CHAPTER TWO

ARBITRATION--BINDING AND NON-BINDING PROCEDURES AND PHASES OF ADR

ARBITRATOR POWERS, DUTIES; ENFORCEMENT AND VACATING:

An arbitrator is a person chosen to settle differences between two or more parties in controversy. An arbitration is the actual hearing and determination of the case referred or submitted to the arbitrator chosen by the parties. An arbitrator has an awe-some power exercising the combined duties of judge, jury and appellate court. The arbitration code of Georgia sets out methods of enforcement of the arbitration award or decision if either party fails to carry out the mandates of the award. The code also provides limited ways and means to seek to vacate, set aside or stay the award in case of some gross mistake, error or where the arbitrator clearly should have disqualified themselves at the beginning. In addition to the state code there in a U.S. Arbitration Act and most private institutions sponsoring ADR have their own set of rules applicable to arbitration. Commercial arbitration rules and International rules of arbitration apply in certain cases, situations and locations.

PUBLIC HEARINGS VS. PRIVATE HEARINGS:

Recently the writer had the opportunity to address the litigation section of the Tennessee Bar Association on the subject of ADR. The title of my talk was: WHAT GOES ON BEHIND CLOSED DOORS? Jury and non-jury trials in our courthouses are generally open to the public. Both young and old can provide the details of what occurs in a Perry Mason or Judge Wampner type trial. On the other hand the public is mostly unaware of the multitude of cases and disputes that are being solved and resolved effectively, speedily and inexpensively in a humane way, privately, behind closed doors. The general public including attorneys should, from time to time, pull the curtain back and take a glimpse behind the ADR closed sessions and hearings. Who knows, if you like what you see you may want to try it!

BLESSED ARE THE PEACEMAKERS:

Lets take a quick look at some of the historical beginnings of ADR. We know that 4,000 years ago Hammurabi's code set up certain rules, regulations, guidelines and penalties for the citizens of that era to adhere to, live by, and to which all were subject. Civil cases could be settled by parties, and, arbitrators were provided by the rulers where needed. About 3,300 years ago Moses was known as a noted law giver. He spent a great deal of time in discussing cases, resolving disputes and in urging others to resolve their own problems so they could live together in peace. Solomon was a wise man and known for justice and a great temple of justice was named for him. All will remember the famous case decided by him as to which woman appearing before him was the rightful mother. David was active in rendering judgments. Isaiah was a great mediator as he said: "Come let us sit down and reason together". Jesus said: "Blessed are the

peacemakers", stressing that problems should be worked out rather than filing suit against ones brother, and taking another to court. Greek and Roman Law indicates that there was great interest in mediation and arbitration. Constantine and Justinian were problem solvers. In France, Louis IX would spend many hours, on an informal basis, while outdoors under the shade of the trees, in trying to get the people to solve their problems and in helping arbitrate their cases, where they could not agree on a solution. He was so popular as a problem solver he was thereafter known as, and called, Saint Louis. A large mid-western city in our country was named after him.

COMMON LAW ACCELERATES ADR:

In England the common law was being developed. The people preferred to settle their own problems or appoint their own arbitrator rather than submitting to an arbitrator appointed by the king. Most of you historians will recall that about 778 years ago, about the middle of June, in the year 1215, a small number of Barons surrounded the tent of King John of England. You may also recall the latter was the bad brother of King Richard the Lionhearted. At a place called Runnymede the Barons placed a sword at his throat and forced King John to sign what we know now as Magna Charta-The Great Charter. This document became the bedrock of a great many of the freedoms we have today. The right to a trial by one's peers and not by the king, the right to select a mediator or arbitrator of ones choice, and not have someone else name the trier of law and fact, greatly accelerated the ADR development. A lot of blood has been spilled in preserving and defending these precious rights and freedoms. The guilds in England conducted the earlier forms of labor arbitration. ADR was utilized in the American colonies; the revolutionary war was partly fought to make the judicial

system of the 13 colonies independent from control by the king.

ENGLAND AND GEORGIA ADR:

Blackstone and Coke are part of our common-law heritage. Both articulated that human beings possessed certain natural inalienable inherent rights that did not come from the king or state, but, by virtue of being a human being. What the king or government gives can be taken away but what is inherent may be suppressed but never completely removed. You will remember that Coke was the advocate in the famous suit where the rule in Shelly's case was pronounced. When Coke was Chief Justice, King James demanded that Coke and his court yield to the King wherever the latter's interest was involved in a case. Coke made his famous statement that he would treat all cases alike and not yield to the king and replied: "sir, you too, like any of your subjects, are under the law". Lord Coke wound up later spending time in the tower of London for having said no to the king. Perhaps less well known is the hobby Coke had of trying to bake cookies, bread and cakes. He thought he was a good baker. One day his wife said: Edward, get out of my kitchen and quit your baking! She continued, "had I wanted to marry a baker I would not have married a Coke [Cook]." We know that when Georgia was settled in 1733 the colony did not have lawyers or judges. ADR procedures of mediation between Oglethorpe and Tomochichi were handled by Mary Musgrove and others designated by both parties concerned. Arbitrators, or persons designated to settle disputes were appointed by the Colonial Government. Today in our state and nation and throughout the world ADR is an idea whose time has arrived and its finest hour is on the horizon.

RIGHT TO SELECT JURY, ARBITRATOR OR MEDIATOR:

A citizen may serve ones community or country in many ways. Voting, paying taxes, serving in the armed forces, serving as a juror are several important ways of making a substantial contribution as a good citizen. It has been said that a jury of 6 or 12 persons is "a cross-section of the community, with different experiences, different backgrounds and from which differences you will be able to arrive at the Truth by using the combination of your collective common sense". Jurors are the judges of the facts while the judge in the case is the judge of the law applicable in the case. The goal is for the facts and the law to "speak the truth". The Voir Dire is the beginning phase of a jury trial. The term is of French origin brought to England in 1066 when the Normans conquered England. "Voir" means to see the juror and "Dire" means to hear the juror respond to questions that may be asked to determine that all are impartial and fair. The law demands that the judge of the law, and, the judges of the facts be, fair and impartial, so that truth may be found and that justice many be done in every case.

LISTEN CAREFULLY, DECIDE IMPARTIALLY:

Most arbitrations are conducted by a single arbitrator although many times a panel of three arbitrators are chosen. Placing the power to judge the law and the facts in one person or a panel of three persons in a case important to all parties, without an appeal, is a unique investment and entrustment of power unequaled in any other responsibility or undertaking one may contemplate. "Unto one whom much is given-much is expected". The character and reputation of an arbitrator chosen in a case goes through at least an indirect Voir Dire. In addition to being known as one being fair and impartial parties

will seek arbitrators that are courteous and conscientious, knowledgeable and well prepared, intelligent and professional, and those that will render a fair, rational and clearly defined result, promptly and without delay. Serving as an arbitrator in any case requires a higher degree of professionalism and responsibility than one would render as a Justice on the highest court of our land. This is true because the case being reviewed by the Justice has already been reviewed, decided and approved by the jury and the trial judge. Also, the Justice has a staff of law clerks and six other judges to share his responsibility while the arbitrator most of the time is all alone without staff or anyone else to render assistance.

ARBITRATION- A THUMB NAIL SKETCH:

Lets view together a mental simulation of a one-judge binding arbitration proceeding, procedure and hearing conducted behind closed doors. Remember, the hearing does not, in most instances, include in attendance a court reporter. A party is entitled to a record, if they agree to pay for it, but, rarely are requests for a record or requests for issuance of subpoenas made in arbitration proceedings. There are no deputy clerks or bailiffs; no one is present at the hearing except the arbitrator, attorneys and the parties. On occasions, upon agreement of the parties, observers may be present. Witnesses usually remain outside of the hearing room until called, unless the parties agree that they may remain in the conference room during the hearing. The arbitrator is seated at the head of the conference table with the different parties and their respective counsels facing each other on opposite sides of the table. The hearing begins promptly at the designated date, hour and location and a word of thanks is expressed to all for being on time. After calling the name of the case and introducing and identifying all of the parties and

their attorneys we are ready to begin.

COMFORTABLE, SEATED, INFORMAL BUT SERIOUS HEARING:

It is appropriate for the arbitrator to state a few words as to his background in the law, and. training and experience in ADR. It is vital that the atmosphere be created that the arbitrator is in charge of the hearing, that the hearing will be orderly and that a fair and impartial tone be established that will prevail during the time all are together. A statement of claim which includes a summary of facts and issues usually has been filed by the plaintiff within 20 days prior to the hearing and the defendant responds in a like manner within 10 days thereafter. If the hearing is a result of a prior arbitration contract or agreement there may also be a stipulation as to the issues before the arbitrator. Prior to opening statements each side should be asked if they have any affidavits or other materials that they plan on presenting that have not been made available to the other side? It is best not to have trial at the hearing by ambush or that any surprise witnesses be produced at the last moment. After the housekeeping discussions are over the complaining party makes an opening statement followed by a like statement by the other side. All witnesses are then sworn and a decision is made as to sequestration of witnesses. All parties at the hearing will remain seated throughout the proceedings. Usually a five minute break will be taken every hour and a half or when needed. Arbitration is less formal and more relaxed than litigation and of course mediation is the least formal of the other two.

MOST EVIDENCE IS ALLOWED:

Many times liability may be conceded by the defendant. If this is the case the only issue to be decided will

be the amount of damages, if any, to be awarded. In a small number of cases the question of arbitrability of a claim may arise. Whether or not the claim has been filed prior to the running of the statute of limitations or contractual limitations previously agreed to by the parties sometimes must be adjudicated by the arbitrator in deciding whether the case is arbitrable. The ordinary rules of evidence are usually placed on the back burner during the hearing. It is my general policy to admit all relevant documents and hearsay evidence that will aid me in understanding clearly all issues to be decided. I will hear all objections made but at the outset I advise counsel that most objections will be overruled. The plaintiff will present their witnesses on direct-examination followed by cross-examination. Documents and exhibits, photographs, police reports, video recordings and other evidence may then be introduced. The defendant follows the same procedure. The arbitrator many times will desire to ask questions of the witnesses. After all evidence is presented by both sides inquiry will be made as to whether any of the documents should be returned to counsel? If so, counsel will mail a large stamped self addressed envelope to the arbitrator within 10 days of the hearing. When all evidence is heard closing arguments will be made by counsel and then the hearing is adjourned. The parties are admonished not to call or contact or discuss the case with the arbitrator in the future if their paths cross again. Of course the attorneys already know this.

IN THE JURY BOX 24 HOURS:

The parties and counsel are told at the time of adjournment of the hearing that the arbitrator will review the case again, the same evening of the hearing, will sleep over the case, and will then review it once more the following day, and then make a decision and award, and mail it in to the forum

the next day after the hearing. In 99% of all cases this arbitrator makes a decision within 24 hours. From the time I leave the hearing I conceive that I am in the jury room until a decision is made. Remember, no government on earth or anyone anywhere can dictate to an arbitrator where the truth lies. On occasions where there is a panel of three arbitrators, two out of the three or a majority of the panel decides the case. In many cases the three may in deliberations and discussions reach a consensus and provide a unanimous decision. The arbitration award may or may not include reasons explaining the decision or award rendered. When a great many cases are cited by parties requiring the later reading, reviewing and studying of authorities relied upon, I may only then, provide 48 or 72 hour service, rather than the usual 24 hour service. To be a faithful trustee of the power invested and invoked by the parties a good arbitrator must know the true facts of the case and apply the applicable law. If an arbitrator is dedicated, determined and devoted in seeking to arrive at the truth in the award made, I like to think he is a bell-wether and bell-ringer leader in ADR and in his profession. The bottom line for an arbitrator is that he must use his heart and must use his head.

BELL WETHER, BELL RINGER, DETERMINATION AND DECISIONS:

Speaking of being a bell-ringer and using one's head brings to mind Victor Hugo's character, Quasimodo, who was known as the hunchback of Notre Dame. Everyone will remember that Quasimodo was the faithful bell-ringer that would ring the bell at the cathedral of Notre Dame in Paris several times each day. After 25 years of faithful service as a bell-ringer Quasimodo retired. The cathedral committee had to consider new applicants for this important position. Forty

to fifty persons applied. One man who applied had arthritis in both arms and could not move either of them. The committee inquired: "are you sure you can ring the bell?" He said, Oh yes, I can use my head." He took a flying leap and hit the bell, and it rang--so he was hired. Every day the bell would ring and the people could set their watches by the regularity, and all residents in the French Capitol were happy and content with the super job he was doing. One day he took a flying leap, missed the bell and sailed out the 3rd story window and landed on the stone courtyard. The sheriff walked up and asked: "who is this man?" A bystander said: "I don't know his name but his face sure does ring a bell." The church committee had to interview more applicants. Another man with arthritis in each arm showed up to apply. The priest said: "you look awfully familiar." The man replied: "My twin-brother used to be your bell-ringer, I can use my head and also ring the bell." The priest agreed to hire him. The bell then rang every day at the appointed time and all in Paris were happy until he too missed the bell, sailed out the 3rd story window and landed on the stone courtyard below. The sheriff asked the priest: "Who is this man?" The priest replied: "I don't know his name but he's a deadringer for his brother!" We arbitrators and lawyers must use our heads but not bang our head against the wall. We must use our heads and catch the enthusiasm of this bell-ringer, but, none of us of course want to be deadringers for anyone, anytime soon!

PRIVACY, PROMPTNESS, AND PARTIES SHARING THE COSTS:

The ABC's of ADR is PRIVACY, PROMPTNESS and INEXPENSIVENESS! Arbitration and Mediation are almost double-first cousins, and are very much alike. The big difference is that in the former the power is given to a third

party arbitrator for a decision, while in the latter, the power remains in the two parties who along with their attorney retain control of the case at all times. A non-binding arbitration is about the same as a binding arbitration except it is only advisory, and, as it's title suggests, is not binding upon anyone. Many times, it nevertheless leads to a settlement or possibly to a mediation. In using this non-binding procedure the parties are really just getting a second opinion from a non-interested third party which may guide their further efforts.

JUSTICE DELAYED IS JUSTICE DENIED:

A well respected judge has recently said that "a lawyer who looks at litigation as the only solution to the problem has probably violated his obligation as a professional." He further added that: "if lawyers do not make an assessment that other options are open, besides litigation, and do not apprise their clients of this, many lawyers in the future may be sued for malpractice." These thoughts are very much about the same message given by Chief Justice Warren Burger when he stated: "Ideas, ideals and great conceptions are vital to a system of justice, but it must have more than that--there must be delivery and execution. Concepts of justice must have hands and feet or they remain sterile abstractions. The hands and feet we need are efficient means and methods to carry out justice in every case in the shortest time and at the lowest cost possible. This is the challenge to every lawyer and judge in America." Berger goes on to admonish us: "The harsh truth is unless we devise substitutes for the courtroom processes, we may be on our way to a society overrun by hordes of lawyers hungry as locusts and brigades of judges never before contemplated...the notion that people want black-robed judges, well dressed lawyers and fine-paneled courtrooms as the setting to resolve their disputes is not correct. People with

problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible." I commend all of these words about ADR to you. It will improve our profession of jurisprudence as well as enhance our own individual professionalism. Justice delayed is justice denied. Arbitration costs less, is private and prompt, and with 24 hour service is Justice expedited; it is further a simple, sensible, sound solution to delay in our system of justice.