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Mary A. Bedikian

Michigan State University College of Law, bedik@law.msu.edu

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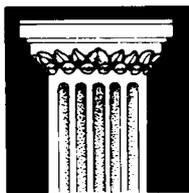
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Overview of Alternative Dispute Resolution Techniques

By Mary A. Bedikian



Commenting on the state of today's legal system, Derek Bok, former President of Harvard Law School, observed:

"The law's response to disputes is cumbersome and expensive even in the best of circumstances. By complicating the rules and insisting on an adversary process conducted by the parties, judges can undermine justice in many types of cases. . . . Devising adequate remedies for this predicament will be extremely difficult . . . An effective program will require not only multiple efforts but a mixture that involves attempts to simplify rules and procedures as well as measures that give greater access to the poor middle class. *Access without simplification will be unjust.*¹ (Emphasis supplied).

This commentary on our system of jurisprudence is not without merit. Most lawyers today realize that litigation is expensive and protracted, frustrating the ultimate goal — justice.

Unfortunately, American society has become entrenched in a litigation mentality, using the courts to resolve disputes that should be settled without judicial intervention. This increase in court congestion and the escalation in legal costs has made alternative methods of dispute resolution (ADR) essential. Today, attorneys must be familiar with various forms of ADR in order to better serve clients. This article will introduce and examine, through a comparative analysis, the most commonly used techniques.



Arbitration

Arbitration involves a third-party neutral who listens to the parties argue the merits of their disputes and imposes a final and binding decision, enforceable in a court of law. Contrasted with litigation, arbitration is less combative and encumbered with fewer formalities and legal precepts, creating a more conducive atmosphere for the expeditious resolution of the conflict.

Among its other advantages:

- The rules of evidence are not strictly enforced, giving parties an opportunity to therapeutically express underlying concerns.
- The proceedings and the results are strictly confidential.²
- The vast majority of cases are disposed of within six to nine months from date of filing, allowing parties to focus on more important business matters.

One of the areas where arbitration has achieved its most noted success is labor relations. As the collective bargaining process developed, arbitration became an accepted part of the grievance procedure, hailed by the U. S. Supreme Court as "the substitute for industrial strife" in their series of landmark decisions, the *Trilogy*.³ Firmly established in the private sector, arbitration eventually spread into public sector labor relations.

Although not as well-documented, arbitration has become an effective alternative to litigation with business persons engaged in domestic as well as international commerce. Viewed as expeditious and less expensive than traditional litigation, standard arbitration clauses have been incorporated into business contracts on a

wide scale basis. In the international business sphere, the use of ADR not only minimizes the strain on the business relationship caused by a dispute, but also saves the time, money and aggravation of litigating in an unfamiliar foreign court. The *U. N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards* was ratified by the United States in 1971 and provides for the courts of the signatory nation to enforce foreign arbitration clauses and awards on the same basis as domestic arbitration proceedings.⁴

Employment-at-Will Arbitration

The common law permits an employer to discharge employees without cause, a corollary to the rule that employees may for any reason separate from the employer without liability.⁵ The notion that the employer or employee may terminate the employment relationship at any time (otherwise known as the "mutuality of obligations" theory) can be altered by express agreement between employer and employee through an individual or collective contract. Employees not protected by the latter must resort to civil litigation to press claims for wrongful or abusive discharge.

The erosion of the employment-at-will doctrine, compelled by judicial attitudes expanding the rights of individual workers, has prompted non-unionized companies to develop systems where employee complaints can be solved at the lowest level.

Responding to the need to resolve employer-employee grievances arising outside the aegis of the collective setting, the American Arbitration Association developed an arbitration model for non-union employees.

The system centers on a streamlined arbitration process following the AAA's "*Expedited Arbitration Rules*." The hearings are deliberately structured to be more informal and less time consuming than traditional arbitration, thereby avoiding some of its pitfalls. To achieve this, the rules feature an abbreviated evidentiary procedure for oral hearings. Post-hearing briefs and a stenographic record of the proceedings are not allowed, enabling the arbitrator to render an award within five days of the close of the hearing.

While expedited proceedings and substantial monetary savings are both important benefits of arbitration, perhaps the most attractive aspect of the practitioner ►

is the final and binding nature of the process. Once the parties have consented to submit their dispute to arbitration, MCLA 600.500(2) provides that the agreement is "enforceable and irrevocable" unless otherwise provided for by law. Most state arbitration statutes, including Michigan's (MCLA 600.5025), also provide for court enforcement of arbitral awards. Judicial review on the merits of the arbitrator's decision, however, is rare.⁶

The current decline in union membership will require employers to address the growing concern about employees' rights. While many states may pass "just cause" mandatory arbitration statutes, it is more likely that employers will elect to revamp their personnel procedures to include a voluntary mediation or arbitration mechanism. The AAA's "Expedited Arbitration Rules" provide a viable vehicle through which workplace disputes can be fairly, expeditiously and inexpensively resolved.

Patent Arbitration

Although arbitration has been used to resolve a growing number of intellectual property disputes, the majority of these cases remain within the mainstream of litigation due to public policy concerns.⁷ This situation is particularly prevalent in the patent field.

While the courts resisted arbitration of patent disputes, it became increasingly clear that expansion of the court system had not kept pace with the increased demand on the court's time spawned by both state and federal legislation.⁸ While patent disputes make up only a small portion of the court docket, their complex and highly technical nature make them both time-consuming and costly.⁹ Coupled in most cases with an absence of questions of legal relevance, adjudication of patent disputes became a burden on an increasingly congested court system.

This situation was addressed in President Reagan's statement in August, 1982 when he signed H.R. 6260 into law, authorizing the arbitration of patent disputes. The President praised arbitration as a means of assisting small businesses and inventors in obtaining patent protection without the inordinately high cost of litigation.

Legislation to use arbitration in patent disputes had been introduced on several occasions but it was not until the passage of section 35 USC 294 (H.R. 6260) that the arbitration of patent disputes became a reality.¹⁰

This Bill provides for voluntary binding arbitration of future and pending disputes over the validity and infringement of patents or patent rights. The significance of this language is that parties to a licensure agreement may not only contract in advance to arbitrate disputes (*in futuro*), but also at the time the dispute actually arises.

The legislation did not simply establish the arbitrability of patent litigation, it also structured the arbitration process to better accommodate this complex area.

Cases are heard by a panel of three arbitrators who are selected from the patent bar. This reduces the time and expenses associated with the traditional adjudication process by obviating the need to brief the panelists on the intricacies of patent law.

The panel is also empowered to rule on any statutory defenses pleaded under section 35 U.S.C. 249. This allows them to preclude any non-meritorious allegations of procedural arbitrability from inhibiting the proceedings.

The award of the arbitration panel must be issued within 60 days from the date the hearing is declared closed, and is enforceable when notice of the award is filed with the Commissioner of Patents and Trademarks.

Unfortunately, few cases have been processed under the "Patent Arbitration Rules." Parties have been slow to realize that in addition to the traditional attributes of arbitration, there are other tangible benefits especially applicable to patent disputes: Single forum resolution, reduced likelihood of damages to continuing business interests and cost maintenance. As the resistance continues to diminish, we can expect to see an increasing number of patent cases resolved through the arbitration process.

Antitrust Arbitration

Historically, arbitration of antitrust disputes has not been permitted by the courts.¹¹

However, in the recent landmark decision, *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc.*,¹² the United States Supreme Court ruled that where a transnational contract contains a broad arbitration clause, antitrust claims are indeed arbitrable, despite the prevailing domestic public policy that the guardians of the public interest are the courts, not arbitrators.

In *Mitsubishi, Soler*, a distributor of Mitsubishi automobiles in Puerto Rico, sought to cancel several shipments of vehicles and transhipped some of his inventory to the continental U.S. Mitsubishi refused to allow this and commenced an action against the dealership for breach of contract to compel arbitration of the dispute. The sales agreement between the parties stipulated that all disputes would be arbitrated under the rules of the Japan Commercial Arbitration Association. Soler denied the allegations and raised several counterclaims under the Sherman Antitrust Act.

The United States Supreme Court granted certiorari to consider two questions:

(1) Whether arbitration of claims asserted under the Sherman Antitrust Act may be compelled under the U.S. Arbitration Act.

(2) Whether arbitration of claims raised under the Sherman Antitrust Act may be compelled under the U.N. Convention.

The United States Supreme Court held that failure to mention the "Sherman Antitrust Act in the arbitration clause does not mean the parties did not contemplate arbitration of all statutory claims."¹³ The Court reiterated the existence of a liberal federal policy favoring arbitration agreements:

"The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."¹⁴

The Court then held that the arbitration clause rendered the antitrust issues arbitrable, even though the antitrust claim was against a Japanese company. This ruling was predicated on the recognition that antitrust arbitration would advance, rather than impair, international commercial interests.

The effects of *Mitsubishi* represent important developments in arbitral jurisprudence: a) Statutory claims can be decided without the aid of judicial review and in a single forum, avoiding multiplicity of proceedings; and b) parties will not be able to raise frivolous threshold arguments regarding antitrust issues to delay resolution of an international or domestic contractual claims subject to arbitration.

Mediation and Conciliation

Often parties do not require the formalities or binding nature of arbitration but need assistance in negotiating and reaching a fair settlement. They can then turn to the more informal methods of mediation and conciliation.

Conciliation is a process where a third-party brings the disputing parties together, encouraging them to

discuss the issues and resolve their problems. The conciliator does not take part in the settlement discussions — his/her primary role is limited to reducing the inflammatory rhetoric and opening channels of communication between the parties. The keystone of conciliation is compromise. In certain sectors, conciliation may be treated as the intermediate stage of dispute resolution, however, it is a process capable of exclusivity. If parties have invoked conciliation, and have failed to produce an agreement, they may proceed to arbitration.

Mediation, often used interchangeably with the term conciliation, requires the more active intervention of an impartial third-party. Unlike an arbitrator, the mediator does not make a decision, rather he/she persuades the disputing parties to reach a mutually acceptable settlement of their differences through clarification, suggestion and advice. This process is purely voluntary, relying extensively (but not exclusively) on the parties own efforts to resolve the dispute.

In certain situations, mediation may be more advantageous than arbitration:

- Arbitration is contractual, mediation is consensual. Parties may have a better chance of bringing in a third-party because the adversarial role of standard arbitration is avoided.
 - Mediation does not require as much preparation.
 - Arbitration may leave scars — mediation has no winners, merely the recognition that a dispute has been settled.
 - Arbitration is not self-executing. Parties must petition a court to get the award confirmed. In mediation, the settlement is by the mutual consent of the parties.
- However, there are some drawbacks to the mediation process:
- Mediation does not work well when one party has an extremely strong contractual claim or defense. ►

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- Although the mediation process is quicker and more economical to invoke, the mediation hearing itself may take longer. Arbitrators can cut off cumulative or repetitive evidence while mediators do not have that power.

- AAA rules permit pre-position statements which lock the parties into actual positions, hindering the flexibility associated with mediation.

Despite these drawbacks, mediation in appropriate cases may prove to be a suitable dispute resolution tool.

Minitrial

Treated primarily as an offshoot of litigation, minitrials represent an attempt on the part of the litigants to conceptualize the outcome of factually complex commercial disputes in an informal context. Ideally, the minitrial encourages an unfiltered version of the facts, crystallization of issues and a more realistic appraisal of the strengths and weaknesses of the parties' positions. The parties jointly select their neutrals who preside over the hearings, and present their case before the panel through counsel consisting of top level executives from each organization. Occasionally, the panel will have a more limited role, only reviewing preliminary documents or sketches of testimony, and rendering an evaluation, not a ruling, of which party will prevail in litigation.

Key procedural elements of the minitrial include:

- 1) Completion of discovery before the information exchange session occurs.
- 2) Preparation of a summary of each party's best case at the information exchange session.
- 3) Presence of a senior executive with unlimited settlement authority.
- 4) Inapplicability of federal or state rules of evidence.

For the minitrial to be successful, it must be invoked at the earliest possible moment, otherwise the dispute

Mary Aslanian-Bedikian is the Michigan Regional Director of the American Arbitration Association. She is a member of the State Bar of Michigan Labor Law Section, and Committee on Arbitration and Alternate Methods of Dispute Resolution, American Bar Association, Industrial Relations Research Association, Society of Professionals in Dispute Resolution, National Association of Women Lawyers and Women Lawyers Association of Michigan — Oakland County Branch. She is a former instructor at the Detroit College of Law, from which she graduated in 1980. Ms. Aslanian-Bedikian has lectured and written extensively on the use of alternate third-party dispute resolution systems.



can become malignant, creating a life of its own.

Robert Coulson, President of the American Arbitration Association, recently observed of the process:

"For trial lawyers, the minitrial has one advantage: It provides an arena within which they can demonstrate their advocacy and exhibit their knowledge of the issues and their enthusiasm for the client's point of view."¹⁵

The increasing complexity of commercial cases should create a greater need for the minitrial, since the system has managed to retain many of the positive aspects of litigation, without the morass of procedural technicalities.

Court-Annexed Arbitration

Increased docket congestion has spawned the adoption of a process which combines the public and private aspects of adjudication. Under court-annexed, or court-administered arbitration, civil suits that involve claims which are at or under an established dollar amount must go through the arbitration process. Cases involving constitutional questions, civil rights issues, title to real estate, or a request for equitable relief, generally do not qualify.

The proceedings before either a court-appointed neutral or panel, functions like arbitration. Unlike regular arbitration, awards in the court-annexed system are only advisory in nature. However, disincentives are built into court-annexed arbitration to "encourage" the litigants to accept the opinion and few cases are appealed.

It is difficult to generalize about the approach different states have taken toward court-annexed arbitration,¹⁶ since each program is designed to meet the individual needs of the jurisdiction.

The Michigan program (MCR 2.403), first initiated in Wayne County in 1971, has gained the widespread respect of the judiciary and has been portrayed as a model for other jurisdictions. The most typical variations among state programs are dollar amounts of the disputes, the method of selecting arbitrators, the composition of the panel and the level at which it is invoked. For example, while most programs — including Michigan's — is initiated at the trial court level, in 1983 South Carolina became the first state to provide for arbitration at the appellate level.

Problematic as it may be to make assumptions concerning court-annexed arbitration, the various programs usually differ from the more traditional type of arbitration in several aspects:

- It is compulsory for cases which meet the court rule threshold.
- Parties are entitled to a trial *de novo* in court.
- The system is administered and supervised by the court.

An annexed arbitration program offers a private, informal and expeditious forum under the auspices of the court, while simultaneously preserving the procedural and substantive right of the litigants. However, there are other considerations in assessing its viability. From the judicial perspective, the primary concern is whether

the benefits of establishing a court-administered program are outweighed by the cost factor. If a large number of cases on the arbitration track go to trial, there is no substantial reduction in the courts' caseload and, correspondingly, no cost savings to justify arbitration.¹⁷

Existing programs, however, seem to indicate that a court-administered arbitration program may create substantial savings. In Pennsylvania for example, one of the first states to develop an adjunct arbitration system, 100,000 cases were disposed of between 1970 and 1980. Of those cases, the appeal rate ranged from eight to 11 percent. Estimated savings in court costs exceeded \$50 million.¹⁸

The results of the documented court-annexed arbitration programs demonstrate the workability of the process. Sanctions imposed for non-acceptance of an award deter the promiscuous exercise of the trial *de novo* mechanism, thus few cases are appealed. Although severe restraints may represent an unconstitutional burden on the right to trial, the majority of the court-administered programs pass muster, thereby serving as a complement to litigation within the justice system.

Conclusion

There is a growing recognition that in order for the rights of Americans, indeed the entire American judicial system, to survive today's overly litigious climate, people must voluntarily resort to alternative methods of litigation.

In response to this change in the "legal marketplace," a vast array of ADR modes have been developed to offer flexible, informal and expeditious proceedings — qualities which are sorely lacking in the traditional court system. The use of these techniques should not be viewed as an attempt to restrict or supplant the formal court system, but as alternative types of forums that give the litigants a choice of where the adjudication of their disputes should occur. Though non-monolithic in their approach, they serve collectively to strengthen the notion that inexpensive and simpler justice can be obtained outside the aegis of the courtroom. ■

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Footnotes

1. D. Bok, *President's Report to the Board of Overseers* (1981-82).
2. Disinterested persons are permitted to attend oral hearings only if all parties agree or the arbitrator determines that justice will be served. With one exception — labor arbitration — the award of the arbitrator is not a matter of public record.
3. The *Trilogy* consisted of three steelworkers union disputes: *United Steelworkers of America v American Mfg. Corp.*, 363 U.S. 564 (1960); *United Steelworkers of America v Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960).
4. See Hoellering, *International Commercial Arbitration: A Peaceful Method of Dispute Settlement*, 40 Arb. J. No. 4, p. 19 (1985); and McMahon, "Implementation of the U.N. Convention on Foreign Arbitral Awards in the U.S." 26 Arb. J. 65 (1971).

5. See *Adair v United States*, 208 U.S. 161 (1908), *Ambrose v Detroit Edison Co.* 367 Mich. 334, (1962) and *Drummay v Henry*, 115 Mich. App. 107 (1982).
6. Arbitration awards are only overturned where (a) the award was procured by corruption, fraud, or other undue means; (b) there was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights; (c) the arbitrator exceeded his or her powers, or (d) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights. *The fact that the relief could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.* MCR 3.602(J)(1). (Emphasis supplied).
7. David, *Patent Arbitration — A Modest Proposal*, 10 Arb. J. 31, 36 (1955).
8. Schlicher, *The Patent Arbitration Law: A New Procedure for Resolving Patent Infringement Disputes*, 40 Arb. J. no 4, pp. 8, 9 (1985).
9. Carmichael, *The Arbitration of Patent Disputes*, 38 Arb. J. No. 1, p. 35 (1983).
10. For a more complete analysis see Bedikian, *Philosophical and Procedural Excursions into the Arbitration World of Patent and Corporate Disputes*, 1983 Det. C. L. Rev. 1053. Goldsmith, *The Arbitration of Patent Disputes*, 34 Arb. J. No. 2, p. 28 (1979).
11. *Overseas Motors, Inc. v Import Motors Ltd., Inc.*, 375 F. Supp. 499 (E.D. Mich. 1974) *aff'd*, 1975-1 Trade Cas. 60340 (6th Cir. 1975).
12. ___U.S.___, 53 USLW 5069 (1985).
13. 53 USLW at 5072-5073.
14. *Id.* at 24.
15. Coulson, *Alternative Dispute Resolution*, 21 Trial 20 (October, 1985).
16. Sixteen States have authorized court-annexed arbitration programs in their general jurisdiction courts. Through November 1984, these states include Alaska, Arizona, California, Connecticut, Delaware, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, and Washington. Jurisdictional amounts vary from a law of \$3,000 in Alaska to \$50,000 in Minnesota.
17. Paper by Eric Green, *The Complete Courthouse*, for the 1985 Chief Justice Earl Warren Conference (May 1985).
18. *A Report on the First National Conference on Court Ordered Arbitration*, Dispute Resolution Forum, Aug. 1985 at 3.

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