Taxonomy of ADR Terms and Overview of Dispute Resolution Options

Richard Hurford Dispute Resolution Services, P.C. has significant and diverse experience in a wide range of Alternative Dispute Resolution (ADR) techniques and processes. By definition ADR is flexible and can be molded to meet the particular needs of the parties given the nature of their relationship and the contours of their dispute. ADR not only leads to creative solutions but also calls for creativity in the design of appropriate, effective and strategic processes. As such, ADR is the antithesis of a "one size fits all" proposition and why, for example, in relationships with key customers, key suppliers, and employees, it is not necessarily appropriate to rely upon "boiler-plate" dispute resolution provisions or no conflict management strategies at all. Dispute resolution mechanisms, like all other contract provisions and terms and conditions that govern the parties' relationship, should have a ***strategic*** purpose. See *The Business Case for SMART™ Dispute Resolution Processes,* Richard L. Hurford, Michigan Bar Journal (June 2010, pp. 42-46).

In addition to providing the ADR services discussed, Richard Hurford Dispute Resolution Services, P.C. can also be of assistance in designing and drafting contractual provisions and employee handbooks and policies that integrate conflict management and dispute resolution methodologies that are consistent with the culture of the organization and are strategic, progressive, proportional, and cost effective.

The approach and methodology parties might pursue to manage conflict and resolve disputes are virtually unlimited. Among the many drafting strategies and dispute resolution methodologies available are:

Meet and Confer Obligations:

In an attempt to manage conflicts and resolve disputes, parties may require various "meet and confer" methodologies throughout the course of the contractual relationship by individuals with authority to address and resolve issues based upon the terms of the contract. Typically, attorneys and other third parties do not participate in these meetings although, depending upon the contractual language or otherwise required by law, third parties may participate. See also the discussion of Real Time Mediation and Dispute Resolution Advisors below.

Meet and confer obligations can be triggered by any number of events: a perceived breach of contract, the failure of parts to meet required specifications, the failure to meet critical contractual milestones, the failure to make required payments, or a party might otherwise be entitled to receive "adequate assurances."

Some of the benefits, issues and features of meet and confer obligations are:

- The parties are encouraged to identify and positively manage conflict and resolve disputes as early as possible;

- Creates a greater "partnering" and "mutual" problem solving mentality among the parties that can be particularly important in fostering long-term relationships;
- The resolutions are purely voluntary;
- Not an adversarial process;
- Minimizes the potential of a dispute festering into litigation or arbitration;
- Certain aspects of the dispute are typically resolved and only the unresolved issues progress to the next step in the dispute resolution process;
- Such meetings can prove unproductive for a number of reasons:
    - The parties fail to take the "time" to devote to such meetings;
    - The parties fail to prepare sufficiently for a productive meeting;
    - The party representatives who attend these meetings are not trained or accustomed to engaging in collaborative problem solving;
    - True decision makers may fail to participate in the meetings;
    - As the meetings take place very early in the life of the dispute, there may be a lack of information that will permit a resolution of the dispute;
    - The absence of a "facilitator" to encourage robust communications and the exploration of mutual interests and needs (see discussion on Real Time Mediation and Dispute Resolution Advisors)
- The party with access to greater information may be at a tactical advantage.

Many of these potential "issues" can be satisfactorily addressed with careful drafting of the appropriate contractual or employee handbook provisions, training and the identification of the activities and objectives the parties desire to incentivize.

In the employment setting, meet and confer variations are relatively typical and can include such mechanisms as open door policies, raising complaints and issues with trained H.R. personnel, the use of ombudspersons, employee hot lines, etc.

Contractual Mechanisms for Raising Disputes:

In some instances, the contract or terms of the relationship between the parties is silent on how conflicts or disputes will be raised and ultimately resolved. This often results in the filing of a lawsuit or demand for arbitration as the first step in the dispute resolution process. This is often not a particularly effective or strategic method of dealing with a dispute in the first instance. Contracts, warranties and employee handbooks and employee policies may provide mechanisms for a party to raise a dispute (such as meet and confer obligations, etc.). In some instances, if that mechanism is not followed, it may result in a contractual "waiver" of the dispute or otherwise extinguish the claim. Such provisions may be viewed as a methodology of allocating risk to the party who is obligated to raise the claim in the prescribed manner or lose the claim. Such provisions can also be viewed as an arguable form of ADR technique in that if the dispute is not raised in the appropriate manner, the dispute will be resolved through the contractual extinguishment of the claim. Typical of such techniques is a shortening of the otherwise applicable statute of limitations, the requirement to exhaust certain procedures as a condition precedent to the filing of a lawsuit or demand for arbitration, etc. However, depending upon the nature of the relationship between the parties, particularly in consumer and employment relationships, there are

certain legal barriers to the ability to waive or extinguish claims in this manner and these limitations must be strictly observed.

Often employers, to ensure compliance with Sarbanes-Oxley and other laws, have implemented processes that are intended to raise complaints as soon as possible with the implementation of employee hot lines, the use of ombudspersons, and other such dispute or claim reporting mechanisms.

Issues associated with such provisions include:

- See meet and confer discussion above;
- They can be most helpful in strategically addressing conflict and issues prior to the initiation of litigation or a demand for arbitration;
- They can lead to increased cooperation and partnering among the parties if the provisions are perceived as "fair";
- Any ensuing investigation of the claim should be viewed as credible and effective;
- They can lead to the early identification of issues that require an immediate investigation and evaluation at the earliest practicable date so that remedial steps may be taken as appropriate; and,
- If the contractual mechanisms are perceived as unfair and inappropriate they can undermine morale or lead to a deterioration in the relationship of the parties and, depending upon the circumstances, may not be enforced by a court or arbitrator.

Contractual "Risk" and "Cost" Allocation Provisions:

Depending upon the nature of the relationship between the parties, the contract may contain any number of risk and cost allocation provisions that can be viewed as a form of ADR. Rather than litigating who bears responsibility for a particular risk or bears the costs if such a risk arises, the parties may address the issue in the contract which minimizes the scope and issues involved in any future litigation or arbitration. For example, in construction projects it is not unusual for the parties to allocate "risk" in the event of a delay by recourse to the "Emdem formula" or some variation of that formula. This formula sets forth the methodology as to how the additional costs of overhead attributable to recoverable delays will be calculated thereby eliminating such an issue in any future litigation or arbitration. Similarly many construction contracts provide how the economic impact of a delaying event upon the completion of the construction project will be determined. Like the Emdem formula such a provision is intended to avoid confusion and controversy in the manner such damages will be calculated. In other construction contracts, "brother keeper" provisions are used to impose obligations on the subcontractor who "covers up" the faulty work of another subcontractor. Such provisions can also be viewed as a "risk" allocation mechanism. In the commercial setting, the parties can contractually allocate risk in the event of a product recall, a change in requirements imposed by, for example, governmental regulations, etc. In addition, there are a whole host of additional insured and indemnification provisions that can be considered by the parties. There are many examples of how these and a multitude of other contractual provisions can be utilized to allocate risk and minimize the scope of future disputes.

Issues associated with such provisions include:

- The parties will "partner" on the contract to fairly allocate risks that are typically encountered or experienced and have the potential to enhance the relationship between the parties during the course of the relationship;
- Such provisions can generate greater "predictability" and the elimination of issues that might otherwise be the subject of significant dispute resolution resources;
- They can set the "tone" and lead to a greater partnering relationship among the parties during the course of the contract if the provisions are perceived as "fair";
- Parties with greater bargaining power, who are perceived as attempting to unfairly transfer risk, may undercut a potential positive relationship with the other parties to the contract; and,
- In some instances certain risk transfer mechanisms may not be enforced by the courts or the arbitrator which may cause greater "unpredictably" and lead to more contentious or protracted litigation.

"Hot Tubbing":

A concept derived from a practice first used in the Australian Courts, where experts give testimony concurrently while answering questions posed by the opposing expert and attorneys. Hot tubbing can be a technique that is used in any number of settings that involve disputes that will be subject to a "battle of experts." The objective is to provide clarity and definition of the factual and legal issues involved in the dispute. Typically, a third party neutral assists in the orchestration and presides over the "hot tubbing" event to narrow the issues in dispute. It is not unusual that immediately following or shortly after the hot tubbing exercise the neutral will then conduct a mediation with the parties. This technique can be particularly helpful in construction, professional malpractice and product liability disputes.

This technique has a number of benefits, issues and features:

- Has the potential of limiting or refining the issues that will be involved in the ultimate resolution of the dispute;
- Permits the parties to the dispute to identify the potential risks of ongoing litigation or arbitration;
- Typically far less expensive, but just as effective (depending upon the nature and scope of the dispute) than a non-binding summary jury trial or a short form non-binding arbitration;
- Can be a highly "evaluative" process that is adversarial in that attorneys are involved;
- Fosters the productivity of a more "facilitative" mediation where the parties require or need an "evaluation" of the merits of their cases prior to the mediation event and the parties will not require or desire a highly evaluative mediation process;
- Typically requires maturity of the dispute and the prior exchange of information and discovery;
- It can be an expensive proposition that is not necessarily appropriate for smaller disputes; and,
- Some parties believe this expense can be avoided should the parties select a subject matter expert to act as a mediator who is qualified and requested to provide an

"evaluation" at some time during the mediation process. See the discussion of "evaluative" and "facilitative" mediation below.

Dispute Resolution Boards:

A board comprised of contractually designated subject matter experts who, following a very truncated presentation of the dispute (typically during the course of the performance of the contract) will issue a binding determination on the parties that will be followed until one of the parties decides to appeal that decision. As initially developed, the main purpose of the Dispute Resolution Board is to ensure that performance under an ongoing contract is not halted and provides the disputants with an early neutral expert evaluation of the dispute. The presentation that is made is typically very truncated and does not call for any significant discovery and relies primarily on the information exchanged during various "meet and confer" meetings held earlier during the life of the dispute. While typically Dispute Resolution Boards consist of three or more members (usually an odd number to avoid a "deadlock'), depending upon the nature and significance of the contractual relationship, the Dispute Resolution Board can be composed of only one individual. In determining the composition of the Dispute Resolution Board the parties often desire to have subject matter experts who are familiar with the custom and practice in the industry involved. Unless the parties desire, it is not necessary that all members of the Dispute Resolution Board have legal training.

In some respects the role of the Dispute Resolution Board is akin to Peer Review typically associated with the employment setting. The Peer Review process involves the selection of neutrals who, based upon their knowledge and familiarity with the work place, decide whether the adverse employment decision will be upheld, modified or set aside. Typically, the decision resulting from the Peer Review process is binding upon the employer but not binding upon the employee. In the employment setting the Peer Review is typically the first step in a progressive ADR scheme. Should the decision be appealed it may next proceed to mediation or mandatory binding arbitration. The decision of the Peer Review mechanism will typically be admissible in any subsequent proceeding.

A number of the features of a Dispute Resolution Board include:

- An evaluative process and attorneys are typically involved;
- Provides for an early resolution of the dispute without protracted discovery and associated costs;
- Designed to provide an interim binding decision so as not to interfere with the ongoing project;
- Decisions may be issued before all relevant information is available;
- The party who is in possession of the majority of the information may have a tactical advantage;
- The party who does not prevail at this stage often voluntarily forgoes an appeal to the next stage of the dispute resolution process and so it does provide finality in many instances; and,
- Adds to the short-term costs of the contract and can be relatively expensive for smaller disputes.

Dispute Resolution Advisors:

A contractually appointed neutral who will assist the parties in constructing and administering a dispute resolution mechanism once a dispute has arisen that the parties are unable to resolve (i.e., meet and confer, Dispute Resolution Boards, etc., have not finally resolved the dispute). Typically, the contract will define the role of the Dispute Resolution Advisor in tailoring a dispute resolution mechanism that is proportional to the dispute and has the potential of avoiding the costs, delay and expenses of boiler plate pre-dispute resolution provisions that may not be appropriate or cost effective given the nature and scope of the specific post contractual dispute. The Dispute Resolution Advisors will often participate in Real Time Mediation during "meet and confer" events when the parties have come to an apparent impasse. See also the discussion of Real Time Mediation below.

Even if a Dispute Resolution Advisor is not named in the contract, the use of a Dispute Resolution can be effective in working with the parties to tailor a cost effective, proportionate and efficient dispute resolution mechanism. Often, by use of a Dispute Advisory Questionnaire or similar instrument (see the Questionnaire attached to this web site), the Dispute Resolution Advisor utilizes his expertise to shape a dispute resolution process that is proportionate to the needs of the parties.

In some respects the role of the Dispute Resolution Advisor in the commercial setting is similar to the Ombudsperson in the employment setting. Depending upon the culture of the organization, the role of the Ombudsperson is to meet with the employee and the individual who made the adverse employment decision and facilitate a resolution of the dispute.

Some of the features of the use of a Dispute Resolution Advisor include:

- Improves the quality of discussions and exchange of information during meet and confer meetings by acting as a "facilitator" or "mediator" during such meetings;
- The ability to "right size" the subsequent dispute resolution mechanism that fosters efficiency and cost effectiveness;
- The ability to craft a dispute resolution mechanism that is specifically tailored to meet the needs of the parties and the nature of the dispute can be quite challenging;
- The dispute resolution process crafted with the assistance of the Dispute Resolution Advisor will often be less costly and expensive than traditional litigation and arbitration;
- The parties will not be fully aware of the complete dispute resolution process at the time they enter into the contract;
- See Real Time Mediation discussed below;
- It adds to the short term costs when and if a dispute arises; and,
- DRA's can significantly reduce the ultimate costs of dispute resolution.

Facilitative Mediation:

A process in which a neutral third party focuses on the "facilitation" of communications between the parties, assists in identifying issues in a neutral and impartial manner, and helps the parties explore solutions to promote a mutually acceptable settlement that enhances party self-determination. If a mediator is "facilitative" the mediator will not render any evaluative opinions on the merits of a party's legal position. A mediator (regardless of whether the mediator is "facilitative," "evaluative" or "analytical") has no authoritative decision-making power. Due to the success of the mediation process in resolving disputes, courts will often refer cases to mediation once a lawsuit is filed.

Because mediation at its core is a voluntary process, some commentators are critical of court mandated mediations and claim there is an inherent tension and inconsistency between voluntariness and being compelled by a court to engage in mediation. Notwithstanding these criticisms, court ordered mediation is here to stay and the practice has been very successful in achieving resolutions that are mutually beneficial to the parties.

The hallmarks of facilitative mediation include:

- The conduct of the mediator (whether facilitative, evaluative or analytical) is governed by Standards of Conduct that have been adopted by the Michigan Supreme Court Administrative Office that are available for review by all disputants;
- Allows for significant creativity in the mutual resolution of disputes that is not achievable in the arbitration or litigation context;
- Resolutions are achieved through party empowerment and self-determination;
- Resolutions and statements made during the mediation process are subject to confidentiality protections;
- Resolutions are purely voluntary;
- A more thorough understanding of the needs and interests of the opposing party;
- Not intended to be an adversarial process even though attorneys participate;
- The process is well suited to parties who want or desire to maintain an ongoing relationship or who need to work together in the future;
- The application of facilitative "reality testing" techniques for the parties (reality testing techniques can also be employed in an evaluative manner, see Evaluative Mediation);
- Encourages integrated as opposed to positional bargaining as appropriate;
- Requires the participation of party representatives with authority to resolve the dispute;
- Some parties need or desire a more "evaluative" process and desire the mediator to give opinions on the legal merits of the dispute (see "evaluative" mediation discussed below);
- Some parties and their attorneys are reluctant to engage in the process until significant discovery costs have been incurred; and,
- The purely facilitative mediator may be most reluctant to utilize various dead lock or impasse strategies (such as the "mediator recommendation," etc.) in resolving the dispute.

Evaluative Mediation:

Often parties are desirous of a mediator who has subject matter expertise of the legal issues involved in the dispute and has significant trial experience. Unlike purely facilitative mediation, the parties are often times interested in obtaining the mediator's "evaluation" of the merits of the dispute and the issues the parties will confront at the time of trail.

Some commentators suggest that mediators who are attorneys are highly likely to be somewhat evaluative during the mediation process. In fact, in a classic analysis of differing mediation styles, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed,* Leonard L. Riskin, 1 Harvard Negotiation Law Review 1-51 (1996), described the continuum between facilitative and evaluative mediator styles. Recourse to this grid is often most helpful to the parties in selecting mediators who are perceived to have a mediator style that is preferred by the parties. Regardless of style

(facilitative, evaluative and analytical) mediations have proven very effective in the resolution of disputes.

Some of the features of evaluative mediation are:

- See Facilitative Mediation discussion above;
- As some commentators believe it is most difficult, particularly when lawyers act as mediators, to have a purely "facilitative" mediation and it is argued it is more "honest" to recognize that virtually all such mediations have an "evaluative" component to some degree or another;
- Some commentators believe that highly or excessively "evaluative" mediators can create a needlessly adversarial atmosphere and party "posturing" during the course of the mediation that undercuts the efficacy of mediation;
- Some commentators believe that highly or excessively "evaluative" mediators unduly interfere with party self-determination;
- Some commentators believe that "evaluative" mediations result in unduly positional as opposed to integrative bargaining;
- Some commentators believe that highly "evaluative" mediations unduly interfere with creative problem-solving and creative resolutions;
- If excessive, the evaluative mediation style can interject an adversarial into the mediation process that can prove counterproductive;
- Parties and their counsel often desire and more comfortable with a mediation style this is more evaluative than facilitative; and,
- There is no known research that suggests one style is more effective than another in reaching a resolution of disputes.

Analytical (Hybrid) Mediation:

The mediator style required in these types of mediation call upon the mediator to be flexible in the utilization of both "facilitative" and "evaluative" techniques given the circumstances that might arise during the course of the mediation. Mediations can be very fluid and dynamic events and no one style, highly facilitative or highly evaluative, may necessarily meet the needs of the parties. Again, with the consent of the parties, the mediator can become somewhat evaluative (typically during private caucuses with a party) as well as predominantly facilitative (typically during joint sessions with the parties) depending upon the needs of the parties in reaching a resolution. Moreover, as the mediation event progresses and the parties are in danger of coming to an impasse or deadlock, the parties will often invite the mediator to become more "evaluative" in the desire to reach a resolution and, where required, the mediator may be required to adapt to the circumstances while complying with the Standards for Mediators.

Some of the features of Analytical Mediation are:

- See Facilitative and Evaluative Mediation discussed above.

Real Time Mediation:

Typically associated with the meet and confer obligations contained in the contract and the concurrent use of Dispute Resolution Advisors. If the parties are unable to resolve the dispute during the meet and confer events, the Dispute Resolution Advisor may be authorized to act as a facilitative mediator to enhance communications during the meet and confer stage or otherwise act as a mediator. If the preliminary dispute resolution steps are unsuccessful in resolving the dispute, the Dispute Resolution Advisor will assist the parties in fashioning a dispute resolution mechanism that is proportionate, progressive and otherwise meets the objectives of the parties as determined in their contract.

A number of the features associated with Real Time Mediation and the Dispute Resolution Advisor are:

- Provides all the benefits of "meet and confer" obligations;
- A very flexible process that allows the parties to "right size" the dispute resolution mechanism to the nature of the dispute;
- Allows the parties to incorporate both evaluative and facilitative techniques into the dispute as deemed appropriate;
- It does not rely upon boiler plate resolution provisions in contracts that typically provide for a "one size" fits all dispute resolution mechanism and focuses on establishing dispute resolution mechanisms that are proportionate to the dispute;
- Such provisions can pose drafting challenges to the practitioners who are not accustomed to these types of provisions;
- Parties who might desire to leverage greater economic and other power during the dispute resolution mechanism may not be fully able to do so;
- Parties relinquish the power to control the complete dispute resolution mechanism in the initial contract; and,
- It adds to the short terms costs of the dispute resolution process when and if a dispute arises.

Mediation-Arbitration Hybrids:

A process by which the parties first engage in mediation in an attempt to resolve some or all aspects of their dispute. If all aspects of the dispute are not resolved during the mediation phase, then the unresolved issues move directly into arbitration where the mediator becomes the arbitrator. The process can also work in reverse; the parties first conduct an arbitration and prior to the arbitrator issuing a final decision the arbitrator will act as a mediator in an attempt to resolve the dispute. There are multiple variations of the above procedures that have been employed.

A number of features associated with these hybrids are:

- The process leads to efficiencies and cost savings in that the neutral does not have to be "re-educated" about the dispute should the matter move to arbitration;
- There are significant ethical and process concerns when the same neutral acts as a mediator and then as an arbitrator (and vice versa) and requires a neutral who has the requisite process expertise;

- Advocates of the process maintain it combines the best of both processes: the opportunity for the parties to voluntarily settle with the assistance of a neutral with closure and finality guaranteed because the same neutral will issue a final binding decision if necessary;
- If the complete dispute is not resolved during the mediation stage, it will typically lead to a resolution of a portion of the dispute or otherwise limit the issues involved in the arbitration thus leading to a far less costly and more efficient arbitration;
- The process requires sophisticated counsel/negotiators; and
- Individuals who are willing and able to provide these services are limited to a much smaller pool of neutrals who can effectively preside over this process.

Early Neutral and Expert Evaluations:

Similar to the role played by the Dispute Resolution Board except the evaluations are typically not binding and merely advisory. The intent is to provide the disputing parties with an early evaluation of the merits of their different legal and factual positions. Often, the parties desire such an evaluation before agreeing to engage in a mediation.

Some of the features of Neutral and Expert evaluations are:

- An evaluative process and the decisions rendered are not intended to be creative or based upon the interests of the parties;
- The decisions are rights based and akin to the decisions one might expect from a judge, arbitrator, or jury;
- It provides a mechanism for narrowing and refining the issues involved in the dispute;
- Allows the parties to identify and evaluate their risks of going forward;
- Adversarial and typically involves attorneys;
- It can add to the short term costs of the dispute resolution process if the decision is rejected by either party;
- Some parties may be reluctant to engage in the process before significant discovery costs have been incurred;
- Typically scheduled, when warranted and desired, to take place before a mediation is scheduled;
- If during the course of the mediation it becomes apparent the parties are in need or desire an "evaluation" it is not unusual to adjourn the mediation to permit for an expert evaluation and then reconvene the mediation once the evaluation is received;
- The party who receives a non-binding and unfavorable opinion typically believes that its bargaining position has been eroded; and,
- Some suggest the cost can be avoided in certain disputes if an "evaluative" mediator is selected.

Mock or Summary Jury Trials:

Typically very truncated and non-binding, this process permits the parties to make a presentation to a "jury" that will issue a decision. It is highly evaluative and adversarial and is engaged in by parties

who are desirous of evaluating the risks associated with proceeding with the litigation and desire to have an evaluation of the jury appeal of their positions and arguments. The proceeding is typically presided over by a neutral who will instruct the jury and ensure the "rules" agreed to by the parties are adhered to during the presentation. The rules of the presentation are fashioned by the parties with the assistance of the neutral (will witnesses be called, how documents and demonstrative evidence will be published to the jury, etc.)

A number of the features associated with this technique are:

- A relatively expensive process that is not cost effective for smaller disputes;
- Typically most helpful when there is a significant difference in the positional bargaining of the parties;
- Very helpful to parties who desire to "reality" test the positions taken both with regard to the facts and the law;
- It can assist a party in modifying its bargaining position when confronted with significant risks;
- A highly adversarial, interest based process;
- Depending upon the outcome it can lead to a party increasing its demand; and,
- Will typically be followed by a mediation event.

Non-binding Arbitration Agreements (i.e., short form arbitrations):

The parties engage in an arbitration that is non-binding and typically will not provide for any significant discovery. It has characteristics that are similar to early neutral and early expert evaluation in that it is highly evaluative but is typically more adversarial in that during a non-binding arbitration witnesses are called and the parties are typically represented by counsel.

- Predictive of the outcome of a far more costly and protracted arbitration or traditional litigation;
- Allows the parties to evaluate risks before engaging in further and more expensive dispute resolution mechanisms;
- Adversarial and involves attorneys;
- Adds to the short term costs incurred during the dispute resolution process;
- Highly evaluative and not intended to be creative or based upon the interests of the parties; and,
- May be followed by a facilitative mediation but often the party who "loses" the non-binding arbitration believes that bargaining power has been eroded.

Binding Arbitration:

A binding adversarial process that was historically seen as being faster and a cheaper dispute resolution that traditional litigation. Its speed and expense has become increasingly questioned by the construction industry and others as a viable alternative to traditional litigation. Arbitration also offers a less robust appellate review process than traditional litigation although certain contractual devices have been attempted to expand the scope of review of arbitration decisions.

- An evaluative, rights based process akin to traditional litigation;

- The arbitrator is a decision maker whose decision is imposed upon the parties;
- Theoretically less costly and protracted than traditional litigation although there are increasing complaints concerning the costs and delay of arbitration particularly when a 3 arbitrator panel is involved;
- Typically significantly less public than traditional litigation;
- Typically results in "winners" and "losers" and creative problem solving is not the objective;
- Some commentators believe there is a tendency by arbitrators to "split the baby";
- Unlike traditional litigation, the parties are provided latitude in describing the "process" that will be followed during the arbitration and to select the neutral(s) who will decide the dispute;
- Limited review by the appellate courts although, in recent years, some parties have attempted to contractually expand the scope of judicial review;
- Some see the limited review as a problem in correcting egregious mistakes the arbitrator may make; and,
- Depending upon the jurisdiction involved, some commentators have noted an erosion of the doctrine of limited judicial review of arbitral decisions.