ABSTRACTS

[Editor's note: The abstracts section contains summaries of recent articles, comments and notes discussing alternative forms of dispute resolution published in law journals not specializing in ADR.]

Phillip De Ly, ***The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning*** **12 NW. J. INT'L L. & BUS 48-85 (1991).** International arbitration law and its processes have become increasingly complex, creating a need to plan for arbitration. Especially important is the need for planning the place of arbitration. The author contends that the legal considerations for choosing an arbitration site are much more important than are the practical ones. He states that the legal considerations are neutrality and the impact of conflict of laws rules. The author identifies the following as the major factors for determining a place of arbitration: the conflict of laws rule that will apply, the law applicable to the arbitral procedure, the degree of judicial intervention and supervision jurisdiction, and the issue of recognition and enforcement of an award in a "foreign" county. Though noting that the place of arbitration has lost some of its importance in the conflict of laws of international commercial arbitration, the author concludes that the place of arbitration remains relevant for other practical and pragmatic reasons and, thus, should be taken into account when planning for arbitration.

Robert Force & Anthony J. Mavronicolas, ***Two Models of Maritime Dispute Resolution: Litigation and Arbitration,*** **65 TUL. L. REV. 1461-1518 (1991).** Both litigation and arbitration are useful methods of resolving maritime disputes, each with specific advantages and disadvantages. The authors explore the field of maritime arbitration with specific focus on the process utilized in New York. The authors briefly summarize the evolution of maritime arbitration and compare the current form with litigation as a means of resolving maritime disputes. The authors contend that parties to a maritime dispute have three central concerns. These concerns relate to fairness, speed, and cost of the proceedings. Labelling litigation as the "Due Process Model" and arbitration as the "Commercial Efficiency Model," the authors explore whether the proper balance between fairness and efficiency is being struck and whether constitutional due process is being afforded by each model. Specifically, the authors examine the two models' notice procedures, the

opportunity of the parties to be heard, the impartiality and competence of the tribunal, the use of precedent, and the opportunity for appellate review. The authors identify two criticisms of the arbitration procedure - that it has become too time consuming and expensive due to the involvement of litigation-minded lawyers, and that procedures are not in place to assure the proper application of the law. The authors propose procedures to accommodate these concerns and suggest a system of incentives and disincentives to ensure adherence to the procedures.

Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319-42 (1991). The main systemic determinants of success at trial and in pretrial bargaining are contextual and relational. The authors begin their analysis of settlement methods with an overview of the two existing theoretical frameworks for understanding the selection of cases for trial. The first theoretical framework cited by the authors, developed primarily in the work of George Priest and Benjamin Klein, holds that a trial represents a failure in parties' predictions of the behavior of the court. The second theoretical framework, espoused by Robert Mnookin, Lewis Kornhauser, and Robert Cooter, describes trial as a failure of bargaining between parties, namely that strategies on one or both sides have gone awry.

In the next section of their work, the authors point out that the data gathered in their study of 529 civil jury trials in California's state superior courts does not fully corroborate with either of these theories once additional criteria are factored into the analysis. Some of these additional criteria are (1) composition and relations between parties, (2) attorney payment arrangements (flat fee verses contingency), (3) existence or absence of insurance to pay damages and costs of litigation, and (4) settlement authority divisions between insurers and the insured defendant.

Finally, Gross and Syverud set forth some of the propositions stemming from both their empirical data study and the traditional frameworks. Also included are detailed appendices showing data gathered and explanations of variables affecting results.

Coleen C. Higgins, *Interim Measures in Transnational Maritime Arbitration*, 65 TUL. L. REV. 1519-46 (1991). The recognition of the autonomy of maritime arbitral forums does not preclude interrelationships with courts in the imposition and enforcement of interim measures to increase the effectiveness of arbitration. The author examines the nature and objectives of interim measures that are applicable to maritime

arbitration. Examples of interim measures include requiring security deposits, attachment of assets, and injunctions. The author contends that court involvement in imposing and enforcing interim measures is justified, but the costs and benefits must be balanced, and caution must be used in their implementation. She argues, however, that the ultimate goal of preserving the status quo during the arbitration proceedings, coupled with the related objectives of enabling effective decisions and promoting settlement, can frustrated by the use of the interim measures solely as a tactic for delay.

According to the author, some courts refuse to intervene in arbitration proceedings on the grounds that it would be contrary to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), which was adopted by the United States in 1970. She argues that respected commentators and other courts, however, find no incompatibility between court-provided interim measures and arbitration. The author also argues that in addition to interim measure imposed by courts, courts have upheld interim measures imposed by the arbitrators. According to the author, while this power of the arbitrator can be justified by provisions within the agreement to arbitrate, the courts have also been willing to find implied powers of the arbitrator to impose such relief.

In order to provide a comparison to the use of interim measures in the United States, the author examines the approach of French law regarding such measures. She finds that although similar relief is provided in maritime cases in France, the bases of the relief are different. According to the author, the French courts are considered as complementary to the arbitral forums. However, the power of the arbitrator to impose interim measures is derived strictly from contractual provisions in agreements to arbitrate. The author concludes by suggesting that it is still unresolved whether international maritime disputes follow the civil-law approach of France, or the common-law approach of the United States. She contends that the acceptance of the legitimacy of interim measures under both approaches, however, is evidence that such measures will be accepted in all international maritime disputes.

Michael R. Hogan, *Judicial Settlements Conferences: Empowering the Parties to Decide Through Negotiation*, 27 WILLIAMETTE L. REV. 429-61 (1991). Judges can play an important role in settlement conferences, assisting in the efficient and just resolution of disputes. The author illustrates the benefits of settlement conferences with the resolution of a mass accident case in which he was involved. He asserts that the success of the settlement conference resolving the dispute

was attributable in part to the participation of a judge with an understanding of and a commitment to the settlement process. The author notes criticism by some commentators of judges' involvement in settlement conferences, but contends that the judge's role simply reflects changes in the adversarial system itself. The author identifies methods judges can use to facilitate the settlement process, including instilling a sense of trust in the process itself, and serving as a communications link. He asserts that these goals can be achieved only if the judge demonstrates true neutrality and is perceived to be neutral by the parties involved. The author states that judges should limit their power over substantive issues and use their procedural powers. The author cites various precedents for allowing a judge to exercise procedural powers in negotiation settlements. The author notes that courts generally have held that imposing sanctions on parties for failure to act "reasonably" or "in good faith" is an abuse of the judge's discretion. The author concludes that judges can serve an active and important roles in settlement negotiations without impairing their traditional judicial roles.

Bryan M. Johnston & Paul J. Krupin, ***The 1989 Pacific Northwest Timber Compromise: An Environmental Dispute Resolution Case Study of a Successful Battle that May Have Lost the War,*** **27** WILLIAMETTE L. REV. **613-43 (1991).** The authors argue that because of inadequacies inherent in the environmental dispute resolution system, the Northwest Timber Compromise was ineffective in helping to resolve issues related to old-growth forests. However, the basic process which resulted in the Compromise is a useful model for future dispute resolution. The authors begin by offering background information against which the Compromise can be viewed. The authors detail the litigation surrounding the logging industry and environmental protection of the spotted owl. The authors assert that the increasing use of environmental dispute resolution has resulted in a consensus as to what strategies make the process successful. The timber compromise is evaluated by the authors in light of these factors. The authors then review the agreement as passed in its legislative form -- Section 318. According to the authors, this legislative enactment was not well received by environmentalists who, ultimately, used both judicial and administrative means to challenge the law. The authors suggest that the downfall of section 318 came when environmental activists succeeded in listing the northern spotted owl on the list of threatened species protected by the Endangered Species Act. In conclusion, the authors point to specific inadequacies in the dispute resolution process leading to the compromise that eventually resulted in the breakdown of the agreement and suggest that these inadequacies

should be considered in shaping future methods of environmental dispute resolution.

Jane Byeff Korn, *Changing Our Perspective on Arbitration: A Traditional and a Feminist View*, 1991 U. ILL. L. REV. 67-106 (1991). The author begins her two-part analysis of arbitration by establishing that the decision-maker's perspective affects both the substance of the dispute as well as the process by which the dispute is resolved. The author's purpose is to examine the judicial system's view of arbitration from the traditional and a feminist perspectives.

Professor Korn first examines arbitration from the traditional perspective. The author suggests that the judicial system, most importantly the U.S. Supreme Court, has recently changed its view of arbitration. Previously, the author asserts, arbitration and other forms of alternative dispute resolution (A.D.R.) were to be mistrusted. Professor Korn shows that this mistrust was exhibited by the Court's failure to enforce agreements to arbitrate in *Wilko v. Swan* and by the Court's refusal to provide preclusive effect to arbitration decisions in subsequent litigation. Traditional analysis reveals that recently the courts have decided to view arbitration as an adequate process to preserve the rights of each party. Professor Korn predicts that the Court is likely to overrule the *Alexander v. Gardner-Denver* line of cases and provide preclusive effect to arbitration decisions in subsequent litigation.

Secondly, the author undertakes a feminist critique. The author argues that since the law of the United States has been shaped by white males, views different from those advanced by white males are excluded from power, oppressed, marginalized and silenced. The hope of feminist theory is that we can stop rejecting people and ideas based on their difference from the norm and begin to value their perspectives. Professor Korn asserts that although the court deferred in the *Steelworker's Trilogy* to the arbitrator's ability to interpret labor contracts the Court would not cede "that which has traditionally been the court's domain."

Professor Korn concludes that although it is clear that the U.S. Supreme Court has changed its view of arbitration when examined under a traditional approach, feminist analysis shows that it is equally clear that because arbitration is different from litigation it will always be perceived as inferior by the judicial system. She suggests that rather than become more like litigation A.D.R. should be a part of reconstructing our existing dispute resolution system.

Stephen H. Kupperman & George C. Freeman III, *Symposium: Achieving Justice in Arbitration: Selected Topics in Securities Arbitration: Rule 15C2-2, Fraud, Duress, Unconscionability, Waiver, Class Arbitration, Punitive Damages, Rights of Review, and Attorney's Fees and Costs*, 65 TUL. L. REV. 1547-1632 (1991). When an arbitration agreement is entered into, the Federal Arbitration Act ("the Act") provides that such agreements should be treated upon the same footing as other contracts. When coupled with the Act's promotion of a strong federal policy favoring arbitration, the Act requires courts to enforce privately negotiated agreements to arbitrate provided the agreement to arbitrate encompasses the issue in dispute and absent external legal constraints.

The authors apply the aforementioned analysis in the context of federal securities law and trace the progression of federal case law and statutory reform. This article begins with an analysis of the promulgation and subsequent eradication of rule 15c2-2, which, when retroactively applied, caused there to be some confusion as to the enforceability of arbitration clauses entered into upon reliance of this rule. Next, the authors examine the legal progression of contractually based objections for avoidance of the agreement to arbitrate, including fraud, duress, unconscionability and waiver. This article also includes discussions of: under what circumstances class actions should be maintained in the arbitration setting; whether arbitrators may award punitive damages; and the scope, procedure, and standards under which arbitration proceedings may be judicially reviewed.

Charles W. Levesque, *Chapter 13 of the United States-Canada Free Trade Agreement: Has it Created an Open and Effective Government Procurement Dispute Resolution System?*, 12 NW. J. INT'L L. & BUS. 187-215 (1991). The Canadian Procurement Review Board serves the policies of Chapter 13 of the United States-Canada Free Trade Agreement by establishing procedures which create "an open, efficient and transparent dispute settlement process." The author examines the nine decisions made by the Procurement Review Board in 1990. He looks at five areas of the Board's actions: disputes with non-Canadian suppliers, interpretation of Board jurisdiction, remedies imposed, procedural and administrative issues, and the impact of Board decisions. His findings show that in each of the five areas, the Board's actions clarify Chapter 13's broad mandate to liberalize government procurement policies. He argues that the Board has provided the type of protection envisioned by the act, it has clarified the jurisdictional definition of the Free Trade Act, it has been consistent and, therefore, predictable in its remedies, and has

followed the guidelines of Chapter 13. The author questions whether the Board's recommendations have sufficient impact upon the development of the law, since those recommendations do not have the force of law. He notes particularly that contracts are sometimes performed before the Board has made a decision. He then suggests that this problem could be solved by reducing the time in which the Board makes its decision or by reducing the time in which a party may bring a complaint. The author concludes by saying that despite this problem, the Procurement Review Board has established an effective dispute resolution process which serves the policies of the Free Trade Act.

William W. Park, *When the Borrower and Banker are at Odds: The Interaction of Judge and Arbitrator in Transborder Finance*, 65 TUL. L. REV. 1323-63 (1991). An emerging trend in transnational finance is to include an arbitration clause in the credit agreement in order to increase the probability that the loan will be repaid. Park argues that this trend is attributable to four related factors: (1) the difficulty of enforcing foreign judgments; (2) the "act of state" and sovereign immunity defenses; (3) the leverage asserted by developing countries when rescheduling debts and financing projects; and (4) the large damages awarded in "lender liability" suits. The author asserts that arbitral awards may be more enforceable than foreign court judgments because of the lack of effective enforcement procedures in the countries where the debtor's assets are located. Park also notes that this problem is exacerbated when the asset situs is not a party to a reciprocal enforcement-of-judgment treaty. Park further argues that the defenses of "act-of-state" and sovereign immunity effectively preclude recovery by a creditor with an otherwise enforceable judgment. The author attributes judicial recognition of these defenses to the notion of separation of powers -- the courts do not want to interfere with the foreign policy being pursued by the executive branch of a foreign government. Park alleges that the Foreign Sovereign Immunity Act (FSIA) allows creditors to overcome these defenses when an arbitral award is involved. The author next argues that the world debt crisis gave developing countries a substantial amount of power over their creditors, and that arbitration has restored many parties to equal bargaining positions. Park asserts that arbitration is a favorable alternative to the rather large jury awards arising from "lender liability" cases since the element of sympathy is absent from arbitration proceedings. The author concludes arbitration is the preferable route for creditors to take. However, Park warns that the International Monetary Fund Articles of Agreement, which establishes those subjects that are

arbitrable, present an obstacle to this otherwise favorable trend by leading to litigation over the arbitrability of a given subject.

Jay R. Sever, ***The Relaxation of Inarbitrability and Public Policy Checks on U.S. and Foreign Arbitration: Arbitration Out of Control,*** **65 TUL. L. REV. 1661-97 (1991).** With an increasingly lax attitude toward judicial oversight in the international arbitration arena, the strong possibility exists that international arbitration is well on its way to becoming inherently unfair and may find itself abruptly curbed by the courts in order to ensure that it does not become superior to the law. The author contends that the current global trend is to relax inarbitrability and public policy checks on U.S. and foreign arbitration. He discusses the recent developments in the U.S. and four other countries: Argentina, England, France, and Belgium. He concludes that in the past decade, the developing world has seen a significant liberalization of judicial restraints on arbitration. He asserts that nowhere is this idea more pervasive than in the U.S. Here, he explains, a court will not consider reviewing an arbitral award at all unless the arbitrators' legal interpretations show manifest disregard for the law. Where international arbitration is concerned, the author submits that this "manifest disregard" standard is applied with great deference to the arbitral results.

The author's survey of foreign arbitral practices revealed that arbitral autonomy is on the rise. He states that in recent years, an increasingly large number of countries have substantially limited the judiciary in its function as guardian of integrity in the arbitration process. Some of the reasons he cites for countries relaxing these restraints are to lessen the burden on the courts, to encourage international commerce and to attract the lucrative business of international arbitration. Belgium, he notes, has implemented an especially liberal policy wherein parties can no longer challenge the arbitrability of ongoing international arbitration for any reason. This system, he concludes, leaves parties there with absolutely no recourse if their arbitration has been procedurally defective. He fears that the U.S. is headed in the same direction.

The author cautions that nations are rapidly opening the doors to completely autonomous arbitration at an "alarming rate." He urges care to be used in order to prevent arbitration from becoming unfair, undesirable, and even dangerous.