Remedies Code (CPRC). While not designed to abridge the rights of either party or the independence of the arbitrator, these rules serve to establish an equitable and consistent application of the spirit of arbitration (and more broadly ADR). These rules should be understood to be constraining, merely outlining the best practices to ensure the success of arbitration.

This intention is fully displayed in the Administrative Code, where the rules principally tell the arbitrator to follow the processes of the Tax Code in making a determination and imposing time guidelines for the arbitration (i.e. attempting to ensure the completion of the proceeding in one hundred twenty days). Because arbitration is a form of appeal, the job of the arbitrator is not to throw the Yijing and assess a property value; an award is still subject to the Tax Code formulas used in appraisal.¹³ Like appellate courts, an arbitration is a review of the veracity of the original determination and is subject to the constraints of such proceedings. Moreover, the arbitrator may not revise an assessment upwards, only confirm the appraisal of the district or the opinion of the property owner.¹⁴

The CPRC also provides more detailed guidelines for how an arbitrator may conduct his or her proceeding. These include rights of parties (including those of representation) and deposition/subpoena powers.¹⁵ Once again, these are designed to ensure the consistency of arbitration procedures, not hamstringing the ability of the parties to present their arguments or the arbitrator from doing their job. Most of this section is taken for granted by the other arbitration

¹² Tex. Gov. Code Ann. 5 §§573.022-.025

¹³ Tex. Admin. Cod Ann. 34 §9.804(f) (2015).

¹⁴ Tex. Tax Code Ann. 1 §41A.09 (2010).

¹⁵ Tex. Civ. Prac. & Rem. Code Ann. §171.044-.051 (1997).

regulations, it thoroughly defines the aforementioned powers to set time and location, etc. Even so, the arbitrator still has broad power to conduct the proceeding in the manner they wish (provided, of course, they remain unbiased).