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As our world is getting smaller, our disputes are becoming larger and not necessarily confined by national borders. As we know, communication is both instantaneous and continuous, with cell phone calls, emails, text messages, video chats, and other forms of connection allowing us to expect immediate responses and ongoing engagement throughout distant time zones, cultures, economies, and judicial systems.

Global trade, international business transactions, and cross-border commerce compel us to expand our horizons, and our Section is also broadening its reach: This month’s issue of Dispute Resolution Magazine provides a wealth of information about the robust development and growth of international dispute resolution.

Although the Dispute Resolution Section has been active internationally since its inception, activity has increased in recent years. In 2008, we sponsored an International Mediation Leadership Summit at The Hague in the Netherlands, at which we talked with our European colleagues about building an international dispute resolution profession.

A few months ago, several Section leaders traveled to Asia on a trip organized by former Chair John Phillips. This was self-funded travel (not supported with Section funds), and our plans allowed us to visit with dispute resolution leaders in Vietnam and Thailand. In Vietnam, we were guided by our own Chuck Crumpton, Co-Chair of the Section’s Mediation Committee and member of the Section Council, who is fluent in Vietnamese and teaches several university courses in the country. ABA president Jim Silkenat, who was attending a New York Bar meeting in Hanoi, joined us to talk with our Vietnamese hosts and members of the delegation about the many resources of the ABA and the Dispute Resolution Section.

Plans are now being finalized for a trip to India in early 2015 under the leadership of Chair-Elect Geetha Ravindra. This trip will feature interactive programming planned by Section members and their counterparts in India. In addition, former Section Chair Bruce Meyerson is planning a possible trip to Cuba for the fall of this year with Academic Travel Abroad, a group that has organized trips for other ABA sections.

The program-packed spring conference, which will be held from April 2 to April 5 in Miami, will also provide many opportunities for attendees to learn about ADR in the international arena. Two programs on Friday afternoon will inform and engage our members about the intricacies of cross-border disputes and the protocols to resolve them. And Miami, a city long considered the gateway to South America, will certainly offer many chances to expand your worldview.

We are actively encouraging international attorneys and dispute resolvers to join the Section. Even if they are not licensed to practice law in the United States, international practitioners are welcome as associate members. Please urge your colleagues in other countries to join us.

Sit back now with this issue and travel with us through the international world of dispute resolution. The articles include a primer on arbitration of investor-state disputes, a summary of the basics of commercial international arbitration, a look at the European Union Mediation Directive, and a survey of mediators in other countries.

And if you think international ADR is all about business, you will probably think again after reading the article about how to mediate child custody and international parental child abductions. Interacting with different cultures enriches us all, as does championing the cause of diversity in the field. Ben Davis, Co-Chair of the Section’s Diversity Committee, reports on the results of a survey on participation, by diversity and gender, in international arbitration practice.

This issue also includes an article on the topic of regulation of mediation that cautions legislators and regulators to do no harm when crafting laws relating to mediation.

In addition to our regular features (Profiles in ADR, Research Insights, and ADR Cases), this issue introduces a new regular feature called On Professional Practice. We are pleased to have Paul Lurie, a partner at Schiff Hardin in Chicago, and Sharon Press, Director of the Dispute Resolution Institute of Hamline University School of Law, as co-editors of this new feature, which will analyze issues of professionalism and offer Paul’s and Sharon’s perspectives on how practitioners can thoughtfully and effectively address them. Many thanks go to our hardworking retiring ethics columnists, Kimberly Taylor and Roger Wolf, Co-Chairs of the Section’s Committee on Mediator Ethical Guidance, for answering ethical inquiries from Section members with such good judgment. The committee continues to provide guidance and answers to practicing mediators.

I hope you enjoy your travels into this issue of Dispute Resolution Magazine.

Ruth V. Glick is Chair of the American Bar Association Section of Dispute Resolution and a commercial and employment mediator and arbitrator in the San Francisco Bay area. She can be reached at rvg@ruthvglick.com.
Top 5 Reasons to Choose Missouri

REPUTATION
Missouri was the first U.S. law school to offer an LL.M. exclusively focused on dispute resolution. Missouri consistently ranks as one of the top law schools in dispute resolution.

FACULTY
Our scholars generate important work influencing dispute resolution theory and practice around the world. We have one of the largest collections of full-time law faculty who focus on dispute resolution, publishing leading articles and texts.

CURRICULUM
Our program blends theoretical analysis, practitioner skills, and systems design work.

COMMUNITY
Our classes are small, creating a close community among faculty and students, forming lifelong bonds for networking and future collaboration. Classes generally are limited to LL.M. students.

DIVERSITY
Our student body is diverse – by age, race, nationality, legal background – which enriches the level of discussion inside and outside the classroom.
Almost three decades ago, the US Supreme Court acknowledged in *Mitsubishi Motors v. Soler Chrysler-Plymouth* that “[a]s international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade.”¹ Global economic integration has been fueled by technological innovation and development ever since, as information technology and affordable transportation have continued to erase the relevance of national borders for investments and other kinds of commercial activities.² This has increased the importance of transnational³ dispute resolution, including under agreed arbitral regimes in bilateral investment treaties, free trade agreements, or investment agreements with host states. Not surprisingly, international law has gained an increasingly important role.

The lack of a delocalized international court system with the power to resolve private cross-border disputes of all kinds has led to a fragmentation of dispute settlement fora,⁴ and arbitration seems to have become the preferred method for the resolution of such disputes. The prevalence of arbitration clauses in transnational commercial contracts at least indicates the perceived value of international arbitration vis-à-vis national court litigation.⁵ The reasons for preferring international arbitration over litigation in a given contractual setting depend on the circumstances and strategic considerations of the parties involved. Generally speaking, the benefits of arbitration are often considered to be “lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.”⁶

A study on the use of nonjudicial dispute resolution undertaken by the American Arbitration Association involving interviews with 254 corporate general counsel, associate general counsel, or people in similar positions of seniority in more than 250 legal departments revealed that the chief reasons for choosing arbitration were that it “saves time” (73%), “saves money” (71%), “has limited discovery” (66%), and “provides a more satisfactory process” (66%).⁷

One of the most appealing features of international arbitration is the cross-border enforceability of awards. Due to the widespread acceptance of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”),⁸ arbitral awards, unlike court judgments, can be effectively enforced in almost every corner of the world. Parties trying to enforce a court judgment often must rely on
“comity” instead of more predictable and reliable legal rules. For resolving a dispute that spans both borders and legal systems, international arbitration seems to be the best way for all parties to get an unbiased hearing and enforceable decision.

The Landscape of International Arbitration

Domestic and international arbitration are structurally different and should not be conflated. International arbitration proceedings are governed by a plethora of different legal rules and systems, whereas a domestic arbitration is embedded in a single national legal order. The most important difference is the New York Convention, which applies only to “arbitral proceedings” not considered as domestic awards in the State where their recognition and enforcement are sought.19

The choice between institutional versus ad hoc arbitration can have a significant impact on a case, and thus should not be taken lightly. Institutional arbitration might be preferable for parties who are looking for established rules and procedures; ad hoc arbitration will provide parties with more procedural flexibility. This flexibility, however, carries many risks for inexperienced users, such as substantial delays and expenses in mishandled proceedings. The “success” of an ad hoc arbitration proceeding may depend to a greater extent on the parties’ procedural cooperation. Some of the most frequently used arbitral institutions for international commercial arbitration are the Court of Arbitration of the International Chamber of Commerce (ICC) in Paris, the London Court of International Arbitration (LCIA), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), and the International Centre for Dispute Resolution (ICDR) established by the American Arbitration Association. In the context of investor-state arbitration, the International Centre for the Settlement of Investment Disputes (ICSID) plays a key role (See the article by Jack Coe in this issue, page 9). In ad hoc arbitration, procedural efficiency considerations might lead the parties to agree, at least, on the use of preexisting arbitration rules. The most important and frequently used arbitration rules in ad hoc proceedings are the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.

The arbitration rules should not be confused with the lex arbitri, or even the law governing the substance of the dispute. The difference is best explained as follows: The arbitration rules are the set of procedural rules agreed by the parties, whereas the lex arbitri is the national legislation governing the arbitration at its seat. Because the seat of arbitration thus provides mandatory rules applicable to the proceeding, its location should be chosen after careful consideration of those arbitration rules.

Pre-Hearing Considerations

Appointment of Arbitrators

Selecting the arbitrators is one of the most important strategic decisions a party can make in an international arbitration. Arbitrators generally should be impartial, independent, and sufficiently qualified from a substantive perspective but also capable of conducting the proceeding efficiently and fairly. The most effective way for counsel to identify such arbitrators is to communicate with prospective candidates, as noted in the recently issued International Bar Association’s Guidelines on Party Representation in International Arbitration, “to determine his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest,”10 which is widely done and generally considered appropriate. When an arbitral tribunal is composed of three arbitrators, counsel might be interested in communicating “with a prospective or appointed Party-Nominated Arbitrator for the purpose of the selection of the Presiding Arbitrator,” as the IBA Guidelines suggest.11 Such ex parte communications are generally permissible, but to avoid disputes, parties may want to discuss and agree to the process in advance.12 The parties, the IBA Guidelines recommend, can also agree to permit ex parte communications with a possible presiding arbitrator to assess the same expertise, ability, and other qualities listed above for arbitrators.13 But before taking any such steps, counsel should review the applicable arbitration rules for any special or diverging provisions. The ICDR International Arbitration Rules, for example, contain the following special rule on the subject:

No party or anyone acting on its behalf shall have any ex parte communication relating to the case with any arbitrator, or with any candidate for appointment as party-appointed arbitrator except to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate’s qualifications, availability or independence in relation to the parties, or to discuss the suitability of candidates for selection as a third arbitrator where the parties or party designated arbitrators are to participate in that selection. No party or anyone acting on its behalf shall have any ex parte communication relating to the case with any candidate for presiding arbitrator.14

SELECTING THE ARBITRATORS IS ONE OF THE MOST IMPORTANT STRATEGIC DECISIONS A PARTY CAN MAKE IN AN INTERNATIONAL ARBITRATION.
Discovery

Facts win cases. This probably holds true in international arbitration as much as in any other contentious proceeding. The crucial importance of evidence-gathering should thus need no further explanation. Close familiarity with the applicable rules relating to the gathering of evidence is also important for a very practical reason: As many readers know, up to 80 percent of the costs in US litigation can be incurred in the context of discovery. Greater access to potential evidence comes only at a higher cost.

Subject to any specifically applicable arbitration rules, the extent and form of discovery in international arbitration proceedings may depend on the legal background of the arbitrators and counsel in a particular case. Civil law jurisdictions generally mandate very limited, if any, document production. Common law jurisdictions permit broad discovery – and in the United States, very broad discovery. Without overgeneralizing, it seems fair to say that as legal cultures have merged in international arbitration practices, the trend, sometimes labeled the “Americanization” of international arbitration, has been toward broader document disclosure. Other American discovery tools, however, such as depositions and interrogatories, are not commonly used in international arbitration.

The IBA Rules on the Taking of Evidence in International Arbitration (“IBA Evidence Rules”) have attempted to strike a balance in this regard. According to Article 3, for example, a request to produce documents must describe “each requested Document sufficient to identify it” or describe “in sufficient detail […] a narrow and specific requested category of Documents that are reasonably believed to exist” and state the relevance and materiality of each document requested. Further, Article 3 “imposes” that the requesting party must be reasonably certain that such documents exist and are in the possession of the other party. Although the IBA Evidence Rules are not binding as such, they are often incorporated by reference into the procedural rules governing the arbitration by the parties’ agreement or by order of the tribunal. Even where the IBA Evidence Rules are not formally incorporated into the procedural rules, arbitrators often refer to them as reflecting best practices.

Contrary to a widely held misconception that international arbitration takes place in a legal vacuum, parties and advocates involved in international arbitration should be aware of the potentially drastic consequences that may flow from a failure to abide by document disclosure rules or orders in such proceedings.

The majority of the tribunal proceeded to decide the related issue against the party that failed to produce.

Written Submissions

International arbitration procedures are initiated by the claimant’s request for arbitration or notice of arbitration, which usually identifies the legal basis for the claim and provides a brief overview of the factual background and the parties. Depending on the particular case strategy and considering that the request is the first submission the arbitrators receive, a claimant may choose to provide more information in the request or notice than the bare essentials. Additionally, when an arbitral institution, rather than the parties, selects the arbitrators, the institution will rely on the request or notice to identify the characteristics it will seek in the arbitrator candidates. Lastly, the request or notice will inform the procedural schedule, which the arbitrators generally set in the first so-called Procedural Order, following the constitution of the tribunal and a first meeting of the tribunal with the parties.

At least one round of written submissions, known as a memorial and counter-memorial, usually follows. In
many international arbitrations, memorials are submitted sequentially, often in two rounds (including memorial, counter-memorial, reply, and rejoinder). The memorial must contain the entire direct case, all documents, witness statements, and legal arguments. Depending on the applicable arbitration rules, in very rare instances the parties also may agree to dispense with submitting memorials, but this is much less frequent than, for example, in US domestic commercial arbitration.

The customary practice in international arbitration, unlike domestic litigation, is for the parties to submit written fact witness statements and expert reports as well as all documentary evidence and copies of legal authorities together with the written submissions. Arbitral tribunals increasingly require that memorials be submitted electronically – and that the memorials include hyperlinks to cited documentary evidence and legal authorities.

There is generally no rule of precedent or stare decisis concerning legal authorities in international arbitration. Nonetheless, the rationale used by other tribunals in other cases may be persuasive. Depending on the applicable law, scholarly commentary, or even general legal customs and principles may be authoritative. Thus, for example, in international law, “international custom,” “general principles of law recognized by civilized nations,” and even “teachings of the most highly qualified publicists of the various nations” are considered sources of international law.23 In addition to international law, one or more national legal systems also may be applicable. Accordingly, proof of that national law must be provided by expert opinion and/or co-counsel from the relevant jurisdiction.

Hearing

A hearing usually follows the last round of written submissions. In some cases where witness testimony is not relevant, the parties may agree to have a “documents-only” arbitration and dispense with a hearing.24 Since extensive written material has already been submitted, oral argument should serve mainly to highlight the key points.

In practice, the hearing usually focuses on the examination of witnesses and experts. The written statements and reports submitted in advance of the hearing are usually taken as the witnesses’ and experts’ direct testimony, so that oral direct testimony at the hearing can be reduced to affirming and, if necessary, updating that written testimony.25 A major challenge for US litigators is the lack of prior deposition testimony; effective cross-examination requires greater preparation.26

In international arbitration it is accepted practice for counsel to interview fact and expert witnesses. Article 4(3) of the IBA Evidence Rules spells this out as follows:

23 “It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them.” Telltale signs that counsel drafted a witness statement or coached a witness, however, likely will diminish that witness’s credibility in the eyes of the arbitrators.

International arbitration can involve foreign language testimony. Experience shows that sequential translation takes more time than simultaneous translation but gives the witness an opportunity to reflect before answering questions. Use of translation, however, inevitably requires allocating more time.

It is fundamentally important for counsel to keep in mind that the arbitrators usually will have read the written submissions, including the written testimony, and that they will see the hearing as their opportunity to ask questions of the witnesses, experts, and counsel.

Concluding Remarks

International arbitration plays an increasingly significant role in the resolution of cross-border disputes. Such disputes naturally involve parties, counsel, and arbitrators from different jurisdictions and may be governed by one

There is generally no rule of precedent or stare decisis concerning legal authorities in international arbitration. Nonetheless, the rationale used by other tribunals in other cases may be persuasive.

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or more foreign legal systems as well as international law. Counsel experienced only in US court litigation need to consider these circumstances carefully and make early strategic decisions to address the nuances. However, US litigation experience certainly is an advantage in dealing with document exchange and other factual matters. ♦

The views expressed in this article are those of the authors alone and are not to be attributed to White & Case LLP or its clients.

Endnotes


3 The term “transnational law” was coined by Philipp Jessup in the 1950s, when he defined it as “all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories.” Philip C. Jessup, Transnational Law 2 (1956).

4 The International Court of Justice (ICJ) is a misnomer in that regard because it is competent to hear only state-to-state disputes concerning (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature or extent of the reparation to be made if established, would constitute a breach of an international obligation; (e) the existence of any fact which, in that regard because it is competent to hear only state-to-state

5 Carolyn B. Lamm & Eckhard R. Hellbeck, When to Arbitrate Rather Than Litigate, in International Litigation Strategies and Practice 191, 192 (B. Legum & E. Berghoff eds., 2nd ed. 2013).


9 New York Convention, art.1(1).

11 Id. art. 8(b).
15 See ABA Section of Litigation Member Survey on Civil Practice: Detailed Report 2 (Dec. 11, 2009), available at http://www.americanbar.org/content/dam/aba/migrated/litigation/survey/docs/report_aba_report.authcheckdam.pdf, (“When asked about the average cost of discovery as a percentage of litigation cost in cases that are not tried, the median response was 70%”).
16 See White & Case/Queen Mary Survey at 3 (“The survey confirms the widely held view that requests for document production are more frequent in the common law world: 74% of common lawyers, compared to only 21% of civil lawyers, said that 75-100% of their arbitrations involved such requests.”).
18 See White & Case/Queen Mary Survey at 2 (“The IBA Rules on the Taking of Evidence in International Arbitration … are used in 60% of arbitrations: in 53% as guidelines and in 7% as binding rules. Under most arbitration rules, the tribunal has the power to fill gaps in the procedural framework.”). See, e.g., ICC Arbitration Rules, art. 19; LCIA Arbitration Rules, art. 14.2; ICDR International Arbitration Rules, art. 16(1).
19 IBA Evidence Rules, art. 9(5).
20 Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Phil., ICSID Case No. ARB/03/25, Award, ¶ 400 (Aug. 16, 2007), annulled on unrelated grounds, Decision on Annulment (Dec. 23, 2010).
21 See id.
22 See, e.g., LCIA Arbitration Rules, art. 5.5.
24 See, e.g., LCIA Arbitration Rules, art. 19.1.
25 See White & Case/Queen Mary Survey at 3.
In 1997, the Ethyl Corporation launched an investment claim against Canada, saying that a Canadian ban on importation of a gasoline additive violated the company’s rights as an investor under Chapter 11 of the North American Free Trade Agreement (NAFTA). A battle on jurisdiction followed, which Canada lost. The claim settled, with Canada reportedly paying Ethyl $13 million. That settlement ended what may have been the earliest investor-state arbitral proceeding launched under a modern investment protection treaty.

Since those early NAFTA days, hundreds of claims have been initiated under other treaties. As in Ethyl, they have been brought directly against the host state, relying on guarantees advanced in a treaty (usually a bilateral investment treaty, or BIT). Like NAFTA Chapter 11, such treaties aim to stimulate foreign direct investment by reciprocally promising minimum levels of treatment for qualifying investors. These pledges include, for example, that the host state will treat the other state’s investor in a fair, nondiscriminatory manner and will pay full compensation in the event of an expropriation. The arbitral claim mechanism is available should the investor believe it has suffered damages resulting from the host state’s failure to abide by one or more of its treaty undertakings. Such a claim may proceed without the investor seeking permission from its home state.

The prerogative of an aggrieved investor to bring a direct claim without the involvement of its state of nationality is distinctive.
The prerogative of an aggrieved investor to bring a direct claim without the involvement of its state of nationality is distinctive. In the traditional espousal method practiced in international relations, the investor’s state of nationality presses the grievance, but only as a matter of discretion7 after weighing (in addition to the merits) the likely effects espousal will have on its relations with others states. Because states do not take up an investor’s claim as a matter of course, the espousal remedy is unpredictable and largely illusory. The direct claim mechanism associated with modern investment treaties, therefore, eliminates a remedial gap that would otherwise undercut the persuasiveness of the treatment promises now found in thousands of investment treaties.

The Docket

Despite NAFTA’s role as a catalyst for investor-state disputes, at present NAFTA accounts for only a modest percentage of the more than 400 investor-state arbitration proceedings that have arisen under an investment treaty.8 Several factors have contributed to the ever-enlarging docket.9 First, the number of BITs and other investment treaties granting access to arbitration has grown rapidly over the last 20 years,10 and states in every region of the world are now parties to such instruments.

Second, in recent decades, adherence to the convention establishing the International Centre for the Settlement of Investment Disputes (ICSID) and to the New York Convention has widened dramatically. These treaties promote global enforcement of investment awards and signal to investors that the awards they receive can be given effect where assets might be found (subject to questions of sovereign immunity).

Encouragement to prospective claimants also came from the recoveries received in the early NAFTA cases, which showed that investor-state tribunals were willing, in appropriate circumstances, to assess liability against states. The arbitral mechanism used was also comforting in its familiarity, being in essence that in use for international commercial disputes. These precursors led to particularly noticeable jumps in claim numbers when states dealt with emergent circumstances on a sector-wide basis, giving rise to multiple claims against a single state, often under multiple BITs. Argentina’s program to address its perilous economic situation in the late 1990s, which resulted in dozens of claims, is one well-known example.

The Investor-State Arbitration Architecture

Once under way, an investor-state proceeding follows the general pattern prevalent in international commercial arbitration.11 A tribunal, usually made up of three arbitrators, is appointed, with each party appointing one arbitrator and typically having some influence upon the selection of the chair, who is the presiding arbitrator. Each arbitrator is to be independent and impartial. The tribunal directs the process, using organizational meetings with the disputants to inform subsequent procedural orders that establish the arbitration’s ground rules and procedural roadmap. Customarily, the parties provide written submissions and the arbitrators hold one or more hearings at which they examine facts and question expert witnesses. Party counsel often make oral submissions. The proceedings may be bifurcated, so that jurisdiction and liability are addressed as separate phases. As a rule, awards are elaborately reasoned.

Despite broad similarities between the two types of arbitration, investor-state arbitration can differ markedly from international commercial arbitration. Unlike contract-based arbitration, investment treaty arbitration is founded upon a host state’s continuing offer (advanced in the BIT or similar treaty) to join in arbitration. Conceptually, the investor accepts the offer by processing the claim in accordance with designated formalities, outlined in the BIT and the governing arbitration rules.12 The BIT often gives the investor a choice of two arbitral avenues.

Usually these two options are ad hoc arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) or one of the two regimes operated by the International Centre for the Settlement of Investment Disputes (influenced by whether the two states involved have ratified the ICSID Convention.) Given the forgoing, respondent state attacks on tribunal jurisdiction or claim admissibility do not center upon a contract’s arbitration clause, but rather the relevant questions are, for example, whether the activity pursued by the claimant was an “investment,” whether the claimant has the requisite affiliation with the counterpart state to invoke the BIT, and whether the claimant has observed the required formalities in launching its claim.

There are other differences between international commercial arbitration and investor-state arbitration. Among these is that compared to international commercial arbitration, investor-state arbitration operates with relative transparency.13 NAFTA states, for example, regularly make available a wide range of materials derived from Chapter 11 arbitrations, including pleadings and awards. Commonly, BIT arbitrations involve participation by amici and, on occasion, public access to hearings. The wide availability of many dozens of reasoned

Despite broad similarities between the two types of arbitration, investor-state arbitration can differ markedly from international commercial arbitration.
Investor-state awards is also noteworthy. It has led to a body of accessible investment jurisprudence. Given confidentiality restraints, the same is not generally true of international commercial arbitration. Finally, with respect to governing law, in investment arbitration the arbitration panel will apply international law to some extent – if only in consulting rules of treaty interpretation. That is unlikely to be true in international commercial arbitration not involving a state, in which tribunals typically use choice of law analysis to select the governing contract law, which will ordinarily be that law chosen by the parties or one otherwise connected to the contract.

**Jurisprudential Disarray, Challenges to Arbitrators, and Other Problems**

The lack of BIT jurisprudence that characterized the seminal NAFTA experience has, over time, given way to a profuse body of awards. There is, however, no rule of precedent and no appeals mechanism to unify international investment law. Each tribunal is a court unto itself, composed of arbitrators who can vary widely in background from tribunal to tribunal. Perhaps because of this, tribunals have differed on the scope and meaning of most of the provisions prevalent in BITs.

States and investors alike decry the prevailing lack of jurisprudential predictability, a concern intensified by the vast sums often involved in investment treaty cases. States have responded in part by adding detail to their BITs in an attempt to clarify the governing law and procedure and to limit arbitrator discretion and inventiveness in assessing the disputants’ rights and duties. States and other stakeholders continue to discuss the possibility of instituting an appeals body of some type, but the realization of such a proposal remains a distant prospect. As an interim solution, some arbitrators have openly pursued a policy of following trends established in earlier awards, as distinct from proceeding with no particular fidelity to established patterns.

A relatively small number of arbitrators and lawyers specialize in investor-state matters, and putative conflicts of interest threaten the legitimacy of the system. The concerns are not merely that when people work together repeatedly they tend to develop predispositions toward each other; what worries many is that the lawyers and arbitrators repeat (and sometimes switch) roles. Disputants, understandably risk averse, appoint experienced investor-state lawyers as counsel and experienced investor-state arbitrators as tribunal members. Thus, a given arbitrator may be called upon to assess more than once – in separate arbitrations – one state’s enactment of a particular regulation or the meaning of a particular treaty provision, raising what some have called “issue” conflicts.

Given the lack of stare decisis, an arbitrator may, of course, reach a different decision in subsequent arbitrations on the same issue, but the human disinclination to do so naturally causes state participants in particular to question her independence and impartiality. Though perhaps on the wane, the practice of the same lawyer serving as arbitrator in one case and lawyer in the next has also been criticized for similar reasons; the fear is that the arbitrator will be tempted to add to the corpus of awards a precedent potentially of use to an existing or (hoped-for) client. Under certain circumstances, these elements give rise to plausible arbitrator challenges in the form of petitions that an arbitrator step down. Challenges for these and other reasons have become commonplace, predictably adding delay to an already delay-prone process.

One proposed reform is to eliminate unilateral party appointments and have institutions appoint the arbitrators, which proponents argue would reduce the number of troubling conflicts. Many variations of this reform have been proposed, but they have not garnered wide support among participants accustomed to the current system.

The same lament heard with respect to commercial arbitration generally – that it has lost the agility needed to produce rapid, cost-effective results – is particularly apt in relation to investor-state disputes. Respondent states defend claims robustly, leaving no jurisdictional defect unexplored and few colorable arbitrator challenges unmade. Perhaps that is to be expected, but the result is a very deliberate process.

And what of post-award maneuvering? Arguably this happens too often: in a common scenario, an investor-state arbitration that required several years and many millions of dollars to complete takes an additional step toward the absurd when a court or institutional control mechanism annuls the award. For ICSID Convention arbitration, that mechanism is a regime (the ad hoc committee system) that relies on a panel of three members empowered to annul the award based on grounds set forth in the Convention. Each annulment proceeding involves a new committee of three. Such attacks on
ICSID awards have been frequent, and annulment has occurred more often than one might have expected.16

Mediation – On the Horizon?
In recent years, the cost, lack of predictability, and other weaknesses in the present investor-state arbitration system have prompted a search for alternatives and a genuine interest in mediation as a process to supplement, if not replace, arbitration. The International Bar Association (IBA) has, for instance, promulgated Rules for Investor-State Mediation, and the United Nations Conference on Trade and Development (UNCTAD) has endeavored to introduce the advantages of mediation to relevant stakeholders.17

Conclusion
The literature addressing investor-state arbitration is copious and generally high in quality. It attests to the allure of a field that blends private and public international law and an architecture that, by being borrowed from international commercial arbitration, has inherited features that perpetuate recurrent debates and generate fresh puzzles. It might have been better to constitute an international court for investment disputes, staffed by term-appointed jurists governed by what would become coherent jurisprudence (promoted by appellate-level review). Whatever the merits of such a proposal, the current investor-state arbitration system remains an improvement on espousal. To eliminate it from the treaty is copious and generally high in quality. It attests to the allure of a field that blends private and public international law and an architecture that, by being borrowed from international commercial arbitration, has inherited features that perpetuate recurrent debates and generate fresh puzzles. It might have been better to constitute an international court for investment disputes, staffed by term-appointed jurists governed by what would become coherent jurisprudence (promoted by appellate-level review). Whatever the merits of such a proposal, the current investor-state arbitration system remains an improvement on espousal. To eliminate it from the treaty

Endnotes
1 See Ethyl Corp. v. Canada, Award on Jurisdiction, 38 I.L.M.708 (1999).
2 Id. at 724-30.
6 Id. (passim).
7 Concerning espousal, see RESTATEMENT (THIRD) FOREIGN RELATIONS, § 713 (2013).
10 There are approximately 3,000 investment treaties in effect. Id.
14 For digests of reasoned challenge decisions reached by the London Court of International Arbitration (LCIA), see Challenge Digests, 27 ARB. INT’L 315-473 (2011).
15 See Jan Paulsson, Moral Hazard In International Dispute Resolution, Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair, University of Miami School of Law (Apr. 29 2010).
16 GUIDE, supra note 5 at 159-177.

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How diverse is the world of international arbitration? As an African American who has practiced and researched in this field for more than 32 years and watched women and minorities — slowly, in too-small numbers — join the ranks of international arbitrators, advocates, and others, I have always been curious about whether my own experience is typical.

To provide a current assessment of the diversity in international arbitration, I expanded on the methodology I used in two earlier articles about American minorities in international arbitration.1 I examined American diversity in international arbitration across the target populations for the ABA’s Goal III diversity efforts: American women, American minorities,2 American lawyers with disabilities, and American LGBTQ lawyers.3 I sent a survey directly to 413 international arbitration practitioners, and I forwarded it to a number of international arbitration practitioner organizations.4 Finally, I contacted leaders of international arbitral institutions to see whether they would be willing to share data on their appointments of members of the target populations. Thirty-four individuals completed the survey, and representatives of three of the international arbitral institutions provided data.

In this article, I first summarize information provided by the arbitral institutions, then discuss information from the survey, and conclude by addressing the pressing question of how to increase appointments of women and minorities to international arbitration cases.

Diversity of Appointments by International Arbitral Institutions

Of the 14 international arbitral institutions I contacted, three responded and provided numbers, or the means to calculate numbers, on arbitrator appointments by gender: The Hong Kong International Arbitration Centre (HKIAC), the International Centre for the Settlement of Investment Disputes of the World Bank (ICSID), and the International Chamber of Commerce International Court of Arbitration (ICC). The organizations did not have information available on American minorities, American lawyers with disabilities, and American LGBTQ lawyers. Chart 1 lists the results from these three institutions.

The numbers speak for themselves: When they are seeking an American arbitrator (or any other national), parties and international arbitral institutions need to appoint more women. Although the percentage of women appointed is significantly higher than it has been in the past, the process of arbitrator selection still has to be opened up somehow by the international arbitration gatekeepers. While each institution has its own process and terminology, in general, appointments are made by the institution pursuant to their nomination process while confirmations are done of arbitrators nominated by the parties.

Based on the survey results below and extrapolating from this information on American women, the participation of American minority lawyers, American lawyers...
with disabilities, and American LGBTQ lawyers is probably far less representative, although still better than it was in international arbitration in the 1980s and 1990s.

**Diversity As Expressed in the Individual Surveys**

The survey asked about the respondents’ experience in international arbitration with members of the four groups listed for the ABA Goal III target populations between 2003 and 2013.

A total of 34 people responded to the individual surveys. Of those, 22 were or had been in private practice, and 23 had acted as arbitrators. The rest were a mix of other categories, such as an employee in an arbitral institution, in-house counsel, professor, or judge. Most of the respondents (25) had more than 20 years’ experience in international arbitration. The respondents’ experience serving as arbitrator, counsel, or with an arbitral institution ranged from one to hundreds of cases. Cumulatively, the respondents have served in more than 2,500 cases in these roles over the past 10 years (although some respondents may have included pre-2003 cases).

**American Minorities**

Of the 34 respondents, 14 had experience with American minorities in international arbitration in the following numbers (some categories contain a range, as some respondents provided estimates).

The respondents noted the participation of American minorities as arbitrators: one Hispanic American chair, two African American co-arbitrators, two Middle Eastern or Arab American co-arbitrators, four Asian American co-arbitrators, two Hispanic American co-arbitrators, and one Asian American sole arbitrator. The respondents provided only a small amount of information about how these American minority arbitrators were appointed: four were appointed by the parties, and one was a joint nomination by either the parties and co-arbitrators or the parties alone.

As to American minorities as counsel in arbitration cases, the respondents reported experience with 27 African Americans, 22 to 24 Middle Eastern or Arab Americans, 18 to 20 Asian Americans, and 22 Hispanic Americans. Three were lead counsel, seven were members of the arbitration team of the claimant(s) or respondent(s), and two were in other roles.

Several survey respondents commented on the particular problems facing African Americans. Among them was this: “In the Middle East, Far East, and Latin America, I have witnessed overt racism towards ‘blacks’ as opposed to those who are ‘brown’ or ‘white’ (and not to African Americans, but usually black people [from that country where the arbitration takes place]). Whether in terms of jokes, stereotypes …or simply getting around a city, it can be challenging due to how the local black population might be treated in that host country, or what the majority of people of that country have viewed and perceived from the television or the media. Combine that with a career where you have to deal with people from different nations – and not just professionals, but witnesses who may be uneducated or not used to seeing a black person – it becomes all the more challenging.”

**American Women**

Twenty-six out of the 34 arbitration practitioners responding had experience with American women in international arbitration. At least 47 to 51 of these experiences were with American women as arbitrators. The respondents reported six occasions when the woman served as chair of the arbitration panel and at least 30 occasions when the women served as

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**Chart 1: Arbitral Institution Appointments**

<table>
<thead>
<tr>
<th>Institution</th>
<th>HKIAC US Nationals</th>
<th>World Bank ICSID US Nationals</th>
<th>World Bank ICSID Other Nationals</th>
<th>ICC US Nationals</th>
<th>ICC Other Nationals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Men appointed</td>
<td>2</td>
<td>11</td>
<td>106</td>
<td>19</td>
<td>536</td>
</tr>
<tr>
<td>Men confirmed</td>
<td>2</td>
<td></td>
<td>59</td>
<td>555</td>
<td></td>
</tr>
<tr>
<td>Women appointed</td>
<td>0</td>
<td>0</td>
<td>11</td>
<td>3</td>
<td>76</td>
</tr>
<tr>
<td>Women confirmed</td>
<td>1</td>
<td></td>
<td>6</td>
<td>47</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>5</td>
<td>11</td>
<td>117</td>
<td>87</td>
<td>1214</td>
</tr>
</tbody>
</table>
co-arbitrators. As to the manner of appointment (note the numbers are based on ranges provided by the respondents), at least 51 to 61 were party appointments as co-arbitrator, jointly as chair, or jointly as sole arbitrator. Six appointments were by arbitral institutions. Well more than 204 to 217 American women served as counsel (some respondents recalled specific numbers and other respondents indicated they had seen “numerous” and “dozens” of American women counsel).

In comments, some respondents observed, “There are women on the team. So they participate as members of the team. I am unaware of any special status or treatment.” Others noted, however, that women with families can face difficulties and that there can be some discomfort associated with foreign travel: “Male colleagues have often seen foreign travel as a time to party/let off steam. Female colleagues are sometimes seen as more conservative or prudent and a hindrance to that lifestyle. For that reason, they may not be selected for a particular trip on account of their gender.”

At least 21 to 24 of these American women were lead counsel, and at least 117 to 118 were members of the arbitration team of the claimant(s) or respondent(s).

American Lawyers with Disabilities

Only one respondent had experience with an American with disabilities in an international arbitration. A few commented that they had not seen Americans with disabilities much in the profession, and others referred to non-Americans with disabilities as having been arbitrators at the “top of their game.”

LGBTQ Lawyers

Five respondents had experience with American LGBTQ lawyers in international arbitration, and the rest either indicated they had no experience or did not know whether any of the participants were LGBTQ. Three American LGBTQ lawyers were noted as serving as arbitrators, although the respondents identified the specific roles for only two: one as chair and one as co-arbitrator. Those who responded indicated that one was jointly nominated by the co-arbitrators and the parties, and one was appointed by an arbitral institution. Four American LGBTQ lawyers were noted as having served as counsel, with one as lead counsel and the other three as members of the arbitration team of the claimant(s) or respondent(s).

One respondent’s comment suggested that, as with women, certain biases may have more force in the context of foreign travel: “[I]t is possible that a lawyer may feel uncomfortable traveling with a gay colleague. While he/she may profess to be ‘okay’ with the sexual preference when in the office, that may become different on the road (though unsaid of course). He/she would just choose someone else for the trip if more senior, or profess an excuse not to travel if junior.”

Comments on the Surveys

While recognizing that these samples are far from perfect and are essentially only slightly more than anecdotal, a few thoughts do come to mind. As of today, a significant number of American women (most likely white) are involved in international arbitration. Many women serve as counsel, but fewer serve as arbitrators. A few American minorities work as counsel, even fewer are working as arbitrators, and an infinitesimal number of American lawyers with disabilities or American LGBTQ lawyers are involved in the field.

This picture may look discouraging. Several of the individual survey respondents commented that the international arbitration field is “pale, male, and stale.” My perspective, however, is a little different. When I compare today’s picture to what I saw in the 1980s and 1990s, I think of the paraphrase of the line from an old Negro spiritual: there are not as many as there ought to be, but things are slightly better than they were.

What Can the Aspiring Practitioner Do?

In an earlier article,5 I noted seven currents that an American minority needs to navigate to make a successful career in international arbitration:

1. Domestic US current: Prestigious international law firm practice
2. Foreign-based current: Experience in the foreign office of a US law firm or foreign law firm
3. Human capital current: Law degrees (with prestige and from different countries), fluency in languages, bar memberships, nationalities, family ties, mentors, internships at international arbitral institutions, participation in the Willem C. Vis International Commercial Arbitration Moot
4. Cooptation current: Articles in key journals, speeches, membership on advisory boards
5. Awareness of changes in international commercial arbitration current: Openness to new areas in arbitration where hierarchies are not set, such as (back in 2004) domain name dispute resolution
6. Lifestyle current: International arbitration requires significant travel and time commitments

Hard work, pluck, luck, and mentorship/sponsorship are all necessary to rise in the international arbitration sector.
7. Cultural diversity current: How open is one’s culture to underrepresented groups moving up the social hierarchy?6

These currents remain valid today, and members of the four groups in the target population need to manage them to advance in the field.

Describing the preparation required of an American woman (a description I would extend to all Americans, especially those in the target populations), the words of Karen Mills of Indonesia are especially apt. “It is not that easy for a woman to break in to the arbitration field, at least not as arbitrator,” she writes. “The first thing she should do is join ArbitralWomen, which supports women in arbitration. But you really need to be involved in actual arbitrations, which means you need to work in a firm that does them and get on the team so you can assist and observe before you have anything to sell yourself on. The Vis and other Moots are very useful, and any student considering entering the field should become involved in the moots as a necessity. It is the best training a student can have.”

Can Neuroscience Help Increase Diversity?

In addition to understanding the currents described above, an understanding of neuroscience should provide insights for gatekeepers and practitioners.

An emerging area is the study of implicit bias and stereotype threat.7 The concepts refer to the process by which schemas (what might be called “mental shortcuts” or “templates of knowledge”) develop in the brain that become implicit cognitions, things we do without thinking, and may become implicit social cognitions, things that guide our thinking about social traits. These implicit social cognitions are derived from stereotypes in the sense of traits we associate with a category and attitudes (overall evaluative feelings that are positive or negative).

Through the process of the schemas with these implicit social cognitions, implicit forms of bias have been seen to emerge. In this research, implicit social cognitions abound around the world, and they tend to support existing social hierarchies.

What could address the types of implicit bias that may be present as members of the target population enter this sea of schemas in international arbitration? Hard work, pluck, luck, and mentorship/sponsorship are all necessary to rise in the international arbitration sector. Those four things may come together in different ways and may occur anywhere in the world.

The key moment, one I have seen repeated for so many people in this field, is the day, usually fairly early in a career for those with high-level international arbitration aspirations, when someone asks “Can you be in Bratislava next week?” The person on the receiving end of this question may have little or no experience with Bratislava, but he or she has the confidence to say yes. To seize an opportunity outside your comfort zone, in short, requires considerable self-assurance.

I call these opportunities, which come in cycles throughout a career, “international plane calling” moments. The key is to recognize them and have the pluck to pack a bag and head toward the airport. That first experience will be followed by a second, and soon the person with pluck will become the “go-to” person for international work.

For the individual in the target population, the principal lesson from neuroscience research is that implicit bias is malleable and can be changed – with varying degrees of difficulty. A secondary lesson is not to succumb to stereotype threat when one feels at risk of confirming, as a self-characteristic, a negative stereotype about one’s group. This would include not giving in to self-handicapping strategies such as reducing practice time for a task and giving up one’s sense of belonging to the stereotyped domain.

To address implicit bias, gatekeepers can use approaches such as social contact across social groups, counter-typical exemplars of a group (called de-biasing agents), or introducing procedural changes in nomination processes for counsel. Specific efforts might take the form of reaching out to young people in the target population to help them gain initial experience in the field as summer associates or interns and setting up organizational structures that help recognize and overcome implicit bias, such as employing people from many cultures so that one particular set of implicit social cognitions connected to one social hierarchy does not predominate and the workspace has a more fluid set of implicit social cognitions.

Finally, rather than shy away from pursuing the study of or practice in international arbitration out of a sense of inadequacy or other self-limiting schema, students and practitioners might trigger their interest in this field by expanding their cultural experiences. If this includes traveling, students and practitioners should avoid the implicit social cognitions that come in the form of “advice” from others about “those people or cultures” and instead should work hard to observe new places and people carefully and make up their own minds about
what they are encountering. In my work with people on five continents, I have found that when I look carefully enough, what shines through is people’s common humanity, not their differences.

Conclusion

While writing this article, I was asked to provide a legal training for the Secretariat of the ICC International Court of Arbitration in Paris. It was in Room 12 at ICC Headquarters, a room where so many plenary and special court sessions, Arbitrator Colloquia, Advanced Arbitrator Trainings, and other events have occurred. As I walked around the room and shook hands with the counsel, deputy counsel, secretaries, and interns in a room where at least half the participants were women, in my mind’s eye I saw the ghosts of sessions in the 1980s, when very few women would have been present. I was overjoyed to see the progress that has been made, progress that gives me hope for what can still be done to enhance diversity, especially American diversity, in international arbitration.

In this article I have focused on diversity of arbitrators and counsel. However, I must pay tribute to the members of the target population who may not have been in the classic roles of arbitrator or lead counsel but have been present, whether working with an arbitrator, on the team of a party counsel, or within an international arbitral institution. These people’s contributions to maintaining and enhancing the international arbitral edifice may rarely be recognized, but I know they have been there, and I salute their determined work. ◆

Endnotes


4 I reached out to ICC Counsel Alumni members, of which I am a member, as well as The International Law Discussion Space listserv, the Society of American Law Teachers listserv, and the Contracts, Dispute Resolution, and Minority Groups listservs of the American Association of Law Schools. Further, I greatly appreciate that OGEMID and ArbitralWomen were kind enough to share the survey in their online spaces.


6 Id.


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An Australian woman marries an American man, and they have a daughter. The family lives in Texas, where the child attends pre-school and Sunday school, visits her paternal grandparents every weekend, is friends with the boy next door, and has regular play dates with her classmates. The mother, however, is unhappy in Texas. She schedules a vacation during the summer to visit her family with the little girl, while the father remains in Texas for work. Shortly after arriving in Australia, the mother calls the father and tells him that she has no intention of returning to the United States and that her lawyer will be contacting him to arrange a schedule for him to visit their daughter in Australia.

This fact pattern is typical of a “simple” international parental child abduction case: the parents are from countries with relatively similar cultures, they speak the same language (as do all extended family members), and neither parent has made any allegations of poor behavior, such as abuse, by the other. The mother is just “unhappy” living in Texas.

The major difficulty in this case is the distance between each parent’s residence, since children typically need to stay primarily in one location to attend school, but even with this added consideration, many family mediators could competently tackle this type of international parental child abduction case.

The parents in a parental child abduction case typically have very high emotions, and the abduction itself can create a sense of emergency. When one parent takes a child across international borders, the case becomes even more complicated.
Unfortunately, few cases are this simple, and most pose almost limitless challenges. This article highlights some of the complexities in international parental child abduction cases and shows why such cases should be handled by capable, highly skilled mediators.

Complexities Based on the Parents’ Identity

In any family law matter, each parent has his or her own baggage, personality, and panoply of emotions. The parents in a parental child abduction case typically have very high emotions, and the abduction itself can create a sense of emergency. When one parent takes a child across international borders, the case becomes even more complicated.

One common concern for the participants is the immigration status of one or both parents. A parent may have originally entered the United States (or taken a child out of the United States) illegally and may now be forbidden from returning, making an in-person mediation session difficult or even impossible.

Even when face-to-face meetings are possible, each parent’s cultural background can create complexities – for the mediator as well as the parents. The parents may come from similar cultures, or they may be worlds apart in language fluency, views, and communication styles. Even when the parents speak a common language, in the high-stress situation of mediation, one or both parents may prefer to speak a native tongue, perhaps requiring the use of a translator. A parent’s culture may even affect who participates: One parent may want a third party, such as a tribal elder, grandparent, or even a child, to attend the sessions, while the other prefers that only both parents be present.

These cases can be especially tricky for the mediator. If the mediator shares one parent’s culture, he or she may have an inherent (or at least perceived) bias. When one parent’s culture permits behavior that other cultures find reprehensible or abhorrent (such as culture-based domestic violence), the mediator can face the additional challenge of remaining neutral, not judging on the basis of cultural practices. When more than one language is spoken, mediators need to use their best judgment about whether everyone involved fully comprehends what is being said, done, and agreed upon.

Geography affects both parents and extended families. Many military families, for example, move regularly and are sometimes stationed overseas. Who should decide where the child or children live and how often they visit the parent who is overseas? In other families, one parent may be a member of a tribe or First Nation whose territory spans international borders, making it difficult for the mediator to determine jurisdiction. Many children of cross-cultural parents, while living primarily in one community, may have traveled overseas frequently while growing up, to spend time with extended family members and learn about their heritage. Deciding on a place of residence is one challenge; how often should the child travel overseas to see grandparents and beloved cousins? In all such cases, a mediator should guide the parents in assessing the impact of distance and travel and of a child seeing or not seeing extended family members as well as the non-resident parent.

Complexities Based on Nationality or Residence

In international parental child abduction mediation, the mediator needs to consider not only two parents but two countries. These countries may have vastly disparate legal systems, including systems that may be founded on religious law, which can make enforcing a mediated agreement in both countries impossible. If an agreement is unenforceable and if there is no mechanism to require the return of an abducted child, the parent who removed the child could feel empowered to stay put and ignore pleas to mediate. Each country (not to mention jurisdictions within countries) has its own rules about mediation, and each parent may have widely different views on what to expect in the process. These variations range from rules about privacy and confidentiality to the role and qualifications of the mediator.

Countries also differ about the role of the child in the mediation. The child is, after all, the focal point of the dispute. Some countries favor involving children of tender years, while others do not allow it. Mediators who are not accustomed to speaking with children, therefore, will need to adjust their practice in cases involving a country that mandates a child’s involvement. Different legal systems will also affect mediation if the parents in the case are same-sex parents or adoptive parents; some countries do not recognize these relationships and therefore may not recognize any agreement reached in regard to the child.

The mediator must also be familiar with something that rarely applies in family conflicts but is common in any international dispute – whether an international treaty may apply. In particular, some countries allow a parent to seek a child’s return under the 1980 Hague Convention on Child Abduction, which sets strict deadlines and structures and involves contacting certain offices within government entities, which, if overlooked, could result in waiver of the parent’s right to invoke the protections of the treaty. In all such cases, a mediator...
Different countries mean different rules, some of which may create a favorable environment for future parental child abductions, and mediators must be aware of these different rules when guiding the discussion. Any agreement should be grounded in the current realities of the family’s situation and anticipate future problems. For example, different governments have vastly different exit controls at international border crossings. The United States allows a parent to exit with a child with no verification of the parent’s authority to travel with the child. Some other countries require signed or notarized consent forms before allowing a child to exit a country with one parent. The mediation discussions should also directly address the possibility of future travel, including who obtains and holds the child’s passport and who pays for international travel.

**Essential Competencies for the Mediator**

Mediators may quickly feel overwhelmed in an international parental child abduction case, at times feeling the need to be experts in international, criminal, family, and immigration law as well as child psychology, cultural norms, and languages. In reality, the mediator needs only to know how and where to find information, when to consult someone with more experience or expertise, and when to terminate the mediation.

All mediators who work on family conflict cases should have some rudimentary information about child psychology and available therapeutic services. In international abduction cases, mediators will often hear of problems related to child-parent bonding and attachment, particularly when young children do not see both parents frequently. If a child is separated from one parent for an extended period of time, mediators may want to present an option that the parents contemplate child-parent reunification therapy.

A mediator also needs to be aware of any criminal issues at play. Parental child abduction is a federal, and frequently a state, crime. If an arrest warrant has been issued for the abductor parent, that parent might not want to return to the United States (or other country) for fear of arrest, making access to the child difficult. If the “criminal” parent insists the other parent drop charges, which the other parent may be unable to do, the mediation could stall.

Finally, a mediator needs to be able to navigate the dynamics that persist when an abduction has taken place. One or both parents, for example, may be planning to abduct the child in the future. The mediator needs to have the skills to address this issue sensitively and allow the parents to craft an agreement that will enforce their current understanding as well as provide safeguards against future poor judgment – all without unnecessarily escalating the conflict.

**Additional Considerations for the Mediator**

In our globally mobile era, any family dispute could be an international parental child abduction case. Family mediators should have a screening protocol that identifies the ways in which the case deviates from a typical family mediation.

For instance, in a parental child abduction case, a parent can file a 1980 Hague return petition in federal court or state court, although each court may have a different process for scheduling hearings and a different ability to hear the case on an expedited basis.

Many parental child abduction cases involve allegations of domestic violence. If the 1980 Hague Abduction Treaty is applicable, a claim of domestic violence may dissuade the court from returning the child. As in all cases, allegations of domestic violence should trigger additional screening to ensure that the participants and the mediator are safe.

Early identification of a case as a parental child abduction dispute will help the mediator plan the process and schedule the mediation for parties in different time zones, particularly if the mediation is done by distance mediation. For parties who want to mediate but cannot attend in person or for third-party participants who cannot attend in person, mediators will need to be familiar with online dispute resolution tools and processes.

As discussed earlier, the mediator should consider what parties or organizations can help make a successful mediation. Offices within the US government, various nongovernmental organizations, and international organizations could have a role. In addition, if one or more of the parties is represented by counsel, the mediator should consider the limitations of the lawyer’s knowledge and his or her impact on the client.
While parental child abduction mediations are less frequent in the United States, organizations in other countries such as Reunite (www.reunite.org) in the United Kingdom and MiKK (www.mikk-ev.de/) in Germany, have been mediating these types of cases frequently and for many years. The Hague Conference on Private International Law (www.hcch.net) has published some of its research in the form of a Guide to Good Practice on handling mediation cases under the 1980 Hague Child Abduction Convention.

Conclusion

International parental child abduction cases are complex high-conflict family cases that involve a myriad of issues and require competent, confident mediators who not only understand the nuances but acknowledge their own limitations and can seek out informed and appropriate help.

Endnotes

1 Parental child abduction is defined as one parent removing a child from the child’s home without the agreement of the other parent.

2 For an informative discussion of marital conflict involving Quranic principles that positions the husband in a favorable bargaining role for a divorce, see Ellen Waldman, Mediation Ethics 318-19 (2011).

3 The United States ratified the 1980 Hague Convention in 1988, and implemented it through the federal International Child Abduction Remedies Act, (“ICARA”) 42 U.S.C. § 11601. ICARA establishes a Central Authority, the Office of Children’s Issues at the US Department of State, to manage the operation of the Convention within the United States, provide case management, and ensure the US meets its treaty obligations.

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Making Mediation Work in Europe

What’s Needed is a New Balance Between Mediation and Court Proceedings

By Machteld W. de Hoon

For some time now, the European Union has been interested in promoting mediation as part of its general policy of supporting access to justice and providing freedom and security for all citizens. The EU’s most explicit intervention is the Mediation Directive of 2008, whose purpose is to support mediation as an alternative means of out-of-court settlement for civil and commercial disputes. Mediation advocates consider the directive a significant milestone, but their dream of seeing mediation solidly established in Europe has not yet been realized: Each year, only a small number of cases actually go to mediation.

This article examines the reasons for the limited use of mediation in EU states: the patchwork application of the directive, the lack of consistency among the EU states, and the directive’s failure to provide what disputants actually need.

Patchwork Regulation

Member states of the European Union were required to implement the Mediation Directive by May 2011, but anyone who looks at EU member states’ mediation regulations and expects to see a unified framework will be disappointed. Regulation is a patchwork of colors and patterns, not a coherent framework.

This patchwork is a consequence of the character of the directive, which opted for minimum, not maximum, harmonization. Minimum harmonization means that member states must meet the basic standards of the directive but can exceed those terms if they wish. Some member states, for instance, opted for extensive regulation on mediation and the professional training of mediators.

Austria, for example, enacted the EU Mediation Directive for cross-border mediation but also has implemented extensive and detailed mediation regulations for both cross-border and domestic mediation. Domestic mediation, however, is separately regulated by the Austrian Mediation Act, and both these acts are supplemented by regulations on the professional training and qualification of mediators. In addition, Austrian law includes many isolated provisions on the use of mediation; one provision, for example, requires parties in neighbor disputes to try mediation before filing a court proceeding.

In contrast, England and the Netherlands opted for a more restrained approach. England introduced a minimum level of compliance with the EU Mediation Directive for cross-border disputes, but all other aspects of mediation, including the professional training and qualifications of mediators, are almost entirely in the hands of the private sector. In the Netherlands, despite strong governmental promotion of mediation by means of court-annexed mediation programs, the Dutch Ministry of Justice has, until recently, abstained from regulating mediation as a matter of principle. Members of the Dutch legislature were concerned that extensive regulation would hinder practitioners and mediation associations from developing mediation methods, so the Netherlands currently has the minimum standards for cross-border disputes, although new legislative initiatives on mediation for both domestic and cross-border disputes were submitted in June 2013. The proposed regulation includes a register for qualified mediators and confidentiality rules for those mediators as well as the parties involved in their mediations.

This patchwork approach means that different rules are applied to different kinds of disputes. The directive itself focuses on civil, commercial, family, and...
employment disputes, but only if these conflicts are so-called “cross-border disputes,” those in which at least one of the parties is domiciled or habitually resident in a member state other than that of any of the other parties. Including domestic disputes would have been a significant extension of the scope of the directive, but according to Article 65 of the EU Treaty, the European Union is allowed to take measures only in civil matters that have cross-border effects. Member states, however, do have permission to broaden the scope to domestic disputes. Some member states, including Austria, France, Germany, and Belgium, have chosen to include domestic as well as cross-border disputes in their mediation regulation. Others, such as the Netherlands, England, and Luxembourg, have not.

**Inconsistent Application**

The text of the Mediation Directive covers the following topics:

- The quality of mediation
- The courts and mediation
- Enforceability of agreements resulting from mediation
- Confidentiality
- Limitation and prescription periods
- Information on mediation

Each member state’s mediation regulations must address these topics, but because each member state—sometimes even different jurisdictions within one member state—has different rules, the directive has not succeeded in creating a unified and consistent legal framework for mediation.

**Quality of Mediation**

The directive aims to ensure the quality of mediation without prescribing any concrete measures, and within the European Union, member states differ on whether the market or the state is better equipped to ensure the quality of mediation. As a result, methods to ensure quality vary widely. England, for example, leaves quality control mostly to private organizations, while in the Netherlands state referral and legal aid programs will use only mediators who belong to a certain association. Austria has an incentive system: Mediation practice is open to anyone, but disputants who choose registered and certified mediators enjoy favorable legal consequences, such as the protections in the rules on confidentiality. Germany also has what could be called an incentive model, but unlike Austria, it offers no favorable legal consequences if disputants choose to work with a certified mediator. Instead, policy makers expect that disputants will prefer certified mediators and that courts and insurance companies will recommend their use. The directive also requires member states to encourage the training of mediators to ensure that mediation is conducted in an effective, impartial, and competent way, but it leaves the challenge of coming up with concrete measures to the member states.

**Courts and Mediation**

The directive allows courts to invite parties to use mediation, to make the use of mediation compulsory, or to develop incentives to use mediation. Italy has opted for compulsory mediation: In 2011, Italy introduced mandatory mediation for a large number of case types as a means of handling a heavy caseload. Italy’s Constitutional Court invalidated the law in 2012, finding that the legislature had unconstitutionally exceeded its delegation of power. In 2013, the Italian government responded by adopting an amended compulsory mediation scheme, with provision for lawyers’ participation and required evaluation of the program after four years.

Other member states, however, introduced mandatory mediation only for specific types of conflict. Germany and Austria, for example, introduced mandatory mediation for neighbor disputes, while Norway made mediation mandatory for family disputes involving children.

Some member states have opted to impose sanctions on parties who do not want to use mediation. Judges in England, for instance, can assess cost sanctions on litigants who reject mediation without a good reason.

Other member states use incentives. Austria, for example, gives financial assistance in the form of reimbursement for most of the costs of the mediator for parties who use mediation in family matters. For a few years, the Netherlands offered a fixed amount of money for every mediation for parties to use mediation for many case types; nowadays, it provides legal aid, reimbursement of most of the costs of the mediator, to parties whose income is below a certain threshold.

The Netherlands has invested heavily in court-annexed mediation. Every court has a special mediator coordinator who helps parties find a mediator suitable for their dispute, and judges have been trained to diagnose the conflict during a hearing and discuss with the disputants the options that best suit their needs. Based on this diagnosis, the judge then discusses referral to mediation as one of the options for dispute resolution (the other options are a court order, a settlement, or an expert opinion). Judges do not mediate, but in their diagnosis and follow-up discussions, they do use some basic mediation techniques.

This patchwork approach means that different rules are applied to different kinds of disputes.
Enforceability of the Agreements

According to Article 6 of the directive, member states must ensure that the content of a written agreement resulting from mediation can be made enforceable with the consent of the parties. Again, there are significant differences between the member states, the majority of which do not provide for direct enforceability. Instead, most member states require some further procedural steps. Usually the parties have a choice between several means of enforcement, including a court order, certification of a notary, or a declaration of an arbitration tribunal.\(^9\)

Confidentiality

Article 7 of the directive requires the member states to ensure that neither the mediators nor those involved in the administration of the mediation process (e.g. experts, translators, legal clerks) are compelled to give evidence in judicial proceedings or arbitration regarding information arising from a mediation, unless the disputants agree otherwise. The directive allows member states to enact stricter measures to protect the confidentiality of mediation, including a limitation of the rights of the parties to testify. In France, unlike in most other member states, the mediator, others involved in the administration of the mediation process, and the parties are all protected by confidentiality rules.\(^10\)

Responsive to the Needs of Disputants?

The Mediation Directive “seeks to ensure a balanced relationship between mediation and judicial proceedings,” but the European Commission, as policy-maker in the European Union, has become interested in mediation primarily as a way to relieve pressure on justice departments’ budgets. I would argue that one goal of the directive is to keep people in civil disputes as far away from judicial proceedings as possible, regardless of their needs and what mediation can offer. Rather than promoting mediation to encourage or require citizens to use mediation services, the European Commission should explore what disputants want and how an improved judicial program can meet those needs. The directive is a policy instrument that does not sufficiently take notice of what disputants want and what mediation can and cannot offer.\(^11\)

Mediation and Court Proceedings: Toward a New Balance

For many years, judges in the Netherlands have been trained to ask parties what they want and need before referring them to mediation. If the parties indicate that a legal ruling will resolve their dispute, the judge provides such a ruling rather than referring the parties to mediation. With encouragement from the Ministry of Justice, the Netherlands’ judiciary has now taken the next step by developing a court-organized online dispute-resolution mechanism (Burenrechter.nl) that serves as an example of a new balance between mediation and court proceedings. Burenrechter.nl will be available for Dutch neighbor disputes starting in early 2014.\(^12\) The disputants can easily access this online mechanism, which focuses on what the parties have in common, not on their differing views, from an early stage of the conflict. Burenrechter.nl integrates mediation techniques, but in this process the disputants can also ask for a quick decision on legal

Mrs. Jansen and Mrs. Jones

A Typical Burenrechter.nl Dispute

Mrs. Jansen and Mrs. Jones are neighbors who have lived in peace for about 10 years. The problems arose after Mr. Jones died. Mrs. Jones, unable to maintain the couple’s garden, did not see a problem in the overhanging tree branches, while Mrs. Jansen did. Mrs. Jansen tried talking to her neighbor several times without success. After months of miscommunications and misunderstandings, Mrs. Jansen decided to go online and log in on http://www.burenrechter.nl. She completes the online questionnaire about the problem, the solution she herself has in mind, and the other people involved in the conflict. A judge then invites Mrs. Jones to do the same. The judge then establishes what the neighbors agree to (and what they don’t), requests additional information, and provides information on legal provisions that apply and solutions that other people in comparable circumstances have chosen. In essence, the judge helps parties find an appropriate solution on their own. He or she visits the place of conflict to see the dispute firsthand, and if the parties do not settle, issues a decision online within 3 to 4 months. A few months later, the judge asks the parties whether the court order (or the agreement) provided a lasting solution; if not, the online procedure continues.
aspects of their situation. A judge also will monitor the commitments of the disputants after the procedure has ended.

This online mechanism is probably not what policymakers envisioned when drafting the EU Mediation Directive. It is, however, an example of what a new balance between mediation and court proceedings can look like. More important, it embraces the idea that civil disputes can be effectively and efficiently resolved with the help of the court.

Final Remark
The Mediation Directive has had a positive impact, triggering thought and discussion on the structure and practices of alternative dispute resolution. Judges and lawyers have become more aware of the disadvantages of claim-based approaches, which has paved the way for other European initiatives on the field of alternative dispute resolution. In November 2011, the European Commission published two proposals that are worth mentioning: The Proposal for a Directive on Consumer Alternative Dispute Resolution and a Proposal for a Regulation on Consumer Online Dispute Resolution. In the near future, all the member states will be obliged to ensure ODR entities for consumer disputes for both cross-border and domestic disputes, which will surely help work toward the noble goal of expanding all citizens' access to justice – and, one hopes, might also encourage consistency in applying regulation to assure high-quality mediation for everyone in the European Union. 

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Endnotes
2 See generally Mediation: Principles and Regulation in Comparative Perspective (Klaus J. Hopt & Felix Steffek eds., 2013). See also Nadja Alexander, International Comparative Mediation: Legal Perspectives (2009).
3 The scope of the application has been discussed in the previous section. See Hopt & Steffek, supra note 2, at 34–37 (discussing the limitation and prescription periods). As for the issue of information: The EU invested heavily in providing an online information program on mediation (e-mediator). The results of this project are expected at the end of 2014.
4 See Hopt & Steffek, supra note 2, at 80–93.
7 See Legislative Decree 22 June 2013, n. 69 (It.). See also Alessandro Bruni, The New Law on Mandatory Attempt of Mediation in Italy, BUS. CONFLICT BLOG (Dec. 12, 2013, 05:32PM), http://businessconflictmanagement.com/blog/2013/12/italy-update/.
8 This program (along with the theory of conflict diagnosed by judges) was successfully developed by Machteld Pel. See Machteld Pel, Referral to Mediation, A Practical Guide for An Effective Mediation Proposal (2008).
9 See Hopt & Steffek, supra note 2, at 45-46.
10 See Alexander, supra note 2.
11 See also Hazel Genn, What is Civil Justice For? Reform, ADR, and Access to Justice, 24 YALE J. L. & HUMAN. 397 (2012).

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Mediators in the Field: Experiences Around the Globe
By Sheila Purcell and Janet Martinez

How do courts, as systems of dispute resolution, compare in their development of court-connected mediation programs? How do practitioners in various countries lay the groundwork for a successful court-based ADR (alternative or appropriate dispute resolution) program? How do they select and train their neutrals, and how do they implement their visions and evaluate their programs?

To start looking at these questions, we decided to go beyond the institutional structure of court-connected mediation programs and see what a brief survey might tell us about the perspectives and experiences of mediators themselves. The goal of our survey was to learn a bit about the mediators, the nature of their practice, the source of their referrals, and how deeply people in their communities accept mediation as a dispute resolution option. A preliminary understanding of these issues, we believe, might guide ADR policymaking and prompt future research efforts.

Survey Methodology
We reached out to highly experienced mediators whom we know personally in a dozen countries, most of whom work in court or court-related programs or academia, asking whether they would be willing to answer a questionnaire to describe mediation practice in their country. We received positive responses from our contacts in 11 countries: Australia, Brazil, China, Bulgaria, Hong Kong, India, Israel, the Netherlands, Singapore, Slovenia, and Spain. Each contact then disseminated a short online survey to mediators – ideally, 15 others – in his or her country. The survey was distributed to a total of 154 mediators, 113 of whom (73%) completed it, although not every mediator responded to every question. Our aim was not to achieve a random data set with statistically significant results but to get a basic sense of who is mediating and what their experiences have been.
Survey Results

Our respondent mediators came from a variety of professional backgrounds. They include a very small number of judges; the rest are nearly equally split between attorneys and other professionals. There are interesting variations by country: None of the respondents from Australia, Hong Kong, India, Israel, or Singapore were judges. All the respondents from India were attorney-mediators. Given that our primary overseas contacts were court-based or court-affiliated and that in many US courts with ADR programs attorney-mediators frequently outnumber non-attorney mediators, we expected to see more respondents who were attorneys.

More than half of Brazil’s respondents were “other professionals,” and 94% of the respondents from Brazil handled family cases. In China, non-lawyer mediators may be specialized in medical, traffic, labor, or insurance matters. Singapore has emphasized community mediation, where mediators are community leaders and volunteers, but court ADR there is also well established.

Training hours varied widely from country to country. More than 80% of respondents had at least 40 hours of mediation training (see Table 1). In Spain, which has promoted mediation in labor and family cases for more than a decade, mediators who handle these cases had an average of 250 training hours and have all had individual assessments. Respondents from Brazil reported that their country has launched online distance learning for mediators. Respondents from Brazil, Bulgaria, India, the Netherlands, Singapore, Slovenia, and Spain all had more than 40 hours of training.

When asked whether they considered their training sufficient preparation to conduct mediations, 70% of respondents said yes. Most respondents who had more than 40 hours of training (about 66%) deemed it sufficient to mediate, but that also means that one-third with more than 40 hours of training felt that was insufficient. Conversely, some respondents who had less than 40 hours of training deemed it sufficient.

On the topic of training, our survey asked whether people were conducting mediation trainings as well as maintaining active mediation practices. Nearly three-quarters of the respondents were trainers, including virtually all respondents in Australia, Brazil, China, India, the Netherlands, and Spain. We speculate that some of these mediators may be working as trainers to earn money, keep their skills active, and have their names in the public eye while they help design and start court programs and encourage people to see mediation as a viable option. The survey also asked about the variety of available training providers. In Brazil, China, and Singapore, court training was dominant, while private in-country training provided by a non-governmental entity prevailed in Bulgaria, Israel, the Netherlands, and Spain. Indian and Spanish mediators were trained equally by in-country and out-of-country private providers. In fact, two respondents noted that training has become a competitive business, so much so that they often see recently trained mediators offering instruction. Overall, private training providers in the domestic country were the most common source of training, something aspiring mediators appear to be willing to pay for (although we did not ask for specifics). As often happens, some mediators reported attending more than one type of training.

How experienced are most mediators who work in court programs? How busy are they? The answers varied from country to country (although not much within specific countries). Most respondents had worked on at least 100 cases, although a majority of respondents in Bulgaria and China reported mediating fewer than 100. Mediators in Australia, Brazil, India, and Israel were especially experienced and busy: most had mediated more than 100 cases.

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**Table 1: Mediator Training – Number of Hours**

<table>
<thead>
<tr>
<th>Number of Training Hours</th>
<th>Number of Respondents</th>
<th>Percentage of Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-10</td>
<td>8</td>
<td>7%</td>
</tr>
<tr>
<td>11-40</td>
<td>11</td>
<td>10%</td>
</tr>
<tr>
<td>&gt; 40</td>
<td>91</td>
<td>83%</td>
</tr>
</tbody>
</table>

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We speculate that some of these mediators may be working as trainers to earn money, keep their skills active, and have their names in the public eye while they help design and start court programs and encourage people to see mediation as a viable option.
cases and reported mediating more than 20 hours per month (which we estimate to be more than two or three cases a month).

As anyone who has ever mediated in a court or court-connected program knows, the source of case referrals is important. Do most cases get sent to mediation by a judge or court official? Staff from a court-connected program? A majority of respondents (64%) reported that they receive referrals from the court staff or staff of a mediation center affiliated with the court, which underscores the central role that court and court-affiliated ADR play in building mediation into the legal systems of these varied countries.

The second-most common referral source was the parties themselves, which suggests that users of mediation have had positive mediation experiences or have been exposed to successful public awareness efforts about mediation’s benefits. More specifically, party referrals comprise more than half of the respondents’ cases in Australia, the Netherlands, and Spain, while in Brazil, Bulgaria, China, India, Israel, and Slovenia, court referrals account for that same amount.

Like many of their court-affiliated counterparts in the United States, the overseas respondents mediated a wide array of case types (see Table 2). Most respondents indicated that they mediate more than one type, which suggests they do not choose to – or maybe cannot afford to – specialize in a single kind of case. Commercial, general civil, and family law cases predominate, with employment close behind.

More than half of those who completed the survey reported that they are paid, but that means that nearly half provide their services pro bono.

We also analyzed how case types get referred to mediators. In Australia, where mediation is often mandatory, most cases are personal referrals for commercial, employment, and general civil cases. In China, all case referrals were by the court and were equally distributed among commercial, employment, family, and general civil cases. In Brazil, most cases are court referrals for commercial, family, general civil, and neighbor cases. In India, most cases are referred by the court for family, general civil, land, and money disputes. In Israel, most are court referrals for commercial and family cases. In the Netherlands, most cases are party referrals for commercial and general civil cases. In Spain, employment and family cases are primarily generated by personal and party referrals. Other countries in our survey showed less marked patterns.

Touching on a subject important to mediators in the United States as well as abroad, the survey asked about mediator compensation. More than half of those who completed the survey reported that they are paid, but that means that nearly half provide their services pro bono. Most respondents in Australia, Hong Kong, India, Israel, the Netherlands, Singapore, Slovenia, and Spain were paid; most respondents in Brazil, Bulgaria, and China were not. From private conversations with some respondents, our understanding is that many newly trained mediators have difficulty getting experience, so pro bono cases may be their only option.

Continuing on this topic, the survey asked about the source of compensation for those respondents (roughly

<table>
<thead>
<tr>
<th>Types of Cases Mediated</th>
<th>Number of Respondents</th>
<th>Percentage of Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Community disputes</td>
<td>34</td>
<td>31%</td>
</tr>
<tr>
<td>Commercial</td>
<td>74</td>
<td>67%</td>
</tr>
<tr>
<td>Consumer</td>
<td>36</td>
<td>32%</td>
</tr>
<tr>
<td>Criminal</td>
<td>13</td>
<td>12%</td>
</tr>
<tr>
<td>Employment</td>
<td>56</td>
<td>50%</td>
</tr>
<tr>
<td>Family</td>
<td>70</td>
<td>63%</td>
</tr>
<tr>
<td>General civil</td>
<td>66</td>
<td>59%</td>
</tr>
<tr>
<td>Land claims</td>
<td>27</td>
<td>24%</td>
</tr>
<tr>
<td>Money claims</td>
<td>47</td>
<td>42%</td>
</tr>
<tr>
<td>Neighbor claims</td>
<td>47</td>
<td>42%</td>
</tr>
<tr>
<td>Personal injury</td>
<td>29</td>
<td>26%</td>
</tr>
</tbody>
</table>
A majority of respondents (64%) reported that they receive referrals from the court staff or staff of a mediation center affiliated with the court, which underscores the central role that court and court-affiliated ADR play in building mediation into the legal systems of these varied countries.

### Table 3: Compensation for Mediation – Sources

Number of respondents = 84

<table>
<thead>
<tr>
<th>Compensation Source (if any)</th>
<th>Number of Respondents</th>
<th>Percentage of Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court</td>
<td>23</td>
<td>27%</td>
</tr>
<tr>
<td>Parties</td>
<td>44</td>
<td>52%</td>
</tr>
<tr>
<td>Other</td>
<td>17</td>
<td>20%</td>
</tr>
<tr>
<td>Usually uncompensated</td>
<td>47</td>
<td></td>
</tr>
</tbody>
</table>
On Compensation

Resource availability affects two aspects of mediation: whether there is enough training and adequate compensation for mediators to sustain a livelihood and garner respect for the process. The issue of compensation received the most comments.

Brazil: “I really hope that we can be recognized for our job as soon as possible.”

Bulgaria: “I am a very good mediator with years of experience and more than 500 agreements and am grateful for being part of mediation development … but I am sure that mediation free of charge is not a good way.”

Hong Kong: “Too many trained mediators and too few cases; there is a tendency to cannibalize the profession – people are willing to provide too much pro bono service, even for legally represented commercial cases. If lawyers are paid, why can’t mediators be paid for the same case?”

On Mediator Education

Training was the second-most mentioned issue. Many commented on the critical elements of high-quality training: not only technique but interpersonal skills, observation of experienced mediators, and coaching. A challenge in many countries is the shortage of opportunities to obtain practical experience, mentoring, and feedback from experienced practitioners. The result is a variance in mediator competence, which can be exacerbated by different standards of accreditation. A few participants specifically pointed to the need for some regulatory governance, including some in Spain, where up to 250 hours of mediation training may be required for new mediators, but some trainers have not had any mediation experience.

Spain: “The most important thing that I miss in the trainings is the personal work that mediators need to do to be a good mediator. Techniques and methods are learned, but the personal qualities and habits are absolutely missed.”

Spain: “There is a need to develop good, and not only more, “mediation culture” among judges and lawyers. The training is deficient; excess of hours, most of them useless, and most trainers have never conducted or even shadowed a mediation.”

China: “To be an excellent mediator, you must have social knowledge such as psychology and find parties’ issues; you also [must] have good verbal communication skills.”

On the Benefits of Mediating and Mediation

While savings for the court, in both time and money, are often central to development of a court-connected mediation program, many courts have realized that improving the public’s trust in and satisfaction with dispute resolution options is a powerful parallel goal. Through ADR, people feel that they have a voice and that they are being treated fairly. The mediators observed that hostility can be reduced and that resolution can come more quickly and less expensively than it would in a courtroom. In short, mediation increases people’s satisfaction with the system of justice. In addition to mentioning these benefits for society and individuals, a few respondents noted their own personal and professional growth through mediation.

China: “The goal of mediation is to help parties find and realize their issues through the perspective of the third party (mediator).”

Singapore: “I find the greatest benefit in being trained as a mediator is actually the changes it has brought about in myself – the ability to do active listening and to see other people’s viewpoints before saying anything.”

Brazil: “Mediation is a marvelous social practice … must be amplified and mediators must be recognized.”

On Educating the Public

A court system has many stakeholders: the people who are in conflict, their counsel, the court itself, its

Table 4: Mediation Cases – Settlement Rates

<table>
<thead>
<tr>
<th>Percentage of Cases Settled</th>
<th>Number of Respondents</th>
<th>Percentage of Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-20</td>
<td>11</td>
<td>12%</td>
</tr>
<tr>
<td>21-40</td>
<td>8</td>
<td>9%</td>
</tr>
<tr>
<td>41-60</td>
<td>27</td>
<td>30%</td>
</tr>
<tr>
<td>61-80</td>
<td>33</td>
<td>36%</td>
</tr>
<tr>
<td>&gt;80</td>
<td>11</td>
<td>12%</td>
</tr>
</tbody>
</table>
staff, and even the citizens within the court’s jurisdiction. How does the introduction of a new process option meet different stakeholders’ interests? Most of the mediators who responded to the online survey highlighted ongoing public education efforts directed toward the bench, the bar, disputants, and their counsel in their countries.

India: “A lot of work is required to be done in simplifying and translating awareness materials.”

Spain: “The culture of labor/employment mediation has been developing in Spain for the last two decades, and it has become more effective and professional through time and the development of training programs enhancing good practices.”

Spain: “On the other hand … I understand that it is essential to educate society and the professionals (lawyers, judges, etc.) on the benefits of mediation, because often it is the legal technicians themselves who have greater reluctance or distrust thereof.”

India: “India is a country with diverse social, religious, cultural, and economic backgrounds. There is an urgent need to spread the benefits of mediation at the grassroots level, preferably by the locals of a particular community. It is therefore necessary to impart training to the locals of a particular region to accomplish said task.”

Spain: “Many attorneys and judges are gaining skills and knowledge, which are beneficial personally and professionally – whether as an advocate or a neutral.”

What We Don’t Know

This survey was a very brief attempt to obtain some basic information about mediation practice in the represented countries. In future research, we would ask about many additional subjects:

- Non-attorney mediators’ background and professions: What did they do before mediating?
- Mediator training: What was its structure and content? How long did it last? How much did it cost?
- On-the-job training and other training modalities: What do they look like?
- Referrals: What kinds of cases come from what sources?
- Case screening: Are mediators trained on screening and selection? Is there discussion about what kinds of cases are appropriate for mediation?

Policy Trends Affecting Mediation Practice

Our survey respondents work around the world in a variety of settings, some of them in contexts that include legislative and policy frameworks. Governments, courts, and international organizations, from the United Nations Commission on International Trade Law (UNCITRAL) to the American Arbitration Association, are increasingly seeing the value of varied dispute resolution options, especially mediation. The European Directive and UNCITRAL are but two examples in which the introduction of mediation is explicitly encouraged and institutionally fostered. See article on the European Union and mediation by Machteld de Hoon on page 23.

Although in a number of countries ADR started as a way of meeting local needs, today there appears to be a gradual convergence of practices, an effort to set some common standards and, in some places, regulate mediation practice. As we see more institutionalization of ADR globally, both within countries and through global organizations such as the International Mediation Institute, we may see the field strengthened and professionalized by the common drive to promote transparent standards and practices.

At its heart, mediation offers a voluntary, confidential, neutral-facilitated process to resolve a broad array of disputes. As mediators around the world have exchanged experiences through cross-training and conferences, we have learned anecdotally that the voluntary, confidential, and neutral components of mediation take different forms according to local history, needs, and resources. We will all benefit from learning more about each other’s training and practice and from allowing different approaches to blend and breathe or be recognized as distinct for a purpose. This study is a first step in that direction.

Endnotes

1. We described three varied examples in a recent article on programs in India, Israel, and California. Janet Martinez, Sheila Purcell, Hagit Shaked-Gvili, & Mohan Mehta, Dispute System Design: A Comparative Study of India, Israel and California, 14 CARDOZO J. CONFLICT RESOL. 807 (2013).
We are grateful for two programs funded by the JAMS Foundation that provided contacts and content for this article: the University of California Hastings College of Law Summer Legal Institute's Envisioning, Designing and Implementing Court ADR program and the JAMS Foundation Weinstein International Fellowship.

The authors extend our deep thanks to the following colleagues in many countries for describing how mediation is practiced in each jurisdiction and connecting us to respondents for the survey: Judge Maria del Rosario Garcia Alvarez, Mr. Marcelo Girade, Judge Jiang (Michael) Heping, Judge Joyce Low, Mr. Lachezar Nasvadi, Ms. Laila Ollapally, Judge Dorcas Quek, Mr. David Sandborg, Ms. Hagit Shaked-Gvili, Ms. Tania Sourdin, and Mr. Ales Zalar.

The questionnaire, which was sent only to our lead contacts, included questions on the history of court-connected mediation (impetus, number of years), public education, cultural traditions, training, non-court mediation options, evaluation, and general observations on factors that have promoted and inhibited use of mediation. The online survey had 16 questions: country of practice, professional position, number of cases mediated, hours mediated per month, where trained, hours of training, whether training adequate, source of case referrals, kinds of cases mediated, opportunities to develop a mediation practice, percentage of cases settled, compensation (whether, by whom, if adequate), and an invitation to comment.

While many jurisdictions struggle with political instability, civil unrest, and corruption, this survey is not representative of those systems and we did not try to account for the range of issues surrounding the rule of law in each country.

The mean settlement rate for 90 respondents is 59; the median value is 60.

These concepts will be very recognizable to those who study and teach dispute resolution system design. See Stephanie Smith & Janet Martinez, An Analytic Framework for Dispute Systems Design, 14 HARV. NEGOT. L. REV. 123 (2009).

As noted earlier, in Spain up to 250 hours of training may be required, and there are a number of training providers who have only recently completed their own training and have not had any case experience.

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Where Mediation Is Concerned, Sometimes “There Ought Not To Be a Law!”

By Sarah R. Cole, Craig A. McEwen, Nancy H. Rogers, James R. Coben, and Peter N. Thompson

In the United States, the expression “There ought to be a law” is a common response to even the most minor injustice. Although the complainant usually is not serious (“The doctor kept me waiting for 90 minutes? There ought to be a law!”), US lawmakers are often quick to turn to laws as solutions to only slightly more serious problems.

Mediation has not escaped this trend. The volume of mediation-related statutes in the United States grew fivefold over the last two decades, and these statutes now fill 2,662 pages of our treatise, Mediation: Law, Policy, and Practice. The statutes, though, represent the tip of the iceberg of mediation-related law, which now includes court rules, administrative regulations, ordinances, and roughly 600 to 700 reported mediation-related court rulings per year.

Much of this growing body of law “regulates” in the most common use of the word, as the legal provisions seek to affect human behavior. But not all. Some mediation laws instead merely establish a program and provide a level of confidentiality, and some case law does not change the interpretation of the law being applied. We focus in this article on those laws that regulate, and we contrast them with informal program rules, standards, and practices that do not carry the force of law, measures we call “programmatic” approaches.

The goals apparently sought by these laws – fairness, quality, equal access, for example – seem sound, but the
approach taken to reach them is often counterproductive. We suggest that policymakers and advocates who have sound ideas for mediation regulation pause before proposing a new law, so they can consider and answer a few questions designed to determine whether the proposed regulatory approach is likely to work.

This review of the approach to regulating mediation practice differs from that advanced by Herbert Kritzer in an earlier issue of this magazine (Spring, 2013: 12), in which he examined when regulating might serve a valid goal. For the purposes of this article, we do not challenge the goals of those who wish to regulate mediation but point out that these laws might not achieve the proponents’ goals if the approach taken is not effective in the mediation context. We suggest six questions that a prospective mediation regulator should consider.

**Question One: Will the proposed law achieve its goals in light of mediation confidentiality?**

Some laws cannot be enforced without undermining mediation confidentiality. Laws may impose duties on mediators, parties, and their lawyers, such as:

- Mediators should maintain a balanced dialogue.
- Mediators should protect the interests of children.
- Mediators are restricted in whether or how they evaluate the merits of the case.
- Parties and lawyers should participate in mediation discussions in good faith.

Enforcement of these duties, however, might open the entire mediation conversation to judicial scrutiny, while lack of enforcement would render them hortatory only. Purporting to create rights or obligations that courts cannot enforce because of strict confidentiality rules might also spawn overt hostility to mediation. For example, a California appellate judge opined that parties and their attorneys should be warned “of the unintended consequences of agreeing to mediate a dispute” because of rights that could not be enforced under that state’s mediation confidentiality statutes. Yet another approach – leaving it unclear whether an exception to confidentiality will permit the potential enforcer to secure the crucial evidence – may generate unnecessary litigation.

How could advocates for a regulatory approach better achieve their goals and ensure the confidentiality necessary for an effective process? They might try a programmatic approach, such as using staff mediators, requiring supervision of mediators that includes supervisors attending some mediation sessions (or even peer review

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and feedback to stretch resources), and recommending that mediators call attorneys in advance of the mediation to assure their preparation and inclination to make use of the mediation, to name only a few examples.

Or they might try a regulatory approach but make certain either (1) that it is an approach that can be enforced without using currently privileged mediation communications or (2) that the reduction in mediation confidentiality is worth the gain. For example, a law such as the Uniform Mediation Act, which permits parties to bring attorneys or other individuals to mediation sessions, may assist the mediator in maintaining a balanced dialogue without breaching confidentiality. Requiring the mediator to maintain a balanced dialogue, by contrast, could be enforced only if the parties introduced evidence of mediation communications.

In a similar vein, suppose a court seeks to make certain that mediation addresses all the parties’ business and personal interests, not just legally cognizable ones. A court rule requiring mediators to ask questions during the mediation about the parties’ broader interests could be enforced only by intruding on mediation confidentiality. If, instead, the rule required all parties to attend the mediation, even parties with lawyers, the court could enforce the attendance rule without having to pierce the confidentiality of the mediation conference to capture mediation communications (setting aside for the moment whether the court could achieve its goal through this approach).

**Question Two: Will mediation participants be aware of the new law?**

Many mediation-related laws seem to be trees falling in empty forests. In dozens of instances each year, court opinions indicate that parties and attorneys disclosed...
privileged mediation discussions. Sometimes it seems that no one involved in the matter knows whether mediation discussions are privileged – one of the central tenets of mediation law in most jurisdictions.

The situation seems far worse if the regulation is part of laws that relate only to specific uses of mediation (small claims mediation, workers’ compensation mediation, and more) because fewer people will know about these laws. For example, laws that require warnings (such as “this agreement can be enforced by a court”) to be written on mediated agreements in only specified mediation programs have produced litigation because some parties have settled without realizing that their agreement should recite these warnings. After all, outside those particular mediation programs, no warnings would be required. One party’s ignorance of the law could allow another party who has second thoughts about the settlement to persuade a court to set aside that agreement. In several cases, courts have set aside the mediation agreement even if the legally naive party relied on its supposed enforceability and would be harmed as a result of the court’s application of the law.

Ultimately, laws that people are not aware of are less effective – and may actually cause harm.

Question Three: Does the law conflict with deeply ingrained practices?

Suppose people are accustomed to doing things a particular way, think they are right in doing so, know their peers do it that way, and believe they will have more professional or economic success if they persist in the behavior. Will their behavior change when a law requires them to do something else but the consequences of ignoring that law seem mild? If you think the answer is yes, recall the difficulties the recording industry had with illegal file-sharing by college students.

To give an example from mediation practice, suppose a court rule requires attorneys to discuss the pros and cons of mediation with their clients before the clients sue or early in litigation. The result? Little change, according to studies in several courts. Attorneys are accustomed to managing client relations in a particular way and may handle what they consider an irrational additional task in a pro forma manner, particularly when they have little reason to fear repercussions.

Instead, an individual trying to change the attorneys’ behavior might take a programmatic approach – coursework in law school or later, to help attorneys understand mediation’s value – or a legal approach that confers an advantage on parties who participate in mediation, such as in the court’s assessment of costs. This approach would provide attorneys with an incentive to talk with clients earnestly about mediation.

Question Four: Are the lines between adjudication and mediation muddled by the law?

Some laws seek to increase settlements through mediation by blurring the distinction between mediation and adjudication. These approaches seem to share one goal – to increase settlement rates. Such approaches include:

- Permitting the mediator to recommend an outcome to the judge if the parties do not reach agreement in mediation.
- Imposing attorney’s fees on the party who fails to secure a judgment that improves on the mediator’s recommendation.
- Calling a judicial settlement conference a “mediation” and purporting to make it confidential even though the judge hosting the conference will make rulings in the case if the parties do not reach a mediated settlement.

These laws evoke extensive criticism on grounds of fairness and equity. Critics point out, in reference to laws allowing the mediator to recommend an outcome, that mediators might base their recommendations to judges on ex parte statements made in caucuses or on documents not admissible in evidence. Laws permitting the mediator to make a recommendation to the judge have also stimulated litigation over such topics as whether the mediator can be cross-examined about the recommendation and whether other testimony about mediation discussions is admissible to contradict the mediator’s testimony. Laws that allow courts to impose a sanction for litigating an adverse mediator challenge would provide attorneys with an incentive to talk with clients earnestly about mediation.
recommendation may make parties with meritorious positions less inclined to take a chance that they have guessed wrong about whether the mediator’s recommendation will carry the day, particularly if those parties have limited resources. If some parties are confused about whether they are in a mediation or a judicial settlement conference, they may think they should be candid during the mediation phase, and the opposing parties could strategically use that information to influence the mediator’s recommendation or decision.

**Question Five: What are the unintended consequences of the law?**

Some laws improve one aspect of mediation but turn out to be counterproductive because of their unintended effects. For example, some mediator qualifications (e.g., educational degree requirements) may eliminate a few substandard mediators but also decrease the diversity of the mediator pool. That, in turn, may, undermine public confidence in mediation as well as in the courts that have required parties to use a pool of mediators that lacks the diversity of our society.

Good-faith participation requirements may provide another example of unintended consequences. Any gain in terms of earnest conversations may be outweighed by the loss in confidentiality and the increase in litigation over the question of whether parties negotiated in good faith.

To ferret out counterproductive laws, one might analyze how a proposed mediation law will affect:

- The parties’ expenses
- The program administration expenses
- The flexibility of mediation to fit the parties’ needs and the context
- The parties’ free choice regarding whether to settle

...stringent that few individuals in some small communities can meet them. If such regulation makes mediation unaffordable for many parties, it may not be worth it.

**Question Six: Can the goals for the law be achieved without the law?**

As the use of mediation increases in the courts and public agencies, it may be natural to begin with enactment or promulgation of laws to set minimum standards. But high-quality and vibrant programs often operate without any new laws. Perhaps these programs approach mediator quality programmatically. For example, the approach may be to supervise mediators and then assume that existing contract law is sufficient to protect against egregious overreaching that is not stopped through supervision.

In other words, asking this question may lead one to answer that legal regulation is unnecessary.
Regulating mediation presents challenges distinct from those presented in regulating arbitration and litigation, which reach resolution without the parties’ consent to the result and depend somewhat less for their success on maintaining flexibility, informality, low cost, ease of use, confidentiality, and enthusiastic endorsement by the parties. The six questions suggested in this article begin an initiative that we hope that others will join—to avoid laws that might, on balance, harm mediation and to shape more effective laws. Even when the goal is to improve mediation, “There ought not to be a law” may sometimes be the best answer.

Endnotes
1 This article is a synthesis of Chapter 16 in Mediation: Law, Policy, and Practice (2013-2014 edition), coauthored by the authors of this article, and is used with permission of Thomson Reuters. The treatise, published by Thomson Reuters, is also available as a searchable Westlaw database, listed as “MEDIATION.” Because of the format of this magazine, we omitted endnotes to the extensive commentary on the issues, but readers may obtain the sources from the treatise.
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Protecting Confidential Information in Commercial Mediations

By Paul M. Lurie and Sharon Press

In this new feature, Paul M. Lurie and Sharon Press will raise issues of professionalism and their practical applications.

Despite efforts that began more than 10 years ago with the creation of the Uniform Mediation Act, there is no uniformity in the United States as to how or when information disclosed in mediation may be used or protected from use in subsequent legal proceedings. This confusion about the protection of information may discourage parties in commercial disputes from using mediation. For those parties who decide to enter mediation, the Model Standards of Conduct for Mediators make the mediator responsible for promoting understanding “of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.” (Standard V.C.)

Surprisingly, Federal Rule of Evidence 408 and similar state rules protect only statements of compromise. State laws range from not protecting confidential information produced in mediation at all to broadly protecting that information (the California Evidence Code) to completely protecting it (the Uniform Mediation Act, now enacted in 11 states and the District of Columbia). Courts in the same state or federal district may vary in how they treat mediation confidentiality. Further, many disputes are mediated through arrangements with mediators appointed by dispute resolution service providers including the American Arbitration Association (AAA), JAMS, and the International Institute for Conflict Prevention and Resolution (CPR). The rules of those providers also lack consistency and have varying weaknesses with respect to the protection of confidential information.

There are several mechanisms to protect information disclosed in mediation. One option is to create a privilege, which is the approach of the Uniform Mediation Act. An inherent problem with the privilege approach is that courts frequently find that the privilege has been waived. Another option is the use of evidentiary exclusion rules, which is California’s approach. That option is less subject to findings of waiver, but some critics bemoan its lack of flexibility in sympathetic situations involving claims of fraud or lawyer malpractice. Creating privileges or evidentiary exclusions can be challenging because courts and legislatures are reluctant to restrict the availability of evidence in legal proceedings. A third option is creating confidentiality by contract. This approach uses dispute resolution service provider rules that are incorporated by reference into the parties’ agreement to mediate.

Commercial mediation involving businesses disputes exists only by reason of contractual agreement: the disputing parties agreed in a contract, which may have been effectuated before or after the dispute arose, to resolve their dispute in mediation. Therefore, it makes sense to use those agreements to also protect confidentiality. The contract approach allows those agreements to be customized to cover information, including preventing the public disclosure of a settlement or lack thereof.

On the following page we provide a suggested mediation confidentiality clause that can be used in agreements to mediate commercial disputes.

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Confidentiality Clause for Mediation

A. Preamble
The parties are involved in a commercial dispute that they desire to resolve as quickly and inexpensively as possible. Toward that end, the parties have retained the services of a qualified mediator who is a signatory to this agreement. In order to overcome the current impasse, the parties desire to exchange information freely with the mediator and also with each other to assist the mediator in finding ways to overcome impasse. The parties will more freely exchange information knowing that if the dispute goes to court or arbitration for a binding decision, information that they would not have been required to disclose in the subsequent proceeding would not become available to adverse parties. Therefore, they are entering into this agreement to further their interest in settlement.

B. Definitions
1. Mediation is a process in which a neutral person or persons facilitate communication between the disputants to help them reach a mutually acceptable agreement.
2. A mediator is a neutral person who conducts a mediation and includes any person designated by a mediator to assist in the mediation or to communicate with the participants in preparation for a mediation.
3. A mediation consultation is a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator.
4. Mediation is the process that begins upon the execution of the mediation agreement and ends by written notice of termination by any party. Mediation is not automatically terminated because the parties also use court or arbitration processes.

C. All information arising out of or received in connection with the mediation or mediation consultation shall be confidential including:
1. the agreement to mediation and its terms;
2. the occurrence of the mediation;
3. any information (documents, statements, communications) created solely for the mediation including views, suggestions, admissions, proposals, and materials indicating willingness to accept a proposal;
4. information disclosed in private to a mediator by a party;
5. the outcome of the mediation and the terms of any settlement;
6. reports to a court or arbitration panel about what transpired in mediation.

D. Concerning information in paragraph C, outside the mediation, participants in the mediation, including the mediator, any person present, and any person involved in the administration of the mediation shall not:
1. disclose, make reference to or rely upon; or
2. give testimony or evidence about; or
3. compel any other person to testify about or produce as evidence
4. confidential information exchanged in the mediation.

E. As an exception to paragraphs C and D, information may be disclosed or admitted as evidence in a subsequent legal proceeding to the extent:
1. the parties have given their authority;
2. necessary to bring the settlement agreement into effect or to enforce it;
3. disclosure is specifically required under law only to the extent necessary for compliance of any term including the confidentiality agreements;
4. disclosure is required in the overriding public interest only to the extent necessary to satisfy such interest;
5. it evidences the existence of an agreement not to take a default or to extend the deadline for acting or refraining from acting in a pending civil action or arbitration;
6. offered to report, prove or disprove professional malpractice or misconduct (solely for the purpose of the professional malpractice proceeding or the internal use of the governmental body conducting the investigation of the conduct);
7. offered for the limited purpose of establishing or refuting legally recognized grounds for voiding or reforming a settlement agreement reached during a mediation.

F. Evidence that is otherwise admissible or discoverable is not rendered inadmissible or nondiscoverable as a result of its use in the mediation process.

G. In addition to the foregoing restrictions, the confidential information shall not be disclosed to the public, including the media. [OPTIONAL]

This clause is based on Model Confidentiality Clause for Mediation Rules presented at the UIA World Forum of Mediation Centres, Dublin 2006.
Research Insights

Edited by James Coben and Donna Stienstra

Editors’ note: Recognizing that conflict resolution procedures are being used and developed in a wide variety of multi-disciplinary settings, this Dispute Resolution Magazine regular feature showcases lessons to be learned from empirical studies of our broad field. Twice a year this feature summarizes, in the authors’ own words, published or forthcoming articles with research findings relevant to readers. The editors welcome suggestions for articles for future issues.

ARBTRATION

The Effect of Gender on Awards in Employment Arbitration Cases: The Experience in the Financial Securities Industry

David Lipsky, Ryan Lamare, and Abhishek Gupta

In this article, the authors analyze the outcomes of nearly 3,200 awards issued in employment disputes settled by arbitration in the securities industry between 1986 and 2008. The large amount of litigation in the securities industry alleging discrimination by securities firms against the women they employ led the authors to hypothesize that women would do less well than men in these arbitration cases. The study revealed that the gender of the complainant and the complainant’s attorney (but not the gender of the respondent’s attorney or the arbitrator) had significant effects on the size of the awards. Across the range of analyses conducted by the authors, female complainants did less well than male complainants in these employment arbitration cases. The gender of the attorney representing the complainant also affected the size of the award: male attorneys obtained larger awards than female attorneys. After examining the features of the arbitration process for which they had data (admittedly limited) and finding that gender differences in arbitration awards were robust across all analyses, the authors hypothesize that these differences are more likely due to persistent differential treatment of women in the securities industry than to the arbitration process.

Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System has Developed?

Alexander J.S. Colvin and Kelly Pike

The authors examined all employment arbitration cases administered by the AAA and terminated in 2008. The study’s purpose was to investigate the degree to which employment arbitration accords with the vision of a simplified but accessible and effective alternative to standard litigation for resolving workplace disputes. Nearly three-quarters of the cases arose from employer requirements that disputes be resolved through arbitration. The typical case in these employer-required arbitration proceedings, as in litigation, is a statutory claim with a damage claim of well over $100,000. (Smaller claims, often seen as unable to access the litigation system, have not turned to arbitration – even though, under AAA rules, employers pay the arbitration fees, which at almost $10,000 per case could otherwise be a barrier to access). Employees win just under one-quarter of the arbitration cases and some recover substantial damages. However, employee win rates and damage amounts in arbitration are lower than those found in litigated cases that get to the trial stage. Self-represented employees, who make up a third of those bringing claims (as compared to about one-quarter in litigated cases) have lower success rates and receive much smaller damages than represented employees. As with litigation, settlement is the resolution mechanism for most cases in arbitration. Summary judgment motions have become a feature of employment arbitration as well; such motions are brought in a quarter of the cases and most are successful. The time it takes to get an arbitration hearing, while arguably still too long at around a year, is shorter than is typical in litigation. The authors conclude that employment arbitration is, in a number of respects, replicating the limitations of the litigation system rather than providing a more accessible and effective system of workplace justice.
NEGOTIATION

On the Role of Personality, Cognitive Ability, and Emotional Intelligence in Predicting Negotiation Outcomes: A Meta-Analysis

Sudeep Sharma, William Bottom, and Hillary Anger Elfenbein

3 ORGANIZATIONAL PSYCHOLOGY REVIEW 293 (2013)

The authors conducted a comprehensive meta-analysis of negotiation studies to investigate the role of individual differences in predicting negotiation outcomes. They found a substantial role for a wide range of individual difference variables. Cognitive ability, emotional intelligence, and numerous personality traits demonstrated significant relationships with multiple negotiation outcomes. These findings revealed that negotiators with higher levels of cognitive ability achieve greater individual economic value, joint economic value, and psychological subjective value. Results also showed that emotionally intelligent negotiators are likely to generate enhanced subjective psychological outcomes such as satisfaction, liking, trust, and intentions to work again with the other party in the future. All the “Big Five” personality traits except conscientiousness (the other four being extraversion, agreeableness, neuroticism, and openness to experience) showed associations with at least one outcome measure. These findings imply that individual differences are valid predictors of negotiator effectiveness. The authors suggest, therefore, that negotiators should seek an understanding of their own and their counterparts’ characteristics so that they can select themselves into negotiation settings in which they are likely to succeed. In addition, superiors should not overlook individual differences when assigning negotiation roles to subordinates.

MEDIATION

“Rebooting” the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU


(A report requested by the EUROPEAN PARLIAMENT [TERMS OF REFERENCE IP/C/JURI/IC/2013-062]).

Five and a half years after its adoption, the European Union Mediation Directive (2008/52/EC) has not yet solved the “EU Mediation Paradox.” Despite its proven and multiple benefits, mediation in civil and commercial matters is still used in less than 1% of the cases in the EU. This study, which solicited the views of up to 816 experts from all over Europe, shows that this disappointing performance results from weak pro-mediation policies, whether legislative or promotional, in almost all of the 28 member states. The experts strongly supported a number of proposed non-legislative measures that could promote mediation development. More fundamentally, the majority view of these experts suggests that introducing a “mitigated” form of mandatory mediation may be the only way to promote the use of mediation in the EU. The study therefore proposes two ways to “reboot” the Mediation Directive: change it, or, based on the current wording of its Article 1, request that each member state commit to and reach a simple “balanced relationship target number” between civil litigation and mediation. (For more on the EU Mediation Directive, see the article by Machteld de Hoon on page 22 of this issue.)

AROUND THE WORLD

Not All Anger is Created Equal: The Impact of the Expresser’s Culture on the Social Effects of Anger in Negotiations

Hajo Adam and Aiwa Shirako

98 JOURNAL OF APPLIED PSYCHOLOGY 785 (SEPTEMBER 2013)

The influence of culture on the social effects of emotions in negotiations has recently gained the attention of researchers, but to date this research has focused exclusively on the cultural background of the perceiver of the emotion expression. The current research offers the first investigation of how the cultural background of the expresser influences negotiation outcomes. On the basis of the stereotypes that East Asians are emotionally inexpressive and European Americans are emotionally expressive, the authors predicted that anger would have a stronger signaling value when East Asians, rather than European American negotiators, expressed it. Specifically, they predicted that angry East Asian negotiators would be perceived as tougher and more threatening and therefore would elicit greater cooperation from counterparts compared with angry European American negotiators. Results from four negotiation studies supported the predictions. In Study 1, angry East Asian negotiators elicited greater cooperation than angry European American and Hispanic negotiators. In Study 2, angry East Asian negotiators elicited greater cooperation than angry European American ones, but emotionally neutral East Asian and European American negotiators elicited the same level of cooperation. Study 3 showed that this effect holds for both East Asian and European American perceivers and is influenced by perceptions of angry East Asian negotiators as tougher and more threatening than angry European American negotiators. Finally, Study 4 demonstrated that the effect emerges only when negotiators hold the stereotype of East Asians being emotionally inexpressive and European
1,000 companies captured a variety of critical changes in second landmark survey of corporate counsel in Fortune resolution processes within large companies. In 2011, a counsel provided the first broad-base picture of conflict resolution systems design in courts, client counseling protocols, and the psychology of litigants more broadly. Analyses revealed that litigants preferred mediation, trial with a judge, and negotiation with attorneys and clients present to all other examined procedures. Within this group of preferred procedures, they did not have a clear (i.e., statistically significant) preference. This pattern has significant implications for courts choosing between mediation and non-binding arbitration for their ADR programs – litigants clearly preferred mediation. Litigants also preferred the judge trial to the jury trial and liked the idea of negotiations that included them along with their attorneys to ones that involved the attorneys alone. Regression analyses used to predict the relation between the attractiveness of each procedure and demographic, case-type, relationship, and attitudinal factors revealed many interesting findings, including the fact that women liked the jury trial and binding arbitration less than men did. The results are discussed in the context of dispute resolution systems design in courts, client counseling protocols, and the psychology of litigants more broadly. As attorneys for the world’s most visible clients, corporate counsel played a key role in the transformation of American conflict resolution in the late twentieth century. In 1997, a survey of Fortune 1,000 corporate counsel provided the first broad-base picture of conflict resolution processes within large companies. In 2011, a second landmark survey of corporate counsel in Fortune 1,000 companies captured a variety of critical changes in the way large companies handle conflict. Comparing their responses to those of the mid-1990s, the authors found clear and significant evolutionary trends, including a further shift in corporate orientation away from litigation and toward alternative dispute resolution; moderated expectations of ADR; increasing use of mediation, contrasted with a dramatic fall-off in arbitration (except, importantly, consumer and products liability cases); greater control over the selection of third-party neutrals; and growing emphasis on proactive approaches such as early neutral evaluation, early case assessment, and integrated systems for managing employment disputes. The article summarizes and analyzes the results of the 2011 Fortune 1,000 survey, compares current data to the 1997 results, and sets both studies against the background of a half-century of evolution. The article concludes with reflections on the future of corporate dispute resolution and conflict management as well as related research questions.

**LITIGANT PREFERENCES**

*The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*

_Donna Shestowsky_

99 _Iowa Law Review_ 637 (January 2014)

This article reports the findings of the first multi-jurisdictional field study of litigants’ evaluations of legal procedures shortly after their cases were filed in court. Litigants from three state courts responded to written surveys designed to 1) assess how attracted they were to various legal procedures (e.g., negotiation, mediation, non-binding arbitration, binding arbitration, jury trials, judge trials) for their particular case, and 2) determine whether demographic, case-type, relationship, and attitudinal factors predicted their attraction to each procedure. Analyses revealed that litigants preferred mediation, trial with a judge, and negotiation with attorneys and clients present to all other examined procedures. Within this group of preferred procedures, they did not have a clear (i.e., statistically significant) preference. This pattern has significant implications for courts choosing between mediation and non-binding arbitration for their ADR programs – litigants clearly preferred mediation. Litigants also preferred the judge trial to the jury trial and liked the idea of negotiations that included them along with their attorneys to ones that involved the attorneys alone. Regression analyses used to predict the relation between the attractiveness of each procedure and demographic, case-type, relationship, and attitudinal factors revealed many interesting findings, including the fact that women liked the jury trial and binding arbitration less than men did. The results are discussed in the context of dispute resolution systems design in courts, client counseling protocols, and the psychology of litigants more broadly.

*Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1,000 Corporations*

_Tom Stipanowich and Ryan Lamare_


As attorneys for the world’s most visible clients, corporate counsel played a key role in the transformation of American conflict resolution in the late twentieth century. In 1997, a survey of Fortune 1,000 corporate counsel provided the first broad-base picture of conflict resolution processes within large companies. In 2011, a second landmark survey of corporate counsel in Fortune 1,000 companies captured a variety of critical changes in the way large companies handle conflict. Comparing their responses to those of the mid-1990s, the authors found clear and significant evolutionary trends, including a further shift in corporate orientation away from litigation and toward alternative dispute resolution; moderated expectations of ADR; increasing use of mediation, contrasted with a dramatic fall-off in arbitration (except, importantly, consumer and products liability cases); greater control over the selection of third-party neutrals; and growing emphasis on proactive approaches such as early neutral evaluation, early case assessment, and integrated systems for managing employment disputes. The article summarizes and analyzes the results of the 2011 Fortune 1,000 survey, compares current data to the 1997 results, and sets both studies against the background of a half-century of evolution. The article concludes with reflections on the future of corporate dispute resolution and conflict management as well as related research questions.

**PERSUASION AND DECISION-MAKING**

*Exploring the Impact of Various Shaped Seating Arrangements on Persuasion*

_Rui (Juliet) Zhu and Jennifer J. Argo_

40 _Journal of Consumer Research_ 336 (August 2013)

Despite the common belief that seating arrangements matter, little research has examined how the geometrical shape of a chair arrangement can impact persuasion. Across three studies, this research demonstrates that the shape of seating arrangements can prime two fundamental human needs, which in turn influence persuasion. When seated in a circular-shaped layout, individuals evaluate persuasive material more favorably if it contains family-oriented cues or majority endorsement information. In contrast, when seated in an angular-shaped seating arrangement, individuals evaluate persuasive material more favorably when it contains self-oriented cues or minority endorsement information. Further, results reveal that these responses to persuasive material arise because circular-shaped seating arrangements prime a need to belong, while angular-shaped seating arrangements prime a need to be unique. Thus, this research shows that a subtle environmental cue – the shape of a seating arrangement – can activate fundamental human needs and consequently affect persuasion.

*From Glue to Gasoline: How Competition Turns Perspective Takers Unethical*

_Jason R. Pierce, Gavin J. Kilduff, Adam D. Galinsky, and Niro Sivanathan_

24 _Psychological Science_ 1986 (No. 10, October 2013)

Perspective taking (the ability to adopt the perspective of others) is often the glue that binds people together.
However, the authors propose that in competitive contexts, perspective taking is akin to adding gasoline to a fire: It inflames already-aroused competitive impulses and leads people to protect themselves from the potentially insidious actions of their competitors. Overall, the authors suggest that perspective taking functions as a relational amplifier. In cooperative contexts, it creates the foundation for pro-social impulses, but in competitive contexts it triggers hyper-competition, leading people to prophylactically engage in unethical behavior to prevent themselves from being exploited. The experiments reported in this article establish that perspective taking interacts with the relational context — cooperative or competitive — to predict unethical behavior, from using insidious negotiation tactics to materially deceiving one’s partner to dishonesty in reporting performance on unrelated cognitive tasks. In the context of competition, perspective taking can pervert the age-old axiom “do unto others as you would have them do unto you” into “do unto others as you think they will try to do unto you.”

The Interactive Effect of Anger and Disgust on Moral Outrage and Judgments

Jessica M. Salerno and Liana C. Peter-Hagene
24 Psychological Science 2069 (No. 10, October 2013)

The two studies reported in this article demonstrated that a combination of anger and disgust predicts moral outrage. In Study 1, anger toward moral transgressions (sexual assault, funeral picketing) predicted moral outrage only when it co-occurred with at least moderate disgust, and disgust predicted moral outrage only when it co-occurred with at least moderate anger. In Study 2, a mock-jury paradigm that included emotionally disturbing photographs of a murder victim revealed that, compared to anger, disgust was a more consistent predictor of moral outrage (i.e., it predicted moral outrage at all levels of anger). Furthermore, moral outrage influenced the effect of participants’ anger on their confidence in a guilty verdict — but only when anger co-occurred with at least a moderate level of disgust — whereas moral outrage influenced the effect of participants’ disgust on their verdict confidence at all levels of anger. The interactive effect of anger and disgust has important implications for theoretical explanations of moral outrage, moral judgments in general, and legal decision making.

Intentional Harms Are Worse, Even When They’re Not

Daniel L. Ames and Susan T. Fiske
24 Psychological Science 1755 (No. 7, July 2013)

People and societies seek to combat harmful events. However, because resources are limited, every wrong righted leaves another harm unchecked. Responses must therefore be calibrated to the magnitude of the harm.

One under-appreciated factor that affects this calibration may be people’s over-sensitivity to intent. Across a series of studies, the authors found that people saw intended harms as worse than unintentional harms, even though the two harms were identical. This harm-magnification effect is attributable to differences in blame motivation and occurred for both subjective and monetary estimates of harm, and it remained when participants were given incentives to be accurate. People may therefore focus on intentional harms to the neglect of unintentional (but equally damaging) harms.

Seeing Green: Mere Exposure to Money Triggers a Business Decision Frame and Unethical Outcomes

Maryam Kouchaki, Kristin Smith-Crowe, Arthur P. Brief, and Carlos Sousa
121 Organizational Behavior and Human Decision Processes 53 (May 2013)

Can mere exposure to money corrupt? Considering the significant role of money in business organizations and everyday life, the idea that subtle reminders of money elicit changes in morality has important implications. The findings from four studies demonstrate that the mere presence of money, an often taken-for-granted and easily overlooked feature of our daily lives, can serve as a prompt for immoral behavior operating through a business decision frame (which entails objectification of social relationships in a cost–benefit calculus where self-interest is pursued over others’ interests). The results of Study 1 demonstrated that individuals “primed” to think about money through use of word cues involving money-related phrases were more likely to demonstrate unethical intentions than those in the control group exposed to non-monetary word cues. In Study 2, the authors showed that participants primed with money were more likely to adopt a business decision frame. In Studies 3 and 4, the authors found that money cues triggered a business decision frame, which led to a greater likelihood of unethical intentions and behavior. The authors suggest that money is a more insidious corrupting factor than previously appreciated, as mere, subtle exposure to money can be a corrupting influence.
Under FAA, Court Decides Whether Party Waived Arbitration

In Hong v. CJ CGV America Holdings, Inc., No. B246945 (Cal. Ct. App.), the court held that under the Federal Arbitration Act, the issue of whether a party waived arbitration by substantially participating in litigation is an issue for the court, not the arbitrator. In this shareholder derivative action, the defendants participated in discovery and other pretrial activities before moving to compel arbitration. The trial court denied the motion, holding that the defendant waived the right to arbitration by “substantially participating in the litigation.” On appeal the defendants claimed that under the FAA the arbitrator should decide the issue of waiver by participation. The court of appeals pointed to the overwhelming weight of federal and state courts that have addressed the issue and have held that waiver by litigation is generally an issue for the court, not the arbitrator, and in this case the arbitration clause did not specifically provide otherwise. To read more: http://www.courts.ca.gov/opinions/documents/B246945.PDF.

Non-appealability Clause in Arbitration Agreement that Eliminates All Federal Court Review of Arbitration Awards, Including FAA, Not Enforceable

In In re: Wal-Mart Wage and Hour Employment Practices Litigation, No. 11-17718 (9th Cir. Dec. 17, 2013), the Ninth Circuit held that parties to an arbitration agreement governed by the FAA cannot agree to narrow the scope of judicial review of arbitral awards. This case was a dispute among parties’ counsel who settled a case with Wal-Mart and had agreed they would arbitrate their entitlements to fees. Parties unhappy with the allocation of fees in the arbitration award petitioned the district court to vacate the award. The court denied the petition on the basis that the agreements provided for “binding, non-appealable arbitration.” On appeal, the Ninth Circuit reversed the district court and held that under the FAA Section 9, an order confirming the arbitration award is enforceable unless the award is vacated or modified under Section 10, which states factors for vacatur. Basing its decision on Hall St. Assoc., L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008), the court ruled that a party may not contract away or waive the right to judicial review of arbitration awards and that Section 10 grounds for vacatur are exclusive and may not be changed by agreement of the parties. To read more: http://cdn.ca9.uscourts.gov/datarstore/opinions/2013/12/17/11-17718.pdf.

Third-Party is Only a Party When Sufficiently Identified

In Lee v. Intellus Inc., No. 11-35810 (9th Cir. Dec. 16, 2013), the Ninth Circuit affirmed the district court’s order denying a third-party defendant’s motion to compel arbitration. After the plaintiff purchased a background check on the Internet, the plaintiff discovered that a third party had been charging his credit card each month for a “Family Safety Report.” In a state-law class action suit, the plaintiff alleged improper charging of plaintiff’s credit card. The court held that the third party was not sufficiently identified as a contractual party during the initial transaction and since a contract must identify the parties to the contract, the plaintiff did not enter a contract with the third party. Additionally, the court reasoned that even if the plaintiff entered into a contract for a purchase where a third-party was not sufficiently identified, a consumer would have assumed that he was consenting to the initial party’s terms and conditions and not the third-party’s and would not be subject to the third-party’s arbitration clause. To read more: http://cdn.ca9.uscourts.gov/datarstore/opinions/2013/12/16/11-35810.pdf.

Bed Bugs and the FTC

In Seney v. Rent-a-Center, Inc., No. 13-1064 (4th Cir. Dec. 11, 2013), the Fourth Circuit held that the arbitration clause in the rental agreement for a parasite-infested bed is not covered by a Federal Trade Commission ban on “pre-dispute” arbitration. The court held that the FTC ban applied only to breach of warranty claims relating to the sale of goods, stating, “The FTC regulations limit suppliers’ ability to require binding arbitration of “written warranties” in sales agreements: they do not reach warranties included in leases.” To read more: http://www.ca4.uscourts.gov/Opinions/Published/131064.P.pdf.

Court, Not Arbitrator, Decides Validity of Arbitration Clause

In Smith v. JEM Group, Inc., No. 11-35964 (9th Cir. Dec. 12, 2013), the Ninth Circuit held that the question of arbitrability is for the court and not the arbitrator. The defendants argued that the lower court erred in denying a motion to compel arbitration and in deciding that the arbitration clause in an attorney retainer agreement was unconscionable. The Ninth Circuit relied on Bridge Fund Capital Corp. v. Fastbucks Franchise Corp., which reads, “the question of arbitrability is for the court to decide regardless of whether the specific challenge to the arbitration clause is raised as a distinct claim in the complaint’ so long ‘as the plaintiff’s challenge to the validity of an arbitration clause is a distinct question from the validity of the contract as a whole’” in upholding the lower court decision. To read more: http://cdn.ca9.uscourts.gov/datarstore/opinions/2013/12/11/11-35964.pdf.

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Delegation to Vietnam and Thailand

By John R. Phillips and Chuck Crumpton

Interested in exchanging ideas and making connections, a small delegation of leaders of the ABA’s Dispute Resolution Section traveled to Vietnam last October and met with ADR professionals and members of that country’s Ministry of Justice before heading to Thailand for similar conversations with officials there. Throughout all these meetings, the delegation’s aim was to learn from others and help our counterparts in these two countries promote mediation as a way to resolve disputes in their own countries and across their borders.

Led by Dispute Resolution Section Immediate Past Chair John Phillips and current Chair Ruth Glick, the delegation included Pamela Enslen, Reginald Holmes, Philip Cottone, Charles Crumpton, and Beth Trent. ABA President Jim Silkenat also participated in the Vietnam portion of the itinerary. ADR wasn’t the only item on the agenda; in addition to attending meetings focusing on mediation, the delegation took advantage of the opportunity to indulge in cultural immersion and tours of historic sites. The group was also able to fit in an overnight cruise on the beautiful Ha Long Bay just north of Hanoi and several days on Koh Samui island off the east coast of Thailand.

In Hanoi, the delegation met with senior representatives of the Vietnam Ministry of Justice who shared insights about their current project of drafting Vietnam’s first decree establishing and authorizing commercial mediation, a project supported by the Vietnam International Arbitration Center (VIAC). The delegation also met with members of leading Vietnam law firms and the Ministry of Justice. Representatives of the VIAC and the law firms all indicated strong interest in establishing collaborative, long-term working relationships with the Section, the ABA, and ADR organizations (such as CPR, which was represented on the trip by Beth Trent) to further the development of commercial mediation in Vietnam.

Establishing these relationships and grounds for collaboration is especially timely, as Vietnam’s Ministry of Justice is in the beginning stage of drafting the mediation decree and planning ways to develop effective mediation procedures and systems. Among the interests and needs of our Vietnamese counterparts are models, guidelines, and consulting assistance in the decree’s drafting and the development of mediation systems, organizations, and agencies; procedural models, programs, and faculty for mediation training and standards; and working groups with which officials can collaborate, hold conferences and workshops, and develop pilot projects.

Mediation in Vietnam is indeed in its infancy; the country passed its first ordinance establishing and authorizing international commercial arbitration in 2003 and passed its current arbitration law, modeled largely after UNCITRAL but varying from it in significant respects, in 2010. Despite such measures, commercial arbitration is still not widely accepted in Vietnam. Most international businesses and other governments tend to favor arbitration in Singapore, Hong Kong, and occasionally European ADR centers and organizations.

In addition to enjoying fascinating discussions about the potential growth of mediation in Vietnam, the delegation feasted on wonderful Vietnamese food, took an electric car tour of the Old (French) Quarter and visited the Women’s History Museum as well as the prison where US servicemen such as Sen. John McCain were held during the war. We also spent a morning touring the food markets and taking a class in Vietnamese cuisine.

In addition to visiting the Chief Judge of the Office of President of the Supreme Court of Thailand, who
assembled nearly two dozen other judges from their unified federal system, the delegation also spent a day on the campus of Bangkok’s beautiful Dhurakij Pundit University, talking with a variety of people about topics such as mediation, environmental disputes, medical disputes, and resolving disputes about family inheritance.

What we learned about mediation culture and practice in Thailand was very different from what we heard about in Vietnam. Largely because of the strong US influence during and since the Vietnam War, Thailand’s mediation system is well developed. Each of the 64 regional courts has its own mediation office with trained mediators. In Bangkok, the mediation office at the Supreme Court of Thailand was beautifully appointed, with spacious facilities.

Cultural tours included a visit to the Royal Palace and the Emerald Buddha as well as shopping for exquisite silk items. Several members of the group continued on to the island of Koh Samui, where we were greeted by representatives of the island’s government office and representatives of community groups and engaged in a discussion about an ongoing dispute about beach hotels’ “carbon footprint” and the impact of environmental laws on the island’s hotel industry. A full and challenging day was capped by a dinner with village leaders at the Samui Botanical Green Park that featured native dancers in full Thai regalia.

The delegation members, all of whom paid their own travel costs and expenses, learned a great deal about cultural practices and customs in Vietnam and Thailand and developed friendships and relationships with ADR leaders in both countries. We hope that such explorations continue and are pleased that future international delegations – and the possibility of a larger conference in 2015, perhaps in India – are now under discussion by the Section Council.

John R. Phillips is Immediate Past Chair of the ABA 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. Charles Crumpton is a member-at-large of the ABA Section of Dispute Resolution Council, Co-Chair of the Section’s Mediation Committee, and an attorney with Crumpton & Hansen in Honolulu, HI. He can be reached at crumpton@chjustice.com.
Section News

Section Awards Announced

D’Alemberte-Raven Award Will Be Presented to Gov. Bill Richardson

On April 4, at its Spring Conference in Miami, the American Bar Association’s Section of Dispute Resolution will present its annual D’Alemberte-Raven Award to Gov. Bill Richardson. Richardson, who has served as a two-term governor of New Mexico, a US ambassador to the United Nations, and Secretary of the US Department of Energy, also spent 15 years in Congress, where he was deputy majority whip, chairman of the Congressional Hispanic Caucus, and chairman of the House Natural Resources Subcommittee on Native American Affairs.

As a negotiator, Richardson has successfully engaged in lengthy one-on-one negotiations with Saddam Hussein, Fidel Castro, members of the Taliban, and two generations of North Korean leaders. In these efforts as well as many others, Richardson modeled problem-solving strategies and skills that won the release of hostages, American servicemen, and prisoners in North Korea, Iraq, Cuba, and Sudan.

The D’Alemberte-Raven Award, named for the late Robert D. Raven of San Francisco and Talbot D’Alemberte of Tallahassee, former ABA presidents and pioneers with the ABA in the area of dispute resolution, recognizes leaders in the dispute resolution community for their significant contributions to the field.

Lisa Blomgren Amsler Selected as 2014 Recipient of the Award for Outstanding Scholarly Work

Professor Lisa Blomgren Amsler (formerly Bingham) has been chosen as the recipient of the ABA Section of Dispute Resolution’s Award for Outstanding Scholarly Work. This award honors individuals whose scholarship has significantly contributed to the dispute resolution field.

Blomgren Amsler, the Keller-Runden Professor of Public Service at Indiana University’s School of Public and Environmental Affairs in Bloomington, Indiana, has co-edited three books and written more than 88 articles and book chapters on dispute resolution, dispute system design, and collaborative governance. Before entering academia, Amsler practiced law for 10 years and was a partner at Shipman and Goodwin in Hartford, Connecticut.

Professor Amsler’s scholarship, which has been prolific, broad, and influential, has played a foundational role in the field of dispute resolution, covering a range of processes (including arbitration, mediation, ombuds, deliberative democracy, dispute system design, and collaborative governance) and practice areas (including government, employment and labor, community, commercial, and environmental). Her scholarship has been interdisciplinary, reaching beyond law into fields such as public policy and social science.

The award will be presented on Saturday, April 5, during the Legal Educators Colloquium Luncheon at the Section’s Spring Conference.

Department of Justice’s Community Relations Service to Receive 2014 Lawyer as Problem Solver Award

Also at the Section conference in Miami, the American Bar Association will present the Lawyer as Problem Solver Award to the US Department of Justice’s Community Relations Service. The Section of Dispute Resolution established the Lawyer as Problem Solver Award 12 years ago to recognize individuals and organizations that use their legal skills in creative, innovative, and often nontraditional ways to solve problems for their clients and within their communities. The Community Relations Service (CRS) embodies the mission of the Lawyer as Problem Solver Award by serving as a vital asset for peacemaking, problem-solving, and conflict management in communities across the United States. Created under the Civil Rights Act of 1964, CRS is a unique federal agency whose mission is to assist state and local branches of government, private and public organizations, families, and community groups with preventing and resolving racial and ethnic tension, violent hate crimes, and civil disorders. The award will be presented during the Section Awards Luncheon on Friday, April 4, during the Section of Dispute Resolution Spring Conference.
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Introducing practicing lawyers and law students to some of the key insights offered by the field of psychology, this guide offers a crash course in those aspects of psychology that will be most useful to practicing attorneys. Included are discussions and insights on perception, memory, judgment, decision making, emotion, influence, communication, and the psychology of justice.

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