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DISPUTE RESOLUTION

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Article Submissions: The Editorial Board welcomes the submission of article concepts as well as draft articles relevant to the field of dispute resolution. The Editorial Board reviews all submissions and makes final decisions as to the publication of articles in Dispute Resolution Magazine. Email submissions to Gina Brown, Editor, at gina.brown@americanbar.org. Submission Guidelines are available on the Publications page of the Section of Dispute Resolution web site: www.americanbar.org/dispute.
The Section of Dispute Resolution’s Spring Conference, held in Chicago from April 3 through April 6, turned out by all accounts to be one of the best ever. For our first meeting in the Midwest, we were pleased to be located in a beautiful hotel overlooking Millennium Park. Although Judge Richard Posner was unable to attend due to a health problem, we were very fortunate to have professor Geoffrey Stone of the University of Chicago School of Law step in as a substitute. His discussion on “same sex” issues currently pending before the Supreme Court had everyone spellbound. And, of course, the annual Frank Sander Lecture on Friday, provided by Sen. (and renowned international mediator) George J. Mitchell, was fascinating. Before each conference plenary, we were gratified by introductory comments from current ABA President Laurel Bellows and ABA President-elect Jim Silkenat. We appreciate the excellent work of conference co-chairs Stuart Widman, Alyson Carrel and Jillisa Brittan as well as that of program chairs Juan Ramirez, Kelly Browe Olson and Myra Selby and, of course, our dedicated staff.

The 2014 Spring Conference is scheduled for April 2 through April 5, 2014, at the Hyatt Regency Miami in Florida. Please save the date!

In a continuing effort to make sure we use our resources to advance the interests of our members, the Long-Range Planning Committee will be meeting between now and the ABA Annual Meeting in August. Long-Range Planning Committee co-chairs Bruce Meyerson and Larry Mills welcome your thoughts in the meantime as to priorities, member benefits and future directions of the Section.

Another important initiative is the National Conversation on Gun Violence. Bruce Meyerson continues to work closely with ABA President Bellows and President-elect Silkenat as well as leaders of many other entities in the ABA to broaden the conversation.

The Asia Pacific Mediation Leadership Summit that had been planned for late October in Hong Kong, with extensions before or after to Vietnam, Beijing and Bangkok, has been transformed into a focused leadership delegation. We will travel to Vietnam and Thailand to visit with judges, academics and mediation/conciliation practitioners to discuss differing processes and cultures. This delegation is expected to be a forerunner of a leadership summit in Asia that will be scheduled within the next two years.

The well-received Advanced Mediation Training Institute that the Dispute Resolution Section has convened for the past 10 years will be held this year in Nashville on November 21 and November 22 and will be chaired by Geetha Ravindra and Marnie Huff. In addition to experiencing the “Nashville scene,” participants will work with top mediators from around the country who will be speakers and/or facilitators. This has proven to be one of the best two-day advanced skills opportunities available in the country, and as always, there will be plenty of time for collaborative interaction and networking.

This issue of Dispute Resolution Magazine focuses on the potential regulation of private dispute resolution. Understandably, our Section’s members are divided on the need for – and the potential dangers of – regulation. The articles in this issue present the arguments “for” and “against” regulation, but they also demonstrate that a “pro” and “con” debate is not sufficient. Rather, the articles in this issue suggest we must now ask the “next generation” questions: When and where is regulation needed? How can it best be accomplished? Who should be responsible for it? What, for example, is the place of self-regulation?

The articles discuss potential regulation of mandatory pre-dispute consumer and employment arbitration, as well as the need for accountability in court-ordered mediation. In looking ahead, this issue suggests that global online dispute resolution and Med-Arb could also be subject to abuse. What have we learned that we can apply to these relatively new processes?

I hope you will notice that several articles in this issue discuss Section initiatives such as the Consumer Arbitration Study Group, the Credentialing Task Force, and the Research and Statistics Task Force. The Section is a key player in organizing and framing these important discussions, and one of our most important functions is to convene people to address difficult dispute resolution-related topics and try to “move the ball forward.” As you look over this issue of Dispute Resolution Magazine, the Section invites you to review some of the results of Section initiatives and become an active part of our field’s inevitable evolution.

Finally, in this issue you will see the first of several new features: an update on the state of dispute resolution outside US borders. This issue’s feature, on Hong Kong, was written by Council member David Sandborg. Future issues will include interviews, book reviews and summaries of research studies relevant to our field. ♦

John R. Phillips is chair of the American Bar Association Section of Dispute Resolution and a partner at the law firm of Husch Blackwell LLP in Kansas City, Chicago & St. Louis. He can be reached at john.phillips@huschblackwell.com.
Take the Next Step

The Master of Laws (LL.M.) in Dispute Resolution degree program provides students with the resources of a major university to design a program of study according to their particular interests in the dispute resolution field. LL.M. graduates are now working in the United States and abroad in a variety of positions.

The LL.M. program greatly improved my abilities as an advocate for and counselor to my clients. I learned how to ascertain the true interests of my clients and opponents, how to explain complex legal problems, and how to develop real and lasting solutions. The program is not just for those who plan a career as a neutral. Any lawyer who litigates or counsels clients would benefit from the University of Missouri LL.M. program.

Lowell Pearson, LL.M. ’06
Partner, Husch Blackwell LLP
Jefferson City, Missouri

Earning my LL.M. from Mizzou opened doors for me, enabling me to move comfortably from a mediator in private practice to one who is responsible for the design and implementation of a complex program. What I value most is coming away with a sophisticated understanding of the theories behind the practical issues that come up every day in my job.

Andrea Braeutigam, LL.M. ’05
Executive Director
Oklahoma Agricultural Mediation Program, Inc.

When I enrolled in the LL.M. Program, all I wanted was a jump start on an ADR career. I found a discipline far richer than I thought, a faculty that challenged and sharpened my analytical abilities, and the opportunity to make significant contributions to a burgeoning field. My time at Missouri not only opened a new career path, it led me places I never thought possible.

Art Hinshaw, J.D. ’93, LL.M. ’00
Clinical Professor of Law
Director, Lodestar Dispute Resolution Program
Sandra Day O’Connor College of Law, Arizona State University

My LL.M. education influenced my current job because I started a practice in mediation and arbitration, and I was able to join the Center of Arbitration and Mediation of the Chamber of Commerce of Quito, the most important center of this kind in Ecuador. I discovered a new world for my professional activities and academic development, which I share with others in my country.

Maria Elena Jara Vasquez, LL.M. ’04
Associate Lawyer, Noboa, Peña, Larrea, Torres & Asociados Cia. Ltda.
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“Live Free” or Regulate?
Considering A, B and their Dispute Resolution Clause Regarding Blackacre

By Jean R. Sternlight

A

and B enter into a dispute resolution agreement pertaining to Blackacre, that parcel of land so often the subject of law school discussions. Should courts or regulators enforce the clause as A and B have written it, void part of their agreement or add more requirements? Absent regulation, is there reason to believe this agreement would be just?

The dispute resolution field is split on these issues. While many of us are attracted to the free-spirit or even libertarian idea that disputants should design processes that best suit their needs, others fear that unregulated dispute resolution processes may lead to unjust results. For example, should A and B be permitted to use any neutral they wish, even if the neutral lacks any commonly accepted credentials or experience with a respected dispute resolution group? (Such lack of credentialing is the norm in many parts of the United States.) Should A and B be permitted to use a process some disapprove of, such as so-called evaluative mediation or party-appointed non-neutral arbitration? Should the neutral A and B selected be required to disclose information not requested by them? Should B be allowed to use a form contract to require A to agree to pre-dispute binding arbitration?

As we consider these issues, we might want to think of the dispute resolution field as a marketplace, one in which A and B may be viewed as shoppers choosing among various dispute resolution products and services. A and B presumably will take into account their own preferences, the costs of the alternative processes (e.g. in money, time and emotion) and the prospective benefits of those processes (e.g. in terms of likely result, money, reputation, emotion, future relationships and furtherance of justice). In this model, the “sellers” of mediation, arbitration and even perhaps judicial dispute resolution services compete to be selected by disputants. Although the government does not actually sell dispute resolution services, except through a heavily subsidized filing fee, at least some court administrators and judges aspire to provide services that will be attractive to disputants.

Those who believe strongly in the benefits of free markets may suggest that regulation is not needed, because A and B will knowingly select a particular form of mediation, arbitration or other process that meets their needs and reject those forms of dispute resolution that they perceive to be too costly, slow, biased or unfair. Such free-market advocates claim that competition between sellers of dispute resolution

While many of us are attracted to the free-spirit or even libertarian idea that disputants should design processes that best suit their needs, others fear that unregulated dispute resolution processes may lead to unjust results.
services will ensure that prices fall to a minimum and that the interests of A and B are well served.

The marketplace analogy, however, is imperfect. First, one purported “seller,” the government, may actually prefer that disputants resolve their disputes privately so that the government need not subsidize litigation. Second, instead of a single buyer choosing a dispute resolution process, this “market” features multiple disputants who may have different preferences but must agree on a common product. Yet despite these limits, the marketplace analogy is still useful as we contemplate whether and when to regulate A’s and B’s choice of dispute resolution processes. While traditional economists are often seen as advocates of limited regulation, relying instead on Adam Smith’s “invisible hand” to ensure fairness and prosperity, the field of economics can also help us understand when regulation is appropriate due to the absence of perfect competition. Adding psychology to economics, as is done in the new field of behavioral economics, provides even more helpful insights. We will also see that the need for regulation depends upon the identity and circumstances of the mysterious A and B.

Limitations of Free Markets Justify Regulation

Lack of Perfect Information

Perfect competition exists only when buyers possess perfect or complete information about the available products and services, so they can choose products they want and avoid products they do not. Yet we know that consumers of dispute resolution services may not be so well informed. If A is Archie Homeowner entering into a small-print form contract with Bezillion Bank, we cannot assume that Archie possesses or can acquire anything close to complete information. Archie may not know what mediation and arbitration are or understand how they relate to litigation. He may not realize that in agreeing to binding arbitration, he is relinquishing any right to a jury trial or, depending on the language of the clause, likely giving up any right he might have had to participate in a class action. He may not know that a dispute resolution provider has an improperly close relationship with some of the disputants for whom the practitioner supposedly provides neutral dispute resolution services. In these kinds of circumstances, we cannot count on perfect competition to protect Archie’s interests and may instead need to prohibit or regulate such clauses.

On the other hand, if A and B are the Allied Renovation Company and Builder Inc., two large companies, we can reasonably assume they are more knowledgeable about the nature of dispute resolution. We can better trust such parties to knowingly select a particular form of mediation, arbitration or other process that meets their need and to reject those forms of dispute resolution that they perceive to be too costly, slow, biased or unfair. Thus, the case for regulation is weaker.

Yet even sophisticated users of dispute resolution services may not have perfect information. They may not understand how neutrals are selected, how discovery or appeals are handled in arbitration or how confidentiality plays out in mediation or arbitration. Moreover, even knowledgeable consumers of dispute resolution services are also affected by cognitive frameworks that may discourage them from seeking out all the information they might need. For example, because we tend to be overly optimistic about the future, we will typically discount the likelihood that a dispute will occur at all, and therefore often pay inadequate attention to the fact that we may end up involved in one.

In sum, the case for regulation is strongest when the parties to a dispute resolution agreement are most likely to lack perfect information. In such cases, we may want to regulate to provide better access to information or, when that is not likely to succeed, to directly regulate the quality of dispute resolution processes.

Impacts of Parties’ Dispute Resolution Clauses on Non-parties

The unregulated market can work perfectly only when the choices of buyers and sellers exclusively impact those buyers and sellers. When, by contrast, A’s and B’s dispute resolution choices may positively or negatively impact other parties indirectly, regulation may be needed. For example, if Archie Homeowner and Builder Inc. choose to litigate the issue of whether the material used in constructing Blackacre causes cancer, their choice to litigate may provide a public good. If the dispute goes to trial,

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and especially if it is appealed, it will create precedent, and the availability of this precedent may help others resolve their similar disputes more efficiently.

Resolutions reached in mediation or arbitration can sometimes also benefit non-parties. For example, Archie Homeowner and Bezillion Bank might settle a dispute over Archie’s mortgage in mediation, and this settlement might require or inspire the bank or other banks to change their loan practices. Or an arbitrator’s decision to require Archie Tenant to vacate the premises of Blackacre might greatly improve the morale of neighbors who had been putting up with a prostitution ring Archie had been running out of his home.

Just as private parties’ resolution of their disputes can benefit non-parties, so can private parties’ use of dispute resolution processes impose burdens on non-parties. If Archie Homeowner is raising pigs on Blackacre, an arbitration clause that results in a decision allowing him to continue that operation will have negative olfactory implications for the entire area. Similarly, if Builder Inc. prevents Archie Homeowner from bringing a class action claim regarding the lead paint used in Blackacre and other properties, this will potentially harm not only Archie but other homeowners and tenants who might have benefitted from that claim. In fact, the Texas Supreme Court found that the adult child of a home purchaser could not bring a personal injury claim against the builder because her father had entered into an arbitration clause with that builder.7

Yet the unregulated free market does not take account of additional costs or benefits imposed on non-parties. To the extent we believe that the dispute resolution agreements between A and B pertaining to Blackacre may implicate the interests of non-parties, we have a societal interest in regulating those agreements, and we may want to prohibit parties from entering into dispute resolution agreements that would deprive the public of important precedents. Or we may want to proscribe certain kinds of dispute resolution agreements that we think might be harmful to society – because, for example, they eliminate the option of class actions.

**Inequality of Initial Resources**

Even a perfectly competitive market cannot ameliorate an initial unequal distribution of resources. If Archie Homeowner believes that Bezillion Bank committed fraud with respect to the mortgage for Blackacre, Archie may not be able to afford to bring that claim, whether in litigation, arbitration or even in mediation. Should society decide that allowing Archie or others to bring such a claim is desirable, it may need to step in to regulate or subsidize the dispute resolution process. Unregulated, dispute resolution processes will often help the rich get richer while the poor get poorer. Consider for example *Bernal v. Burnett*, in which a number of students in online, for-profit technical schools and colleges sought to litigate fraud and consumer protection claims against those schools, only to be told that an arbitration clause precluded them from joining together in a class action.8 As Marc Galanter noted many years ago, the more powerful “repeat players” are well positioned to do better than “single player” disputants in any context.9 Thus we may want to prevent wealthy companies or individuals from using dispute resolution clauses to take advantage of less wealthy members of society by eliminating jury trials, class actions, or punitive or compensatory damages. We might even regulate dispute resolution clauses to try to begin to equalize resources by, for example, requiring companies to submit to binding arbitration when consumers select arbitration.10

**Beware the Race to the Bottom**

If consumers of dispute resolution services cannot protect themselves, do we necessarily need to turn to government regulation for protection? Some will urge that we should trust dispute resolution providers to do the right thing, because they are good and fair and because they are interested in protecting their own reputations. Yet economics teaches that profit-driven providers of dispute resolution services will always at least be tempted to cater to powerful repeat players, to the detriment of less knowledgeable consumers. Though some providers may be reputable and ethicial, companies may be tempted to retain other, less reputable ones. If the market cannot be relied upon to regulate itself and if the government does not step in, there is nothing to prevent this race to the bottom. Had the Minnesota attorney general not sued the National Arbitration Forum for fraud and deceptive practices, the NAF would likely still be purporting to provide neutral services to debt collectors with whom it was intertwined.11

**When Regulation is Least Needed**

An economic and psychological analysis of the market for dispute resolution also provides insights for when
Conclusion

Understanding some of the purposes of regulation—
to protect people who lack sufficient information to
protect themselves; to protect the interests of non-
parties; and, at times, to redistribute resources that are
distributed inequitably—can help us to work toward
to perfect competition include market power (one side dictates
terms), transaction costs (buyers’ and sellers’ costs to exchanging
goods and services), and non-homogenous products and services
(lots of variation among mediation, arbitration and litigation).

Endnotes

1 See generally Stephen J. Ware, Is Adjudication a Public
   Good?: “Overcrowded Courts” and the Private-Sector Alternative of
   Arbitration, 14 CARDOZO J. CONFLICT RESOL. (forthcoming May
   extent to which it is appropriate to subsidize use of court system).
   as a Private Good, 8 J. LEGAL STUDIES 235 (1979).
3 Paul D. Carrington, Adjudication as a Private Good: A
   Comment, 8 J. LEGAL STUDIES 303 (1979).
4 This article does not provide a comprehensive list of all of the
   conditions for a free market to be effective. Other important limits
to perfect competition include market power (one side dictates
terms), transaction costs (buyers’ and sellers’ costs to exchanging
goods and services), and non-homogenous products and services
(lots of variation among mediation, arbitration and litigation).
5 See, e.g., BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein
6 See Russell Korobkin, Bounded Rationality, Standard Form
   See generally Jennifer K. ROBBENNOET & JEAN R. STERNLIGHT,
   PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS
7 In re Weekley Homes, L.P., 180 S.W.3d 127 (Tex. 2005)
   (applying estoppel principles).
9 Marc Galanter, Why the ‘Haves’ Come Out Ahead: Speculations
10 See Jean R. Sternlight, In Defense of Mandatory Arbitration
    (if Imposed on the Company), 8 N.Y. J. 82 (2007).
11 See Complaint, Minnesota v. National Arbitration Forum,

If the market cannot be relied upon to regulate itself and if the government does
not step in, there is nothing to prevent this race to the bottom.

regulation is least needed. Sometimes the features of
a particular dispute make it reasonably likely that the
market will effectively regulate itself and ensure that
any dispute resolution clause entered into will be fair.
Specifically, when two or more sophisticated users of
dispute resolution services, with fairly equal resources,
knowingly want to enter into an agreement that will have
little impact on others, there is little need to fear market
imperfections and thus little need to prevent them from
entering that agreement. Thus, if Allied Renovation
Company and Builder Inc. want to enter a dispute resolu-
tion agreement regarding problems that might occur
during the renovation of Blackacre, we should not worry
much about issues such as the credentials of the neutrals
they select or the precise form of the dispute resolution
process they choose.

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The Case Against Misdirected Regulation of ADR

By Kathleen Bryan and Mara Weinstein

Regulations, no matter how well meaning, inevitably limit and constrain. In sharp contrast, the primary benefits of private dispute resolution include flexibility, creative evolutionary change and customization. This article will serve as a cautionary tale against the unintended negative consequences of misdirected regulation in the ADR field. While ADR may have moved into “mainstream” legal practice, it continues to develop and change in the United States and abroad. We will explore how the ADR profession effectively polices itself, and how any ADR regulations that use a one-size-fits-all approach could have negative long-term effects on ADR’s further development and acceptance.

This article is primarily addressed at commercial ADR in the business-to-business context, where the essential element is party choice about the mechanism used and the level of procedural safeguards desired. We appreciate that in a few, very narrow and specific areas of law (particularly where a large power discrepancy exists between parties), limited regulation may be necessary. In those limited instances, we advocate for extreme prudence when regulating ADR.

Introduction

Pairing creative solutions with complex commercial disputes may seem impractical. One may believe big companies like British American Tobacco (“BAT”) would feel more comfortable sticking to a regulated and uniform dispute resolution regime on which predictable outcomes can be relied to ensure accurate earning projections for company shareholders. Although predictability is desirable, so is maximization of one’s fiduciary obligations. Creative dispute resolution tailored to the case at hand ultimately saves company time and resources, thereby maximizing shareholder profits. To illustrate this, we look at a disagreement between BAT and Pall Mall Export Clothing (“PMEC”), a popular Netherlands clothing company, over brand valuation.

PMEC sells trendy casual clothing, originally modeled after 1950s aviation gear. The brands that make up their successful clothing collection were previously owned by BAT – the vestige of an outdated business model. A few years ago, Michael Leathes, then head of intellectual property at BAT, was trying to narrow BAT’s focus to the tobacco industry, and Bob Bulder, the managing director of PMEC, decided he would feel more comfortable owning rather than licensing the brands. A sale of the brands was complementary to both companies’ interests. However, when it came to price, both sides arrived at drastically different numbers. PMEC was willing to pay for the brands but did not feel they commanded the price tag BAT had proposed.

Both sides realized that this disagreement needed to be addressed quickly and cost-efficiently and that some
Many ADR options were considered and discarded. Both sides were concerned that traditional arbitration would lead to unacceptable results (too high or too low). Baseball arbitration was also considered—a process in which best offers are written down and the arbitrator choose the one he or she deems most just. This encourages each side to put forth its most reasonable offer. Though possibly workable, the decision in this type of arbitration was deemed too one-dimensional, perhaps missing the potential for creative business solutions. Mediation was also considered, but the fear that a timely agreement would not be reached was prohibitive. Finally, the parties decided to conduct an arbitration-mediation, in which the neutral would sit as an arbitrator in the morning and place a binding decision in an envelope on the table over lunch. The afternoon would then be spent mediating the dispute. This solution allowed for the possibility of an autonomous, multi-dimensional party-crafted solution through mediation, but also the guarantee of a resolution should the mediation fail.

After careful selection of a neutral, with help from ACBMediation, a Dutch ADR institute, the parties engaged in the arb-med. The afternoon negotiations were conducted with the ominous presence of the decision envelope from the morning hearing on the table, and yet an amicable solution was eventually reached by the parties through mediation. Though both sides were curious as to the decision, they agreed not to open the envelope. Leathes explained, “We had shaken hands. Both of us were happy with the outcome. If we opened the envelope, that situation would most likely change. One of us would suddenly have become unhappy. If the number in the envelope was higher than what we had agreed, then obviously I would be unhappy. If the number was lower, Bob would have been unhappy.” The mediator, Willem Kervers, confirmed that the deal was enhanced by not opening the envelope. He explained that comparing the negotiated deal to the arbitral decision was the wrong approach. Instead, he said, “It was a multifaceted deal and they worked it out together. It was much better for them than whatever one-dimension number I had written in the envelope. This deal pleased them both. Outcomes don’t come better than that.”

This scenario highlights the well-known benefits of ADR: (i) party control or choice; (ii) efficiency; (iii) privacy; (iv) cost reduction; (v) flexibility; and (vi) preservation of relationships. It also demonstrates that ADR processes cannot be viewed in isolation and instead need to be viewed within the larger ADR context. The parties understood the benefits and drawbacks of various different approaches and were free to combine techniques and processes into a single, efficient, fair process that, most significantly, met their business needs. The fact that they both felt the deal preserved their relationship cannot be understated. It would be difficult or impossible to craft regulation permitting this high level of creativity and customization.

**Effectiveness of Self-Policing**

A common argument against regulation is one that uses “free market” theories to reason that if the ADR industry is unfettered by regulation, competition will inspire effective self-policing. Parties will seek institutional ADR providers with unbiased neutrals who can deliver high-caliber services. It has been our experience that stiff competition and service provider initiatives have provided sufficient self-policing in the business-to-business context. It also has been our experience, as demonstrated by the BAT-PMEC deal, that differently situated commercial parties will not hesitate to adjust their methods to create hybrid processes that institutionalized settings cannot provide. This is more than ADR as a better way—it’s a market accommodation that accelerates the move to interest-based bargaining and brings efficiency that is not only in the parties’ interests but in society’s as well.

---

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Some initiatives by the International Institute for
Conflict Prevention and Resolution ("CPR Institute"),
which both authors are affiliated with, exemplify this
rationale. The CPR Institute’s approach uses its com-
mitties to develop guidelines and protocols in lieu of
inflexible requirements. A recent example is the CPR
Guidelines for Early Disposition of Issues in Arbitration.6
These guidelines set out the types of issues for which
eye disposition may be appropriate and suggest ways
they may be addressed and responded to — always provid-
ing that early disposition will result in overall efficiencies.
The guidelines include cost-shifting potential if parties
make premature or meritless requests.

An example of a more
proscriptive approach by
CPR is the CPR-Georgetown
Commission on Ethics
and Standards of Practice
in ADR, which promul-
gated several groundbreaking
documents, including a set of
Provider Principles for orga-
nizations involved in ADR.
The impact of the CPR-
Georgetown Commission in
this area has been tangible;
for example, all members of
CPR’s Panels of Distinguished Neutrals are required to
adhere to the Commission’s Model Rule for The Lawyer as
Third-Party Neutral.

In addition to this commission, CPR also created the
CPR Commission on the Future of Arbitration in 1998
to provide educational guidance for users of business-to-
business arbitration. Among the bedrock principles emerg-
ing from the commission’s work is the idea that arbitrators
should be impartial and independent and preside over a
process that ensures all parties’ due process rights are fully
protected. CPR has always required under its Arbitration
Rules that all arbitrators be “independent and impartial”
and that awards issued by arbitrators contain a reasoned
explanation.7 CPR has never endorsed the notion of a
partisan party-appointed arbitrator and has always objected
to any deviation from a fair, impartial arbitration process.

CPR is not alone among ADR institutions that are able
to effectively self-policing. In 1998, the American Arbitration
Association promulgated the Consumer Due Process
Protocol. This protocol has been widely disseminated, has
enjoyed judicial support and has been cited more than 140
times in journal and law review articles. The principles
focus on unbiased administration, equal voices among
parties with unequal bargaining power in neutral selection,
preservation of court relief, reasonable cost to the consumer
and the accessibility to court remedies in the arbitration.
These tangible examples of self-regulation illustrate the
drive of the ADR industry to establish boundaries for itself
that command fairness and integrity.

**Government regulation of ADR means there would be an external force dictating terms that may or may not be relevant to the particular circumstances.**

**Damage to Party Autonomy and Flexibility**

At the heart of ADR lies contract law, which is con-
stitutionally recognized and the reason ADR is able to
function in our legal system. The policy behind the free-
dom of contract is founded on, among other things, the
importance our society places on autonomy. Government
regulation of ADR means there would be an external
force dictating terms that may or may not be relevant to
the particular circumstances. The strength of the agree-
ment would automatically be diminished because owner-
ship and commitment to the ADR agreement would no
longer lie with the individual parties.

A regulated approach to ADR could produce a restric-
tive default ADR model that could soon become the
norm. That’s not the reality of the BAT-PMEC transac-
tion described above, nor is it the way ADR is used by
businesses. Regulation typically proscribes standards of
practice, and conformity to such practices is encouraged
or mandated. This one-size-fits-all method would strip
creativity and the drive to create a better and more
effective dispute resolution system. It’s a path that court
ADR programs have sought to avoid.

In the introductory example, if the parties had been
forced to use a standard mediation or arbitration process
or select a neutral from a prescribed court list, they may
not have had the confidence in the process or the neutral,
which could have reduced their chances for having
a positive experience. Indeed, as shown by a 2011 survey
of Fortune 1000 companies, businesses choose ADR over
litigation because they wish to have more control over
the design of the process and improve their results while
still preserving relationships.8 If an ADR process cannot
provide those perceived benefits over a standard litiga-
tion process, business simply will not use it.

Limited regulation, in the area of private dispute
resolution, is possible because of the wide range of tools
to assist in the management of conflict, including pub-
lished guidelines and rules for the resolution of conflict.
The implementation of a tailored, efficient and effective
process should not need to first be checked against
bureaucratic regulations that block deployment, develop-
ment and advancement.

**Potential for Unintended Consequences**

If ADR regulations are considered for matters outside
the commercial context, we strongly advocate for caution
in drafting and for allowing flexible ADR provisions. We
have seen this unfortunate event in the early proposed
drafts to amend the Federal Arbitration Act to protect
“consumers” from arbitration. The definitions used initially were imprecise and far-reaching. They inadvertently invalidated pre-dispute agreements to arbitrate commercial disputes, including potential impact on international, as well as domestic arbitration.  

Therefore, provision must be made in any regulation to allow the parties to tailor the process for their particular situation. In this way, some of the autonomy may be retained in ADR.

Even when allowing for flexibility, regulators must still proceed with prudence in order to avoid possible unintended consequences. Situations that must be considered before regulation is passed include: (i) the more regulated ADR becomes, the more the courts will be forced to deal with cases interpreting the regulations; (ii) regulation efforts and enforcement will deplete government resources that may be best allocated elsewhere; (iii) state licensing of arbitrators and mediators puts geographic limits on what was traditionally a multi-jurisdictional/cultural practice; and (iv) creating barriers to the practice of ADR would hinder those practitioners who provide low-profit services. These, and other possible effects of regulation, must be thoughtfully considered before proceeding with regulation, which may prove difficult given the increasing polarization of lawmaking in this country.

Conclusion

There is no doubt that those who want ADR regulations do so from the well-meaning position of wanting to improve the process. But the best of intentions may have adverse effects. The field of commercial ADR itself exemplifies how private processes inspire self-policing of creative and individually-suited processes that have the full commitment of parties because it is their choice to engage in them. This, in turn, leads to parties’ exploration of paths to efficient resolution that meet and satisfy their operational needs – in terms of dealing with their adversary, crafting terms to foster a relationship and building stronger and more lasting resolutions. The end results are agreements that, one-by-one, help reduce the conflict in our society in an effective, efficient and private manner that preserves both personal and business relationships. ADR regulation in certain areas of law may be beneficial, but rules must be drafted with the utmost care while taking into consideration all angles of the debate.

Endnotes

1 The authors recognize that alternative dispute resolution (ADR) combines very different processes and thus, arbitration and mediation, as well as other forms of ADR, may demand different regulatory approaches. In non-commercial contexts cautious and carefully tailored regulation of adhesion contracts, such as pre-dispute binding employment and consumer arbitration, may be appropriate.


3 Id.


5 Since its inception in 1979, CPR’s membership has included general counsels and senior lawyers of Fortune 1000 organizations, partners of hundreds of well-respected law firms, sitting and retired judges, government officials and leading academics.


9 The 2011 Fortune 1000 Survey was conducted by the Scheiman Institute on Conflict Resolution at Cornell University, the Straus Institute for Dispute Resolution at Pepperdine University School of Law and the International Institute for Conflict Prevention & Resolution.

To Regulate or Not to Regulate, or (Better Still) When to Regulate

By Herbert M. Kritzer

In the years since Frank Sander posed the idea of the multi-door courthouse at a 1976 conference,¹ the use of alternative dispute resolution has grown dramatically. This growth has been particularly rapid since the mid-1990s, which also witnessed acceptance of dispute resolution by many of the regular actors in the civil justice system. But as dispute resolution has become more commonplace, an increasing number of people have wondered whether some type of regulation should be imposed, both on how dispute resolution is done and on the providers of dispute resolution services. Some of this interest in regulation comes from dispute resolution professionals for whom regulation and licensing would provide both legitimacy and recognition. Others seek to regulate out of a concern that dispute resolution processes are often imposed on unwilling parties who may be disadvantaged.

In thinking about whether and how to regulate dispute resolution processes, one must take into account a variety of factors. Two prominent factors are the types of parties involved and how the parties came to be involved in the process. The first factor relates to Marc Galanter’s frequently cited distinction between one-shot and repeat-players.² In this context, for analytic purposes it is probably better to think of this factor as a dichotomy between sophisticated and unsophisticated parties (in the real world, there is undoubtedly a continuum here rather than a simple dichotomy). There are three combinations of types of parties: both unsophisticated, both sophisticated, and one of each.

The second factor, how the parties come to the dispute resolution process, captures whether the process occurs under the auspices of a court or administrative agency and the degree to which the turn to dispute resolution is voluntary or effectively involuntary. While contractual dispute resolution is technically voluntary because one can always, in theory, choose to forego the relationship, often it is effectively involuntary for one party because the service (such as telephone) or relationship (such as employment) is one about which there is little choice. This second factor relates closely to who controls the design of the dispute resolution system, an issue noted by Lisa Bingham (See the article by Bingham in this issue, page 26).³

In the Level of Regulation table shown on the next page, the body of the table indicates the level of regulation that would probably be called for in each combination of party types and how the parties came to dispute resolution. Not surprisingly, the strongest regulation would be appropriate for situations involving one sophisticated and one unsophisticated party where the dispute resolution process was actually or essentially forced on one or both parties. Given that the unsophisticated party is unlikely to have a full understanding of what he or she is agreeing to do, significant regulation is probably appropriate even if the use of dispute resolution was voluntarily for both parties.

The weakest regulation would involve contractual dispute resolution between two sophisticated parties, although some regulation might be called for if one of those parties was so much stronger than the other that it could demand, on a take-it-or-leave-it basis, that the second party accept an ADR clause. An example of this latter situation might be where one party has such extreme market power that it can essentially dictate terms of a contract (think Wal-Mart or General Motors). Disputes involving two unsophisticated parties fall somewhere between the other two party configuration situations.

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To what degree the regulations might focus on how neutrals are chosen and what qualifications they have versus a focus on the specifics of how the dispute resolution process operates is left unspecified, as is where the responsibility for regulation should be lodged. Also unresolved is what mechanism or mechanisms might be designed to do the tracking of private dispute resolution processes that would be necessary for regulation to be effective. Would there be a requirement that all such dispute resolution processes be reported to some government agency, or only instances involving some threshold-amount of money, or only instances where a resolution was actually reached? All these questions would need to be resolved before any effective regulation could be implemented.

Finally, one lurking issue takes us back to Galanter’s one-shot versus repeat-player dichotomy. One well-known issue in regulation is the problem of regulatory agencies being captured by those significantly affected by the regulation. In the case of dispute resolution, the repeat players, virtually all of whom would be sophisticated parties, would be likely to try to capture the regulatory agency. A challenge for any system of regulation is to insure that over the long run, capture of this type is minimized because if it is not, the regulatory process may in fact come to primarily serve the interests of the parties that have a long-term stake in the process.

Endnotes

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Mandatory pre-dispute arbitration has been a divisive issue for many years, particularly since the Supreme Court began enforcing the arbitration clauses that businesses and employers impose on consumers and employees, respectively, in contracts of adhesion. In 2009, the Dispute Resolution Section’s Council proposed to weigh in on this issue through the vehicle of an ABA House of Delegates resolution. The compromise position developed by the Section, expressing support for pre-dispute mandatory arbitration clauses provided they offer a meaningful opt-out, generated such a firestorm of opposition from both pro-arbitration and anti-arbitration advocates that the Council ultimately chose to abstain from expressing any position at all.

**Consumer Arbitration Study Group**

In 2010, however, the Council revisited the issue by authorizing then-Section chair Homer LaRue, former Section chair Larry Mills and professor Nancy Welsh to convene a small group of scholars, business and consumer advocates and dispute resolution providers for a facilitated discussion regarding consumer arbitration. The organizers engaged professors Tom Stipanowich and Lisa Bingham to facilitate the discussion and borrowed liberally from the worlds of back-channel diplomacy and public policy dialogue in structuring what came to be known as the Consumer Arbitration Study Group. The Section hosted the meeting at the ABA offices in Washington, DC, and provided limited travel reimbursement for invitees who otherwise would not have been able to participate.

The invitees were knowledgeable regarding consumer issues and dispute resolution, influential, and balanced in terms of their organizational affiliations. They did not possess any decision-making power, but they had reputations as thoughtful and persuasive people who were effective both in educating and in listening to others. The Study Group’s discussions were conducted subject to a modified version of the Chatham House Rule. Specifically, although a list of attendees would be made available to the public, there would be no identification of individuals with specific statements that had been made. The goal was thoughtful, frank discussion that might lead to new and productive insights.

Considering the relatively realistic goals of the Consumer Arbitration Study Group, it is unsurprising that it produced no “magic bullet” solutions. Rather, the event resulted in a long list of preliminary ideas that have since inspired a few concrete proposals and indirectly influenced other developments. One example of a concrete proposal is Tom Stipanowich’s Fairness Index, included in this issue of the Dispute Resolution Magazine. One example of indirect influence may be some companies’ decisions to revise their arbitration...
His e-mail recently awarded a Stephen H. Weiss Presidential Fellowship by the University in recognition of his undergraduate teaching and advising.

Study Group, an ad hoc Planning Committee\(^1\) began after the discussions of that continued to burn and the flicker of hope of these developments Protection Bureau. In light the Consumer Financial posia and other settings; used within academic sym- decisions; debates contin- controversial arbitration a series of ever-more- Supreme Court issued continued to meeting, the issue of mandatory pre-dispute arbitration. The Study Group recommended continuing to convene these sorts of discussions on the issue of mandatory pre-dispute arbitration.

**Pursuing a National Conversation**

After the Consumer Arbitration Study Group’s meeting, the issue of mandatory pre-dispute arbitration continued to fester. The Supreme Court issued a series of ever-more-controversial arbitration decisions; debates continued within academic symposia and other settings; and Congress authorized the Consumer Financial Protection Bureau. In light of these developments and the flicker of hope that continued to burn after the discussions of the Consumer Arbitration Study Group, an ad hoc Planning Committee\(^1\) began meeting in mid-2011 to hold another “national conversation regarding consumer and employment dispute resolution.” As before, the modified Chatham House Rules applied, and invitees included scholars, business and consumer advocates, employee advocates and dispute resolution providers. Also as before, the invitees participated as individuals, not as official representatives of any institutions, firms or clients. Unlike before, however, the conversation included decision-makers as well as agency representatives and policymakers. The goal this time was to identify “areas of current or possible consensus, promising procedural initiatives, and gaps in knowledge that require empirical research.”

The Planning Committee also stated that it hoped its efforts would “move the ball forward.”

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**National Roundtable on Consumer Arbitration**

The first National Roundtable focused on consumers, with particular (though not exclusive) emphasis on consumer financial services and securities transactions. The National Roundtable on Consumer Arbitration was held at Pepperdine University on February 2-4, 2012, and co-sponsored by the Pepperdine School of Law, the Straus Institute for Dispute Resolution and Penn State University, Dickinson School of Law. The Roundtable began with a series of brief presentations regarding the wide variety of existing consumer dispute resolution programs and models, including the American Arbitration Association’s and JAMS’ consumer arbitration services, debt collection arbitration, FINRA securities arbitration, consumer dispute resolution under the Magnuson-Moss Act, the Better Business Bureau Autoline Program, online dispute resolution, class actions, small claims courts and mediation.

During these presentations and the thoughtful discussion that followed, we learned that the term “consumer arbitration” is itself problematic. The label suggests that there is one model of arbitration in the consumer context. In fact, there are many, as well as important differences in overall systems. Some private arbitral organizations (e.g., AAA) require arbitration clauses’ adherence to the Consumer Due Process Protocols. Others do not. Some organizations’ procedures (e.g., FINRA) are subject to federal regulatory auditing and approval. Most are not. Some organizations’ arbitrators (e.g., JAMS) are well-compensated. Other organizations use voluntary arbitrators who are paid a small stipend. Some arbitral awards (e.g., AAA and JAMS) are binding upon both the consumer and company. Other organizations’ awards (e.g., Better Business Bureau Autoline) are binding upon the company but not upon a losing consumer. Some organizations (e.g., FINRA) make their awards public and even index them. Other organizations do not.

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**The Consumer Arbitration Study Group revealed the value of bringing together a group of people to get to know each other as thoughtful human beings trying to solve a problem....**

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The term “consumer arbitration” is also problematic in another way. It can be understood to focus on three quite different types of claims:

1) claims initiated by companies against consumers (e.g., debt collection claims);
2) “easy” claims initiated by consumers – claims that the consumers can easily identify, raise and present on their own; and
3) “difficult” consumer-initiated claims – or claims consumers tend to find difficult to identify, raise and present on their own without the assistance of legal counsel.

As each Roundtable participant presented regarding his or her experience with something called “consumer arbitration,” he or she focused on a particular “slice” of the field, largely unaware of the other slices involving very different parties, issues and dynamics. We learned to be careful to define which part of “consumer arbitration” we were discussing.

These presentations revealed that very few debt collection claims are currently being arbitrated. It is unclear what has happened to the cases that were handled at one time by the National Arbitration Forum.6 We learned, however, that companies face many disadvantages in using arbitration for debt collection. Arbitration fees often are higher than court filing fees; statutes of limitations for the enforcement of arbitral awards are shorter than those that apply to debt collection; and most debtors and creditors will benefit more from a procedure focused on helping the debtor develop a realistic repayment plan than they would from an arbitral award and judgment. Of course, we also learned that there are many problems associated with litigation of these matters – e.g., lack of notice to consumer-debtors, disproportional court filing fees, and consumers’ ignorance of statutes of limitations and other affirmative defenses. Research suggests, though, that consumers tend to perceive courts as fairer than arbitration.

We also learned that very few consumer-initiated claims are being arbitrated. The American Arbitration Association conducts fewer than 1,500 consumer arbitrations on an annual basis. Although the Better Business Bureau’s Autoline Program had approximately 18,000 cases in 2011, it has seen a steady decline over the years and has found that about 40 percent of the cases that are opened do not proceed to an arbitration hearing. Many cases resolve as a result of the scheduling of settlement teleconferences and information-sharing. The low volume of these cases suggests that corporate subsidization of mandatory pre-dispute arbitration may not be as expensive as some have argued. These numbers also suggest the importance of determining whether mandatory pre-dispute consumer arbitration may itself have the effect of claim suppression.

Indeed, research conducted by the Federal Trade Commission indicates that a greater incidence of claiming by consumers is correlated with the availability of “credit card chargeback” systems to resolve disputes. There is no cost to the consumer for using these sorts of systems, and the credit card companies provide systemic monitoring. A business that significantly exceeds the average number of complaints is likely to be noticed by a credit card issuer (or bank), which may then contact the FTC to suggest an investigation.

The Roundtable also included several presentations regarding empirical studies of consumer dispute resolution. These presentations revealed that arbitration clauses are being included in a declining percentage of credit card companies’ contracts. For example, by 2010, the percentage of credit card loans with arbitration clauses had declined from 95 percent to 48 percent, probably due primarily to settlements reached in two cases, Ross et al v. Bank of America, N.A.5 and State of Minnesota v. National Arbitration Forum et al.6 Meanwhile, however, other research indicates very frequent inclusion of arbitration clauses in wireless contracts, with terms that are becoming more consumer-friendly.

There was also a presentation regarding the results of the Searle study, which show generally that businesses win debt collection cases at approximately the same rate in arbitration as in litigation. Businesses tend to win in both settings. There is also some evidence of the repeat-player effect in arbitration. The reason for this effect is not clear. It may be, for example, that arbitrators simply are biased toward businesses. Alternatively – and more likely – it may be that over time, arbitrators are influenced by their exposure to repeat players. Or, it may be that repeat-player businesses learn to identify and settle the cases in which consumer-plaintiffs have strong claims; they then arbitrate only those cases involving weaker claims. In the securities arbitration context, researchers have reported that a significant majority of

Research conducted by the Federal Trade Commission indicates that a greater incidence of claiming by consumers is correlated with the availability of “credit card chargeback” systems to resolve disputes.
investors (who do not tend to be repeat players) perceive the process as unfair and perceive the arbitrators as biased. These results may have contributed, in part, to FINRA’s subsequent creation of an all-public arbitral panel option.

By the end of the Roundtable, many of the participants had concluded that it would be worthwhile to identify “difficult” consumer-initiated claims that could be converted into “easy” consumer-initiated claims. For example, as discussed in the Rogers article in this issue on page 20, dispute resolution systems such as the existing credit card chargeback system and online dispute resolution options have the potential to transform “difficult” cross-border (and domestic) consumer disputes into “easy” claims. Roundtable participants also began to explore options that would permit the aggregation of individual consumers’ online claims. For example, when “easy” consumer-initiated claims reach a particular volume, this may signal the presence of a bad practice or a bad actor and the need for regulatory action or a modified form of class action.

Roundtable participants also acknowledged the potential value of non-legal, privately administered trustmarks, or “seals of approval,” established by a trusted consumer organization.

Last, however, Roundtable participants grappled with the difficult question of whether individual, consumer-initiated arbitration or privately administered trustmarks truly can replace class actions. On one hand, it is important to acknowledge the views of consumer advocates, who argue that consumers need access to effective collective action (and legal representation) to deter corporate actors’ bad behavior that involves only small individual stakes but generates a huge collective unearned profit. On the other hand, it is important to acknowledge the views of industry advocates, who urge that class claims can be frivolous and wasteful and that the “take rate” (the claim filing rate) in some class actions is so low that it evidences more concern for lawyers’ income than consumers’ rights. Despite healthy skepticism regarding each other’s real open-mindedness, a heartwarmingly large number of the Roundtable participants expressed interest in trying to find reasonable ways to assure that class actions are used only when necessary, that companies provide consumers with real redress and that consumers with valid claims get access to legal representation.\(^7\)

**National Roundtable on Employment Dispute Resolution**

The second Roundtable focused on the other area in which mandatory pre-dispute arbitration has generated the most significant concern: employment matters. The National Roundtable on Employment Dispute Resolution was held at Penn State University on September 6-8, 2012, and was sponsored by Penn State University, Dickinson School of Law. As before, the invitees represented virtually all major stakeholders and constituencies in workplace dispute resolution, including academics and researchers, management and union representatives, employment attorneys, federal agencies and major providers. This Roundtable included some of those who had participated in the Consumer Roundtable, but there were also substantial differences in the pool of participants, due to the different substantive focus.

The symposium opened with an in-depth description of the landscape of employment dispute resolution and the importance of distinguishing the methods and policies used to resolve disputes between labor unions and employers (nowadays generally referred to as labor disputes) from the methods and policies used to resolve disputes between individual, nonunion employees and their employers (now referred to as employment disputes). While the Roundtable focused primarily on employment disputes, the organizers also invited presentations regarding experience with the methods used to resolve labor disputes.

The organizers justified their primary focus on employment disputes based on changes in the US workforce. Today less than 12 percent of the US workforce (and less than 7 percent of the private-sector workforce) is represented by unions for collective bargaining (including grievance) purposes. Meanwhile, research presented at the Roundtable demonstrated that close to half of the employees in large US corporations have access to one or more of the various dispute resolution processes available to resolve employment disputes.

In particular, participants at the Roundtable paid special attention to the emergence of so-called “integrated conflict management systems” and the use of early, internal dispute resolution methods to resolve workplace conflict. Recent research reveals that many organizations are adopting a strategic approach to conflict management, which allows them to resolve...
workplace conflict before the disputants need to turn to outside forums (such as third-party mediation and arbitration or the courts). Invariably, the participants offered comparisons of how the handling of employment disputes differed from the handling of labor disputes. For example, some participants (particularly those representing unions in labor disputes) expressed concerns about whether the resolution of employment disputes provided equity and procedural protections that approximated those provided in the resolution of labor disputes.

One of the presentations reported research confirming the presence of a significant “repeat-player effect” in employment arbitration cases. In unionized settings, both the employer and the union are likely to be repeat players; that is, both parties have probably had considerable experience in the use of arbitration, mediation and other third-party techniques to resolve disputes. But in employment dispute resolution, employers are more likely to be repeat players and employees are more likely to be “one-shotters.”

Are repeat players more likely to “win” in employment arbitration? Research involving nearly 4,000 employment arbitration cases administered by the AAA over the period from 2003 to 2007 has resulted in strong evidence that employee win rates and award amounts are significantly lower when the employer has been involved in multiple arbitration cases. This current research confirms previous research results from the 1990s involving a smaller sample of AAA employment cases. Then, too, employees lost more frequently when the employer was a repeat player. These research results are worryingly consistent with the repeat-player effects reported during the National Roundtable on Consumer Arbitration. They suggest, at the very least, the need for more research to identify why the repeat-player effect is so robust.

Some of the participants noted that the widespread adoption of innovative conflict management strategies by many employers in both the private and public sectors provides employees with easy access to efficient and inexpensive (for many employees, costless) means of resolving workplace complaints that are not generally available to unionized employees. One presentation reported the results of a CPR/Pepperdine/Cornell survey showing that over the past 15 years, major employers have adopted a wide array of internal ADR techniques, including so-called “hotlines,” open-door policies, early neutral evaluation, early case assessment, and conflict coaching.

Participants at the Penn State Roundtable also offered anecdotal evidence of other internal measures adopted by employers to achieve early resolution of workplace conflicts, ranging from the increased use of supervisor training to ensure “conflict competence” in the organization to the enhanced use of communication and feedback to provide managers with early warning signals of incipient workplace conflict. Some of the participants also noted that a growing number of employers are incorporating the effective resolution of conflict into their performance appraisals of managers and supervisors. The use of these strategies, particularly if they are part of an integrated conflict management system, may winnow out stronger cases and help explain the repeat-player effect.

There was broad recognition, however, that a conflict management system differs in important ways from a practice or technique. Most important, a system entails a comprehensive, proactive approach to managing and resolving conflict in an organization.9 At the Roundtable, there were two presentations regarding the establishment and use of integrated conflict management systems, rather than the importation of a particular ADR technique. These presentations described the potential for top and trusted corporate officers to create and implement integrated conflict management systems, and for ombuds to encourage the development of such systems. But these presentations also revealed the significance of the character, reputation and trustworthiness of the particular person responsible for establishing and implementing a conflict management system. This heavy reliance on the presence of the “right person” would seem to represent a potential weakness in terms of sustainable system design. Nonetheless, most Roundtable participants, regardless of their organizational affiliations, viewed the use of ombuds and integrated conflict management systems with considerable favor and believed further growth in their use would improve the management of workplace conflict.

There was great interest in developing a “turn-key,” or “ADR in a box,” conflict management system for small- and medium-sized employers that probably cannot afford a customized system.
The participants also came to recognize that the lawyers who regularly represent employees in employment litigation play an important role in these systems. When potential clients come to them for representation, these lawyers are likely to spend substantial time learning about the internal dispute resolution options available to the clients, to be able to advise them regarding their use. Some lawyers even provide information and advice online. In a sense, these lawyers are serving as “conflict coaches,” even though they would probably tend to think of themselves as engaging in “client counseling.”

Commonalities

During the two Roundtables and in pre-meeting telephone conversations, the organizers were heartened to discover that our knowledgeable participants recognized that there was much they did not know. They wanted to learn from each other about different dispute resolution procedures, best practices within those procedures, different models of regulation or accountability and means to deter bad behavior and encourage good behavior. Perhaps this desire reveals some sort of faith that being open to others’ knowledge and experience will (or at least may) reveal paths toward resolution.

More than one participant, however, also emphasized the need to “do” and not “just talk.” The organizers feel the same way. Each of us, in our own way, continues to try to move the ball forward. We have produced a report for the National Roundtable on Consumer Arbitration. We hope to do the same for the National Roundtable on Employment Dispute Resolution. We have presented at the ABA Dispute Resolution Section’s annual conference.

But our ad hoc group has also realized the need for the major dispute resolution organizations to play leading roles. The National Roundtables identified several projects that could inform appropriate next steps. For example, we need to understand why the repeat-player effect is so robust. We also need to know the characteristics of the industries that include arbitration clauses in their boilerplate contracts with consumers and the specific terms and implementation of those clauses. We need to help companies, policymakers, advocates, consumers and employees in making dispute resolution (and conflict management) systems sufficiently effective and fair. The National Roundtables thus also suggest that these stakeholders need guidance in creating, participating in, and assessing the effects of mandatory pre-dispute arbitration. The ABA Dispute Resolution Section (perhaps in collaboration with other major dispute resolution organizations and ABA sections) is uniquely positioned to spearhead needed research and the development of guides and best practices for companies, consumers and employees. We encourage the Section to take these next steps. 

Endnotes

1 The Chatham House rule reads: “When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.” More information regarding the rule, including its very interesting history, is available at http://www.chathamhouse.org/about-us/chathamhouseerule.


3 Comprised of Professors Tom Stipanowich and Nancy Welsh (co-chairs), Professor Lisa Blomgren Bingham and Larry Mills, with advice and assistance from Professor Homer LaRue, for the National Roundtable on Consumer Arbitration, and comprised of Professors Stipanowich and Welsh (co-chairs), Professor Bingham and Professor David B. Lipsky, with advice and assistance from Ruth Glick, for the National Roundtable on Employment Dispute Resolution.


5 NO. 05-CV-7116 (S.D.N.Y.).

6 Available at www.ag.state.mn.us/PDF/PressReleases/ SignedFiledComplaintArbitrationCompany.pdf.


8 An integrated conflict management system: (1) entails a comprehensive, proactive approach to managing and resolving conflict in an organization; (2) has a broad scope, allowing many different types of disputes (statutory, nonstatutory, etc.) to be heard and resolved; (3) provides multiple access points for employees who have complaints (e.g., an employee can file a complaint with his supervisor, the human resource function, the counsel’s office, or the office that manages the system); and (4) provides multiple options for resolving disputes (e.g., both interest-based and rights-based methods).

9 This brief summary of the presentations and discussions at the Employment Dispute Resolution Roundtable cannot do justice to the range and depth of the subjects considered at the event. For example, there was also an extended discussion of the potential to revisit and update the Due Process Protocol for resolving employment disputes; the advances in case management implemented in recent years by the AAA, JAMS, FINRA, FMCS, and EEOC (e.g., assessment of neutrals, the customization of processes, and the public availability of information regarding outcomes and reasoning); and the growing reliance on online methods in workplace dispute resolution.
Managing Disputes in the Online Global Marketplace

Reviewing the Progress of UNCITRAL’s Working Group III on ODR

By Vikki Rogers

As many of us have discovered, a customer in the United States who buys something on eBay and is displeased – because the item arrived broken, was not as described, or even never arrived at all – can seek recourse in the same online platform with which he or she bought the item. But if that same person buys a crystal vase directly from an online vendor based in Budapest and the vase arrives in pieces, the buyer’s only option to dispute the transaction and get a refund or replacement may be to fly to Hungary and file a claim there.

The United Nations Commission on International Trade Law, known as UNCITRAL, has been working to change this for three years, aiming to establish an online dispute resolution (ODR) framework to resolve low-value, cross-border e-commerce disputes. But several months after the fifth meeting of the Working Group III, which is focused on this challenge, it remains to be seen whether the states involved can develop a system that can be both readily implemented and effective.

This article relates my experiences as an observer of the Working Group as well my views on the draft rules and policies currently under consideration.

The Internet was opened for commercial use as recently as 1992. It was a few years later, in 1996, that ODR made its appearance in academic literature, and it was about this same time that e-commerce became part of consumers’ marketplace options. Fast-forward less than 20 years, and our dependence on technology is self-evident. Online intermediaries such as Google, Twitter, Apple, Facebook, Amazon, eBay, and PayPal have capitalized on the synergies among online searching, communicating, buying and selling. Similarly, the devices on which we do all these things are evolving rapidly and making their way into the hands of billions of people globally. We have undergone a merger of our physical and virtual worlds, and younger generations, in particular, operate seamlessly in both these platforms.

Naturally, as consumers engage in the virtual world, disputes of all sorts arise, and e-commerce is no exception.
exception. Indeed, in 2010 eBay/PayPal handled 60 million disputes between buyers and sellers, up 20 million from 2008. Although e-commerce (along with its share of online disputes) has penetrated domestic marketplaces, cross-border e-commerce has not seen a corresponding growth throughout most of the world.

The Working Group’s mandate is based, in part, on the premise that one reason for this lack of growth is merchants’ and consumers’ uncertainty about what forum and law would apply in case of a dispute. Many involved in the Working Group assume that if an effective dispute resolution system were in place, both merchants and consumers would flock to new cross-border opportunities.

**UNCITRAL ODR Colloquium**

UNCITRAL convened the ODR Colloquium in 2010 as a first step toward the goal of creating a cross-border ODR system for e-commerce. Speakers at the colloquium confirmed that the number of disputes arising from low-value e-commerce transactions could annually amount to the multi-millions. Other than credit card chargeback protection, which is not available in a majority of countries, few, if any, legal redress mechanisms are currently available, leaving a wide legal gap in the online marketplace. More than one expert urged system designers and legislators to think outside the box and not necessarily resort to traditional ADR models.

The rapidly developing online marketplace and emerging new payment structures, they argued, need a correspondingly rapid system. Speakers also recommended that any set of rules accommodate transactions made over mobile phone devices, possibly using mobile payment options, as well as other electronic commerce platforms. Finally, given the nature of the online marketplace, speakers asserted that there was no reason to distinguish between business-to-business (B2B) and business-to-consumer (B2C) transactions for the purposes of developing model ODR rules and processes for low-value transactions.

With regard to this last point, it is worth noting that at the outset of this project most representatives involved agreed that ODR is particularly suited to low-value “straightforward” online transactions such as Amazon or eBay purchases. In this scenario, the seller has made the buyer aware of the specifications for the goods and contract terms and the buyer has made payment – all without direct interaction between buyer and seller. This is in contrast to more traditional B2B online sales, in which the web presence is the first point of entry for the buyer to view the seller’s goods but which usually involves further direct negotiation between buyer and seller of pricing, payment, quantity, delivery and other terms.

Shortly after the colloquium, state delegates to UNCITRAL overwhelmingly supported the creation of the Working Group to establish an ODR framework to resolve high-volume, low-value e-commerce disputes. Specifically, the current mandate includes a four-part framework: (1) procedural rules; (2) substantive rules; (3) standards for ODR providers; and (4) an enforcement protocol. Most observers expect that independent ODR providers – for example, the newly established MODRIA – will provide ODR services in accordance with the framework, as opposed to UNCITRAL or national government agencies.

**Current Systems to Address Low-Value Disputes**

Two widely recognized models currently exist to address disputes arising from low-value e-commerce transactions, represented by the regulated credit card chargeback system and the private eBay/PayPal ODR system. The main commonalities are: (1) they sit within the transactions and/or payment channel, so consumers are readily (and intuitively) aware of their availability and the systems are easily accessed; (2) the resolutions are executed within the self-contained system, since the payment channel can “move money”; (3) sellers who use the payment system are bound to use the dispute resolution system – the system binds sellers to the dispute resolution process, without binding the buyers; (4) parties always have recourse (which is virtually never used, but exists) back to the courts; and (5) the systems are funded by a fee charged to the seller, which for chargebacks increases for “bad” sellers and therefore encourages merchants to resolve issues before a chargeback is filed. As such, there is an inherent equalizing quality in the system, so large “repeat-players” do not necessarily have increased leverage over a consumer.

There are also a few additional benefits specific to payment intermediary-hosted dispute resolution for

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e-commerce. First, payment intermediaries have incentives to have “good” sellers and buyers use their services and accordingly have developed mechanisms to track and reduce fraudulent sellers and buyers on the front end of the transaction. Market-driven screening systems in the front end can be coupled with back-end dispute resolution systems for the most comprehensive protections against fraud. Second, sellers need online payment intermediaries and therefore have incentives to provide good customer service to prevent claims from being filed and potentially losing their rights to use the payment service. Third, these systems are scalable and cost-effective. An autonomous institution administering B2B cross-border commercial arbitrations may manage 1,000 to 2,000 international commercial arbitration cases a year, cases in which an arbitrator makes a few hundred dollars an hour. This model is not transferable to resolve millions of disputes that average less than $100 per dispute.

**Working Group Draft Procedural Rules**

The Working Group is currently negotiating the procedural rules. Despite the apparent effectiveness and advantages of the dispute resolution models in the current payment systems, the Working Group has not factored these models into its work or used them as a starting point to tweak away their shortcomings. Instead, the rules were initially structured to provide a two-tiered binding dispute resolution process that sits entirely outside the transaction channel (i.e., not with the payment intermediary or another online intermediary). Specifically, the rules provided for a mandatory automated negotiation phase (where, it is assumed, a majority of claims will be resolved) and, if no resolution is reached, a binding online arbitration process. An arbitrator also has the discretion to facilitate a settlement between the parties before issuing a final, binding award.

The Working Group seems to have put the cart before the horse, establishing a procedure for claims it has not yet defined. What types of disputes will be covered? Disputes over goods and all types of services? Delivery issues? Non-conformities? It’s reasonable to think that to create a process that handles the disputes effectively, this level of definition is necessary.

The proposal also departs from the payment intermediary-hosted systems in several profound ways:

1. If the dispute resolution system sits outside the payment channels, autonomously in cyberspace, it means a.) sellers will have to be made aware of it and voluntarily sign up and stay enrolled in the system (and pay for it!); b.) buyers will be forced to bind themselves to it at the time of the transaction and later on must recall the availability and/or trust the seller’s referral to “their” system; c.) the autonomous system, presumably managed by independent ODR providers, will not have the power to enforce decisions, so if a seller does not voluntarily comply, the buyer must go to seller’s jurisdiction and seek to have the award enforced under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) in local court; d.) unless addressed by the Working Group at some point, the system will not be centralized within a few payment providers but instead decentralized among several ODR providers, making it difficult, if not impossible, to track scheming or fraudulent sellers and buyers.

2. Consumer-buyers lose their right to seek redress in court and are essentially stripped of their right to court intervention and review regarding the substance of the matter (given limited New York Convention review), and states lose this critical oversight because of confidential proceedings. Moreover, including binding international arbitration has an impact beyond the process itself. The rules take an ADR process that is intended for complex and/or industry-specific B2B commercial disputes and transpose it to apply to all simple low-value e-commerce cases. As such, they incorporate the UNICITRAL international arbitration machinery into the process. How is a trained customer service representative (a.k.a. an arbitrator, under these rules) supposed to navigate the complexities of these laws for a few dollars? Further, what are the possible impacts on landmark rules and conventions, such as the New York Convention and the UNICITRAL Model Arbitration Law, of including low value e-commerce cases under their umbrellas? Also, when we get to the second part of the framework, substantive rules, how can a good-faith claim be made that substantive rules should be disregarded, i.e., decisions should be made on an equitable basis or on a few basic general principles, when on the procedural side, we are reliant on a complex body of law?

Proponents of this system have primarily argued that:

- Arbitration is necessary to ensure enforcement in a cross-border context;
- It must be binding pre-dispute, or else sellers will not participate post-dispute;
- Blacklists and trustmarks will help sellers comply with the awards;
• Sellers will protest the system if a binding option is not included; and
• Companies and individuals in the developing world don’t have sophisticated e-commerce environments or online payment systems, so a more traditional ADR approach must be taken.

The proponents also claim that if the rules establish a fair, efficient and transparent system, there is nothing wrong with binding buyers pre-dispute and taking away their right to go to court.

These arguments, however, seem to run contrary to the experience within the existing systems. Sellers aren’t stonewalling credit card companies or PayPal, which bind them to their ADR systems while leaving buyers with non-binding options. Traditional trustmark schemes have limited appeal in the online marketplace. E-commerce and payment systems in the developing world are transforming so quickly on mobile phones that legislating on today’s technology is short-sighted. Forcing a buyer to seek enforcement in a local court under the New York Convention puts us back at square one, leaving a buyer without effective options.

In fact, we must create a fair, efficient and transparent system because no other remedy exists. And if we do build that system, sellers and buyers will be drawn to use it as a preferred option – not because it is their only option. We are looking to accommodate three needs: buyers looking for cheaper buying options, sellers looking to expand markets and states wanting to protect their citizens’ rights – in some cases, constitutionally protected rights. Insisting on a binding arbitration system makes it very difficult to accommodate these three interests and could hinder, rather than encourage, cross-border e-commerce.

In the background of this debate is a larger policy question that has largely not been addressed. Some Working Group observers have suggested that the chargeback and the eBay/PayPal system are more or less customer-service mechanisms, whereas a cross-border binding arbitration system is more akin to an online global justice system for low-value disputes, running parallel to domestic small claims court systems. This suggestion seems to imply that the latter is more desirable than the former. Assuming one agrees with the categorization of the two systems, the Working Group apparently has not yet defined the breadth of the system it is looking to create. As a starting point to this discussion, remember that consumers and merchants in the United States, which has a robust small claims court system, use chargebacks and non-binding ODR to resolve low-value e-commerce disputes. To my knowledge, neither merchants, consumers, consumer groups, nor government agencies are alleging justice has been denied.

We need to consider whether the United States would have a better system for its consumers if it abandoned chargebacks and private ODR initiatives and put government-funded small claims courts online. If 60 million eBay/PayPal disputes were redirected to small claims courts, would consumers obtain more justice in this scenario? Similarly, would the creation of essentially a B2B cross-border arbitration system – as opposed to payment intermediary hosted ODR system – provide more or better justice for millions of consumers worldwide? The procedural layers of a cross-border binding arbitration system might make the breadth of the framework look good on paper but unrealistic to implement (or alternatively unrealistic to expect wide-spread participation). If this is the case, the Working Group will have reinforced the status quo, which means no redress opportunities, no justice, for consumers engaging in the cross-border marketplace.

A Two-Track System?
The larger policy questions regarding the breadth of the system remain unanswered. The states in the Working Group disagree about whether the rules should include binding arbitration and allow for pre-dispute arbitration agreements. This split is clearly influenced by the recent US Supreme Court cases supporting the enforcement of pre-dispute arbitration agreements in B2C contracts and the recent European Commission proposal for an ODR regulation and the regional sentiment that runs counter to the current Supreme Court jurisprudence.11 In fact, negotiations were moving toward a halt over this issue until this past November, when the delegation for the Czech Republic reignited discussions with a proposal to modify the procedural rules to provide for a two-track system. One track provides for a non-binding two-phase process, negotiation and facilitated settlement (and possibly a non-binding decision-making stage). The second track reflects the current draft rules, providing for negotiation, facilitated settlement and binding arbitration. Merchants apparently would choose

[W]e must create a fair, efficient and transparent system because no other remedy exists. And if we do build that system, sellers and buyers will be drawn to use it as a preferred option – not because it is their only option.
the track by inserting one or the other dispute resolution clause into their contract.

Although this proposal does provide an opportunity for states to consider alternatives to the current draft, two concerns immediately come to mind. First, if they want to ensure that the binding track is not applied against their consumers, states are likely to pass legislation eliminating that option. If this is the case, is there really a need to introduce a two-track process? Second, this approach would place a significant burden on merchants to tailor their dispute resolution clause to every individual sale. Arguably, it would require a) buyers to identify to the seller whether they are consumers or merchants; and b) have sellers analyze the buyer’s domestic law to determine which clause should be included. In the alternative, sellers could take a uniform approach and insert a binding dispute resolution clause that consumers may feel obligated to agree to because they are not aware of their rights and options. Either option seems designed to thwart desired objectives.

The greatest contribution of the latest proposal may be that it represents an openness to discuss other approaches to achieve the Working Group’s objectives. If, going forward, attention is shifted to understanding system design and more specific types of claims, it may help to naturally reshape the rules to a more realistic option (e.g., uniform ODR framework for payment providers). But whether the states involved perceive a need to shift – and are willing and open to that possibility – is still unclear.

The Next Step

Pursuant to UNCITRAL practice, eventually the chair of the Working Group will need to consolidate the discussion and express an opinion on what he considers the prevailing view. It would be a shame if this leads to a framework based on binding arbitration, as it would not close the legal gap that was identified in the 2010 UNCITRAL Colloquium and would seem a lost opportunity for ODR and e-commerce. Without a significant shift in the discussions at future Working Group meetings, the smart money will look instead to domestic law initiatives by state agencies or to the launch of private marketplace initiatives (or a combination thereof) to ultimately determine the opportunities for justice that consumers will receive in the cross-border online marketplace.

If, going forward, attention is shifted to understanding system design and more specific types of claims, it may help to naturally reshape the rules to a more realistic option.

Endnotes
1  Ethan Katsh, Dispute Resolution in Cyberspace, 28 Conn. L. Rev. 953 (1996).
4  Colin Rule, Making Peace on eBay: Resolving Disputes in the World’s Largest Marketplace, ACREsolutions, Fall 2008, at 8.
6  In 2010, the Pace Law School Institute of International Commercial Law, the UNCITRAL Secretariat, and Penn State Dickinson School of Law organized a colloquium of leading experts in the ODR field (podcasts of presentations can be found at http://law.pace.edu/speaker-presentations).
7  As noted on the UNCITRAL website, “The Commission is composed of sixty member States elected by the General Assembly. Membership is structured so as to be representative of the world’s various geographic regions and its principal economic and legal systems. Members of the Commission are elected for terms of six years, the terms of half the members expiring every three years.” For further information regarding State representation at UNCITRAL see http://www. uncitral.org/uncitral/en/about/origin.html.
8  Reports of Working Group III and a copy of the draft procedural rules are available on the UNCITRAL website at UNCITRAL Working Groups ODR.
9  In China, Alibaba/Alipay also offers an online dispute resolution platform. It is the author’s understanding that although the process is slightly different and it appears that payment is placed in escrow until delivery of conforming goods is confirmed, the commonalities between chargebacks and eBay/PayPal identified in this article are also applicable to this process.
10  As states apply the concept of mediation differently and conciliation is addressed in the UNCITRAL Model Law on International Commercial Conciliation, the term “facilitated settlement” offers a level of autonomy and neutrality to be shaped by the states in the ODR framework.
Mediation.org is the all-new online resource to the world of mediation. Join our network, a community built for mediators, by mediators. You’ll get access to the latest news and tools, mediation education, practice development and a host of other resources. Get listed and appear in our online mediator search tool alongside AAA® panel mediators.
How Can We Measure Justice and Fairness in Arbitration Programs?

By Lisa Blomgren Bingham

Companies are using adhesive clauses to impose mandatory binding arbitration on employees and consumers, and they are using their superior bargaining power to exercise control over the dispute system design for arbitration programs. These programs can displace the civil justice system by precluding litigation in state or federal courts or through ad hoc court or agency dispute resolution. The field of dispute resolution makes claims that invariably include an implicit or explicit comparison: that dispute resolution is faster, cheaper or better at producing high-quality outcomes; better at improving disputants’ capacity to handle conflict in the future; and better at transforming conflict into something productive and creative.

To prove – or disprove – these claims, we need comprehensive, longitudinal data about our civil justice system and differing dispute system designs, including arbitration. Getting that data, however, requires two things: transparency and systematic, consistent information-gathering. Right now, we have neither. This article will review what we need and how it might inform policy on mandatory arbitration.

At the heart of the controversy over mandatory arbitration is the inescapable fact that one party unilaterally adopts a dispute system design that may work to the other party’s disadvantage. Before mandatory arbitration, consumers with small claims could band together to pursue them through a class action. Mandatory arbitration may bar consumer access to class action. With mandatory arbitration, employees cannot get to a jury to prove grounds for certain damages. However, arbitration programs vary widely in their design in ways that involve manipulation of many design elements. The elements of dispute system design can include, but are not limited to, structural features, context and administration (see chart on page 27).

The key question is party control over dispute system design in ways that affect both process and outcome in a case. For example, the designer may pick the location for an arbitration hearing and impose travel costs on the other side or limit discovery or class relief. We do not adequately understand how different dispute system designs function. Do dispute resolution systems designed by one party function as fairly and effectively for all participants as systems designed by third parties such as the courts and government? How does the power of the marketplace shape dispute resolution systems? We need the baseline: consistently collected observations about dispute resolution and the systems with which it is compared.

Under the Alternative Dispute Resolution Act of 1998, all federal district courts had to adopt a dispute resolution program, but there was no template; the thousand flowers bloomed. How do these designs compare? Without consistent data, there is no way to know.

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In 2003, the Research and Statistics Task Force of the American Bar Association Section of Dispute Resolution embarked on a project to help courts use their information technology systems to collect data for ADR program evaluation. Through an email survey to court administrators, the Section sought to create a list of data fields that all courts could collect. If state and federal courts collected the same data comprehensively and longitudinally, the Section’s Task Force members reasoned, researchers might be able to quantify more effectively the impact of different dispute system designs on the justice system. The survey asked respondents to rank the importance of 56 data collection fields on a scale from one (not at all important) to seven (very important). An initial version of the survey also asked respondents to indicate whether their court currently collected any of this data.

The survey responses identified 27 data collection fields as “important.” These fall into six general categories:

- Dispute processing information (the timing of the ADR intervention)
- Transaction costs
- Outcomes
- ADR use
- Long-term implementation of settlement
- Satisfaction of the participants with the process, outcome and neutral

However, more than 75 percent of the respondents indicated their court did not collect the information. The categories of information rated less important by respondents included demographics of the disputants and neutral, content of the dispute, and the identity of the attorney representing the litigants.

After analyzing survey results, the Task Force developed a list, the Top Ten Pieces of Information Courts Should Collect on ADR (published on the ABA Section of Dispute Resolution Resources Page–http://ambar.org/disputeresources) and summarized in the chart on page 28. At least in the public civil justice system, most of these fields do not represent information that is confidential. The final field of participant perceptions could be maintained as confidential and reported in the aggregate, as the Federal Judicial Center has done with its studies of ADR in courts.

The problem with evaluating the fairness of binding arbitration is compounded; not only do we lack consistent, longitudinal data collection on various dispute system designs, but much of the information itself is confidential and not available to researchers except through the voluntary cooperation of dispute resolution third-party providers or the companies that mandate these programs. There is no consistent transparency even for the program descriptions. Unlike ERISA’s requirement for plan booklets, there is no general mandate that companies publish the detailed dispute system designs of arbitration programs for employees and consumers. Moreover, we lack comprehensive case management data on arbitration. While some states, notably California, have adopted mandates that third-party providers publish summary case results, that data is incomplete and inconsistent.

We need a law to give us some degree of transparency on arbitration, at least as to program and system designs and basic case management data. What could we do with that information? We could determine how widespread mandatory arbitration is. We could measure what impact its adoption has had on use of the civil justice system. We could compare differing arbitration system designs and see whether some programs produce a more level playing field than others. We could determine whether programs are fair and produce justice, in some form, for the disputants. This information would allow us to analyze current legal structures and program designs and discuss appropriate changes to the policy on arbitration.
Top Ten Pieces of Information Courts Should Collect on ADR

1. Was ADR used for this case (yes/no)? This indicator tracks whether ADR is used in civil litigation and provides a baseline for determining what percentage of civil litigation uses an ADR intervention. It is the fundamental minimum information necessary.

2. What ADR process was used in this case (mediation, early neutral assessment, non-binding arbitration, fact-finding, mini-trial, summary jury trial, other)? There is a great diversity of court ADR programs. The parties themselves elect from a variety of processes. This information permits examination of differences across courts in the type of ADR used and the frequency of use. Within courts, it allows for a comparison of the results of different processes and an examination of the kinds of cases for which parties use different processes.

3. Timing information (the date the claim was docketed; date of referral to ADR; date of first ADR session; date of close of ADR referral period; at what point in the docket duration did ADR occur (before suit, after filing suit, before discovery, just before trial) the final disposition date of the case; the date of post-trial motions). ADR is used at different points in time in the life of a case. This information will help determine what timing is most effective to use ADR and how early or late a case might be referred to ADR.

4. Whether the case settled because of ADR. If settled, whether the case settled in full or settled in part. Advocates claim that ADR settles cases or at least narrows the issues in dispute. This question helps examine that claim.

5. What precipitated the use of ADR (court order sua sponte, party consent to the process, party motion with one or more parties opposed and a court order for ADR following, automatic referral per court rule due to kind of case)? Court programs vary widely in how cases enter ADR. This question allows for a comparison of different methods for intake and an exploration of whether voluntary or mandatory programs are more effective.

6. Was there a settlement without ADR (yes/no)? If so, how was the case terminated — e.g., dispositive motion, settlement in ADR, settlement by some other process, during or after trial, removal to another court, etc. Some cases referred to ADR settle before the process — or after the process but because of factors other than ADR. Many argue that 90 percent of all cases settle anyway, so it is hard to identify whether ADR is making a difference. This information permits comparison of the outcomes for ADR and non-ADR cases.

7. Case type (general civil, criminal, domestic, housing, traffic, small claims). This information will permit examination of a number of claims and questions about ADR: For which cases is ADR most effective? Does ADR use and effectiveness vary by subject matter in dispute? Do more small claims cases settle in ADR than housing claims, for example? If the court has limited ADR funds, what kinds of cases should get priority for ADR?

8. The cost of the ADR process to the participants. Critics suggest that the ADR process simply adds transaction costs to litigation; advocates say ADR saves money. This question allows us to compare ADR costs to other studies on litigation costs.

9. Did the disputants use more than one form of ADR? If so, which? To know which form of ADR is most effective for which cases, we need to be able to separate cases by process and identify those with more complex sequences.

10. Satisfaction data: How satisfied are the participants with the process, the outcome and the neutral? A key value in the justice system is that people who use it believe it to be fair and to provide justice. These questions are ways to determine how people who use ADR feel about their experience.

Endnotes


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An “Arbitration Fairness Index”
A Rating System for Consumer and Employment Arbitration Programs

By Thomas J. Stipanowich

Should there be a public rating system for arbitration programs tied to consumer goods and services or for individual employment contracts? Like it or not, we live in a society that is obsessed by, and makes key choices on the basis of, ratings. Recently I proposed the idea of an “Arbitration Fairness Index,” a multi-dimensional system to rate and rank consumer and employment arbitration programs.

Building on many years of pro-arbitration precedents, recent Supreme Court decisions support broad enforcement of class action waivers, permit companies to give arbitrators virtual plenary authority over challenges to arbitration agreements and place new limits on the ability of courts to police arbitration agreements in standardized contracts of adhesion. Meanwhile, although binding arbitration agreements are widely used in consumer contracts and individual employment contracts, most individuals probably have little or no understanding about what an arbitration agreement entails. Because fundamental fairness hinges on many characteristics of dispute resolution systems, arbitration programs may or may not provide an effective means of achieving an appropriate remedy.

Developed and implemented by a respected independent institution with broad-based input, a Consumer Reports-like reputable rating system for consumer and employment arbitration programs might:

• Help inform the public about arbitration programs and their workings, as well as key differences between programs;

• Put pressure on businesses to “open up” and provide more information about their arbitration programs, including rules and procedures, arbitration panels, administrative practices, and case statistics;

• Provide incentives to businesses – and business sectors – to develop and maintain fair, effective dispute resolution programs and more carefully weigh the cost of that “extra bite of the apple”; and

• Underpin the future efforts of courts, legislators and other policymakers to ensure the protection of individuals’ rights and, where appropriate, promote effective punishment and deterrence.

During the first meeting of last year’s National Roundtable on Consumer and Employment Dispute Resolution (See Welsh and Lipsky in this issue on page 14), there was a good deal of interest in such a rating system. Some thought published arbitration ratings, like posted Health Department letter grades for restaurants, might help alert consumers and encourage companies to improve their practices. It was also suggested that a respected organization or regulatory agency might issue a “trustmark,” the equivalent of a Good Housekeeping Seal of Approval for a business’s consumer dispute resolution system.

A Possible Template

The chart on the opposite page lists key elements upon which corporate arbitration programs might be rated in an Arbitration Fairness Index. This model was derived from a variety of sources – “due process exemplars” including judicial opinions, Due Process Protocols and leading procedures. It consists of five categories of elements of procedural fairness that may be critical to consumers or employees in dispute resolution, including many aspects that would not appear in published arbitration procedures.

Questions and Concerns

All this said, one wonders whether a workable Arbitration Fairness Index could be developed and sustained. The recent firestorm over US News rankings for university and graduate programs reminds us of the difficulties associated with constructing meaningful ratings systems and obtaining accurate and truthful data. What institution(s) would sponsor the activity, and how would it be funded? Who would collaborate or be consulted on the design? What adaptations to the template would be required for different transactional scenarios (such as, for example, small consumer claims versus disputes involving larger amounts in controversy)? To what extent should hotlines, mediation and other useful dispute resolution
mechanisms be addressed in a ratings system? How would helpful, reliable information (such as statistics on case disposition and outcomes) be obtained regarding the actual operation of programs?

Moreover, if we build a system to rate and rank arbitration programs, will anyone come? Is it possible to develop a mechanism that would not only reach and inform members of the public but motivate businesses to improve their dispute resolution programs? What, if any, means of communication – a website, a TV broadcast or online program, or a print publication – might be effective in conveying information and influencing public opinion and decision-making by businesses? Is there value in some form of “trustmark” system, a seal or badge of quality, that could render an assurance that certain companies’ consumer or employment dispute resolution systems meet certain standards of fairness and transparency?

What Do You Think?

What do you think about the concept of an Arbitration Fairness Index? Do you have ideas for implementing a meaningful and sustainable program? If you’d like to offer comments or suggestions, please contact me at thomas.stipanowich@pepperdine.edu.

Endnotes


4 See Stipanowich, supra note 2, at 328 n.15 (observing that arbitration agreements in individual employment contracts may affect as many as 15 percent to 25 percent of employees).

5 See id. at 427-32 (discussing potential alternatives to the current scheme of binding arbitration consumer and employment disputes).

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Getting Under the Hood:  
A Practical Guide to Drafting Consumer and Employee Arbitration Agreements

By Archis A. Parasharami, Kevin Ranlett and Phillip R. Dupré

Over the past two years, courts around the country, led by the Supreme Court’s decision in AT&T Mobility LLC v. Concepcion, have strongly supported the enforcement of agreements to arbitrate on an individual basis in lieu of class actions. These major developments in the law have made it far more attractive for businesses to adopt arbitration agreements with their customers and employees.

Much of our practice, especially since Concepcion, has involved advising companies on how to implement arbitration agreements that are practical, fair and enforceable. Because there are many different types of businesses – and because the nature of the relationships between those businesses and their customers and employees varies significantly – there is no “one-size-fits-all” arbitration clause. But we have identified some core principles that should help companies, and those advising them, tailor arbitration programs to fit their needs and those of their customers or employees.

Background

Arbitration often represents a win-win proposition for companies and their customers and employees. To begin with, both parties benefit from the cost savings of arbitration, as well as its simplicity, speed and less adversarial nature. Some studies show that consumers and employees, especially those with relatively small claims, often find the process more accessible than litigation. And companies often benefit from a reduction in their dispute-resolution costs; basic economic theory teaches that those benefits are passed along to consumers and employees in the form of lower prices and higher wages.

Federal law has long supported the use of arbitration agreements. In 1925, Congress enacted the Federal Arbitration Act (“FAA”) to reverse the longstanding judicial hostility to arbitration agreements. The Supreme Court has repeatedly noted that the FAA embodies a strong federal policy favoring the enforcement of arbitration agreements. The centerpiece of the FAA, Section 2, provides that written arbitration agreements are “valid, enforceable, and irrevocable, save upon such grounds as exist in law or in equity for the revocation of any contract.” In other words, the FAA puts arbitration agreements on “equal footing” with other kinds of contracts. Thus, courts must reject any asserted state-law defense to enforcement of an arbitration agreement unless the defense is applicable to contracts generally. These defenses include, for example, “fraud, duress, or unconscionability.” Moreover, because “the FAA was
designed to promote arbitration” and “to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings,” states cannot condition the enforceability of arbitration agreements on compliance with “[r]ules aimed at destroying arbitration” or the availability of “procedures incompatible with arbitration.”\(^6\)

**Implementing an Arbitration Program**

As many businesses have come to recognize, the foundation for a successful arbitration program is a well-crafted arbitration agreement. First, the dispute resolution process should function smoothly for both the company and its consumers or employees. In other words, the arbitration program should generally be more efficient and less costly than litigation. Second, because the arbitration agreement does not benefit anyone unless it can be enforced, it must be drafted with an eye on the courts in which it might be challenged and the arguments that might be asserted against its enforcement.

**How Does the Arbitration Process Function?**

Most fundamentally, an arbitration agreement should set up a dispute resolution process that works for all parties – the business as well as its customers or employees. As it tries to set up a well-functioning process, a company should consider several issues.

Most significantly, businesses should make clear that class or representative arbitrations are not permitted. As the Supreme Court explained in *Concepcion*, class arbitration “sacrifices the principal advantage of arbitration – its informality – and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.”\(^7\) Businesses are understandably reluctant to submit to class procedures because of the settlement pressures that result from aggregating a large number of claims; that problem is exacerbated in the arbitration context because businesses will face the risk of an effectively unreviewable class-wide award. Moreover, data show that few consumers and employees benefit from class actions, because most class claims are not certified, and the remaining ones are usually settled, often for pennies on the dollar, which makes it less likely that class members will submit claims and obtain recoveries.\(^8\)

Despite the undesirability of class arbitrations, a number of courts have held that class arbitration may be available when an arbitration agreement fails to address the topic. To avoid this risk, businesses should include express language prohibiting the arbitration of class or representative claims rather than relying on silence.\(^9\)

For added security, drafters should include a provision that makes the “class waiver” language in an arbitration agreement non-severable to avoid the possibility of being forced into a class or representative arbitration if, notwithstanding *Concepcion*, a court were to invalidate the restriction on such proceedings.

Companies also should consider making a “pre-arbitration” dispute resolution mechanism an integral part of the arbitration procedure. For example, drafters of consumer and employee arbitration agreements could require the parties to notify one another of a dispute and to be given some time (say, 30 days or more) to try to settle the dispute before arbitration commences. Of course, even without a mandatory pre-arbitration dispute resolution process, the parties could settle disputes in advance of a formal arbitration. But when the arbitration agreement specifies a “cooling off” period that allows the company to try to settle a dispute informally, it is much more likely that claims can be resolved without the need for a customer or employee to initiate arbitration, saving time and money for all parties.

A company also should identify in its agreements an arbitration organization to administer the arbitrations. The two leading organizations are the American Arbitration Association and JAMS. Both organizations have developed arbitration rules and procedures that address the needs of consumers and employees. In our experience, these rules and procedures, although not perfect, are workable in practice and certainly make dispute resolution more streamlined than litigation.

Finally, the drafter should pore over the arbitration program for hidden landmines. While ideally all parties to arbitration agreements will make use of arbitration in good faith to pursue genuine disputes, the arbitration process can be, just like the court system, subject to abuse. Authors of arbitration clauses should attempt to anticipate such abuses and forestall them – without erecting obstacles to the pursuit of legitimate claims.

**Is the Arbitration Agreement Fair and Enforceable?**

Of course, it is not enough to create a well-functioning arbitration process; the arbitration agreement must be enforceable in the first place. Because plaintiffs often seek to avoid their arbitration agreements, especially if they are seeking to bring a class action, companies will want

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to have certainty that courts will enforce their arbitration agreements, and that, in turn, means persuading courts that the agreements are fair to individual consumers or employees.

Plaintiffs have made a wide variety of arguments against the enforcement of arbitration agreements. Most of the arguments we have seen, however, tend to fall into three categories: (1) challenges to the manner in which an arbitration agreement was formed; (2) contenions that the dispute at issue is outside the scope of the arbitration agreement; and (3) assertions that the agreement is unconscionable or violates public policy (in short, that the agreement is unfair). Businesses should anticipate these arguments when creating an arbitration program, as most (if not all) of these objections to arbitration can be answered at the drafting stage.

Contract formation

To begin with, a company should think carefully about how consumers or employees enter into their arbitration agreements. As a rule of thumb, a company should provide the consumer or employee with advance notice of the arbitration agreement if feasible (or an opportunity to cancel the contract if advance notice is not practical) and should ensure that the arbitration requirement is clearly disclosed in the contract. The company also should consider the possibility of giving consumers or employees a certain period of time after entering into the contract to opt out of the arbitration program.

Developing the contract-formation process, however, is only part of the story. When it becomes necessary to compel arbitration, a company will need to prove that its customers or employees have agreed to arbitrate. To do so, a business should maintain records that allow it either to identify particular contracts or demonstrate its routine practices for entering into customer or employee agreements. To be sure, it is rare that plaintiffs are able to raise genuine issue of disputed material fact over whether an arbitration agreement has been formed. But if that does happen—and sometimes it does—the FAA provides for a jury trial on such issues. Certainly no company wants to face a jury trial—even on such a narrow issue—when one of the key reasons it agreed to arbitrate was to avoid jury trials in the first place.

Scope of arbitration agreement

Plaintiffs frequently argue that their claims fall outside the scope of the issues that the parties agreed to arbitrate. This problem often is simple to fix, because the drafter of an arbitration provision can (and should) define precisely how broadly or narrowly construed the arbitration agreement is intended to be. Many courts have held that agreements to arbitrate disputes “arising out of or relating to” the contract or its breach are “broad” and require arbitration of “all issues that ‘touch matters’ within” the underlying contract. But there are outlier decisions that adopt a far more constricted reading of that standard language, and so a company that wishes to avoid fights over the scope of the arbitration agreement may prefer to adopt a more all-encompassing arbitration agreement, such as an agreement to arbitrate “all disputes” between the parties.

Some companies may prefer to exempt certain categories of claims from arbitration. There are many situations in which doing so makes perfect business sense, but a company should be watchful for attacks on any such exceptions. For example, if the company intends to create only a narrow exception to arbitration, that exception should be defined in precise terms to prevent other kinds of claims, especially claims that could in theory be brought on a class basis, from being shoehorned into the exception (and out of arbitration). Although the Supreme Court has held that the federal policy favoring arbitration requires that “[a]ny doubts concerning the scope of arbitrable issues . . . be resolved in favor of arbitration,” parties seeking to exploit an ambiguity in an exception to an arbitration agreement can be expected to argue that the controlling principle is instead that contracts should be interpreted against the drafter.

Finally, the company should consider whether it wants courts or arbitrators to decide whether a particular dispute is arbitrable. The Supreme Court has explained that “[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so.” But prudence dictates that the drafter of an arbitration agreement address this topic expressly to avoid a surprise in either direction. Many businesses prefer to have courts decide these issues to guarantee appellate review. Such businesses should specify in the agreement that courts will decide questions of arbitrability. Conversely, if the company prefers to have arbitrators resolve challenges to the enforcement of an arbitration agreement, something the Supreme Court has confirmed is permissible, the drafters should say so directly.
Unconscionability and public policy

In recent years, the plaintiffs’ bar has regularly contended that arbitration agreements are unconscionable and/or violate state or federal public policy. Concepcion makes clear that states may not declare (either as a matter of unconscionability or public policy) that arbitration agreements are unenforceable on the ground that they preclude class treatment of claims. And the Supreme Court currently is considering the validity of a similar argument under federal law in American Express Co. v. Italian Colors Restaurant.13

That said, doctrines like unconscionability will still have a role to play in challenges to the enforcement of arbitration agreements, as long as the principles being invoked are generally applicable. As the Supreme Court has recently recognized, arbitration agreements may be “unenforceable under state common law principles that are not specific to arbitration and preempted by the FAA.”14

Some unconscionability challenges attack features of the arbitration agreement that arguably tilt the process in favor of the company, such as requirements that consumers or employees pay arbitration costs that are excessive in the context of small claims, waive substantive rights available to remedy an individual’s claims under applicable law or travel to distant places to arbitrate. Many of these features are common in business-to-business agreements. To forestall unconscionability challenges, companies should consider removing these artifacts of older business agreements from their consumer or employee arbitration agreements. In addition, drafters may consider adding some or all of the following hallmarks of pro-consumer arbitration provisions:

- **Low-cost or cost-free arbitration:** Make arbitration affordable for customers and employees. Consider offering to pay the full costs of arbitration for modest-size claims.
- **Mutuality:** To the greatest extent possible, both parties should be obligated to arbitrate claims, and any exceptions to arbitration should be fully mutual.
- **Do not impose limits on legal remedies:** Courts remain skeptical of efforts to bar statutory or punitive damages and recovery of statutory attorneys’ fees or to shorten statutes of limitations.
- **Offer a convenient location** for the non-business party. Courts are reluctant to enforce arbitration agreements that require a consumer or employee to cross the country to arbitrate.
- **Confidentiality:** Although confidentiality is often thought of as a benefit of arbitration, some courts have expressed concerns with arbitration agreements that require a consumer or employee to keep the results of arbitration secret.
- **Neutral arbitrator-selection process:** When specifying an organization as the forum for arbitration of disputes, make sure that the organization and its process for selecting arbitrators are reputable and unbiased.

Before Concepcion, plaintiffs often sought to challenge arbitration agreements on the ground that they required individual rather than classwide arbitration. And at least in some states, most notably California, those arguments had met with success. But as noted above, in Concepcion, the Supreme Court held that the FAA preempts such state-law rules because “[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”15 To condition the enforcement of arbitration agreements on the availability of class procedures therefore impermissibly creates an “obstacle to the accomplishment of the FAA’s objectives” of “ensur[ing] that private arbitration agreements are enforced according to their terms.”16

The majority opinion in Concepcion also rejected an argument made in the dissent that “class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system.” The majority first explained that, “States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.” The majority then added that the consumer false-advertising claim at issue “was most unlikely to go unresolved,” because under the AT&T arbitration provision at issue, “AT&T will pay claimants a minimum of $7,500 and twice their attorney’s fees if they obtain an arbitration award greater than AT&T’s last settlement offer.” The majority noted that lower courts had “found this scheme sufficient to provide incentive for the individual prosecution of meritorious claims that are not immediately settled” and that “aggrieved customers who filed claims would be ‘essentially guarantee[d]’ to be made whole.”17

Some plaintiffs, taking their cue from Concepcion’s praise for AT&T’s exceptionally consumer-friendly arbitration provision, have argued that the reach of Concepcion is limited to arbitration provisions that contain the same (or very similar) pro-consumer features as AT&T’s clause in Concepcion did. But most courts have
rejected that attempt to narrow Concepcion; explaining that Concepcion’s holding is both “broad and clear” and prohibits states from relying on the absence of class procedures as a ground for refusing to enforce arbitration provisions. That said, given the Supreme Court’s ruling in Concepcion, companies that adopt arbitration provisions similar to AT&T’s clause will likely benefit from what one judge has described as a “safe harbor.” Indeed, in the American Express case pending before the Supreme Court, both the plaintiffs and the United States have recognized in their briefing that arbitration provisions like AT&T’s allow individual consumers to pursue their claims effectively.

Alternatively, plaintiffs have sought to oppose arbitration by arguing that their arbitration agreements prevent them from “effectively vindicating” their federal statutory rights because the agreements waive class actions. As noted above, the Supreme Court is currently considering this issue in the context of federal antitrust claims in American Express Co. v. Italian Colors Restaurant. In that case, a panel of the Second Circuit refused to enforce the merchant plaintiffs’ arbitration agreements because the plaintiffs had presented unrebuted evidence that they needed hundreds of thousands of dollars’ worth of expert testimony to proceed with their claims. The Supreme Court held oral arguments in American Express on February 27, and a majority of the Court seemed skeptical of the Second Circuit’s ruling.

Conclusion

In light of Concepcion and subsequent developments in the law, consumer and employment arbitration agreements are now more attractive to businesses than ever. But it remains critical that businesses make informed choices about the types of arbitration provisions they adopt. We are the first to recognize that there is no such thing as an optimal arbitration agreement for every company. But all businesses that wish to make use of arbitration – and their lawyers – should benefit from the guidelines we’ve discussed: Make the arbitration process function well for all parties and ensure that it is fair and enforceable. ●

Endnotes
2 Stephen J. Ware, Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements, 2001 J. Disp. Resol. 89, 92.
6 Concepcion, 131 S. Ct. at 1748-49 (internal quotation marks omitted).
7 Id. at 1748.
9 Although the majority view is that an arbitrator may not preside over a class or representative arbitration unless the arbitration agreement expressly authorizes such a proceeding, there is continuing disagreement about how to construe “silent” arbitration agreements. In Oxford Health Plans LLC v. Sutter, No. 12-125, which will be heard this term, the Supreme Court will decide whether an arbitration agreement that does not expressly address class arbitration can nonetheless be interpreted to authorize that procedure.
15 Concepcion, 131 S. Ct. at 1748.
16 Id. at 1748, 1753.
17 Id. (citation omitted).
The College of Commercial Arbitrators ("CCA") is an invitation-only national organization dedicated to providing a meaningful contribution to the profession, the public and to the businesses and lawyers who depend on commercial arbitration as a primary means of dispute resolution.

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A New Policy on Mediator Credentialing

By Dwight Golann

The issue of mediator credentialing provokes strong feelings in many of us. We want to see mediation recognized as a true profession and end stories about incompetent neutrals. At the same time we treasure the openness of the field and do not want anyone to impose a single “correct” way to mediate. Credentialing almost inevitably brings these values into tension.

I won’t cover here the arguments pro and con on this issue. Instead let me summarize the recommendations of the ABA Section of Dispute Resolution Task Force on Mediator Credentialing, as approved by the Section Council in August 2012. You can view the Task Force Report on the Section’s Resources web site: http://ambar.org/disputeresources.

Varieties of Credentialing

Credentialing is widespread. Private training organizations, for example, regularly give their graduates certificates, and courts impose qualifications for membership on panels. What certification or credentialing means, however, varies enormously from one context to another. Some organizations require only that their students attend class, while others demand that candidates go through training, obtain experience in the field and demonstrate competence in specific skills.

In Florida, for instance, mediators can qualify for court certification by accumulating points based on education, training and experience in mentorships. Maryland, by contrast, decided not to impose statewide credentialing and instead created a program that encourages mediators to improve their skills over time.

A private center in San Diego requires candidates to complete training, observe and co-mediate several disputes and then be assessed as they mediate simulated cases. The International Mediation Institute’s certification process emphasizes transparency: Candidates are certified after receiving training by an approved organization and having several clients submit assessments of their work to a third party who compiles the data. A summary of this information is then put on the web for review by prospective users.

The Task Force

The Task Force on Credentialing included practicing mediators, academics, a system administrator and other experts. The question posed to the Task Force was whether to support credentialing activities by others, not whether the ABA should offer credentialing services itself. After fact-gathering and discussion, the members reached the following conclusions and recommendations about the need for credentialing and the characteristics of credentialing programs.

Need for Credentialing

Task Force members were divided on the basic questions of whether mediator credentialing has potential to assist consumers seeking a competent neutral and is the best process for competent mediators wishing to distinguish themselves in the marketplace, with no one holding a strong opinion. Members agreed that the need for credentialing is likely to be greatest:

- When a court or public or private entity requires disputants to use, or sponsors or refers disputants to, specific programs or mediators.
- When disputants enter mediation who are not knowledgeable about the process or the qualifications of individual providers and do not have counsel capable of advising them.
- When lawyers and other professionals who choose mediators do not have a good understanding of mediation or find it difficult to identify competent mediators in a particular field or geographic area.

A majority of Task Force members believed that credentialing is not needed in large civil cases involving repeat users, while a minority believed a need exists in smaller cases where parties are represented by counsel who do not have the knowledge or resources to select competent mediators.

Characteristics of a Credentialing Program

Perhaps the Task Force’s most important recommendations concerned the minimum standards of quality that a credentialing program should meet. A program should:

1. Clearly define the skills, knowledge and values that persons it credentials must possess. Without a clear definition of the skills, knowledge and values a credentialed...
mediator must possess, credentialing organizations cannot assess whether a candidate possesses them and disputants cannot know what weight to place on a credential. Such definitions should be tailored to a specific form of mediation (family, large commercial, small claims, transformative, etc.) for which the credential is issued.

2. Ensure candidates have training adequate to install those skills, knowledge and values. Such training should include:
   a. Substantial instruction, including experience acting as mediator in role-plays similar to the types of disputes for which the candidate seeks credentials.
   b. Observation of one or more actual mediations.
   c. Experience mediating one or more actual cases as co-mediator with a credentialed mediator.

3. Be administered by an organization distinct from the training organization. The Task Force concluded that it is problematic for the same organization both to charge for training and to assess whether its training has been successful. For the same reason that law schools are not permitted to decide whether their graduates pass the bar, training programs should not judge whether their efforts have been effective.

4. Have an assessment process capable of determining with consistency whether candidates possess the defined qualities. The Task Force believed that for credentialing to be credible, it must be based on a determination whether a candidate has acquired the skills, knowledge and values that comprise the credential. This requires a testing process based on specific criteria and a consistent method of evaluation.

5. Explain clearly to persons likely to rely on its credential what is being certified. Credentialing is justified in large measure by the difficulty that some users have in choosing a competent mediator. For this reason a credentialing program should explain in a clear and understandable manner, to the persons expected to rely on its credential, the skills, knowledge and values its mediators possess. Organizations should make clear in particular whether a credential signifies that a mediator has attained a given level of competence and experience or simply confirms their attendance at a program, and should describe the form, school or style of mediation the organization is certifying.

6. Provide an accessible and transparent system to register complaints and provide feedback. Promptly and fairly investigate complaints and, if appropriate, de-credential mediators. Not all credentialed mediators can be expected to display in practice or retain over a career the skills and values required by their credential. Credentialing organizations must have an accessible and transparent mechanism to receive complaints about their mediators. A majority of the Task Force believed organizations should also have a process to monitor the performance of credentialed mediators such as periodic requests for feedback, and, if a complaint is received, to promptly investigate and fairly assess it and, if appropriate, de-credential the mediator. A minority believed such monitoring was not feasible, and that at least in situations where the users are “repeat players” it would be enough that the substance of any complaints be made available to users.

Concerns about Credentialing

Most important, perhaps, Task Force members concluded that neither American users of mediation nor American mediators presently show sufficient demand for credentials to fund the cost of a strong credentialing system (the fees charged to candidates in the San Diego program, for example, total almost $5,000).

The Task Force cautioned, finally, that credentialing should not:
   • Evolve into mandatory licensing,
   • Exclude non-lawyers from becoming mediators,
   • Prevent disputants from voluntarily selecting a non-credentialed mediator.

ABA Section of Dispute Resolution Statement of Policy

The ABA Section of Dispute Resolution Council approved the report with the following statement of policy:

“The Section supports local initiatives and innovations in the field of credentialing, provided they meet the guidelines set forth in this report. Given, however, the lack of a consensus at this time about the attributes of the mediation process or a process for determining competency, the Section does not support creation of a single nationwide credentialing system.”

We hope the Section’s new policy will make mediator credentials more meaningful to the disputants who rely on them.

Endnotes

1 For excellent presentations, see www.law.suffolk.edu/ADRcredentials. For the results of a recent survey of international corporate counsel on what they seek in a mediator, see http://imimediation.orgimi-international-corporate-users-adr-survey-full-results.

2 This may be because most members believed there is a lack of consensus within the field about what skills and behaviors are necessary and appropriate for a mediator and what processes should be considered “mediation,” even within a specific subject area (although some members believed the field has, or could, do so for particular schools or styles of mediation).
Med-Arb: The Best of Both Worlds

By Martin C. Weisman

The combination of mediation and arbitration (Med-Arb) is an often-overlooked alternative dispute resolution vehicle. Med-Arb is a hybrid mechanism in which the parties attempt to reach a voluntary agreement with a third-party neutral first through mediation, and if that is not successful, through arbitration. San Francisco lawyer and arbitrator Sam Kagel is often credited with developing Med-Arb to settle a nurses' strike in the 1970s; today it is still most commonly found in the labor and international arenas, but it is also increasingly being used in commercial settings.

Med-Arb gives parties the best that mediation and arbitration have to offer, providing incentives to resolve issues promptly, efficiently and in a less costly manner. Facing the prospect of an adverse, non-appealable determination in arbitration, parties have an incentive to resolve their disputes at mediation: the few studies examining Med-Arb have generally found that parties were substantially more motivated to settle in mediation because they wanted to avoid the loss of control that would come in the arbitration phase.1

It is important to note that Med-Arb is not a "one-size-fits-all" kind of process; each Med-Arb should be tailored to the circumstances of the dispute and needs of the parties and should be undertaken only with the parties' full, voluntary consent.

Consideration of the Med-Arb Process

The suggestion to use the Med-Arb process almost always arises at the initial meeting with the neutral. Whether the provider is selected as a mediator or as an arbitrator does not matter, for it is at the point and time of the initial meeting with counsel and perhaps the parties that the concept usually germinates. A common factor in determining whether Med-Arb is appropriate is the willingness of the parties to settle, which usually can be identified at the time of the pre-hearing or pre-mediation conference.

On many occasions, when an ADR provider is selected as an arbitrator, counsel may request Med-Arb at the pre-hearing conference or even during the arbitration hearings if there is a possibility that all or a portion of the case can be settled if the neutral agrees to mediate all or some of the issues involved.

This scenario also applies in cases where a mediator is retained. Often a neutral is selected because of the advocates' familiarity and comfort with him or her, but this does not necessarily mean that the clients are equally comfortable with the neutral. Thus, if the Med-Arb process is being considered, the mediator-arbitrator often will schedule a second pre-hearing to meet with clients and counsel to discuss the Med-Arb process, explaining what it is, how it works and that if the mediation does not end in agreement, he or she will render a final, binding decision. At that conference, it is imperative that the mediator-arbitrator describe both the benefits and criticisms of the process.

Med-Arb is a voluntary process, and the parties' freedom to choose it, as well as the neutral, contributes to its success. The process and its scope should always be in the hands of the parties, starting with the initial pre-hearing conferences in which the neutral talks about Med-Arb and the parties' expectations. Throughout discussions, the neutral should underline the fact that the process is up to the parties and that they, not the neutral, determine its boundaries.

The American Arbitration Association (AAA) offers mediation services to all those who sign up for

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its arbitration services. When the neutral retained is an arbitrator, in the initial meeting with counsel the advocate will generally identify and suggest, based upon the nature of the claims involved, whether mediation is appropriate. It is important to note that the AAA Med-Arb process uses different neutrals for the mediation and the arbitration portions of a Med-Arb.

Critiques of Med-Arb

Many of the criticisms and complaints surrounding the traditional Med-Arb process are actually concerns about possible abuses by the neutral mediator-arbitrator. To create a productive and fair process, the neutral must have certain essential skills. First, he or she should be accomplished and experienced in both mediation and arbitration and understand the requirements and standards for both roles. (There are mediation and arbitration protocols governing the ethical standards in each process, but none of the standards encompasses their combination.) Second, the neutral must be able to move from a facilitative role to an evaluative, decision-making one. Third, the neutral must be able to disregard the information and the positions of the parties that he or she learned during the mediation. Finally, the neutral must be able to gain and keep the trust of the parties and establish and maintain credibility for the process. The neutral’s personality, substantive expertise and experience all play significant roles in creating and promoting this trust.

A common critique of Med-Arb is that information shared during confidential mediation caucus sessions will impact the arbitration award. Some arbitrators do not consider this to be a problem; others decline to serve as mediator-arbitrators for just this reason. Certainly, the influence of confidential information is a potential problem, but as long as the mediator-arbitrator informs the parties how confidential information will be handled throughout the Med-Arb, these concerns can be ameliorated. Specifically, the mediator-arbitrator should address how he or she will deal with information in caucus and in the arbitration hearings. Ideally, the neutral should start the arbitration as if there had been no mediation, but the neutral should also tell the parties that he or she is a human with a brain that remembers but will make every effort to disregard what was said or presented in the mediation. Judges do this all the time when receiving information that should not be admitted into evidence, commonly practicing “temporary amnesia,” and mediator-arbitrators can do it, too. In my discussions with providers who have performed Med-Arbs, nearly all said they believe that the concerns about the misuse of confidential information are overstated.

Benefits of Med-Arb

The few studies of the process clearly support the notion that Med-Arb does seem to reduce costs and increase the efficiency of the dispute resolution process. Med-Arb is most likely to be successful in cases in which there are many complex interrelated issues and the arbitration hearing is expected to be lengthy. Of approximately 12 Michigan-based Med-Arb cases in which I have served as the neutral in the past few years, only two have gone to the arbitration stage. All these cases were complex commercial disputes involving a variety of issues. In the two matters that did go to arbitration, the number of issues arbitrated was significantly reduced as a result of agreements obtained during the mediation stage.

In my experience as a Med-Arb provider and in my discussions with those who have used Med-Arb, I have concluded that those who have never utilized the process tend to fear the unknown and be critical of it. In reality, given Med-Arb’s flexibility and the variations that can be incorporated in a Med-Arb process, there really is no reason for advocates and their clients in complex commercial cases not to try it. Med-Arb will continue to grow as a viable and effective process because it is an economical, efficient and fair method for the settlement of disputes.

Endnotes


Hybrid mediation-arbitration proponents claim that Med-Arb joins mediation’s flexibility with arbitration’s finality. Arguing that the benefits outweigh the negatives, proponents believe self-determination is embodied within the initial consent agreement. Yes, Med-Arb results in settlement, but the adage “if something sounds too good to be true, it probably is” applies: “Med” and “Arb” occur in forms detrimental to the best qualities of each. This article discusses the most common Med-Arb model, where the same neutral mediates and then, if the mediation does not produce an agreement, arbitrates.

Confidentiality at Risk

Weisman states that the neutral must be able to disregard mediation communications during the arbitration phase. The weight of psychological evidence, however, suggests people have great difficulty deliberately disregarding information. Evidence, for example, indicates that judges do not disregard inadmissible information when making substantive decisions. Further, and especially relevant for Med-Arb, judges have been found to be less able to ignore inadmissible evidence when making determinations that they consider at low risk of being reviewed by a higher court. If judges are unable to reliably disregard information, how can we expect arbitrators (who face little risk of review) to not consider mediation communications during the arbitration phase? Weisman’s own Med-Arb agreement provides: “Any confidential information received during the mediation will not be used [by him] in rendering a decision as arbitrator,” which seems an aspirational statement at best. Weisman’s Med-Arb agreement further notes, “nothing disclosed in [caucus] may be considered in the arbitration process unless introduced by either party independently during the arbitration.” Being human means that we are not completely in control of our thought processes. Parties should be aware of this limitation and be wary of any neutrals claiming to be able to keep a secret from themselves.

Med-Arb May Inhibit Candor in Mediation

Mediators rely on free information exchange to identify interests, assist in correcting information asymmetries, reality-test assumptions and build trust between the parties. When they know that the mediator may later assume the role of arbitrator, advocates and parties will not be as candid with the mediator regarding the weaknesses in their arguments or with information that may be detrimental to their positions. Advocates and their clients will carefully guard their statements, for fear they could be used against them in arbitration. Thus the information needed to craft a lasting, reasonable settlement will not be available.

If same-neutral Med-Arb is a form of crack designed to addict new mediation junkies, the product lacks purity and costs too much.


**Mediator-Arbitrator Neutrality is Questioned**

While there is a spectrum of mediation styles, legal mediation is most often characterized by the neutral firmly controlling the discussion, engaging in some level of case analysis and providing substantive settlement recommendations based on predicted court outcomes. Mediators accustomed to this style may struggle to reality-test parties’ arguments effectively in caucus without signaling their views about the merits of the claims. The mediator in Med-Arb controls the BATNA (the best alternative to a negotiated agreement), and the parties will naturally examine any clues as to the neutral’s preferences. Instead of the neutral helping parties to determine their BATNA, the parties will attempt to determine from the mediator clues as to their own BATNA.

This phenomenon occurs in the most common Med-Arb alternative: Arb-Med. The Arb-Med neutral conducts the arbitration first, seals the award and then mediates the dispute. The parties will carefully watch the neutral’s subsequent statements and will attempt to glean information about the award. In Med-Arb, the award is yet to be determined, providing opportunity for the parties to influence the prospective award and determine what that award might be, to see whether a settlement would be preferable.

In Med-Arb, the neutrality issue survives even after mediation ends. It is likely that the mediator will learn the potential settlement range during the mediation phase. Once in arbitration, however, the neutral is charged with impartially rendering the award according to the evidence, and decisions falling outside the settlement range will naturally be met with displeasure by the disadvantaged party. The arbitrator is certainly acting with impartiality, but to one party’s dissatisfaction. Despite fulfilling the obligations of the role, the neutral will no longer appear “impartial,” even though the parties consented to the process. In sum, the Med-Arb hybrid provides additional pressure for the arbitrator to issue a compromised award that “splits the baby,” a common critique of arbitration.

**Parties Relinquish Self-determination**

Mediation is unique in its informality and for the ability of parties to speak freely without fear that they can be harmed for their candor. According to the Model Standards of Conduct for Mediators, “Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.”

According to Weisman, usually the parties do not seek out Med-Arb but consider it at the neutral’s suggestion. While parties do exercise self-determination in agreeing to Med-Arb, the neutral suggesting the process may not effectively detail all the limitations of Med-Arb. Self-determination is more clearly exercised where advocates request Med-Arb.

What about self-determination beyond the initial agreement? The parties have an incentive to retain self-determination by reaching a mediated settlement. But what if one or both sides no longer see the neutral as impartial? Self-determination in mediation occurs throughout the process, not simply at the initial agreement stage. Parties in some respect are always negotiating for the third party neutral’s perception, but Med-Arb elevates this to a greater degree. Self-determination would be greater in Med-Arb if the parties could each opt out and select an alternative arbitrator. Most Med-Arb agreements require the parties to use the same neutral for both phases and thus leave no recourse if either party is unhappy with the neutral’s performance in mediation.

**Med-Arb Changes the Dynamic of the Mediation**

**Caucus or Ex Parte Communication?**

Med-Arb allows parties to have ex parte conversations with their future arbitrator in confidential mediation caucus sessions. Ideally, the mediation and the arbitration processes are distinct and in mediation the parties are focused on working to avoid the arbitration phase. However, there is the potential for advocates to use the mediation, and the caucus sessions in particular, offensively in anticipation of arbitration. Because parties cannot possibly address arguments made by the other side during a confidential mediation caucus, mediation’s core principle of confidentiality may then be in direct conflict with a fundamental tenet of arbitration and due process: the ability to know of and confront the other side’s arguments.

**Incentives to Arbitrate the Mediation**

Mediation communications in private caucus sessions provide the opportunity for advocates to “poison the well.” Advocates may utilize these separate caucus sessions to reveal unfavorable information about the
other side, knowing that the other side will not know of these communications and be able to rebut them. The mediation session may be far more formal and adversarial than it might be otherwise. The impending arbitration phase may provide a carrot to “behave” that leads to settlement, but it also creates a competing incentive for the “Arb” to leak into the “Med.” Placing the prospective decision-maker in the room changes the dynamics: Instead of mediation, the “Med” in Med-Arb may perilously become more akin to a judicial settlement conference.

**Illusory Time and Cost Savings**

The ideal Med-Arb neutral will be equally skilled in both facilitative mediation and arbitration, but these are vastly different skills and mindsets, and finding the right neutral may take considerable time. Further, to be prepared for this process, an advocate should be thoroughly prepared for both the mediation and arbitration. Finally, incentives towards formality and the resulting adversarial tactics may increase time and cost. Same-neutral Med-Arb may take more time and money than different-neutral Med-Arb.

**Sparse Institutional Administration of Med-Arb**

The American Arbitration Association (AAA) recommends same-neutral Med-Arb only in unusual circumstances. JAMS does not recommend same neutral Med-Arb but will administer cases if it is within the contract or the parties have stipulated to it, and JAMS’ ADR clause-drafting guide neither mentions nor provides suggested language for same-neutral Med-Arb. The International Institute for Conflict Prevention and Resolution cautions that “to ensure the integrity of the arbitration process, Med-Arb agreements should provide that the arbitrator shall not be the same person who served as mediator in the matter.” These organizations allow for different-neutral Med-Arb, but they do not have specific Med-Arb rosters. Med-Arb is not a new phenomenon, and these organizations exist to administer and settle disputes. If this is such a good idea, why have they not endorsed it and moved to develop Med-Arb as a part of their business models?

**Conclusion**

To conduct same-neutral Med-Arb correctly requires an individual with the substantive expertise to serve as the arbitrator and the facilitative skills to remain neutral during the mediation. The consent agreement must include confidentially waivers and an explicit explanation and waivers of the risks discussed above. Ideally, the mediation would not include caucuses to avoid confrontation issues and would include an opt-out clause to allow the parties to utilize a different neutral for arbitration. Med-Arb is not conducted this way, resulting in risk to the quality of both the “Med” and the “Arb.” Without question, the ability of parties to design a creative and individualized dispute process is an important feature of ADR. Parties are free to select Med-Arb, but given the same-neutral hybrid’s inherent deficiencies, why choose to do so? Stick with different neutral Med-Arb. It is an excellent way to have your cake and eat it, too. ◆

**Endnotes**

2 Kristen M. Blankley, Keeping a Secret From Yourself? Confidentiality When the Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case, 63 BAYLOR L. REV. 317, 325 (2011).  
5 _Id._  
6 _Id._  
7 Blankley, supra note 2.  
9 MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard 1(a) (2005).  
11 AMERICAN ARBITRATION ASSOCIATION, A GUIDE TO DRAFTING DISPUTE RESOLUTION CLAUSES.  
12 Conversation with JAMS Office of General Counsel, on April 25, 2013.  
13 JAMS, JAMS CLAUSE WORKBOOK.  
Dispatch from Hong Kong

By David Sandborg

Editors’ note: Recognizing that the world is becoming a smaller place, Dispute Resolution Magazine is launching a regular feature to showcase both international dispute resolution and domestic developments outside the United States. The editors welcome suggestions for future issues.

After a century and a half as a colony of Great Britain, sovereignty over Hong Kong reverted to the People’s Republic of China on July 1, 1997. Although now a Special Administrative Region within the People’s Republic of China, Hong Kong was given a “high degree of autonomy” to run its own affairs, retained its traditional common law legal system (within a civil law country) and remained a robust capitalist economy (within a Communist state). This unique arrangement came to be known as “One Country, Two Systems.”

Hong Kong has taken full advantage if its unique status in many areas, not the least of which is its continuing leadership in the field of dispute resolution. In just the past few years, there have been major developments in the law and practice of both mediation and arbitration in Hong Kong. Among a number of important changes, a new statute (called an “ordinance” in Hong Kong) governing mediation and another new statute applicable to all arbitrations seated in Hong Kong have been enacted. Both the Hong Kong government (through the Department of Justice) and the Hong Kong judiciary have been major catalysts in bringing about these and other significant changes.

Mediation

Initiatives of the Hong Kong Government

In a major policy address in 2007, the Chief Executive of Hong Kong called for action to more effectively utilize mediation to resolve both higher-end commercial disputes and smaller local disputes. Although mediation had been used in the construction industry for a number of years and to some extent in family law matters, it had not been widely used in commercial disputes generally or in connection with litigation.

Following the Chief Executive’s address, in 2008 the Secretary for Justice (called the Attorney General under British rule) established a cross-sector Working Group on Mediation to study the current development of mediation and the provision of mediation services in Hong Kong.

Three sub-groups were formed under the Working Group to study and make recommendations in the following areas: 1) public education and publicity; 2) accreditation and training; and 3) regulatory framework. In February 2010, the Working Group, taking into account the work of the several sub-groups, made its report with a number of recommendations.

Among the most significant of these recommendations was one calling for the enactment of a stand-alone Mediation Ordinance to provide a legal framework for mediations conducted in Hong Kong. As a result of that recommendation, the Hong Kong legislature (Legislative Council) enacted the Mediation Ordinance in 2012,

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To take effect on January 1, 2013. As a Department of Justice press release issued before the Mediation Bill was introduced in the Legislature explained, the Mediation Bill sought to establish a legislative framework for conducting mediation without hampering the flexibility of the process and to assist in the promotion of mediation in Hong Kong. The press release went on to explain that, “The Bill is necessary to provide legal certainty regarding confidentiality of mediation communications and admissibility of mediation communications in evidence.”

Initiatives of the Hong Kong Judiciary

In recent years, the judiciary in Hong Kong has actively promoted the use of mediation in civil proceedings. The chief justice issued Practice Direction 31 (PD31) applicable to all civil proceedings in the Court of First Instance and the District Court (except for particular proceedings in specialist lists for which similar but separate mediation procedures are provided). PD31 came into force on January 1, 2010.

PD31 requires that within 28 days from the close of pleadings, parties must file a Timetabling Questionnaire together with a Mediation Certificate signed by the party and its attorney. The Mediation Certificate must state the following: 1) whether or not the party is willing to engage in mediation and if not, the reasons; 2) that the party’s attorney has explained the availability of mediation to resolve the dispute and the cost of mediation as compared to the cost of the litigation; and 3) that the party understands the contents of PD31.

A party wishing to attempt mediation must serve a Mediation Notice on the other side, and the party receiving the Mediation Notice must respond within 14 days. If the respondent does not agree to attempt mediation, reasons must be given. PD31 provides that the court, in exercising its discretion as to the costs of the action, may make an adverse-costs ruling against the party whose refusal to mediate the court has found to be unreasonable.

Accreditation of Mediators

For a number of years, the Mediator Accreditation Committee (MAC) of the Hong Kong International Centre (HKIAC) has been the principal accrediting body for mediators in Hong Kong. The accreditation process of the MAC requires that a candidate take and pass a mediation training course of 40 hours approved by the MAC, pass two independent assessments and commit to a continuing professional development obligation.

However, over time a number of other organizations instituted their own procedures for accrediting mediators. As mediation became more popular and gained government support, the sentiment for one central accrediting body grew.

In April 2013, the Hong Kong Mediation Accreditation Association Limited (HKMAAL) was launched. The four founding members of HKMAAL are the Law Society of Hong Kong (solicitors), the Hong Kong Bar Association (barristers), the Hong Kong International Arbitration Centre and the Hong Kong Mediation Centre. The HKMAAL is expected to be the premier accreditation body for mediators in Hong Kong, discharging both accreditation and disciplinary functions. While not itself providing training courses, it will set standards for training and accreditation.
Arbitration

A new arbitration law, repealing the existing Arbitration Ordinance, was enacted in November 2010 and became effective in June 2011. Under the repealed arbitration ordinance, it was said that Hong Kong had a “dual legal regime” for arbitrations that had their juridical seat in Hong Kong – part of the arbitration ordinance was applicable to “domestic” arbitrations, and different provisions applied to “international” arbitrations. The part of the repealed ordinance that applied to international cases was the UNCITRAL Model Law on International Commercial Arbitration (the UML), which was adopted in Hong Kong and became effective in 1990. Hong Kong was one of the first jurisdictions to enact the UML, which was initially promulgated by UNCITRAL in 1985.

The most significant change brought about by the new arbitration ordinance was the abolition of the “dual regime” and the application of the UML (as amended in 2006) to all arbitrations seated in Hong Kong, both domestic and international. Because the domestic regime of the repealed ordinance contained provisions that were important to the construction industry, a very important industry in Hong Kong, many of those provisions were made available in the new ordinance by means of a list of “opt-in” provisions. These “opt-in” provisions are contained in Schedule 2 of the ordinance and include provisions for consolidation, court decision on a preliminary question of law, challenge to an award on the ground of “serious irregularity,” appeal from an award on a question of law and agreement on a sole arbitrator.

Other important changes brought about by the new ordinance include provisions relating to confidentiality, the “writing requirement” (‘Option I’ of Article 7 of the UML, as amended in 2006), new procedures for “preliminary orders” in conjunction with requests for interim measures and a number of others. As the repealed ordinance did, the new ordinance provides that the arbitrator may act as a mediator if the parties agree in writing.

The Hong Kong International Arbitration Centre

Established in 1985, the Hong Kong International Arbitration Centre (HKIAC) has increasingly become a focal point for both arbitration and mediation activities in Hong Kong. Located in the heart of the central business district, its premises have been recently renovated and the space has doubled. Its hearing rooms and facilities are available for ad hoc arbitrations, arbitrations administered by the HKIAC as well as other arbitral institutions, for mediations and for numerous other functions.

HKIAC is in the process of revising its administered arbitration rules (based on the UNCITRAL Rules and first promulgated by HKIAC in 2008) to reflect best practices and to enhance the efficiency of the arbitral process. Key changes in these rules include those relating to joinder of parties, consolidation of arbitrations, interim measures of protection and emergency arbitrators. These new rules are expected to take effect in the latter half of 2013.

Conclusion

At the crossroads of trade and commerce in the Asia-Pacific region, Hong Kong is well equipped to accommodate the resolution of a wide range of disputes, both domestic and international, with an up-to-date legal framework for both arbitration and mediation, support and encouragement from the government and the judiciary, world-class facilities and well trained and experienced professionals to serve the needs of the parties. Moreover, to encourage foreign parties to use Hong Kong as a venue, there is no requirement for special admission in order for foreign lawyers to represent their clients in arbitrations or mediations. •
In the spring of 2010, the Dispute Resolution Section of the ABA bestowed its highest honor, the D’Alemberte-Raven Award, on the Honorable Warren Knight. In conferring this award, the Section sought to give full public recognition to the immense contribution to the development of the field of alternative dispute resolution that Judge Knight set in motion when he founded JAMS in 1979 and then guided into maturity over the next three decades. Our field suffered a huge loss when Judge Knight died on November 15, 2012.

Perhaps more than anything else, Judge Knight’s journey teaches us the necessity and power of interdependence in our field between the private and the public sectors. Judge Knight’s career illuminates graphically the kind of symbiosis to which private and public provision of ADR services should aspire – not a forced passive tolerance, but an active, complementary, mutually supportive and deeply invigorating relationship.

Warren Knight began his work in our field as a judge. Sitting in Superior Court in California in the mid- and late 1970s, he saw, firsthand, what damage huge backlogs can do to justice – and to the people’s confidence in the reality of the rule of law. Recognizing that justice so long delayed threatened to make justice a mirage, Judge Knight and his presiding judge decided that they needed to commit substantial judicial resources to settlement work. Under the new court policy that he helped shape, Judge Knight personally hosted hundreds of settlement conferences.

As significant, Judge Knight played a lead role in establishing a new “Settlement Week” program. Two prescient features distinguished this program: (1) the court committed all of the time of 12 of its judges to settlement work for each of these settlement weeks, and (2) the court enlisted the settlement services of 50 respected members of the private bar (25 plaintiffs’ lawyers and 25 members of the defense bar). By so combining and coordinating the resources of judges and lawyers, Judge Knight and his colleagues inaugurated a mutually supportive relationship, one through which both the public and private sectors could serve the pressing needs of litigants and through which each could teach and learn from the other.
Viewing the system of justice holistically, Judge Knight recognized that the public and private side are deeply connected, so that every serious problem in one area has far reaching effects on the other.

Ironically, it was the fact that, in the late 1970s, the public’s leaders were not willing to commit the resources necessary for the public side to support its fair share of dispute resolution services that led Judge Knight to consider moving over into the private sector. From his perch on the bench, he could see the dimensions of a need that he knew public institutions simply would not meet.

So, even though virtually everyone (save his wife and best friend) thought he was setting off on a fool’s errand, he decided to leave the security and prestige of his position on the bench and borrow money to launch a private dispute resolution enterprise. It was an enterprise, at the time, of one.

It also is ironic that much of Judge’s Knight’s business in the early years of his “enterprise” came from the public sector, as a result of a decision (reflected in a statute enacted in California in 1979) to require modest-size cases to participate in what was called “judicial arbitration,” even though the time of no sitting judges was allocated to these proceedings. Thus, cases that the public court system in effect pushed out of itself became the principal sources of Judge Knight’s business.

In the early years, however, there was pushback from these cases that the courts tried to push out, so much pushback that Judge Knight had to schedule 10 “judicial arbitrations” a day to feel relatively confident that the parties in five cases would actually show up. By today’s standards, “hearing” four or five cases a day seems unimaginable. And the fact that the dollar values were modest did not mean that these matters were simple or unaccompanied by strong feelings. But Judge Knight brought wisdom and worldliness to every proceeding – and provided the parties with an opportunity that they would otherwise never have had.

Because he was so good at what he did, because he delivered so much value to line-weary litigants, the queue for Judge Knight’s services quickly grew so long that he could not meet the demand the legislature had helped create. So, gradually, he persuaded other retired judges to join his enterprise.

Over the next decade or so Judge Knight and his colleagues struggled to define themselves. For a time, they were pushed into a high-volume business model that they discovered to be deeply unsatisfying. They learned that the most significant rewards of their work came not from closing cases but from helping parties feel that they had been given a full opportunity to explain their side of a dispute, had gained a better understanding of their circumstances and had identified their options more reliably. Judge Knight and his colleagues came to understand that their “product” was the quality of the process they sponsored. And in demanding this kind of quality from themselves, they set an elevated example for other ADR service providers – in both the private and the public sectors.

As the years passed and the needs of litigants and lawyers evolved, Judge Knight and his colleagues gradually expanded the range of services they provided. “Judicial arbitration,” as originally contemplated in the statutes, turned out not to be the panacea for which the legislature had hoped. Reformers, client groups, lawyers and judges searched for other tools for responding to the needs that conventional litigation left unmet. Under Judge Knight’s leadership, panels at JAMS actively participated in the development of more sophisticated forms of arbitration, a range of approaches to mediation and neutral evaluation and innovative uses of special masters and referees.

Regardless of the process setting in which he was working, however, there were four remarkable irreducibles that defined Judge Knight: warmth, wisdom, independence and integrity. In Judge Knight, these were not intangibles. The people he served could feel them. They inspired respect and love.

The final chapter in Judge Knight’s story is not about the maturation and character of the models of service he and his colleagues developed. Rather, in that final chapter, Judge Knight returned, full circle, to the roots of his calling. In 2002 he played a key role in establishing the JAMS Foundation – an instrument that was designed for the purpose of returning to the people the resources and learning, resources and learning that are being used to extend the constructive role of ADR around the world.

The foundation delivers more leveraging resources back to the public sector and to the world ADR community than any other entity. It has made millions of dollars of grants to a huge range of public and nonprofit organizations all over the globe, all of which are working to improve how people, especially young people and people in under-served communities, cope with and resolve conflicts. Through this foundation, Judge Knight will continue to teach us how rich and rewarding the symbiosis between the private and the public ADR communities can be.

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Not All State Laws Prohibiting Arbitration Agreements Are Preempted by the FAA

In State of Washington v. James River Ins. Co., 292 P.3d 118 (Wash. 2013), the Supreme Court of Washington affirmed the trial court ruling that a mandatory arbitration clause in an insurance contract was unenforceable under state law. Generally, state statutes prohibiting arbitration agreements are preempted by the Federal Arbitration Act. However, the court noted that the McCarran-Ferguson Act provides an exception to this general rule when the state statute was enacted “for the purpose of regulating the business of insurance.” Here, the state statute regulates the “business of insurance” directly because it regulates the insured-insurer relationship. Thus the McCarran-Ferguson Act shields the state statute from preemption by the FAA. To read more: http://www.courts.wa.gov/opinions/pdf/876444.opn.pdf.

Challenges to the Formation of a Contract, Rather Than to Its Validity, Must Be Decided by a Court When Determining Arbitrability

In SBRMCOA LLC v. Bayside Resort, Inc., 707 F.3d 267 (3d Cir. 2013), the Third Circuit affirmed in part and vacated in part a District Court’s order to compel arbitration in a contract dispute. The Third Circuit noted that its ruling in Sandvik AB v. Advent Int’l Corp. 220 F.3d 99 (3d Cir. 2000), which drew a distinction between claims that a contract is void, which are not arbitrable, and claims that a contract is voidable, which are arbitrable, is called into question by the intervening Supreme Court decision in Buckeye Check Cashing v. Cardegna, 546 U.S. 440 (2006). In Buckeye, the Supreme Court rejected the void/voidable distinction and held that the correct distinction is between challenges to contract formation and contract validity. To read more: http://www.ca3.uscourts.gov/opinarch/072436p.pdf.

Undisclosed Campaign Contributions by a Party to an Arbitrator’s Judicial Campaign Are Not Evidence of Evident Partiality

In Freeman v. Pittsburgh Glass Works, LLC, 709 F.3d 240 (3d Cir. 2013), the Third Circuit addressed a matter of first impression: whether undisclosed campaign contributions can be proof of evident partiality. The court determined that undisclosed campaign contributions are not evidence of partiality because they are on the public record, the contribution was relatively small and under state law the candidate must create a campaign committee and could not directly solicit funds. In addition, attorneys for the plaintiff in this case contributed five times that of the defendant’s contribution to the arbitrators’ campaign. Furthermore, the court noted that judicial elections are common throughout many states and “to conclude that an arbitrator demonstrates evident partiality simply based on non-disclosure of publically recorded and relatively small campaign contributions would impose too great a burden on the system.” To read more: http://www.ca3.uscourts.gov/opinarch/122026p.pdf.

Nondisclosure of Counsel’s Affiliation with Same ADR Provider As Neutral Arbitrator Is Grounds to Vacate Arbitration Award

In Gray v. Chau, 151 Cal. Rptr. 3d 791 (Cal. App. 2013), the parties agreed upon a neutral arbitrator, but prior to the hearing the counsel for the defendant affiliated with the same ADR provider organization as a neutral arbitrator without disclosing the relationship. The California Court of Appeals vacated the arbitration award, citing Ethic Standard 8, which requires disclosure of a relationship between the dispute resolution provider and a party or lawyer in the arbitration. To read more: http://www.courts.ca.gov/opinions/documents/B238304.PDF.

 Fees Awarded Can Include Costs Incurred in Pre-Dispute Mediation As Long As They Are Reasonable

In Grossman v. Park Fort Washington Ass’n, 151 Cal. Rptr. 3d 48 (Cal. App. 2013), the California Court of Appeals awarded attorneys’ fees, including time spent preparing for mediation, pursuant to the Davis-Stirling Common Interest Development Act. The court noted the strong public policy favoring ADR and determined the dispositive term in the statute is “reasonable.” Thus, absent evidence of unreasonableness, costs expended in pre-litigation ADR may be recovered in an action to enforce the governing documents of a common interest development. To read more: http://www.courts.ca.gov/opinions/documents/F063125.PDF.

Class Arbitration Waiver and Fee-Splitting Provisions Are Not Unconscionable in Light of Supreme Court Precedent

In Muriithi v. Shuttle Express, Inc. ___ F.3d ___, 2013 WL 1287859 (4th Cir. 2013), the Fourth Circuit held that a class arbitration waiver and a fee-splitting provision were not unconscionable under state law in light of Supreme Court rulings in AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), and Green Tree Financial v. Randolph, 531 U.S. 79 (2000). In Concepcion, the Supreme Court held that a class action waiver may not be used to invalidate an otherwise valid arbitration agreement. In Green Tree Financial, the Supreme Court held that a fee-splitting provision may render an arbitration agreement unenforceable if the costs are so prohibitive as to effectively deny an employee access to the arbitral forum. Here, Muriithi failed to provide evidence of the cost of arbitration or his ability to pay and failed to meet the standard in Green Tree Financial. To read more: http://www.ca4.uscourts.gov/Opinions/Published/111445.P.pdf.

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