The Ohio State University Moritz College of Law

THE MAYHEW-HITE REPORT
ON DISPUTE RESOLUTION AND THE COURTS

Created by the Program on Dispute Resolution and the Ohio State Journal on Dispute Resolution at the Moritz College of Law and made possible by a deferred gift from Harold E. and Betty W. Hite in honor of Kimberly Hite Mayhew

Welcome

The Ohio State Journal on Dispute Resolution, in collaboration with the Moritz College of Law's Program on Dispute Resolution, is pleased to bring you Volume 14, Issue 2, of the Mayhew-Hite Report on Dispute Resolution and the Courts.

Managing the Risk of Legal Error in Arbitration

Stephen L. Sepinuck

A CAUTIONARY TALE

Arbitrators sometimes make mistakes. Sometimes spectacular mistakes. Consider the case of Martin Evans. He and Craig Nielsen purchased several H&R Block franchises, with each franchise owned by a separate limited liability company. Nielsen provided financing for Evans, who signed a promissory note for the amount due. The note provided that, upon default, Nielsen was authorized "to charge or setoff all sums owing on the debt" against Evans' interests in the LLCs. Evans did default and Nielsen proposed to keep the LLC interests in full satisfaction of the debt. Evans objected and brought an action seeking a declaration that Nielsen's seizure of the LLC interests was ineffective and that Evans remained a member of the LLCs.

The matter was referred to arbitration pursuant to the parties' agreement. The arbitrator ruled that Article 9 of the UCC did not apply because § 9-109(d)(10) generally excludes recoupment and setoff from the scope of the Article.[1] The arbitrator then added that, even if Article 9 did apply and even if Nielsen had failed to comply with § 9-620 by not obtaining Evans' consent to Nielsen's acceptance of the collateral in satisfaction of the debt, the acceptance was effective and Evans' only right was to recover damages for the loss of a surplus.[2]

Both rulings are patently wrong. Setoff is a mechanism for netting mutual *debts*. A security interest, on the other hand, is an interest in personal *property* that secures a debt.[3] Evans' interests in the LLCs were his personal property, not debts. Thus, the note provided for a security interest, not setoff. The fact that the note described Nielsen's right as a "setoff" is immaterial: Article 9 applies to any transaction, "regardless of its form," that creates a security interest.[4] The arbitrator's ruling, if applied generally, would allow people to avoid application of Article 9 simply by labeling the creditor's rights as a "setoff." It is therefore bad policy in addition to being clearly erroneous.

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EDITOR'S CORNER

I'm Kelli Jo Amador, editor of the Mayhew-Hite Report for 2015-16.

The lead article featured in this issue is a reprint of Dean Stephen Sepinuck's article, *Managing the Risk of Legal Error in Arbitration,* originally published by Gonzaga University School of Law's Commercial Law Center in their newsletter, *The Transactional Lawyer*. Dean Sepunick is currently an Associate Dean at the Gonzaga University School of Law. This article covers the types of errors made in arbitration along with their associated risks, and strategies for avoiding such errors.

The article summary, by Mark Zronek, Articles Editor and current member of The Ohio State Journal on Dispute Resolution, focuses on a forthcoming article by Hal Abramson, to be published in The Ohio State Journal on Dispute Resolution, slated for 2016. The article, *Nelson Mandela as Negotiator*: *What can we learn from him?* previews Abramson's examination of the political figure as a negotiator by analyzing Mandela's practices, speeches, relationships, and

March, that ruling was affirmed on appeal.[6] The appellate court noted that the judiciary's role is not to review an arbitrator's award for legal error, but merely to determine whether the arbitrator exceeded his authority. The court then concluded that the decision was not so without foundation as to justify refusing to enforce it based on irrationality or manifest disregard for the law.[7]

For litigators and transactional attorneys alike, this case should be troubling. Arbitration is frequently touted not only as speedier, less expensive, and more confidential than litigation, but also as less prone to error because of the expertise and experience of the arbitrators. But if even flagrant errors of law cannot be corrected, two questions naturally follow: (i) how does the risk of legal error in arbitration differ from the risk in litigation; and (ii) how should transactional attorneys manage that risk to protect their client's interests?

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ARTICLE SUMMARY

Summary of: "Nelson Mandela as Negotiator: What can we learn from him?"

Mark Zronek

In *Nelson Mandela as Negotiator: What can we learn from him?*, Hal Abramson, Professor of Law at the Touro Law Center, New York, examines Mandela as a negotiator from 1985, when he refused an offer to be released from prison if he were to denounce violence, until his release in 1990. Abramson argues that Mandela followed a textbook approach to his negotiations with the South African Nationalist government; therefore, Mandela did not teach us anything new on how to negotiate. Mandela performed as any good negotiator should.

In his introduction, Abramson describes his visit to Johannesburg, which occurred in the wake of Mandela's death. Abramson participated in the remembrance, mourning, and learning that followed Mandela's passing. It was during this visit that Abramson began to examine Mandela as a negotiator. Abramson explains that Mandela faced multiple distributive disputes from 1985 to 1990. For example, Mandela could have either renounced the armed struggle against the Nationalist government or not. His organization, the African National Congress (ANC), could have either been banned or not. While managing these distributive disputes and others, Mandela faced a conflict of interest. Government officials tempted Mandela with his personal freedom if he were to compromise the interests of his country. Mandela was determined to resolve these disputes in his favor without succumbing to his conflict of interest.

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CASE SUMMARY

Supreme Court Oral Argument Summary: DIRECTV, Inc. v. Imburgia

Danny Dubow

A rising question in the field of ADR has been whether the Federal Arbitration Act (FAA) preempts state law on arbitration agreements. The Supreme Court will hopefully create a clear ruling on this issue in *DIRECTV*. Of pertinence to this case, is the FAA's handling of class action arbitration. Under the FAA, a party can draft an arbitration clause into an agreement, forcing any claims between two

treatment of issues as informed through the lens of Abramson's visit to Johannesburg shortly after Mandela's death.

The case summary, by Danny Dubow, Articles Editor and current member of The Ohio State Journal on Dispute Resolution, features *DIRECTV, Inc. v. Imburgia*, United States Supreme Court No. 14-462 *DIRECTTV* addresses the continued conflict between the FAA's preemption of state law and the language of an arbitration agreement requiring the application of a state law, specifically with respect to contract language limiting class action arbitration.

Lastly, the student spotlight highlights recent Moritz graduate Brian Kelso's ('15) award-winning article *Drawing Outside the Lines: Utilizing International Approaches to Resolve Due Process Concerns in Med-Arb*. We appreciate Brian's and the ABA's willingness to reproduce this article in this edition of the Mayhew-Hite Report.

Take a look at the Headline News for ADR news around Moritz, and feel free to email me with any comments or suggestions at amador.22@osu.edu.

STUDENT SPOTLIGHT

Drawing Outside The Lines: Utilizing International Approaches to Resolve Due Process Concerns in Med-Arb*

Brian Kelso**

I. INTRODUCTION

Every country has a unique approach to conflict resolution, and how each

parties to be brought to arbitration—not in the court system. Further, the drafting party can preclude other parties from consolidating claims and attempting to enter into class action arbitration. This stance from the FAA stands in direct conflict with some states and circuit courts, holding that arbitration clauses prohibiting class action arbitration to be unenforceable as unconscionable. California is one of these states.

The parties stayed *DIRECTV* to await the Supreme Court's decision of *AT&T LLC v. Concepcion*, 563 U.S. 333 (2011). In *Concepcion*, the Supreme Court faced the question of whether the FAA preempts state law prohibiting a party from having an arbitration clause precluding class arbitration. AT&T had a contract that compelled those with cell phone contracts to bring claims to arbitration. Plaintiffs brought a claim after AT&T advertised "free" cell phones, but charged tax on the so-called free phones. The plaintiffs attempted to bring a class action claim, and AT&T moved to compel arbitration, where each would have to proceed alone.

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HEADLINE NEWS

Schwartz Lecture with Theodore St. Antoine set for April 5, 2016

At noon on April 5, 2016, esteemed labor arbitrator and University of Michigan Law Professor Emeritus **Theodore St. Antoine** will deliver Moritz's Schwartz Lecture on Dispute Resolution. Professor St. Antoine will discuss current issues in labor arbitration in his address titled "Labor and Employment Arbitration Today: A Midlife Crisis or New Golden Age?" Look for more details in 2016!

The Schwartz Lecture on Dispute Resolution was established in 1992 as a result of the generosity of the late Stanley Schwartz Jr. (a 1947 Moritz College of Law graduate) and the Schwartz family. Each lecture is published in the interdisciplinary Ohio State Journal on Dispute Resolution, in keeping with Mr. Schwartz's interest in the promotion of scholarly publication in the area of dispute resolution.

2015 Lawrence Lecture: Tales of the Master Negotiator, Roy J. Lewicki

Holly B. Cline

At first glance, haggling for vegetables at a market, the culture of the Grand Bazaar in Istanbul, antique clock collecting, minivan shopping, and a conflict with a neighbor about underground plumbing may not appear to have a whole lot in common. At the 2015 Lawrence Lecture "Tales of a Master Negotiator: The Challenges of Moving Theory Into Practice," OSU Fisher College of Business Professor Emeritus **Roy J. Lewicki** shared how these diverse life experiences have helped him become the "master negotiator" that he is today.

On September 22, 2015, more than one-hundred students, faculty and friends of The Ohio State University Moritz College of Law gathered during lunch to hear Professor Lewicki discuss and reflect on his experience as a negotiator and the practical ways in which he has mastered negotiation theory. In setting forth six negotiation lessons—apprentice to the masters; beware of your assumptions; manage (and train) your team; learn when to NOT negotiate; remember to "go to the balcony" and focus on interests; and capitalize on your learned expertise through preparation—Professor Lewicki shared anecdotal and entertaining stories highlighting how he learned these six lessons the "hard way."

nation facilitates that process varies based on their cultural norms.[1] Due to the backlog in the United States court system, there is a need for more expeditious resolution and cost saving approaches. As a result, new hybrid styles of dispute resolution have increased in popularity. One of the most prevalent alternative methods, known as med-arb, allows for a third-party neutral to conduct a mediation with the parties and proceed to binding arbitration only after settlement efforts have failed.[2] While med-arb can provide many unique advantages for the parties, it also creates serious due process concerns during the exchange of confidential information while in caucus. Several countries utilize med-arb as a form of dispute resolution and have chosen to address these due process concerns with varying degrees of success. This paper will analyze these international approaches, and provide some guidance for how the United States can adopt a statutory remedy based on foreign solutions to combat these deficiencies. Part II of this paper gives a brief history and overview of med-arb in the United States. Part III will look at several international approaches to med-arb and how these countries address due process issues when transitioning from mediation to arbitration. Part IV will outline some potential statutory provisions based on foreign approaches to improve med-arb in the United States.

II. OVERVIEW OF MED-ARB IN THE UNITED STATES

Same-neutral med-arb is a two-step approach that traditionally begins with mediation and is followed by binding arbitration only after failing to reach a settlement.[3] The neutral party acts in dual roles as both the mediator and the arbitrator throughout the process.[4] A primary feature of this hybrid approach is that the parties in dispute desire to have a single individual act as both the mediator and arbitrator during the joint session. This request is either through contract or the consent of the parties. As med-arb has developed in the last few decades it has become prevalent in many dispute resolution settings. Parties that employ med-arb cite the benefits of an efficient and cost-saving method that can give parties some finality in their dispute. While there is a place for med- arb as a viable form of dispute resolution in the United States, there remains several defects with the process. The most discouraging is the lack of due process

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Mental Health & Mediation

Cory Martinson

On Friday, October 2, The Ohio Mediation Association held a meeting at The Ohio State University's Moritz College of Law. OSU College of Nursing Emeritus Professor **Jeanne Clement** discussed how to relate to individuals with mental illness during mediation. Professor Clement's accomplishments over a more than fifty year career in the field of psychiatric nursing and mental health are too numerous to name and she has been a part of countless mediations involving individuals with mental illnesses. She facilitated discussion focused on common issues, such as capacity, which mediators may encounter while conducting a mediation involving at least one mentally ill participant.

Professor Clement recognized that while some individuals with mental illnesses must be treated as "special" cases in the mediation setting, she also stressed that many participants with mental illnesses are capable of partaking in the mediation process. She suggested that there are a variety of steps a mediator could take depending on the type, severity, and symptoms of the participant to better prepare the participant for mediation. Thorough mediator preparation will give participants a chance to fruitfully participate in mediation and develop a durable agreement.

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Lawrence Competition a Success—Four Students at Regionals

Between October 5 and 8, 2015, nearly seventy Moritz students participated in the annual Lawrence Negotiation Competition. Special thanks to Moritz's Moot Court Governing Board for arranging competition logistics and to all of the local practitioners who volunteered to judge this year's competition.

Congratulations to the wining team, **Pat Schlembach** & **Trenton Weaver**. **Robert Southers** & **Carol Walden** claimed second place. On November 13 and 14 two teams (**Robert Southers** & **Carol Walden** and **Tyler Blair** & **Tyler Hall**) traveled to Chicago with coach **Luke Fedlam** ('13) where they admirably represented Moritz at the ABA's Midwestern Regional Negotiation Competition.

Truancy Mediation Project Resumes at Local Schools

Moritz's Truancy Mediation Project (TMP) facilitated this year's first truancy mediation cases on November 5 at West High School. TMP law student mediators work with students, parents and school officials with the goals of fostering clearer expectations between schools and families, helping to generate ideas that will help students and their families prioritize school attendance, and, ultimately, reduce absences in schools. West High School—part of the Columbus City School District—has one of the highest truancy rates in the district. TMP student mediators will continue to mediate at West and other local schools throughout the school year.

protections for parties when transitioning from mediation to arbitration. Read more

MORITZ ADR LINKS

Moritz Program on Dispute Resolution

Widely regarded as one of the nation's finest programs in the area of Alternative Dispute Resolution, the Moritz ADR program was established in recognition of the need for future lawyers to be trained in an array of dispute resolution methods beyond litigation, including negotiation, mediation, and arbitration. [**Program Home**]

Ohio State Journal on Dispute Resolution

The *Ohio State Journal on Dispute Resolution* ("*JDR*") is a student-initiated, student-run publication and is the official law journal of the American Bar Association's Section on Dispute Resolution. [***JDR* Home**]

The Caucus

The Caucus is a monthly e-newsletter that highlights the scholarship and accomplishments of the Moritz Program on Dispute Resolution faculty and students. [***The Caucus* Home**]

Indisputably

Indisputably is a blog operated by law professors from around the United States concentrating on issues involving dispute resolution. [**Indisputably Home**]

Bridge Initiative @ Mershon and Moritz

The Bridge Initiative, which combines resources from Moritz College of Law and the Mershon Center for International Securities Studies, is an indispensable resource for those doing research in issues involving dispute resolution. [**Bridge Initiative Home**]

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Stephen L. Sepinuck

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Both rulings are patently wrong. Setoff is a mechanism for netting mutual *debts*. A security interest, on the other hand, is an interest in personal *property* that secures a debt.[3] Evans' interests in the LLCs were his personal property, not debts. Thus, the note provided for a security interest, not setoff. The fact that the note described Nielsen's right as a "setoff" is immaterial: Article 9 applies to any transaction, "regardless of its form," that creates a security interest.[4] The arbitrator's ruling, if applied generally, would allow people to avoid application of Article 9 simply by labeling the creditor's rights as a "setoff." It is therefore bad policy in addition to being clearly erroneous.

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Despite these errors, a Utah trial court confirmed the arbitration decision. In March, that ruling was affirmed on appeal.[6] The appellate court noted that the judiciary's role is not to review an arbitrator's award for legal error, but merely to determine whether the arbitrator exceeded his authority. The court then concluded that the decision was not so without foundation as to justify refusing to enforce it based on irrationality or manifest disregard for the law.[7]

For litigators and transactional attorneys alike, this case should be troubling. Arbitration is frequently touted not only as speedier, less expensive, and more confidential than litigation, but also as less prone to error because of the expertise and experience of the arbitrators. But if even flagrant errors of law cannot be corrected, two questions naturally follow: (i) how does the risk of legal error in arbitration differ from the risk in litigation; and (ii) how should transactional attorneys manage that risk to protect their client's interests?

ASSESSING THE RISK OF ERROR

Quantitative Risk of Error

There are some reasons to believe that the risk of error is lower in arbitration than in litigation. First, arbitrators can be screened and chosen for their expertise in the legal issues in dispute or for their familiarity with the parties' industry. Such was apparently not done in *Evans v. Nielsen*, however. The arbitrator in that case was a professor of clinical law experienced in dispute resolution, but with no apparent expertise in commercial law.

Second, arbitrators have a bit more freedom to confer and consult with third parties before rendering a decision. For example, under the rules of the American Arbitration Association, an arbitrator may obtain help from an associate, a research assistant or other person if the arbitrator informs the parties and the person providing help agrees to be bound by the confidentiality rule that binds the arbitrator.[8] In contrast, a judge may obtain written advice from a disinterested expert on the law only after giving advance notice to the parties and affording them the opportunity both to object and to respond to the advice received.[9] Despite this greater freedom afforded arbitrators, it is not clear that either arbitrators or judges avail themselves of this authority in anything other than an exceptional case.

On the other hand, there is one reason to think that the frequency of error in litigation might be less than in arbitration. Judicial decisions are a matter of public record. No judge likes to be wrong and most take the time to inform themselves about the law that applies to the dispute before them. Presumably, arbitrators too want to get the law correct – indeed their selection as arbitrator in future cases probably depends on their reputation – but the confidentiality of their decisions makes it difficult to assess their competence and correctness. Secrecy might beget sloth.

These countervailing considerations leave us with little guidance; each is merely an untested hypothesis about which process is more prone to an erroneous decision. Moreover, for several reasons, it is unlikely there will ever be a reliable, empirical study of the comparative frequency of error in arbitration and litigation. First, there is the normative or epistemological problem of determining which decisions are wrong. While the arbitrator's decision in *Evans v. Nielsen* was unquestionably wrong, such blatant errors are, one can hope, relatively rare. Instead, many errors will concern matters about which reasonable minds could disagree. It seems likely, therefore, that we could never have widespread consensus on which decisions were in fact erroneous. Second, not all errors are equivalent. Thus, even if we could quantify the rate of error, it is doubtful we could objectively determine the significance of those errors. Finally, too much of each data set is unavailable. Many judicial rulings at the trial court level never lead to a reported decision or even to an unreported decision available on Lexis or Westlaw. Arbitrators are often not required to explain their reasons and the great bulk of arbitrations rulings are confidential. Moreover, there is no way to ensure that any sampling of either data set would be representative.

Qualitative Risk

While the relative quantum of error might never be known, in at least one respect the risk of error in arbitration seems qualitatively different – and greater – than the risk of error in litigation. That is because an arbitrator's decision may be based on notions of justice and equity; it need not be consistent with the law.[10] Thus, for example, an action barred by the applicable statute of limitations might nevertheless lead to an arbitration award.[11]

Indeed, one distinguished commercial lawyer recently reported that he received arbitrator training several years ago from a national arbitration service. During that training, the group of prospective arbitrators was given a hypothetical involving an effort to collect a usurious loan and told that the penalty under applicable law for charging usurious interest was a forfeiture of the right to all interest. When asked how they would rule in the case, approximately one-third stated they would apply the law

and prohibit the lender from recovering any interest. Approximately one-third said they would reduce the interest rate to the highest non-usurious amount. The remaining one-third stated that they would enforce the agreement as written despite the prohibition on usury. The trainers did not indicate that any of these ruling would be improper.

For these reasons, some arbitration decisions will be contrary to what the law requires. This is, of course, also true with respect to litigation,[12] but appellate review of judicial decisions provides an opportunity to correct legal errors by the trial judge. In contrast, judicial review of an arbitration decision – at least in federal court – is restricted to evidence that the award was procured by fraud or corruption, the arbitrator was patently partial to one side, the arbitrator's misconduct prejudiced one party's rights, or the arbitrator exceeded his or her authority.[13] Manifest disregard of the law *might* be an additional basis for a federal court to refuse to enforce an arbitration award, but that point remains in doubt.[14] What is clear is that parties cannot by agreement expand the bases for federal judicial review, such as by authorizing courts to review for any legal error.[15] The risk of legal error is, simply put, "the price of agreeing to arbitration."[16]

It is important to understand, however, that these rules apply only to review in federal court. A few states, such as New Hampshire, provide for a more expansive judicial review of arbitration decisions, including review for plain error.[17] In addition, at least one state S California S authorizes parties to provide in their arbitration agreement for judicial review of arbitration decisions based on legal error.[18] Nevertheless, most states, particularly those that have enacted the Revised Uniform Arbitration Act,[19] do not permit judicial review for legal error, even if the parties provide for it.[20]

STRATEGIES FOR MINIMIZING RISK OF ERROR

If we accept the proposition that the risk of legal error in arbitration is greater than the risk of legal error in litigation – or if we simply want to reduce or manage that risk for whatever reason – there are four different strategies the transactional lawyer could employ.

Require the Arbitrator to Follow the Substantive Law. Contracting parties that expect their counterparts to strictly comply with their contractual and legal duties might choose to circumscribe an arbitrator's otherwise wide discretion to render a decision based on notions of justice and equity. They can do this by including in the agreement a requirement that the arbitrator's decision be based upon and consistent with the parties' legal rights. This should prevent an arbitrator from willfully disregarding the law in favor of some sense of justice or equity. However, it is doubtful that this approach would have any effect on unintentional error, such as apparently occurred in *Evans v. Nielsen*.

Provide for Appeal to a Panel of Arbitrators. The parties can provide for *non-judicial* review of an arbitration decision. For example, they can permit an appeal of the arbitrator's findings of fact and conclusions of law to an appellate arbitrator or to a panel of appellate arbitrators. Indeed, the rules of some arbitration organizations expressly envision an appealsprocess while those of others, such as the AAA, implicitly permit it.[21] If such review is desired, the arbitration clause in the parties' agreement should: (i) require the initial arbitrator to apply the law; (ii) require the initial arbitrator to state in writing the basis for the arbitrator's decision;[22] and specify the grounds for reversal on appeal, the standard of review, and the procedures to be

Provide for Judicial Review. If applicable state law provides for judicial review based on legal error, the parties could require the arbitrator to follow the law and choose the state courts in that state as the exclusive forum for enforcing or challenging an arbitration award. Alternatively, if applicable state law permits parties to expand the scope of judicial review to include legal error, the parties could require the arbitrator to follow the law, provide for judicial review based on legal error, and choose the state courts in that state as the exclusive forum for enforcing or challenging an arbitration award.

Unfortunately, providing for appeal to either a panel of arbitrators or a court undermines two of the principal benefits that

arbitration purports to have: speed and lower cost. The process might still be a bit faster and less expensive than litigation due to less discovery and motion practice, but the parties have to pay the arbitrator whereas they do not pay a judge. Moreover, if the parties arrange for judicial review for legal error, a third principal benefit of arbitration – confidentiality – is also compromised. For these reasons, parties concerned about error might wish to rethink the decision to arbitrate at all.

Reconsider Whether and What to Arbitrate. There are some types of contracts and disputes for which arbitration might be particularly desirable. For example, a business that provides goods or services to consumers might want to require arbitration to avoid class proceedings or juries. Arbitration might also be appropriate with respect to a transaction involving trade secrets or confidential information which, if disclosed or made available publicly, might prompt or affect other litigation.

Finally, some businesses might want to arbitrate to help insulate themselves from – that is, to evade – the law. For example, a client who tends to charge usurious interest in a state with a significant penalty for doing so might wish to provide for mandatory arbitration in the hope that the arbitrator will not be inclined to enforce those penalties. Similarly, a buyer of structured settlement payments might attempt to use arbitration to bypass the statutory procedures designed to protect individuals from this somewhat predatory practice – although one somewhat notorious lender found that this did not work.[23] Of course, evading the law might not be the most legitimate reason to provide for arbitration and an attorney drafting an agreement that skirts the law should carefully consider whether doing so violates applicable ethical rules.[24]

On the other hand, there are several other situations for which parties might wish to avoid arbitration. One pair of arbitration advocates identified three:

1. high stakes ("bet-the-company") disputes, in which the parties may fear an aberrational arbitration award subject only to limited judicial review

2. disputes in which the parties anticipate needing emergency relief, which arbitration is ill-suited to provide; and

3. disputes in areas with clear and well developed law and contract terms, because the industry expertise of arbitrators is of less value and the limited judicial review in arbitration more [25]

Transactional lawyers should carefully consider this list. The first item in particular seems predicated on the risk of legal error in arbitration. More generally though, transactional lawyers should consider that parties enter into written agreements in large measure to detail their legal rights. An agreement to arbitrate is, to some degree, an agreement to surrender those rights and allow an arbitrator to render a decision contrary to the law. Query if that is what the client really wants.

1 Interim Award at 4 (Oct. 31, 2011).
2 *Id.*
3 *See* § 1-201(b)(35).
4 § 9-109(a)(1).
5 *See* § 9-602(a)(1), (b)(2), (c).
6 Evans v. Nielsen, 2015 WL 1325540 (Utah Ct. App. 2015).
7 *Id.* at *3-6.
8 AAA Code of Ethics for Arbitrators in Commercial Disputes, Canon VI(b) (2004).
9 Code of Judicial Conduct for United States Judges, Canon 3(A)(4)(c); ABA Model Code of Judicial Conduct, Rule 9(a)(2).
10 *See* AAA, Commercial Arbitration Rules and Mediation Procedures, Rule 47(a) (2013) ("The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties").

11 Broom Morgan Stanley DW Inc., 236 P.3d 182 (Wash. 2010)

12 *See* Bayer Cropscience LP Texana Rice Mill Ltd, 2015 WL 1474393 (E.D. Mo. 2015) (citing to UCC 9-322(a)(1) as the applicable priority rule but improperly describing it as a first-to-perfect rule, rather than a first-to-file-or-perfect rule, and reaching the wrong result).

13 *See* 9 S.C. § 10(a) (applicable only to federal courts). *See also* Cal. Civ. Pro. § 1286.2 (specifying the exclusive bases for a California court to vacate an arbitration award); General Mills, Inc. v. BCTGM Local 316G, 2014 WL 5100650 (N.D. Ill. 2014) (arbitrator exceeded her authority in case concerning employer's discharge of an employee by awarding damages to the union).

14 *Compare* Stolt-Nielsen A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 672 n.3 (2010) (suggesting that an arbitration decision may be reversed for a manifest disregard of the law, which "requir[es] a showing that the arbitrators knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it"); LaTour v. Citigroup Global Markets, Inc., 544 F. App'x 748 (9th Cir. 2013) (upholding an arbitration award after reviewing it for manifest disregard of the law); Wachovia Sec. LLC v. Brand, 671 F.3d 472, 480-83 (4th Cir. 2012) (concluding after *Stolt-Nielsen* that manifest disregard of the law remains a basis for vacating an arbitration award); Schwartz v. Merrill Lynch & Co., Inc., 665 F.3d 444, 451-52 (2d Cir. 2011) (same); Broom v. Morgan Stanley DW Inc., 236 P.3d 182 (Wash. 2010) (a facial legal error is a basis for vacating an arbitral award because it indicates that the arbitrators exceeded their powers), *with* Med. Shoppe Int'l, Inc. v. Turner Invs., Inc., 614 F.3d 485, 489 (8th Cir. 2010) (manifest disregard of the law is no longer a basis for vacating a arbitration award); Frazier v. CitiFinancial Corp., 604 F.3d 1313, 1324 (11th Cir. 2010) (same); Citigroup Global Mkts., Inc. v. Bacon, 562 F.3d 349, 355 (5th Cir. 2009) (same). *See also* Michael H. LeRoy, *Are Arbitrators Above the Law? The "Manifest Disregard of the Law" Standard*, 52 B.C. LAW REV. 137, 180-81 (2011).

15 *See* Hall Street v. Mattel, Inc., 552 U.S. 576 (2008).

16 Oxford Health Plans LLC Sutter, 133 S. Ct. 2064, 2070-71 (2013).

17 *See, g.*, N.H. Rev. Stat. § 542:8 (permitting courts to correct or modify an award for "plain mistake"). *See also* Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts*, 10 CARDOZO J. CONFLICT RESOL. 509 (2009); Hall Street Assocs. LLC v. Mattel, Inc., 552 U.S. 576, 590 (2008) (suggesting that the scope of judicial review might be different under state law); Schmidt v. UBS Fin. Servs., Inc., 10 N.E.3d 1145 (Mass. Ct. App. 2014) (§ 10 of the FAA does not apply in state court).

18 *See* Cable Connection, v. DIRECTV, Inc., 190 P.3d 586 (Cal. 2008).

19 Eighteen S. jurisdictions have adopted the Revised Uniform Arbitration Act of 2000 (Alaska, Arizona, Arkansas, Colorado, D.C., Florida, Hawaii, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, and Washington). Other states have a different statutory scheme, some modeled after the previous Uniform Arbitration Act. *E.g.*, Del. Code tit. 10, ch. 57.

20 *See, g.*, HL 1, LLC v. Riverwalk, LLC, 15 A.3d 725, 735 n.11 (Me. 2011).

21 *See* AAA, Optional Appellate Arbitration Rules, Rule A-1 (2013); Paul Marrow, *A Practical Approach to Affording Review of Commercial Arbitration Awards: Using an Appellate Arbitrator*, 60 DISP. RES. J. 10 (2005) (referring to rules of the International Institute for Conflict Prevention and Resolution, the Judicial Arbitration and Mediation Services, and the National Arbitration Forum).

22 AAA, Commercial Arbitration Rules and Mediation Procedures, Rule 46(b) (requiring a reasoned award if both parties request one).

23 *See* Symetra Nat'l Life Co. v. Rapid Settlements, Ltd., 2009 WL 1057339 (Tex. Ct. App. 2009) (assignee of payments from structured settlement violated public policy by using arbitration scheme to bypass state statutory requirement of judicial approval for the assignment); Symetra Nat'l Life Ins. Co. v. Rapid Settlements, Ltd., 657 F. Supp. 2d 795 (S.D. Tex. 2009) (factor was permanently enjoined from effectuating a transfer of rights to payment under structured settlements through the use of arbitration rather than by complying with state statutes on transfer); Symetra Life Ins. Co. v. Rapid Settlements, Ltd., 2011 WL 4807901 (S.D. Tex. 2011) (obligor on structured settlements had claim for tortious interference with contractual relations against assignee of structured settlement payments that attempted to use arbitration to avoid state statutes requiring

court approval of the transfers because the assignee had no colorable argument that arbitration could be used in such a manner). *See also* Symetra Life Ins. Co. v. Rapid Settlements, Ltd., 599 F. Supp. 2d 809 (S.D. Tex. 2008); Symetra Life Ins. Co. v. Rapid Settlements, Ltd., 2007 WL 114497 (S.D. Tex. 2007); Fidelity and Guaranty Life Ins. Co. v. Harrod, 2007 WL 2847966 (Md. 2007); R & Q Reinsurance Co. v. Rapid Settlements, Ltd., 2007 WL 2330899 (S.D. Fla. 2007); Symetra Life Ins. Co. v. Rapid Settlements, Ltd., 2007 WL 1643211 (S.D. Tex. 2007); Allstate Settlement Corp. v. Rapid Settlements, Ltd., 2007 WL 1377667 (E.D. Pa. 2007); In re Rapid Settlements, Ltd., 2007 WL 925698 (Tex. Ct. App. 2007) (refusing to order arbitration against issuer of annuity for structured settlement).

24 *See* Y. Ethics Op. 584 (1987); Alaska Ethics Op. 84-4 (both distinguishing between an illegal clause or contract and an unenforceable clause or contract). *See also* Greg M. Duhl, *The Ethics of Contract Drafting*, 14 LEWIS & CLARK L. REV. 989, 1012-17 (2010).

25 Christopher Drahozal and Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?* 25 OHIO STATE J. ON DISP. RESOL. 433, 437(2010).

Mayhew-Hite Report Summary of: “Nelson Mandela as Negotiator: What can we learn from him?”

Mark Zronek

In *Nelson Mandela as Negotiator: What can we learn from him?*, Hal Abramson, Professor of Law at the Touro Law Center, New York, examines Mandela as a negotiator from 1985, when he refused an offer to be released from prison if he were to denounce violence, until his release in 1990. Abramson argues that Mandela followed a textbook approach to his negotiations with the South African Nationalist government; therefore, Mandela did not teach us anything new on how to negotiate. Mandela performed as any good negotiator should.

In his introduction, Abramson describes his visit to Johannesburg, which occurred in the wake of Mandela’s death. Abramson participated in the remembrance, mourning, and learning that followed Mandela’s passing. It was during this visit that Abramson began to examine Mandela as a negotiator. Abramson explains that Mandela faced multiple distributive disputes from 1985 to 1990. For example, Mandela could have either renounced the armed struggle against the Nationalist government or not. His organization, the African National Congress (ANC), could have either been banned or not. While managing these distributive disputes and others, Mandela faced a conflict of interest. Government officials tempted Mandela with his personal freedom if he were to compromise the interests of his country. Mandela was determined to resolve these disputes in his favor without succumbing to his conflict of interest.

Abramson later analyses Mandela’s first speech as a freeman, which reveals his approach to negotiating freedom for South Africa and himself. The first sentence of Mandela’s speech called for the continuation of the armed struggle against the Nationalist government. Mandela’s choice to continue the armed struggle contrasts with the choices of Mahatma Gandhi and Martin Luther King, Jr. Abramson explains, “Mandela understood one of the basic tenets of negotiations: your negotiating power is fueled by the strength of your alternative to settlement, known as the BATNAs (Best Alternative to a Negotiated Agreement) of the parties.”[1] Mandela endorsed the use of violence because this weakened the Government’s BATNA. The Government could either negotiate with the ANC or suffer the consequences of continued armed struggle. Mandela understood the limits of violence. Violence would not defeat the apartheid, but negotiations would. Mandela stated, “We express the hope that a climate conducive to a negotiated settlement will be created soon so that there may no longer be the need for the armed struggle.”[2] Apart from highlighting violence as a tactic to weaken the Government’s BATNA, Abramson also notes the importance of the anti-apartheid leaders’ and sympathizers’ non-violent actions in weakening the Government’s BATNA.

Abramson goes on to describe Mandela’s negotiation style in terms of his choice of good practices, tactics, and tricks. Good practices are likely to produce the best negotiated outcome. A few examples of good practices, provided by Abramson, are: asserting interests rather than positions, acting ethically and fairly, and building trusting relationships.[3] Negotiators who assert interests are more likely to create multiple solutions of which some might be acceptable or tolerable to the other side. Tactics are viewed as generally accepted practices and because of this, their use does not undermine the relationship of the negotiators. Tricks are practices that are unethical and if their use is discovered, they can undermine the relationship of the negotiators. But, if tricks are properly used, they can be effective. Abramson notes that there is no agreed upon list of tactics or tricks.

Mandela employed several strategies that would be considered good practices. Mandela advocated for his primary interest, a democratic, nonracial, and unitary South Africa, in the face of temptations to compromise this primary interest for a lesser interest, his release from prison. Mandela refused President Botha’s conditional offer: if Mandela would publicly reject violence then he would release him from jail. Mandela had been in prison for 21 years, but still refused this offer because it would not satisfy his primary interest: freedom for everyone. Mandela understood his interests and their priority. Like any skilled negotiator, Mandela relentlessly advocated for his primary interest.

Mandela was also incredibly skilled at understanding the other side’s interests and satisfying them. White South Africans were afraid of black South African domination. Mandela quelled these fears. Mandela repeatedly ensured the Government that, “[T]he majority would need the minority. . . .”[4] and that, “driv[ing] the whites away would devastate the nation.”[5] Mandela stated, “Any man or woman who abandons apartheid will be embraced in our struggle for a democratic, nonracial South Africa….”[6]

Mandela also cultivated relationships with the other side regardless of their past grievances and animosity. Mandela explained that the problem was not either party, but instead the system of repression. Mandela praised the Nationalist President, Frederik de Klerk, for going “further than any other Nationalist president in taking real steps to normalize the situation. . . .”[7] Mandela treated the other side with respect and negotiated with their agents in joint sessions. This allowed for direct communication between the parties. Direct communication and personal interaction can open up opportunities for relationship building. Mandela was also a good listener and willing to accept partial apologies from the other side. These practices also helped improve relationships.

Apart from these good practices, Abramson notes at least one instance in which Mandela misrepresented his actions with the government to the people of South Africa. Mandela held secret talks with the government where he discussed the “basic demands of the struggle” and “entered into negotiations about the future of [the] country.”[8] However, Mandela told the people that he had not begun discussing these matters with the government. Abramson argues, however, that this misrepresentation was not a trick. Mandela justified these misrepresentations by stating they were for the benefit of the ANC and its members. Although Abramson is willing to argue these actions were not a trick, he is also not willing to categorize them as a good practices. These misrepresentations risked undermining the people’s trust in Mandela and the negotiation process. Thus, this misrepresentation was a tactic.

Subsequently, Abramson explains that Mandela achieved an impressive negotiated outcome with the government when one considers all of the distributive disputes that he resolved in his favor. Mandela made not one single concession to the government. However, Abramson notes that despite the government capitulating on all of the disputes, it still satisfied its own significant interests. The normalizing of relations between the majority and minority populations would allow South Africa to become governable and to reenter the regional and global communities. The government was also able to take the moral high ground by eliminating violence and its justifications for violence. The outcome also provided the government with a black leader who it could negotiate with.

Abramson concludes that Mandela did nothing new. He negotiated as any good negotiator should. “Mandela uncompromisingly advocated interests, convincingly addressed the other side’s interests, helped shape an unattractive alternative to negotiations for the Nationalist government, and consistently engaged in good negotiation practices with some tactics.”[9] Although Mandela did not teach us anything new about how to negotiate, he did teach us the effectiveness of his negotiation practices.

[1] *Id.*

[2] *Id.* (quoting Padraig O’Malley*, Remarks By Nelson Mandela In Cape Town On February 11, 1990 After His Release from Victor Verster*, Nelson Mandela Centre of Memory, https://www.nelsonmandela.org/omalley/index.php/site/q/03lv03445/04lv04015/05lv04154/06lv04191.htm (last visited July 8, 2015).

[3] *Id.*

[4] *Id.* (quoting Nelson Mandela, Long Walk to Freedom: The Autobiography of Nelson Mandela, 539 (1995)).

[5] *Id.* (quoting Mandela, *supra* note 5, at 568-69).

[6] *Id.*

[7] *Id*. (quoting O’Malley, *supra* note 3).

[8] *Id.* (quoting O’Malley, *supra* note 3).

[9] *Id.*

Mayhew-Hite Report Supreme Court Oral Argument Summary: DIRECTV, Inc. v. Imburgia

Danny Dubow

A rising question in the field of ADR has been whether the Federal Arbitration Act (FAA) preempts state law on arbitration agreements. The Supreme Court will hopefully create a clear ruling on this issue in *DIRECTV*. Of pertinence to this case, is the FAA's handling of class action arbitration. Under the FAA, a party can draft an arbitration clause into an agreement, forcing any claims between two parties to be brought to arbitration—not in the court system. Further, the drafting party can preclude other parties from consolidating claims and attempting to enter into class action arbitration. This stance from the FAA stands in direct conflict with some states and circuit courts, holding that arbitration clauses prohibiting class action arbitration to be unenforceable as unconscionable. California is one of these states.

The parties stayed *DIRECTV* to await the Supreme Court's decision of *AT&T LLC v. Concepcion*, 563 U.S. 333 (2011). In *Concepcion*, the Supreme Court faced the question of whether the FAA preempts state law prohibiting a party from having an arbitration clause precluding class arbitration. AT&T had a contract that compelled those with cell phone contracts to bring claims to arbitration. Plaintiffs brought a claim after AT&T advertised "free" cell phones, but charged tax on the so-called free phones. The plaintiffs attempted to bring a class action claim, and AT&T moved to compel arbitration, where each would have to proceed alone.

The Ninth Circuit found that state law preempted federal law on this matter. Thus, because California holds arbitration clauses prohibiting class arbitration to be unconscionable, the Ninth Circuit found that this clause was also unconscionable, and the plaintiffs could proceed in court. However, the Supreme Court reversed this ruling. According to the Court, holding the way the Ninth Circuit did would be inconsistent with Congress's intent in passing the FAA. This would effectively render the arbitration clause useless, when the parties both agreed to arbitrate rather than proceed in court. Further, class action arbitration frustrates the process of arbitration itself, removing many of the benefits of arbitration over the court system (formality, costs, and the like). Congress passed the FAA intending to protect arbitration clauses, as many parties attempt to back out of arbitration even after signing such agreements.

DIRECTV differentiates from *Concepcion* due to an additional clause referencing state law. One of the provisions in DIRECTV's contract states: "If, however, the law of your state would find the agreement to dispense with class arbitration procedures unenforceable, then [the entire section requiring arbitration] is unenforceable." The arbitration clause in *Concepcion* did not mention state law—California attempted to apply state law to the contract. Thus, the issue presented in *DIRECTV* is whether a clause referencing state law in the arbitration clause requires the state law to preempt the FAA.

During the oral argument,[1] DIRECTV argued that the clause referencing state law further underscores the importance of precluding class actions, and proceeding to arbitration. Because the contract written by DIRECTV preceded the Supreme Court's decision in *Concepcion*, the contract was written in this fashion to acknowledge that state courts were holding arbitration clauses prohibiting class action to be unenforceable. The provision was written to acknowledge this problem, not to say that state law would apply to the proceeding instead of the FAA. Further, congress passed the FAA to resolve ambiguities in arbitration clauses in favor of compelling the parties to arbitrate. *Volt Inf. Sciences v. Stanford Univ.*, 489 U.S. 468 (1989).

The parties contracted together to arbitrate future claims, and reading the clause allowing state law to preempt the FAA would lead to unenforceability. This would mean that the parties entered a contract that both knew was invalid and unenforceable. Both parties have an incentive to enter into a contract that is valid. Finally, the contract only included the reference to state law to delineate that the FAA would prevail, and that state law would not govern the arbitration clause. If the drafters of the contract intended state law to prevail over the FAA, they would have included more information suggesting this, rather than stating that the FAA should prevail.

The respondents in the oral argument expressed fear over the broad presumption in favor of arbitration. The respondents argued that plaintiffs did not offer a rule that would keep the court from always deciding in favor of arbitration. Further, the respondents argued that whether the arbitration agreement is enforceable is a question left for the state to decide—not to be determined by federal law. According to the respondents, parties have only agreed to arbitrate when sufficient evidence proves that they intended to arbitrate under the state law in which they entered a contract. As the consumers entered into the contracts in California, and California law does not allow provisions prohibiting class arbitration, the California consumers then did not agree to arbitrate. Further, respondents pointed to the fact that DIRECTV changed the wording in the contract during the *Concepcion* case, to strengthen the language that the FAA would be controlling. Also, DIRECTV filed an amicus brief for *Concepcion* stating that they would not arbitrate with any consumers in California due to the law in California being against arbitration. The respondents suggested that this meant DIRECTV understood that consumers in California did not agree to arbitrate in their state.

1 A transcript of the oral argument can be found at *DIRECTV, INC. v. Imburgia*, Oyez.org, https://apps.oyez.org/player/#/roberts6/oral_argument_audio/23999 (last visited Nov. 25, 2015).

Mayhew-Hite Report 2015 Lawrence Lecture: Tales of the Master Negotiator, Roy J. Lewicki

Holly B. Cline

At first glance, haggling for vegetables at a market, the culture of the Grand Bazaar in Istanbul, antique clock collecting, minivan shopping, and a conflict with a neighbor about underground plumbing may not appear to have a whole lot in common. At the 2015 Lawrence Lecture "Tales of a Master Negotiator: The Challenges of Moving Theory Into Practice," OSU Fisher College of Business Professor Emeritus **Roy J. Lewicki** shared how these diverse life experiences have helped him become the "master negotiator" that he is today.

On September 22, 2015, more than one-hundred students, faculty and friends of The Ohio State University Moritz College of Law gathered during lunch to hear Professor Lewicki discuss and reflect on his experience as a negotiator and the practical ways in which he has mastered negotiation theory. In setting forth six negotiation lessons—apprentice to the masters; beware of your assumptions; manage (and train) your team; learn when to NOT negotiate; remember to "go to the balcony" and focus on interests; and capitalize on your learned expertise through preparation—Professor Lewicki shared anecdotal and entertaining stories highlighting how he learned these six lessons the "hard way."

In his lecture, Professor Lewicki advised students interested in Mortiz's Program on Dispute Resolution that when trying to buy a car or haggling over the price of vegetables in the marketplace, competitive behavior carries little potential downside because no long-term relationship is at stake. To get the best agreement in such exchanges, Professor Lewicki instructed that one should expect a lot, give up little, and show you are willing to walk away.

However, in other negotiation situations, such as visiting the Grand Bazaar in Istanbul or resolving a dispute with a neighbor, hospitable and cooperative behavior is necessary to build a good reputation that, together with trust, is critical to effective negotiations and the maintenance and development of strong relationships.

During his lecture, Professor Lewicki explained that inside of Istanbul's Grand Bazaar, where the prices of items are not posted, the store owner defers immediate business with hospitality—often by sharing a nice cup of tea and talking with the customer. The shop owner makes an effort to build a relationship with the customer, and, once a customer expresses interest in an item, the shop owner can discuss the terms of sale as the customer's friend. Thus, Professor Lewicki concluded, immediately employing a competitive haggling strategy will likely result in an unsuccessful negotiation—and expensive price—for the customer.

After sharing his experience at the Grand Bazaar in Istanbul, Professor Lewicki advised students to explore the other party's perspective with questions designed to reveal his or her needs and interests, noting that it is "very much to your advantage to understand what the other party really wants." He also recommended focusing on the other side's strategy and tactics, pointing out that "although it is unlikely the other party will reveal his or her strategy outright—particularly if he or she is intending to use distributive tactics—you can infer this information."[1]

Professor Lewicki's lecture was presented by The Ohio State University Moritz College of Law Program on Dispute Resolution, and the lecture's namesake, James K.L. Lawrence '65, a member with Frost Brown Todd in Cincinnati who has practiced labor-relations and employment law for more than 30 years.

[1] *See* Lewicki, Roy J., David M. Saunders, and John W. Minton, *Essentials of Negotiation*, 6th ed., (New York: McGraw-Hill/Irwin, 2013).

Mayhew-Hite Report Mental Health & Mediation

Cory Martinson

On Friday, October 2, The Ohio Mediation Association held a meeting at The Ohio State University's Moritz College of Law. OSU College of Nursing Emeritus Professor **Jeanne Clement** discussed how to relate to individuals with mental illness during mediation. Professor Clement's accomplishments over a more than fifty year career in the field of psychiatric nursing and mental health are too numerous to name and she has been a part of countless mediations involving individuals with mental illnesses. She facilitated discussion focused on common issues, such as capacity, which mediators may encounter while conducting a mediation involving at least one mentally ill participant.

Professor Clement recognized that while some individuals with mental illnesses must be treated as "special" cases in the mediation setting, she also stressed that many participants with mental illnesses are capable of partaking in the mediation process. She suggested that there are a variety of steps a mediator could take depending on the type, severity, and symptoms of the participant to better prepare the participant for mediation. Thorough mediator preparation will give participants a chance to fruitfully participate in mediation and develop a durable agreement.

In addition to the issue of capacity, mediators may encounter participants with mental illness who need help maintaining focus, listening, communicating, or understanding the material. Mediators may also fear that any agreement, if reached, may not be followed. However, these issues are not unique to participants with mental illnesses. More importantly, in many cases, all of these issues can be abetted—if not remedied—through proper preparation on behalf of all parties involved in the mediation, including rigorous preparation and patience on the mediator's behalf.

Professor Clement stressed that mediators should not allow the stigmas often associated with mental illness to lead to a presumption that participants with a mental illness will not be successful in mediation. Her message reinforced the notion that mediation is a process designed to give all participants a voice. While mediation involving one or more participants who are dealing with the effects of a mental illness may require additional patience and preparation, in most cases, this should not prohibit a mediator's ability to facilitate the process.

Mayhew-Hite Report Drawing Outside The Lines: Utilizing International Approaches to Resolve Due Process Concerns in Med-Arb*

Brian Kelso**

I. INTRODUCTION

Every country has a unique approach to conflict resolution, and how each nation facilitates that process varies based on their cultural norms.[1] Due to the backlog in the United States court system, there is a need for more expeditious resolution and cost saving approaches. As a result, new hybrid styles of dispute resolution have increased in popularity. One of the most prevalent alternative methods, known as med-arb, allows for a third-party neutral to conduct a mediation with the parties and proceed to binding arbitration only after settlement efforts have failed.[2] While med-arb can provide many unique advantages for the parties, it also creates serious due process concerns during the exchange of confidential information while in caucus.

Several countries utilize med-arb as a form of dispute resolution and have chosen to address these due process concerns with varying degrees of success. This paper will analyze these international approaches, and provide some guidance for how the United States can adopt a statutory remedy based on foreign solutions to combat these deficiencies. Part II of this paper gives a brief history and overview of med-arb in the United States. Part III will look at several international approaches to med-arb and how these countries address due process issues when transitioning from mediation to arbitration. Part IV will outline some potential statutory provisions based on foreign approaches to improve med-arb in the United States.

II. OVERVIEW OF MED-ARB IN THE UNITED STATES

Same-neutral med-arb is a two-step approach that traditionally begins with mediation and is followed by binding arbitration only after failing to reach a settlement.[3] The neutral party acts in dual roles as both the mediator and the arbitrator throughout the process.[4] A primary feature of this hybrid approach is that the parties in dispute desire to have a single individual act as both the mediator and arbitrator during the joint session. This request is either through contract or the consent of the parties.

As med-arb has developed in the last few decades it has become prevalent in many dispute resolution settings. Parties that employ med-arb cite the benefits of an efficient and cost- saving method that can give parties some finality in their dispute. While there is a place for med- arb as a viable form of dispute resolution in the United States, there remains several defects with the process. The most discouraging is the lack of due process protections for parties when transitioning from mediation to arbitration.

A. *History and Application*

When President Franklin D. Roosevelt created the National War Labor Board ("NWLB") in 1942 the United States began its first foray into med-arb.[5]5 While the process was not identified as med-arb, it followed the same basic structure. These NWLB proceedings were essentially mediation and arbitration that sought "equitable rather than legally correct conclusions."[6] The formal start of med-arb is attributed to Sam and John Kagel in the 1970s and was originally used in nursing strikes.[7]

The acceptance of med-arb as a dispute resolution process has evolved significantly in the last 50 years. During the early 20th century the use of a neutral as both an arbitrator and mediator was considered a "cardinal sin" in the alternative dispute resolution ("ADR") community.[8] The tide began to turn in the last few decades as more practitioners began to see the merits of med-arb in the field.[9] Today, the American Arbitration Association ("AAA") and Judicial Arbitration and Mediation Services ("JAMS") do not recommend the use of single neutral med-arb, except in unique circumstances. However, both organizations will provide assistance with the hybrid process at the parties' request.[10] While far from universally accepted,[11] med-arb has grown significantly and has created a prominent niche in the ADR field.[12] While it is employed in a number of settings, the four primary areas where med-arb is utilized are corporate,[13] labor, international commercial arbitration, and family law disputes.[14] While some scholars have espoused the benefits of med-arb for smaller claims it is also prominent in larger international disputes.[15] As alternative dispute resolution systems have grown in the United States practitioners have come around to the benefits of conducting both proceedings in a joint session.

B. *Advantages of Med-Arb.*

Med-arb is designed for the parties to benefit from the procedural advantages of both mediation and arbitration.[16] The process is often praised for the efficiency, flexibility, and finality it provides parties in dispute. First, the efficiency of med-arb is one of the reasons why several fields commonly utilize the process[17] and why some authors have cited efficiency as a reason other unique fields would benefit from using med-arb.[18] One of the primary explanations for the efficiency of med-arb is the need for only one proceeding.[19] By eliminating the hassle of changing locations and arranging a second time to conduct the arbitration the parties can shift from mediation to arbitration during a single hearing. Further, by removing the need for a second neutral the parties save time and the frustration of briefing a new arbitrator on background information and pre-hearing material.

Finally, an efficient resolution can help preserve the relationship of the parties.[20] As evidenced in countless cases stuck in protracted litigation the longer the dispute goes the more strain is put on the parties' relationship. By shifting from mediation to arbitration in one proceeding, parties that have an interest in preserving their affiliation with the other side can reduce the risk of damaging their long-term relationship. While the vetting process for employing a neutral in this dual role could take more effort, it still provides a far more efficient method compared to hiring the mediator and arbitrator separately.[21]

In addition to efficiency, the flexibility of med-arb is a major advantage. While the traditional med-arb approach has mediation followed by a full arbitration proceeding, parties can request breaks, or alternatively have an arbitration proceeding prior to the mediation.[22] Depending on the design of the process the neutral can revert back to the role of mediator to address an issue during the arbitration.[23] The ability to shape the process that works best with the parties' needs is a major advantage for finding a successful resolution.

The third major benefit of med-arb is the finality of the process. The parties can begin the proceeding with the knowledge that they will receive a final resolution to the dispute. This can vary from a settlement during the initial mediation phase to resolving the dispute through an arbitration award.[24] Regardless of how the final decision is made the parties can walk out of the hearing with a binding and enforceable agreement.[25] As opposed to a non-binding procedure like mediation, the conclusiveness of med-arb creates a great incentive for both parties to settle early in order to avoid the risk of an uncertain

arbitration decision.[26] The finality of med-arb can save the parties time and resources in protracted litigation.

C. Shortcoming of the Current Process

While it is evident that med-arb has a viable role as an alternative dispute resolution method there are several problems in how the process is applied in the United States. Med-arb can often seem coercive if the parties feel pressured to find a resolution. Additionally, given the merging of processes there is some confusion in the U.S. on the actual appealability of med-arb claims. Finally, the most serious concern is the due process and confidentiality risks from caucusing during mediation and then utilizing *ex parte* information in the arbitration award.

One of the weaknesses commonly cited by critics of med-arb is that participants feel coerced to reach an agreement. While the finality of the process is a major advantage, parties are at risk for feeling forced into an agreement to settle when it is not in their best interests. Critics argue that this coercive effect impedes the parties from finding a settlement that will create a true and lasting agreement.[27] This coercive approach can detract from the voluntary nature of alternative forms of resolution.

Another major deficiency is appealability. While mediated agreements are enforceable in the courts, the settlement itself is not necessarily covered under the Federal Arbitration Act. Given the unique features of med-arb it is arguably materially distinct from arbitration and is not designed for appeal under the FAA in its current form.[28] Neither the arbitration nor mediation methods of "appeal" are designed for this hybrid process as many of the issues on appeal depend on what stage the settlement was reached.[29] The courts have created remedies for confidentiality violations in adjudications that follow pure mediation. For example, California's evidence code requires vacating a decision if there is a reference during the proceeding to discussions from mediation that impacts the "substantial rights" of the parties.[30] It is unclear if these remedies extend to med-arb.

The court in *Advance Bodycare* found that the procedure of the alternative method controlled how the court would consider the process, not the title. "Normally labels do not control; indeed, if an agreement specifies in detail a dispute resolution procedure, which it calls 'mediation' (or anything else) but which is, in substance, FAA 'arbitration,' *substance controls over title*."[31] So if the parties create a med-arb provision, a court could interpret that process as materially distinct from arbitration under the FAA. Since med-arb is not the typical arbitration structure it is a fair inference to think that a future court could reject the appeal of a med-arb result under the FAA procedures.

While coercion and appealability are serious shortcomings of med-arb the most gaping deficiency is a lack of due process for the parties. The most obvious example of this is using information exchanged during caucus[32] as "evidence" in the final award.[33] The use of *ex parte* communications impacts both the objectivity of the neutral and the open flow of information between parties in the dispute.[34] The lack of procedural protections in med-arb, found in litigation or arbitration, impacts the reliability of the information during the proceeding.

If a neutral hears information in the caucus that is later used as the basis of his ruling during the arbitration phase it creates a number of confidentiality issues. First, it prevents the outside party from responding to the dispositive information. Since the med-arbiter is obligated to keep the communication private the other side has no opportunity to dispute the claim. Additionally, a party that thinks that the other side will tell the neutral false or misleading information in caucus could be hesitant to fully participate, or at the very least this would increase their anxiety during the process.

The evidentiary system in the United States puts a special importance on confidentiality during settlement. This emphasis is apparent in our evidentiary protections[35] as well as through state regulations.[36] The Uniform Mediation Act forbids a mediator from disclosing statements from mediation to a future judge or arbitrator that will rule on the dispute.[37] However, when the

neutral conducts both proceedings this protection is nonexistent. The party that did not participate in the caucus is left to wonder how that private information will impact the neutral's decision.[38] This violates the parties' trust that the communication will remain confidential. While awards that are based on these confidential communications can be vacated under FAA §10 this is difficult to identify let alone demonstrate to a judge.[39] In caucus, while confidentiality helps to make participants feel comfortable in discussions with the neutral, it unfairly excludes the party that was not privy to the communication.

Not only is the neutral privy to the parties' confidential information, but also their interests. Parties in caucus, with the belief that the communication will remain confidential, often disclose their bottom-line figures. While it is easy to say the med-arbiter will simply not use this information in fashioning the award this seems overly idealistic and ignores the simple reality that judges or arbitrators will inevitably use all the resources and information to craft their decision. Requiring them to ignore information from caucus is not a realistic solution.[40] The arbitrator, knowing what each party cares about from their private discussion in caucus, can create an award using information that was outside the arbitration hearing.[41] This could create a "chilling effect on participants" and negates many of the advantages of med-arb.[42] As a result, the parties may withhold any weaknesses or concerns with their position believing that the med-arbiter will use it later in their decision.

The parties could go as far as to present false or misleading information during caucus. Statements in mediation are not under oath and provide no real protections against dishonesty.[43] Denying the non-producing party a realistic opportunity to rebut material statements creates a major disadvantage for reaching a fair resolution. Confidentiality in caucus, in this context, is actually a negative because it prevents the excluded party from knowing what information the med-arbiter is considering in their arbitration award. While in the criminal context evidence that is deemed "poisoned" by how it was obtained is excluded from the jury, med-arb does not have a similar protection.[44] While confidentiality is needed to improve the freedom for parties to communicate, it also gives them the freedom to stretch the truth. The lack of a proper shield against private disclosures leaves the possibility for a one-sided dialogue during caucus that could change the outcome of a case.[45]

The confidentiality dilemma creates its own ethical predicament for neutrals. This is evident in the distinctions in the two roles of the med-arbiter. "The primary role of an arbitrator is to assess the merits of the parties' claims and to make a decision, while a mediator mainly facilitates communication between the parties and assists them in reaching a settlement."[46] The distinct characteristics of these two roles create a difficult ethical dilemma once the parties shift from mediation to arbitration.

The risk of this confidentiality concern was evident in the Ohio case *Bowden v. Weikert*.[47] The disputes arose from the sale of an insurance business where the contract called for the med- arbiter to first try and resolve the case through mediation.[48] The parties drafted an agreement, but the specific terms were never finalized and were eventually rejected during mediation.[49] Once the mediation broke down, the med-arbiter used that agreement as the basis of his award and included some other terms from industry norms.[50]

The award was challenged, and the court vacated the arbitrator's ruling finding that the neutral's use of the prior agreement was a communication that was to remain confidential during the arbitration phase.[51] The court found that the med-arbiter was only allowed to rely on the original contract and other evidence presented during the arbitration hearing. This case demonstrates the court's concern for confidentiality and informed consent violations in med- arb.[52] While the court caught this particular violation, there is no guarantee that future parties will be so fortunate. These due process deficiencies leave a serious gap in the fundamental protections of the parties.

III. INTERNATIONAL APPROACHES TO CONFIDENTIALITY IN MED-ARB

While med-arb has proved a useful resolution process in the United States there remain serious due process concerns. Other

countries have adopted different responses to remedy this deficiency by how they structure their med-arb systems. While some international settings forbid the neutral to work as a mediator and an arbitrator,[53] others include statutory protections that allow both processes to operate at maximum capacity. Countries like China and Germany incorporate mediation and settlement discussions into their arbitration proceedings. This allows for a more efficient resolution, but fails to provide adequate protections for the parties. Australia has provided a progressive model that ensures strong statutory safeguards for parties that ensure their due process rights are protected. Analyzing how these countries have addressed these issues could greatly benefit med-arb in the United States as it continues to grow in popularity.

A. *Med-Arb In China*

While China and the United States both share strong economic and military influence around the globe they have numerous cultural distinctions that set them apart. Among the many cultural differences between these two nations is how they approach dispute resolution. Historically, the United States has emphasized an adversarial process and the special role of a judge to decide the merits of a dispute. The Chinese approach to dispute resolution emphasizes conciliation over litigation.[54] While in the U.S. there is a hesitation to combine processes, Chinese culture espouses the merits of hybrid resolution systems.[55]

Mediation in China has roots in Confucian philosophy and dates back to pre-Communism China.[56] There is also an extensive tradition of avoiding conflict by resolving disputes using neutrals.[57] The conception of individual vs. collective identity is a major distinction between the United States and many eastern philosophies.[58] These preferences impact the parties' desire for adversarial or mediation based methods. Mediation is recognized as an "informal social control"[59] that places effective resolution over formality of process. The "rule of li" is a social obligation compared to the rule of law in Western culture.[60] Unlike the U.S. system that encourages complaints through the courts, Chinese law discourages bringing cases for violations of personal rights that ignore the consequences of the adversarial approach on society.[61]

In addition to the traditional use of mediation, arbitration has expanded rapidly in China largely in business settings. The arbitration system in international contexts was formalized in the International Economic and Trade Arbitration Commission ("CIETAC").[62] CIETAC, also known as the "Oriental Model", accounts for settlement efforts by allowing arbitrators to act as a neutral once the formal proceedings commence. Under the CIETAC rules, no express agreement by the parties is needed for the neutral to work as a mediator during the arbitration proceeding. Unlike the U.S. where express agreement is needed for med-arb, the combined process of med- arb has become a part of the Chinese resolution procedure as an informal cultural practice.[63] The goal of these settlement meetings is to promote mutual cooperation and understanding. Similar to mediation in the U.S., if an agreement is reached the arbitral award is based on the parties' terms. If no settlement is found, an arbitrator gives an award.[64]

What distinguishes the Chinese approach from the United States is that mediation occurs *throughout* the arbitration proceedings. The arbitrator after receiving evidence and listening to witnesses' testimony can try to settle the case, and if they are unsuccessful, return to the hearing. Then after more evidence is presented, the arbitrator can attempt more settlements efforts later in the proceedings.[65] This approach is not only permissible in China, but also prevalent in more formal litigation proceedings with a judge.[66] These ex parte discussions can be disclosed to the other party, but is not a requirement.[67] Ambiguous language in the Beijing Arbitration Commission ("BAC") rules only reinforces this approach.[68] The BAC language allows the parties in dispute to mediate the case "in a manner they see appropriate."[69] The CIETAC provides a small safeguard by forbidding the parties from referencing or utilizing any statements or opinions by the other party or neutral from the mediation phase in arbitration.[70] However, nothing forbids the arbitrator using the information from the mediation in the final arbitration decision.[71]

Despite the due process concerns, the Chinese system frequently employs caucusing in med-arb. They view the ability to have *ex parte* communications through caucusing with individual parties as a way to help influence the process of the arbitration.[72] While there is concern for how these private conversations impact the med-arbiter's decision-making there are no serious efforts to address this problem.[73] The BAC Rules Article 56(2) allows the parties to request a new med-arbiter if they have significant concerns of bias, however this is only a suitable remedy if both parties consent.[74] The result of this provision is if one party identifies that the neutral has a bias or coercive there is no suitable remedy to end the arbitration.[75] Unlike other jurisdictions, discussed later in this paper, the CIETAC rules did not adopt the requirement to disclose material information before arbitration. There is also no China Arbitration Law or rule from the arbitration commission on confidentiality in the med-arb process.[76]

The Chinese philosophy on the role of a mediator was evident in the discussions when creating the UNCITRAL Model Conciliation Law. The United Nations established the Commission on International Trade Law ("UNITRAL"). The goal of the assembly was to recognize and resolve the disparities in national laws on arbitration involving international trade law. The Chinese representative noted during the discussion that the joint role of mediator and arbitrator in countries like the United States is distinct from eastern philosophies.[77] As a result, when creating CIETAC, the Chinese representatives chose to not incorporate aspects of the Model Rules that restricted the arbitrator's power to work as a mediator during the same session.[78] The efforts by the Chinese to include many aspects of other countries' approaches reflect the need for some harmony in international arbitration. However, the noticeable distinctions between CIETAC and UNCITRAL-based approaches demonstrate how deep these cultural beliefs of reconciliation run.[79]
These distinctions in the Chinese approach fuel several commentators' doubts about submitting disputes to CIETAC neutrals based on their perceived lack of independence and impartiality.[80] In contrast, other Asian nations have adopted varying levels of due process protections that are considered more impartial systems for resolving disputes.[81] Hong Kong Arbitration Ordinance Section 2A(2) provides a process that is similar to med-arb already utilized in the United States.[82] However, 2B(3) requires that information from the mediation that is relevant must be disclosed to the other party if no settlement is reached.[83]

Similar to Hong Kong, Singapore has made substantial legislative changes to regulate med-arb. This is evidenced in The Singapore International Arbitration Act § 63 that requires a materiality disclosure comparable to Hong Kong Ordinance 2B(3).[84] Both Hong Kong and Singapore's due process protections try to combat the deficiencies evident in China.[85] Similar to China, the Japanese arbitration law does not require the disclosure requirements in caucusing when shifting systems. While the Japanese system approaches med-arb in a two-stage system like the United States the cultural importance of conciliation is still highly prevalent. Like China, the Japanese system considers the concern over due process violations in caucus second to an efficient settlement.[86] While China's effective use of hybrid approaches provide an interesting method, the lack of procedural safeguards only exacerbate the due process deficiencies in the U.S. med-arb system.

B. *Germany*

While Germany has many clear cultural differences from China, both countries have recognized the utility of med-arb.[87] Unlike other countries in Europe, med-arb is well established in Germany based largely on the country's predilections for efficiency in their dispute resolution systems. While not couched as med-arb, the arbitration process in Germany allows for settlement in the middle of the arbitration.

In Germany, both judges and arbitrators are authorized to use settlement proceedings at any time. The German Code of Civil Procedure 1053(1) states that settlements are classified as "arbitral award on agreed terms."[88] The German process is also less formal and codified than other countries. This gives a great deal of discretion to the arbitrator. While early resolution is encouraged, the primary focus of a German neutral is to arbitrate the dispute, not to settle it. As a result, arbitrators see settlement discussions, or the mediation phase of med-arb, as an evaluative aspect of their job. While the U.S. emphasizes the mediation aspect of settlement first, the arbitrator in Germany considers this a secondary focus, but necessary as part of

their "noble office."[89] The mediation phase is used primarily to inform the parties of the law at issue and the parties' options going forward. While this is more of an evaluative mediation approach, the technique encompasses many of the same principles used in med-arb.[90]

While there are limited sources on the subject, caucusing between parties is not typical for German arbitrators.[91] The lack of caucusing is not exclusive to Germany. The CEDR Commission on Settlement in International Arbitration, which drafted advisory guidelines for improvements in drafting settlements, also discourages caucusing when using med-arb.[92] Additionally, information that is discussed without the other party is *not* considered confidential.[93]

The German approach of not caucusing or maintaining confidentiality between processes helps avoid the due process issue all together.[94] The de-emphasis of the mediation stage leaves many to claim that U.S. med-arb not a fair comparison,[95] however the German approach seems to limit some of the problems evident in U.S. system. While the German med-arb process provides the valuable advantages of avoiding the due process issue entirely, the inability to conduct two full dispute resolution processes is too great of a shift from our current system and would not provide the most optimal remedy.

C. *Australia*

Australia is unique to many other countries in their widespread enthusiasm for alternative dispute resolution. In Australia, some form of ADR process exists in every court or judicial setting in the country.[96] Unlike other nations that have failed to codify a med-arb provision, Australia has created specific language in their arbitration laws that govern med-arb. The Commercial Arbitration Act of Australia ("CAA"),[97] which governs domestic arbitration, addresses the dual roles of the med-arbiter and includes language to protect confidential information disclosed in caucus.[98]

First, Article 27(D)(1) of CAA requires the arbitrator, acting as mediator, to have the consent of the parties and have the arrangement explicitly detailed in the contract.[99] Most importantly, the statute addresses confidentiality by requiring that the parties consent to how the arbitrator treats confidential communications. If the parties want to agree to disclose all information they revealed in caucuses once the mediation is complete they may do so. The statute itself provides confidentiality protection for "material" information. While CAA 27(D)(a) expressly allows for caucusing during mediation, the CAA provides an additional protection that the neutral, prior to the start of the arbitration proceeding, must disclose to both parties any confidential information that was learned during the mediation that is deemed "material."[100] This safeguard against *ex parte* communications is comparable to materiality provisions in other countries like Hong Kong and Singapore.[101]
An additional protection allows for the parties, if they feel uncomfortable with the med- arbiter after the mediation phase, to opt-out for a second neutral to conduct the arbitration.[102] While this remedy limits the efficiency of the process it protects any due process concerns exposed when transitioning to arbitration. When shifting processes the Australian system relies on consent and transparency prior to continuing with the arbitration. This idea is evident in the *Duke Group v. Alamain Investments Ltd & Ors*., where the arbitrator withdrew from his position after realizing he had previously meditated the parties. "[T]here should be no communication or association between a(n) (arbitrator) and one of the parties (or the legal advisors or witnesses of such a party) otherwise than in the presence of or with the previous knowledge or consent of the other party."[103] This language demonstrates the Australian focus on transparency between the parties. The ability to consent or opt-out of entering arbitration once all the material communications are disclosed is a useful protection that makes Australia's med-arb system unique.

The drafters of the CAA recognized that the previously discussed provisions limit the efficiency of the med-arb process. This is partially remedied under CAA 27(D)(5) where the parties may not object to the resolution of the dispute on the basis of bias solely because the arbitrator was previously the mediator.[104] This offers some finality to the arbitration award to compliment some of the other due process protections in the rest of the statute.

While the CAA is utilized for domestic arbitration disputes, the IAA is used for international commercial arbitration in Australia. After recent reform, the IAA was amended to conform to more uniform international approaches. Unlike the CAA, the IAA does not contain a med-arb provision.[105] This was an interesting development given major competitors like Hong Kong and Singapore have these protections. Several authors cited this as a disappointing omission from the IAA, but could reflect Australia's need for a universal approach in international commercial arbitration instead of the country's preference for progressive dispute resolution reform.[106] The extensive amount of statutory protections in Australia's CAA is an excellent model for the U.S. to consider to going forward.

IV. REMEDIES

The due process deficiencies in the U.S. med-arb system leave a serious gap in the fundamental protections of the parties. However, employing remedies used in international systems can help reduce this risk. While strong contractual language is always beneficial for parties, the United States is best served by adopting a med-arb provision in the FAA, similar to Australia, which gives the parties adequate due process protections.

First, the provision should require parties to include explicit language in their agreement to demonstrate that both sides consent to using med-arb. Comparable language to 27(D)(1) of Australia's CAA would provide the most guidance on this issue.[107] This provision could also include a notice requirement, similar to the one recommended by the CEDR, which explains the risks of adopting med-arb to resolve their dispute.[108] This will give the parties adequate notice and allows them to consider including language that details how best to conduct a med-arb session, how the mediator will act during the initial proceeding, and if they can make any mediation efforts once the arbitration has started.

Additionally, the language of the statutory provision should define confidential statements, and describe the arbitrator's responsibilities for disclosing admissions that are deemed material. Currently, some parties already include these materiality disclosures in contracts, but adding this statutory protection will ensure this disclosure requirement is included in all med-arb agreements.[109] Language from the Hong Kong or Singapore statutes would offer some tested standards to include in the new provision.[110] At the very least, these statutes would provide some guidance on what is considered a "material" communication in this context.

Another section of the med-arb provision should contain a clear statement that protects the confidentiality of non-material communications during caucus. "Like the domestic U.S. rules applicable in court, a number of foreign arbitration statutes erect an evidentiary barrier that prohibits parties from referring, during arbitral proceedings, to any statement made during mediation."[111] Including explicit language that protects the confidentiality of non-material information still allows the med-arbiter to maintain other confidential communication disclosed privately, which could embarrass or harm the disclosing party. This would inform the parties that they can feel comfortable speaking openly with the mediator in caucus about their feelings and concerns as long as it does not unduly hinder the excluded party's due process rights. This provision would complement the materiality disclosure requirement that ensures both parties are privy to the relevant information.[112]

The main criticism of the statutory disclosure requirement is it disrupts the confidential nature of mediation, which is recognized as a fundamental part of the resolution process. Without confidentiality, the freedom to communicate in the mediation process is greatly hampered.[113] However, the structural limitations of med-arb require the due process rights of the parties to trump any lesser interest in efficiency. Even with the disclosure requirement, several confidentiality protections are still available to the parties. The med-arbiter will maintain confidentiality of non-material information with an individual party, as well as all information that arises during entire proceeding from outside parties. If no disclosure requirement is put into place, the party that was not present for the caucus is excluded them from material information that could jeopardize the integrity of the arbitration award. Creating a statutory requirement for material information and requiring the med-arbiter to notify the

parties of this requirement will serve as strong due process protections.

One final safeguard is to have a double consent requirement included in the statute similar provision to Australia's CAA Article 27(D)(4). The provision requires the parties give written consent that the med-arbiter will continue his role as the arbitrator if settlement talks in mediation are unsuccessful. This allows the parties to choose another neutral after the mediation is complete if they feel that the mediator cannot give an unbiased decision. Including this option in the statute would offer more party autonomy and control over their due process rights. This final consent requirement does hinder the efficiency of med-arb, but due process concerns are a far more fundamental protection in the United States. For example, the exclusionary rule in a criminal context is highly inefficient for criminal convictions, but the courts have found that evidence that is "poisoned" from improper actions by law enforcement should not be considered. Similarly, binding parties to a process that does not allow them a fair resolution or opportunity to defend themselves is not worth any ancillary benefits like an expedited resolution. While the double consent requirement does limit the efficiency and finality of med-arb, the due process concerns trump any benefit of early resolution to an agreement.[114]

To create this significant of a transformation of our med-arb process will take a concerted effort by the federal legislature. The Australian government has redefined their conception of the judiciary to include a more expansive ADR system. This has incentivized their legislature to focus reform efforts on ADR processes.[115] However, given the current stalemate in Washington it is unlikely for any substantive legislative remedies to occur in the near future. Given this political reality creating a persuasive authority comparable to the Uniform Commercial Code (U.C.C.) is a strong secondary objective. The development of a non-binding series of acts and procedures that harmonizes the med-arb laws across the country would provide a valuable resource that states could adopt going forward. This would provide a useful workaround to going through Congress and incentivize states to openly address these deficient procedures.

While adopting a similar approach to the Australian CAA would offer some needed safeguards for the parties it does create two new problems. One, parties are less likely to caucus effectively with the understanding that if the mediation fails the arbitrator will disclose that private information. Second, the parties could be sensitive to any hint of bias and favoritism. While these are genuine concerns, the benefit of protecting the parties due process interests greatly out way any enhanced sensitivities by the parties. By the time arbitration begins the med- arbiter has transformed into the role of an arbitrator and is chiefly concerned with a just resolution of the dispute. The materiality disclosure requirements provide a protection for the parties more than the med-arbiter who is already aware of this material information. Ensuring that the process is fair and transparent are more fundamental interests in the U.S. system than any risk of enhanced party sensitivities.

One possible alternative to protect against due process discrepancies would be to adopt a similar approach to the German model and exclude caucusing altogether. While this creates a simple remedy to the due process problems, it deprives the parties of a major part of mediation, and denies the med-arbiter a useful tool when facilitating a resolution. The use of caucusing is incredibly valuable for the mediator to recognize the core interests of the parties. This denies all parties involved of a major benefit of the hybrid approach. Removing this as an option, while protecting the due process concerns from manifesting, does not give the parties the best chance for a settlement.

There is also the added concern that removing caucusing from mediation is too significant a departure from common mediation approaches in the United States. By adding statutory disclosure requirements, mediators are required to communicate material information and receive clear consent from the parties. While the German approach gives little due process or confidentiality issues, it hinders the core interest of alternative dispute resolution, which is to give the parties the best chance for an equitable settlement.

Several highly respected scholars on med-arb have called for informed consent to the process as a suitable remedy.

However, informed consent alone does not go far enough to ensure adequate due process protections.[116] In the United States, med-arb agreements can often include waivers that require the parties to forfeit their right to terminate the process or challenge the award. For example, the California ADR Practice Guide recommends a waiver that states, "[t]he parties understand that this process will likely cause the arbitrator to receive information that might not otherwise have been received as evidence in the arbitration and to receive information confidentially from each of the parties that may not be disclosed to the other side."[117] While waiver and consent agreements are positive steps to ensure both parties understand the process, these protections should be codified in a statutory provision to complement mandatory disclosure requirements.

The goals of giving the parties adequate notice and consent to the process are consistent with how some courts have already interpreted med-arb provisions. In U.S. Steel Mining Company v. Wilson Downhole Services, the parties consented to the use of a single neutral to facilitate both the mediation and the arbitration.[118] The contract allowed the neutral to consider confidential disclosures in mediation when reaching the arbitration award. The arbitrator's ruling was challenged for fraud, but the court upheld the award finding there no such evidence that the terms of the contract conflicted with the parties' consent for this process.[119] The addition of a new section of the FAA that governs med-arb, or a persuasive authority for states to adopt would add significant protections for parties that are currently missing in our med-arb procedure.

V. CONCLUSION

How countries conduct dispute resolution reflects their cultural norms and values. With the continued growth of med-arb in the United States, a significant shift is needed to ensure due process for the parties. While several countries have created statutes that solve many of these issues, adopting a statutory provision in the FAA, similar to Australia, provides the best model going forward. The exchange of "material" information and allowing parties to opt-out prior to the start of arbitration will protect against arbitration awards based on confidential communications. While a statutory remedy is ideal, a uniform act, similar to the U.C.C. that states can adopt would provide guidance on how to handle due process issues in hybrid dispute resolution systems. If these statutory safeguards are adopted in the United States the benefits of the med-arb like efficiency and flexibility, with added due process protections, can offer a strong method of dispute resolution for years to come.

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1 John, Blankenship, *Developing Your Adr Attitude Med-Arb, A Template for Adaptive Adr*, TENN. B.J., (2006).
2 *Id.*
3 Gerald F. Phillips, *Same-Neutral Med-Arb: What Does the Future Hold?,* DISP. RESOL. J., 24, 27 (2005). For the purposes of this paper, mediation is defined as a dispute resolution process in which the parties in conflict use-party to facilitate a resolution. Similarly, arbitration is defined as the use of a formal alternative method where the parties present their case in front of a third-party to reach a verdict.
4 Yolanda Vorys, *The Best of Both Worlds: The Use of Med-Arb for Resolving Will Disputes*, 22 OHIO ST. J. DISP. RESOL. 871, 886 (2007).
5 *Id.*
6 Blankenship, *supra* note 1, at 32.
7 James Peter, *Med-Arb in International Arbitration*, 8 AM. REV. INT'L ARB. 83, 88 (1997).

Barry C. Bartel, *Med-Arb As A Distinct Method of Dispute Resolution: History, Analysis, and Potential*, 27 WILLAMETTE L. REV. 661, 662 (1991).

9 *Id.* at 677 (writing that at the 1988 meeting 45% of National Academy of Arbitrators members and 33% of non- Academy members stated that they had participated in labor-management mediation fact-finding mediation, or med- arb in 1986).

10 Phillips, *supra* note 3, at 27.

11 *See e.g*. The Ontario Arbitration Act, forbids any individuals acting as arbitrators from operating as a mediator in the same session. The exact language reads:

The members of an arbitral tribunal shall not conduct any part of the arbitration as a mediation or conciliation process or other similar process that might compromise or appear to compromise the arbitral tribunal's ability to decide the dispute impartially. Ontario Arbitration Act § 35 (1991), *available at* http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_91a17_e.htm#BK42.

12 David and Sean-Patrick Wilson, *Compelling Mediation in the Context of Med-Arb Agreements*, DISP. RESOL. J.,28, 29 n. 4 (2008) (finding that ten years ago as many as 40% of Fortune 1000 corporations used med-arb as a dispute resolution process).

13 Dafna Lavi, *Divorce Involving Domestic Violence: Is Med-Arb Likely to Be the Solution?,* 14 PEPP. DISP. RESOL. L.J. 91, 131 n. 207 (discussing the very successful use of med-arb in resolving an protracted intellectual property dispute between IBM and Fujitsu that had hundreds of millions of dollars in the balance); Blankenship, *supra* note 1, at 33.

14 *Id*. at 132.

15 Edna Sussman wrote that disputes that went as high as 5 million dollars would benefit from the efficiency and finality of med-arb. Edna Susman, *Med-Arb: an Argument for Favoring Ex Parte Communications in Mediation Phase*, 7 WOR. ARB. AND MED. R, 1, 2 (2013)

16 Peter, *supra* note 7, at 89.

17 Lavi, *supra* note 13, at 131. For a more extensive discussion on the various forms of med-arb *see* Blankenship, *supra* note 1, at 30–32; Peter, *supra* note 7, at 98–103.

18 *See generally* Lavi, *supra* note 13 (applying med-arb in divorce cases with domestic violence). *See also* Vorys, *supra* note 4, at 894 (arguing the merits of applying med-arb in resolving will disputes).

19 *See generally*, Carlos de Vera, *Arbitrating Harmony: 'Med-Arb' and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China*, 18 COLUM. J. ASIAN L. 149 (2004).

20 *Id.*

21 Gu Weixia, *The Delicate Art of Med-Arb and Its Future Institutionalisation in China*, 31 UCLA PAC. BASIN L.J. 97, 98 (2014).

22 Kristen Blankley, *Keeping A Secret from Yourself? Confidentiality When the Same Neutral Serves Both AsMediator and As Arbitrator in the Same Case*, 63 BAYLOR L. REV. 317, 329 (2011); *See also* Blankenship, *supra* note 1, at 34.

23 Lavi, *supra* note 13, at 135.

24 Blankley, *supra* note 22, at 331.

25 Blankenship, *supra* note 1, at 35.

26 *Id*. at 34.

27 *Id.*

28 Ellen E. Deason, *Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review*, 5 PENN ST. Y.B. ARB. & MED., 219 (2013).

29 *Id.* at. 240.

30 CAL. EVID. CODE SECT. 1128. *See also* Deason, *supra* note 28, at 240.

31 *Id.* (emphasis added).

32 "A caucus is a private meeting between the mediator and one of the parties that does not include the other party." Weixia, *supra* note 21, at 105.

33 Blankenship, *supra* note 1, at 36.

34 Bartel, *supra* note 8, at 686.

35 *See e.g.* FED. R. EVID. 408.
36 *See* Blankley, *supra* note 22, at 343–346.
37 37 UNIF. MEDIATION ACT § 7.
38 Blankenship, *supra* note 1, at 36.
39 9 U.S.C. §10.
40 *See* Andrew J. Wistrich et. al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1323 (2005) (concluding that judges, like everyone else, can not close off information and will inevitably use all the information possible in a decision).
41 Vorys, *supra* note 4, at 894.
42 Blankenship, *supra* note 1, at 37
43 Peter, *supra* note 7, at 95.
44 *See e.g.* U.S. CONST. amend. IV; Mapp v. Ohio, 367 U.S. 643 (1961).
45 Richard Fullerton, *Med-Arb and Its Variants: Ethical Issues for Parties and Neutrals*, DISP. RESOL. J., 52, 61 (2010).
46 Weixia, *supra* note 21, at 104.
47 Bowden v. Weickert, 2003-Ohio-3223, WL 21419175 (2003).
48 *Id.*
49 *Id*. at 3.
50 *Id.*
51 *Id.* at 4.
52 *See also* Gaskin v. Gaskin, No. 2-06-039-CV, 2006 WL 2507319(Tex. App. 2006) (rejected the arbitration award after it was demonstrated that only one of the parties consented to the use of a single neutral for both mediation and arbitration).
53 "Unless otherwise agreed by the parties, the conciliator shall not act as an arbitrator in respect of a dispute that was or is the subject of the conciliation proceedings or in respect of another dispute that has arisen from the same contract or legal relationship or any related contract or legal relationship." UNCITRAL Model Law on International Commercial Conciliation Rules, Art. 12; *See also* Ontario Arbitration Act § 35.
54 Peter, *supra* note 7, at 106.
55 M. Scott Donahey, *Seeking Harmony-Is the Asian Concept of the Conciliator/arbitrator Applicable in the West?*, DISP. RESOL. J., 74, 75 (1995).
56 Victor Lau and Vanja Bulut, *Resolution of Disputes in China-What it means for Australia*, Clayton Utz, last updated March 15, 2012, *available at* http://www.claytonutz.com/publications/edition/15_march_2012/20120315/resolution_of_disputes_in_china-what_it_means_for_australia.page; *See also* Vera, *supra* note 19, at 165.
57 Wang Wenying, *The Role of Conciliation in Resolving Disputes: A P.R.C. Perspective*, 20 OHIO ST. J. ON DISP. RESOL. 421, 422 (2005).
58 *Id.*; Shahla F. Ali, *Approaching the Global Arbitration Table: Comparing the Advantages of Arbitration As Seen by Practitioners in East Asia and the West*, 28 REV. LITIG. 791, 796 (2009).
59 Vera, *supra* note 19, at 165. Vera artfully explains that in the absence of formal written law social duties regulated ordinary affairs.
60 *Id.*
61 *Id.*
62 CIETAC is only growing in popularity. In 2013, CIETAC accepted 1256 cases. That is close to double the amount of cases in 2000. Weixia *supra* note 21, at 98. Of those cases, 20–30% were settled using a form of med-arb. *Id.*
While CIETAC was an effort to harmonize the Chinese arbitration system with other international approaches it still remains a useful example of how Chinese culture influences their dispute resolution philosophy.
63 Donahey, *supra* note 55, at 74.
64 *Id.* at 76.
65 *Id.*

66 Catherine A. Rogers, *The Ethics of Advocacy in International Arbitration*, Penn State Univ., Dickinson Sch. Of Law, Legal Studies Research Paper No. 18-2010, at 2-3 (2010), *available at* http://papers.ssrn.com/sol3/papers.cfrn?abstract_id=1559012.

67 Comparatively, Japan, unlike China, has adopted a similar procedure to the United States conducting the arbitration only after the parties have exhausted all efforts to find a resolution through mediation. *Id.* While Japan and the U.S. seem concerned with the dual role of the neutral, the Chinese system embraces it.

68 China has a bifurcated system of arbitration where the BAC is used for domestic disputes and the CIETAC largely controls in international contexts. Both systems reflect the intermingled nature of the mediation and arbitration processes with few exceptions that are detailed in the text of the paper.

69 Beijing Arbitration Commission Rules Article 38(1).

70 "Where conciliation fails, any opinion, view or statement . . . by either party or by the arbitral tribunal in the process of conciliation, shall not be invoked by either party as grounds for any claim, defense or counterclaim in the subsequent arbitration proceedings." CIETAC Article 45(9).

71 Weixia, *supra* note 21, at 105.

72 Ali, *supra* note 58, at 817.

73 *Id.* at 107.

74 Beijing Arbitration Commission Article 56(2), *available at* http://www.intracen.org/Beijing-Arbitration-Commission-Arbitration-Rules/.

75 *See* Gao Haiyan v. Keeneye Holdings Ltd., [2011] 3 H.K.C. 157 (C.F.I.) (upholding an arbitration decision where the award was 1/5 of what was proposed in mediation).

76 Weixia*, supra* note 21, at 105.

77 Ali, *supra* note 58, at 805–806.

78 *Id.*

79 *Id*. at 831. Ali also notes that eastern approaches have a higher regard for the need for amicability in arbitration compared to western methods. *Id.* at 833.

80 Michael I. Kaplan, *Solving the Pitfalls of Impartiality When Arbitrating in China: How the Lessons of the Soviet Union and Iran Can Provide Solutions to Western Parties Arbitrating in China*, 110 PENN ST. L. REV. 769, 787 (2006).

81 *Id.*

82 "Where an arbitration agreement provides for the appointment of a conciliator and . . . that the person . . . shall act as an arbitrator in the event of the conciliation proceedings failing to produce a settlement acceptable to the parties- (a) no objection shall be taken to the appointment of such person as an arbitrator." Hong Kong Arbitration Ordinance Section 2A(2).

83 Weixia, *supra* note 21, at 111 *citing* Section 33(4)(b) of Hong Kong Arbitration Ordinance (Cap 609). "If an arbitrator obtains information from a party during mediation proceedings . . . the arbitrator is required to disclose to all other parties the information that he or she considers material to the arbitral proceedings before resuming them."

84 "Where confidential information is obtained by an arbitrator" the arbitrator prior to beginning the arbitral portion of the proceeding must disclose to both parties "as much of that information as he considers material to the arbitral proceedings." Singapore International Arbitration Act 17(3).

85 *Id.* at 111.

86 Interestingly, based largely off the Asian trade influence, the British International Commercial Arbitration Act in Canada allows neutrals to act as a mediator during a stage of an arbitration proceeding. *Id.* at 76.

87 Germany and Switzerland do not formally utilize med-arb as the Chinese, but the frequency of settlement conference prior to arbitration effectively gives the same dealings with the neutral. Peter, *supra* note 7, at 109.

88 ALEXANDER TRUNK & VALERJI A. MUSIN, INTERNATIONAL COMMERCIAL ARBITRATION AND INTERNATIONAL MARITIME LAW FROM A GERMAN AND RUSSIAN PERSPECTIVE 42 *available at* https://books.google.com/books.

89 *Id.* at 113.

90 *Id*. at 111.

91 Peter, *supra* note 7, at 109.

92 The Center for Effective Dispute Resolution (CEDR) Commission on Settlement in International Arbitration, Final Report, *available at* http://www.cedr.com/about_us/arbitration_commission/ Arbitration_Commission_Doc_Final.pdf. The CEDR is an independent international provider in Europe. For more information *see* http://www.cedr.com/about_us/.

93 *Id.*

94 *Peter*, *supra* note 7, at 113.

95 Peter finds that the de-emphasis of mediation is "evaluative." However, in business settings mediation is often conducted using evaluative approaches instead of a facilitative process. *Id*. at 114.

96 Nadja Alexander, *What's Law Got To Do with It: Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions*, 13 BOND L. REV. 335, 340 (2001).

97 Australia has a bifurcated system, similar to China, which govern arbitration issues. The International Arbitration Act of 1974 ("IAA") is utilized in international commercial arbitration disputes. This generally recognizes that Australia will enforce international arbitration agreements. IAA is also the body of law that promotes the execution of UNCITRAL Model Law. For domestic issues submitted to arbitrations the Commercial Arbitration Act typically governs. Since the IAA is more of a reflection of international approaches the remainder of this section focuses on the CAA as a more representative of Australian ideals in arbitration. Albert Monichino, *Arbitration Reform in Australia: Striving for International Best Practice*, The Arbitrator & Mediator (2010).

For an expansive discussion on the current CAA and proposed changes through the Model Commercial Arbitration Bill *see* Cameron Miles et al, *Understanding Australia's New Domestic regime*: *A Comparison of the Australian State Commercial Arbitration Acts and the New Model Commercial Arbitration Bill*, Chartered Institute of Arbitrators of Australia, https://www.ciarb.net.au/resources/domestic-arbitration/understanding-australias-new-domestic-arbitration-regime-a-comparison-of-the-australian-state-commercial-arbitration-acts-and-the-new-model-commercial-arbitration-bill.

98 Weixia, *supra* note 21, at 115. The CAA was adopted individually by each state and territory. The Model Commercial Bill is sometimes cited with the CAA. It appears that the model bill was adopted by the states individually similar to the way states in the U.S. have adopted the U.C.C in specific jurisdictions.

99 *Id*. at 116.

100 Commercial Arbitration Act 2010 (NSW) s. 27(D)(7); Monichino, *supra*, note 97, at 17. Monichino also writes that this protection is derived from Section 17 of the Singapore International Arbitration Act. *Id*. at 17 n. 73.

101 Alan L. Limbury, *Med-Arb: Getting the Best of Both Worlds*, *available at* https://imimediation.org/document_382.(citing both 2A-2C of the Arbitration Ordinance and Section 17 of the International Arbitration Act for Hong Kong and Singapore respectively).

102 C.A.A. 27(D)(3).

103 The Duke Group Ltd. (In Liq.) v. Alamain Investments Ltd & Ors., (2003) SASC 272, *available at* http://www.austlii.edu.au/au/cases/sa/SASC/2003/272.html.

104 C.A.A. 27(D)(5).

105 Monichino, *supra* note 97, at 12.

106 *Id.*

107 *See e.g.* C.A.A. 27(D)(1). "[T]he arbitration agreement provides for the arbitrator to act as mediator in mediation proceedings (whether before or after proceeding to arbitration, and whether or not continuing with the arbitration); or (b) each party has consented in writing to the arbitrator so acting."

108 CEDR, *supra* note 92, at 16.

109 Bartel, *supra* note 8, at 686.

110 *See* e.g. *supra* notes 89 and 90.

111 Deason, *supra* note 28, at 227.

112 Peter, *supra* note 7, at 109.

113 Deason, Ellen, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQ. L. REV. 79, 85 (2001).

114 Weixia, *supra* note 21, at 119.

115 Tania Sourdin, *International Dispatch: Adr Trends Down Under*, DISP. RESOL. MAG., 30, 31 (2014).

116 *See Edna Sussman, Developing an Effective Med-Arb/Arb-Med Process*, 2 N.Y. Disp. Res. L. 71(2009); *see also* Deason, *supra*, note 28, at 227.

117 Vorys, *supra* note 4, at n. 117 *citing* the California ADR Practice Guide.

118 U.S. Steel Mining Company v. Wilson Downhole Services, No 02:00CV1758, 2006 WL 2869535 (W.D. Pa., 2006).

118 *Id.* at 5.