

ALTERNATIVE RESOLUTIONS



STATE BAR OF TEXAS ALTERNATIVE DISPUTE RESOLUTION SECTION

CHAIR'S CORNER

By Susan Schultz, Chair, ADR Section

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Susan Schultz

We held our second council meeting of the year in Austin on September 25, 2010. And, yes, it was a home football weekend for UT – so, despite that or because of it, we had a good turnout at the meeting. The date was also fortuitous because it allowed me to report on the Council of Chairs meeting, which I had just attended the day before in Austin.

Highlights from the Council of Chairs meeting:

- For attorneys, you must be aware by now of the proposed **new disciplinary rules of professional conduct**. The State Bar has reviewed them and is recommending some changes. A redlined version is available on the State Bar website at www.texasbar.com.
- **Protecting personal information** – the Bar suggests that sections need to consider protecting their members' information, especially email addresses. To the extent that

sections have membership rosters on their website, they may want to keep the roster in a “member only” area. The ADR Section does not keep a member roster on its website, but we are looking into a “member only” area to facilitate discussions among members.

- **ADR Section name change** – the meeting heated up at this point! I was called up to the front of the room to present the Section's request to change its name to “Dispute Resolution.” I recounted the various reasons that the Council and the Section have for proposing the change - see John Allen Chalk's article for more details on this – which make sense to me, especially considering the ABA's “Dispute Resolution” section and the various universities “dispute resolution” programs. This proposal elicited some questions and comments, as well as an objection from the Family Law section, which was a surprise – keep reading.

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**NOMINATIONS FOR THE FRANK EVANS
AWARD REQUESTED -- See page 45**

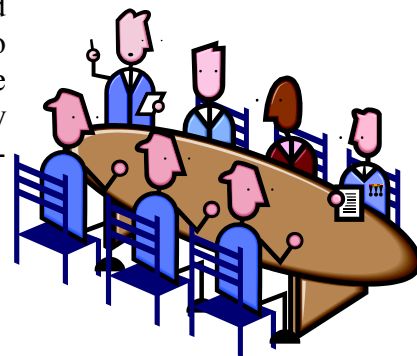
Highlights from the ADR Section council meeting:

- **ADR Section Name Change** – based on the reaction that our proposal had at the Council of Chairs meeting, council members offered to do some outreach to the Family Law section. As of today, I know that council member Alvin Zimmerman has already contacted Family Law members and started that conversation. If you would like to do some outreach to the Family Law section, by all means. Please report back to me or any council member if we need to follow up. We will also follow up with the Section Representatives Committee, which is the next step along this long process.
- **Save the date for our CLE Program:** *Tactical Interventions in Mediation: Preventing Bad Settlement Decisions and Impasse Minute By Minute*, January 28, 2011 in Houston at the Crowne Plaza Hotel. Chair of the CLE Committee Don Philbin acquitted his responsibility admirably by enticing **Douglas E. Noll** to come spend the day

with us and present a fabulous program. Online registration is now available.

- **International DR Committee** – Chair Wayne Fagan has put much energy and enthusiasm into building a very robust committee with a nice derivative of increased membership. This committee will explore ways in which practitioners across borders can interact and learn from one another.

Our next council meeting will be on January 29, 2010 in Houston, the day following our CLE program. If you have suggestions for initiatives or projects that you would like the Council to consider, please email me or any other council member.



FROM THE EDITORS

Stephen K. Huber

E. Wendy Trachte-Huber

We have heard from several members of the ADR Section that they are not receiving Alternative Resolutions on their e-mail. If you have provided an e-mail address to the State Bar of Texas, the journal should automatically appear on your e-mail – you should not have to go to the Section Web page to retrieve Alternative Resolutions. The person to contact is <Lily.Hewgley@TEXASBAR.com>, who is our webmaster at the State Bar [Yes – it has occurred to us that this message will be received mostly by those who do not have a problem, but increased knowledge should help.]

One of the important services offered by Alternative Resolutions is to provide updates on recent case law and other ADR developments. Arbitration case law is readily found by your editors, but other legal developments can easily escape our attention. We are also interested in learning about the activities of city and area ADR groups, including Dispute Resolution Centers.

Set out below are summaries of twelve important and recent ADR court decision – two mediation and ten arbitration. In addition, Mary Thompson's ADR On the Web in this issue describes some useful Internet sites for keeping up on recent ADR case law developments.

ADR IN THE COURTS:

A DOZEN DECISIONS

1. Discovery Related to a Mediation Proceeding Prohibited

In re Empire Pipeline Corp., --- S.W.3d ----, 2010 WL 3566155 (Tex.App.-Dallas). Gunter sued Relators (several Empire entities) alleging breach of contract and related theories of recovery. At a mediation, the parties signed a settlement agreement, which Gunter subsequently sought to avoid. The Relators' attorney, Robert L. Harris participated in the mediation. The trial court approved Gunter's request to depose Harris about matters related to the

mediation, albeit with restrictions. The appellate court reversed, insofar as the order required any testimony in connection with the mediation and drafting of the settlement agreement.

Empire claimed an ADR Privilege, based on the Texas ADR Act, § 154.053. While confidentiality of mediation proceedings is not absolute, no exception was applicable in this case. Consequently, any and all discovery related to the mediation – both the proposed deposition and document production – was prohibited.

2. Sanctions for Failure to Attend Mediation

Barnhouse v. Wild Dunes Resort, L.L.C., 2010 WL 3187044 (D.S.C.). Dr. Barnhouse brought suit due to burns sustained from a hot stone massage treatment. A mediation meeting was scheduled, but the insurance adjuster could not appear in person. Representatives of the corporate defendant and its insurer did not attend the mediation, as required by the local Civil Procedure rules.

The insurance company representative participated by phone, due to a work conflict. Counsel for the defendant knew of this conflict but thought his legal assistant had obtained approval for the telephonic participation. The adjuster did participate by phone, but the case did not settle. If this was the only basis for the imposition of sanctions, a close question would arise, even though the court pointed out that miscommunication does not constitute "good cause." However, the corporate defendants failed to send a corporate representative (let alone one with appropriate settlement authority) – only counsel appeared.

Accordingly, the imposition of sanctions was clearly warranted; the amount of the sanctions is the interesting aspect of the case. Dr. Barnhouse's sought \$9,784 — \$525 in legal costs, \$1,140 in mediator fees, \$619 in travel expenses, and lost income of \$7,500 (12,000 in lost income for two days less \$4,500 in saved costs). The district court allowed all the out-of-pocket expenses and also \$2,000 in

lost income. Unfortunately, the court provided no explanation whatsoever for its treatment of the lost income item – the most important aspect of the case.

3. Judicial Sanctions by Court for Alleged Wrongful Conduct in Arbitration Rejected.

Positive Software Solutions, Inc. v. New Century Mortgage Corp., --- F.3d ----, 2010 WL 3530013 (5th Cir. 2010). The district court imposed sanctions on an attorney for several instances of bad faith conduct during arbitration. The Fifth Circuit reversed, because the district court did not have inherent authority to impose such sanctions. The fact that a court orders parties to arbitrate a dispute does not provide a basis for subsequent supervision of the proceedings. Arbitration is an alternative to litigation, not an annex thereto.

The 5th Circuit distinguished *LaPrade v. Kidder Peabody & Co.*, 146 F.3d 899 (D.C.Cir.1998), where counsel for a party brought suit in state court to halt an arbitration ordered by the federal district court. Sanctions against the attorney were upheld because he had acted in violation of the district court order. Here the bad faith action occurred during the arbitration proceeding.

The 5th Circuit held that the district court was wrong to expand judicial authority over arbitration, since a central goal of the FAA is to limit judicial involvement in the arbitration arena. The injured party was not without alternatives: asking the AAA to reopen the proceeding, or resort to the grievance process. In fact, a grievance had been filed previously, but the State Bar of Texas declined to proceed on the matter. The 5th Circuit closed by directing the clerk of the court to send a copy of the decision to the State Bar of Texas.

4. Enforcement of Award Absent Consent to Court Jurisdiction Provision

Idea Nuova, Inc. v. GM Licensing Group, Inc.,--- F.3d ----, 2010 WL 3079917 (2^d Cir. 2010). Nuova appealed the confirmation of an arbitration award because the arbitration agreement did not provide for consent to the court's jurisdiction. The agreement called for use of the AAA's Commercial Arbitration Rules, which expressly provide for judicial confirmation of final awards. On that basis, the 2^d Circuit upheld the confirmation of the award.

Idea Nuova argued that the absence of “final and binding” language in the arbitration agreement precluded confirmation of the award. *See* 9 U.S.C. § 9 (provides for confirmation where “parties in their agreement have agreed that a judgment of the court shall be entered” upon the arbitration award.) The consequence of a contrary finding would be that the confirmation proceeding would be a regular trial rather than the summary proceeding called for by § 9, and use of a standard of review more intrusive than that provided for under the FAA.

5. Waiver of Arbitration

Snider v. Production Chemical Mfg., Inc., --- P.3d -- --, 348 Or. 257, (Or. 2010). The employment agreement called for arbitration. Production terminated Snider, who then brought a breach of contract action in state court. Seven months of amended pleadings, motions and discovery – the usual pre-trial jousting – ensued. Six days before the trial date Production successfully moved to postpone the trial. Shortly after the original trial date, Production filed a motion to compel arbitration. This motion was denied, and a trial on the merits ensued. The Oregon Supreme Court affirmed the trial court decision in all respects.

6. Power of Third Party to Require Arbitration

PRM Energy Systems, Inc. v. Primenergy, L.L.C., 592 F.3d 830 (8th Cir. 2010). PRM licensed gasification technology patents to Primenergy – to use the technology, and to enter into sublicense agreements in a number of countries. PRM brought suit against Kobe Steel for tortious interference with the contract, based on dealings between Kobe and Primenergy. The district court granted Kobe Steel's motion, and the 8th Circuit affirmed.

The order directing arbitration and staying the judicial proceeding is an interlocutory order, and not appealable because not a “final decision.” *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 87 n. 2 (2000). The order became “final,” and therefore appealable, upon dismissal of the claim by the district court. 9 U.S.C. § 16(a)(3). However, if the district court had retained jurisdiction, the matter would not have been immediately appealable. Why should the discretionary decision of the district court about retaining jurisdiction after the dispute is off to arbitration determine the timing of appeal? The

short answer: there is no good reason. [This is an editorial comment by the author, not the court.]

Whether a nonsignatory can compel arbitration is determined under state contract law. *Arthur Andersen LLP v. Carlisle*, 129 S.Ct. 1896 (2009). The 8th circuit, however, based its decision on prior case law, without reference to the contract law of any state. See *Donaldson Co., Inc. v. Burroughs Diesel, Inc.*, 581 F.3d 726, 730 (8th Cir.2009) The basis for jurisdiction in this instance was concerted misconduct between a contracting party (Primenergy) and a third party (Kobe).

Judge Beam dissented, because he disagree with the court's conclusion that PRM's claims were connected to the contract. The arbitration clause was limited to "all disputes arising under" the PRM and Primenergy agreement. "The concerted misconduct requirements of *Donaldson*, are almost totally absent. Here, unlike in *Donaldson*, there was not pre-arranged collusive behavior, so there was no basis for arbitration of this garden variety tort claims at the behest of Kobe Steel."

7. Interim Judicial Relief Pending Arbitration

Toyo Tire Holdings Of Americas Inc. v. Continental Tire North America, Inc., --- F.3d ---- (9th Cir. 2010). Toyo sought to to enjoin Continental and Yokohama from dissolving the parties' joint venture pending ICC arbitration. The ICC rules provide for judicially imposed interim relief, including injunctive relief. Under Rule 23(2), a court is authorized to issue an interim injunction so that the ICC can appoint an arbitration panel to decide the matter. In doing so, the court does not impinge of the arbitration process, but merely maintains the status quo until the arbitral panel can take action.

8. Credit Repair Organization Act (CROA) Not Subject to FAA

Greenwood v. CompuCredit Corp., --- F.3d ----, 2010 WL 3222415 (9th Cir. 2010). The CROA authorizes protected parties to "sue" in certain situations. The contract at issue called for arbitration. The 9th Circuit employed a plain meaning approach to conclude that "sue" doe not mean "arbitrate." In dissent, Judge Tashima argued that "right to sue" did not require resort to a judicial forum, or preclude enforcement of an arbitration agreement.

The dissent criticized the majority for failing to consider the legislative history of the CROA. There is a certain irony here because the Supreme Court's strongest supporters of arbitration – Justices Scalia and Thomas – also are strong proponents of relying on statutory language, while largely ignoring legislative history as undependable. If *Greenwood* makes its way on to the Supreme Court docket, the best guess of your author is that the Court would reverse the 9th Circuit decision..

9. Preliminary Injunction Enjoining Arbitration

Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30 (2d Cir. 2010). The 2d Circuit affirmed a district court order that enjoined arbitration by the Financial Industry Regulatory Authority (FINRA). VCG sought arbitration regarding transactions between the parties, whereupon Citigroup sought an injunction on the ground that VCG was not a customer of Citigroup.

Under the conventional standards for injunctive relief, the moving party must demonstrate irreparable harm and probably success on the merits. The district court granted an injunction even though Citigroup failed to satisfy the probable success standard because there were "serious questions" about VCG's customer standard. This case is interesting because courts rarely enjoin arbitration.

10. Legal Error on Face of Award as Basis for Vacatur

Broom v. Morgan Stanley DW Inc., 236 P.3d 182 (Wash. 2010) (5-4 decision). The Supreme Court of Washington vacated an arbitration award because the explanation of the award demonstrated that the arbitrator has misapplied the statute of limitations. "Facial error" is an accepted ground for vacatur, and consistent with the Washington UAA. See *Boyd v. Davis*, 897 P.2d 1239 (Wash. 1995). The court recognized the authority of the arbitrators to make decisions regarding time limitations, but the facial error rule provides a narrow basis for vacating this arbitral award.

The dissent argued that the limitations issue was for the arbitrator to decide, and that the court was usurping the role of the arbitrator. This decision illustrates why arbitral organizations such as the AAA prefer conclusory awards to reasoned awards.

11. Reinstatement of Senior Employee by Arbitrators.

Sands v. Menard, Inc., 787 N.W.2d 384, (Wis. 2010) (6-3 decision). The arbitrator ruled that Dawn Sands' was wrongfully terminated by Menard, and ordered her reinstated as the General Counsel of Menard. The Wisconsin Supreme Court vacated this remedy because: "the attorney-client relationship between Menard and Sands has been so irretrievably damaged that the panel exceeded its authority by ordering reinstatement." Reinstatement would be contrary to public policy because Sands could not serve as General Counsel of Menard without violating her ethical obligations as an attorney, notably the duty of loyalty to the client.

To be sure that this decision did not generate additional public policy claims, the court stated that this was a rare and unusual situation, the violation of public policy must be clear, and the burden of proof rests with the proponent. See *Schoonmaker v. Cummings & Lockwood of Connecticut, P.C.*, 252 Conn. 416, 747 A.2d 1017 (2000) (recognizing that the Rules of Professional Conduct can serve as a public policy ground on which to vacate arbitration awards); though choosing not to do so in that case); *Weiss v. Carpenter, Bennett & Morrissey*, 672 A.2d 1132 (N.J. 1996) (same). The court also noted that reinstatement of an employee is an appropriate remedy in most instances, and may even be so for attorneys in some instances.

Chief Justice Shirley Abrahamson wrote a stinging dissent, arguing that the majority exceeded the very limited role of courts in reviewing arbitration awards. The arbitrators – all attorneys – did not exceed their authority, and that should have been the

end of the matter. She found the majority's argument that the reinstatement remedy was inappropriate to be a powerful one, but inappropriate is not a ground for vacating an arbitration award. If the parties find reinstatement to be unworkable they are free to negotiate a different arrangement.

Why, one might wonder, would Dawn Sands want to go back to work for Menard? The answer is that she did not want to do so, and did not request that remedy. Instead, she sought two years of income. Thus the arbitrators awarded a form of relief not suggested by either party. Unfortunately, the dissent did not directly address this difficulty.

12. Absolute Immunity For Police Officer Witness in Arbitration

Rolon v. Henneman, 517 F.3d 140 (2d Cir. 2008). This slightly dated decision is covered here because the author of the opinion, Judge Sonia Sotomayor, was subsequently promoted to the United States Supreme Court. A police official has absolute immunity from civil suit for testimony in a disciplinary hearing. The relevant law regarding immunity was developed in the context of judicial proceedings; this case extended that immunity to arbitral disciplinary proceedings.



The Reemergence of Latin America's Rejection of International Arbitration

Deborah Ko*

I. Introduction

While the use of commercial international arbitration for extractive industry disputes between private companies and Latin American host governments has historically been met with hostility by Latin American countries, recent developments and literature suggest that these countries have increasingly cooperated, integrating arbitration agreements into relationships with foreign investors through the ratification of international treaties and contract clauses. However, seemingly retaliatory acts, such as the expropriation of the Brisas Project by Venezuela, are contrary to national policies that encourage international arbitration, indicating that the hostility toward arbitration in Latin America continues to the present day.

This article will consider recent extractive industry disputes in Venezuela, Ecuador, and Bolivia. It will examine the historic rejection of international arbitration clauses with foreign private investors; attempts in the last two decades by Latin American countries to promote neutral dispute resolution systems; and the possible reasons for the de facto failure of these systems. Part II will characterize the mixed blessings that result from foreign investment in Latin America's vast, sovereign natural resources. Part III will identify the key methods that foreign investors have sought to level the playing field with host governments. Part IV will assess responses that Latin American countries have demonstrated as a result of the World Bank's creation of an international dispute forum. Part V will provide a new explanatory framework for Latin American countries' rejection of international arbitration.

II. History of Foreign Extractive Industries Investment in South America

South America possesses nearly one-tenth of global crude oil reserves and one-fifth of world natural gas reserves. Other parts of the continent contain rich biodiversity regions, and this combination of abun-

dant natural resources has led to a geopolitical pattern of exploitation over the centuries. The exploration for, and production of, these resources has been a common component of long term capitalistic trends, carried out by countries wielding the most advanced technology capabilities.

In terms of oil resources, Latin America has the second largest oil reserves globally, with Venezuela alone holding the sixth largest crude oil reserves in the world, at nearly 100 billion barrels. In 2008, Venezuela produced over 900 million barrels of crude oil and 1,100 billion cubic feet of natural gas. Brazil surpassed these production rates at more than 12,700 million barrels of crude oil reserves and 11,500 billion cubic feet of natural gas reserves produced in the same year. Additionally, Argentina, Bolivia, and Ecuador also boast a wealth of hydrocarbons. Thus South America is a strategic region in the landscape of energy resources. It is little wonder that significant international disputes occur between these resource rich countries and technology-based countries, the latter seeking to extract resources beyond the capability of local populations in their endeavors to invest industrial capital.

As Latin American countries became increasingly democratized, restructured and privatized toward free market economies in the late twentieth century, further foreign investment interest turned toward the region. Specifically, the world's multinational petroleum companies sought exploration and production opportunities in Latin America. In the absence of foreign investment, domestic production within Latin America would not necessarily have translated into overall economic growth. For example, oil exports from Venezuela and Ecuador, while increasing approximately ten percent per year from 1992 to 2002, have only produced an overall economic growth rate of one and two percent respectively. Furthermore, oil price volatility has a major impact on economic growth in nations heavily dependent on oil exports. By contrast, Mexico's more diversi-

fied economy partially compensates for energy price volatility.

The energy economy of Latin America is sensitive to global market prices, and for countries that rely on exports for fiscal revenue and foreign exchange, notably Venezuela and Ecuador, low prices can have major negative consequences. Even for countries that import more in hydrocarbons than they export – e.g., Brazil, Peru, and Chile – oil prices nonetheless determine inflation, the cost of production, trade balance, and the strength of local currencies. Adding to the complexity of oil sensitive economies, some state-owned oil companies in these countries have faced challenges of finding and developing new fields as older fields experience steady decline. As a result, a wave of exploration and production surged after the turn of the century, especially in Brazil, bringing with it U.S. investment partners.

Foreign investment in the abundance of South American natural resources has been an exploitive, predatory process throughout much of the region's political history, depending on the cyclical waves of high commodity valuation in domestic and international markets. The harms were especially felt when the extraction was commonly coupled with violence, occupation, and environmental degradation. Given this history, Latin American hostility toward foreign investment followed as a natural outcome. In the late 19th century, Latin American countries responded with the "Calvo doctrine." Prior to the introduction of this doctrine, an aggrieved foreign investor's sole recourse against the host government consisted of seeking diplomatic protection from its own government against the host state. The Calvo doctrine, as formulated by Argentine lawyer Carlos Calvo, conceived that the jurisdiction over an international investment disputes is that of the country where the investment is located, and the foreign investor has no right to benefit from diplomatic intervention. Through Calvo Clauses, this principle found its place into many foreign investment contracts and treaties, much to the dissatisfaction of foreign investors who were accordingly subjugated to treatment by the host state's local court systems.

Furthermore, versions of the Calvo doctrine were included in many Latin American national constitutions, including those of Mexico, Ecuador, Peru, Bolivia, and Venezuela. The doctrine had effects rang-

ing from specifying such terms as the exclusion of diplomatic protection for foreign investors only in cases of denial of justice, to any case at all, or it specified the treatment and obligations of foreign investors as analogous to that of the local citizenry. Using the Calvo Clause in international arbitration to challenge the tribunal's competence or jurisdiction, these governments maintained the position that foreign investors had no legal right demand treatment better than that given to local actors, and that there was no logical reason even under international laws for absolving the investor of his waiver of diplomatic protection. Behind these sentiments stood the idea that national constitutions represented the supreme law of the state as a fundamental statute, to which a commensurate level of legal devotion should be accorded.

III. Foreign Investors Seek More Favorable Dispute Resolution Provisions

While use of the Calvo Clause developed as a response to unwelcome foreign investors, in the last decades of the 20th century foreign some countries increasing came to see foreign direct investment as a tool for economic growth. However, political risks associated with unstable governance, corruption, and partiality of local courts have been obstacles to attracting foreign investors. As late as the 1990's, the Calvo doctrine still acted as a nearly indestructible barrier to fair dispute resolution between foreign investors and Latin American governments through the use of binding international arbitration. Traditional hostilities toward international arbitration, rooted in a history of foreign exploitive resource development, eventually subsided as Latin American economies matured and sought to establish foreign confidence – and thus more financing.

Since 1980, several Latin American countries have amended their domestic legislation to provide for and facilitate commercial arbitration involving foreign arbitrators, and adopted modern laws like the United Nations Commission on International Trade Law (UNCITRAL) Model Law for International Arbitration. Adopting countries include Chile, the Dominican Republic, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, and Venezuela.

Moreover, Latin American states began slowly abandoning the Calvo Doctrine in the late 1980's when states acceded to the Panama Convention, the New York Convention, and later the Convention on

the Settlement of Investment Disputes between States and Nationals of Other States (ICSID). Ratification marked a salient turnaround from the former attitudes that prevailed during most of the 20th century. In fact, Latin American countries collectively rejected the World Bank's initial proposition to create the ICSID in 1964, which had been designed to allow investment disputes to be heard outside of local courts without involving diplomatic protections and conflicts between states. The ICSID Convention was revolutionary: it introduced a process that allowed states to attract foreign investment by agreeing in advance that these investors could claim alleged violations of international standards of treatment before international arbitrators. Ratification of the ICSID also obliges member states to enforce ICSID awards as if they were final judgments of each state's own highest courts, without providing grounds to refuse enforcement even under provisions of the New York Convention. As a result, the ICSID Convention essentially provides that a member state may consent to arbitration claims being filed against it by a foreign investor, whether through claims under investment treaties, investment agreements, or local investment laws of the host states.

Political risks have been additionally mitigated by the widespread introduction and use of bilateral investment treaties (BITs), in which investors receive assurance that their assets in certain countries will receive internationally recognized standards of treatment, without having to resort to reliance on their own governments for diplomatic protection. In the 1990's, Latin American nations joined the ranks of developed and developing countries, who had been entering into BITs since the 1960's, and began to execute and ratify BITs in order to ameliorate the investment landscape in the region. BITs provide substantive terms and guarantees of "fair and equitable treatment," nondiscriminatory and "most favored nation" treatment, "full protection and security," free transfer of currency, and prohibitions on expropriation without compensation, thus articulating minimum standards for treatment of foreign investors and ensuring foreign investors direct access to neutral forums. In addition, many BITs contain umbrella clauses that require contracting parties to observe contractual obligations with investors such that a breach of the contract between state and investor could be elevated to the level of a breach of

the treaty. The access to arbitration between foreign investors and Latin American states is heralded as one of the most significant guarantees provided by BITs, and has the effect of limiting the influence of the Calvo doctrine, either by facilitating investor-state arbitration or by permitting it after foreign investors comply with domestic proceedings.

Investment treaties often allow foreign investors to choose from international arbitration under the ICSID Convention, international arbitration under the ICSID's Additional Facility (when one party to the dispute has not ratified the Convention), or ad hoc arbitration under UNCITRAL's model rules. Other treaties permit investors to select from the Stockholm Arbitration Institute or the International Court of Arbitration of the International Chamber of Commerce. The most common forum, however, is the ICSID, which operates under the sponsorship of the World Bank in Washington, D.C.

ICSID Article 42(1) uniquely provides for substantive law standards, in that it allows parties to choose the law to be applied to the investment dispute. In doing so, the ICSID features a system permitting party autonomy. In addition, the ICSID – unlike the UNCITRAL Arbitration rules – makes express reference to the applicability of international law. Although ICSID tribunals have in their arsenal a wide range of international substantive law – absent a choice of law provision – in practice ICSID tribunals have generally viewed the scope of international law narrowly. Thus the applicable law varies for different BIT arbitrations, depending on whether ICSID or UNCITRAL governs the arbitral proceeding. Generally, an investor's claim would arise under the invoked BIT, and international law would nonetheless play a role whether or not the parties agreed upon applicable law. Furthermore, because the majority of parties do not provide for applicable law under these treaties, the provision for international law under Article 42(1) of the ICSID Convention becomes significant.

Across the world and in South America, the trend in resolving investment disputes between foreign investors and states demonstrates a willingness to be subjugated to the provisions of ICSID, as more than a hundred states have become signatories to the convention. However, Brazil remains apart from this trend and is also not a party to any BIT, despite the significant contributions of foreign investment to its

economy. In 1964, Brazil nonetheless participated actively in the consultations that preceded the development of the ICSID convention, with delegate Francisco da Cunha Ribeiro signaling that the creation of the ICSID would “reinforce and almost institutionalize the state of tension, so difficult to eradicate in international political relations, between dominant and dominated economies.” This position was consistent with that taken by other Latin American countries at the time, which were still governed by the principles of the Calvo Doctrine. Today, however, one possible reason for Brazil’s reluctance to ratify the ICSID convention and bind itself to the ensuing choice of law provisions is that of legal uncertainty. This uncertainty is rooted in the controversy regarding whether ratification of the ICSID would be prohibited under the law of the state, as a potential impediment to the sovereign right of the state. Despite these concerns, Brazil has lawfully and previously consented to dispute resolution mechanisms by entering into contracts that require binding foreign arbitration, and by its ratification of the Panama and New York conventions; such effective consent is not out of step with recent pressures to ratify BITs, as exerted by increasingly internationalized investors in Brazil.

The reluctance to depart from Calvo doctrine principles is understandable in that many of the claims comprising the total ICSID caseload have been allegations against Latin American states. From 1996 to 2007, nearly sixty cases have been filed against Ecuador, Venezuela, Bolivia, Argentina, Peru, and Chile, collectively. Furthermore, on the opposite side of these cases have been investors from industrialized Europe and the United States, although a few have found Latin American investors pitted against Latin American states. With so many claims against these sovereign states, recent scholarship suggests a need for assessment of the consequences of evolving from an age of sovereign immunity against foreign investors, to the current proliferation of BITs containing provisions for investor-state arbitration. Because disputes create obligations for many states under these treaties, and because obligations contained in BITs may be very similar, the obligations of one state decided under a BIT may also shape the obligations of other states, including those in the form of significant monetary reparation to investor claimants. Furthermore, a state may be unable to promulgate its desired public policy, or may

discover a need to breach investment obligations under other international commitments as a result of being bound to arbitration awards under BITs.

In May 2005, these quandaries were realized in a case brought against Argentina by CMS Gas Transmission Company (GMS Gas), a U.S. corporation. The World Bank arbitration panel, under the ICSID, awarded \$133 million to CMS Gas as compensation for revenues lost in a utility rate freeze enacted by the State in violation of investor rights under the BIT between the United States and Argentina. Due to a severe economic crisis, Argentina in 2002 froze its domestic utility rates in pesos for Argentinean customers; during this time the international peso value plunged, causing CMS Gas’s revenues to fall by seventy percent. Given the large amount of damages awarded, Argentina’s potential liabilities for this case alone were severe. However, if similar awards result from the more than thirty similar cases that Argentina is party to under the ICSID, the consequences of prioritizing conflicting obligations to the Argentinean public and private duties owed to CMS Gas and companies like it could be crippling for the country and its populace.

IV. ICSID Ratification – and Recent Rejection?

The consequences of prioritizing conflicting obligations to private companies and to public welfare have been demonstrated by recent events in Latin America, such as Bolivia’s nationalization of its gas sector and Venezuela’s similar exaction over foreign oil companies under concession contracts, and by the new waves of ICSID cases against these countries. This next section will examine acts by Venezuela, Ecuador, and Bolivia as they relate to investor v. state contract disputes which suggest that the rejection of international arbitration has resurfaced.

A. Venezuela

In 2007, Venezuela President Hugo Chavez nationalized three projects in the country’s Orinoco River area dealing with the upgrade of heavy oil into export quality crude, effectively “kicking out” oil giants ExxonMobil and ConocoPhillips, for failure to reduce their position to a minority stake in the project under nationalization. Then, in May of 2009, Venezuela enacted a law permitting state owned oil company *Petróleos de Venezuela S.A. (PdVSA)* to expropriate oil and gas assets from foreign companies who refused to continue work pending a back-

log of unpaid receipts amounting to \$12 billion.

Considered one of the largest hydrocarbon reservoirs in the world, the Orinoco Oil Belt potentially holds up to 1.4 trillion barrels of crude oil, with high profitability associated with low potential production costs of seven dollars per barrel. The Venezuelan government considers these reserves to be under the constitutionally rightful ownership of state oil company PdVSA, in “the new spirit of public accountability” and of the country’s oil sovereignty. Foreign oil companies began to explore in the Orinoco area during the 1990s, paying royalties to the Venezuelan government in exchange. However, the government viewed these royalties as inadequate, designed to hold PdVSA “hostage” to the foreign companies in the process. Reflecting this perception, the Venezuela Hydrocarbons Law of 2001 dictated mandatory adjustments to private oil investment contracts, so that the state would receive majority ownership and increased tax and royalty income, and exert sovereignty over the nation’s extractive resources. In 2007, PdVSA commenced negotiations to restructure ownership of Orinoco Oil Belt projects, working under the guidance of the Venezuelan Ministry of Energy and Petroleum, and closely with the Venezuelan government. While companies such as Chevron, Statoil, Total, ENI, BP and Sinopec agreed to the renegotiation of equity in Orinoco projects, ExxonMobil and ConocoPhillips rejected the new terms assigning PdVSA majority ownership, thereby triggering the international arbitration terms provided in the initial contract. ExxonMobil filed an arbitration claim against Venezuela with ICSID regarding its Cerro Negro and La Ceiba projects, seeking fair market value of the expropriated assets, while ConocoPhillips continued its negotiations with PdVSA.

In an effort to forestall these claims in international arbitration, Venezuela declared that arbitration clauses in its existing oil contracts would not be honored, and that those companies who sought to invoke them would be precluded from further investment in the country. While these tactics could at least temporarily discourage foreign investors from challenging some sovereign acts, the practical consequences of this declaration are nonetheless unclear because investors are more likely to elevate their grievances to the ICSID if their ability to conduct business becomes crippled. Furthermore, as

the state breaches contracts due to an inability to pay because to falling oil prices, the policy message to foreign investors is that the legal framework in the country is unreliable across the board. If major American and European oil companies are deterred from investing, the Venezuela economy could also suffer, as oil is left unrecovered and drops in state revenue turn into drops in public spending.

Another consequence of these state actions is that the government must turn elsewhere for foreign investors willing to provide industrial capital for activities like drilling – e.g., Russia, Iran, China, and South Korea, and countries with national oil companies. Venezuela, through PdVSA, has targeted Chinese companies for joint investment in refinery and heavy crude projects, continuing to execute bilateral agreements in the process. Because some of the national oil companies are not bound by stringent emissions and environmental standards, and their profits unhindered by U.S. mandated investments in greener energy, they provide Venezuela with greater taxable income. For example, Russia opposed a G8 proposal to reduce carbon dioxide emissions, and Asian oil companies in Africa have also proceeded with little regard for environmentally friendly development measures. Additionally, some nationalized projects, such as the crude upgrader project, have begun to experience unplanned shut in and output decline, though PdVSA has pointed to obsolete or poorly designed inherited equipment and inadequate maintenance prior to nationalization as the causes for these problems.

From the viewpoint of Venezuela, these acts of expropriation were a measure to bring illegal foreign projects extracting sovereign Orinoco resources back under the control of the government, in order to transfer the proceeds of resources from the coffers of foreign investors back to the rightful beneficiaries of social development programs. In fact, the Embassy of Venezuela described ExxonMobil’s response as “aggressive, unilateral and coercive measures to disqualify any proposed solution,” tantamount to “judiciary terrorism,” even through the international arbitration process. Turning the tables of legal legitimacy back on ExxonMobil, the government further espoused that the additional lawsuits filed by ExxonMobil on top of the international arbitration claim demonstrated a lack of respect for international arbitration. The oil company filed

three lawsuits, in American, Dutch, and British courts; Venezuela viewed these lawsuits as violations of the procedural tools to resolve dispute as provided in the contract where international law under the ICSID should have been relied upon.

B. Ecuador

In 2007, Ecuador announced its rejection of the IC-SID as a dispute resolution forum for investor-state complaints, with cases against it still pending under ICSID jurisdiction. Specifically, the limits on IC-SID participation were directed toward the arbitration of disputes regarding investments in natural resources, such as oil, gas, and minerals. The pending cases include a \$1 billion dollar claim by Occidental Petroleum based on Ecuador's cancellation of Occidental's contract and seizure of the company's oil field assets. This rejection, which followed in the wake of Bolivia's similar withdrawal and appeared to self-exempt Ecuador from future claims under the ICSID, demonstrates a broader dissatisfaction with the dispute settlement regime of international investment law.

One of the most prominent investor claims against Ecuador involves Chevron's allegation of bilateral investment treaty breach. In the 1960's, Texaco – now merged into Chevron – began producing oil in Ecuador, while the country was still under military dictate. Already at the time, political tension surrounded Texaco's development of a forested region that had been inhabited by native tribes. Texaco drilled in the Ecuadorian Amazon from 1964 to 1990, and during this time dumped massive amounts of toxic water, crude oil, and hazardous waste into the surrounding area, abandoning 900 waste pits in the process. In 1998, Texaco formulated an agreement with the government of Ecuador to clean up its share of the waste pits, while Petroecuador, the national oil company, was to clean up the remainder given its own activity in the oil fields. This \$40 million clean up agreement was designed to absolve Texaco from future liability.

Nonetheless, in 2003 a large group of indigenous people (*circa* 30,000) in the oil region filed a lawsuit against Chevron for environmental damage. The waste pits, supposedly cleaned up by Texaco, contain varying degrees of pollution at the surface, though Petroecuador itself has had a poor environmental record including a minimum of 800 oil spills since 1990. These indigenous plaintiffs, backed by

the Ecuadorian government under President Rafael Correa, demanded \$27 billion in added compensation despite the binding nature of the 1998 agreement releasing Texaco from further liability.

Chevron responded by filed an international arbitration under United Nations trade law claiming that the Ecuadorian government violated the bilateral investment treaty between the United States and Ecuador, investment agreements, and international law. Chevron sought the enforcement of the earlier settlement and release agreement, in order to hold Ecuador to obligations it owed under Ecuadorian law and international treaties. The general counsel for Chevron observed that “because Ecuador's judicial system is incapable of functioning independently of political influence, Chevron had no choice but to seek relief under the treaty.”

Ecuador then filed suit in U.S. district court seeking to enjoin arbitration, but the court ruled for Chevron on this matter. *Republic of Ecuador v. Chevron Corp.*, 2010 WL 1028349 (S.D.N.Y.) This decision is now on appeal to the Second Circuit Court of Appeals. For an extended discussion of the entire saga, see Stephen L. Kass, *A Most Inconvenient Forum*, N.Y.L.J., April 23, 2010, at 3.

As the Chevron case proceeds through arbitration, the next questions revolving around foreign direct investments in Ecuador are ones of future foreign investment deterrence. Legal and political discontinuity, resulting from government activism, may deter investment by capital intensive industries whose financing schemes are typically long term, spanning the rise and demise of several governments. Past severe economic crisis has also played a role as well in political discontinuity, notably the 1999 bank collapse that resulted in political transformations where even the role of foreign investment had been contested. Thus, it would seem that the Ecuadorian government has already weighed the benefits of legal redress with the effects generated on the business climate, in pursuing its courses of action against Chevron, despite comments by investors that Ecuador must offer stable contracts and legal guarantees in order for the private sector to realize their investments.

Resentment toward foreign investment has been reinforced by Ecuador's newest constitution, which limits the availability of international arbitration, though recognizing local or regional arbitration. In

addition, a windfall tax passed in 2004 would raise oil taxes on foreign firms to fifty percent whenever oil prices exceed a certain point. Another example of Ecuador's rejection of arbitration involves oil company disputes over the refund of value added taxes, where an arbitration panel awarded a U.S. company \$75 million against the state government. Although the government initially paid the award in 2008, it commenced investigations against the company for other reasons, cancelled its contract, and seized its assets, again propelling Ecuador into arbitration proceedings under the U.S.-Ecuador BIT.

Adding to the apparent rejection of arbitration and some foreign investment, Ecuador has joined Venezuela in the movement away from transnational, private oil companies and toward solicitation of national oil companies from Russia and Asia. The logic of this move may rest on the fact that these national oil companies operate under less public scrutiny, akin to Ecuador's own preference against transparency in its oil operations. Furthermore, inconsistent application and interpretation of its own investment laws affects Ecuador's investment transparency, increasing the risk of doing business in the country. As a result, U.S. companies continue to rely on international arbitration under contracts or bilateral investment treaties, both for remedial purposes and decisions about future investments.

C. Bolivia

Bolivia remains the most notorious of the Latin American states insofar as it has entirely rejected the ICSID. Bolivia withdrew from the ICSID convention in 2007, soon after President Evo Morales nationalized the country's oil and gas assets. President Morales's position was unwavering: "Some multinational companies take over our natural resources, privatize basic services, fail to pay taxes and then, when they have no arguments in their defense, they go to the so-called ICSID. And then, in that World Bank tribunal, no country wins against the multinationals. So why do we need an ICSID where only the multinational companies can win?"

Despite these sentiments, Bolivia signed bilateral investment treaties with other countries, including the United States, as late as 2001. The United States and Bolivia BIT guarantees the option for international arbitration for disagreements that are unable to be settled within the Bolivian judicial system, suggesting Bolivia's theoretical welcoming of for-

ign investment. The principle limiting the acceptance of foreign investment may be summed up in Bolivia's belief that sovereign nations must be partners with their foreign investors, rather than managed by them as subordinates. However, those against international arbitration point to BITs and arbitration as placing investments squarely in the hands of the foreign company, subordinating states in the process.

Not surprisingly, in 2006 the Bolivian government announced the renegotiation of its BITs. With regard to its rejection of the ICSID, Bolivia may find support for its position in its constitution. Article 135 of the Bolivian Constitution provides that "all the companies established ... in the country will be considered national and will be subject to the sovereignty, the laws and the authorities of the Republic." As for hydrocarbon investment, Article 359 of the 2009 Constitution states that all deposits belong to Bolivia such that no contracts may transfer such ownership to private interests. The Bolivian government nonetheless relies on its state oil company, Yacimientos Petrolíferos Fiscales Bolivianos (YPFB), to enter into limited joint venture contracts with foreign companies to develop its oil and gas resources.

Advocates in support of Bolivia's rejection of the ICSID convention, such as the Committee for Abolition of Third World Debt, provide other non-constitutionally related reasons to defend the state's withdrawal. First, these proponents argue that the ICSID is unjust, allowing foreign companies to bypass local courts to take their claims to forums of their own creation. Second, they denounce the ICSID as antidemocratic, permitting foreign companies to bring sensitive state managed sectors like water management into the realm of closed door proceedings. Third, the ICSID is expensive, requiring international lawyers. Fourth, frequently awards obtained by foreign companies amount to millions in compensation for lost future earnings, rather than to compensate the relatively minimal tangible investments of these firms. Finally, these advocates find that ICSID adjudicatory process inherently conflicted, as the World Bank is both the judge and an interested party. Far from the reasons that led to the development of the Calvo Clause, the new discontent with international arbitration in Bolivia captures the yet again changing attitude of Latin American nations with regard to foreign extractive investment.

V. Rejecting International Arbitration: Explanatory Frameworks After Calvo

A. Constitutional and Public Policy Concerns

One framework that Latin American states have recently relied on to justify their rejection of international arbitration is the sanctity of constitutional provisions that invoke public policy considerations. The use of this defense is not illogical, as there are often enormous social implications of awards against states. Because states may find justification for reasserting control over arbitral proceedings for perceived public policy violations, firms want to also ensure that the arbitration process is free from bribery and corruption.

The constitutional protection of fundamental rights has evolved to include the protection of those rights in arbitration as well, and protection may entail the setting aside of arbitral awards. These constitutional guarantees have also been deemed to be a part of public policy, necessitating respect from judges and arbitrators. For example, in a 1999 Venezuelan case known as the Exploration Round, citizens challenged the international arbitration of disputes under oil exploration contracts owned by PdVSA and foreign investors. Using Article 127 of the 1961 Venezuelan Constitution, which excludes arbitration for contracts involving the public interest, plaintiffs argued that only state courts may adjudicate and these courts may not hear foreign claims. Nonetheless, the Venezuelan Supreme Court ruled that the arbitration clause was not an unconstitutional exception to Article 127, and that local court jurisdiction over remedies would not apply. Thus, the exception enabled the court to decide on a case-by-case basis whether the contract was one entailing the public interest. The judicial subjectivity underlying this provision has even led some members of the international community to perceive Article 127 as a revival of the Calvo Doctrine.

The principle of strict legality - that states are only authorized to act as their constitution permits - also factors into the public interest defense. Where national constitutions limit international arbitration, the state and its actors are prohibited from becoming involved in arbitration. Alternatively, a state's participation in an underlying public interest transaction would also result in preclusion from international arbitration. It follows that as contracts be-

come nationalized by Latin American governments, the disputes arising under them also become nationalized into the public interest, subject to constitutional provisions against international arbitration.

Whether the invocation of constitutional and public policy defenses is legitimate remains unclear. In 2005, the Constitutional Chamber of the Supreme Spanish Court commented that Latin American states' increasing use of national constitutions against international arbitration is being applied as a tactic more out of convenience than out of necessity.

B. Economic Crisis and Short Term Need

When the immediacy and effects of economic crisis collide with long term obligations under bilateral investment treaties, necessity provides an explanation for rejection of international arbitration terms. Foreign direct investment, is a long term undertaking, where investment does not provide immediate returns. For Latin American countries, the 1990's were a decade of liberal policies and market friendly approaches, but the turn of the century brought economic and social crisis, as well as political upheaval in many countries.

In general, with increasingly limited resources it would be natural to place the short term concerns of the state, such as unemployment and poverty, above the fulfillment of debt service obligations to private foreign companies or payment of ICSID arbitral awards. Even with the confidence of foreign investors and sovereign bondholders at stake, issues of societal welfare are of more immediate concern and consequence to governments.

Perhaps exemplifying the effects of economic crisis and political disruption, Venezuela's political transformation during the 1990's also brought with it a new conceptualization of foreign investment, especially for the extractive resource sector. Because oil and gas development triggers growth through other parts of the economy, it is particularly representative of national attitudes and politics. However, by responding reflexively to crisis by diversion of billions in PdVSA profits to state welfare programs, President Chavez's actions have also led to falls in crude oil production of more than 700,000 barrels per day in the last ten years. Although the energy sector faces the greatest stress from decisions made during economic crisis, and despite the nationalization of oil companies across these periods, it appears

that Latin American nations nonetheless do not fully reject foreign investors, as these firms continue to develop state owned oil and gas.

This article does not offer an in depth examination of extractive industry claims against Argentina because the numerous recent ICSID claims against the country are the result of a financial crisis in 2001 that affected major contracts with foreign firms across the board rather than a focus on energy firms. Nonetheless, these claims (for many billions of dollars in the aggregate) provide an important example of ICSID rejection due to an economic emergency. Argentina responded to the financial crisis by a currency devaluation, and emergency laws that affected many public utility sector contracts with private companies, including the previously mentioned CMS Gas. In response to these ICSID claim, Argentina argued that its alleged breaches of contract were necessary to address a national emergency.

C. Calculus of Risk and Reward

Rational, rent seeking behavior would dictate an evaluation of risky behavior against the potential for reward. A risk-weighted calculation of the large potential arbitral awards against the host state versus the capital influx seem like standard considerations when drafting investment agreements with foreign companies. Large risks, like hefty awards against states, could even signal premium values in agreements, as a prediction of increased investment flows. Though the possibility of these awards detract from sovereign enthusiasm toward foreign investors, the investors themselves understandably seek protection of their foreign assets. And because investment often flows into the economies of developing countries, one logical view would be that the risk of paying on an arbitral award would be more than compensated for by the value of the investment by foreign firms.

However, nations that are economically dependent on oil exports may calculate risk and reward differently from this “rational maximizer” approach. The fiscal balance of these economies is especially sensitive to fluctuations in oil prices: as prices rise, governments are better able to finance public expenditures, but as prices fall, fiscal shortfall occurs. For example, President Chavez “tore up contracts that he could no longer pay” when oil prices fell, unfortunately setting off even lower levels of public spending as oil revenues from these contracts dimin-

ished. Lower oil prices may trigger an impulsive calculus, devaluing future investment rewards and making a high stakes international arbitration process appear even less appealing. Although creation of oil stabilization funds represents one response to the problem of fiscal shortfall following low oil prices, the reality remains that governments find it far easier to raise expenditures than to cut them. (This approach is not limited to Latin American governments.)

Furthermore, in constructing a calculation of risk and reward, governments expect that many firms will choose to renegotiate their status following nationalization of their assets rather than attempting to defend preexisting rights under contract. This was the case after the effective nationalization of the Orinoco area projects by Venezuela. Similarly, under the Bolivian nationalization of the hydrocarbons sector following the democratic political shift in 2006, aggressive renegotiations of upstream operating contracts, refinery ownership, and stock shares occurred with the aim of transferring equity to the state. While investors that remained threatened international arbitration proceedings under BITs, none of them ended up filing ICSID claims against the government. To explain these investor responses, it is possible that BITs and international arbitration are less relevant to investment decisions because foreign companies are more attracted to economic factors than institutional ones. Thus, when foreign investors continue to view newly assigned equity terms as profitable it follows that the relative risks of arbitration and rejection of arbitration would pale in comparison to the rents still available to both sides. However, should subsequent developments reduce net returns to investors, they are likely to alter their own strategies and bring enough claims into international courts so as to change the risk-reward calculus of Latin American nations.

D. Noncompliance as a Development of the International Law

One final framework for interpreting the recent rejection of international arbitration by Latin American states is viewing rejection as a signal to the international law community that current legal frameworks are inadequate. As such, it is possible that constitutionally based arguments against international arbitration are in fact a result of the insufficiency of these forums to protect certain fundamen-

tal principles. Professor Jacob Cogan, formerly an advisor of the U.S. Department of State, offers a theory of operational noncompliance to develop descriptive and normative justifications for the sometimes illegal behavior that states exhibit under international procedural law. Jacob Katz Cogan, *Non-compliance and the International Rule of Law*, 31 YALE J. INT'L L. 189 (2006). He defines operational noncompliance as “noncompliance that keeps a partially effective system, such as international law, operational by reconciling formal legal prescriptions with changing community policies or by bridging the enforcement gap created by inadequate community mechanisms of control.”

Professor Cogan first identifies the more limited ability of the international law system to self-correct and self-enforce, which creates a gap between “aspiration and authority” and “procedures and policy.” Thus, when states find that they must resort to illegal acts, noncompliance in international relations occurs even to the extent that a state finds that it must withdraw from an organization altogether. Bolivia’s full rejection and Ecuador’s partial rejection of the ICSID provide prime examples of noncompliance by self-removal. President Morales’s criticism of ICSID, along with Bolivia’s frustrations at being treated as subordinate to foreign nations, both in adjudication and for social priorities, points to the very substantive and procedural flaws that normally justify noncompliance – a lack of fairness. Thus, the unilateral acts against foreign investors may be viewed as indicators that ICSID and similar international conventions fail to respect current political and social realities.

Despite terming Latin American attitudes towards international arbitration as operationally noncompliant, it is nonetheless possible that recent nationalizations and renegotiations are simply illegitimate acts within a generally equitable and flexible system. So long as arbitration awards, even those rendered unfairly, may be set aside according to provisions under model arbitration laws already adopted by Latin American countries, the international law would not experience the gaps that Professor Cogan indicates are a basis for noncompliance.

VI. Conclusion

The last decade has seen a strong adverse response to international and ICSID arbitration from Latin

American countries – notably Venezuela, Bolivia, and Ecuador – in nationalizing foreign oil and gas operations and rejecting arbitration agreements. The acts run counter to the commitments that Latin American governments have made under bilateral investment treaties with foreign investors, and to the obligations pledged to arbitral conventions like the ICSID.

While during most of the 20th century hostility towards foreign direct investment manifested itself in the Calvo Doctrine, the adoption of BITs and the ratification of conventions signaled a change to nations seeking to invest industrial capital, especially with regard to hydrocarbons in this oil rich region. Now the tide has turned again, but more likely for reasons unrelated to the violence and occupation that formed the basis for the Calvo Doctrine.

This article has sought to provide modern insights and explanations for the behaviors of Latin American states, by considering the constitutional objections to international arbitration, the turbulent economic and political circumstances surrounding the rejection of foreign intervention, the risk and reward calculus underpinning state decision making, and finally, the normative implications of deeming these acts as operationally noncompliant. With these frameworks in mind, acts of expropriation in response to claims made by foreign firms against them in arbitral courts take on greater significance than mere retaliation, and set the stage for the next decade of foreign investor relations with Latin America.

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ONLINE DISPUTE RESOLUTION

The Platform to Fit the Population

By John Patton*

I. Introduction: Overview of Online Dispute Resolution (ODR)

Americans currently have access to a variety of ways to resolve their disputes outside of traditional litigation. While some alternative dispute resolution (ADR) styles have recently come under increasing criticism, most notably binding arbitration based on contracts of adhesion, many other approaches continue to flourish. Notably, disputes resolved by mediation continue to rise in the present legal environment. The variety of available ADR processes enables disputants to choose a “forum to fit the fuss.” Other factors, however, require a look at ADR from a completely different perspective due to the changes in the way the population, particularly its younger members, lives and communicates. As the percentage of the population that is “plugged in” continues to grow, and interpersonal communication styles continue to evolve, the demand for online solutions become not only an issue of a “forum to fit the fuss”, but also a matter of a platform to fit the population.

A. History of ODR

ODR has its roots, understandably, in internet disputes. The Internet Corporation for Assigned Names and Numbers (ICANN) was granted the authority in 1998 to assign domain names to various users. As websites multiplied and disputes over names became common, the Uniform Dispute Resolution Policy (UDRP) was established by ICANN to provide a system for resolving domain name disputes. The policy instituted a modified arbitration process with the result that nonbinding decisions are implemented by changing the domain registry.

To support this policy, ICANN appointed several vendors to offer services pursuant to the UDRP. One such vendor, eResolution, designed and built a platform to provide services in this particular area, specifically targeting domain name disputes using a

fully online system. Other organizations, such as the World Intellectual Property Organization (WIPO), also began providing dispute resolution services for domain name disputes, and still do so today. Ultimately, eResolution did not command enough market-share to continue to mediate ICANN disputes, but eResolution did provide an important first step in demonstrating the possibility of online dispute resolution.

Another ODR pioneer was born in the e-commerce arena. After eBay was created in 1995, it quickly recognized the need to enable its users to resolve their expeditiously across wide distance barriers and at a minimal cost. In 1999, eBay partnered with the Center for Information Technology and Dispute Resolution at the University of Massachusetts to evaluate the use of an online dispute resolution system. This project led to the creation and launch of SquareTrade in 1999 to support eBay and other e-commerce customers.

SquareTrade became widely used by the eBay commerce market eventually handling millions of disputes in the e-commerce arena. Subsequently, SquareTrade’s dispute resolution services declined drastically when the company left the eBay market due to contractual and procedural disagreements – eBay required disputants to first pass through eBay’s consumer resolution department.

SquareTrade has since moved on to other ventures and in 2008 discontinued its dispute resolution services. SquareTrade continues to be remembered as a pioneer in the field. Other online dispute sites also have both come and gone. These early market-specific online dispute systems were successful enough to spur similar systems, and such systems continue to thrive today.

B. Expansion of ODR Outside of Individual Markets

Note that the initial successes of ODR forums stemmed from the relatively closed markets from which they were born. Naturally, people involved in the waxing internet business and commerce arena would be comfortable enough with the online medium to engage in ADR in the same medium. However, in those early years, the online dispute resolution solutions were tailored to particular disputes and markets, and remained simple outgrowths of those particular markets. As the online market expanded its reach into practically every facet of today's society, so too has society become increasingly comfortable with, and perhaps even dependant on, technology for everything from commerce to communication. Now that relationship is affecting society's view toward dispute resolution as well. Due to the increasing technological comfort level of a much larger portion of the population, and mirroring our current population's preferred communication style, today's online dispute resolution forums operate outside specific markets as effective, independent organizations in their own right.

II. Population and Technology

It goes without saying that today's population is "plugged in" as never before. Payphones are a thing of the past because 83% of the population owns their own phone – 75% of teens and 93% of adults ages 18-29 have cell phones. Rather than using this influx of cell phones predominantly for voice communications, however, recent studies show that *texting* is commonly the preferred mode of communicating via cell phones for young adults aged 18-29. Twitter and texting are fast becoming the standard mode of communication for a large portion of society, and this trend continues to grow. This reality increasingly tends to offset the dissatisfaction voiced by critics that ODR does not allow for an effective level of communication, or that people does not have widespread access to the necessary technology. When faced with the facts illustrating our society's use and dependence on online systems, as well as the evolution of communications styles among all but older Americans – who are (on average) less likely to adopt new technologies – it is clear that ODR reflects the natural progression of modern forms of communication technology.

A. Increased Internet Usage and its Effects

A common criticism of ODR is the claim that many people do not have access to the necessary technology to conduct ODR, or that they are uncomfortable using computers to conduct a dispute resolution process. This challenge, however, is contradicted by the rising level of internet usage in recent years. Also, internet usage has spread to older and less educated segments of the population – often with aid from children. Demographically, the early online presence was predominantly white males, but now there is no gender gap and black and Hispanic presence on the internet has increased dramatically. Access to computers is also commonly cited as a concern, but computer use is on the rise even in the older generation, and computers have become ever more user-friendly. Prices have dropped dramatically, and it is common in most cities and even rural communities for libraries to have computers for public use.

Internet usage statistics for the United States illustrate the pattern of change: in 2001 – 54%; in 2005 – 68%; in 2009 – 74%. No longer is internet access a matter of keeping up with the Jones; instead, internet access is considered a basic need. Partly due to the wide exposure to computer use cultivated in today's children, statistics regarding the younger generation indicate a deep penetration in internet and instant messaging. In 2005, it was estimated that 77% of children 6 years old and younger have used a computer. Computers are found in almost every school in the country, including primary schools. Virtually all college and law school applications are submitted electronically. The impacts of these changes in our society deserve a close examination.

The standard dispute resolution methodologies – arbitration, litigation, mediation, plus hybrids and variants of these – are focused on face-to-face meetings. Both mediators and arbitrators need to understand the evolved way our society communicates so that these communications styles can be integrated into ADR processes. [The same can be said for courts, but that is a topic for another day.] Thus, rather than ODR being lauded as the "forum to fit the fuss," perhaps it is more appropriate to proclaim ODR the platform to fit the population. One observer of interpersonal communications research states that today's youngest generation is gravitating towards communicating in a "clipped, rapid manner

that does not provide much opportunity for subtlety or nuance.” David Larson, *Technology Mediated Dispute Resolution (TMDR): A New Paradigm for ADR*, 21 Ohio St. J. Disp. Resol. 629, 633 (2006). Other researchers have found support for this view in research indicating that “highly stimulating, quickly changing technologies can affect a child’s ability to concentrate.” *Id.* at 681. If this hypothesis is accurate and the younger generation is in fact becoming less suited for long, drawn out sessions requiring intense concentration, then it follows that their shorter attention spans will require shorter mediation or arbitration settings – and likely more than one session. ODR thus provides an excellent forum for the aging “younger” generation. Because of the ability for ODR sessions to be asynchronous, each party is able to focus on their comments or response and then go on to something else rather than sitting in marathon mediation or arbitration settings. With this in mind, I turn to other ways that the evolution of interpersonal communications will impact the use of ODR.

B. Effectiveness of Computer Mediated Communication (CMC)

Research indicates that between 65% and 93% of face-to-face (FTF) communication is through non-verbal means. Barbara G. Madonik, *I Hear What You Say, But What Are You Telling Me? Strategic Use of Nonverbal Communication in Mediation 3* (Josey-Bass 2001). Non-verbal communication includes body posture, expression, and gestures but also such auditory cues as pitch, volume, and intonation. Critics of CMC and ODR are quick to point out that with so many non-verbal cues lost when a person resorts to CMC, ODR is ill-suited to mediation. However, research suggests that that is not the case and, in fact, in many situations, CMC may be a *more effective* medium for mediation than FTF. For example, researchers have found that when people engage in CMC, they tend towards higher levels of self-disclosure than when in FTF communications. Researchers liken this effect to the “strangers on a train” phenomenon. This well-known, and often experienced, effect has been noticed often as travelers on a train or plane find themselves sharing personal, intimate information with others because they still retain a feeling of anonymity despite speaking face-to-face with each other.

In addition to the psychological aspects of personal disclosure, there are practical reasons why CMC communications are as effective as FTF communications. CMC has developed additional cues to offset the lack of traditional non-verbal cues. Common users in the email and texting forum have developed their own text-based signals for emotional and non-verbal cues. The name for these cues is “emoticons.” For example, most email users know that typing in all capital letters is the equivalent of yelling. Many of the cues are context driven, and some are even specific to certain internet cultures. Many, however, are common throughout the internet such as LOL (laugh out loud); :) – happy face, smiling, take the comment as friendly; and :(– sad or frowning face, expressing unhappiness. The list goes on and on, demonstrating just a few instances of the ways that people insert non-verbal, FTF cues into their online communications. For examples, see Wikipedia, entry for “Emoticon.” The point is that the natural evolution of online communication offsets many of the “non-verbal” concerns raised by early critics of CMC.

C. Effects of CMC on Social Pressure, Disclosure, and Honesty

Another key finding of interpersonal communications research deals with the effects of social presence. Social presence is the pressure manifested by a person’s contact with others. This pressure can be likened to peer-pressure, but also involves behavioral patterns induced by feelings of self-consciousness, subconscious feelings of judgment, or a desire for social approval that appear to be more active in social situations. As the level of “social presence” in a given situation increases, people (on average) become less willing to answer personal questions and/or face a greater desire to put themselves in a positive light. Research indicates that online communications show a significant decrease in socially desirable responses (as opposed to more accurate responses), and link this effect to the decreased social presence felt by using such forums of communication that reduce face-to-face style interactions. In one such study, the research clearly demonstrated the differences between email/text, telephone, and face-to-face communications. Of the three modes of communications, email or text-only communications resulted in fewer lies or exaggerations. The researchers went on to demonstrate that

when video capabilities are added to the computer communications, the levels of disclosure and honesty then regressed back to the same levels as found in FTF communications.

One explanation for the greater level of disclosure found in CMC discussions than in FTF communications is called the Uncertainty Reduction Principle. When people communicate without the usual visual cues, they unconsciously compensate in other ways to reduce the uncertainty in their communications. Thus, people naturally compensate by reaching out through other information sources, much like relying more on sound or touch when blindfolded, to compensate for the lack of information through non-verbal cues. For example, questions often become more probing and personal in CMC than in FTF, and research shows a dramatic increase in both the number of questions asked and unsolicited information provided in an apparent attempt to offset the lack of non-verbal cues. Thus, concerns over a lack of visual cues seem to be misplaced in many circumstances, and should be given less weight when considering the proper communication medium for dispute resolution.

It remains to be seen if the research regarding honesty and self-disclosure is fully applicable in positional situations like serious disputes, but ultimately, what these theories suggest is that rather than being a poor substitute for FTF communication as some critics argue, email and texting potentially provide invaluable advantages to ADR processes in an online environments. Artemio Ramirez, Jr. & Kathy Broneck, *"IM me": Instant Messaging as Relational Maintenance and Everyday Communication*, 26 J. Social & Personal Relationships 291 (2009). Thus, regardless of the reasons for greater disclosure and increased honesty in interpersonal communications, the research demonstrates clear differences in various communication mediums. Mediators and arbitrators need to integrate this understanding into their dispute resolution processes and selection of forums for ADR. As the texting population continues to grow, and text communication continues to rise, mediators need to understand its effects on our ability to communicate and the resulting approaches to the negotiation and mediation of disputes.

In light of the dramatic changes in interpersonal communications in today's population, mediators and arbitrators really need to take another look at

ADR methodology. Whether considering the attention spans of today's younger generation, or new trends in the psychology of online communications, mediators need to be aware of the changing face of today's and tomorrow's disputants. The forums of yesterday might no longer be the best choice for an increasing percentage of the population. As technology expands and improves to provide additional dispute resolution platforms that are tailored to the skill set and habits of the population, mediators and arbitrators should take advantage of new ODR tools to focus on a dispute resolution platform to fit the population.

III. Benefits of ODR

As access to ODR systems has increased, several benefits have been clearly demonstrated. The most mentioned benefit is the relatively lesser cost associated with ODR, compared to more traditional ADR processes or litigation. Depending on the ODR process being used, mediators and attorneys can in many cases be eliminated, in whole or in part. Essential for modest dollar disputes, travel becomes unnecessary. "Down time" inherent in the mediation process (and compounded in multiparty mediation or arbitration) is virtually non-existent due to the asynchronous nature of emailed discussions. Another benefit to ODR is the protection from deficiencies in the face-to-face (FTF) model typically used in ADR. FTF interactions are prone to psychological tricks involving proxemics, verbal or physical intimidation, personality conflicts, and ego. ODR can remove much of this strategic behavior from the dispute resolution process, enabling the parties to focus on the issue at hand rather than negotiation gamesmanship. Third, in many situations, marathon mediation sessions are just not the best approach to resolving a dispute – especially for complex issues. Many forms of ODR give parties the ability to make carefully crafted comments back and forth as many times as needed to explain and discuss the issues in the dispute.

A. Lower Costs Associated with ODR

Whether weeding out unnecessary facilities cost, travel, or simply avoiding the intricacies of scheduling associated with FTF dispute resolution proceedings, ODR provides an economical way to resolve disputes. "The same search for convenient, cost-

effective, efficient ways of resolving disputes that supported the growth of ADR also supported the development of ODR.” Andrea M. Braeutigam, *Fusses That Fit Online: Online Mediation in Non-Commercial Contexts*, 5 *Appalachian J. L.* 275, 277 (2006). The potential for ODR cost savings is readily apparent. Actual examples are readily found, and cost effectiveness will increase as use of ODR increases. New York City claims savings of over \$70 million since the adoption of CyberSettle for personal injury claims. *CyberSettle Saves the City of New York* *Time and Money*, NYC Press Office, PR09-08-207 (August 18, 2009). Notably, the city dropped from 77,000 open cases to 10,000. CyberSettle CEO Robert Ballou attributes the success of CyberSettle to the removal of party posturing and emotion from the negotiation. Douglas S. Malan, *A Numbers Game: Online Settlement Negotiations Drive Greenwich Business*, Conn. L. Trib. (January 25, 2010). In a similar vein, the AAA provides online dispute resolution using CyberSettle technology for as little as \$50 in simple 2-party disputes involving less than \$10,000. Third party evaluations are also available - Virtual CourtHouse provides a neutral person to decide cases or recommend judgments for as little as \$400 (\$200 per party).

When paying for a mediator or arbitrator, much of price goes to the transaction costs inherent in the process. By largely or completely removing the physical forum, ODR does away with the standard facility costs: office space, furniture, equipment, and personnel. While certainly beneficial in an FTF environment, ODR makes such items superfluous. Tables, chairs and other furnishings are replaced by the comfort of one’s own home, or, in some cases, the offices of one’s attorney (for which parties already pay for whether or not they use them). Paper, flip charts, etc. can all be mimicked online in either a chat room or by using WebEx or similar software. Note, too, that where FTF communication is beneficial to resolving disputes, video teleconference platforms can be utilized to increase the social interaction among the participants. With regard to travel expenses, consider cases such as *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), where the claimants lived in Washington state and the choice of forum clause specified Florida. Rather than facing high travel costs, travel might be as simple as traveling to your attorney’s office or perhaps could even be eliminated completely.

Consider also the potential time savings when faced with the typical caucus-style mediation. Aside from a brief introduction, about half of the time spent at the mediation is potentially wasted as the mediator bounces from party to party. The caucus-style mediation becomes even less efficient when more than two parties are involved. Granted, some of that wasted time can be mitigated by directing parties to consider particular points. By comparison, use of an online mediation forum transcends the typical time concerns. As each participant submits comments, the other participant is notified electronically of the comment and then they can then formulate a response, thus maintaining the privacy of the caucus approach without incurring the wasted time that typically goes with it. An additional cost-saving mechanism is that some ODR forums do not begin by immediately bringing in a mediator, and instead provide a forum for party-to-party negotiation. Then, if a solution is not reached, the ODR system can phase in a mediator or other third party neutral to facilitate a resolution. This approach limits the additional fees of a mediator to those cases that truly require such involvement.

Participant convenience is another significant feature of ODR. Coordinating the schedules of the persons associated with a dispute can be a nightmare. Asynchronous communication makes it possible to forego most scheduling problems. This feature of ODR is especially beneficial in multi-party disputes. Each party can respond as it is ready to proceed rather than enduring the seemingly endless (and costly) round-robin of large caucused mediations.

B. Effects of Personality in ODR

The Myers-Briggs assessment scale has been used for over 50 years to help people communicate and resolve their disputes. The assessment weighs a person using four scales: Introversion – Extroversion, Sensing-Intuition, Thinking-Feeling, and Judging-Perceiving. By applying such analyses to a mediation environment, trends begin to form as to the interplay between differing types of personalities. Dale Eilerman, *Use of the Myers-Briggs Conflict Pairs in Assessing Conflict*, <mediate.com/articles> (May 2006).

Perhaps the easiest example of a personality-type advantage in FTF mediation is between a strong introvert and a strong extrovert. The Myers-Briggs system characterizes an extrovert as someone who

externalizes issues and quickly moves on to other topics. The extrovert has no problem stating his concerns and what he wants. She may be very eloquent and forceful. Conversely, the introvert is characterized by his desire to internalize the information and evaluate all aspects of the situation before answering. The introvert is far less likely to speak up and express himself. He might not be as eloquent. He may not be comfortable in an environment with more than a few people. This reticence, however, fades when you separate the parties and make use of an ODR environment. Impatient or fast-talking extroverts don't have the opportunity to interrupt a slower, thoughtful introvert. Introverts get the chance to craft their responses without being the center of attention. By removing the people, i.e. the social pressure, we are thus more likely to get input and feedback from both sides.

Another common example involves the "Planner" and the "Decision-Maker". The Decision-Maker is at home in the FTF environment and ready to make a decision. The Planner needs to take some time to think things through. By switching to an ODR environment, the Planner has the chance to consider the implications of each decision as he crafts his reply. The Decision-Maker is able to make a quick response, as is his wont, or in the alternative can take more time to dwell on the decision.

When put in the perspective of ODR, parties would appear to be more likely to be open and forthright in their communications: 1) because the lack of physical presence lowers the "social pressure" of the situation; 2) because tendencies like the Uncertainty Reduction Principle moves people toward greater disclosure; and 3) differences in introversion or extroversion and decision-making speed are obviated by the lack of physical presence and the staggered, timed approach to the discussions.

C. Games People Play: Strategic Behavior in Negotiation

Another reason to avoid the face-to-face style of mediation is to avoid the machinations of clever negotiators. Research tells us that perceptions of power are tied up in social status, clothes, education, the presence of an attorney, language (native English-speaker), and the ability to spend money on legal proceedings. The effects of such social status impacts people in various ways. For an extended discussion of this topic, see, e. g. Robert Cialdini

Influence: The Psychology of Persuasion (1998), and Conrad Levinson, Mark S.A., Smith & Orvel R. Wilson, *Guerilla Negotiating* (1999). These and similar works are written for the express purpose of identifying every psychological trick "in the book" to either negate the other party's advantage or else gain an advantage over one's opponent. If one regards such strategic behavior as a problem, ODR often provides a useful response.

1. Environmental Manipulations

One of the key areas of strategic negotiating behavior involves attempts to achieve perceived control over the negotiating environment. *Guerrilla Negotiating* identifies such tactics as: closing the door; rearranging the furniture; moving one's chair; moving the desk; moving items on the desk; spreading out and taking up as much room as possible; and "accidentally" touching someone. The key principle behind these suggested tactics is that every time someone performs one of these acts, that person is demonstrating his "influence" or power over the environment – even if the environment is on the home turf of the other party. Such tactics seek to increase the social presence of the situation, thereby turning the negotiation from a focus on resolving the dispute on the merits into a contest for psychological dominance.

Other tactics can include such acts as holding the door, and passing out the mediator's drinks. These and other small almost unnoticeable favors are one of the tricks in the bags of skilled negotiators. Granted, these things are often performed for no other reason than politeness, but in the hands of a skilled manipulator the physical environment of the ADR becomes simply another tool to score an often unconscious advantage against an opposing party. Other guerilla negotiating tactics include such items as: encouraging high-sugar foods and drinks to cause a sugar slump and the resultant loss in mental acuity; making one's chair higher than your opponent; dressing better than the other party; having more people on your side of the table than the other party; having an attractive person on your side; talking louder; giving a firmer handshake; staring a person in the eye; and wearing certain colored clothes. All these are simple, some would say cheap, tactics for gaining a slight psychological advantage or to increase your social power. However, other tactics are also mentioned which impact the ability to think

clearly and make careful decisions. For example: make the room too hot or too cold; encourage caffeinated beverages but put off bathroom breaks; and provide a large lunch to induce drowsiness, but don't eat very much yourself. By imposing a slight physical discomfort that increases over time a party can gradually gain an advantage over the discomfited party – that of a sense of urgency and increased willingness to compromise. Meanwhile, the comfortable party does not have the additional effect of physical discomfort, and thereby erodes the negotiating willpower of the other party. Working in an ODR environment, however, obviates the need to defend against such tactics.

My favorite example of environmental tactics comes from a historical book about the use of submarines by the US Navy – *Blind Man's Bluff* by Sherry Sonntag. As she relates the story Admiral Hyman Rickenbacker was a colorful figure in the Navy who preferred to keep meetings short. So, he arranged for all the visitor chairs in his room to have one inch cut off of their front legs. Such an arrangement had a negligible effect at the beginning of a meeting. As time progressed, however, the slightly forward stance gradually took a toll on his visitors. The end result was that few meetings extended beyond one hour.

2. Natural Tendencies

Other attempts are also made to garner influence in certain situations. As an example of having our own natural tendencies used against us, Robert Cialdini explains the “rule for reciprocity.” This rule identifies a deeply ingrained, innate tendency most people possess to reciprocate favors. The idea is that when a person performs a favor for another person, the other person incurs a feeling of indebtedness and demonstrable desire to reciprocate the favor. A real world example of this tendency is related in Dr. Cialdini's book. The Disabled American Veterans organization reported that the response rate to its regular mailings was 18 percent. However, when an unsolicited gift such as gummed, individualized address labels was included, the response rate increased to 35 percent.

An additional example of the tendency to reciprocate was played out in a study conducted by Professor Dennis Regan of Cornell University. A test subject was told that he was part of an experiment on “art appreciation.” His partner, “Joe,” however,

executed the real test. In half of the test cases, Joe would ask to be excused to go buy a drink. Subsequently, he would return with two sodas, giving one of them to the subject unsolicited. In the other case, Joe did not get a soda for the other person. Later, during a break, Joe would mention to the test subject that he was selling raffle tickets and then asked the subject to buy tickets. The study revealed that subjects to whom Joe had given a soda bought twice as many lottery tickets. Moving a step further, the study also ranked whether or not the subject liked Joe, and demonstrates that likes or dislikes make little difference with regard to reciprocity. As Dr. Cialdini explains this tendency works regardless of a disparity of worth between the favors – the price of the lottery tickets was several times greater than the cost of the soda. With regard to the rule of reciprocity in ADR settings, some negotiators are not above creating less than ideal environmental conditions. By forcing a party to make requests and “negotiate” needless minutia, some negotiators seek out ways to make “concessions” thereby garnering the positive effects of the rule of reciprocity.

Other tendencies impact our ability to negotiate as well. Dr. Cialdini notes that physically attractive people are automatically assigned other traits (whether earned or not) such as kindness, honesty, and intelligence. Good-looking people are also significantly more likely to receive lesser sentences in criminal proceedings. It is standard practice among attorneys for criminal defendant to ensure that their clients are well dressed when appearing in court. Dressing similarly to another person seems to effect compliance with a request, or offer. Another ingrained tendency in people is a sense of duty to those in authority. As Dr. Cialdini explains, this tendency manifests itself from a variety of cues such as title (doctor, judge, attorney), clothes (suit, lab coat), and other possessions (cars, jewelry). A telling example was revealed by a study related by Dr. Cialdini in which a middle-aged man walked across the street against the light. Depending on his attire, up to three times as many people were likely to follow his lead. While perhaps the inclination may be slight and may not work as well with opposing parties to a dispute, dress and appearance still create definite impressions and can lead to a feeling of power imbalance or social discomfort.

We know that mediators go to great lengths to promote a level playing field, yet some tactics simply

cannot be easily countered and some naturally occurring situations cannot be corrected. ODR sallies into this background battle over our subconscious by leveling the playing field. When parties are communicating via text, it is impossible to practice such gamesmanship. In addition, time pressures are eased because of the asynchronous communication inherent in text-based communications. By enabling parties to side-step such pressures, ODR puts unsophisticated negotiators in an equal bargaining position and ensures that decisions are reached through agreement about the issues.

D. Limitations of ODR

ODR is not the best forum for every dispute. In particular, situations in which a relationship needs to be built or saved often require face-to-face communications to aid in developing and healing the relationship. However, even these situations might benefit from ODR in certain circumstances. The first steps in rebuilding such a relationship might best be taken in a CMC environment if the parties have a history of poor communications. That way, learned habits of bad interpersonal techniques are set aside while the parties are “brought back to the table” and good communications skills are re-introduced to the discussion. In these situations, ODR can play an important first step in bringing the parties together. Then during the next stage, the parties can meet face-to-face, where the intimacy of eye contact, tone, and perhaps even touch can be employed as strong tools to rehabilitate the relationship.

In some circumstances, people may not want a more efficient forum. Areas in which there is uncertain legal precedent, where such precedent needs to be challenged, or where it is in one party’s interest to either delay resolution or to increase the cost of litigation, ODR may not be a favored approach for a party. That being said, those who pursue the resolution of disputes should carefully consider the additional benefits of using an online forum.

IV. Current ODR Providers

The ADR tree has many branches: arbitration (binding and non-binding), mediation, neutral evaluation, moderated settlement conference, summary jury trial, and mini-trial are all types of alternative dispute resolutions found in the Texas ADR Act. These different approaches to dispute resolu-

tion function with varying degrees of formality, costs, and procedural rules. Today’s online markets have spawned numerous ODR providers to cater to these various approaches to dispute resolution. Some providers are continually touted as success stories, like CyberSettle, while others have faded away, like SquareTrade. Other providers have considerably expanded on the early ventures of online dispute resolution and provide a whole spectrum of ADR services mostly or completely online. It seems uncertain what criteria make a successful ODR venture, but there are numerous providers from which to choose.

A. “Basic” ODR Providers

Many ODR providers are limited to smaller two-party transactions. However, with the development of software packages enabling further tailoring of ODR processes, many vendors are providing support for larger multi-party litigation. [The information about the providers that follows is subject to change, and is based in significant part on materials created by the providers themselves – so, *caveat emptor*.]

1. eBay. As noted earlier, eBay originally used SquareTrade as its preferred dispute resolution provider. When SquareTrade moved on, eBay’s customer resolution department was ramped up to fill the gap. eBay’s dispute resolution approach is a form of mediated communication process. The initial complaint process is handled online. Then, a third party steps in and assists by making contact with the seller. The format is asynchronous, but inserting a third party into the dispute resolution process lessens the benefit of carefully crafting a response. From eBay’s web site, it is unclear how the negotiations proceed, or the consequences of failing to resolve the dispute. The process is free to the users.

2. CyberSettle <<http://www.cybersettle.com/pub>> CyberSettle worked its way into the ODR hall of fame by patenting a simple negotiation technique implemented by two trial attorneys attempting to settle a dispute in 1995. The two attorneys reached a point where neither one wanted to yield their position despite having a good idea for what the case would settle. The attorneys reached an agreement where each party would write down a figure and

give it to the court clerk. The understanding was that if the offers were within a few thousand dollars, the case would settle, but if the offers were not close, then the clerk would destroy the papers and never reveal the figures. The attorneys figures were within a few thousand dollars, a settlement was reached, and a few years later CyberSettle was up and running using the same process to help disputants achieve settlements.

While CyberSettle is probably ODR's best known poster child, their service focuses mainly on providing an online settlement bidding process. By providing each party a way to make secret bids, neither party ends up showing its hand during the final settlement process. If the bids overlap, or are within \$1,000 of each other, then a settlement is announced and a mediator phones the parties to finalize the agreement. If no overlap occurs, then the parties are free to either try again (for another fee), to request a telephone facilitator, or to continue their dispute in different forums. Successful applications of CyberSettle are prevalent throughout the United States with some governmental entities also making use of the technology. Another success story already mentioned is New York City's use of the CyberSettle process to manage their personal injury litigation.

3. AAA <adr.org/eroom/faces/welcome_and_steps.jspx>

The AAA offers a small scale ODR program. AAA offers this service for business-to-business and consumer disputes involving relatively minor two-party disagreements in which less than \$10,000 is in dispute. For a flat rate of \$50, parties are provided an online forum with a trained mediator to facilitate their discussions via chat-room technology. Parties also can communicate privately with the mediator through a chat-room environment. AAA advertises that most disputes are resolved within thirty days.

4. Better Business Bureau (BBB)

The BBB's dispute resolution process permits an online complaint mechanism, followed by a "conciliation" proceseding. In this process, the BBB assists parties in resolving their dispute – mainly through written and/or telephone communications.

5. Butler Mediation

<butlermediation.com/SiteInfoPrivacy>

Moving upward in complexity from CyberSettle, Butler Mediation focuses on large, multi-party litigation settlements. In this forum, only attorneys registered as representing a party have access to the system. Once underway, each defendant negotiates separately with each plaintiff. Communications between different parties are private, and no defendant or claimant has access to the private exchanges between other defendants or claimants. The primary benefit of this forum is to enable each plaintiff to provide their facts and negotiate their settlements without waiting for the mediator to go round-robin among all the parties. An additional Butler Mediation approach provides a means for parties to design the negotiating interface. By enabling certain fields for exchanging information, the parties are able to better able to assess the settlement value of each particular claim.

6. Mediation Arbitration Resolution Services (MARS)

<resolvemydispute.com>

Mediation Arbitration Resolution Services (MARS) is another ODR provider that appears to be geared towards smaller consumer transactions, but also offers services for online arbitration and mediation using video teleconferencing technologies. MARS's consumer dispute resolution services begin by enabling the filing of an online complaint. Filing a complaint against a merchant costs \$10, at which point the consumer provides the background of the dispute. The system notifies the merchant of the complaint and allows the merchant 72 hours to respond. Non-member merchants are encouraged to join in the process by such tactics as reporting the merchant to the Federal Trade Commission and placing the business on the MARS Wall of Shame. After the merchant's initial response, two more rounds of communications take place. If the parties reach an agreement the matter is settled. If the parties do not agree, then a mediator is assigned to the case. Two more rounds of communications then take place after which, if the parties still do not agree, the third party netural (no longer a mediator) has the authority to make a binding decision.

MARS also provides online arbitration services through video teleconferencing. This process is ini-

tiated by telephone or electronically. Once the arbitration is initiated, the parties can upload documents to an online repository and can review submissions to the arbitrator by the other party. The dispute resolution professional then caucuses with each party via video and works towards resolution. If that process does not produce a settlement, the third party makes a binding decision.

7. Juripax <juripax.com>

Juripax is based overseas with offices in the United States, The Netherlands, and Germany. The service supports multiparty disputes and also includes multi-lingual services. Filing a basic dispute is free. Each party enters its basic information, and whether particular information should be made available to other parties. Additional, more complex filings (divorce, workplace disputes, etc) are also supported, which include selecting other non-monetary desires such as maintaining and evaluating relationships. Once a dispute is filed, the system enables asynchronous communications with attachments via the website to parties or the mediator. The messaging system also provides emoticons for non-verbal cues including Pleased, Astonished/Surprised, Getting Impatient, Reflecting, and Reconsidering. Juripax's service includes an online collaborative agreement drafting tool for use in the event than an agreement is reached.

B. Additional ODR Providers

The aforementioned ODR providers each have good approaches to mediating many kinds of disputes, but ADR legislation, such as the Texas ADR Act, envisions several other valuable ways to resolve disputes. Aside from mediation, other suggested forms of dispute resolution outside of traditional litigation include moderated settlement conferences, mini trials, summary jury trials, neutral party evaluations, and arbitration — both binding and non-binding. There are additional ODR providers who offer a wider range of ADR forums which provide support for such dispute resolution formats.

1. Virtual Courthouse <virtualcourthouse.com>

Virtual Courthouse provides, along with mediation and arbitration services, online neutral evaluations. Similar to other vendors, the process begins with

one party initiating the file and making its selections for the neutral party. Virtual Courthouse's list of neutral parties is in the hundreds, and includes several judges. The opposing party is then invited to participate, and to select a neutral party (or several options). Once a neutral party is agreed upon, that persons examines the dispute, identifies the issues, and confirms the type of resolution desired. The claimant files his arguments for the neutral first. Then, the defendant uploads his case arguments. Next the neutral reviews both submissions and renders a decision. Fees for a simple online decision are listed as \$300. For online case evaluations taking less than one hour, the fee is also \$300. More complex evaluations are supported at the hourly rate of the neutral party. Virtual Courthouse also provides mediation and arbitration services.

2. Electronic Courthouse <electroniccourthouse.com>

The Electronic Courthouse site provides online mediation, arbitration, and neutral party case evaluation. Their site is equipped to handle complex, multiparty dispute resolutions as well. Electronic Courthouse offers a wider range of ancillary services than most of the other providers. These include translation, providing answers to legal questions, mediation memoranda, and other administrative actions like file scanning or providing a download of the documents used in the process. Access to the site and basic services costs \$200, with additional fees for selected administrative services as well as mediation-arbitrator-neutral party fees.

3. iCourthouse <i-courthouse.com>

iCourthouse offers a free online service enabling disputants to air their grievances in a web-based forum. This site initially appears to be more of a populist forum (anyone can log in to access the case or become a juror for as many cases as they want); however the site does include sample language to insert into a contract that would make the process required or binding. The most important aspect of iCourthouse is that it demonstrates the capabilities of an ODR environment and the desire (even if it seems to be for entertainment value) for an online trial forum. Certain limitations are inherent in this environment. Because the cases are open to the

public, names and identifying information are not allowed to be posted. However, each party has the opportunity to provide opening arguments, file evidence, and is encouraged to cite legal authorities in their arguments. In a significant departure from US court procedure, jurors are allowed and encouraged to ask substantive questions and to obtain additional information outside the bounds of what was presented by the parties.

V. Conclusion

The continual development of improved – and ever more readily available – information technology, is dramatically changing the way people live – even if these can only be seen (and understood) through a glass, darkly. Likewise the communications styles, availability of communications platforms, and even the types of disputes that arise between parties will require ongoing evaluation to ensure that appropriate systems are brought to bear to produce effective (and inexpensive) dispute resolution. It seems clear that today’s population will benefit substantially from online versions of ADR processes. Such systems match the new technology, the communication style preferences of a growing portion of our population, and provide cost advantages over face-to-face ADR that ADR enjoys over litigation. With the re-

cent rise of software platforms built to capitalize on the growing need for ODR systems, ODR is poised to step into its role as the platform to fit the population for dispute resolution.

In closing, it should be noted that ODR and the supporting technology reflect a process of continuous change and improvement. This article has presented an overview of major recent ODR developments, but it will appear dated in short order. The message for current successful dispute resolution professionals is that they must adapt to this brave new world of telecommunications, on penalty of being regarded as out-of-touch and less than fully competent at their trade.

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BBB AUTOLINE PROGRAM: Warranty and Similar Disputes

By Wesley Hamilton*

A. Program Overview

AUTOLINE is a discrete Better Business Bureau (BBB) program that facilitates the resolution of warranty and lemon law disputes – but *not* tort claims – between participating automobile manufacturers and their customers. The service is funded by annual subscription fees paid by participating manufacturers, and is available to consumers at no charge. See generally, James E Baumhart, *Better Business Bureau: Administrator of Ethics through Self Regulatory Programs*, 3 Loy. Consumer L. Rep. 134 (1991); Council of Better Business Bureaus, *BBB AUTOLINE Hearing Site Bureau Staff Training Manual* (2002); Donna Steslow, *My Car is a Lemon! Use the Better Business Bureau's Auto Line Program as a Pedagogical Model of ADR*, 27 J. Legal Stud. Educ. 105 (2010).

AUTOLINE got its start in 1978, and gained significant momentum in 1983, when the Federal Trade Commission (FTC) and General Motors Corporation (GM) entered a consent order settling charges against GM in exchange for an agreement to maintain an independent dispute resolution facility for consumer complaints. The FTC had alleged that GM deceptively failed to notify consumers of exceptionally high failure rates in certain automobile components. Today, most of the major automobile manufacturers, including General Motors, Ford, Nissan and Honda, are nationwide participants with respect to warranty and other issues defined in the manufacturer specific program summary. Some manufacturers (e.g., BMW and Mercedes) participate only in certain states. Important manufacturers that do not participate at all include Toyota and Chrysler.

In some states (e.g., Florida), consumers must pursue lemon law complaints through BBB AUTOLINE prior to filing with the state-run lemon law program or seeking relief in court. In other states (e.g., Vermont) the consumer has a choice of either

BBB AUTOLINE or a state-run non-binding arbitration program prior to pursuing relief in court.

Similarly to the BBB's other dispute resolution programs, AUTOLINE features a tiered system whereby unnecessary escalation is avoided yet ultimate resolution is assured through a capstone arbitration mechanism. Incoming claims are passed through conciliation and mediation stages in an effort to achieve settlement prior to conditionally binding arbitration. The most notable feature of the AUTOLINE arbitration process may be that the arbitrator's decision is *not* binding upon the consumer but, if accepted by the consumer, is binding upon the manufacturer. Thus the consumer has the option of either enforcing the arbitral award against the manufacturer or abandoning the arbitral award in favor of pursuing other remedies available through the courts or state lemon law procedures.

This conditionally binding feature and several other aspects of the AUTOLINE program – notably the 40 day filing to resolution timeline, annual support from automakers, and tape recording of hearings – are required to maintain compliance with FTC Rule 703. See, 16 C.F.R. § 703. Rule 703 was promulgated under the authority of the Magnuson-Moss Warranty Act of 1975, and is applicable in situations where consumers are required to use the dispute resolution program prior to pursuing remedies in court. The BBB maintains compliance with FTC Rule 703 because some automaker warranties expressly require participation in AUTOLINE dispute resolution prior to legal action. In some states (e.g. Florida), AUTOLINE is the dispute resolution mechanism through which lemon law claims must pass prior to court action. Given the costs associated with pursuing alternative remedies, most consumers do not go beyond the AUTOLINE process – and that holds true even when the award largely favors the manufacturer.

In 1984, the year after the consent agreement between the FTC and General Motors, the AUTO-

LINE program handled a record 244,300 cases. Even as recently as 1990, the program handled 92,000 cases. Between 2004 and 2009, however, the caseload has averaged approximately 30,000 per year. The Council of BBBs states that the volume decrease since the early years of the program is attributable to several factors. First, the FTC consent agreement with GM made a wider range of vehicles eligible – there were no mileage or age limits – compared to today, when eligibility is limited to late models covered by warranty and lemon laws. Second, automakers have improved product quality thereby contributing to a downward trend in complaint volumes. Third, the BBB points to improved attentiveness and complaint handling by automakers meaning that many disputes are now resolved short of the point where the consumer turns to the BBB for assistance.

B. Complaint Intake and Pre-Arbitration Settlement Procedures

Consumers may initiate the AUTOLINE process either through an on-line system or by telephone. In contrast to other consumer disputes, AUTOLINE complaints are routed directly to and substantially managed by the Council of BBBs rather than the local bureaus. During the initial contact with the consumer, the BBB acquires basic information about the consumer and the automobile that is the subject of the complaint. The BBB then sends out an information packet which describes the process, along with a consumer complaint form that must be completed and returned to officially initiate a complaint. Notably, the BBB also notifies the automobile manufacturer of the likely complaint at the time that the information packet and complaint form are mailed to the consumer. Upon receipt of the completed complaint form, the BBB confirms that the complaint falls within the scope of the relevant manufacturer's pre-agreement with the BBB.

The BBB maintains a Program Summary document, by state, for each participating manufacturer that clearly describes the manufacturer's pre-agreement with the BBB. These program summary documents are readily available to the public on the BBB's web site. Assuming that the complaint falls within the limits of the manufacturers pre-commitment, the BBB formally opens the case and begins the process of facilitating and mediating settlement discussions between the consumer and the manufacturer. As

required by FTC Rule 703, the BBB has a goal of resolving complaints either by settlement agreement or arbitral award within 40 days after formal initiation of the complaint.

C. The AUTOLINE Arbitration Process

If the dispute is not settled through either conciliation or mediation within 14 days of official intake, the BBB initiates the AUTOLINE arbitration process. As in arbitration associated with the BBB's primary dispute resolution program, the first step in AUTOLINE arbitration is preparation of an Agreement to Arbitrate that clearly defines the issues submitted for arbitration and the remedies sought by each party.

Once the Agreement to Arbitrate is signed, the case is referred to a local bureau located near the consumer for arbitration. The local bureau assigns an AUTOLINE arbitrator and sets a hearing date. Most AUTOLINE arbitrations are conducted by a single arbitrator. Panels of three arbitrators are required, however, by some manufacturers and in some states. Notably, the AUTOLINE arbitrator pool is distinct from the arbitrators involved in the more mainline BBB dispute resolution program. AUTOLINE arbitrators must complete a specialized national training and certification program operated by the Council of BBBs.

The arbitral hearing itself is conducted much like any other consumer arbitration. Most AUTOLINE hearings are conducted in-person but the parties may also elect to participate either by telephone or in writing. The participants are placed under oath, and are given a chance to present their case and to rebut the opponent's case. Unlike other BBB arbitrations, however, AUTOLINE hearings are audio recorded by BBB staff – as required by FTC Rule 703. The conduct of the hearing is not governed by formal evidentiary rules, but the arbitrator has authority to limit repetitious or irrelevant evidence. Except where prohibited by law – notably, Florida – the hearing includes inspection and often a test drive of the vehicle in cases where the consumer seeks any remedy other than reimbursement for cost of prior repairs. The arbitrator, who does not necessarily have expertise in the automotive field, may additionally request that the BBB arrange an inspection by an impartial technical expert.

The AUTOLINE arbitration mechanism anticipates that the parties may attempt to reach a settlement agreement during the arbitration hearing. If the parties chose to initiate settlement discussions, the hearing is temporarily recessed. The tape recorder is then stopped and the arbitrator departs from the hearing room, leaving a BBB staff member to monitor the negotiation between the parties. Any settlement agreement reached during the hearing recess is documented on a consent agreement form which is signed by both parties and subsequently by the arbitrator. If negotiations do not yield a settlement, the arbitration hearing is restarted.

Before the arbitrator reaches a final decision, he may schedule additional hearings or request that the parties submit additional evidence through the BBB. The arbitrator will ultimately issue a written decision (either interim or final) which he views as fair, equitable and within the scope of the Program Summary for the manufacturer involved. The arbitrator's decision may be classified as either an interim or a final decision. A typical interim decision takes the form of a repair to be performed by the manufacturer within 30 days with a subsequent "test drive" period (typically, 30 days) by the consumer. In the case of such an interim decision, the arbitrator retains authority over the case until the date specified in the decision – usually, the end of the test driver period. A final decision may deny the claim in total; provide for reimbursement for prior repairs; or, require either repurchase or replacement of the vehicle — subject to adjustments for prior use and possibly damage to the vehicle by the consumer.

As noted earlier, a central feature of the AUTOLINE process is the unilateral ability of the consumer to either accept or reject the arbitral award. When mailing the arbitrator's decision to the customer, the BBB includes a form for the consumer to indicate her acceptance or rejection of the award. The BBB also clearly indicates the date by which the consumer must formally accept the award. If a formal acceptance is not received prior to the stated deadline the award is deemed rejected. If the consumer chooses to accept the arbitral award, the manufacturer is bound to abide by the decision. Third party surveys conducted as part of the FTC's annual audit of the AUTOLINE program indicate that 75% of the consumers who received an arbitral award (as opposed to a denial) accepted the award.

The AUTOLINE rules allow a party to dispute the award only for the following reasons: that the award is impossible to perform; that the arbitrator has exceeded his authority; or that the arbitrator made a mistake with regard to a material fact. The rules also provide a limited mechanism for requesting clarification of an award.

D. AUTOLINE Program Outcomes

In 2009, the BBB AUTOLINE program received almost 20,000 inquiries or requests for formal complaint packets, of which 61% (11,800) matured into formal AUTOLINE complaints. So, what happened to the other 39%? Did those consumers simply get the packet and subsequently decide that pursuing the complaint would be too cumbersome and maybe not worth the effort? The BBB has actually performed survey work to answer this question. It appears that most (the BBB would not reveal an exact percentage) of the consumers settled the case with the automobile manufacturer shortly after the packet was requested and the BBB notified the manufacturer of the likely complaint

Slightly over one-half of the 11,800 formal complaints processed during 2009 were disposed prior to formal action: 43 percent were determined to be ineligible for the AUTOLINE program, and another 8 percent were withdrawn. No doubt, some of the withdrawn complaints were addressed by the manufacturer in a manner satisfactory to the customer. The main reasons for complaints being rejected were that the complaint was outside of the scope of the AUTOLINE program as defined by the specific manufacturer's program summary, the manufacturer's warranty on the vehicle, or the applicable state lemon law.

Pre-arbitration settlements were reached in almost 3,400 (29%) of filed cases. Of these, 24% provided for repurchase or replacement of the vehicle by the manufacturer, while 52% of the settlements involved repairs to be performed by the manufacturer. The manufacturer reimbursing the consumer for prior repairs in 18 percent of the cases, while the remaining resolutions involved other settlement features such as an extended service plan.

In the disputes that proceeded to arbitration, the consumer's claim was denied in a striking 62% of the cases. This figure reflects the prior consideration of the claims by manufacturers, who either denied the

claims or offered a settlement that was rejected by the consumer. In the remaining cases, where the consumer prevailed: 23% of the arbitral decisions required the automaker to repurchase or replace the automobile; 12% required the automaker to make specified repairs to the vehicle; and 3% ordered payment for prior repairs or other settlement features. Third party surveys conducted as part of the FTC's annual audit of the AUTOLINE program indicate that 75% of the consumers who have used BBB AUTOLINE would recommend the service to a friend or family member experiencing an auto warranty or lemon law issue.

E. Conclusion

Winston Churchill once remarked that democracy is the worst form of government, except for all the rest. The BBB model may indeed be the worst approach to consumer dispute resolution, except for all the rest. Without a doubt, the fact that the BBB is funded by member businesses immediately calls its neutrality into question. Doubts about the BBB's ability to engage non-member businesses in the dispute resolution process are also well founded. These arguable problems with BBB dispute resolution in

general are of only minor concern with the AUTOLINE due to the need to operate in compliance with FTC Rule 703. Under AUTOLINE, there are numerous features designed to ensure neutrality. Perhaps most important, the arbitration decision is binding on the automobile company but not binding on the consumer.



** Wesley Hamilton is a member of the Class of 2011 at the University of Houston Law Center. He has a B.S. degree in Chemical Engineering from Texas A&M, and is employed by Albermarle Corporation as Technology Director for Refinery Catalyst Manufacturing. Mr. Hamilton serves as a volunteer mediator at the Better Business Bureau and the Harris County Dispute Resolution Center. He can be reached at: <Wesley.Hamilton@albermarle.com>*

**TEXAS MEDIATOR CREDENTIALING
ASSOCIATION SYMPOSIUM**

**Save the date: TMCA Symposium
Saturday, November 6th, 2010,
8:00 a.m. - 4:45 p.m.**

The annual Texas Mediator Credentialing Association symposium is scheduled for Saturday, November 6th at the State Bar Law Center at 1414 Colorado St., Austin, Texas. The theme this year will focus on styles of mediation: facilitative, transformative and evaluative. Last year's symposium proved quite thought provoking and our goal is to make this year's even better and equally valuable for all mediators regardless of background or style. We'll be back to you in mid-summer with more information. Block out the November 6th date on your calendar for this year's TMCA symposium.

Sincerely,
Cecilia H. Morgan
TMCA Board Representative to the
ADR Section of the State Bar of Texas

COLLABORATIVE LAW IN A NEW VENUE PARTNERING WITH CPS

By Sherry Abney*

When a Minnesota family lawyer first developed Collaborative Law twenty years ago, no one dreamed that it would expand to other areas of practice. Today there are many disputes making use of the collaborative process including corporate and partnership dissolutions, medical error, sexual harassment /retaliation, intellectual property, construction, and probate. Recently Child Protective Services (CPS) and collaboratively trained professionals came together to provide collaborative training for CPS caseworkers and attorneys in Dallas County. Now families with children at risk may take advantage of the benefits of the collaborative process to avoid litigation and preserve their parental rights.

The family unit is the foundation of our society, and its preservation is the purpose of this program. When a parent is reported to Child Protective Services, the case investigator determines the severity of the risk, and the children are often removed from their homes while the parents attempt to remedy whatever may be the source of concerns for the children's safety. In less serious situations, the children may remain in the home, and their safety is closely monitored by caseworkers.

Unless CPS files a petition with the court to terminate the parental rights of the parents, the parents have no one to represent their interests since most of them cannot afford to hire a lawyer when their children are first put into foster care. Often parents do not understand the seriousness of their situation, and they fail to participate properly in the parenting plan created by the CPS caseworkers. Parenting plans will include tasks such as finding an appropriate place to live, parenting classes, various types of counseling, and attendance in support groups when addiction or mental disorders are part of the problem. Often parents are unemployed and must look

for work while they are trying to participate in the CPS plans.

Most caseworkers have much larger caseloads than they can easily manage and are unable to devote a great deal of time to monitoring the parents' progress. When parents fail to meet the caseworker's expectations the children are removed from the home. When the children have already been removed from the home and the parents do not complete their assigned tasks, papers are filed to terminate parental rights. If the court grants the petitions, the children are permanently separated from their biological parents. Termination of parental rights is sometimes necessary to protect the children from harm; however, there are many situations where parents are able to change their circumstances. When parents have the assistance of the collaborative teams, the chances for their success in providing a safe home for the children are increased.

Termination of parental rights is very difficult for some parents, but the real victims are the children. Children who are permanently separated from their parents often have serious psychological and emotional problems that stay with them their entire lives. When it is possible to safely keep children with their biological parents, the entire community as well as the family benefits.

The first step in the CPS Collaborative Program is to introduce parents with children at risk to the collaborative process. If the parents choose to participate, a collaborative team is established consisting of the parents, case facilitator, CPS caseworkers, and lawyers for the parents, children, and CPS. When children have been placed in the care of relatives, the relatives may also participate in the collaborative process and have collaborative lawyers to represent them. Other professionals may be added to the team if any are needed.

All of the professionals participating in the program have been trained in Collaborative Law. The program is designed to allow the parents of children at risk to have representation prior to any action being taken at court, and instead of parents simply being told what they must do, the parents participate in discussions regarding their concerns and the concerns of the caseworkers. Various options are developed and evaluated to remedy the conditions that put the children at risk. When parents participate in developing the plans they are expected to work, they are much more likely to follow through and successfully complete them.

In addition to the CPS program that is already in place, a new program is being established called Mentors for Parents of Children at Risk. The primary focus of this program is the parents rather than the children. The purpose of the program is to provide ongoing support for parents once the CPS cases are closed, and parents no longer have support from the professionals that were assigned to the case. Some parents may need this support to prevent them from returning to the life styles and situations that originally put the children at risk. Mentors will be available to assist parents in creating opportunities for self-help in areas such as parenting, education, employment, medical care and discovering third party organizations able to assist parents in meeting their personal goals.

Currently the CPS Collaborative Program is functioning in Dallas County, but other counties such as Denton and Travis are interested in putting the collaborative process to work to assist families in their communities.

Anyone interested in more information regarding this program may contact Dallas attorney Gay Cox at Cox Waters PLLC, 2213 Boll Street, Dallas, Texas 75204-2613, Phone: 214-522-0150, Fax: 214-522-0151 For more information regarding the collaborative process go to www.collaborativelaw.us for civil or www.collablawtexas.com for family or contact Sherrie Abney at sherrie.abney@att.net.



Sherrie R. Abney is a collaborative lawyer, mediator, facilitator, and trainer. She was co-founder and first chair of the Dallas Bar Association Collaborative Law Section and is past chair of the ADR Section of the Dallas Bar. As a founding director of the Global Collaborative Law Council (formerly the Texas Collaborative Law Council), she has served as Vice President of Education and Training for the organization since 2004. Sherrie has presented at many dispute resolution conferences all over the world, and she has trained lawyers in the collaborative process in Ireland, Australia, Uganda and at Oxford University as well as cities across the U.S. and Canada. Currently, Sherrie serves on the ADR Advisory Council for the State Bar of Texas and the Collaborative Law Committee of the DR Section of the American Bar Association. She is the author of *Avoiding Litigation, A Guide to Civil Collaborative Law* and numerous articles on the use of Collaborative Law in resolving civil dispute.

A NEW NAME FOR A NEW ERA

By John Allen Chalk, Sr.*

“Dispute Resolution Section” is a new name for a new era in dispute management and resolution. The State Bar of Texas ADR Section Council voted unanimously on April 10, 2010, to submit its recommendation to the ADR Section’s members that the Section’s name be changed from “Alternative Dispute Resolution Section” to “Dispute Resolution Section.” Before going further, this recommendation must first be approved by members of the ADR Section. Upon approval, that decision then goes to the SBOT Council of Chairs for its consideration, comments, and recommendation. The ADR Section members’ decision then goes to our ADR Section Representatives on the SBOT Board of Directors for their review and presentation to the Executive Committee of the SBOT Board, with the opportunity for any interested persons to appear before the Executive Committee in support of or in opposition to the proposed name change. The Executive Committee then makes its recommendation to the SBOT Board of Directors, where, again, interested persons may be allowed to appear in support of or in opposition to the recommended name change.

Many reasons were suggested by the Council members for this proposed Section name change. Disputes are resolved in many different ways. Disputes are managed in many different ways. Thousands of students in academic institutions across the U.S., not just law schools, are studying conflict theory, conflict management, and conflict resolution. New and inventive dispute resolution methods are being created and employed daily to resolve all kinds of disputes. “Alternative” has outlived its descriptive usefulness. One meaning of “alternative” is “existing or functioning outside the established cultural, social, or economic system.” *Merriam-Webster’s Collegiate Dictionary* 37 (11th ed. 2004). “Alternative” may even imply something that is secondary or inferior. The traditional “alternative” dispute resolution methods of mediation and arbitration, as examples, have long since become mainstream dispute resolution methods. Other dispute resolution methods also are being devised and employed, both in and out of the civil and criminal justice system, by an increas-

ing number of trained practitioners. Any method that resolves a dispute, that brings peace to warring parties, that restores productive activity, that focuses on civic and personal stability and harmony is welcomed in civilized society, none of which should be viewed as “alternative.”

All concerned participants in a democracy should be keenly interested in dispute resolution. There should no “alternative” dispute resolution. All effective dispute resolution should be mainstreamed as quickly as possible for a more ordered and productive society. The proposed name change to “Dispute Resolution Section” of the SBOT, as unanimously recommended by the ADR Section Council on April 10, 2010, is an idea whose time has come.



* **John Allen Chalk** is Immediate Past Chair of the State Bar of Texas Alternative Dispute Resolution Section, and a partner in the Fort Worth law firm of Whitaker, Chalk, Swindle & Sawyer, LLP. Chalk is a practicing lawyer, arbitrator, and mediator.



ETHICAL PUZZLER

By Suzanne M. Duvall

This column addresses hypothetical problems that mediators may face. If you would like to propose an ethical puzzler for future issues, please send it to Suzanne M. Duvall, 4080 Stanford Avenue, Dallas, Texas 75225, or fax it to 214-368-7528.

For the past nine years I have authored the “Ethical Puzzler” column for *Alternative Resolutions*, the newsletter for the ADR Section of the State Bar of Texas.

The usual format for the “Puzzler” is that I pose a “real-life” ethical dilemma that has been brought to my attention and call upon ADR professionals state-wide to share their solutions to such issues with the readers.

However, once each year I call upon ADR professionals to submit an ethical dilemma that they have faced in their own practice and to let the readers know how they handled it. Enjoy.

Anonymous Mediator, (Somewhere in Texas):

The issue that I faced related to the development of my litigation practice and how it might affect my mediation business. It is not uncommon for mediators to have prior relationships with the attorneys on either or both sides of the mediation. There are also times when the mediator has a previous business relationship with an attorney, either as members of a firm or as co-counsel. The dilemma that I faced was that after mediating a number of cases with a particular attorney, he asked me to co-counsel with him on a commercial litigation matter. This attorney was a good source of mediation business and was one of my more consistent sources of mediation. I had to ask myself if I was trading one stream of business for another.

The answer to my question is in the ethical standards regarding disclosure, which provide:

1. Disclosure of Possible Conflicts. Prior to commencing the mediation, the mediator shall make a full disclosure of any known relationships with

the parties or their counsel that may affect or give the appearance of affecting the mediator’s neutrality. A mediator shall not serve in the matter if a party makes an objection to the mediator based upon a conflict or perceived conflict.

Comment (a). A mediator shall withdraw from mediation if it is inappropriate to serve.

Comment (b). If after commencement of the mediation the mediator discovers that such a relationship exists, the mediator shall make full disclosure as soon as practicable.

The disclosure rules do not prohibit a mediator from mediating for an attorney with whom he has conducted business with, but the rules require him to disclose that relationship. Mediators understand that the last thing anyone wants is to appear to be biased and discover that the mediation was a waste of time. Still as it related to my mediation practice, I did not know how the other party would respond when I disclosed my prior business relationships with his opposing counsel. I decided to work with the attorney on the litigation matter and I have not regretted the decision. My experience has been that my disclosure of past business dealings have not made a significant difference in my ability to serve as a mediator. I have made a disclosure of my prior business interactions with several attorneys in numerous mediations and in each case, the opposing counsel simply thanked me for the disclosure and agreed to allow me to serve as the mediator.

Raymond Kerr, (Houston): Several years ago I was retained to mediate a case in Cuero, Texas. The parties to the dispute were a 50 year old widow who was the Lessor of the Oil and Gas lease in question, and a small exploration and production company which was the Lessee. The Plaintiff complained

about almost everything pertaining to the lease including, but not limited to, alleged failure to fully develop the acreage, damages to the surface which she also owned, alleged metering issues, cheating her on monthly royalty payments, improperly charging leasehold expenses, and a number of other issues. The Lessee denied all these claims.

When I arrived at the law office in Cuero to conduct the mediation, I met the Plaintiff, her large blustery father, and her very quiet diffident attorney. The Defendant's attorney was a seasoned oil and gas practitioner from South Texas and the company representative was a young Vice President of Exploration and Production for the oil company.

In the opening session, the Plaintiff's father insisted on speaking and described in some detail the alleged wrongdoing of the company. The defendant's counsel was responsive and professional without going antagonistic.

The negotiation was difficult with the Plaintiff asserting a large number of demands, some of which were reasonable, and many of which were not. While we were able to resolve a majority of the issues incrementally, a few still remained and the company rep was starting to lose patience.

At about 7:30 in the evening, I had narrowed the unresolved issues down to a short list and caucused with the Plaintiff going over those items, one at a time, obtaining a counter-offer on some, and concessions on some. According to my notes, every open item had been agreed upon or conceded except for the few remaining items for which I had a counter-offer. Before leaving that caucus, I had actually listed all of the items that had been in play identifying them as agreed to, conceded, or with a listed counter-offer. Anticipating that the other side might agree to the remaining counter-offers, I reviewed my list with the Plaintiff, the father and her attorney and believed they were in agreement.

I took the list to the Defendant, discussed the few remaining open items, and obtained their agreement to each of the counters proposed by the Plaintiff. I then said it appeared that we had a settlement.

When I went to the Plaintiff's caucus room and announced that the Defendant had accepted their last

counter on the remaining open items, and that it appeared we had a settlement, the Plaintiff's father said, "let me see this list." He looked at the list and he said to me, "you failed to include on this list our demand about expanding the gathering system for the natural gas wells." I replied that that was the first time I heard about that demand during this 10 hour negotiation, looked at my notes and said it didn't look to me like that issue had ever been on the table. The Plaintiff's father berated me and said we didn't have a deal unless the issue about the gathering system was part of it.

I went back to the other side and told them about the additional demand indicating that the Plaintiff claimed I had failed to convey the full offer. The Defendant's representative responded angrily saying the Plaintiff was just trying to retrade the deal, and that he was ready to walk out. While I did not believe I had failed to carry

I had failed to carry all the issues the Plaintiff was asserting, I indicated that I could have made a mistake, and suggested rather than walking away, why not see whether that demand could be met in some fashion that the Defendant found agreeable. Defendant's counsel and representative caucused separately from me for about 20 minutes and

probably made some phone calls. When they called me back in, they said that issue was not a deal breaker, and that the company actually had a gathering system improvement project on the drawing board anyway. So we drafted the settlement agreement that evening and the case was settled.

What this situation illustrates to me is that it is very important for the mediator not to get his or her emotions and ego caught up in the issues that may develop in contentious mediations among the parties. I like to say that "the mediator always takes the fall" by which I mean, if there is some issues that comes up about communications the mediator is carrying back and forth between the caucus rooms, the mediator should accept some responsibility rather than try to point a finger at one party or the other.



It is the parties' dispute, not the mediator's. The mediator is simply the facilitator of their settlement negotiation. As mediators if we can conduct ourselves so that we keep the "me" out of mediation, we will be much more effective in trying to assist the parties we serve.

William G. Short, Jr., (Dallas): Two years ago a situation presented itself that both puzzled and ethically challenged me. One of the District Courts had assigned a lawsuit to me for mediation under the Dallas County standing order. After months of effort by my assistant to schedule a date for mediation, and with the mediation deadline and the trial date looming, counsel for the corporate plaintiff and counsel for the individual defendant agreed on a date and appeared at my offices for the mediation. The lawyers had agreed (against my recommendation) to have their respective clients available for mediation only by telephone.

After talking briefly with the lawyers jointly, they separated to their respective caucus rooms. My first private conversation was with the lawyer for the corporate plaintiff who was very clear and specific that the objective of his client was to settle that day. Shortly thereafter, but within the first half-hour of the mediation, my assistant advised me that the lawyer for the corporate plaintiff had already given her a check for my agreed fee but that the lawyer for the individual defendant had told her that the share of my fee owed by the defense would not be paid by his law firm and further that any payment of mine would have to be collected by me from his client (who wasn't there). Moreover, when I addressed these disclosures directly with the defense lawyer, he advised me that the policy of his law firm was not to be responsible in any manner for the fees of mediators. He then went on to tell me that the lawsuit had triggered a severe financial downturn in the business of the defendant, who, as a result was in severe financial distress. Finally, the defense lawyer told me that only he would communicate by phone with his client during the mediation and that I would not be allowed to do so. The conduct of the defense lawyer was the puzzler. The prohibition against having any contract with his

client (the defendant who was to pay for my work that day) was the ethical challenge. Was the prospect of my not being paid for one-half of my fee to be allowed to de-rail the mediation that the plaintiff was intent on successfully completing that day?

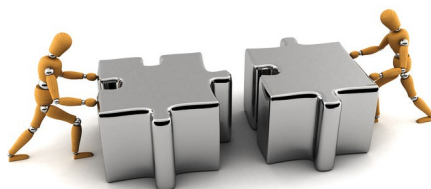
My decision was to press ahead regardless of the financial consequences to me, make no disclosure of the circumstances concerning the non-payment of my fee that day by the defense counsel, and make every effort to assist the parties in reaching a negotiated settlement. The result, the settlement of the lawsuit, did in fact occur by the end of the day and I was advised less than a month later by the lawyer for the plaintiff that the financial terms of the settlement were completely fulfilled by the defendant.

The epilogue as to the portion of my fee payable by the defense: the client ultimately refused to pay any of my fee citing the unreasonableness of the amount, and the lawyers reprised their firm policy – we don't pay mediators.

Note to the neutral: he took one for the process.

Pat Wenetschlaeger, (Irving): As an advocate in mediation you always wonder what is being said in the "other" room. We mediators and lawyers must remember that our clients, especially in the family law, often continue to communicate with each other outside of our offices. And that is how we sometimes find out what went on in the "other" room.

In a divorce mediation, where I represented Husband, most of the issues had been settled prior to mediation each of both parties had strong incentives to settle. In this mediation, there was a disagreement about the value of husband's business; however, the parties had decided to mediate before paying for a formal appraisal. Husband is keeping the business and paying wife for her community portion. Not surprising, wife believes it is worth more than the number he has offered. The parties were originally about \$150,000 apart on this issue. During mediation wife threw out her new number which was more than triple her number coming in. I was confused, my client was angry and the mediator stated she would try again to "reason with her" but just didn't know if



her attorney could get her to come down on her new number. My client stood his ground with his original number. We ended up settling for \$25,000 over our original number.

Part of my confusion over wife's new value of the business came because wife's attorney had told me earlier that morning that he had explained the figures and valuation of the business and stated he thought he had her at a reasonable number -- just slightly higher than hers. So, why the belated introduction of a higher number? I originally thought it must be her attorney trying to manipulate the negotiations, especially since that was what the mediator was insinuating in our room.

A few days after the mediation, I received a call from my client, who was outraged -- not about the settlement, but the process of mediation and the Mediator's tactics. He had spoken to his wife about the way things had gone in mediation. (I told you these people continue talking.) He asked her why she played it the way she did in regards to the business value. She told him the following -- in summary: "I told the mediator to go back in your room with a number half-way between our number and that we needed to settle. The mediator told me NO, I should ask for a lot more and thought it would make you come up a lot in your number because she knew you wanted to settle. The MEDIATOR told me she was in a real estate business and she thought that the business was worth a lot more than either attorney did. She said she and her husband bought and sold businesses so she knew how to calculate their value. She proceeded to write out her calculations of how to make it work in my favor and said she would go to your room and try to convince you that this was correct. So, I went along with it and my attorney didn't say otherwise."

What to do? Do you see this as an ethical violation? How would you deal with this issue? Should mediators be giving this kind of advice in mediation? Is it the mediator's job to tell clients what is or is not acceptable?



Wendy Trachte-Huber (Bellville). My issue revolves around being a country mediator. Rules related to professional ethics are designed by and for people in larger organizations, often with the substantial assistance of academics. The reason is simple: these people are more likely to have the time to devote to such an endeavor than solo and rural practitioners. [This observation applies to professions generally, and is not limited to dispute resolution.]

Let me offer a brief sketch of Bellville, which can be viewed as a surrogate for hundreds of small towns in Texas and throughout America. Bellville has a population of under 5,000 inhabitants, and is too small to support a McDonald's or a movie theater. (There is a Dairy Queen, lest you were beginning to worry.). The schools still close each October for two and one-half days during the Austin County Fair where many local kids show their rabbits, pigs, lambs, horses or calves. The Mom's Mafia is alive and well as teenagers are reported back to the appropriate Mom when engaged in any activity seemingly improper. Greater depth may be provided by works of fiction such as Thornton Wilder's OUR TOWN; and, most recently, by Garrison Keillor's oral descriptions of life in Lake Wobegon. Needless to say, we ALL know one another in this town.

Living in a rural area raised a new question for this mediator that did not arise during my career in Houston: how do you deal in a practical way with potential conflicts of interests? Recently I was approached by counsel in a visitation order modification case about mediating the matter. I sought some information about the parties and realized that, although I did not know the parties themselves, I was well acquainted with peripheral persons. I knew the lawyers for both parties; the parents of one of the parties; and the brother of the new husband. The families of the parties attended the same church as did my family. When asked if I knew the parties, I disclosed all of this information. It occurred to me in a county where we meet monthly as a bar association in a restaurant -- sometimes at a single large table-- we are bound to know one another. Does this mean all our mediators must be brought in from outside? How does a rural, small community mediator manage this issue?

After thinking about the matter, I decided to let my name go forward as a potential mediator. This approach reflected the realities of small town life, and with my full disclosure, allowed the parties to make an informed choice. After all, the dispute belongs to the parties when it comes to selecting the mediator as well as during the mediation. In the end, the parties selected an out-of-town mediator, and the mediation took place away from Bellville.

Comment: Raymond Kerr said it perfectly: This quarter's Ethical Puzzlers all revolve around keeping the "me" out of the mediator. Ours is indeed a profession that demands, that as mediators we set aside our emotions, our opinions, our egos our judgments and our ambitions in order to serve both parties and the process so as to allow the disputants the best possible opportunity to resolve the problem that brings the to the table, It is really a very simple concept, but as our contributors have pointed out, it's not always easy.



** Suzanne M. Duvall is an attorney-mediator in Dallas. With over 800 hours of basic and advanced training in mediation, arbitration, and negotiation, she has mediated over 1,500 cases to resolution. She is a faculty member, lecturer, and trainer for numerous dispute resolution and educational organizations. She has received an Association of Attorney-Mediators Pro Bono Service Award, Louis Weber Outstanding Mediator of the Year Award, and the Susanne C. Adams and Frank G. Evans Awards for outstanding leadership in the field of ADR. Currently, she is President and a Credentialed Distinguished Mediator of the Texas Mediator Credentialing Association. She is a former Chair of the ADR Section of the State Bar of Texas.*

REFLECTIONS FROM THE EDGE

SHOW ME THE MONEY!

Financial Matters in Mediation

By Peter Conlon* & Kay Elkins Elliott**

Practically all mediations have financial issues that need to be resolved. In cases based on personal injury, insurance coverage, contract and securities disputes, divorce, employment and probate, mediators are asked to assist in working out the numbers. How much training does the average mediator get in the resolution of complex financial questions? How much experience or education does the average mediator bring to the table to help the parties decide the who, what and where of the financial arrangements?

In some mediations, such as divorce cases, the parties are restricted by rules, regulations and laws as to the financial agreements. The major third parties to this scenario are the Internal Revenue Service (IRS), the Department of Labor (DOL) and the agency that enforces the Employment Retirement Income Security Act of 1974 (ERISA). In this article, we will briefly touch on several general classifications where the Mediation Agreement could be affected by these third party rules and regulations.

Modern day divorces often include the division of assets such as employer sponsored retirement and benefit plans, Individual Retirement Accounts (IRA), life insurance, and annuities to name a few. What all these mentioned classes of assets have in common is a tax deferred accumulated value. For many mediators the method used to handle the employer sponsored plan is a Qualified Domestic Relations Order (QDRO).

How many readers realize that the QDRO should also be used for *any* tax deferred asset vehicle that is to be divided or transferred? When any of these tax deferred assets are divided or transferred *without* a court order directing that division or transfer, the IRS will be seeking taxes and possibly penalties from the original owner of the asset, not the receiver.

At times, participants in the mediation will acknowledge the need for a QDRO and proceed to include

conditions into the QDRO that are prohibited or are not acceptable to the plan sponsor. If the attorneys in the case are not knowledgeable about the requirements of the plan sponsor, trouble can ensue. Mediators, without giving legal advice, could inquire early in the mediation if the attorneys have spoken to the plan sponsor about the preferred wording for the QDRO and suggest they do so immediately. Even better, mediators should request, in writing, *before* the mediation, that the lawyers consult with the plan sponsor and bring information to the mediation about the preferred wording. Experts in the field, such as Pete Conlon, report many statements not in compliance with the needs of the plan being divided:

- A direction to the IRA custodian to make the husband's IRA a *joint retirement account*, because the wife did not want to split the account while the market was down. Unfortunately, IRS Publication 590, Individual Retirement Arrangements, does not allow joint ownership of the IRA.

Solution? Include wording in the QDRO that establishes an in-kind trustee who could transfer a portion of the account being divided into the wife's name, allowing her to enjoy any recovery in the market value of her holdings.

- A direction that the husband applies for a loan from his 401(k) plan at work. A loan does not need a QDRO to be applied for: however the plan must allow loans as one of the features in the plan. The plan cannot allow a loan for one of the partners and not for others.

Solution? The attorney in a mediation would have to explain (perhaps after consultation with the mediator) to the divorcing couple that if the plan sponsor granted a request to give only one partner this right, the plan would be non compliant with the plan document and could be forced into termination by the DOL (in extreme cases) retroactive to the beginning of the year. Other options could then be generated that did not produce such negative consequences.

Both of these examples are from decrees that a judge had signed. If the parties had asked for assistance during the drafting of the QDRO, both couples could have saved time and money. Could this be yet another reason that mediators need to refrain from preparing the legal documents at the end of mediation? Could this also be a reason for mediators to suggest, privately, to attorneys that before the QDRO is drafted the advice of the plan administrator and the advice of a qualified financial expert be obtained?

Financial loss, regardless of the cause, can be traumatic for many people, especially in this difficult global economy. In few arenas is the emotional toll as intense as when a client has to sue her stockbroker. The client has the feelings of betrayal, financial loss, and loss of trust in a system they may not ever have understood. When you file such a claim you cross through the looking glass into the world of FINRA! This organization has a Code of Arbitration and Mediation. The code applies a standard set of rules in all 50 states concerning filing dates, discovery, motions and deadlines. For some legal practitioners, these rules are different from what they may be familiar with in their normal practice. Once a practitioner gets comfortable with the rules of Mediation, the FINRA Manual of Rules applicable to all member firms and their associated persons will be an eye-opener.

Within these rules you will find some items that cannot be mediated. For example, expungement of the claim from the broker's record (Rule 2080) can only be done by an arbitration panel or a court of competent jurisdiction. There are also restrictions on the broker asking for a client's help in getting an expungement in return for a larger monetary settlement to the client. The rules also point to a standard of care due the client, known as suitability. (Rule

2310). That is a general standard that can be easily met — or not. The rules also reveal that the broker has a higher standard of accountability to the broker-dealer than to the client.

Notwithstanding these restrictions, mediating the dollars and cents of the actual damages is no different than any other mediation. If there is an Errors and Omissions insurance policy in place, the carrier will have approved an amount for settlement. The difficult part of these mediations is when the client asks for some relief that is not able to be mediated — e.g. suspension of the broker, or other administrative punitive actions. The rules do not allow a client to be granted these types of awards and the member firm or broker cannot agree to them in a settlement with a client.

Confidentiality is another issue. The FINRA mediator cannot be asked to testify at an arbitration concerning the discussions held during the mediation sessions. To that extent the FINRA mediation is confidential, however, once the case is filed a case number is assigned and an entry is made on the broker's permanent record about that complaint. The entry includes a factual summary of the complaint. If the complaint is resolved, that fact will be entered on the record and the amount of the settlement will be noted. These records are public and currently are online for the entire time the broker works for any member firm plus two years. FINRA is now updating the data base to include any associated person that left the industry during the last ten years and had a complaint or disciplinary action on their record. The data base is heading towards permanent public availability of certain information.

The authors are currently coaching a team of three law students from Texas Wesleyan School of Law in Ft. Worth (Misty James, Michael Zimprich and Saniya Ali) to compete in the second annual St. John's law school dispute resolution triathlon. FINRA is a joint sponsor of this event held in New York City. The students must represent a client, in our case the broker, in a dispute with an investor. In the first of three rounds in the triathlon, negotiation, one student is the attorney, one student is the client and one student plays a new role: Settlement Counsel. The Settlement Counsel acts as a **Positive Neutral** who works with both parties and their attorneys to find common ground for resolution. This is an emerging area of practice for mediators. In the sec-

ond round the students have a FINRA mediator and work with that person and the other side to resolve the case. A Settlement Counsel for each team explains to the judges (Wall Street Attorneys) what the strategy of the team will be and can counsel with the team during the round if things do not proceed as planned. In the final round the teams arbitrate the dispute before a FINRA arbitrator. Another unusual feature of this competition is that a prize is given to the team that exhibits the most courteous and professional demeanor during the three rounds — and ballots are cast by the teams themselves for a team of their choice.

This is where we now are in legal education! In November, Texas Wesleyan will send a law student to a new competition at the University of Houston to choose the best *mediator* who will receive a large cash prize named after Judge Frank Evans. The New Lawyer is an evolved creature that combines the best attributes of diligent advocate, decision counselor, creative problem solver, conflict preventer/resolver, collaborative professional and settlement counsel. What next?

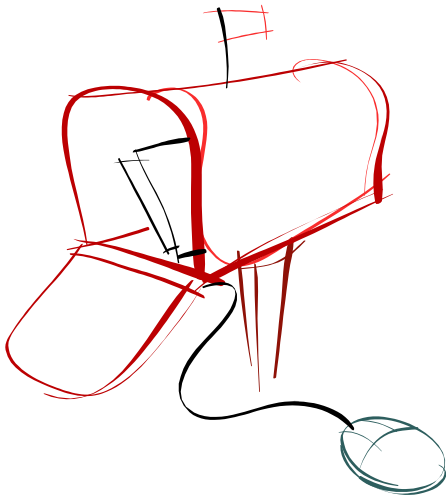


** Peter J. Conlon Jr. MBA, RFC, is a Fort Worth based Financial Industry Regulatory Authority (FINRA) mediator/arbitrator. He is the proprietor of Conlon Financial Advisors, He has been a qualified mediator since 1990, arbitrator since 1994, and a charter member of TCAM. Pete writes and teaches continuing education classes for financial professionals, advises company retirement plans, and provides expert witness*

opinions on investments, retirement plans, insurance matters and standards of practice in the financial industry. Pete can be contacted via email at: <www.conlonfinancial.com>



*** Kay Elliott, JD, LL.M, has arbitrated and mediated over 1,800 cases since 1980. She has taught in and coordinated ADR graduate programs at Texas Woman's University and Texas Wesleyan School of Law since 1990, where she has coached championship negotiation and mediation advocacy teams. She is ACR Dallas President, Council Member of TMTR, Board Member of TMCA, a frequent contributor to ADR publications and seminars. Kay co-edited the SBOT ADR Handbook (2003) with Frank Elliott.*



ADR ON THE WEB

By Mary Thompson*

ADR Case Law

Following are some national as well as Texas-based internet resources on ADR case law. As one would assume, most of the content is on arbitration, rather than mediation. The sites vary in their focus, quality, and provision of up-to-date information.

Mediation Case Law Project

<http://law.hamline.edu/dri/mclp/index.html>

This site was developed by Hamline University School of Law and contains

- Short mediation case law videos that demonstrate what happened in a mediation that resulted in litigation, organized by litigation theme (enforcement, ethics/malpractice, etc.),
- Written summaries of significant mediation cases,
- A searchable data base of over 2000 cases.

Although the case law on this site seems not to have been updated in recent years, this is a comprehensive resource for mediation cases. The videos would be a great educational tool.

ADR Law and Policy Update

<http://www.adrforum.com/adrupdate/login.aspx?ReturnUrl=%2fadrupdate%2fwelcomescreen.aspx>

Sponsored by the National Arbitration Forum, this web site has a clearly-formatted listings of State and Federal cases. Only subscribers have access to the most recent cases. Others can view cases from past newsletter issues as well as “year in review” summaries.

Arbitration Law Memo

[http://www.lawmemo.com/arb/memo/2010/04/arbitration law 44.html](http://www.lawmemo.com/arb/memo/2010/04/arbitration%20law%2044.html)

Specializing in employment law, the Law Memo is based in Salem, Oregon, and edited by law professor and arbitrator Ross Runkel. The Arbitration Law Memo is one of several specialty areas on the site.

Disputing

<http://www.karlbayer.com/blog/>

Austin attorney, mediator and arbitrator Karl Bayer’s well-organized blog contains a section entitled “Court Decisions About Arbitration.” These up-to-date articles cover decisions from the Fifth Circuit, Texas Supreme Court and U.S. Supreme Court. Each article also provides opportunities for readers to post comments. In addition, there are numerous articles on mediation and arbitration legislation.



Supreme Court of Texas Opinion Search

<http://www.supreme.courts.state.tx.us/opinions/opinionsearch.asp>

This feature, On the Supreme Court of Texas site, allows the visitor to search according to case number, date or text (e.g., “arbitration”). Video and audio recordings of oral arguments are also available.

ADR Law Texas

<http://texas-arbitration-case-law.blogspot.com/2007/08/recent-arbitration-case-law-from-texas.html>

Harris County legal researcher Wolfgang de Mino's blog focuses on "recent litigation and appeals involving issues in mediation, arbitration and other means of non-judicial conflict resolution and settlement."

Texas Opinions

<http://www.texas-opinions.com/law-arbitration.html>

Another site compiled by de Mino is found at Texas Opinions. Entitled "Recent Texas Supreme Court Decisions Involving Disputes Over Arbitration," this page provides links to topics that include decisions relating to arbitration mandamus, arbitration of work place injury claims, and waiver of right to enforce arbitration to agreement.

Houston Case Law Monitor

<http://www.houston-opinions.com/>

This website describes itself as the "Unofficial web site on Texas State Courts of Appeals Whose Rulings Affect Houston." The list entitled "Practice Area and Legal Topics Pages" includes links to ADR in Family Courts, Arbitration Case Law, and Arbitration Confirmation Suits.



* *Mary Thompson, Corder/Thompson & Associates, is a mediator, facilitator and trainer in Austin.*

JUSTICE FRANK G. EVANS AWARD

Justice Frank G. Evans Award Selection Criteria Policies and Procedures for Selection of Recipients

- The Evans Award is created and dedicated as a living tribute to Justice Frank G. Evans who is considered the founder of the alternative dispute resolution movement in Texas.
- The award is awarded annually to persons **who have performed exceptional and outstanding efforts in promoting or furthering the use or research of alternative dispute resolution methods in Texas.** The recipients should be persons who are recognized leaders in the field of ADR. Although the award is presented by the ADR Section of the State Bar of Texas, the recipients do not have to be either a member of the State Bar, a member of the ADR Section, a lawyer, or a practicing third-party neutral.
- **Up to two awards may be awarded annually.**
- Each nomination submitted will be considered for two consecutive years but persons are encouraged to re-submit nominations yearly.
- Anyone may submit nominations provided the nominations are timely submitted on forms provided by the Awards Committee. The person making the nomination does not have to be a lawyer, a member of the ADR Section, or a third-party neutral.
- Nominations **must be received by March 1** of each year.
- Nomination forms may be obtained from any member of the ADR Section Directors Council or from the ADR Section Liaison at the State Bar of Texas.
- The nomination form will also be published at least once a year annually in the news bulletin of the ADR Section, preferably in the Fall edition. In addition, other non-State Bar ADR associations will be encouraged to publish or distribute the nomination form annually to their memberships.
- Selection of the recipients will be made by an Awards Committee of the ADR Section with approval of the Council. **Awards Committee voting membership will be comprised of five members of the Council.** The Chair and

the voting members of the Awards Committee will be appointed by the Chair of the ADR Section. The Chair of the Section will not serve as the Chair of the Awards Committee. If an Awards Committee member is nominated, consideration of that nomination shall be delayed to the first subsequent year when the nominee is no longer a member of the Awards Committee.

- Persons who are members of the council as of March 1 are ineligible for consideration for the Evans Award for that calendar year. Ex-officio members are eligible.
- Although duration of involvement is not a requirement for selection of a recipient, special consideration will be given to nominees who have devoted themselves to alternative dispute resolution over an extended period of time.
- Presentation of the Award will be made at an appropriate ceremony at the annual State Bar Convention with a report of the presentation submitted for subsequent publication in the State Journal and the ADR Section bulletin.

Recipients

2010 Cecilia H. Morgan
2009 Michael J. Kopp
2008 Robyn G. Pietsch
2008 Walter Wright
2007 Cynthia Taylor Krier
2007 Charles R. "Bob" Dunn
2006 Michael J. Schless
2005 Maxel "Bud" Silverberg and
Rena Silverberg
2004 Professor Brian D. Shannon
2003 Honorable John Coselli
2002 Gary Condra
2001 John Palmer
2000 Suzanne Mann Duvall
1999 C. Bruce Stratton
1998 Professor Edward F. Sherman
1997 The Honorable Nancy Atlas, Judge,
Southern District of Texas
1996 Bill Low, First Non-Attorney Recipient
1995 Professor Kimberlee K. Kovach

NOMINATION FORM

JUSTICE FRANK G. EVANS AWARD

PRESENTED BY THE ALTERNATIVE DISPUTE RESOLUTION SECTION

I hereby nominate the following person for the Justice Frank G. Evans Award in recognition of the nominee's outstanding contributions toward, and achievements in, furthering the use or research of alternative dispute resolution in Texas [Attach additional pages as necessary]:

Nominee (Print) _____

Address: _____

City: _____ State: _____ ZIP: _____

Phone: _____ FAX: _____ E-Mail: _____

1. Is the nominee an attorney licensed to practice law in Texas? (Y) (N) (Circle one)

2. What is the nominee's occupation and business address:

3. List ADR methods in which the nominee has received training (e.g., mediation, arbitration) and, if possible, identify the training organization, length of training, and training year:

4. List ADR methods in which the nominee has conducted training (e.g., mediation, arbitration) and the number of courses and the organizations:

5. List the number of years that the nominee has been a member of the ADR Section of the State Bar. Describe in detail the extent of involvement:

6. List the areas in which the nominee serves as a third-party neutral (e.g., family law, government, environmental):

7. List honors, awards, and recognitions received by the nominee in the field of ADR:

8. List the ADR organizations (national, state, and local) to which this nominee belongs or has belonged. Describe the extent of involvement, including offices (with dates) held by the nominee in the organizations:

9. List articles on ADR written by the nominee. Include the names of the publications in which the articles were published and the dates of publication:

10. On additional pages, please explain in detail what acts of outstanding achievement the nominee has performed in furthering alternative dispute resolution in Texas that qualifies the nominee for consideration for this award. Attach all documentation necessary, including letters of recommendation, to support the nomination and submit this completed form and all attached documentation as a single nomination packet.

Nominated by: _____
(Please Print)

Signature: _____ Date: _____

Address: _____

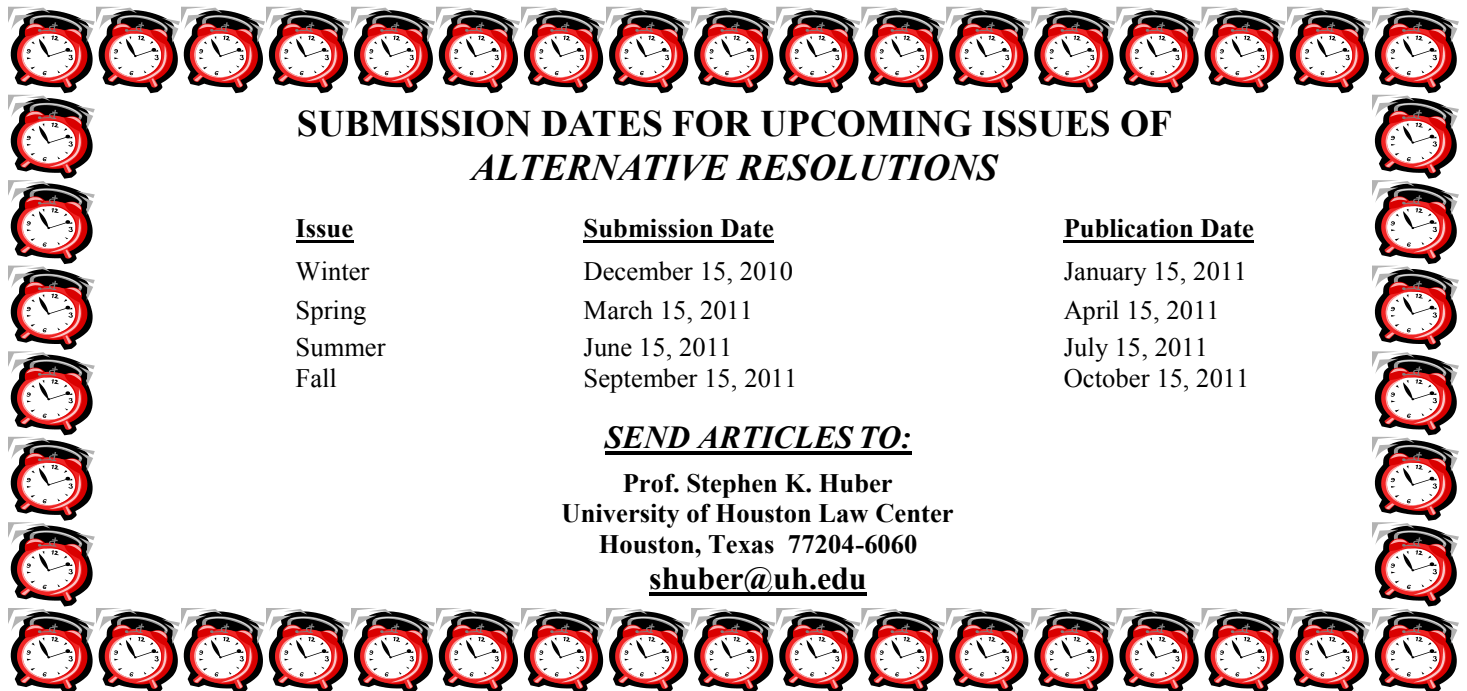
City: _____ State: _____ ZIP: _____

Phone: _____ FAX: _____ E-Mail: _____

Note: Nominations must be received by **March 1, 2011**

Submit nomination packet to:

Hon. Anne Ashby
One Lincoln Centre
5400 LBJ Freeway, # 525
Dallas, Texas 75240
972-661-2622 – Office
214-384-0674 – Cell
aashby@cblegal.com



**SUBMISSION DATES FOR UPCOMING ISSUES OF
*ALTERNATIVE RESOLUTIONS***

<u>Issue</u>	<u>Submission Date</u>	<u>Publication Date</u>
Winter	December 15, 2010	January 15, 2011
Spring	March 15, 2011	April 15, 2011
Summer	June 15, 2011	July 15, 2011
Fall	September 15, 2011	October 15, 2011

SEND ARTICLES TO:
Prof. Stephen K. Huber
University of Houston Law Center
Houston, Texas 77204-6060
shuber@uh.edu

WAIVER OF ARBITRATION CLAIMS: A NEW FLEXIBILITY?

Recent Fifth Circuit and Texas Supreme Court Decisions

By Stephen K. Huber*

A. Introduction to the Topic

This article proceeds from the premise that the parties to a law suit initially had a contractual right to require arbitration of all claims. At some juncture in the proceedings, one of the parties makes a motion for arbitration (and a stay of litigation), whereupon the other party responds that the movant has waived the opportunity to require arbitration. The United States Supreme Court has never addressed the topic of waiver of arbitration, so there is no direction from the highest court in the land.

Waiver of the right to obtain arbitration requires a substantial invocation of the litigation process, plus a showing that the party opposing arbitration has suffered significant prejudice. The right to arbitrate is not easily waived. There is a strong presumption against waiver, and the burden of proof is on the party claiming waiver. These standards leave open the important questions of how much invocation of litigation will suffice, how much prejudice is sufficient, and the specificity of proof required to demonstrate prejudice. Furthermore courts commonly employ a "totality of the circumstances" test in determining waiver. The fact patterns differ from case to case, so the waiver inquiry tends to be fact-intensive.

In most instances where a type of dispute comes before an appellate tribunal, the trial court decisions will favor claimants in some instances and respondents in others. This is not, however, the situation with waiver of arbitration cases. In those instances where the trial court grants a motion for arbitration that determination is not immediately appealable, and the dispute proceeds to arbitration. Only after the arbitration process is complete may the party

that opposed arbitration get its day in court. Such claims are uncommon – the *Perry Homes* decision by the Texas Supreme Court, discussed below, provides an example. In nearly all the cases that come to the appellate courts the trial court has ruled that a waiver of arbitration occurred. Waiver determinations depend on factual determinations, so some courts decide the close cases in favor of upholding the judgment of the trial court. Less generous courts point out, correctly, that the facts regarding trial-related activity are largely if not entirely uncontested, and therefore no deference need be given to the trial court.

Taken together, these factors produce waiver decisions that reflect an attitude toward waiver of arbitration claims as much as a set of rules. This reality is nicely demonstrated by comparing recent Fifth Circuit Court of Appeals and Texas Supreme Court arbitration waiver decisions. Applying the same general principles, the Fifth Circuit is far more receptive to assertions that arbitration has been waived than is the Texas Supreme Court, which has only found a waiver once. Before turning to the case law, some background about the two central requirements for waiver: judicial activity and prejudice.

B. Substantial Invocation of the Judicial Process

Apart from hard-line anti-waiver courts, of which the Texas Supreme Court is perhaps the leading American example, most proponents of waiver meet the substantial invocation test. At a minimum, one party has filed suit and the other party has answered. [In many of the federal cases, the case was initially filed in state court, and removed to federal court by the defendant.] One might, by analogy to election of

remedies, reason that these acts constitute a selection of a judicial forum in preference to arbitration. All the reported state supreme court and federal court of appeals cases involve more trial-related activity, and additional time. Pleadings are amended, motions are filed, some amount of discovery is undertaken (or at least planned), settlement efforts take place, etc. In short, the substantial invocation prong of the arbitration waiver analysis is almost always satisfied in the published cases. This is not surprising, because these cases have passed through two filters – the trial court, which sends the easy cases on to arbitration, and the determination that the appellate court decision is worthy of publication.

The Texas Supreme Court, in *Perry Homes*, 258 S.W.3d at 590-91, provided a convenient list of factors to be considered in making the totality of the circumstances determination:

- whether the movant was plaintiff (who chose to file in court) or defendant;
- how long the movant delayed before seeking arbitration;
- whether the movant knew of the arbitration clause all along;
- how much pretrial activity related to the merits rather than arbitrability or jurisdiction
- how much time and expense has been incurred in litigation;
- whether the movant sought or opposed arbitration earlier in the case;
- whether the movant filed affirmative claims or dispositive motions;
- what discovery would be unavailable in arbitration;
- whether activity in court would be duplicated in arbitration; and
- when the case was to be tried.

Of course, all these factors are rarely presented in a single case. Federal courts have found waiver based on a few, or even a single one. The Texas Supreme Court has considered factors such as:

- when the movant knew of the arbitration clause;
- how much discovery has been conducted;
- who initiated it;
- whether it related to the merits rather than

arbitrability or standing;

- how much of it would be useful in arbitration; and whether the movant sought judgment on the merits.

C. Showing of Significant Prejudice

The real action in the waiver of arbitration cases is the requirement of prejudice – how much is required, and what level of proof. Both the Texas Supreme Court and the Fifth Circuit require real prejudice as part of the waiver analysis. While prejudice is clearly required by most courts, the rationale for this approach is not self-evident. The Seventh Circuit Court of Appeals, alone among the circuits, has adopted the position that no showing of prejudice is required. The leading case is *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388 (7th Cir. 1995), with the opinion written by Judge Posner. The heart of the matter is basic contract law: waiver does not require any showing of prejudice.

Ours may be the minority position but it is supported by the principal treatise on arbitration. 2 Ian R. Macneil, Richard E. Speidel & Thomas J. Stipanowich, *Federal Arbitration Law: Agreements, Awards, and Remedies under the Federal Arbitration Act* § 21.3.3 (1994). It is not a revival of the doctrine of election of remedies, which survives only as a bar to double recovery. In ordinary contract law, a waiver normally is effective without proof of consideration or detrimental reliance. E. Allan Farnsworth, *Contracts* § 8.5 (2d ed. 1990); 3A Arthur Linton Corbin, *Corbin on Contracts* § 753 (1960).

The Seventh Circuits also gives considerable deference to trial court factual findings – and the totality of the circumstances approach is necessarily fact-based. The trial court determination is evaluated under the clear error standard.

The Seventh Circuit’s approach is not inconsistent with the “strong federal policy” in favor of arbitration. There is no doubt that the parties agreed to arbitrate, so no thumb on the scale is needed. The FAA requires courts to enforce agreements to arbitrate, but it does not prefer arbitration over litigation. “Therefore, we should treat a waiver of the right to arbitrate the same as we would treat the waiver of any other contract right.” (590)

The Seventh Circuit closed its *Cabintree* opinion with a strong statement that set forth its views of effective practice and policy:

Selection of a forum in which to resolve a legal dispute should be made at the earliest possible opportunity in order to economize on the resources, both public and private, consumed in dispute resolution. This policy is reflected not only in the thirty-day deadline for removing a suit from state to federal court but also in the provision waiving objections to venue if not raised at the earliest opportunity. Fed.R.Civ.P. 12(h)(1). Parties know how important it is to settle on a forum at the earliest possible opportunity, and the failure of either of them to move promptly for arbitration is powerful evidence that they made their election – against arbitration. Except in extraordinary circumstances not here presented, they should be bound by their election.

The 7th Circuit approach, as articulated by Judge Posner, is a persuasive one, and no state or federal court has offered an effective rebuttal.

Courts in the Seventh Circuit readily find waiver, a fact that surely has not gone unnoticed by the bar. In *Viking Packaging Technologies, Inc. v. Rima Frutta Packing, Inc.*, 629 F.Supp.2d 883 (E.D.Wisc. 2009), the court found a waiver of arbitration after a delay of ten weeks from the filing of the initial suit in state court, and only six weeks after removal to federal court.

The essential question is whether the party did all it could reasonably have been expected to do to make the earliest feasible determination of whether to proceed judicially or by arbitration. In the present case, the earliest feasible time to elect arbitration was when the responsive pleading was due. ... Defendants have offered no reason for their delay, leaving me to assume that the delay was either the result of inexcusable neglect or a desire to test the waters in district court before deciding that arbitration would be preferable.

Few courts, federal or state, would so readily rule that the claimant waived its right to arbitration.

All the other federal circuit courts have adopted a prejudice requirement, but not necessarily a strong one. For example, in the First Circuit “the prejudice

showing required is tame at best.” *Rankin v. Allstate Ins. Co.*, 336 F.3d 8, 14 (1st Cir. 2003). Nothing more than a “modicum of prejudice” is required. *In Re Tyco Intern. Ltd. Securities Litigation*, 422 F.3d 41, 46 (1st Cir. 2005). This standard requires little more than a fig leaf to establish prejudice.

Furthermore, prejudice is in practice difficult to separate from the court-related activity that results in a finding of waiver. After all, delay and cost are the central consequences of a failure by the other party to promptly seek arbitration. Discovery is limited in arbitration, but not prohibited. Instead, the arbitrator is in charge, and has discretion to determine the nature and amount of discovery. When a court determines that “expense and delay constitute prejudice,” the two factors seem to collapse into one. *See e.g. Nino v. Jewelry Exchange, Inc.*, 609 F.3d 191 (3d Cir. 2010).

D. Who Decides Waiver of Arbitration Claims: Court or Arbitrator?

In *Perry Homes*, 258 S.W.3d at 587-590, the Texas Supreme Court ruled that waiver of arbitration was a topic to be decided by a judicial rather than an arbitral tribunal. All the higher state and federal courts have reached the same conclusion, most recently: *Radil v. National Union Fire Ins. Co. of Pittsburg, PA*, 233 P.3d 688 (Colo. 2010); *JPD, Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388, 393-94 (6th Cir. 2008); *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 217-19 (3d Cir.2007).

“This Court and the federal courts have held that waiver of arbitration is a question of law for the court. The Culls argue this was all changed in 2002 by the *Howsam* decision, in which the United States Supreme Court said the “presumption is that the arbitrator should decide allegations of waiver, delay, or a like defense to arbitrability.” 537 U.S. 79, 84, (2002) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983). For several reasons, we disagree that this single sentence changed the federal arbitration landscape.

“First, “waiver” and “delay” are broad terms used in many different contexts. *Howsam* involved the National Association of Securities Dealers' six-year limitations period for arbitration claims, not waiver by litigation conduct; indeed, it does not appear the Supreme Court has ever addressed the latter kind of

waiver. Although the federal courts do not defer to arbitrators when waiver is a question of litigation conduct, they consistently do so when waiver concerns limitations periods or waiver of particular claims or defenses. As *Howsam* involved the latter rather than the former, its reference to waiver must be read in that context.

“Second, the *Howsam* court specifically stated that “parties to an arbitration contract would normally expect a forum-based decisionmaker to decide forum-specific procedural gateway matters.” *Id.* at 86. Thus, the NASD’s six-year limitations rule in that case was a gateway matter for the NASD arbitrator because “the NASD arbitrators, comparatively more expert about the meaning of their own rule, are comparatively better able to interpret and to apply it.” *Id.* at 85. By contrast, when waiver turns on conduct in court, the court is obviously in a better position to decide whether it amounts to waiver. “Contracting parties would expect the court to decide whether one party’s conduct before the court waived the right to arbitrate.” *Tristar Fin. Ins. Agency, Inc. v. Equicredit Corp. of Am.*, 97 Fed.Appx. 462, 464 (5th Cir.2004).

“Third, as the *Howsam* Court itself stated, parties generally intend arbitrators to decide matters that “grow out of the dispute and bear on its final disposition,” while they intend courts to decide gateway matters regarding “whether the parties have submitted a particular dispute to arbitration.” *Howsam*, 537 U.S. at 83-84 Waiver of a substantive claim or delay beyond a limitations deadline could affect final disposition, but waiver by litigation conduct affects only the gateway matter of where the case is tried. *See Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1, 13 (1st Cir.2005).

Finally, arbitrators generally must decide defenses that apply to the whole contract, while courts decide defenses relating solely to the arbitration clause. Thus, for example, arbitrators must decide if an entire contract was fraudulently induced, while courts must decide if an arbitration clause was. As waiver by litigation conduct goes solely to the arbitration clause rather than the whole contract, consistency suggests it is an issue for the courts.

Every federal circuit court that has addressed this issue since *Howsam* has continued to hold that substantial invocation of the litigation process is a question for the court rather than the arbitrator. Legal commentators appear to agree. *See* Stephen K.

Huber, *The Arbitration Jurisprudence of the Fifth Circuit, Round II*, 37 Tex. Tech L.Rev. 531, 542 (2005). So do we.”

E. Texas Supreme Court: *Perry Homes v. Cull*

This section is fundamentally about a single case: *Perry Homes v. Cull*, 258 S.W.3d 580 (Tex. 2008); cert. denied sub nom. *Cull v. Perry Homes*, 129 S.Ct. 952 (2009). In *Perry Homes* the Texas Supreme Court, by a 5-4 vote, ruled that a party to an arbitration agreement had waived an established right to arbitration. The possibility of such waiver has always existed, and the Texas Supreme Court had written extensively on this topic over the decades, but the previously writings were just theoretical exercises. No matter what the background facts, the result was always the same: no waiver, so proceed to arbitration. And, when the Supreme Court speaks, lower level judges listen. Like other human beings, judges develop heuristics to order their lives – experience-based techniques for problem solving, or “rules of thumb.” So, it should be no surprise that the lower courts hardly ever found that a party had waived arbitration – if for no other reason that to avoid having the decision appealed and reversed.

Will *Perry Homes* be a singularity, not to be repeated absent truly extraordinary facts, or is this the beginning of a new receptivity to arbitration waiver claims? As the justices split 5-4 in *Perry Homes*, there is little reason to suppose that the Texas Supreme Court is now receptive to waiver of arbitration claims. A possible basis for a more generous approach toward assertions of waiver would be the desire of the Supreme Court to keep its doctrine and practice consistent with that of the Fifth Circuit, which is more receptive to assertions of waiver.

Perry Homes has been cited by the Supreme Court of Texas in four subsequent cases, three dealing with waiver arbitration and one addressing the analogous issue of waiver of a choice of forum provision. None of these decisions found a waiver, or suggested that the Court might be sympathetic to waive claims on other facts. *In re Fleetwood Homes of Texas, L.P.*, 257 S.W.3d 692 (Tex. 2008) (no waiver of arbitration, *Perry Homes* cited for standard rules regarding waiver); *In re Citigroup Global Markets, Inc.*, 258 S.W.3d 623 (Tex. 2008) (no waiver of arbitration; *Perry Homes* cited for standard rules regarding waiver); *In re Gulf Exploration, LLC*, 289

S.W.3d 836 (Tex. 2009). (discussing post-arbitration review of trial court determination that arbitration not waived). *In re ADM Investor Services, Inc.*, 304 S.W.3d 371 (Tex. 2010) (purported waiver of Illinois forum selection clause; analysis parallels that for waiver of arbitration).

The Culls brought suit against the builder of their house, Perry Homes, plus a company from whom they purchased a warranty and its insurer. While Perry Homes is the name party in the suit, primary liability may rest elsewhere. The name Perry Homes – and Perry apparently took the lead in this litigation – is shorthand for the three defendants.

Perry Homes represents one of those unusual instances where both parties are arguing positions that are inconsistent with the interests of similarly situated persons – consumers in the case of the Culls; merchants who regularly make use of form arbitration provisions in the case of Perry Homes. How did this come to pass?

The Culls sought to have their claim decided in litigation, while the *Perry* parties sought arbitration, as called for by their standard form contract. The parties kept doing things related to the case; for whatever reason *Perry Homes* did not press the court to send the case to arbitration. After a considerable amount of pre-trial activity, the court sent the matter to arbitration at the behest of the Culls, an order that is only subject to post-arbitration challenge. They sought arbitration because of the costs of the judicial proceedings, and further discovery.

The arbitral panel ruled in favor of the Culls, awarding them \$800,000. At this juncture, the Culls sought confirmation of the award, while Perry Homes challenged the award on the basis of waiver. The Texas Supreme Court decided for Perry Homes, although this required a first-time-ever finding of arbitration waiver. In view of Bob Perry's well-known funding of pro-business judicial candidates, this outcome produced a certain amount of adverse comment. See e.g., Will Pryor, *Alternative Dispute Resolution*, 62 SMU L. Rev. 843, 845 n16 (2009); Editorial, Donors Shouldn't Tip Scales of Justice, *Austin American Statesman*, May 6, 2008; Renegade Texas Supreme Court?, *Houston Chronicle*, May 2, 2008.

So ended the waiver of arbitration matter, but not the underlying dispute. The parties returned to court,

and in March 2010 a Fort Worth jury awarded the Culls some \$58 million in damages, including \$44 million in punitive damages. American Lawyer, *Tex Parte Blog*, last visited September 28, 2010. Needless to say, defendants are appealing this verdict.

F. Fifth Circuit Court of Appeals Decisions

In the last eighteen (18) months, the Fifth Circuit Court of Appeals has decided four (4) cases in which the Court ruled that a party entitled to require arbitration of a dispute waived that right. [The earliest of these decisions was published on April 15, 2009, and the publication dated of this issue of *Alternative Resolutions* is October 15, 2010, so the elapsed time period is precisely 18 months.] That this series of rulings should emanate from one of the most pro-arbitration courts in the nation is striking. These decisions do not reflect any changes in the applicable legal doctrine, but they do suggest an attitude that is more favorable to waiver of arbitration assertions.

1. *Nicholas v. KBR, Inc.*, 565 F.3d 904 (5th Cir. 2009) (“Nicholas”)

In this employment dispute, Nicholas filed suit in Texas state court in January 2007. KBR promptly removed the case to federal court. Various pre-trial activities ensued. In November Nicholas sought arbitration. KBR responded in January, arguing that Nicholas had waived arbitration, and the district court agreed; the Fifth Circuit affirmed.

In most instances the party seeking arbitration is the defendant, but here it was the party who initially selected the judicial forum. In such an instance, the finding of a substantial invocation of the judicial process can be made with relative ease. Filing suit plus ten months of pre-trial activity constituted waiver. The legal rules apply equally to plaintiffs and defendants, but the fact of starting the judicial process, instead of seeking arbitration, “constitutes substantial invocation of the judicial process.” Indeed, this is the clearest way of preferring litigation to arbitration. This action, together with other pre-trial activity, clearly constituted a waiver of the right to compel arbitration.

There is a second element to the waiver analysis, and that is demonstrable prejudice to the other party. The usual factors are expense, delay, and harm to

ones legal position. The pre-trial activity that is integral to the waiver, is also a factor in the calculus of prejudice. A failure to provide a plausible explanation for failing to request arbitration in an expeditious manner is also a relevant consideration. The court particularly noted the taking of depositions, which are not standard practice in arbitration. While the AAA rules authorize the arbitrator to permit some depositions, that determination is made by the arbitrator – who has complete discretion over the matter – and not the parties. Here Nicholas deposed a third-party witness, something unlikely to occur in arbitration.

The *Nicholas* court expressly considered and declined to follow the *Cabintree* approach that eliminates the need for a showing of prejudice. 565 F.3d at 909.

Although this circuit has not expressly drawn a distinction between the waiver analysis when applied to a plaintiff and that applied to a defendant, we have recognized that the decision to file suit typically indicates a "disinclination" to arbitrate. We have not, however, gone as far as the Seventh Circuit on this issue, and we do not do so here, as we continue to require a showing of prejudice, even if there is a substantial invocation of the process. *See Cabintree* (holding that a party's "election to proceed before a nonarbitral tribunal for the resolution of a contractual dispute is a presumptive waiver of the right to arbitrate.").

A few paragraphs later, however, the *Nicholas* court made a favorable reference to *Cabintree*: "Nicholas's belated decision to seek arbitration is particularly troubling given that it came on the heels of an adverse ruling. 50 F.3d at 391 (expressing particular concern with plaintiffs that want to test the waters in litigation before deciding whether they would be better off in arbitration)." *Id.* at 910.

2. *Petroleum Pipe Americas Corp. v. Jindal Saw, Ltd.*, 575 F.3d 476 (5th Cir. 2009) ("Jindal")

Jindal brought suit against PPA for breach of a contract that called for arbitration of disputes (ICC, London). A year of pre-trial activity ensued, culminating in an off-the-record judicial conference at which the trial judge expressed an adverse view of Jindal's position – the parties, of course, disagreed about how

adverse — but Jindal admitted that the court "expressed concern" about its legal position. Jindal then invoked the arbitration provision. The court commented:

The lack of a formal ruling does not convince us that Jindal, having learned that the district court was not receptive to its arguments, should be allowed a second bite at the apple through arbitration. Nor does it matter that Jindal contends that it did not seek a ruling – it knew, or should have known, that a decision on the merits was reasonably likely once settlement negotiations reached a standstill and the parties submitted their competing interpretations of the Settlement Agreement. We conclude that Jindal substantially invoked the judicial process by waiting to move to arbitrate until the district court's pronouncements in the May 19 conference and that PPA was prejudiced thereby. As that constituted waiver of Jindal's putative right to invoke arbitration, we need not consider whether Jindal's other actions constitute waiver.

In evaluating waiver claims, the court pointed out that three factors are of particular importance: discovery related to arbitral claims; time and expense incurred; and delay. *Walker v. J.C. Bradford & Co.*, 938 F.2d 575, 576 (5th Cir.1991). The court also noted a presumption against waiver, and the burden of proof was on the opponent of arbitration. However, an attempt to obtain a merits determination, and then switch to arbitration, is "clearly impermissible." *Miller Brewing Co. v. Ft. Worth Distributing Co.*, 781 F.2d 494, 498 (5th Cir.1986).

3. *C.C.N. Managed Care, Inc. v. Shamieh*, 2010 WL 1141634 (5th Cir. 2010) ("CNN")

The trial court refused to order arbitration, and the Fifth Circuit agreed. Suit was initially filed by health care Providers who contracted with appellee CCN, a Preferred Provider Organization (PPO). The Providers first filed an action in state court seeking to declare their contracts with PPOs unenforceable. The action was removed to federal court, whereupon the Providers dismissed CNN and other defendants. CCN then filed the instant action seeking a federal declaratory judgment regarding its claims. The complaint also sought damages and attorneys' fees for

breach of contract. The now federal defendant Providers sought a dismissal or stay of the CNN's claims, without requesting arbitration. The district court granted a stay, but it was subsequently lifted, whereupon CNN moved for summary judgment. Only then did the Providers request arbitration.

Relying on *Nicholas*, the court concluded that: "the act of a plaintiff filing suit without asserting an arbitration clause constitutes substantial invocation of the judicial process." 565 F.3d at 904. As for prejudice, it is most easily demonstrated by pretrial activity inconsistent with arbitration, without invoking arbitration. The court took account of the state court litigation filed by the Providers as well as delay in seeking arbitration in CNN's suit.

Prejudice was based on the costs associated with the Providers' invocation of the judicial process, as well as the costs associated with the present suit (\$110,000). After denying arbitration, the district court granted CNN's summary judgment motion, so CNN would be severely prejudiced by having to re-litigate these issues in arbitration. See *Nicholas*, 565 F.3d at 911 ("KBR would be prejudiced by having to re-litigate in the arbitration forum the ERISA pre-emption issue already decided by the district court in its favor"). The district court finding of prejudice was not clearly erroneous, and therefore affirmed.

4. *In re Mirant Corp.*, --- F.3d ----, 2010 WL 2992079 (5th Cir. 2010) ("*Mirant*")

Castex appealed the denial of its motion to compel arbitration of its dispute with MCAR (the successor of Mirant). In response to a suit by MCAR, Castex answered and moved for dismissal of the action. Arbitration was mentioned in a footnote. Two amended complaints followed — in each instance, Castex again sought dismissal while purporting to reserve the right to compel arbitration. Castex then asked the court to bar additional amendments by MCAR, and to dismiss all claims with prejudice. After MCAR filed a third amended complaint, Castex moved for arbitration.

Castex waived the right to compel arbitration because it substantially invoked the judicial process by its motions to dismiss, and waited 18 months before attempting to invoke the arbitration agreement. [If MCAR had sought arbitration, the case for waiver

would be even stronger.] The court noted the strong presumption against waiver, and the burden of proof on the party opposing arbitration, but it had no difficulty finding waiver. As for invocation of the legal process: "A party waives arbitration by seeking a decision on the merits before attempting to arbitrate." *Petroleum Pipe Ams. Corp. v. Jindal Saw, Ltd.*, 575 F.3d 476, 480 (5th Cir 2009). Mentioning arbitration in court documents without asking the court to compel arbitration was insufficient. The court distinguished *Keytrade USA, Inc. v. Ain Te-mouchent M/V*, 404 F.3d 891, 897-98 (5th Cir. 2005), where a party submitted alternative motions for summary disposition or else arbitration.

Prejudice was readily found based on legal expenses of \$265,000 incurred by MCAR in opposing Castex's discovery requests and motions to dismiss. MCAR also suffered prejudice to its legal position because its responses to Castex's motions to dismiss offered up "a full preview of MCAR's evidence and litigation strategy, particularly its arguments and evidence in response to Castex's affirmative defenses."

G. Conclusion

Federal courts of appeals around the country, including the Fifth Circuit, have in recent years evinced a considerably more receptive attitude toward claims that a party has waived the right to have a dispute resolved through arbitration due to invocation of the judicial process. Although the Texas Supreme Court recently has for the first time ever held that a party waived arbitration, it did so by a 5-4 decision on facts that would easily meet the waiver test in virtually every state or federal court. Accordingly, the likelihood that a Texas dispute results in litigation or arbitration when waiver is claimed will depend in important part on whether the claim is heard by a state or a federal court.

* *Steve Huber* is Professor Emeritus at the University of Houston Law Center, and the Co-Editor of *Alternative Resolutions*.

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