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From The Chair  By Howard Herman

Geetha Ravindra’s year as Chair of the Dispute Resolution Section was marked by an ambitious outreach that included the remarkable Asia-Pacific Mediation Summit in Delhi, India. Following in her footsteps is a humbling task. This year, my hope is to build on the connections we’ve established internationally and strengthen the vibrant partnership between the academics, neutrals, practicing lawyers, and court personnel that our Section represents.

Although this challenge is huge, I think my experience will help. My 30 years in dispute resolution have largely been spent working to bridge the sometimes-disparate worlds of service as a neutral, a practicing attorney, a teacher, and an official in the courts. Beginning in 1985 as one of the first mediators in the Ninth Circuit Court of Appeals’ early experiments in settling appellate cases and continuing as a private mediator and as director of ADR programs in both state and federal trial courts in Northern California, I have devoted myself to figuring out ways to ensure that new ideas and approaches to dispute resolution get every possible opportunity to thrive. I’m proud to say that my court is something of a model for bringing ADR processes into the institutionalized setting of the courts while maintaining the energy, excitement, quality, and integrity of the early promise of those processes. My work also has included teaching as an adjunct at UC Hastings College of the Law and conducting mediation trainings and programs on the design of ADR programs throughout the world.

The consistent theme in this work has been the effort to link theory and practice — to try to think deeply about the values that underlie ADR practice but ground that thinking in the realities of the day-to-day work. The Section of Dispute Resolution has been key to that endeavor, bringing me into contact with leading scholars and practitioners, lawyers and nonlawyers, in a generous exchange of ideas and approaches not to be found anywhere else.

In the spirit of that exchange, this year the Section has enhanced its major educational offerings in a number of ways. By the time you read this, we will have completed our first live Negotiation Institute in Washington, DC, directed at helping practicing lawyers enhance their negotiation skills — whether in direct negotiations or as advocates in ADR proceedings. October also will feature our Twelfth Annual Advanced Mediation Institute, this year in Atlanta, bringing together mediators, litigators, and in-house counsel to share the most current ideas about mediation best practices. In April, our signature event, the Spring Conference, will be held in New York City, and in June, we will hold the Arbitration Institute with a new format designed to ensure a lively interaction between arbitrators and counsel. Throughout the year, an exciting stream of online programming will be devoted to a wide array of dispute resolution topics.

Of course, this magazine is one of the most important mechanisms by which the Section serves as a wide platform for new ideas and new leaders in our field. Nancy Welsh and Josh Stulberg have served with great distinction as co-chairs of the Editorial Board since 2011. As Nancy steps into the role of Chair-Elect of the Section, she necessarily steps down from this post, though she will continue as the ex-officio liaison from the Section Council. I am very pleased to announce that Andrea Schneider, Professor of Law and Director of the Dispute Resolution Program at Marquette Law School, will join Josh Stulberg as co-chair of the Editorial Board. I am confident that this team will ensure that Dispute Resolution Magazine remains the most important venue in the field, delivering thought-provoking, challenging content in an accessible form that reaches a wide range of readers.

Through our revitalized committee structure, the Section is engaged in projects that affect every aspect of the dispute resolution landscape. To list but a few examples:

- The International Committee is building an online International Dispute Resolution Resource Center to serve as a clearinghouse of information related to international mediation and arbitration.
- The Law School Committee recently helped revise an ABA rule that would have limited the ability of law schools to sponsor mediation clinics and is working on measures to enhance the standing of dispute resolution in law schools.
- The Health Law Committee is sponsoring an ABA Resolution supporting the use of ADR in this growing field.
- The Mediation Committee is launching its Mediator Evaluation project, allowing confidential review and feedback of mediators by mediation participants.
- We need and want your help and your involvement. If you haven’t yet joined a committee, sign up today. If you’ve got an idea for a project, please let me know.

I am truly honored to help guide the Section in its work this year, and I look forward to working with all of you.

Howard Herman is the ADR Program Director for the US District Court, Northern District of California, in San Francisco. He can be reached at howard_herman@cand.uscourts.gov.
Numerable are the lawyers who explain that they picked law over a technical field because they have a ‘math block’ “Seventh Circuit Federal Court of Appeals Judge Richard Allen Posner observed in a 2013 opinion. This oft-repeated career-driving logic is ironic, given that numbers are at the very heart of the work that most lawyers do — and key to alternative dispute resolution. With this issue, the Dispute Resolution Magazine board seeks to bring numbers to the forefront, examining how and why they get used and exploring their seductive power and peril.

Numbers provide a perspective and precision (or at least the illusion of both) that words cannot compete with. And numbers are seductive. Just by way of illustration, we asked ADR colleagues around the world to send us their “favorite ADR number” that tells us something about our field, based on their own research or that of someone else. Here’s a sampling of responses:2

<table>
<thead>
<tr>
<th>More than 500,000,000</th>
<th>Estimated number of contracts with mandatory arbitration provisions that US consumers are parties to.3</th>
</tr>
</thead>
<tbody>
<tr>
<td>47,640,905</td>
<td>2010 state court filings (excluding juvenile and traffic).4</td>
</tr>
<tr>
<td>60,000,000</td>
<td>The number of cases eBay’s online dispute resolution system handles each year.5</td>
</tr>
<tr>
<td>359,594</td>
<td>2010 federal court filings (civil and criminal).6</td>
</tr>
<tr>
<td>8,400</td>
<td>Number of jobs held by arbitrators, mediators, and conciliators in the United States in 2012.7</td>
</tr>
<tr>
<td>714</td>
<td>The percentage increase in court-affiliated dispute resolution programs in Maryland from 1999 to 2013.8</td>
</tr>
<tr>
<td>150</td>
<td>The breaking point in attendance at a public meeting above which it becomes impossible to carry on orderly conversation while maintaining full interaction among all participants.9</td>
</tr>
<tr>
<td>134</td>
<td>Total arbitration claims filed at the American Arbitration Association by AT&amp;T wireless customers between 2009 and 2014.10</td>
</tr>
<tr>
<td>57</td>
<td>Percentage of parties who reported that their lawyer talked more than they did in mediation.11</td>
</tr>
<tr>
<td>47</td>
<td>Percentage rate at which borrowers and lenders achieve agreement in foreclosure mediation.12</td>
</tr>
<tr>
<td>10</td>
<td>Decrease in predicted percentage probability of re-incarceration resulting from just one two-hour prisoner re-entry mediation session.13</td>
</tr>
<tr>
<td>3</td>
<td>Behavioral software predicts final settlement value within about 3% after only 3 negotiation moves.14</td>
</tr>
</tbody>
</table>
Your reaction to these numbers probably ranged from a nod of agreement to surprise and maybe even disbelief. But we have no doubt that you reacted. Indeed, it’s impossible not to be influenced by numbers. And, in a cruel twist of fate, modern cognitive science strongly suggests we are especially irrational when working with numbers, subject to a wide variety of biases that make the myth of the economically rational decision-maker seem quite quaint. Moreover, in a legal system that often requires the monetization of harms, the most powerful numbers thrown around during dispute resolution procedures often include dollar signs. Wrong moves in managing those numbers can spell disaster.

What numbers mean, how we can use them effectively, and what they might tell us about the state of our democracy are all well worth exploration. To help us do so, Jennifer Robbennolt provides an overview of the inevitability of the presence of numbers in negotiation and mediation, describes the potential pitfalls in their use, and offers readers some practical recommendations for navigating their perils. Marjorie Corman Aaron and Wayne Brazil explore the power of decision analysis — as well as the care that must be taken with its use — as parties assess the number, character, dynamics, and results of the many “risk pivots” in civil litigation. Robert Creo makes the case that numbers “are always there” and offers practical strategies, developed in his own considerable mediation experience, for neutrals to use numbers effectively in support of settlement efforts. In the final article, Matt Leighninger and Tina Nabatchi focus on democracy and numbers by documenting and analyzing the direct, innovative, and interactive forms of public participation emerging through new technology and their impact on the continued development of a vibrant democracy. Thanks to all six contributing authors for helping us increase our understanding of and comfort with numbers.

Endnotes
1 Jackson v. Pollion, 733 F.3d 786, 788 (7th Cir. 2013) (citing David L. Faigman, et al., Modern Scientific Evidence: Standards, Statistics, and Research Methods V (2008 student ed.) for the proposition that “law students as a group, seem peculiarly averse to math and science.”)
2 Numbers listed here were contributed by Lorig Charkoudian, James Coben, Noam Ebner, Rafael Gely, Toby Guerin, Don Philbin, and Nancy Welsh.


5 Arthur Pearlstein et al., ODR in North America, in ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE 457 n. 22 (Mohamed S. Abdel Wahab et al. eds. 2011).

6 Resnik, supra note 4.


9 Carrie Menkel-Meadow, Scaling Up Deliberative Democracy as Dispute Resolution in Healthcare Reform: A Work in Progress, 74 LAW & CONTEMP. PROBS. 1, 24 (Summer 2011).

10 Resnik, supra note 4, at 2812-13 (noting that during the same time period AT&T wireless customers increased from 85 million to 120 million).


13 Shawn M. Flower, Community Mediation Maryland: Re-entry Mediation In-Depth Recidivism Analysis, CHOICE RESEARCH ASSOCIATES I, IV (2014).


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The Promise and Perils of Numbers in Negotiation and Mediation

By Jennifer K. Robbennolt

Numbers arise in myriad ways in negotiation and mediation. Offers and demands almost always include numbers: dollar amounts, interest rates, inflation figures, or percentages. Agreements (and alternatives to them) are often framed in similar terms. Even parties’ aspirations, bottom lines, and thoughts about a deal’s fairness are usually expressed in numerical terms.

Numbers are clearly useful for negotiators and neutrals in crafting options, evaluating proposals, and generating persuasive arguments. But numbers also present challenges, potential problems so big that wise mediators and negotiators will think carefully about how to make the most of numbers’ promise without falling prey to their perils.

The Promise of Numbers

Numbers can be illuminating and compelling. Negotiators (and mediators) invariably make predictions about the likelihood of future outcomes, outcomes such as a court’s ruling on a motion, winning or losing in court, consummation of a deal, and so on. These likelihoods are commonly expressed numerically in terms of probabilities. Potential outcomes, such as a damage award, the value of a deal, or the value of stock options, are also often quantified. And the expected value of a particular outcome is formulated as a mathematical function of its likelihood and magnitude.

Transaction costs such as lawyers’ fees, the dollar value of delays, or the costs associated with going to mediation are often put in numerical terms. Negotiations, deals, or settlements that unfold over time often involve numbers associated with time, including the time value of money, inflation, interest rates, and risk assessments. The substance of the negotiation will determine the relevance of particular numbers. Medical cases, for example, might involve quantitative information about prognosis, chances of recovery, efficacy of treatment, likelihood of side effects, and more; employment cases may turn on statistical analysis of discrimination; and numbers about market share might be central to a case involving antitrust.

Persuasion and problem-solving may involve numerical arguments. Negotiators may seek (and mediators may recommend looking to) objective quantitative information. They might consider an appraisal; some set of comparables (other products, verdicts in similar cases, the salary offered to another job candidate); safety or environmental standards; engineering specifications; or data about replacement
costs, “blue-book” values, market price, or depreciation. How many neutrals, after helping parties negotiate away most of their differences and edge close to agreement, have urged the parties to step back, look at the small numbers gap that divides them, and “split the difference?”

All of these numbers can be useful decision-making tools. Getting hard data about a matter in dispute may reduce ambiguity and, potentially, the bargaining range. Focusing on numerical information may help negotiators resist common biases in judgment, such as overreliance on a general impression of how well an example fits a particular category — its representativeness — or on anecdotes that may or may not be characteristic of a broader pattern.

Numbers can create focal points, salient reference points that can facilitate settlement. Numbers might be used to “calibrate” the information that is being provided to the negotiator. For example, to calibrate the information that different real estate agents are giving you about the value of your home, you might ask them to provide information about the original listing prices and final selling prices of the last 10 houses they sold.

The Perils of Numbers

Dealing with numbers can be difficult for many negotiators and mediators. As psychologist Ellen Peters has pointed out, “numbers can be difficult to evaluate because they are abstract symbols, and context changes their good/bad meaning.” She notes the wildly varied interpretations we can give one number in three different instances: 9 degrees Fahrenheit, $9 billion, and a 9% chance of a tsunami. Working with numbers (such as dollar amounts) that fall on an unbounded scale can be especially difficult.

Even choosing which numbers to entertain can be fraught. The confirmation bias is a tendency to look for, pay attention to, and more readily accept information (including numbers) that confirms an existing belief or preference while disregarding information that is less congenial. And when the information is amenable to differing interpretations, it is likely to be interpreted differently by different parties to the negotiation in ways that are conducive to their respective positions and in ways that can even cause greater disagreement.

It can be difficult to sort out where particular numbers come from, their validity and reliability, and what other potentially important numbers are not part of the conversation.

In addition, many numbers in negotiation do not come out of thin air. Someone has made a decision about how to measure a particular concept, how to collect the data, what comparisons to make or highlight, and how to present the data. Describing, for example, the “average” house price in a particular neighborhood using a mean (what many people think of as an “average”) or a median (the middle value) might convey different information. Imagine a neighborhood with a large number of relatively modest houses but a few disproportionately expensive ones. Those expensive houses will result in a higher mean, as compared to the more typical, lower, median home value. It can be difficult to sort out where particular numbers come from, their validity and reliability, and what other potentially important numbers are not part of the conversation.

One of the most discussed ways in which numbers can distort decision-making is how our numerical judgments can be influenced, or anchored, by other numbers that are at the front of our minds. Available numbers can provide benchmarks for our estimates even when they are irrelevant to the judgment or estimation task at hand. In one classic study, for example, people’s estimates of the number of African countries in the United Nations were influenced by a number generated by spinning a wheel of fortune. In negotiation, judgments can be influenced by initial offers or demands, negotiator aspirations or reservation prices, information (accurate or not) about other cases, and constraints such as insurance policy limits or statutory damage caps.

Another commonly described distortion is the effect of framing a choice as a loss or a gain. Specifically, people tend to be risk-averse toward moderate- to high-probability gains but risk-seeking toward moderate- to high-probability losses. Thus the same numerical information, presented differently, can
result in strikingly different decisions.\textsuperscript{11} Imagine the following situations:

- You are a plaintiff in a lawsuit. You have been offered $48,000 to settle. You (or your attorney) estimate that at trial you have a 50% chance of winning $100,000 and a 50% chance of receiving nothing.
- You are a defendant in a lawsuit. You can settle the case for $48,000. You (or your lawyer) estimate that at trial you have a 50% chance of losing and paying $100,000 and a 50% chance of winning and paying nothing.

In each case, would you choose to settle or go to trial? Most people would accept the settlement in the first case (choosing the certain gain of $48,000 rather than gambling on a gain of $100,000). In contrast, most people would opt to go trial in the second example (choosing to risk paying $100,000 rather than the definite loss of $48,000).\textsuperscript{12}

A variety of additional phenomena can also make working with numbers challenging. For example, as Gary Belsky and Thomas Gilovich point out in \textit{Why Smart People Make Big Money Mistakes — and How to Correct Them}, we have a tendency to “categorize and treat money differently depending on where it comes from, where it is kept, or how it is spent,” a quirk of mental accounting that means that different dollars are treated as having different values.\textsuperscript{13}

People also have difficulty understanding the effects of inflation and compounding interest. The \textit{money illusion} involves confusing dollars with buying power. In addition, \textit{bigness bias} inclines us to focus our attention on big numbers to the neglect of smaller ones, even though small losses or gains can become substantial when they add up over time. To see the problem, consider two identical investors who contribute $50 a month to a mutual fund that earns 10% per year. The first began contributing at age 21 and contributed for 8 years, investing $4,800; the other started contributing at age 29 and continued for 37 years, investing $22,200. Which investor would you expect to have more money in the investment account at age 65? One might be tempted to think that the investor who contributed $22,200 (and now has $217,830) would have more money in the account at age 65 than the other investor would at the same age. But it turns out that the first investor, whose total contributions were much smaller but had more time to grow, will have accumulated more money ($256,650) than the investor who contributed more but whose contributions had less time to grow.\textsuperscript{14}

The precision of a number also has an effect on how it is perceived and used. For example, there is a tendency to perceive round numbers as being bigger than precise numbers of approximately the same magnitude.\textsuperscript{15} In addition, researchers have found that more precise first offers tend to be perceived as better reasoned and act as more “potent” anchors than do round numbers of similar size.\textsuperscript{16} And there is a tendency to be more influenced by the left-hand digits in a number than by the numbers on the right side, a finding that helps explain why $.99 pricing is so common.\textsuperscript{17}

**Numeracy**

All of this is complicated by the fact that people, even highly educated people, differ in their level of understanding of and comfort with numbers, a construct known as \textit{numeracy}.\textsuperscript{18} Highly numerate people understand and tend to use numbers and numerical concepts (such as number lines, measurement, time, mathematical calculations, size comparison, and ratios such as fractions or percentages) to facilitate
decision-making. Those higher in numeracy may get a richer “gist” from numerical information than those lower in numeracy, and they are more inclined to seek out numerical information, tend to think more critically about numbers and their validity, and are likely to draw more accurate affective meaning from numerical data. 19

In contrast, those who are less numerate experience less comfort with numbers, are more trusting of information that is presented in a verbal or narrative format than they are of information that is presented via numbers, and are more likely to be influenced by non-numerical information such as mood or emotion. Low numeracy can make people more vulnerable to psychological heuristics and is, not surprisingly then, associated with various biases in how risks and benefits are perceived. 20

Thus people with differing degrees of numeracy may prefer and pay attention to different kinds of information and use or interpret the same numerical information differently. In addition, there is evidence that people who are lower in numeracy are less likely than those high in numeracy to desire more shared decision-making, exhibiting more comfort with a more passive role instead. 21

Dealing with Numbers

Given the benefits and perils of numbers, the challenge for negotiators and mediators is to make good use of numbers without falling prey to their pitfalls. To this end, negotiators and mediators would be well served to have basic training in how to work with numbers, paying particular attention to where numbers come from: How were concepts defined? How were the numbers generated? Are there alternative numbers that might also be useful? 22

Broadening the range of information on which to focus can help blunt the distorting influence of particular anchor points or frames. For example, experimental data suggests that focusing on other numbers — such as the negotiator’s own goals, the counterpart’s reservation price, or the counterpart’s alternatives — can moderate the anchoring effect of a first offer. 23 Similarly, negotiators can consider

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Negotiators and mediators would be well served to have basic training in how to work with numbers, paying particular attention to where numbers come from: How were concepts defined? How were the numbers generated? Are there alternative numbers that might also be useful?

Numerical information in different frames or with different degrees of precision.

Mediators or other advisors can also help ensure that useful numbers are considered by negotiators and take steps to help to make numbers manageable for negotiators, recognizing that individuals will come to the numbers with differing levels of numeracy. Drawing focus to the most important data, ordering or framing the data in useful ways, suggesting useful comparisons, tailoring complexity to level of numeracy, and combining numbers with descriptive labels may reduce the cognitive demands of numerical information, aid comprehension, and facilitate the effective use of numbers. Asking questions about the sources, validity, and reliability of numbers, as well as the degree of uncertainty associated with them, can help negotiators realistically assess them. Augmenting numerical information with appropriate visual representations of the data, including graphs or tables, can also be helpful, but it is important to pay attention to the ways different presentations can influence understanding.24

Because numbers can facilitate agreement by providing objective parameters for deals, helping negotiators resist certain kinds of judgment errors, and providing focal points for discussion, negotiators and neutrals would do well to think about the ways in which numerical information can be introduced into negotiations and mediation sessions. But negotiators and mediators must also take steps to make sure that they deal with numerical information appropriately, using it in ways that enhance decision-making rather than allowing it to derail the negotiation, feed into judgment biases, or be misused in other ways.

Understanding what numbers might be useful in a negotiation, where those numbers come from, and how to present numbers in effective ways is crucial for any effective negotiator or mediator.

**Endnotes**

1. See David M. Messick, Equality as a Decision Heuristic, in PSYCHOLOGICAL PERSPECTIVES ON JUSTICE: THEORY AND APPLICATIONS 11 (Barbara A. Mellers & Jonathan Baron eds., 1993) (explaining the perils of “splitting the difference”).

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15 Manoj Thomas et al., The Price Precision Effect: Evidence from Laboratory and Market Data, 29 MARKETING SCI. 175 (2010).

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20 Wändi Bruine de Bruin et al., “Thinking about Numbers Is Not My Idea of Fun”: Need for Cognition Mediates Age Differences in Numeracy Performance, 35 MED. DECISION MAKING 22 (2015); Nathan F. Dieckmann et al., The Use of Narrative Evidence and Explicit Likelihood by Decisionmakers Varying in Numeracy, 29 RISK ANALYSIS 1473 (2009); Reyna et al., How Numeracy Influences Risk Comprehension and Medical Decision Making, 135 PSYCHOL. BULL. 943 (2009).


22 For accessible materials on understanding numbers see, e.g., Jeffrey Katzer et al., EVALUATING INFORMATION: A GUIDE FOR USERS OF SOCIAL SCIENCE RESEARCH (1998); Robert M. Lawless et al., EMPIRICAL METHODS IN LAW (2010).

23 Galinsky & Mussweiler, supra note 10.

24 Lipkus & Peters, supra note 18; Peters, supra note 5.

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Jennifer K. Robbennolt is the Alice Curtis Campbell Professor of Law, Professor of Psychology, and Co-Director of the Program on Law, Behavior, and Social Science at the University of Illinois College of Law. She is co-author (with Jean Sternlight) of Psychology for Lawyers: Understanding the Human Factors in Negotiation, Litigation, and Decision Making (2012). She can be reached at jrobbenn @illinois.edu.
We are two long-time colleagues with many years of work in the courtroom, in the classroom, on the bench, and around the mediation table. Our purpose here is to extend a conversation between us that we hope will enhance our readers’ appreciation of the power and the limitations of decision analysis. We write together, approaching this subject from different perspectives, some wholly complementary and others reflecting professionally respectful differences of view.

We hope that what follows will equip lawyers and neutrals to make better informed judgments about how to use decision analysis more instructively and reliably — as well as how to identify circumstances in which its superficial use can yield unreliable assessments of risk and value.

Our topic centers on the theme of this issue of Dispute Resolution Magazine: the role of numbers in our corner of the legal subculture. Numbers have huge psychological power, and this power is the principal source of both the value and the danger in decision analysis.

It is ironic that among lawyers, many of whom turned to this profession because they felt so challenged by math, numbers have so much power. Maybe lawyers, who are more comfortable with words, are especially susceptible to measurability bias. We tend to overweigh what is measured, counted, quantified — and to underweigh what is not. Take something out of the language of numbers, and we are less likely to assign it importance for decision-making. Present that same message in numbers, and we consider it significant. Our clients are apt to do the same.

We wonder if this is because humans have a deep need for certainty, or at least for some kind of reassurance. It may be rooted in our raw understanding of how profoundly uncertainty pervades so much of our existence. But the lure of quantification makes us vulnerable to deception through the slightest manipulation of numbers.

Of course, even with its numerical appearance and mathematical operations, decision analysis provides no certainty. In a legal case, it is based upon human estimates. Thus, the numbers it yields are no more certain than traditional case evaluation, delivered in prose.

The Pure Pluses

Decision analysis marries judgments (best professional guesses) to numbers. A fragile coupling — but not for that reason to be shunned. On the contrary, this union can yield great rewards.

Decision analysis, properly used, can constitute a highly disciplined, rational, analytically demanding and careful approach to decision-making — at least
when the thing about which we need to make decisions is as elastic, dynamic, fluid, and mercurial as civil litigation can be.

This is true because decision analysis exposes, more effectively than any other tool, including a prose summary, the number and character of the “risk pivots” that civil litigation entails and clients and lawyers must try to assess. By exposing these in a graphic presentation, decision trees also help clients and lawyers understand the succession of and the dynamics between the pivot points.

Just as important, carefully constructed decision trees emphatically remind us that to fully comprehend our litigation circumstance, we must assess each risk pivot in relation to the others. Each may contribute to larger cumulative risks. In this way, decision trees succinctly illustrate the complexity, convolution, and uncertainty that inhabit so much of civil litigation.

Lawyers and clients both seek to feel comfortable with their decisions. Many need to be able to explain and defend their choices to themselves and to others, including shareholders as well as people higher on the organizational chart. In our own work, we have found that when used with appropriate refinement and circumvention, the method’s numerical yields — cumulative probabilities of possible outcomes and overall discounted value — may provide people with such comfort. Decision trees’ numbers can help clients feel that their settlement decisions (yea or nay) are not undisciplined or arbitrary but supported by a process that provides logic and reasoning.

Important Precautionary Refinements

Decision tree analysis involves cumulating probabilities. Put in the clients’ words, “Of all the ways this case could play out, what’s most likely to happen? What are my overall chances of getting nothing? Of winning enough to cover my losses? Of getting socked with a verdict that will bankrupt my business?”

The method is also used to derive a “discounted value”: the sum of each possible outcome multiplied by its cumulative probability. Given that these results — cumulative probabilities and discounted value — run on math and are often given meaning in settlement decisions, anyone who wants to use decision trees effectively and properly needs to deeply understand the process’s sophistication and limitations. In that spirit, we offer the following discussion of important cautionary refinements. Far from an exhaustive list, it addresses some of our own concerns about the method’s use.

Beware of biases when estimating the probabilities and case outcomes.

Lawyers and clients are both subject to optimism and partisan perception biases, notwithstanding commitments to remain “objective.” Also relevant is the anchoring bias; initial numbers unduly influence our judgments.

These biases may be old news to our highly educated readers. The bad news is that, even when aware, people tend to believe they are less susceptible to these biases. But that’s just not true. Research establishes that most lawyers are not terribly competent at predicting how a judge, jury, or arbitrator will rule. Attorneys tend to be overconfident and inaccurate. Interestingly, research suggests that the risk of excessive optimism increases with the complexity of the task or the target of estimation — and forming “guesses” about litigation outcomes is a notoriously complex task. Thus, we urge humility when estimating probabilities on a decision tree. It is good practice to try a range of probability estimates for critical risk pivots. Even if your current estimate is 65% for a certain event (say, liability), try calculating the tree with that probability at 60% or 70%, or 55% or 75%.

The same advice holds for predicting verdict awards. While plaintiffs and their counsel certainly overestimate, research suggests that defense lawyers are particularly prone to optimism when (under) estimating awards. Defense counsel are advised to remember: the jury that finds liability is a jury that favors the plaintiff. One of us served as a mediator in a case where, in a caucus, we all waved away the possibility of damages beyond a few million dollars. The case proceeded to trial, and the jury awarded damages of $40 million. Don’t fail to consider the worst-case scenario.

Judgmental anchoring — a previously considered number’s influence on a numeric judgment — also critically impacts the decision analyst. Much as an anchor pulls a boat in its direction, a first number — that first guess or reference point, even if obviously wishful — pulls subsequent numerical judgments up or down. Anchoring is another robust, consistently demonstrated phenomenon in research on psychology.
and decision-making, across domains, for novices and experts, including lawyers. It is easy to see how a lawyer or client could be anchored to a number generated by his or her own biased guess, or by a recent high or low verdict reported online or in the papers.

We’d like to think an intelligent lawyer would adjust an early number for new information or further thinking. Unfortunately, research confirms that, while some adjustment occurs, most people adjust insufficiently from initial anchors. People estimate ranges too narrowly, and they tend to remain confident and optimistic.

**Probability estimates must be true to their location on the tree and must assess interdependence of outcomes at risk pivots.**

Effective estimates of probabilities at any given risk pivot must reflect what the circumstances would be on that particular branch of the decision tree at that particular juncture, i.e., at the moment in time represented on the tree. In a tree that presents a risk pivot at summary judgment, probabilities after “summary judgment denied” should be estimated in that light. After all, only after such a ruling will everyone know that the judge found some merit to arguments about a serious factual question.

To dig more deeply into the litigation weeds and the litigator’s judgment, imagine a case involving a hard-fought motion to dismiss a cluster of fraud claims. Along each tree branch after the motion, the next risk pivot might be labeled “liability or no liability.” The litigator’s common sense knows to adjust chances of liability based on whether the risk pivot sits on a tree branch following a positive or negative ruling on the fraud claims. After all (let’s assume), if the fraud claims remain, the jury will hear additional, inflammatory evidence that may also impact the odds of its finding liability.

Thus, before working through a decision tree analysis, defense counsel might have roughly estimated the chances of winning a defense verdict at, say 50% to 60%. But when constructing the tree, counsel is compelled to recognize that these percentages are credible only if the fraud claims are dismissed. Given the judge’s revealed proclivities and the potentially inflammatory evidence, counsel would be wise to estimate that the chances of a defense verdict along that path are much lower.

Under probability theory, an analyst can determine the cumulative or joint probability of a particular outcome by multiplying the likelihood of one event by the likelihood of another event only if the likelihood that each event will occur is truly independent. In civil litigation, sometimes the same important factor, or set of closely related factors, can significantly affect the likely outcome at different pivot points along a decision tree. When this is the case, a decision analyst must be very careful to assess the impact of the interdependence of the factors at each pivot point.

Basic probability theory agrees. Indeed, when calculating cumulative probabilities, bedrock rules of probability require deliberate adjustment if probabilities along a path are not independent.

To discuss the question of independence in cumulative probability, it’s worth illustrating how cumulative probabilities work with a game involving serial jars of marbles. The rules of the game are that to win the pot of gold, you have to draw two red marbles (while blindfolded), one from each of two jars placed in a row. The first jar holds 100 marbles, 80 red and 20 black. The second jar also holds 100 marbles, but 50 red and 50 black. What happens on the first draw has no impact on the draw from the second jar (except that you won’t proceed to the second jar if you draw a black marble from the first). In this game, the cumulative probability of winning the end pot of gold is 40%: 80% (first jar) x 50% (second jar) = 40%. These two independent probabilities are not affected by any hidden, shared factors. In other words, drawing that first red marble does not have any hidden but powerful effect on the odds that you will later draw another.

Returning to the jars of marbles: what if, as soon as you drew a red marble from that 80/20 first jar, an invisible hand altered the black-to-red marble ratio in the second jar? That invisible hand changed the marble mix in the second jar from 50 red/50 black to 70 red/30 black. Now, the cumulative probability of drawing two red marbles is no longer 40% (the product of 80% x 50%); it is 56% (the product of 80% x 70%).

In the case example, the judge’s ruling on the fraud claims functions as the invisible hand in the marble jar. It changes the “marble mix.” The rules of probability are satisfied only if players use the new, altered probability.
Let’s look at another example to illustrate the challenge presented when the same factor affects the likelihood of outcomes at different risk pivots. In personal injury cases, the same factor — what the jury thinks of the plaintiff as a human being — can affect both the likelihood that the jury will believe her account of how the accident occurred (thus how the jury will resolve the liability issue) and the likelihood that the jury will be generous when it awards general damages (a notoriously elastic determination). When the same variable can play a significant role in the outcome at two formally distinct risk pivots, a risk analyst who is trying to determine the cumulative probability of an ultimate outcome faces a very difficult task. She must take fully into account her judgment about the likelihood that the jury will believe (and believe in) the plaintiff when she is developing her estimate of the most likely zone of general damages.

What’s crucial here: Pay attention to the interdependence/independence of outcomes at the risk pivots and stay on top of the rolling analytical logs. As reality unfolds, return to earlier developed decision trees to adjust estimates and structure based on new insights. Take into account what has happened in the litigation, unforeseen developments with evidence and witnesses, and new information learned in discovery. A judge’s comments at oral argument or in a written opinion might call for some reevaluation. After all, the judge may have been the first neutral to weigh in and will rule on evidentiary motions at trial.

**Reflect what triers of fact are asked to decide — and how they return verdicts.**

The decision analyst is charged with thinking carefully about how judges and juries may rule. To do that, the decision analyst should consider what questions the triers of fact will be asked, imagine their possible answers, and estimate the likelihood of their (determinative) answers.

For that reason, the decision analyst should be aware of the importance of the form of verdict a jury will use. Let’s assume that the jury will understand the judge’s formal instructions that in order to find liability, it must first find both causation and negligence. Where the jury will be given only a simple general verdict form, should the decision analyst assess the probabilities of each separately and multiply them to get the cumulative probability of a liability finding? Probably not. After all, when jurors return verdicts on general verdict forms (without addressing specific questions), a litigator’s experience suggests that despite the legal distinctions, the jurors will slip unselfconsciously into a gut sense of what’s right — of the justice they want to bring about. If you don’t believe they will assess the negligence and causation issues separately, but rather holistically, then your probability estimate should be holistic. It should reflect the way you believe the jury will approach the question.

In federal courts, juries commonly return their verdicts in the form of answers to special interrogatories. Special interrogatories are designed to cabin decision-making sloppiness by compelling juries to make separate findings about legally separable issues, e.g., to address separate components of multi-element claims or defenses one component or one element at a time. When the court thus parses and isolates separate issues, it asks the jury to determine, separately for each issue, whether the party bearing the burden of proof has met its burden. To assess probabilities, the decision analyst could ask the parallel questions: What is the likelihood of the jury answering yes to
each and every one of the questions required for a liability finding?

**Pay attention to your gut — and to the arithmetic.**

What if the cumulative probability of a particularly important result — liability or a desirable damages award — ends up far, far from a lawyer’s gut sense? Should we look to the gut or the math as the distortionist? The answer, of course, is that we should re-examine both with some care.

A decision tree that is too simple fails to represent complex realities. Imagine an employment case with serious dispositive motions, controversy about back pay, emotional distress, front pay, and punitive damages. A tree with one risk pivot for liability and one round damages estimate, or even a rough undifferentiated range, would not fairly map the litigation. This case will involve multiple risk pivots on liability and damages components. There is more than one way the plaintiff could lose or end up with pretty low damages.

One of the strongest reasons to use decision analysis is that the lawyer’s intuitive gut calculator cannot know the cumulative probabilities for each possible outcome in a complicated case. We know that, in rare instances, everything or nothing will break our way. But reality is more often a dastardly combination of positive and negative breaks. When the tree fairly captures an informed analysis of the risk pivots and yet the cumulative probabilities of desirable and undesirable outcomes contradict the lawyer’s gut sense, it’s time for the lawyer and client to carefully consider arithmetic’s counsel.

On the other hand, experienced lawyers also have a legitimate gut sense that the more branch clusters along a given decision-tree path, the lower the cumulative probability of each possible result and the lower the discounted value. A highly complex tree with many layers of branch clusters may also serve to distort reality. This kind of tree should be “read” with some caution, with a critical eye for over-complexity, for too many risk pivots, and too much interdependence between their outcomes.

**The net matters.**

A competent decision analysis should at the very least account for all quantifiable costs along the path to any outcome. Estimated attorney’s fees and costs must be subtracted from the plaintiff’s potential positive “payoffs” (in non-fee shifting cases) and added to the defense’s potential negative payoffs.

Estimated verdict amounts should also include any statutory interest. Particularly in times of higher general interest rates and when final judgment is far in the future, it’s best to calculate the time value of the future award.

Let’s imagine a case with a potentially dispositive preliminary motion, with a relatively low chance of success. Assume that if the plaintiff wins on liability, base damages could be $75,000, $200,000, or $350,000 — depending. The plaintiff could succeed on some theory that would entitle her to collect her
attorneys’ fees from the defendant, and a 2X multiplier of actual damages. The defense costs will be approximately $30,000 through the dispositive motion (including discovery, which is only partially complete), and an additional $70,000 through trial. Plaintiff’s counsel’s “reasonable fees and costs” through trial would also be $100,000.

The tree on page 16 details the discounted value from the defense perspective without considering anyone’s costs or fees.

See the bottom of page 17 for the tree after including costs and fees the defense will or may pay. Quite a difference in the discounted value.

Having decided to use this method, it would be misleading to omit these fees and costs. They will be real when incurred.

Best practice could also include subtracting other quantifiable costs from net payoffs. For example, the client might estimate that he will pay $8,000 in overtime labor to comply with discovery. And what if five executives will have to testify on deposition and at trial? Using their high salaries as a base, the lost value of their time in depositions, prep, and trial may be in the tens of thousands of dollars. While quantifying everything would be impossible, we should try to think through all significant additional costs of the process.

**Don’t ignore intangibles.**

Intangibles matter when making decisions. Litigants care and worry about risk. They experience the emotional value of restoration, vindication, or closure. Litigants appreciate the value (to sense of self and to future prospects) of a good recommendation or endorsement, an enhanced reputation, a trademark’s cachet, and the importance of goodwill with customers or upstream vendors. If the decision analyst and the client can jointly formulate reasonable estimates of their value, then theoretically these estimates could be built into the payoffs at the end of the appropriate path on the tree.

Most important is not to allow these intangibles to be overshadowed and undervalued by undue focus on the tree’s numerical inputs and outputs. The decision analyst is wise to create space in time and on the page for discussion of intangible consequences and why they matter. Plaintiffs who cannot afford to pay the mortgage in the event of $0 recovery may adjust their sights downward. The possibility of losing future business or a current friendship if a certain witness is subpoenaed may weigh heavily. Intangibles are important, not secondary, because they reflect the very real contexts within which our legal disputes occur.

**Summing It Up**

When done with integrity and competence, decision analysis can offer considerable insight, improve communication, and add greater rigor to the decision-making process. Yet it is also susceptible to error and manipulation in ways that we hope our readers will come to recognize and avoid.
1 We have chosen to use the term “risk pivots” as a less technical way of describing what are called “chance nodes” on a decision tree, usually represented by small circles.

2 Too much experimental and empirical research exists confirming the power of bias in human (including lawyers’) decision-making to attempt its thorough citation here. Thus this article includes citations only for highly specific references. Those who wish to delve deeper into the impact of bias and other ways that psychology impacts lawyers’ thinking are encouraged to read Jennifer Robbennolt’s and Jean Sternlight’s comprehensive work, Psychology for Lawyers: Understanding the Human Factors in Negotiation, Litigation and Decision Making (2013). Also, Ch. 5 in Professor Marjorie Corman Aaron’s book, Client Science: Advice for Lawyers on Counseling Clients through Bad News and Other Legal Realities (2012) provides a shorter summary on the topics. Important research specific to lawyers’ decisions regarding settlement and trial can be found in Randall Kiser’s book, Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients (2010), drawing upon research reported in the Randall Kiser, Martin Asher, and Blakeley B. McShane article, Let’s Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations, 5 J. EMPIRICAL LEGAL STUD. 3, 551-91 (2008).


5 Roselle Wissler et al., Decisionmaking about General Damages: A Comparison of Jurors, Judges, and Lawyers, 98 Mich. L. REV. 3, 751, 805 (1999). Note that, as defined in Kiser’s study, the mean “decision error cost” — defined as the difference between the last offer and trial result — was $52,183 in New York and $73,400 in California for plaintiffs, but $920,874 in New York and $1,403,654 in California for defendants. See Kiser et al., supra, 566-70.

6 While there are technical ways to include numerical discounts for risk aversion, these are quite technical (and, ironically, fraught with risk for the integrity of the process).
Like Count von Count, the Sesame Street character who counts aloud everything he can see, hear, and touch, mediators and advocates inhabit a world filled with numbers. In all the cases where I have served as a neutral, despite the entreaties of the mediation profession to create holistic solutions that focus on the transformative elements of the resolution of the conflict, the numbers have always been present — and deserved careful attention. Interest-based solutions do not occur in isolation. Every litigated case has at least one economic component, since bringing a claim to adjudication always involves costs, even if parties are proceeding pro se to an arbitral forum. The Count and the numbers are always there.

**Numbers “R” Us**

The Anglo-Saxon legal code applied the concept of *lex talionis*, the law of retaliation, commonly referred to as “an eye for an eye” from the biblical foundations in the Old Testament and the Code of Hammurabi (around 1780 BCE) of Mesopotamia, to substitute payment of what was previously called *weregild*, for “blood revenge,” or direct retribution. The civil justice system compensates aggrieved parties by the payment of money from those found to be at fault, with the trier of fact determining appropriate sums for damages that are difficult to calculate directly, such as personal injury claims.

When I arbitrate or mediate, I sometimes think of the Count as sitting on a swing hanging from the ceiling: always present and ready to be called into action, even if the parties and advocates ignore him. Let’s take a journey with the Count, review some specific past rides, and see how the numbers affected the process or the outcome.

**When Do We Get to the Numbers?**

The structure of my mediation model has not changed dramatically over the decades. It follows a funnel approach where information is exchanged and discussed, risks are assessed, and then bargaining begins as the scope of the topics is continually narrowed until the final dialogue focuses on the economic terms and conditions. I instruct all the participants...
not to discuss specific demands or proposals in any joint session and wait until I believe the time is ripe for the bargaining.

Many advocates are impatient and want to get to the numbers quickly. Their fear is that the parties are too far apart and the mediation is going to be a waste of time, or worse yet, that in mediation they will compromise their position without getting concessions or a significant reduction in the numbers from the other side. Their interest is legitimate: creating a new ceiling or floor for negotiations before the judge at a pre-trial or settlement conference can open up new challenges. The mediator must strike a difficult balance, and my own experience is that introducing numbers too early in the process can produce posturing that can mislead the participants to a conclusion that settlement is improbable and that the process should be shut down immediately.

For example, in a recent employment case involving a claim of constructive discharge for an employee who resigned, the plaintiff’s lawyer demanded $175,000 a few days prior to the scheduled mediation session. The day before the mediation, the claims adjuster instructed counsel for the insured to cancel the session because the parties were “too far apart.” Counsel, however, thought going forward with mediation made sense because there were significant non-economic issues to discuss, and they had a telephone discussion (without me) late into the evening, ending with an agreement by the employer to pay the employer’s share of the mediation cost if the insurer declined to cover it. In the mediation session the following day, both parties focused on non-economic issues, and once they were close to a tentative agreement on those matters, the economic issue was settled with one phone call to the adjuster.

Anchor Me Not

When the plaintiff starts with an excessive demand or the defendant opens with an intentional lowball offer to anchor the negotiations or “send a message” to the other party, the mediator faces a knotty problem. (On page 6 in this issue of Dispute Resolution Magazine, Jennifer Robbennolt further discusses the psychology of anchoring.) I have, however, seen sophisticated negotiators discount these extremes and bargain in the context of the fair-market value of the claim.

One approach to the challenge of anchoring is to engage only in “What if” discussions or other shadow, or soft, exchanges that flush out the potential zone of settlement — but also leave the parties officially at their opening positions if they reach an impasse. For example, if the plaintiff is stuck at an opening demand of $1 million, the mediator could ask the defendant in caucus where he would be if the initial demand were $750,000. From the response, the mediator can get a decent reading of where the defense might go. Similarly, mediators can ask the defendant what would be a more reasonable demand, and once the defendant answers, ask the defense what number he or she thinks the other party would offer in response.

Another approach is for the mediator to propose large ranges to each side in caucus, effectively ignoring the opening anchors. These ranges should be tied to potential jury verdict ranges or hard-number damages that are supported by the claim documents. In a recent construction case, for example, I referred back to the contract line-item bid in the contract documents to eliminate outliers on both sides that were far from this hard number. In caucus, both parties acknowledged that it was unlikely that their number could be sustained in trial or on appeal.

Decision Trees and Economic Models

Even when damages are liquidated or readily calculated by the breach of the contract or generally accepted accounting or legal principles, I find decision trees or other attempts to use more objective mathematical models, involving assigning a specific probability to an inherently uncertain risk or event, to be problematic and unhelpful. (For another perspective, see the article by Marjorie Corman Aaron and Wayne Brazil on page 12 of this magazine.)

It’s the Principle, Not the Principal

Many cases are primarily relationship-based. The economics are not the dominant interest and are considered only after the business or contractual relationship issues have been resolved. The stumbling block is often the counsel fees and litigation costs necessary to get the parties to productive dialogue at the mediation table. One recent case I mediated involved an order to confirm a labor arbitration award brought by the union in federal court. After many hours of mediation, the parties
were able to agree to the application of the award to their daily operations. The union then demanded a modest sum of less than $2,000 for their attorney fees. The employer responded that as a matter of principle, the parties for many years had always paid their own fees and that he would never pay a penny toward lawyer fees unless ordered to do so by the court. Determined not to establish the precedent of voluntarily paying any portion of union counsel fees as part of a settlement, the employer was willing to go to trial and lose and then perhaps be ordered to pay the fees. So that the case could settle with the hope of a more harmonious future relationship between the parties, the union counsel withdrew the demand for fee payment.

Problems When There Are Multiple Parties

Frequently individual defendants have authority that is interdependent or otherwise contingent upon the amount of the proposals offered by one or more of the other defendants, and many defendants resist paying more than their own fair share of how they have evaluated the apportioned liability. This is especially true if there is one defendant who all agree has significant exposure but that defendant is contributing little or no money to the settlement pot. Mediators have devised a number of techniques to address this issue, usually involving the individual contributions being disclosed in some manner only to the mediator. These can be as simple as orally advising the mediator or having the parties write on the same-size and color of paper, or index cards, the amount without identification of the participant.

A method I developed years ago involves my placing a random number known only to me in a calculator, and then passing the calculator around the room for each participant to enter their settlement authority. My random number makes it impossible for any of the parties to calculate the settlement authority entered in by any of the other parties. I ask each counsel to write the number they entered onto a folded paper kept in their own pocket. Once the calculator is returned to me, the original number is subtracted out and the total amount of the offer is revealed to all defendants. I usually do it at least twice to confirm there were no entry errors by any participant.²

In a construction case where the defense agreed that the owner was not liable and the remediation had already been completed so the damages were fixed, the only issue was apportionment among multiple defendants. There was significant difference of opinion, and no counsel wanted to get out in front by starting too high and allowing others to “hide in the weeds” to attempt to pay less than a “fair” share. Once I announced that the “blind trust” method had yielded an initial pot of almost 80% of the total required to settle the case, it was an easy matter to make a round of individual caucuses to bridge the gap. At the start of each caucus the counsel handed me his or her own folded paper, and we discussed what additional contribution would be offered from that party. The individual contributions were not disclosed until the full amount had been raised and the case settled. This prevented backsliding and reduced the potential for buyer’s remorse based upon one or more parties not being “fair” with their percentage of contribution.

Obviously, the mediator can explore a joint tortfeasor or individual settlements if the global proposal cannot be obtained. I prefer a more direct approach that convinces each defendant that in light of the multitude of factors and risk tolerances going into any individual evaluation, it is wiser to extend his or her own authority, independent of what others contribute, to make progress. Often the obstacle to increased settlement authority is an insurance adjuster who does not want to appear to be weak or being taken

“Many advocates are impatient and want to get to the numbers quickly. Their fear is that the parties are too far apart and the mediation is going to be a waste of time, or worse yet, that in mediation they will compromise their position without getting concessions or a significant reduction in the numbers from the other side.”
advantage of by the other adjusters acting on behalf of other defendants.

**Using Numbers to Break Impasse**

Here are a few techniques involving numbers that practitioners might use to break impasse.¹

**Russian Roulette**

If a party, usually a plaintiff, is confident of the odds of prevailing at trial, I ask the party if he or she really thinks there is a 100% chance of receiving an award larger than the last offer made by the defendant; a companion query is whether there is any chance of a full defense verdict. Few lawyers are willing to commit to 100% odds in front of their clients. I then ask if there is at least a 15% to 20% chance of the defense position’s prevailing in the litigation. Most counsel are unwilling to go above 80% or 85% probability of success of a complete victory. I then talk about the game of Russian roulette, in which one bullet is placed in the six-chamber cylinder of a revolver and then the cylinder is spun around before being held to the player’s head. The odds of being killed in this game are less than 17%, which is comparable or better than the probabilities being considered by the plaintiff. I point out that the counsel for both parties have other cases to spread their risk, but the plaintiff is taking a risk on what is almost certainly his or her only case. Reframing the settlement along these mathematical lines encourages the participants to view their odds more thoughtfully.

**Lines in the Sand**

Participants often frame their numbers as being “lines in the sand” from which there is no retreat. I usually am dismissive of these statements, often responding with the equally overused cliché “let’s see which way, and how strongly, the wind is blowing.” I say that “maybe the lines will shift or fade under the force of new numbers from the other side.” If I sense that the party has perceived my words or tone as disrespectful or patronizing, I address this in a transparent manner by explaining that a core job competency of a mediator is the ability to press ahead by discounting statements of this nature.

Many cases are primarily relationship-based. The economics are not the dominant interest and are considered only after the business or contractual relationship issues have been resolved.

**Risk Premiump**

Almost all participants, especially businesses, carry various forms of insurance that are paid on an annual or periodic basis. I ask the participants rhetorical questions about their own insurance premiums, including whether they regret paying the premium the past year since they are still alive. Reframing the payments for settlement as insurance against the risk of trial is often effective, especially when the cost of trial approaches or exceeds the cost of settlement.

**Third-Party Assistance and Experts**

The three approaches described above reframe the numbers and the issues for the parties. One very different approach is for the mediator to consult an independent third party for an assessment of the value of damages. As the mediator, I usually select the independent person after a review for conflicts of interest or provide a list of candidates for the parties to rank privately with me. I may solicit suggestions from the parties of specific people. As part of my own due diligence, I have some familiarity with a variety of experts from prior cases and independent sources or associations in that substantive area whom I can contact.

This approach has worked well in determining the cost of repairs in construction claims, the evaluation of the fair-market value of a business or real estate, or the future cost of providing care for a catastrophic loss claimant. The key concerns usually stem from the cost and delay in engaging the expert and negotiating the extent or limitations on the use of any report. The expert is almost always engaged by the mediator, is part of the mediation team, and reports directly to the mediator. This preserves the confidentiality of the evaluation and precludes it from being introduced into subsequent litigation in the event of impasse. The expert bills the mediator, who collects the payment.
from the parties in advance. The expert remains independent of the parties to ensure a candid assessment rather than the customary spin or slant of experts retained as hired guns.

In one large and ongoing complex dispute, a CPA was retained to act as chief financial officer to review and approve all corporate expenditures in a closely held business operated by one of the disputants but owned with four other disputants. The CPA stayed on retainer for a number of years while some assets were sold and others transferred to 100% ownership into alliances or entities controlled by sub-groups of the disputants.

Another case involved my retaining an engineering company to issue a report on the extent of damages and the cost of repairs on an apartment building, with the report being considered final and binding and admissible as such in litigation should the matter not settle in mediation. The report became a stipulated fact for purposes of calculating the remedial damages while the parties continued the litigation over liability.

Conclusion

Like Count von Count, the neutral must be engaged with the numbers either actively or passively throughout the process. Parties usually come to mediation armed with an array of computations supporting their positions or expert reports based upon complex calculations of accident or product causation failures, economic damages, and a host of other mathematical support. Being able to understand and work with numbers is a desirable skill for both lawyers and neutrals, often critical in the countdown to obtaining a consensus on calculations and exchanges to obtain closure, and utilizing experts in damages, taxation, and structured settlements and to determine fair-market value should be part and parcel of the mediator’s toolbox.

Although numbers matter, in some cases the size of the number is irrelevant. The case moves forward to litigation on principle. As a quote often attributed to Albert Einstein points out, “Many of the things you can count, don’t count. Many of the things you can’t count, really count.”

Endnotes

1 See Robert A. Creo, Emerging from No Man’s Land to Establish a Bargaining Model, 19 Alt. to the High Cost of Litig., No. 8, 191 (2001).

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How Can We Quantify Democracy?

Hint: It Requires More than Just Counting Votes

By Matt Leighninger and Tina Nabatchi

What kinds of numbers are helpful for measuring democracy? Traditionally, political scientists have looked at voter turnout and other easily quantifiable indicators of indirect, republican political participation. Those numbers generally paint a dismal picture, showing declines in the number of people who vote, trust government, believe the political system works, and think that public officials are listening to their constituents.1 What these numbers measure, however, is not the level of democracy but rather the (decreasing) enthusiasm for representative governance.

In the last decade, more direct, innovative, interactive — and democratic — forms of participation have emerged, giving us new sets of numbers to collect and analyze. Dispute resolution practices and practitioners have been integral to many of these democratic innovations, which are a direct response to the failures of purely representative political systems. Increasingly, we can quantify how many people get involved in these new forms of democracy, what kinds of people participate, what they think of the experience, and how these processes affect public learning, decision-making, and problem-solving.2 From areas of high democratic innovation in countries such as Brazil and India — which have a more robust recent history of sustained, democratic innovation — we can also quantify the long-term effects of public participation on inequality, public safety, economic vitality, and public health.

In this article, we explore the new forms of democracy, differentiating new types of participation from the older, “conventional” formats for engagement. Drawing on our recent book, Public Participation for 21st Century Democracy, we give examples of how these activities are being measured quantitatively and describe how this work can be assessed more meaningfully and efficiently in the future. This is not just a scholarly subject: We believe that if you want to help people build consensus, solve problems, or even just conduct a constructive meeting, you must first understand how public engagement happens today.

What Do We Mean by Democracy? ‘Thick’ and ‘Thin’ Participation

While representative governance relies on indirect participation, whereby citizens affect decisions primarily through representatives or other intermediaries, democratic governance is powered by direct forms of participation, whereby citizens are personally involved and actively engaged in providing input, making decisions, and solving problems. People in a wide range of fields and professions — including planning, education, journalism, disaster preparedness, human relations, public safety, community development, conflict resolution, health, and public finance, among others — have developed successful direct participatory tactics. These democratic innovations are sometimes organized as a supplement to official, conventional public meetings, such as planning and zoning hearings, school board meetings, and city council proceedings, but are also organized independently.

Some of these new democratic tactics produce participation that is “thick,” in that it is intensive, informed, and deliberative. Organizers assemble large and diverse numbers of people; give participants chances to share their experiences; present them with a range of views or policy options; and encourage action and change at multiple levels. Two of the most prominent examples of thick engagement are Portsmouth Listens in New Hampshire, which describes itself as “working at the
local level to support civil, public deliberation of complex issues affecting Portsmouth residents’ everyday lives,” and Participatory Budgeting in Chicago and New York City, organized by local officials with support from the Participatory Budgeting Project, a nonprofit organization whose mission is “to empower people to decide together how to spend public money.” Thick participation formats are easily recognizable to practitioners of dispute resolution and consensus building, since they employ some of the same principles and practices.

“Thin” participation is faster, easier, and potentially viral. It encompasses a range of activities that allow people to express their opinions, make choices, or affiliate themselves with a particular group or cause. The defeat of the Stop Online Piracy Act/Protect Intellectual Property Act (SOPA/PIPA) was one of the first high-profile examples of thin engagement; Black Lives Matter is probably the best-known current example.

Thick participation opportunities are more likely to be face-to-face, and thin ones are more likely to happen online. However, many thick processes include both online and face-to-face elements, and some examples of thin participation (signing a petition, for example) certainly existed long before the Internet. The most promising direction for innovation may be to find ways of combining the best features of thick and thin, such as the recent “Text, Talk, Act” process in the National Dialogue on Mental Health.3

Both categories of participation are responses to, and attempts to capitalize on, the new expectations and capacities of citizens. As these innovations proliferate, they are challenging us to think more deeply about what we mean by democracy.4 The political scientist Hélène Landemore sees their emergence as a herald of what she calls, provocatively, “post-representative democracy.”5

Quantifying Participation: Process Numbers

So what do the numbers say about thick and thin participation? Some of the most significant impacts, such as policy changes, are inherently difficult to quantify. But at this point, enough scholarly research and evaluative work exists to pull together a concise statistical glimpse of the kinds of things these projects accomplish.6 Our discussion below draws on the report “Deliberation by the Numbers,”7 as well as other empirical research8 to quantify the new forms of democracy. We look first at process measures and then at outcome measures.

Who participates?

Perhaps the easiest thing to measure about these democratic processes is how many people participate. Recruitment is always difficult, mainly because of low levels of public trust and citizens’ general perception that getting involved in any political activity is futile. But in many instances of thick and thin participation, organizers have used proactive, network-based recruitment strategies to attract large, diverse numbers of people. For example, an evaluation of the “Horizons” project, designed to reduce poverty and achieve economic sustainability in rural communities throughout seven Northwest states, found that 30% of the population in the 283 communities involved — more than 100,000 people in all — participated in that program. Other research suggests that these efforts can be successful at generating the participation of marginalized communities. For example, in “Our Budget, Our Economy,” another large-scale project focused on the US federal budget and deficit, 17% of participants were from households earning less than $25,000 a year.

Because of the viral capacity of the Internet, purely online forms of participation can be much larger (even though examples of a truly viral dissemination are rare and hard to predict). Black Lives Matter, organized after the shooting of Michael Brown in Ferguson, Missouri, is the most prominent recent case, having accumulated 65,000 followers on Twitter and more than 89,000 “likes” on Facebook.
These levels of participation are in direct contrast to those at most official public meetings, where the public is typically either “angry or absent.” To give one specific example, nearly 80% of all public meetings on how to spend community development block grant (CDBG) funding have an average attendance of zero to 20 people.

Do people enjoy participating?

The ability to generate turnout is not only a function of recruitment strategies but also of the fact that people enjoy more interactive, democratic forms of participation. For example, 93% of participants in “CaliforniaSpeaks,” a statewide process focused on health care, said they would participate in a similar event, and 95% of participants in West Virginia’s National Issues Forums, part of a nationwide network of locally sponsored public meetings for conversations about public policy questions, expressed interest in participating in other forums. Similarly, 96% of participants in the Online Town Halls with Members of Congress agreed that they would be interested in doing similar sessions for other issues, and 95% agree that such sessions were “very valuable to our democracy.” Finally, 97% of participants in the 2012 Community Forum on Budget Priorities in Bell, California, agreed that the facilitators provided a fair, safe, and well-managed environment for participants.

Data on citizen satisfaction with thin forms of participation are harder to come by — and in most cases, the experience is so easy and convenient that participants have lower expectations for the results of their engagement. Evaluations of Text, Talk, Act, which combines thin engagement through texting with the thick engagement of a small-group discussion, show that 76% of participants rated the process as “good” or “excellent.”

Again, these levels of satisfaction are very different from citizens’ views of conventional public meetings. For example, two studies of conventional public meetings about landfills found that only 41% to 44% of participants were satisfied with the process, that only 5% to 8% thought their opinions would matter in the final decision, and that most left the meetings feeling worse about the situation. Likewise, a survey of California public managers found that most officials believed that public participation actually degraded the quality of decision-making and policy implementation.

Quantifying Participation: Outcome Numbers

Quantifying the outcomes of more democratic forms of participation is possible at many different levels, including: (1) individual level impacts in terms of public learning and civic skills and dispositions; (2) impacts produced by individuals taking action as a result of participation; and (3) long-term impacts on macro-level social indicators.

Does participation generate individual-level impacts?

There are many indications that participation — particularly of the thicker, more deliberative variety — can help people learn and (re)shape their perspectives on issues. For example, an evaluation of National Issues Forums held in South Dakota found that 72% of the participants in these deliberative public meetings reported gaining new insights, 79% reported discussing aspects of the problem they had not considered before, and 37% reported thinking differently about the issue afterward. In “Listening to the City,” a large-scale process about the redevelopment of Ground Zero, 35% of participants said that they had come to agree with practical ideas that they had not thought of previously, and 32% said that they had changed their minds on some of the issues. More evidence comes from the “Our Budget, Our Economy” project. Of the participants, 48% of political “neutrals” and 24% of conservatives became more supportive of raising taxes on the wealthy to reduce the deficit; 49% of political neutrals, 28% of liberals, and 27% of conservatives became more supportive of cutting entitlement programs to reduce the deficit; and 68% of political neutrals, 39% of conservatives, and 19% of...
There are many indications that participation — particularly of the thicker, more deliberative variety — can help people learn and (re)shape their perspectives on issues.

... that 63% of participating communities reported more people taking individual actions to help those living in poverty and that 40% of communities were working on systemic poverty reduction efforts (e.g., jobs creation, skills training, micro-enterprise, or business development). Moreover, 34% of participating communities reported that people new to leadership roles have been elected to public office, and in 39% of the communities, more people have joined local boards, clubs, service organizations, or other groups.

Does participation produce long-term, macro-level change?
A critical challenge of assessing the impacts of democratic participation in the United States is that these projects have been, for the most part, temporary; they are stand-alone, one-off processes that are seldom incorporated into any larger engagement plan or system. However, evidence about the link between participation and social outcomes has emerged in the Global South, where some countries have established more durable structures for public participation. Scholars have studied the effects of citizen-driven land-use planning exercises in India, local health councils in Brazil, and ward committees in South Africa. These more sustained forms of participation seem to have stronger impacts on equity, government efficiency, and trust. Tiago Peixoto, a leader at the World Bank’s Digital Engagement Unit, conducted a review of longitudinal studies on sustained engagement. In his research summary, Peixoto finds that:

- Participants are more willing to pay taxes.
- Governments are more likely to complete planned projects.
- Public finances are better managed and less prone to corruption.
- Participants exhibit increased trust in public institutions.
- Public expenditures are more likely to benefit low-income people.
- Poverty is reduced.
- Public health outcomes, such as the rate of infant mortality, are improved.

The quantifiable effects of sustained democratic participation are worth exploring further because...
research in the United States underscores the power of social capital and the strength of community networks. Strong, ongoing connections between residents, robust relationships between people and institutions, and positive feelings by citizens about the places they live are highly correlated with a range of positive outcomes, from economic development to public health. For example:

- Cities and towns that have higher levels of “community attachment” have higher rates of economic growth and lower levels of unemployment.⑩
- Neighborhoods where people work together and have higher “collective efficacy” also have lower crime rates.⑪
- People with stronger relationships to friends and neighbors are at less risk of serious illness and premature death.⑫

Quantifying Democracy: Numbers for the Future

Two further avenues for quantifying democracy seem particularly fruitful to explore. First, making the data on participation broadly accessible and highly visible may be critical for helping people assess and improve engagement. Tiago Peixoto of the World Bank argues that one reason Participatory Budgeting and other innovative democratic processes have had such strong, positive impacts in Brazilian cities is that the data on inequality, wealth distribution, and other relevant indicators was made public.⑬

Second, giving people easy, simple, technologically enabled ways to rate participation opportunities, including conventional public meetings as well as thick and thin formats, has great promise. Today we are constantly being engaged by citizen-centered ways of measuring — and improving — many other aspects of our lives. Almost every transaction now comes with the opportunity to rate the product or service you receive, from the customer reviews on Amazon to the link to an online survey on receipts from store cashiers. This same thinking and technology could be applied to democratic participation. Citizens could be assessing all kinds of civic opportunities, from the Facebook page run by the neighborhood association to the app that helps parents interpret their children’s test scores. Rather than tiny, incomplete snapshots of individual processes and tools, this approach to measurement would give us a more comprehensive, holistic, citizen-centered information about local democracy and might spur efforts to improve all kinds of engagement.⑭

For advocates of dispute resolution, these ways of quantifying democracy may help expand the meaning and scope of their work. The numbers we have gathered here indicate that people enjoy participating in both thick and thin ways, and they think their engagement makes a difference. By collecting, reporting, and analyzing the numbers of public participation, we can better articulate the power of our work and better ensure that it fits what citizens want.

Endnotes


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What Law Applies to an Agreement to Arbitrate?

By Terry L. Trantina

When asked to resolve a dispute arising out of a contract containing an arbitration provision, the first question a lawyer must answer is what law governs the obligation to arbitrate a dispute. And that answer could — and often does — determine the dispute’s outcome.

From experience, lawyers know that most contracts contain a boilerplate choice-of-law clause, so in searching for an answer, most lawyers immediately turn to that term in the parties’ agreement. Although this a logical place to start, stopping there can lead to a significant and costly mistake. The mistake many lawyers (and courts) make at that point is to assume that the state law identified in that clause governs all legal issues, including issues involving the arbitration of the parties’ disputes.

In fact, just the opposite is almost certainly the case because, with few exceptions, the state law identified in the contract is entirely preempted by the Federal Arbitration Act (FAA) and only the FAA will apply to the arbitration of the disputes arising under or related to the parties’ agreement.

In short, the FAA trumps all. The FAA applies to the parties’ agreement to arbitrate disputes whether or not it is expressly mentioned in that agreement — and is presumed to preempt the state law selected in a general choice-of-law provision unless the contract expressly evidences the parties’ clear intent that state arbitration law applies in place of or in addition to the FAA. This has been the applicable law since at least 1995, but few practitioners know or understand the breadth of the FAA.

Common Assumptions and Mistakes

Three common misunderstandings about the FAA contribute to the mistaken assumption that state law applies. First, many practitioners assume that to be applicable, the FAA must be mentioned in the parties’ agreement. But the US Supreme Court made clear in Mastrobuono v. Shearson Lehman Hutton that the FAA does not have to be mentioned in the contract or arbitration provision to apply and preempt state law.

Second, under the FAA, the arbitration provision in a contract is treated as a separate agreement of the parties. Therefore, a general choice-of-law provision is not viewed as applying to the agreement to arbitrate disputes (unless it expressly states that it does) and state law governs the substantive issues of the remainder of the contract.

Third, many practitioners also assume that the FAA is a procedural, rather than substantive, statute that applies only to transactions that are obviously interstate in nature. As a result, many often assume that the scope of the FAA’s applicability (and its preemptive effect) is narrower than it actually is. However, the FAA, first enacted in 1925 and restated in 1947, has been held by the US Supreme Court to be a small body of substantive law that applies to all written agreements to arbitrate disputes evidencing a transaction “involving interstate commerce.”

This is far and away the most misunderstood part of the FAA. The scope of the FAA’s applicability and preemptive effect is drastically underestimated. The US Supreme Court has held that the “involving commerce” language of Section 2 of the FAA does not mean “in commerce” (which would narrow the FAA’s
applicability to activity obviously interstate in nature) but rather that “involving commerce” has the same meaning as “affecting commerce.” Therefore, the US Supreme Court, in Allied-Bruce Terminix Cos. v. Dobson, found the FAA has the full reach of the US Constitution’s Commerce Clause and encompasses a wider range of activity than those “in commerce.” The FAA applies to activity “within the flow of interstate commerce.”

The FAA’s Scope

In Allied-Bruce, the Court enforced a consumer contract’s arbitration provision in a contract between parties in a state, Alabama, whose statutes banned consumer pre-dispute arbitration provisions, holding that the FAA applied to and enforced a homeowner’s obligation to arbitrate a dispute involving a contract to treat a home for insects because Allied-Bruce Terminix purchased the insecticide used to treat the home from an out-of-state source and the interstate sale of insecticide was something Congress could choose to regulate. The Court reached this conclusion in Allied-Bruce by finding that the FAA governs any agreement to arbitrate if some economic activity of one of the parties (not necessarily the parties’ transaction or the contract itself) has a nexus to interstate commerce.

In US v. Lopez, a case striking down a federal statute banning the possession of a gun near a school as not being within Congress’s power under the Commerce Clause (decided the same year but after Allied-Bruce), the Court summarized all of its prior decisions regarding the scope of the Commerce Clause. There was dicta in that case that caused some state courts with reservations about the FAA’s applicability and preemptive scope (including the Alabama Supreme Court) to question the continued viability of Allied-Bruce.

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In this day and age, few party relationships giving rise to a contract have no nexus to interstate commerce, and therefore, there are very few agreements to arbitrate that are not governed solely by the FAA, absent an express contractual statement of intent otherwise.

When State Law Governs

Although the FAA applies generally and broadly, the US Supreme Court has recognized in its Volt and First Options decisions that the FAA permits the contracting parties to change the arbitration process to suit their needs and that the FAA will enforce those changes if the parties’ intent to do so is expressly reflected or incorporated into their agreement. The Court has held that the parties may add portions of a state’s arbitration law to the FAA’s provisions or opt out of the FAA’s provisions entirely. However, the US Supreme Court has also held that a contract’s general choice-of-law clause’s selection of a particular state’s law is an insufficient expression of the intent required to opt out of the FAA or add portions of a state’s law to the FAA.
Therefore, a contract’s general choice provision selecting a particular state’s law to govern the contract as a whole, without more, is not sufficient to trump the applicability of the FAA to the contract’s arbitration obligation and preemption of the state law identified in the general choice of law provision.

The scope of the FAA’s preemption is itself a very important issue and has been the subject of many court decisions faced with challenges to the applicability of and preemption by the FAA. The FAA has been held to preempt any state constitutional provision, statute, court rule, or decision that is not generally applicable to all contracts. If a state statute, constitutional provision, court ruling, or public policy singles out agreements to arbitrate for special treatment, then it is preempted by the FAA. And even state provisions or rulings that are generally applicable to all contracts are preempted if they serve as an “obstacle to the accomplishment of the FAA’s objectives” (i.e., enforcement of the arbitration agreement in accordance with its terms).

The answer to the simple question of what law applies to an agreement to arbitrate is not the simple, contract-specified one that many lawyers might assume, and becoming familiar with the FAA and its body of substantive law is crucial for anyone working in this field who wants to be a skilled, competent practitioner. Until there is clear evidence to the contrary, practitioners will be better off assuming that the FAA, not state law, applies.

Endnotes

1 There is an express, but very limited statutory exception to the applicability of the FAA. Section 1 of the FAA, 9 U.S.C. § 1, expressly excludes arbitration agreements involving employment of any class of workers actually employed in foreign or interstate commerce, e.g., railroads, airlines, and telecommunications carriers.

3 See id. at 60, n.4 (1995).
7 Id. at 273-274 (citing Perry v. Thomas, 482 U.S. 483, 490 (1987).
8 Id.
11 Id. at 58.
12 Id. at 57, citing Katzenbach v. McClung, 379 U.S. 294, 304-305 (1964); see also Crawford v. West Jersey Systems, 847 F. Supp. 1232, 1240 (D.N.J. 1994) (the involving commerce connection is satisfied when the contract has only the smallest nexus with interstate commerce or when contractual activity affects this commerce, even if tangentially).
14 Mastrobuono id. at 62-64 (1995). Some have viewed the US Supreme Court’s decision in Volt as being inconsistent with Mastrobuono, but subsequent decisions, including Allied-Bruce, have determined otherwise and explained that in Volt the US Supreme Court was simply giving deference to the prior holding of the California Supreme Court as to the contracting parties’ intent, a subject that was not before the US Supreme Court. See R.R Package Sys, Inc. v. Kayser, 257 F. 3d 287 (3d Cir. 2001).
Enforcement of Settlement Agreements in International Commercial Mediation: A New Legal Framework?

By Ellen E. Deason

Domestically, arbitration has shown signs of falling into disfavor for business-to-business disputes, and scholars have labeled mediation the “new arbitration.” Transnationally, arbitration is still the favored method of dispute resolution, but some users complain that the cost can be high, the proceedings lengthy, and the process legalistic.

Mediation provides an alternative, but it also lacks the international enforcement mechanisms that support arbitral awards under the widely adopted 1958 UN Convention on Recognition and Enforcement of Arbitral Awards (the New York Convention). Some evidence suggests that parties would find cross-border mediation more attractive if their settlements were subject to a legal regime providing for expedited enforcement.

Reaching agreement on the issue of enforcement of mediated settlement agreements has proved difficult in the past. The Uniform Law Commission’s Uniform Mediation Act, which has now been enacted in 12 US jurisdictions, does not contain an enforcement provision despite a serious effort to draft one. Similarly, harmonization of enforcement procedures proved impossible in the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Conciliation, which leaves the choice of enforcement mechanisms to each nation.

UNCITRAL Working Group II (Arbitration and Conciliation) is now considering ways to improve the enforcement of mediated settlements reached in cross-border commercial mediation. The United States delegation to the Working Group has proposed that UNCITRAL develop a convention – modeled on the New York Convention – to provide for the enforcement of settlement agreements resulting from international commercial conciliation, which UNCITRAL defines as equivalent to mediation. I attended a Working Group meeting held in New York in 2015 as an observer credentialed by the American Society of International Law.

"By signaling the importance of mediation internationally and by creating a clear and uniform framework, a convention could generate greater certainty that settlements can be relied upon and readily enforced. This would promote the resolution of international commercial disputes through mediation."
This article reports on the US proposal and examines several of the issues that will need to be resolved in developing an instrument on the international enforcement of mediated settlements.9

Do We Need a Convention?

The motivation for proposing a convention to enforce mediated settlement agreements is straightforward: to encourage parties to use mediation for cross-border disputes because it can save time and money and help preserve ongoing commercial relationships. By signaling the importance of mediation internationally and by creating a clear and uniform framework, a convention could generate greater certainty that settlements can be relied upon and readily enforced. This would promote the resolution of international commercial disputes through mediation.

At the 2015 New York Working Group meeting, several business representatives and groups noted the burden and uncertainty of current cross-border enforcement mechanisms that rely on contract law and articulated a need for a more effective international legal framework. Many were from the United States, but they also represented multinational perspectives. In contrast, some countries’ delegates, perhaps reflecting variations in the degree to which different legal cultures have embraced mediation for cross-border disputes, questioned the need for an enforcement framework for mediated settlements.

This may be a “chicken-or-egg” problem: those who favor a convention hope to stimulate cross-border use of mediation, but perhaps one of the best ways to appreciate the benefits of a convention is through experience with the use of mediation internationally.

Other countries’ representatives maintained that current enforcement mechanisms are sufficient. Indeed, in many countries, settlements can be entered and enforced as court judgments. This procedure is, however, often limited to court-sponsored mediation or cases filed in court, and enforcing such court judgments across borders can be notoriously difficult. Alternatively, some national laws allow arbitral tribunals to convert mediated settlement agreements into awards on agreed terms, thus enabling the agreements to be enforced as arbitral awards. But again, this procedure is not always available for freestanding mediations, as some countries limit it to settlements reached during ongoing arbitrations.

Furthermore, the international vitality of an agreed award rendered by an arbitrator appointed after a settlement is uncertain. By its terms, the New York Convention governs arbitrations arising out of “differences,” yet it is ambiguous on whether those differences must exist at the start of an arbitration. With a prior mediated settlement, there are arguably no differences to be arbitrated because they have already been settled, which could cast doubt on enforcement as an award.10

Even more significantly, creating an arbitral award is not a practical solution for many parties in mediation. Unless they were already engaged in arbitration, they would need to initiate it – with the associated expense and delay – merely to rubber-stamp their settlement. This need to resort to arbitration would undermine the goal of promoting mediation as an independent, co-equal dispute resolution process.

There are also questions about what form a new legal framework should take. Some countries are concerned that a convention defining criteria for enforcement would add legal complexity or standardize procedures, limiting the flexibility that is one of mediation’s defining characteristics. There is thus some sentiment in favor of a model national law or a document providing official guidance, options the Working Group will consider. Many believe, however, these alternatives would be weaker solutions. A convention would carry far greater weight in endorsing mediation as an international dispute resolution mechanism equal in stature to arbitration and litigation.

What Scope is Desirable?

The United States proposes a convention that would govern enforcement of settlements resulting from conciliation of international commercial disputes. This restriction to commercial settings would exclude disputes arising out of consumer and employment
contracts with non-business parties. This is, in my view, wise because crafting desirable protections for relatively unsophisticated parties subject to adhesion agreements would overly complicate a convention. Furthermore, absent this exclusion, a convention would run afoul of mandatory laws protecting such parties, which frequently are stronger outside the United States.

There is, however, a more fundamental scope question: the United States proposes limiting the convention to settlements resulting from mediation, which raises thorny philosophical issues. Many legal systems make no distinction between agreements reached with third-party assistance and those resulting from unassisted negotiation; both are subject to rules of contract law. So some countries object to differentiating between them for purposes of enforcement. Even more broadly, some nations are concerned about the effect on contract law of treating enforcement of settlement agreements differently from that of ordinary contracts, such as sales agreements.

Limiting a convention to mediation is a pragmatic approach. If a country is hesitant to enact enforcement mechanisms for settlement agreements, ratifying a convention limited to mediation would be a narrower, less dramatic step than approving one that concerns all settlements. Furthermore, the distinction between mediated and negotiated settlements is familiar to many because confidentiality protections typically differ along that fault line. Hence instruments such as the Conciliation Model Law, which sets forth provisions on confidentiality, could serve as a precedent for singling out mediation as a settlement process.

The proposed convention is also limited to enforcement of settlement agreements. Although some scholars calling for a convention regard enforcement of parties’ agreements to mediate as a high priority, the current focus, sensibly, I believe, is on enforcement of settlement agreements that result from mediation. Again, as a practical matter, garnering support for a less ambitious legal instrument would probably be easier. Moreover, it is not clear that enforcement is needed at the initiation of mediation. Data from the United States suggests that enforcement of settlements, not of agreements to mediate, generates the largest amount of mediation-related litigation.

How to Deal with the Diversity of Practices?

One of the challenges of crafting an effective convention is the wide variety of enforcement frameworks in use around the world. Current practices will influence nations’ attitudes toward acceptable criteria for enforcement, and the procedures ultimately adopted in a convention will have to coexist with the full range of domestic mechanisms.

Existing diversity. The UNCITRAL Secretariat has compiled a valuable set of information on current national enforcement regimes for mediated settlements. Many nations treat such settlements as an ordinary contract, which often means that a party must file a suit claiming breach of contract to obtain enforcement. In other nations, a party can apply to a court to convert a settlement agreement into an enforceable legal instrument, but that often requires the court to approve the settlement or confirm its validity. Grounds for denying enforcement of the agreement include (depending on the country) lack of capacity, duress, undue influence, misrepresentation, mistake, fraud, unconscionability, or illegality.

Some countries have special summary or expedited procedures for enforcement. In addition to the procedures for turning a settlement into an arbitral award mentioned earlier, other mechanisms provide for expedited treatment in court. In Ontario and Nova Scotia, Canada, for example, a party to a commercial conciliation settlement can convert it into an enforceable court judgment merely by registering or filing the agreement with a court. In some civil-law countries, parties can use procedures that involve notaries: if they declare in their agreement that they consent to compulsory execution and record the agreement in a public document drawn up by a notary, they can obtain expedited enforcement. In other countries, mediated settlement agreements are directly enforceable if they meet certain criteria. In Ecuador, for instance, a mediated settlement agreement is an enforceable instrument if it is signed by the parties and the mediator and the mediation was conducted in compliance with Ecuadorian law.
These are, however, domestic procedures, and in the absence of treaties or the special framework of the European Union for recognition of court judgments, their application to international settlements is at best uncertain. Only a few countries have a specific legal framework for cross-border enforcement of settlement agreements.¹⁴

Relationship of a convention to domestic enforcement. In determining which mediated settlements to enforce, one approach would be to rely on domestic frameworks to produce an instrument that could then be enforceable internationally. Under this approach, if a settlement has already passed muster by meeting the requirements for enforcement in the country where the mediation occurred, the enforcing jurisdiction could use an expedited procedure. But given the current range of enforcement procedures, this would seem to require either a herculean harmonization effort among jurisdictions or acceptance of a diverse set of enforceable instruments. More significantly, by requiring a domestic procedure as a prerequisite to international enforcement, this approach would impose a two-step approval process that would create undesirable burdens for parties seeking enforcement.

Alternatively, a convention could provide for direct enforcement of settlement agreements under specified criteria, with the enforcing jurisdiction evaluating compliance with those criteria. The New York Convention uses this general approach for enforcement of arbitral awards. In the context of mediation, such a system would eliminate the need to decide which of the many domestic mechanisms would be acceptable as a basis for enforcement in other countries. It would also open the possibility for a legal regime that is less tied to the forum where the mediation occurred, perhaps allowing enforceability to be judged on law chosen by the parties or the law of the enforcing nation. Given the increase in electronic proceedings that are not localized and the freedom parties have in mediation to design solutions that are not directly tied to remedies in a particular legal system, this might be appropriate.

Is the New York Convention a Useful Model?

The widespread adoption, pro-enforcement philosophy, and simple structure of the New York Convention have all greatly encouraged the growth of arbitration, making it the primary method for resolving commercial disputes internationally. Comments at the Working Group meeting seemed to indicate a general view that any conciliation convention should likewise avoid complexity. Moreover, a structure similar to the New York Convention’s would be familiar, and nations might find it easier to adopt a sister convention than one based on an entirely different approach.

Questions remain as to how best to modify the New York Convention to adapt it to the very different context of mediation. In my view, a conciliation convention should not merely transform settlement agreements into arbitral awards. While such a conversion might be an expedient way to piggyback on the New York Convention, arbitration and mediation are very distinct processes that raise different enforcement issues. Rather, as the US proposal envisions, I believe that the heart of a convention could parallel the structure of the New York Convention by establishing a general obligation for party-states to recognize and enforce mediated settlements (as in Article III) with a limited list of grounds to refuse enforcement (as in Article V).

Appropriate defenses to enforcement. Some of the New York Convention’s grounds to refuse enforcement are simply not relevant to mediation, such as those that concern the composition of the arbitral tribunal and the scope of its authority. These should be dropped. Others are directly applicable to settlements and require little modification. For example, under the proposal offered by the US delegation, a nation’s courts should be able to decline to enforce a mediated settlement if in that country the subject matter of the parties’ agreement is not capable of being settled (Art. V(2)(a)) or if enforcement would be contrary to its public policy, as that term has been narrowly interpreted under the New York Convention (Art. V(2)(b)).

Other grounds to refuse enforcement of arbitral awards under the New York Convention will be appropriate for mediation only if they are modified, which further illustrates why merely converting settlement
The widespread adoption, pro-enforcement philosophy, and simple structure of the New York Convention have all greatly encouraged the growth of arbitration, making it the primary method for resolving commercial disputes internationally. Comments at the Working Group meeting seemed to indicate a general view that any conciliation convention should likewise avoid complexity.

The emphasis on party self-determination in the mediation context also means that an enforcement process should respect parties’ ability to place limits on the scope of their agreement, including its enforcement. Parties could, for example, use a forum selection clause to specify that enforcement will be limited to particular jurisdictions or agree that they must return to mediation if they have a dispute about enforcement. A convention should include provisions allowing nations to refuse enforcement that would conflict with such terms.

The mechanism to trigger enforcement. When parties agree to arbitration, they subject their arbitral award to enforcement under the New York Convention. In contrast, under the US proposal’s principle of respect for limitations agreed by the parties, parties could specify that the mediation convention would not apply at all to their agreement. This opt-out structure, with its emphasis on party autonomy, would be an important modification of the approach of the New York Convention.

An opt-out framework makes sense from the perspective of maximizing use of the convention’s enforcement mechanisms. Research has shown that default rules are “sticky,” meaning that parties tend not to alter them. As a result, an opt-out structure would be more likely to increase the use of mediation in cross-border disputes than one that requires parties to affirmatively decide to use the convention’s procedures (“opt-in”).

Under an opt-out system, however, in the absence of an agreement by the parties, the convention’s enforcement mechanism would apply to all conciliated settlement agreements that fall within its purview. For this to be fully consistent with self-determination, parties must know enough to evaluate whether they want expedited enforcement of their agreement. While many parties to international commercial transactions are likely to be represented by relatively sophisticated legal counsel, some may be small businesses with attorneys who are not schooled in the details of international dispute resolution. One can argue that such parties should be protected from unfair surprise by using an opt-in system that would...
not subject them to expedited enforcement unless they had explicitly considered its benefits. On the other hand, an opt-in system could also be a source of unfair surprise if a party assumed it would obtain a convention’s benefits without taking positive steps to invoke expedited enforcement.

Widespread acceptance of a convention might also be at stake: nations might be more willing to sign on if they see enforcement as voluntary. A voluntary system would be analogous to familiar enforcement procedures in some countries, such as obtaining a public deed or instrument title, that similarly require the request of all the parties. It could also reduce the need for preliminary scrutiny of enforcement in the forum where the parties conducted their mediation.

Furthermore, I propose that using an opt-in system could help solve the dilemma (discussed above) of what contract defenses an enforcing jurisdiction should recognize as reasons to deny enforcement. One possibility is that a convention could specify that the parties’ agreement to use its expedited procedures would operate as a waiver of some of the contract defenses that they might otherwise be able to raise in ordinary enforcement proceedings.

Tailoring the Scope of Application

If UNCITRAL decides to formulate a convention, that type of instrument would allow nations to tailor their participation by using declarations or reservations. This would avoid the need for all contracting states to agree on a uniform approach to all issues and make it easier to accommodate differences among national legal regimes. The United States has suggested several areas where this approach might create options and provide flexibility:

- Limitations on the types of obligations that can be enforced (perhaps excluding, for example, non-monetary or complex settlements);
- Application of the convention when a governmental body is a party to a settlement;
- Determining whether the convention would apply by default (an opt-out regime) or only when parties to a settlement agreement affirmatively invoke its enforcement mechanisms.

What’s ahead for UNCITRAL?

Use of mediation has grown in many parts of the world since UNCITRAL adopted its Conciliation
Model Law in 2002. Court-sponsored mediation programs, business contracts with dispute resolution step clauses, and mediation legislation have all fostered mediation’s growth and acceptance, with numerous countries adopting enforcement regimes. Trying to create an efficient international framework for enforcing mediation agreements will be challenging, but these developments make having such a framework both more important and more acceptable. UNCITRAL has given Working Group II a broad mandate to tackle the topic of enforcement of settlement agreements. This mandate is not limited to preparing a convention, but considerable support and enthusiasm have been expressed for that idea.

This article is intended to stimulate interest and involvement in the UNCITRAL deliberation process. By the time it is published, Working Group II will have met in Vienna. You can follow its progress on the important question of enforcement of mediated agreements for international commercial disputes at www.uncitral.org.

Endnotes
1 E.g., Thomas J. Stipanowich & J. Ryan Lamare, Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1,000 Companies, 19 HARV. NEGOT. L. REV. 1, 44-54 (2014).
5 UNCITRAL Model Law on International Commercial Conciliation and Guide to Enactment and Use 55 para. 87

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8 Conciliation Model Law, supra note 5, at Art. 14.
10 See Deason, supra note 7, at 589 n.174; Sussman, supra note 9, at 6-9.
15 For example, some New York Convention contracting states have adopted a reservation requiring reciprocity. They restrict application of the convention to awards rendered in other contracting states. Others have adopted a declaration that they will enforce only awards arising from commercial relationships.
A Mediator’s Obligation to Memorialize the Agreement

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

The parties in a long and difficult mediation have (finally) reached agreement. Needless to say, everyone is eager to leave. What are your obligations as a mediator in terms of memorializing the parties’ agreement?

As is so often the case, context matters. Are the parties represented by counsel who attended and participated in the mediation? What type of dispute was this — small claims, family, general civil, special education, or some other? What is the mediator’s orientation — facilitative, evaluative, transformative, narrative … ? Is the mediator an attorney (licensed to practice in the jurisdiction of the mediation or not) or a member of some other profession? Where does the mediation take place, and are there rules that govern this question directly or indirectly?

Whether a mediator has any responsibility for producing written documentation of the mediation is one of those questions that mediators tend to have strong feelings about — even though they do not always agree on the answer.

Benefits to the Parties

Parties often want a written agreement before they leave the mediation, for emotional and legal reasons. Parties often want the sense of closure and certainty that having a mediation agreement in hand can bring. If parties reach an oral agreement that is not memorialized at the mediation and later have a dispute about the agreement, the confidentiality provisions in many jurisdictions limit or prevent those present from testifying in a subsequent hearing about the terms of the agreement or any of the communications that led to their understanding of the agreement. Thus, the parties may conclude that the time spent mediating will be “wasted” if they do not leave with an agreement in writing. And in cases where one (or more) of the parties is not represented at the mediation (or at all), the mediator may be the only one present who can record the agreement “neutrally.”

Mediator Concerns

Drafting an agreement is not a “neutral” function. Deciding how something is worded has real consequences and has the potential to advantage or disadvantage one of the parties. The written agreement can be enforced either as a contract or directly by the court if it is the result of a court-ordered mediation. If the mediator is a lawyer, some jurisdictions may view the drafting of terms as a conflict of interest. If a mediator is not licensed to practice law or is licensed in a jurisdiction other than the one where the mediation takes place, “memorializing” the agreement has the potential to be considered the practice of law and thus the Unauthorized Practice of Law (UPL).

Unauthorized Practice of Law

On February 2, 2002, the ABA Section of Dispute Resolution adopted a Resolution on Mediation and the Unauthorized Practice of Law. An important part of this resolution was the paragraph dealing with the “drafting of settlement agreements”:

When an agreement is reached in a mediation, the parties often request assistance from the mediator in memorializing their agreement. The preparation of a memorandum of understanding or settlement agreement by a mediator, incorporating the terms of settlement specified by the parties, does not constitute the practice of law. If the mediator drafts an agreement that goes beyond...
the terms specified by the parties, he or she may be engaged in the practice of law. However, in such a case, a mediator shall not be engaged in the practice of law if (a) all parties are represented by counsel and (b) the mediator discloses that any proposal that he or she makes with respect to the terms of settlement is informational as opposed to the practice of law, and that the parties should not view or rely upon such proposals as advice of counsel, but merely consider them in consultation with their own attorneys. (Emphasis added)

For purposes of considering the question of UPL, the resolution attempts to make a distinction between memorializing the parties’ agreement by recording the terms of settlement specified by the parties and going beyond those terms. Even this prohibition is tempered by an exception if the parties are represented by counsel (presumably this means that all of the parties are represented) and the mediator makes clear that she is providing information for the parties to consider in consultation with their own attorneys and is not intended to be the practice of law.3

This distinction — between “memorializing” the parties’ agreement and drafting settlement terms — is responsive to the mediator concerns raised above. A mediator may appropriately prepare a memorandum of understanding or settlement agreement that incorporates the parties’ terms (thus satisfying the needs of the parties), but the mediator may not “draft” the terms (make decisions for the parties, thereby crossing the line to perform a non-neutral function).

Ethical Standards

For mediators and lawyers representing clients in dispute resolution processes, there are a myriad of ethical codes that may apply, depending on the context. Interestingly, the Model Standards of Conduct for Mediators adopted by the American Arbitration Association, the American Bar Association, and the Association for Conflict Resolution does not address this issue directly. Arguably, self-determination (Standard I), impartiality (Standard II), competence (Standard IV), confidentiality (Standard V) and quality of the process (Standard VI) all indirectly touch on this issue.

In contrast, the Model Standards of Practice for Family and Divorce Mediation contains the following provision:

With the agreement of the participants, the mediator may document the participants’ resolution of their dispute. The mediator should inform the participants that any agreement should be reviewed by an independent attorney before it is signed.4

In contrast to the permissive language of the Model Standards of Practice for Family and Divorce Mediation, the ethical standards for mediators in Florida explicitly obligate the mediator to ensure the agreement is memorialized:

Closure. The mediator shall cause the terms of any agreement reached to be memorialized appropriately and discuss with the parties and counsel the process for formalization and implementation of the agreement.5

The Committee Notes to the Florida Rule provide additional context by pointing out that the procedural rules adopted by the court “require that any mediated agreement be reduced to writing.”6 The note continues to clarify that “[m]ediators have an obligation to ensure these rules are complied with, but are not required to write the agreement themselves.”

A few important themes emerge from this initial exploration:

In most jurisdictions, mediators are permitted to “memorialize” or “document” the terms of the parties’ agreement. While some jurisdictions may go further and mandate this role, most jurisdictions consider this to be permissive.

A mediator should not go beyond memorializing or documenting the parties’ terms of agreement. It is not acceptable for a mediator to “draft” or create new terms for the parties.

If the parties are represented by counsel, the parties may opt for one of the attorneys to draft the agreement.

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International Dispatch

Building Sustainable Mediation Programs: A Singapore Perspective

By Sundaresh Menon

Alternative dispute resolution defines itself with a negative, encompassing any form of dispute resolution that is not litigation. This definition sometimes also carries with it a negative connotation of being inferior to litigation in the courts. We need to shift our thinking and see ADR not as an alternative to traditional court systems and processes but rather as providing a range of tools that are an essential element in a complex and rich toolkit that is available to resolve disputes. These propositions will be developed through an account of Singapore’s experience with mediation.

Mediation and Asian Culture

The resolution of disputes through informal mediation has an impressive tradition in Singapore, as it does in many Southeast Asian nations. In days that are now long gone, community disputes were often resolved amicably through the intervention of community leaders and elders. Mediation is particularly suited to many traditional Asian cultures, where concepts of social order, harmony, and honor are all highly regarded.¹

For many of us in Asia, going to court is not the conventional response to a dispute. Instead we turn to processes such as mediation that allow parties to resolve disputes in a manner that preserves their relationships. Throughout most of the latter part of the last century, however, the use of mediation in Singapore had declined with the onset of rapid urbanization and the increasing influence of foreign cultures as well as the growing sophistication of business and legal actors.

The Revival of Mediation in Singapore

It was only in the 1990s that mediation saw a revival in Singapore. Concerns that Singaporeans were becoming excessively litigious loomed large, and policymakers saw mediation as a less costly and a more harmonious way of settling disputes. Decision-makers also thought mediation would assist in case management and ease the burden of the burgeoning judicial caseload.²

Three mediation institutions were established in the 1990s to provide avenues for formalized mediation. The Primary Dispute Resolution Centre (PDRC), established in 1994, offers court-annexed alternative dispute resolution services targeted at civil cases heard in the State Courts of Singapore, which have a jurisdictional ceiling of $250,000 in Singapore dollars (the equivalent of approximately $185,000 in US dollars). Mediators at the PDRC initially were State Courts judges who had received specialized training in the conduct and techniques of mediation. But the rise in the number of cases has seen this group of judge-mediators add to their company other legally trained or accredited volunteer mediators. The role of the PDRC in the dispute resolution framework has been shored up by recent amendments to the State Courts Practice Directions that create a “presumption of ADR”: parties to a dispute are automatically referred to the most suitable form of ADR, including mediation, unless they opt out of the ADR process.

The Singapore Mediation Centre (SMC), established in 1997, focuses primarily on private commercial matters. The SMC works closely with the Supreme Court of Singapore. (The Supreme Court consists of the High Court, which hears trials and appeals from the State Courts, and the Court of Appeal, the highest
appellate court in Singapore.) The parties to a dispute proceeding in the Supreme Court are actively encouraged to explore the option of mediation and ADR at case management conferences. The court may refer a case directly to mediation if it thinks appropriate. The SMC has also partnered with key industries to develop industry-focused mediation schemes tailored to the needs of those industries. Examples include the Council for Estate Agencies Mediation Sub-Scheme and the Council for Private Education Mediation-Arbitration Scheme.

The Community Mediation Centres (CMCs), established in 1998, deal predominantly with day-to-day relational disputes between neighbors, family members, and friends. The CMCs do not mediate disputes involving legal issues or matters of a commercial nature. The types of cases the CMCs deal with allow the CMCs to tap the diversity of experience of trained volunteer mediators who hail from all walks of life. The CMCs uphold quality standards through a Mediator Management Framework that prescribes criteria for the appointment and training of its volunteer mediators.

**The Fruits of the Revival**

The results achieved by these three institutions have been impressive. The PDRC mediated 7,292 cases in 2013 and 6,420 cases in 2014. Settlement rates have hovered around 90%. The CMCs have mediated more than 7,000 community disputes and report a 70% settlement rate. The SMC has mediated 2,300 cases with an overall settlement rate of 75%.

The reason for the success of these institutions is fourfold. First, the government has played an active role in encouraging prospective litigants to consider mediation or other forms of ADR. Legislative and executive actions have built mediation into dispute resolution processes in industries such as labor and government procurement.

Second, the judiciary has helped entrench mediation as a parallel process to traditional court proceedings. The Singapore courts recognize that justice can be accessed outside the courtroom; there is a strong judicial and legislative bent toward encouraging parties to resolve their disputes through collaborative processes. For example, the January 2014 amendments to the Supreme Court Practice Directions incorporate an “ADR Offer Procedure” intended to encourage litigants to consider mediation and other methods of alternative dispute resolution at an early stage. Provisions in the Rules of Court also allow the court to take into account parties’ attempts at mediation or other means of dispute resolution.
when exercising its discretion in making adverse costs orders in court proceedings. These provisions incentivize litigants to consider and participate meaningfully in mediation or other ADR processes.

Third, Singapore places great emphasis on developing and maintaining an available pool of trained and experienced mediators. This commitment led recently to the establishment of the Singapore International Mediation Institute, which will accredit and regulate mediators and make mediation a recognized and regulated profession marked by a commitment to high standards.

Finally, mediation programs in Singapore have been responsive to the needs of users. Mediation programs have continued to evolve and develop.

Looking Ahead

Mediation in Singapore has achieved the greatest gains in the areas of family justice and international dispute resolution, two areas that arguably could not be more different. In the former, some of our most closely held community values are engaged and agonized over in very real and concrete ways. In the latter, these values take a back seat, and the focus shifts to accommodating the rigors of commercial disagreements that penetrate both geographical and cultural boundaries. Both of these areas have experienced significant developments in recent years.

Family Justice

The area of family justice saw sweeping reforms with the establishment of the Family Justice Courts (FJC) in 2014. Prior to the establishment of the FJC, disputes over maintenance, probate, adoption, spousal violence, and other family-related matters were heard by the Singapore Family Court. While the Family Court made extensive use of processes such as mediation and counseling, the trial process remained fundamentally adversarial; it was not possible to fully ameliorate the distress and acrimony suffered by families litigating in the Family Court.

The FJC seeks to change that. The FJC now places the less confrontational approaches of mediation and counseling front and center: where once it was mandatory only for couples with children under age 14, mediation is now required for any parents whose children are under 21. Judges of the FJC are also empowered to order parties to attend mediation and counseling as part of the court process where appropriate. In proceedings involving custody or the welfare of a child or any other person, the court may appoint medical specialists, counselors, or social workers to assess the suitability of measures the court is considering.

These reforms came in response to recommendations made by the Committee for Family Justice, which was impaneled in 2012. After an extensive consultative review of the family justice system with experts in the field as well as the public, the committee recognized that family cases often involve parties whose relationships will continue beyond the life of the case and that the adversarial court process did little to preserve those relationships. As a result, the committee advocated more extensive use of non-confrontational methods of dispute resolution such as mediation and conciliation and called for family court judges to be granted more powers to intervene in the course of such proceedings, to reduce conflict and acrimony. There was also a recommendation for a shift to a more judge-led trial process, which would be less adversarial in nature.

The Family Court intends to put in place new professional standards and training requirements so that specialist family mediators will be properly equipped to handle sensitive family issues.

International Dispute Resolution

The tremendous growth in international trade and investment in Asia in recent years has brought an urgent need for high-quality dispute resolution services that can address the concerns of international corporate interests. Singapore has positioned itself as a neutral venue for the resolution of transnational commercial disputes and is now one of the most preferred arbitration seats in the world.

The Singapore International Arbitration Centre (SIAC), established in 1991, has led the charge thus far in the field of international commercial arbitration. The SIAC’s caseload has increased in both number of cases and case value since it was established in 1991.

The Singapore International Mediation Center (SIMC) was established on the recommendations of a Working Group constituted in 2013. The Working Group conducted an extensive survey of the mediation landscape and made comprehensive
recommendations, including the establishment of a professional body to set standards and provide accreditation for mediators as well as legislation to strengthen the mediation framework in Singapore. The Working Group also proposed the establishment of an international mediation services provider to offer a diverse panel of experienced international mediators and experts.

The SIMC offers international commercial mediation services under the umbrella of its own mediation rules. Beyond that, the SIMC provides logistical and administrative support to facilitate mediations at all stages. The SIMC and SIAC have also collaborated to offer a unique “arb-med-arb” service that allows for a seamless transition between arbitration and mediation and is targeted at international businesses that may value both finality and enforceability in addition to confidentiality and flexibility.

To complete the picture, the Singapore International Commercial Court (SICC) joined the ranks of the SIAC and SIMC in January 2015. The newly established SICC, a division of the Singapore High Court, is set to hear international and commercial disputes that have little or no connection to Singapore. The SICC will provide a middle ground between traditional court and arbitration proceedings. It aims to offer the structured formality of the court process with several of the advantages of arbitration. This triumvirate of institutions will work together to advance a truly Asian hub for dispute resolution services.

Conclusion

These recent advancements in mediation cut across disparate areas of Singapore law and perhaps foretell the promise of ADR for the future. The time will soon come when we no longer see ADR as an adjunct or an alternative to court systems and processes. Rather, we will view it as an integral part necessary to complete any legal system that is keen to make available the most appropriate dispute resolution mechanism for the dispute at hand.

Endnotes


Chief Justice Sundaresh Menon

Chief Justice Sundaresh Menon was in private practice for almost 25 years and was appointed Senior Counsel in 2008. He has also been in the public service, having served as a Judicial Commissioner of the Supreme Court, Attorney-General of Singapore, a Judge of Appeal of the Supreme Court, and the Chief Justice of Singapore since November 6, 2012. He previously served as Deputy Chairman of the Singapore International Arbitration Centre and has represented Singapore at the UNCITRAL Working Group on Arbitration.

This article is based on Chief Justice Menon’s keynote address at the Asia-Pacific International Mediation Summit in New Delhi, India (Feb. 14, 2015), https://www.supremecourt.gov.sg/data/doc/ManagePage/5801/Asia-Pacific%20International%20Mediation%20Summit%20-%20speech%20by%20CJ.pdf. The full text of the speech will be published in the 2015 issue of the Asian Journal on Mediation (published by Academy Publishing on behalf of the Singapore Mediation Centre).
Section News

The Section of Dispute Resolution Welcomes our 2015-2016 Officers and Council Members

Section Chair, Howard Herman
The Section is pleased to welcome Howard Herman as the 2015-2016 Section Chair. Howard has been a member of the ABA Section of Dispute Resolution since 1984. In addition to his work on the Section Council, he has served as Spring Conference Planning Committee Program Chair, co-chair of the Advanced Mediation and Advocacy Skills Institute, and co-chair of the Court Committee. He also served on the Section’s Mediation Quality Task Force.

Howard has worked as a mediator and as a developer of court-annexed ADR programs since 1985. He currently serves as Director of the ADR Program for the US District Court, Northern District of California, in San Francisco, where he has worked since 1997. At the district court, Howard both mediates cases and serves as the lead trainer and supervisor of the hundreds of lawyers who serve as volunteer neutrals in the court’s ADR programs. He previously served as Director of ADR Programs for Contra Costa County Superior Court and spent four years as a settlement conference attorney for the United States Court of Appeals for the Ninth Circuit, ultimately serving as the co-director of that court’s settlement conference program. Since 1997, Howard also has taught various negotiation and mediation courses at the University of California’s Hastings College of the Law, and he has developed and conducted ADR training courses for judges and lawyers throughout the world. In 2002, Howard was an inaugural recipient of the Robert F. Peckham Award for Excellence in Alternative Dispute Resolution presented by the United States Court of Appeals for the Ninth Circuit. In 2011, he was co-recipient of the Mediation Society of San Francisco’s annual Award for Outstanding Contribution in the Field of Mediation. In 2013, he was the inaugural recipient of the Exceptional Service Award presented by UC Hastings College of the Law’s Center for Negotiation and Dispute Resolution. Howard previously practiced as a civil litigator with the firms of Graham & James and Kindel & Anderson in San Francisco.

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**ADR Cases** By Joyce Fondong, Darlene Hemerka, and Matthew Conger

**Arbitrator Exceeds Authority by Acting Contrary to Arbitrator-and-Forum Selection Clauses**

In *PoolRe Ins. Corp v. Organizational Strategies, Inc.*, 783 F.3d 256 (5th Cir. April 7, 2015), the Fifth Circuit affirmed the District Court’s decision to vacate an arbitration award after determining that the arbitrator exceeded his authority under 9 U.S.C.S § 10(a)(4). The arbitration agreement between Organizational Strategies, Inc (OSI) and Capstone, a group of entities that provides administrative services for captive insurance companies, called for arbitration under the Commercial Arbitration Rules of the AAA, with the venue of Delaware. PoolRe issued insurance policies to OSI and three captive insurance companies. An arbitration agreement between PoolRe and the captive insurance companies called for arbitration by the International Chamber of Commerce (ICC) in Anguilla, and the arbitrator was to be chosen by the Anguilla Director of Insurance.

Capstone brought suit against OSI for breach-of-contract claims. Under the AAA arbitration terms, a Texas-based arbitrator was selected. PoolRe joined for the limited purpose of having the Texas-based arbitrator appoint an Anguilla-based arbitrator. The Texas-based arbitrator disregarded the arbitrator request, applied AAA rules, and found jurisdiction over Capstone’s claim and over PoolRe’s claims, holding that PoolRe waived its rights to an Anguilla-based arbitrator.

In affirming the lower court’s decision, the Fifth Circuit reasoned that selection of the arbitrator was done in a manner contrary to the arbitration agreement between PoolRe and the captive insurers and the requirement that all disputes arising out of their contractual relationship be submitted to the ICC and under the ICC Rules of Arbitration.

**Class and Collective Action Falls Outside Scope of Arbitration Clause**

In *Lloyd v. J.P. Morgan Chase & Co.*, 791 F.3d 265 (2d Cir. June 29, 2015), the Second Circuit held that the District Court correctly read the arbitration agreement to incorporate the rules of the Financial Industry Regulatory Authority (FINRA). The Second Circuit reasoned that the individual arbitration clause required individual arbitration only to the extent such arbitration was required by the FINRA rules. FINRA Rule 13024 precludes class and collective action claims from arbitration. The Second Circuit reasoned that the parties could not have intended to arbitrate claims before an arbitral body that, under its own rules, could not hear them. Finally, the Second Circuit reasoned that the parties must have intended the FINRA rules to govern the scope, arbitrability, and the arbitral procedure of disputes between the bank and its employees that were submitted to arbitration.

**FINRA Rule is Not Contrary to Federal Arbitration Act**

In *Cohen v. UBS Financial Services Inc.* Docket No. 14–781–cv, 2015 WL 3953348 (2d Cir. June 30, 2015), the Second Circuit held that FINRA rule 13204 is not contrary to the Federal Arbitration Act. Cohen was a former employee of UBS Financial Services. Under the employment contract, any dispute arising from the contract was to go to arbitration. In addition, the employment contract contained a provision in which the employee waived his right to commence or be part of a class action or collective action arising out of or relating to his employment. Despite this provision, Cohen filed a putative class and collective action asserting violation of the Fair Labor Standards Act. USB moved to stay the case and have it transferred to arbitration. The District Court granted the motion to compel arbitration and the Second Circuit affirmed, after reasoning that Rule 13204 is not a contrary congressional command that would override the enforcement of the arbitration agreement under the Federal Arbitration Act. Further, the Second Circuit stated that Rule 13204 “said nothing about class action and collective action waivers and cannot be a bar to the enforcement of them.”

**District Court Lacks Discretion When Stay is Requested**

In *Katz v. Cellco Partnership*, Docket Nos. 14–138 (Lead), 14–291(XAP ), (2d Cir. July 28, 2015), the Second Circuit found that the District Court did not have discretion to dismiss the case. Cellco asked the District Court to stay the case and send all claims to arbitration. Instead, the District Court decided to compel all claims to arbitration and dismissed the action. Cellco appealed. While the Second Circuit acknowledged that the circuit courts have not settled the question of whether a district court has the discretion to dismiss a case after referring all claims to arbitration and a stay is requested, it found that a stay
was required by the Federal Arbitration Act. The court relied on the plain meaning of Section 3 of the Federal Arbitration Act, particularly the words “shall on application of one of the parties stay the trial of the action.”

**Consumer Contract is Not Unconscionable**

In *Sanchez v Valencia Holding Comp.*, 190 Cal Rptr.3d 812 (Cal. August 3, 2015), the California Supreme Court reversed the decision by the Court of Appeals holding that the contract was unconscionable. Sanchez brought a putative class action against Valencia for, among other claims, violation of the California Consumer Legal Remedies Act, based on allegations that Valencia made false representations to Sanchez regarding the condition of an automobile purchased by Valencia. Valencia moved to compel arbitration as required under the automobile sales contract. The District Court denied this motion, finding the entire contract unconscionable, and the Court of Appeals affirmed. Valencia sought review by the California Supreme Court. Applying *AT&T Mobility LLC v. Concepcion*, the California Supreme Court held that the Federal Arbitration Act requires enforcement of waivers in consumer arbitration agreements and preempts state law that is inconsistent.

**Arbitrator Must Decide Whether Contract Unconscionable**

In *Brennan v. Opus Bank*, Nos 13-35580. 1335598, 2015 WL, 4731378 (9th Cir. August 11, 2015), the Ninth Circuit affirmed the District Court’s decision that all claims should be arbitrated and that the arbitrator must determine whether Opus Bank may compel its former employee, Brennan, to arbitrate his wrongful termination claim. Brennan argued that the entire employment contract was unconscionable and thus unenforceable. Opus responded that an arbitrator had to decide both the employment dispute and whether the contract was unconscionable. Relying on US Supreme Court decision *Rent-A-Center, West, Inc. v. Jackson*, the court found that because Brennan failed to specifically challenge the delegation of the arbitration provision as unconscionable, the issue should be decided by the arbitrator.

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