An Introduction to Dispute Boards

Dispute Boards are often used in major projects, and construction lawyers need to understand them

The term 'Dispute Board' is a general usage of international construction law and practice that connotes the form of dispute resolution or appraisal in which a panel of between one and three people, usually technical rather than legal in their qualifications, is convened (either at the outset of a project on a standing basis or on an ad hoc basis when a dispute arises) to conduct first (or second) instance review of disputes that arise between the project participants, and depending on their mandate make either a non-binding recommendation or a binding interim determination in respect of the issues in dispute.

This post is by Dr Sam Luttrell. It sets out the key features of the Dispute Board process and summarises the differences between the leading sets of Dispute Board rules

Main Forms

There are three 'species' of Dispute Board:

1. Dispute Review Board (DRB) – the DRB reviews the matters in dispute and makes a non-binding recommendation to the parties. DRBs are common in the United States, and contracts of the Federation of international Consulting Engineers (FIDIC) series also provide for a DRB option, as do the Dispute Board Rules (DB Rules) of the International Chamber of Commerce (ICC).
2. Dispute Adjudication Board (DAB) – the DAB adjudicates and makes a binding interim determination in respect of the matters in dispute. The ICC DB Rules provide a DAB option as an alternative to the DRB option discussed above. Contracts of the FIDIC series also contain a DAB option.
3. Combined Dispute Board (CDB) – the CDB reviews the matters in dispute and makes a non-binding recommendation to the parties, but if either party requests (and no party objects) the CDB acquires the power to make a binding interim determination. The CDB is a hybrid option available under the ICC DR Rules.

As is evident from this list, the key distinguishing feature of the three species is the mandate of the board to make a binding decision. A Dispute Board that has a mandate to make a binding decision is a DAB; a dispute board that only has the power to make a recommendation is a DRB.
Key Features

At a high level, the unifying characteristics of a Dispute Board in all three of these main models are:

1. Number of members – most Dispute Boards are comprised of three members, with each party appointing one member and the two party-appointees selecting the chairman. In very large disputes, five members are sometimes used, although this is fairly rare.
2. Independence and impartiality – although there is considerable variation in the extent to which municipal laws impose obligations of natural justice on the members of a Dispute Board, it is settled that all members must be impartial and independent, and this is an express requirement under all of the leading rules.
3. Confidentiality – Dispute Board proceedings and outcomes are usually confidential and are not able to be disclosed to third parties.
4. Current Knowledge – the members of the Dispute Board are usually obliged to keep themselves informed of the progress of the project, including but not limited to the performance of the parties to the dispute, for example by reading progress reports and visiting the site.
5. Expertise – the members are usually required to possess the technical qualifications or skills necessary to review or determine the matters in dispute, and more often than not this translates into a requirements that they be engineers, programming specialists or quantity surveyors. The presence of one member that has legal qualifications is increasingly common, especially in high value projects.
6. Inquisitorial procedure – the members of the Dispute Board are not bound by the rules of evidence, and are free to inform themselves in any manner necessary to properly evaluate the matters in dispute. They can question witnesses directly, conduct site visits *sua sponte*, and call for the production of documents.
7. Short time frames – the period for 'hearing' the dispute and rendering the written recommendation or determination is usually short, being typically three months from the date of referral of the dispute to the board.
8. Continuity of performance – the parties are obliged to continue to perform their obligations while the dispute is before the Dispute Board. This is especially significant in the context of a large scale construction project.

Because a Dispute Board is a creature of contract, party autonomy applies, with the result that there are any number of variants of these three main species. For example, it is open to the parties to specify the qualifications of the members, the time frame for their deliberations, the extent to which principles of evidence and natural justice will apply, and the form and effect of the determination that the members reach. Some caution should be taken in this area because, at least in Anglo-common law jurisdictions, if there is sufficient attention paid in the contract to the rules of natural justice and evidence, it may be that the Dispute Board acquires the character of an arbitral tribunal. This may affect the way the proceedings are regulated and their product policed.

Scale has also led to structural innovations in the use of Dispute Boards. For example, it is also possible to have separate Dispute boards with separate factual mandates. The Channel Tunnel Rail Link project used two Dispute Boards, one composed of engineers with a technical mandate; and another composed project finance specialists with a mandate to determine disputes relating to the financial provisions of the Build-Own-Operate-Transfer concession agreement. In the context of a high value, multi-party project, this model may be appropriate, along with other project-specific rules.

Rather than by creation of a bespoke body of rules, the most efficient way of making these modifications is by reference to a body of established Dispute Board rules, such as the ICC DB Rules or the American Arbitration Association (AAA) Dispute Review Board Guide Specifications (*AAA DRB Guide*).
Origins of Dispute Boards

The earliest uses of Dispute Boards were in the United States in the 70s and 80s, particularly in the context of large scale public works projects such as tunnels and dams. The practice developed out of a concern that the use of an engineer to perform the role of first instance dispute resolution was biased in favour of the employer, who is typically responsible for the engineer's remuneration.

The adoption of FIDIC form contracts in the bidding documents for World Bank-funded projects saw the practice of using Dispute Boards gain traction in other jurisdictions, the first of which was Honduras (for the El Cajon Hydroelectric Project). Since the mid-90s, a number of very large international projects have made successful use of Dispute Boards, including

1. Channel Tunnel Project, where a standing five member DAB was used;
2. Hong Kong Airport Project, where a seven member DAB was used; and
3. Ertan Hydroelectric Power Project in China, where a three member DRB was used.

The main agent in the export of the Dispute Board model was initially the World Bank, and more recently FIDIC has played a significant role. Outside the United States, the majority of known or reported Dispute Boards have been convened in construction projects governed by FIDIC Red, Silver and Yellow Books.

The dispute resolution clauses of the Red, Silver and Yellow Books all provide for DAB as the first instance tier, and ICC Rules arbitration as the final tier. The FIDIC contracts, therefore, incorporate the ICC DB Rules by reference, and this has given the ICC something of a lead in the market for Dispute Board services. It has also caused a body of ICC jurisprudence to develop in key areas of Dispute Board law and practice, including the admissibility of Dispute Board recommendations and determinations in subsequent arbitral proceedings.

Leading Rules

A number of institutions have rules specifically designed to regulate the conduct and outcome of proceedings before Dispute Boards. These institutions include FIDIC, the AAA, the ICC, the London Court of International Arbitration (LCIA) and the Hong Kong International Arbitration Centre (HKIAC). There is now a growing interest in Dispute Boards at these institutions, and an emerging willingness to use Dispute Boards outside of strictly construction project contexts.

The ICC, FIDIC and AAA rules are the most commonly used rules of this group. It is appropriate to compare these rules at a high level.

1. ICC DB Rules – the ICC system allows the parties to use a DRB, DAB or CDB. The main distinguishing feature of the ICC DB Rules is that it contains an optional review model: the determination or recommendation of the Board may be reviewed by the ICC before it is transmitted to the parties. The ICC DB Rules also contain provisions directed at encouraging the parties to resolve the dispute amicably, and a provision allowing adaptation of the rules by the Dispute Board where there are multiple parties.

2. AAA DRB Guide – the AAA model is the most 'institutional' of all of the various Dispute Board systems. Under the AAA DRB Guide, the AAA administers the proceedings, assisting in the process of appointing members and acting more or less like a registry. Whilst the parties can contract out of this model to some extent, the preference of the AAA is that the institutional character of the proceedings be maintained. The other thing that separates the AAA system from the ICC system is the manner in which the Dispute Board is constituted: under the AAA DRB Guide, the parties can veto one another's appointments, and this can make the process of forming an ad hoc Dispute Board drawn out. The AAA
DRB Guide is also unique in that it contains a joinder and consolidation provision. Under the AAA system, the recommendation of the DRB is not binding. The AAA DRB Guide allows the parties to agree on any form of dispute resolution as the next or final tier after the Dispute Board, and do not require AAA Rules arbitration.

3. FIDIC Dispute Board Procedure Rules – the FIDIC system allows for the use of standing or ad hoc DABs. The decision of the DAB is final unless the parties agree otherwise or it is revised by arbitral award. Similarly, the decision of the DAB is binding unless it is taken to arbitration within 28 days. Only the Red Book requires a standing DAB – the Silver and Yellow books provide for ad hoc or standing boards – and only the Red Book requires that the members of the DAB monitor the project.

These three systems generally require an exchange of statements, typically framed as claim and defence, and a subsequent factual inquiry by the members of the Dispute Board. Hearings are by no means the rule, and it is very rare to use witnesses (at least in the adversarial way of Anglo-American procedure). Party representatives with actual knowledge are the main source of fact when a hearing is held. In practice, the Dispute Board process looks a lot like a 'desk arbitration', with most (if not all) of the argument and case presentation being done 'on the papers'.

The three main systems vary in respect of their approach to the involvement of lawyers. Generally, it is within the power of the Dispute Board to regulate its own proceedings, and this includes the power to deny audience to anybody other than the representatives of the parties. The ICC DB Rules allow for the use of lawyers as assistants only, and not as advocates. The AAA DRB Guide expressly limits the involvement of lawyers.

**Relationship to Arbitration**

A Dispute Board is not an arbitral tribunal. It is a body with a mandate and function similar to either that of a conciliator (in the case of a DRB) or a statutory adjudicator in the English or Australian legal systems (in the case of a DAB). At present, no country has passed a law specifically regulating Dispute Boards, and as such the law applicable to the Dispute Board is the contract law of the state that is most closely connected to it, which will normally be the law of the state in which the project is located. The substantive governing law of the contract will, if it is the law of a different country, also play a role.

Although depending on the terms of the contract and the rules applicable to the formation and procedure of the Dispute Board its decision may be binding, its determination or recommendation is not an award for the purposes of international or domestic arbitration law. If the rules do provide that the determination or recommendation of the Dispute Board is final and binding, then it is enforceable only to the extent that non-compliance with it may be characterised as a breach of contract. It must be prosecuted as such in accordance with the final dispute resolution arrangements in the contract.

In practice, arbitration often functions as a quasi-appellate process or long-stop to the Dispute Board procedure, and it is only where the arbitral process is carried to a conclusion consistent with the determination or recommendation of the Dispute Board that that determination or recommendation acquires the force and currency or an enforceable arbitral award.

One of the main issues that arises where Dispute Boards are used is what effect the determination or recommendation should have, and whether the determination of recommendation should be admissible, in subsequent final dispute resolution proceedings. It is not possible to generalise on this issue, other than to say that it will depend on the words of the contract. The decision of a Dispute Board is final and binding only to extent that the parties have agreed it will be final and binding in their contract (or subsequently), and so where the determination is (or has become) final and binding, an issue estoppel would lie against a party if it sought to raise those issues again in another proceeding. This would not be the case where, to use the FIDIC example,
the decision of the DAB is handed down but contested by proper notice of arbitration within 28 days.

Similarly, the decision of Dispute Board has no value as a precedent. The safest answer to the question of admissibility is that the determination or recommendation is admissible as evidence in arbitration or litigation, but only between the same parties. The weight to be given to the determination or recommendation is a matter for the arbitrators or judge.
Dispute Review Boards: Elements of a Convincing Recommendation

Kathleen M. J. Harmon

Abstract: This paper will discuss the dispute review board (DRB) process and in particular the settlement recommendation and the elements thereof that may induce contractual parties to resolve their conflict. The recommendation is a document issued after the contractual parties bring a dispute to the DRB panel that they have failed to resolve. To lay the foundation for the issuance of a recommendation, the DRB process will be briefly discussed. Also discussed is the groundwork the panel itself must lay to gain the parties trust prior to the issuance of any recommendation. Given the importance of the recommendation as a linchpin of the DRB process, it is surprising to note the dearth of literature regarding it. This paper will help to partially fill that void.

DOI: 10.1061/(ASCE)1052-3928(2004)130:4(289)

CE Database subject headings: Dispute resolution; Conflict; Insurance; Construction industry.

Dispute Review Board Process

The dispute review board (DRB) process comprises a neutral panel set up at the start of construction, before a shovel is put to earth, whose purpose is to assist the contractual parties in the resolution of disputes as they may arise during the course of the work.

The DRB panel comprises three experienced construction industry professionals. One panel member is proposed by the owner, the other by the contractor, with each party approving the other party’s proposed candidate. Candidates are neutral and should have no employment or consulting ties with the contractual parties. The third panelist may be selected by the first two members, but may also be nominated by mutual agreement of the contractual parties and the chosen DRB panelists. The result is a neutral panel of respected construction industry personnel that is acceptable to both the contractor and owner.

The DRB is set up generally during the preconstruction phase and is present throughout the course of the work, visiting the site periodically whether or not any unresolved disputes are present. As a result of the regular site visits, panelists become familiar with the parties and project and develop a “vested” interest in sharing the goals of the contractual parties, namely, the successful completion of the project. From the contractual parties’ perspective, a successful project is one constructed in accordance with the plans and specifications, generally within the time and costs originally anticipated by both the contractor and the owner, (Harmon 2002).

Because of the manner in which the process is framed, if an unresolved issue is brought before the DRB, the contractual parties do not need to educate the DRB on the workings of the project, the conditions of the work, or virtually any other project or industry specific information other than the conditions and events around which the conflict revolves. This saves enormous amounts of time and money when compared to arbitration, litigation, or even mediation, where third-party fact finders need to be educated on almost every aspect of the contract project, and dynamics of the parties’ relationship. The DRB process is different from other alternative dispute resolution methodologies in that successful use of the process requires that unresolved issues are brought before the DRB during the course of the contract, as they arise, not at contract completion. The DRB process does not supplant the dispute resolution mechanism in the contract but rather acts as an advisory board if the parties cannot settle the conflict among themselves. When the parties agree that no further productive discussions can take place between themselves, they bring the dispute before the DRB and request the panel’s recommendations as to how the particular dispute should be resolved.

It is important to note that the DRB is a servant of the contractual parties, not an adjudicatory body. What makes the DRB recommendation different from a judicial or arbitration ruling is that it is nonbinding, but, it can provide a recommendation for the results sought by a party. This rarely occurs with judicial rulings or arbitration awards. However, because the DRB recommendation is nonbinding, it must convince or “sell” the parties on the proposed outcome of the dispute. Therein lies the challenge.

Purpose of Dispute Review Board

The sole purpose of a DRB is to assist the parties in preventing and/or resolving conflicts. Although its members are experienced construction professionals, it does not act as consultants aiding in the means and methods of constructing the project, but rather as an advisory body assisting in the resolution of disputes. The DRB process recognizes that conflicts are “normal” rather than “abnormal” and that they are a part of any relationship, particularly those where complex work activities are preformed.

A conflict arises when the contractual parties have different
interpretations of the contract or the conditions under which the contract work was undertaken, e.g., differing site conditions. A conflict may arise concerning extra or additional work where the contractor believes it is entitled to a change order for unanticipated costs and/or time, and the owner interprets the same work as a part of the original contract. The DRB assists the parties in resolving conflicts before they evolve into protracted disputes that may adversely affect the progress of the work.

Matters brought before a panel vary depending on the parties’ needs and requirements. Any unresolved issue can be brought before the panel if the parties so choose. Nevertheless, if the underlying dispute is a question of law, this writer would suggest that the DRB may not be the most appropriate venue. A court, not a DRB, is best suited to render decision on a strictly legal matter. An advisory body of experience construction professions such as the DRB is better suited to resolve cases that are mixtures of law and fact—for example, whether or not a change order should be issued for work the contractor considers beyond what the contract anticipated or required.

**Unresolved Conflicts—The Hearing**

When the parties have decided that their discussions concerning a proposed change order or claim can go no further and after other contractual procedures to resolve the issue have been exhausted, the issue is brought to the DRB panel. The panel then schedules a hearing at which both contractual parties present their side of the conflict. Prior to the actual hearing, the parties develop a written document that speaks to the issue(s) at hand and details each party’s position and rebuttal. At the hearing, oral testimony is made by the actual project participants with first-hand knowledge of the unresolved issue. Occasionally, an expert is brought in if the contractual parties do not have the expertise to discuss the issue to the satisfaction of the panel. For example, a metallurgist might be brought in to provide expert opinion concerning the appropriateness of a specified material. However, in most cases, the individuals on the job site on a daily basis provide the information needed by the panel to fully understand the nature of the dispute. These presentations are encouraged to be made as soon as it is apparent that the parties have reached a stalemate in their negotiations but before the parties’ position become inextricably fixed.

Generally, only the panel can question the witnesses, the opposing party usually does not have the right of cross-examination. The panelist’s questioning skill, the ability to ask probing and insightful questions that uncover the issues as well as the parties’ needs, is essential in determining what truly lies at the heart of the issue as well as the barriers that prevented settlement. The ability to gather this information is associated with the panelists’ adeptness at asking pertinent questions. Although the importance of a panelist’s skill in questioning and understanding the disputant’s issues is widely accepted, little has been written about the way panelists question the witnesses, the opportunity to gather information needed by the panel to fully understand the nature of the dispute. These presentations are encouraged to be made as soon as it is apparent that the parties have reached a stalemate in their negotiations but before the parties’ position become inextricably fixed.

In addition, communication has been shown to be positively related to trust (Anderson and Weltz 1992; Morgan and Hunt 1994). More importantly, communication is shown to be an antecedent to trust (Morgan and Hunt 1992). Interpersonal trust has been shown to strongly influence interpersonal and group behaviors (Heimovics 1984). Trust encompasses confidence in another’s ability to get the job done and assists in making good decisions (Schultz and Evans 2002).

Questioning also can encourage meaningful two-way communication between the panel and the contractual parties. The emphasis on two-way communications suggests that questioning and listening to responses allow the parties to feel that they have been heard, thereby increasing the perception of voice. The value of voice is determined by whether it can effectuate change (Hirschman 1970). Some studies indicate that feelings of unfairness will increase if an individual’s voice is ignored (e.g., Folger 1977). However, the right to be heard is an empty option when it does not include the possibility of being taken seriously and listened to (Solomon and Flores 2001). Therefore, speaking but being “silenced” by being ignored may increase an individual’s perception of unfairness. Thus it is important to address each of the parties’ issues. The importance of this is more fully discussed in the later section of this paper regarding drafting the parties’ position as a part of the recommendation.

After a presentation is made by both parties and all documentation has been submitted as well as all queries answered, the then panel closes the hearing, discusses the issue(s) in a closed session, and issues a written recommendation as to the panel’s opinion on the disposition of the conflict. First and foremost, panelists should seek unanimous agreement to all elements or particulars of the recommendation. At times this is difficult, but the DRB has a responsibility to the parties to make every effort to achieve unanimity.

**The Panel**

The DRB begins to “sell” its recommendation before the first dispute is heard. Legally, the panel has no more authority then that granted to it by the contractual parties. However, it has social power vested in it by reason of its collective experience in the type of work occurring, longevity in the industry, reputation among fellow panelists, contractual parties, and contracting industry, as well as in the manner in which they personally conduct themselves during regularly scheduled meetings and at hearings. An effective panel establishes its authority as neutral experts with integrity and experience. The DRB’s authority is enhanced by treating all the project participants with respect and dignity. This mixture of neutrality, expertise, integrity, and respectful behavior are the building blocks upon which trust is based.

Trust is a valuable commodity. For the DRB to have value to the parties, trust must be built and maintained. Building trust involves skill and commitment (Solomon and Flores 2001). In fact, the foundation upon which the DRB panel gains and maintains its authority is by establishing trust; trust is a dynamic precondition to an effective DRB. The contractual parties need to trust that panelists will be impartial, fair, responsible, respectful, and carry out their duties with the utmost professionalism. If the contractual parties trust the DRB, it is highly likely that they will also believe that the process is fair. Scholarly research on justice, specifically interactional justice, discusses the issue of trust and the perception of fairness in resolving disputes. Interactional justice scholars (e.g., Tyler, Bies, Greenberg, etc.) address two inter-
personal components: (1) the perceived fairness of the decision maker’s procedures (Tyler and Bies 1990); and (2) the portrayal of the decision maker’s image as a fair person (Greenberg 1990; Greenberg et al. 1991). It also concerns interpersonal conduct, wherein disputants are concerned with how they are treated and whether they believe they are treated with respect and honesty (Bies 1987; Greenberg 1990; Tyler and Bies 1990; Vermunt et al. 1993). This also affects the evaluation of whether a process is deemed fair. Studies indicate that individuals react strongly to the quality of interpersonal treatment they receive from third-party decision makers (Bies and Moag 1986; Tyler and Folger 1980; Vermunt et al. 1993). Therefore, the treatment the contractual parties receive by the DRB and the manner in which the panel conducts itself play a significant role in whether or not the process is deemed fair, and the panel gains the trust of the parties. Therefore, trust not only must be earned by the panel, it must also be given by the contractual parties (Solomon and Flores 2001). A nonbinding process not deemed fair and overseen by a panel that does not have the trust of the contractual parties will not be effective in resolving disputes.

**Recommendation**

A chief element in achieving its purpose to assist the parties to settle their conflicts is for the DRB to issue a document that will convince the parties of the “wisdom” of the panel’s solution. In addition, the panel’s recommendation as to the proposed settlement gives the contractual parties a view of how the dispute may be perceived by other third-party fact finders such as an arbitration panel, judge, or jury.

**Components of Recommendation**

What are the components for a recommendation? Can any recommendation, no matter how well written, convince the “losing” party to settle? To answer these and other questions, we must first address the purpose of the recommendation. The entire purpose of the recommendation is to “sell” the disputing parties on its reasonableness in light of the panel’s experience and its familiarity with the job conditions, participants, and the contract, as well as using the trust they have established with the contractual parties. In essence, the DRB needs to convince the parties that its opinion is justified and that the steps for settlement it outlines are valid and reasonable. The parties need to trust that the recommendation has been based on their presentation of the facts, the actual jobsite conditions, contract language, the panel’s expertise and neutrality, as well as the fairness of the process.

The components to a recommendation include reciting the parties’ positions and rebuttals. This demonstrates an understanding of each party’s position. It is not dissimilar to the theory of reflective listening, where the listener paraphrases what has been told relating just the facts without the emotional baggage. It is not merely rewriting what has been presented. It is interpreting or reframing what has been provided in writing and in oral testimony so that a complete picture of the problem is outlined. This assures the disputants that they have been listened to, and more importantly, heard and understood. By reframing the presentation and discussions, an unimpassioned narrative of the issue at hand and how both parties view those issues can emerge.

Reframing the presentation, both written and oral, accomplishes several things. First, it helps the panel demonstrate its understanding of the issues and parties positions regarding them. Second, it provides a concise narrative forming the foundation upon which the recommendation is built. In addition, it acts as a reality check among the panelists to make sure that each panelist understands or sees the issues as their fellow panelists do. The panelists, in effect, develop a single narrative of the issues. This story is developed when the DRB caucuses behind closed doors after the close of the hearings. If there are inconsistencies or differences in the understanding of facts or problems, the DRB can seek further clarifications or submissions from the parties. A joint and agreed to understanding of the issue(s) at hand by all parties, both disputants as well as the panel itself, is an essential building block upon which the individual elements of the recommendation are laid.

On the basis of a solid understanding of the facts and issues, the panel issues a draft recommendation. The purpose of this draft recommendation is for the panel to assure themselves that they are in complete understanding of the facts as presented to them. Moreover, it is a chance for the contractual parties to correct any misconceptions the panel may have as to certain facts. However, some DRB panelists argue against issuance of a draft recommendation. These panelists believe a draft recommendation provides another “bite at the apple,” which delays the issuance of a final recommendation. This concern can be eliminated if the panel directs the parties to correct only the factual errors and gets a time limit of its return. Award decisions from judges, juries, or arbitration panels often do not have this function; therefore, their decisions can be based on faulty, incomplete, or misunderstood information. The correctability of the draft recommendation prevents such difficulties. It is this correctability that is one function of the effectiveness of the DRB process. It assures the parties that the DRB knows and fully understands its positions and arguments.

**Using Contracts in Drafting the Recommendation**

In addition to having an understanding of the facts and parties positions, the panelists themselves must have knowledge of the contract. The contract is the rules under which both sides have agreed to “play the game.” More importantly, it is a legally binding understanding by the parties of their individual rights and responsibilities. The panel must not disregard the contract in crafting its recommendation, no matter how one sided the contract may be. Just as in any game, you cannot change the rules midstream without significant adverse ramifications. If the contract is “unfair” (whatever that means) and it is so interpreted by one party, the panel neither has the authority nor the responsibility to make recommendations concerning the dispute in an effort to make up for an unfair contract. This would be totally inappropriate as well as a subversion of the DRB process. If, as a panelist, you want fair—talk to the Almighty—He/She will be the final arbiter of what was fair or unfair in this world. It is His/Her responsibility to make sure everyone gets a fair shake in this world, not the DRB. It is the DRB’s responsibility to develop its recommendation based on the contract, the parties presentations, and the panelist’s and/or parties’ experience in the execution of the subject project. Additionally, in a recent national study (Harmon 2003), respondents overwhelmingly agreed that the recommendation should follow the contract.

There should be no doubt that the purpose of the recommendation is to convince the disputants as to the equitable solution the panel has proposed, which is in accordance with the contract as well as project conditions. The recommendations should also be in accordance with applicable law. It is unlikely that a DRB recommendation will be accepted by the parties if it does not gener-
ally follow the legal precedent. For example, if the DRB recommends settlement of a dispute regarding an extra work issue in favor of the contractor and during the course of the presentation it has been agreed that the contractor failed to give any notice of the extra work (with notice being the actual written notice as required by the contract or constructive notice where the issue was discussed repeatedly at job meetings or in conversation with various owner personnel), then, with a recommendation suggesting the disposition in favor of the contractor, the DRB is not fulfilling its charter. This is because the DRB is ignoring applicable contract provisions and prevailing law (for example, New York City law requiring strict compliance with the contractual notice provisions). Moreover, it is unlikely that the owner will accept the recommendation. The extra work may truly have been extra work, but the contractor’s failure to give timely notice essentially denied the owner the opportunity to investigate the problem and craft its own solution.

Drafting the Recommendation

The panelists have been chosen for their experience and knowledge as well as an industry reputation for fairness, integrity, knowledge, and the like. They have a job to do, which is to write the recommended settlement in clear positive terms, focusing on key points, contract language, and arguments.

Developing the recommendation is both an art and science. If the panel wants to be persuasive in selling its recommendation, then knowledge of the target audience and parties perspective is important and necessary. Most likely, the target audience is more than the site personnel on the project on a day-to-day basis. It also may include home office executives and legal counsel. Logic and reasoning should be at the heart of the recommendation, and it should be written in such a manner that it is a “stand alone” document in that all the facts, issues, and discussions are thoroughly developed and recited. Moreover, common sense should dictate that the DRB proofread its work carefully to eliminate spelling and grammatical errors, as well as unclear logic. Additionally, it should be written in an active rather than passive voice and should not include criticism of a party or position. Further, a good recommendation answers the questions put to the panel—and no others.

Format

The written recommendation should follow some simple guidelines as to format and should be straightforward and simple. Inasmuch as the decision is likely to be “sold” both to upper management as well as counsel, it may be advisable to draft the recommendation similar to legal opinions that follow the old army method: Tell them what you are going to say, say it, then tell them what you said. In short, the suggested format is (1) a short summary of the recommended settlement; (2) the nature of the dispute; (3) the parties positions; (4) DRB’s findings on those merits; and (5) a full discussion of the reasoning behind the recommendation, including applicable contract language, law, and each party’s presentation. A well-explained recommendation will allow the disputants, counsel, and upper management to understand the reasoning; and therefore, they will be more capable of making an independent decision as to whether or not to accept the DRB’s advice.

First—Recommended Settlement

The recommended settlement should be succinctly stated. You only want to decide the kernel of the problem brought before you and only address the issue as parties frame it to you. Like any arbitration award or court order, we all go to find out what the ultimate decision is. So why not put it up front? This document is not a great mystery novel to be savored. No one wants to read all the juicy details before finding out that Colonel Mustard killed Professor Plum in the library. While there may be some debate about putting a summary of the decision first, consider this, we all know the story of the Titanic. On its maiden voyage the boat sank, but we still want to read all about it because we are fascinated by the topic. The point being that even if we know the ending, particularly in the settlement of a conflict, most, if not all the parties, are interested in how the suggested recommendation came about.

Second—Nature of Dispute

The nature of the issue brought before the panel should be described and should include a statement noting its most important aspects. It should also include pertinent background data, the remedy requested, and the contract provisions.

Can the remedy be gleaned from the parties’ presentation? Although common sense would dictate that the parties when outlining their position would also outline their proposed solution to their problem, namely, the sought after remedy, and occasionally this does not occur. Unfortunately as renowned psychologist Alfred Adler noted “common sense is not so common,” and the hoped for remedies are not always articulated. Nevertheless, with some careful questioning the DRB can determine what the sought for remedy is, and it is in this section where the requested remedy should be clearly stated (e.g., the contractor seek a change order for … in the amount of $150,000 and a time extension of 15 calendar days…).

Third—Parties’ Positions

Position statements, should narrow the issues and remove as much extraneous matter as possible. The DRB should use its best efforts to enhance the understanding of the parties on positions and rebuttals each hold. The discussion should begin with an overall statement with the parties’ positions in sequential order. This overall statement should note the most important aspect of the dispute in crisp, clear language so that it is a good starting point for the remainder of the discussion. It is important that the DRB address the parties positions as valid and worthy of a reasoned response, regardless of how “off the wall” they might be. No one likes to be marginalized, and, in many cases jobsite personnel, not legal or consulting experts, develop the presentation. Therefore, the written presentation as well as the testimony may not be as sophisticated as those developed by professionals whose main business is conflicts. Hence, the DRB positions should focus on the issue’s strength with weaker attributes shown to be offset by one or more primary issues. Additionally, addressing each issue will demonstrate to the parties not only that they have been heard but also that the panel listened to each party’s position. As any married couple knows, there is a difference between hearing and listening. The DRB needs to do both to be effective.

There is an old saying, less is more, and sometimes that is true, but less is not necessarily better because this approach requires complete confidence and trust in the panel’s wisdom, experience,
expertise, and judgment. Although the project participants on site might believe this, in today’s litigious times it is best to be logical, clear, and concise in addressing each and every position, to enable individuals not intimately familiar with the project to understand what was presented or argued. Thus, frame the factual and legal (if any) issues and note agreement or disagreement with the facts as if preparing a document for those other than jobsite personnel to read.

Fourth—Dispute Review Board Findings as to the Merits of Party’s Positions

In reciting the facts and the parties’ positions, the panel needs to be aware that some disputants will take a “kitchen sink” approach to quoting contract provisions. Therefore, pertinent contract clauses should be included, and the reasoning behind rejecting other clauses as pertinent should be detailed. Additionally, the panel needs to detail which positions have merit and were strongly considered and which positions are not supportable by either the facts, generally accepted construction practices, and/or the contract.

This type of presentation is similar to a summary-of-benefits approach to selling (Wagner et al. 2001), where the focus of the sales “pitch” is how the “product,” or in this case, the recommendation, will benefit the “buyer,” i.e., the contractual parties. The summary-of-benefits selling strategy concentrates on “providing the most favorable product-related information possible to lead the buyer to a positive evaluation of the product” (Wagner et al. 2001, p. 291). This approach will allow not only jobsite personnel but also others the ability to structure their own decision while letting them operate effectively in concluding the validity of the DRB’s recommendation. For example the DRB can state: here we found that … moreover they did not follow contact procedures as noted in Section X of the contract … and although the Contractor cited Section Y, we do not believe this section to be applicable because… thus we conclude… .

According to research, selling skills or procedural knowledge (Rentz et al. 2002) consists of several components:
1. Interpersonal skills—knowing how to cope with and resolve conflicts (Churchill et al. 1985; Dawson et al. 1992; Castleberry and Shepherd 1993);
2. Salesmanship skills—knowing how to make a presentation and close sales (Ford et al. 1987); and
3. Technical skills—knowledge of product features, engineering skills and procedures required by company policies, and meeting the customer’s needs (Walker et al. 1977; Smith and Owens 1995).

An effective panel writes a well thought out and logical recommendation that uses all these components.

The Recommendation as to the Disposition of Conflict

The most important aspect is the soundness of the recommended disposition of the matter, and it should be made with a detailed explanation as to how the recommended settlement was reached. This part should be unambiguous, so the parties have a clear understanding of the proposed settlement and instructions for its implementation. (For example, the DRB found that the Contractor complied with the Owners directive to perform the work as required by Contract Section A and in doing so performed extra work, therefore the Owner should award the contractor a change order in the amount of X and a time extension to the contract of Y.) Simply put, be very clear in stating the suggested settlement for both merit and quantum. If the panel was asked to render a recommendation on just the liability aspects of the dispute and not the damages, the decision should be limited to the liability issue (merit). If it was asked to comment on liability (merit) and resulting damages (quantum), it should do both. The DRB is a servant of the contractual parties, not its master.

The panel might also influence the party’s decision structure by suggesting constraints (i.e., this contract provision is not applicable to this situation because …) to simplify the choice and to suggest the best solution for resolving the issue between the parties. The contractual parties who use the suggested constraints will then reject the other alternatives (i.e., leaving the matter unresolved to the end of the job, pursuing litigation or arbitration, etc.) while keeping the DRB’s suggestions under consideration. Thus, the party’s decision structure is modified by altering criteria (the constraints) and rule of choice (by applying constraints to eliminate alternatives), and the alternatives considered (those that satisfy the constraints, namely the DRB recommendation), thereby accepting the DRB’s suggestions for resolution. By influencing a decision maker’s agenda, studies shown that it can substantially alter the probability of choice outcomes (Glazer 1991; Hauser 1986; Kahn 1987).

The DRB process can be effective and compelling if viable solutions are proposed for settlement. The absence of a well-crafted recommendation represents a missed opportunity to assist the parties in settling their conflict. The DRB can only influence the decision makers by making recommendations as to how the dispute should be settled. Those recommendations may or may not be followed. Nevertheless, the parties are more likely to accept the panel’s suggestions about how to structure a settlement if the recommendation is well justified and a natural part of the decision-making process. Thus, any strategy attempting to affect the party’s decision structure should be compatible with the contract as well as applicable laws.

Issuing a Draft Recommendation

Before circulating a draft recommendation to the contractual parties, the DRB panelists should ask themselves, “Are we effectively selling our position?” Conventional wisdom recognizes the importance of a well-argued recommendation. Selling effectiveness is the “degree in which the preferred solutions of salespeople are realized across their customer interactions” (Weitz 1981, p. 91). The DRB is the salesperson selling their product, which is the wisdom and reasonableness of their recommendation, to the client, the contractual parties. Also, the draft recommendation allows the parties to correct any misstatements as to the facts upon which the recommendation may be based. This correctability is not available in most other dispute resolution processes. Knowing that the DRB is relying on correct facts leads the contractual parties to believe in the fairness of the process.

Usefulness of the Recommendation

The usefulness of a well-crafted recommendation is not limited to the current issue at hand. A wider and potentially more cost-effective potential of the recommendation lies in its application to other smoldering disputes and, of equal or greater importance, conflict prevention. Strategic objectiveness in “selling” the proposed settlement recommendation often involves changing the parties’ beliefs and evaluations concerning the issue in the conflict. It is an attempt to influence the structure of the parties’
decision on whether or not to accept the panel’s recommendation. If the panel succeeds in influencing the contractual party’s decision, some important benefits may follow. The panel might be able to focus the contractor’s attention on criteria on which the owner has distinct preferences. The DRB might also suggest specific future behavior to prevent disputes from reoccurring or create a better working alliance. Thus, the DRB has the potential to influence decision criteria on whether or not a conflict would be better settled among the parties without DRB involvement, which can lead to more enhanced beliefs about the abilities of how the project participants view each other.

The second most important matter a recommendation can do is actually work for the contractual parties to help them to achieve their mutual goal—to complete the project within the anticipated time and costs, while assuring that all conflicts are resolved contemporaneously, thereby providing the contractual parties with a successful project and good working relationship, as well as possibly shaping the parties’ future relationships.

The entire DRB process provides the contractual parties with a methodology to deal with the rough spots in their relationship and to keep it and the project working. The value added by the DRB’s recommendation lies in its ability to move one or both parties off their positions by providing a candid evaluation of the issue(s) and by illustrating both that adhering to their position has risks as well as costs and that there may exist a more suitable resolution enabling a better solution than by binding decisions or even win-win situations. Additionally, a well-crafted recommendation can be helpful if there are third-party interests such as subcontractors or internal politics within the disputant’s organization who have certain expectations as to the outcome of the dispute.

Conclusion

Individuals react more favorably to decisions based on perceived fair procedures than to those believed to be unfair (Cropanzano 1993; Cropanzano and Greenberg 1997; Greenberg 1987, 1990; Lind and Tyler 1988). Leventhal and colleagues (Leventhal 1976, 1980; Leventhal et al. 1980) proposed six rules that individuals use to measure fairness: (1) consistency; (2) bias suppression; (3) accuracy; (4) correctability; (5) representativeness of all concerned (also known as “voice”); and (6) ethicality. Greenberg (1986) identified five similar rules. In this paper, the writer discussed that the DRB’s building of trust prior to hearing the first dispute is an important component to its effectiveness in selling the recommendation and meeting the needs of the contractual parties. Trust building involved neutrality (bias suppression), integrity (ethicality), and experience. This paper also discussed the conduct of the panel at the regular jobsite meetings and at the hearing itself in communicatng with the contractual parties, listening as well as hearing what was said, and giving voice to the disputants (interactional justice and representativeness). The writer also detailed the elements of a well-crafted recommendation allowing for accuracy and correctability.

A solution will only be accepted by the parties if it meets their needs, and it is only achievable if the process by which it is achieved gives voice to everyone who has a stake in the outcome. A well written and argued recommendation by three neutral, respected, professional, and knowledgeable industry experts can be the voice of reason, allowing the parties the room to end their dispute. The recommendation is to be a tool for settlement. It should be crafted so as to sell the parties the logic and reasoning behind the suggested settlement. To do so, it must demonstrate an understanding of the issues, contract, parties, and positions as well as provide a convincing analysis of the facts and how they relate to appropriate contract provisions, oral, testimonies, and exhibits, as well as the parties needs. If the “sales pitch” is not logical, well argued, with emphasis placed on the key elements of the dispute, it is unlikely that the parties will “buy” the proposed settlement.

Will using these strategies and guidelines always result in the parties’ acceptance of the DRB decision? No. There will be instances that no matter how well argued or how well the DRB implemented its strategy in attempting to restructure the parties’ decision structure, one party will not accept the suggested settlement, even despite the logic of settling rather than bringing the matter before a binding process. Many factors influence the parties to settle or continue the conflict. Some of these factors include entrapment and face-saving, where the emotional costs of settling the dispute are considered “too high.” These issues may play a shadow-type role in whether or not settlement is even desired.

Consumers are always shopping for value, and contractual parties are no different. What value does a DRB bring to the project if it does not have the respect of the parties? What value does the recommendation have if it is poorly crafted, and/or it is at variance with the contract and/or applicable law? A DRB is not only serving the contractual parties themselves but also the construction industry as a whole because it is an example to the entire community that disputes do not have to be derisive, time-consuming, expensive lessons in frustration but can be handled like any other difficulty—head on, with the contractual parties and panel working together to craft solutions. Every successful DRB project is an example to the entire contracting community as to how disputes can be managed. It has a ripple effect on future projects involving the present contractual parties, either as another contractual entity or as ambassadors to the process.

References


Using DRB to Maintain Control of Large, Complex Construction Projects

BY KATHLEEN M. J. HARMON

The author holds a Ph.D. from Nova Southeastern University. She is president of Harmon/York Associates, a 29-year-old construction consulting firm located in Ridgefield Park, N.J. Her e-mail address is kharmon777@aol.com.
The construction business has never been simple. However, over the last 30 years it has become more complex and, unfortunately, litigious. Multiple parties, 500-plus page contracts in which the owner endeavors to transfer the risk of every contingency to the contractor (even those not within the contractor’s control), unstable economic conditions, are just some of the conditions that have made construction projects ripe for disputes. Contractors naturally react to the owner’s risk-shifting efforts with exceptions and clarifications to the terms and conditions. The result has been that both owners and contractors rely more on legalistic maneuvering to attempt to control their risks.

The case for dispute review boards, what they do, and where they have been used.
The question of who should bear the responsibility for any particular risk has a logical answer. It should be borne by the entity that can best assess, evaluate, and control it. But just because a risk is properly allocated does not guarantee that disputes will be avoided, since along with more complex contracts, changes in the scope of work, design modifications, or improvements all increase the opportunities for contractual disputes to arise. Then, there are risks inherent in the construction process that also foster conflict, for example, unforeseen conditions and force majeure events.

Why DRBs?

Legal expenses that result from adversarial dispute resolution can have severe financial consequences on the parties to the dispute. Consequently, one of the greatest challenges facing the construction industry today is how to resolve conflicts “in real time,” meaning as they occur, and failing that, to control the cost and time involved in resolving disputes at a later time. It is well known that issues left unresolved until the end of the project often result in either mediation, arbitration, or litigation, or some combination of mediation and an adversarial process. Finding an alternative to mediation is also desirable since, in challenging economic times, parties may be less willing or able to compromise.

It is clear that a real-time dispute resolution option that gives the owner and contractor (the contracting parties) control over the process, the costs, and the outcome, is better than traditional dispute resolution options. One option that fits this bill is a dispute review board (DRB). The DRB is a dispute avoidance and resolution technique that has most often been used in public construction projects. It has been shown to help prevent disputes and assist the rapid resolution of disputes brought to the DRB’s attention.

What Are DRBs?

The DRB process is different from other alternative dispute resolution (ADR) methodologies in that the issues tend to be construction- or contract-related. Legal issues generally are not involved. That is why, more often than not, construction experts, not lawyers, generally serve on DRBs.

The DRB has three members, usually highly respected and experienced construction professionals (often contractors, engineers, and architects) who are independent of the contractor and owner and chosen jointly by them. One member is proposed by the owner, the other by the contractor. Each party must approve the other party’s candidate. The third member of the board may be selected by the first two members, or be nominated by mutual agreement of the owner and the contractor and the chosen DRB members. The third member may chair the DRB. Often the qualifications of this person supplement those of the two DRB members first selected.

Purpose of the DRB

The purpose of the DRB is to monitor the project until the contracting parties agree to bring an unresolved issue to it. The board’s members are selected during the pre-construc-
tion phase of the project. Once established, the board visits the site periodically, whether or not any unresolved disputes are present. As a result of the regular site visits, the members of the DRB become familiar with the people working on the project and the issues they are facing. For this reason, it has been said that members of a DRB share the goals of the parties for a successful project. Parties to a construction contract generally consider a project to be a success if it is constructed in accordance with the plans and specifications, and completed within the time and budget originally anticipated by them.

How the DRB Works

Because the DRB members have become familiar with the project as a result of their regular site visits, when an unresolved issue is brought to them, the contracting parties do not need to educate them about the workings of the project, or the conditions of the work. The only information the DRB members need concerns the conflict itself, the conditions leading up to it and other events relating to it. By contrast, ADR processes that take place long after the conflict arose (even after the completion of construction) require the mediator or arbitrator to be educated on almost every aspect of the contract, the project, and the dynamics of the parties’ relationship, at great cost and loss of time.

When the contracting parties agree that their efforts to resolve the dispute on their own cannot go any further, they can bring the dispute to the DRB. They provide the DRB with a written document that briefly summarizes the dispute and their respective views on the dispute, along with supporting documentation. They generally will also exchange these written documents.

The DRB will promptly schedule a hearing at which project participants with first-hand knowledge of the dispute will present oral testimony. While the parties have the opportunity to provide rebuttal testimony, they have no right to cross-examine anyone at the DRB hearing.

The job of the board is to develop a recommendation for the parties that will advise them how to resolve the dispute. After the close of the hearing, which usually takes no more than one day, the DRB members will review the documents and the testimony and decide on a recommended resolution of the dispute.

The Recommendation

The DRB recommendation is in writing. It usually acknowledges the party’s perspectives on the dispute before providing a recommended resolution and the reasoning behind it.

DRB recommendations are generally unanimous and non-binding. However, some contracts provide that the recommendation is binding until contract completion.

It is important to keep in mind that a DRB is a servant of the contracting parties. It is not an adjudicatory body, like an arbitration panel or a court. A DRB recommendation provides the parties with the perspective of three respected experts in construction who are familiar with the project, the contract, the progress of construction, and the disputed issues. But it is the parties—the owner and contractor—who decide whether or not to implement the recommendation. They are usually free to accept it, reject it, or modify it as they see fit.

Benefits of the DRB

The primary benefits of having a DRB are:

- Disputes are avoided because the contracting parties do not want to embarrass themselves before respected DRB members, or waste the DRB members’ time, or increase their own dispute resolution costs, by bringing minor problems to the board.

- Problems at the job site that the parties consider serious enough to bring to the DRB can be resolved promptly by taking the DRB’s recommendation. Using the DRB at this time prevents these problems from escalating into intractable disputes that could bring a project to a halt.

- Parties that use a DRB are taking a professional approach to problem solving. They retain three respected industry experts to advise them how to resolve a problem and then they decide how to proceed in light of that advice. Because they make this decision, they are likely to be more satisfied than if someone with no expertise (for example a judge or jury) imposes a solution on them.

- A DRB can facilitate continued negotiations by providing reasons for its recommendation. This tends to preserve the parties’ relationship and enables the project to be constructed.

- Problems at the job site can stay out of the public arena.
Time and Cost Benefits

The DRB process also has time and cost benefits, even considering the cost of maintaining a DRB during a long-term contract. Here’s why.

Because the DRB process is generally not binding, the usual practice of involving attorneys who then conduct lengthy “discovery” and retain expert consultants can be drastically limited or even eliminated.

The DRB addresses potentially difficult problems early on with far less disruption to the project and other business activities of the parties.

Furthermore, resolving a real-time problem using a DRB is faster than employing an arbitration or litigation long after the problem arose. After receiving the documents the parties have provided and hearing testimony at the hearing, DRB members are usually prepared to suggest how the dispute can be satisfactorily resolved in a matter of days.

Cost of the DRB

The hourly rate for a DRB panelist can range from $165 (University of Washington, 2010) to $350. Caltrans (California Transportation) has used the DRB process on 296 projects involving $10.1 billion from 1989-2011. The DRBs on all of these projects were paid approximately $10.1 million or 0.1% of construction costs with Caltrans and contractors splitting this cost equally.

The Florida Department of Transportation (FDOT) has used DRBs on 822 projects between 1994 to January 2012. Between 2002-2011, the DRB members were paid $13.5 million on $11.8 billion of construction work. Until 2011, FDOT paid 100% of DRB costs, but recently, for 2012 projects, it changed its procedures to require contractors to pay 50% of the costs.

In Milwaukee, Wisconsin, the Marquette Interchange South Leg and Core, a $389 million project, involved DRB costs of $43,072 shared equally by contractors and the state DOT. Boston’s Central Artery Tunnel project had 46 contracts with multiple DRBs totaling $8.4 billion with $1.8 million paid by the owner and an equal amount paid by contractors. These examples involve huge, highly complex, public construction projects. The cost of a DRB on much smaller projects would be far less.

The cost of a regular DRB site visit on a FDOT project has generally ranged from $3,000 to $4,000, but has cost as much as $17,500 on some Metropolitan Transit Authority East Side Access projects in New York City. On some projects, the hearing was held during a regular site visit. On other projects, an additional visit was needed for the hearing. The overall costs were much less than the tens of thousands in legal expenses that would have been necessary to pursue a mediated solution, an arbitrated decision, or a court judgment. Thus, the wisdom of using a DRB in construction contracting seems to be a virtual “no brainer.”

Where DRBs Have Been Used

From 1974 to Feb. 3, 2012, DRBs have been used on 2,340 projects worldwide, totalling over $166.1 billion worth of contract work. Countries outside the United States where DRBs have been used include Australia, Brazil, China, Chile, Canada, Great Britain, India, and New Zealand.

DRBs have been used in every sector of construction, but mostly on highway projects. The graph in Table I provides a breakdown of DRB use by project type.

As of Feb. 3, 2012, DRBs have been used on 2,173 construction projects in the United States. The map on the facing page shows the states where DRBs have been used. Florida and California have used DRBs the most. FDOT and Caltrans have used DRBs on all of their larger projects. Florida has set up “regional DRBs” for projects under $10 million.

In 2005, no South American projects used a DRB. That has changed. Recently there have been projects in Chile and Brazil that used DRBs.

There is also an increase in the use of DRBs in Australia, New Zealand, and Canada.

The increase in use of DRBs shows clear recognition of their value. This conclusion is not just based on anecdotal reports. DRBs have shown impressive results. The Dispute Resolution Board Foundation (DRBF) has been keeping
records on DRB usage since its inception in 1996. I have updated the DRBF database since 2010 and it shows that out of 2,753 disputes brought before DRB panels, 88% were satisfactorily resolved; only 327 (or 12%) went on to other dispute resolution methodologies (such as mediation, litigation, or arbitration).  

**Conclusion**

A DRB gives owners and contractors the greatest amount of control over their construction dollars when a dispute arises. Dispute resolution costs increase exponentially when the contracting parties are unable to resolve the dispute themselves and they turn the dispute over to lawyers for the purpose of having the dispute resolved by a third person. Moreover, even with a court-rendered judgment, the losing party may not comply. It could file an appeal, which could drag out the conclusion of the dispute for years.

A number of public sector owners, particularly transportation departments, have recognized the unique benefits of DRBs in preventing, and if necessary, resolving disputes contemporaneously with work on the project. This process provides the greatest opportunity for win-win solutions and the conditions for the contracting parties to maintain their relationship.

We are beginning to see DRBs on complex projects that do not involve highway construction (e.g., New York City’s East Side Access project, $7.2 billion; and San Francisco’s Public Utilities Authority’s Water System Improvement Program, $4.6 billion). We are also beginning to see DRBs being used on private construction of mixed use (hotel/apartment/condominium) buildings.

There is no guarantee that all disputes on a project with a DRB will be resolved by the DRB’s recommendations. But by and large, DRBs have motivated owners and contractors to resolve disputes on their own, and when they cannot do so, to seek the DRB’s assistance.

Basically, DRBs encourage owners and contractors to work together towards successful completion of their projects without interference by any outside decision makers.

**ENDNOTES**

1 The exception is public works projects where changes and exceptions can void a bid.
3 I have read over 500 recommendations since 2001 and have only seen one dissenting opinion and in that case the recommendation was non-binding.
6 Personal communication, Zach Wiginton, State Construction Office, Florida Department of Transportation.
9 All FDOT panel members live in Florida. Therefore, they have minimal travel and lodging costs.
10 Most members of the MTA’s East Side Access panel do not live in New York City. Therefore, they are reimbursed for travel costs, lodging, and meals.
11 DRB database, updated as of Feb. 3, 2012. For a copy, e-mail kharmon777@aol.com.
12 Id.
13 Id.
14 In 2005, there were 1,256 projects using DRBs in 26 states, the District of Columbia, and Puerto Rico.
15 Id.
16 Harmon, supra n. 9. (At completion of the Central/Artery Tunnel project, a significant number of disputes were languishing.)
Effectiveness of Dispute Review Boards
Kathleen M. J. Harmon¹

Abstract: A Dispute Review Board (DRB) is a panel of three respected, experienced industry professionals jointly selected by the owner and contractor of a project and established at the beginning of a construction project. It meets regularly at the job site to be briefed on the work, the schedule, and any potential issues in dispute. With the use of DRB growing, a pilot study was undertaken to determine the attitudes of industry members concerning its effectiveness in preventing and contemporaneously resolving disputes.

DOI: 10.1061/(ASCE)0733-9364(2003)129:6(674)

CE Database subject headings: Dispute resolution; Contractors; Construction industry.

Introduction

The Dispute Review Board (DRB) was established in the mid-1970s as a nontraditional approach to reducing conflicts and costs on construction projects. Their development was precipitated by a growing dissatisfaction with the costly and often unsuccessful procedures associated with traditional litigation. Moreover, existing alternative dispute resolution (ADR) methodologies, such as arbitration, mediation, mediation/arbitration, and mini-trials typically did not address conflicts contemporaneously. More often than not, these ADR procedures were implemented only after project completion. In recent years, the Construction Industry Institute has endorsed the use of DRBs as a “successful technique” (CII 23-2 1996, p. v) for resolving disputes in a timely and cost efficient manner (Duran and Yates 2000).

A DRB is a contractual arrangement comprising a panel of three respected, experienced industry professionals jointly selected by the owner and contractor of a project (Matyas et al. 1996). It is put in place at the beginning of a construction project and meets regularly at the job site to be briefed on the work, the schedule, and any potential issues in dispute (Matyas et al. 1996; Silberman and Battelle 1997). It continues to meet at the job site at regular intervals whether or not disputes are brought before it. The DRB hears unresolved conflicts presented by the parties and issues nonbinding recommendations, but does not supplant the contract’s dispute resolution procedures. According to statistics maintained by the Dispute Review Board Foundation projects with DRBs have a 98% success rate, with success being defined as no unresolved disputes at the time of contract completion. (The Dispute Review Board Foundation, formed in 1996, is a not-for-profit organization of individuals interested in the resolution of construction disputes through the use of the DRB process.)

In this report, I report findings from a survey designed to determine how parties to a construction contract perceive the role and effectiveness of DRBs in reducing conflicts and/or resolving disputes. It is hypothesized that a disputing party’s perceptions and behavior are influenced by (1) the DRB’s expertise, (2) being given a voice in the hearing, and (3) control over the outcome of the dispute. From this framework, survey questions were developed to elucidate a number of central issues: Why are projects with DRBs successful in resolving disputes or claims prior to contract completion? How can parties to a contract effectively prevent disputes, settle conflicts, and resolve their legitimate differences during the course of the construction project? By what criteria can a process for resolving disputes and reducing conflicts be deemed effective? Such information is important and timely in bringing forth a better understanding of the effectiveness of DRBs, particularly in an industry that places a high value on both time and money.

Method

Participants

Sixty-three participants of the Fifth Annual Meeting of the Dispute Review Board Foundation held in October 2001 in Las Vegas, Nevada were invited to complete the survey. Of the 50 questionnaires returned, 48 contained useful data, yielding a 76% overall response rate. The final sample, therefore, consisted of 48 respondents (46 males, 2 females; 95% Caucasian; age range = 38–83), whose professional composition included attorneys (13%), consultants (46%), contractors (21%), engineers (13%), and owner/administrators (7%). Ninety-six percent of these individuals indicated having had some level of college education: 47% held graduate or professional degrees. Industry experience ranged from 1 to 52 years, with 48% of the sample having more than 30 years of relevant professional experience. Sixty-seven percent of the respondents had served as a DRB panel member, and 86% reported having had some experience with the DRB process within the last 5 years.

Instrument

The questionnaire consisted of 91 statements designed to assess attitudes of the respondents regarding DRBs, using a Likert-type scaling system (Oppenheim 1966). Respondents were asked to rate their extent of agreement with each statement on a five-point scale ranging from “strongly agree” to “strongly disagree,” with

¹Dr. President, Harmon/York Associates, Inc., 131 Brinkerhoff St., Ridgefield Park, NJ 07669. E-mail: Kharmen77@gmail.com

Note: Discussion open until May 1, 2004. Separate discussions must be submitted for individual papers. To extend the closing date by one month, a written request must be filed with the ASCE Managing Editor. The manuscript for this paper was submitted for review and possible publication on May 22, 2002; approved on October 4, 2002. This paper is part of the Journal of Construction Engineering and Management, Vol. 129, No. 6, December 1, 2003. ©ASCE, ISSN 0733-9364/2003/6-674–679/$18.00.
the midpoint representing “no opinion.” An additional seven questions were included to elicit relevant demographic information. The internal consistency of the questionnaire, as determined by Cronbach’s alpha with the current sample, was 0.88.

Results and Discussion

Issues

It is well recognized that all construction projects experience changes, which may thereby precipitate conflicts (Clegg 1992; Kane 1992; Augustine 1994; McManamy 1994; Fenn et al. 1997), but not all conflicts escalate into disputes. When individuals become emotionally involved in a conflict, they “magnify the importance of what is really at stake” (Greenhalgh 1999, p. 8). When you add emotions to an unresolved conflict, it spirals out of control and the net result is a dispute. Whereas conflict can have positive outcomes and be constructive, disputes routinely have negative consequences and tend to be destructive.

Unresolved disputes occurring during the course of construction can result in significant out-of-pocket costs to both the contractor and owner, including legal fees, expert witness costs, and consultant fees. In the present study, 98% of the respondents agreed that unresolved disputes result in additional financial costs and concerns, while 89% agreed that having a DRB would keep dispute-related costs to a minimum. Clearly, money paid to attorneys, consultants, or expert witnesses does not add value to the project. These costs are, in effect, the unrecoverable costs of a dispute. For the owner, money spent on resolving disputes reduces the amount of funds available for rehabilitation, repairs, refurbishment, or new construction. For a contractor, it reduces the company’s profitability. A dispute spiraling out of control can significantly affect not only the total cost of a project but also a company’s bottom line. Seventy-two percent of the survey participants believed that having a DRB assist in the resolution of disputes would enhance their company’s profitability. The predominant view (98%) was that having a DRB reduces the costs of outside counsel, while 87% believed that costs for consultants would also be reduced. The difference in the two results may be explained by the need, in some instances, for consultants to assist in the preparation of information presented at a DRB hearing. Nevertheless, the reduction in unrecoverable fees paid to a consultant or attorney to resolve disputes can be made available for more productive endeavors.

Ninety-eight percent of the participants recognized that other “hidden” financial costs may be incurred by both parties as a result of unresolved disputes. These costs may be the result of the diversion of manpower from new work to prepare for depositions and/or to be witnesses at trial or arbitration, as well as the need to bring an attorney and/or consultant up-to-speed concerning problems on the project and the nature of the work. Eighty-five percent of the respondents were concerned that unresolved disputes would force them to divert their attention from their next project. Certainly the diversion of manpower as a result of unresolved disputes is a major concern for the construction industry. Ninety-six percent of the respondents agreed that having a DRB would reduce the indirect costs of resolving a dispute by having available manpower focused on constructing new projects rather than helping to resolve disputes regarding completed projects.

Moreover, the findings overwhelmingly reflect the view that conflict creates an emotional cost in terms of the deterioration of the relationship between the parties (100% agreement); is physically and emotionally draining (98% agreement); and reduces job satisfaction among employees (100% agreement). In addition, a vast majority (87%) of the respondents felt that disputes undermine the progress of construction. Are these emotional costs ever recoverable, even if one party “wins” the case?

The construction process, if made less adversarial, could become more cost effective for both the owner and the contractor. Fees not spent on defending against litigation or other adversarial methodologies could be put to better use on additional projects reducing actual and emotional costs for both parties and increasing job satisfaction. Therefore, a DRB that resolves disputes contemporaneously with the emergence of a problem is likely to result in less stress, greater job satisfaction, and a more efficient workforce that can concentrate their efforts on constructing the project rather than resolving the dispute. This creates win/win solutions not only for the parties themselves, but also for the public as a whole because money is not diverted from new projects or company profits for the purpose of resolving disputes.

Characteristics of the Dispute Review Board Panel

Individuals who comprise the DRB panel are chosen because of their experience, knowledge, and standing in the construction industry as well as their expertise in the type of construction being performed (Battelle and Dettman 1993). In this regard, all respondents in the present study felt that panelists should be chosen on the basis of their knowledge and level of industry experience. Industry reputation (94% agreement) and knowledge of the type of work being performed (90% agreement) were also considered to be important qualifications for panel membership. These findings are consistent with research (Arnold and O’Connor 1999), which demonstrates that disputing parties’ perceptions of the expertise of third party neutrals are based on the third party’s education, training, and experience. Others (Treacy 1995; Sutherland et al. 1998) have suggested that the panelists’ standing, integrity, and technical expertise play an important role in understanding the nature of the dispute and bringing about its subsequent resolution. Such factors enable the DRB to have legitimacy and authority. In fact, in its 1996 report, the Construction Industry Institute noted that a critical element for a successful DRB is the “selection of respected construction experts” (CII 23-2 1996, p. v; see also Loulakis and Smith 1992).

In choosing a DRB panel member, knowledge of the law was not considered an essential characteristic by 55% of respondents, although knowledge of claims was judged to be important by 81% of the study sample. This mirrors opinions within the industry that disputes can be resolved in a timely and cost-effective manner without the use of attorneys, but with someone knowledgeable in claims practice and procedure. These findings might also explain the earlier-cited results indicating that nearly all participants believed that having a DRB would reduce legal fees, whereas substantially fewer respondents felt that it would reduce consultant fees.

Survey respondents were undivided in their views that candidates for a DRB must have the ability to render fair and impartial decisions, and that having a choice in the selection of panel members is important to the confidence they would have in the panel. Virtually all (98%) survey participants agreed that a DRB panel member needs to be unbiased and should not be an advocate for the party that chose him or her. Having unbiased, experienced, and knowledgeable panel members hearing the presentations made by the contracting parties, rather than by their attorneys,
be a powerful tool for establishing the procedural fairness of a DRB hearing.

Procedural justice theory proposes that parties are concerned about the perceived fairness of the process and its outcome. Having a “voice” in dispute resolution procedures leads some to believe the procedure is fair (Folger et al. 1996). Having a choice in the selection of panel members, as well as the right to reject proposed panel members, and the right to tell “their own story” concerning the dispute brought before the DRB allows the parties to believe that the process is fair.

A neutral party’s attention to procedural issues is said to be an important factor in appraisals of the fairness of outcomes in dispute resolution (Shapiro 1993; Posthuma et al. 2000). Fair procedures are those that include consistency, suppression of bias, accuracy, and ethical behavior (Leventhal 1980). Ninety-eight percent of the respondents to the current survey agreed that the DRB provides a forum where disputes can be fairly aired and all agreed that it allows for the impartial resolution of a dispute. The DRB process provides for all the conditions to meet the parties’ needs for a fair, timely, and cost-effective dispute resolution procedure. Americans put great emphasis on procedural fairness (Lind and Tyler 1988), therefore, any dispute resolution procedure that is not considered procedurally fair is not likely to be effective.

**Effectiveness of the Dispute Review Boards Process**

A 1993 construction industry survey reported that 92% of respondents agreed that any dispute resolution procedure should attempt to prevent as well as resolve disputes (Voster 1993, Appendix D-11). The construction industry has always been at the forefront of movements to resolve disputes by ADR methods (Smith 1995; Mix 1997; Brooker 1999; Keil 1999; Cloke and Goldsmith 2000), and the utilization of a DRB is a natural extension of the ADR process. But, in a real sense, the use of DRBs is not technically an ADR methodology (Harmon 2001). DRBs not only resolve disputes, they also can act as an impetus towards dispute resolution initiated by the parties themselves (Loualkis and Smith 1992; Barnett 1997; Zuckerman 1999; Chapman 2001). In the current study, 96% of the participants agreed that the mere presence of a DRB results in the resolution of disputes and 89% agreed that it reduces the number of disputes. As noted by Denning (1993), DRBs foster “an atmosphere of trust and cooperation that helps resolve minor disputes at the lowest levels” (p. 42). Indeed, part of the effectiveness of DRBs stems from their ability to engage the parties early on in the dispute resolution process, at a time when information about the issues is easily available. In other cases, the mere presence of a DRB during construction may influence the parties to resolve their differences before preparing a presentation and bringing a matter to the DRB (Technical Committee 1991; Silberman and Battelle 1997; Cox 2000). As others have pointed out (Greenhalgh 1999; Cox 2000), people often feel obligated to appear reasonable and responsible because they care more about the neutral panel’s opinion of them than about their adversary’s opinion. Findings from the present study confirm these observations. In addition, 94% of survey participants agreed that the presence of a DRB reduces the likelihood of insupportable claims, while 60% believed it reduces spurious claims.

A very substantial number of participants (96%) felt that having a DRB provision in the contract indicates the openness of the owner to resolving disputes without resorting to arbitration/litigation, thereby contributing to the satisfaction of the contracting parties. The majority (77%) of respondents agreed that a contractual DRB provision indicates the owner’s willingness to resolve disputes in a timely manner as well. At the same time, however, 98% of participants in this study indicate their belief that having a DRB would not guarantee that either litigation or arbitration would be avoided. It is surprising to find that, while 53% believe that the presence of a contractual DRB provision does not provide assurance that disputes will be minimal, 40% believe that it will. These results could be the result of the variable nature of disputes and their impact on the project. Unfortunately, having a DRB is not itself a panacea for the construction industry; the parties must be committed to the process and perceive it as inherently fair. Nevertheless, DRBs are becoming increasingly more popular because of their success in avoiding litigation and encouraging cooperation between the parties (Stanislaw 1993; Denning 1993; “Turning the tide” 1994; Duran and Yates 2000). This is a self-fulfilling prophecy: The more people believe that the conflict can be successfully resolved, the more likely they are to pursue resolution as a goal (Mayer 2000).

**Dispute Review Boards Recommendation**

Since the DRB is set up prior to the commencement of a project, it establishes its legitimacy and knowledge prior to the hearing of any disputes. After the hearing of a dispute, it issues a nonbinding recommendation. The recommendation is believed to be equitable and well reasoned by 89% of the respondents, logical and timely by 92%, consistent with the terms and conditions of the contract (92%), containing useful information concerning the validity of the claim (100%), and providing useful talking points in resolving the financial impact of a dispute (98%). Arnold and O’Connor’s 1999 study demonstrated that the perception of expertise of a third party was an important consideration in accepting the settlement proposed by the third party. The third party’s credibility, a product of their education, experience and training, made their recommendations persuasive. Like mediators, a DRB cannot force a settlement. Therefore, its success in resolving disputes may rely on its ability to persuade the parties to accept its recommendation. A DRB panel or its individual members can cultivate the parties’ perceptions of its expertise and use this as a form of social power (French and Raven 1959). This has been suggested by several authors (e.g., Kolb 1985; Ziegenvass 1988) in other research. The more persuasive the recommendation, the more likely the parties will accept it to resolve the dispute.

In addition, the DRB may be effective because it can be considered a face-saving mechanism. Disputants may be concerned about saving face during their conflict and in their negotiations (e.g., Fisher and Ury 1981; Worcel and Lundgren 1991; Wilson 1992). Face has been described as the positive value that individuals attach to their identities (Goffman 1967), their self-esteem (Worcel and Lundgren 1991) and the image of strength individuals project while in conflict (Tjosvold 1983). Making concessions can be viewed as a sign of weakness (Pruitt and Johnson 1970; Hiltop and Rubin 1981), which can encourage the opponent to increase its demands (Brown 1968; Pruitt and Smith 1981; Worcel and Lundgren 1991). On the other hand, the failure to make concessions may be viewed as not negotiating in good faith (Hiltop and Rubin 1981). Then there is the paradox of the alleged inability to make concessions because of the “weakness as strength” ploy, claiming, “my hands are tied” (Friedland 1983). With a DRB, a party can make concessions and shift the responsibility for those concessions to the DRB and its recommendation, which is generally admissible in litigation or arbitration. As Stevens (1963) notes, by shifting responsibility to others “the
posture of retreat is more comfortable. The [disputant] has been constrained by [the DRB panel] not by his opponent...” (p. 134). Moreover, if the recommendation is fair, reasonable, and well argued, both parties can rationalize that they are making an intelligent business decision in accepting the recommendation of a DRB panel of their own choosing. In this way, the DRB saves the face of both disputants, since a business decision is allowed to be reached.

Conclusions

To resolve a conflict, the first step is to create an atmosphere that will be effective to the resolution process (Weeks 1992). Is a DRB effective in resolving disputes? Conflict theorists note that a competitive, argumentative, and win-lose form of dispute resolution is ineffective in resolving disputes (Augsburger 1992). The construction industry is coming to this same conclusion. Moreover, parties directly involved and heavily invested in a dispute are least likely to settle it constructively (Augsburger 1992). Constructive alternate methods to resolve disputes are most likely to come from third parties (Augsburger 1992). The German scholar, Jurgen Habermas, noted that positive change originates from communicative action. This action is the capacity of people to work through and resolve disagreements to achieve effective solutions to problems. Rubin and Brown (1975) assert that the mere presence of an independent party may be a significant factor in the dispute resolution process. The presence of a DRB can circumvent the negative attitudes and posturing by both parties that occur when disputes linger for years and when attorneys, either in-house or outside counsel, are actively involved in the dispute process.

The present findings confirm the perceived importance, among industry professionals, of third party assistance and procedural fairness in resolving complex construction disputes. At the same time, the survey results provide an extension of previous work on conflict management technologies. A DRB seeks to change the dynamics of the adversarial stance so that it is noncompetitive and nonexploitative while enhancing the participant’s belief in a collaborative problem-solving approach to problems that are an inherent part of every construction project. Having a DRB, with the parties committed to the process and its success, is the foundation for creating a project environment in which quality and productivity can enhance performance.

Also, numerous studies have demonstrated that disputants coming together on an equal basis (Amir 1969; Cook 1985) and working toward a common goal (Sherif et al. 1961; Worchel et al. 1977) is the most effective means of conflict resolution, because both parties believe they have equal power to influence decisions. The DRB process allows both parties to have equality. In addition, focusing on a common goal of resolving the dispute can divert attention away from the party’s differences and concentrate them on problem solving as their common interest. It also demonstrates the party’s commitment to the DRB process in resolving disputes.

Overall, the results of this survey indicated that 87% of the participants had positive experiences utilizing DRBs and 100% of the participants agree that DRBs contribute to the success of a project. Clearly, a project’s well-being depends upon the parties’ approach to conflict and dispute resolution. An important goal of every construction project should be the early recognition and action on potential and/or actual conflicts before the parties are polarized in their positions. A process that allows for the evaluation of the full consequences and costs of a dispute may deter the parties from escalating the matter into a needless series of extensive, unsatisfactory occurrences. The DRB mechanism is such a process.

DRB indicates that the parties are creating a new mind-set in that the resolution of differences is designed to be a collaborative process and not to be sloughed off on others for binding decisions. The collaborative process is built on cooperation in reaching mutual goals and objectives as well as the efficient use of time and limited resources. Having a DRB as an aid to facilitating the dispute resolution process still leaves the final resolution of the dispute with those most interested in the outcome—the parties themselves. However, it also recognizes that the parties who are directly and emotionally involved in the dispute are “in the worst position” and least equipped (Augsburger 1992, p. 5) to resolve the dispute on their own. The benefit of a DRB is that it seeks to create a contemporaneous win/win attitude absent from other dispute resolution methodologies.

Although preliminary, the results of this study indicate that the presence of a DRB can assist the parties in resolving conflicts before they escalate into costly disputes. The DRB process provides a forum that allows the maintenance of the relationship and cooperation between the parties while resolving disputes in a timely and equitable manner.

Finally, it is useful to outline several limitations to the present study. The most important of these revolves around the issue of generalizability. In particular, the sampling was limited to attendees of the Dispute Review Board Foundation annual meeting. It is difficult to determine whether the same findings would have emerged if participants had been from another construction industry sampling base. Fortunately, the present findings are consistent with the published opinions of industry experts, thereby lending some credence to the present conclusions. Another limitation is grounded in practical constraints that arise from the construction process itself. A direct comparison between two like projects, one with a DRB and one without, would not be possible because each project is unique, with its own set of plans, geological and environmental conditions, and different parties responsible for its successful completion. However, because the success of DRBs remains in the realm of opinion and experience, attempts to establish their effectiveness can usefully be implemented with a quantitative survey approach, such as that adopted in the current study. Nevertheless, encouraged by the promising findings of the current survey, and the positive perceptions of DRBs by industry professionals overall, alternative research strategies should be brought to bear to enrich our understanding of the relative costs and benefits of the process.

References

nical Committee, The American Society of Civil Engineers, New York.


Greenhalgh, 678


Thousand Oaks, Calif.
USER PREFERENCES AND MEDIATOR PRACTICES: CAN THEY BE RECONCILED WITHIN THE PARAMETERS SET BY ETHICAL CONSIDERATIONS

By Edna Sussman*

Recent surveys have shown that users of mediation in commercial disputes value active and directive techniques in mediation. It would seem that a large number of such mediation users want someone who can get the deal done and a great many of them believe an evaluative mediator, who applies pressure for resolution, is more successful in achieving this result. The progressive movement of mediation away from its roots in a more facilitative or transformative model to an increasingly common evaluative model in commercial cases raises a host of questions and concerns. This Article examines the question of what users really want and whether their wishes can appropriately be accommodated with current mediation models and practices within the parameters set by ethical standards. As the American Bar Association (“ABA”) Dispute Resolution Section noted in its pamphlet, Improving Civil Litigation (hereinafter “ABA Pamphlet” or “Pamphlet”), while “there is great value in considering user’s thoughts and experiences” one should “not equate high quality mediation practice with what lawyers and parties want.”1

I. EMPIRICAL STUDIES ON MEDIATION SATISFACTION

The American Bar Association Task Force on Improving Mediation Quality (hereinafter “Task Force”) issued a report in

* Edna Sussman, of SussmanADR LLC, is the Distinguished ADR Practitioner in Residence at Fordham University School of Law and a seasoned arbitrator and mediator.

February of 2008 (hereinafter “ABA Report”) summarizing its findings, which were based on an extensive two-year-long outreach to users and mediators. To elicit data, the Task Force organized a series of well-attended focus groups in nine cities across the United States, collected over 100 responses to questionnaires and conducted telephone interviews. The participants included in-house and non-in-house attorneys whose responsibilities included working for parties in mediation, as well as experienced civil mediators. The Task Force’s work was limited to private civil cases in areas such as commercial, tort, construction and employment (where the parties are typically represented by counsel) and did not include domestic, family or community disputes.3

The findings suggest that more evaluative mediation, with some pressure exerted on the parties, is preferred by many in the context of such disputes. Of those questioned, the following percentages thought the mediator undertaking the listed activities would be helpful in about half or more of their cases:

- 95%—ask pointed questions that raise issues;
- 95%—give analysis of case, including strengths and weaknesses;
- 60%—make prediction about likely court results;
- 100%—suggest possible ways to resolve issues;
- 84%—recommend a specific settlement; and
- 74%—apply some pressure to accept a specific solution.4

---


3 As the ABA Report recognizes, mediator techniques could be very different in family mediation cases or cases where the parties are not represented by counsel. ABA Report, supra note 2, at 19.

4 However, almost half of those questioned felt that there were times when it was not appropriate for a mediator to assess strengths or weaknesses or to recommend a specific settlement. Thus mediators must be sensitive to what is appropriate in particular cases and work with the parties to tailor the process accordingly.
Parallel results were found in a survey of 3,000 lawyers and parties over a six-year period conducted by the Singapore Mediation Centre. An article by the Executive Director of the Centre reports that, of the 87% of survey respondents who use mediation and who were highly satisfied with the mediation process: 83% said that an evaluation of the merits of the case was important; 89% said that assistance in evaluating the case was important; 68% said that recommendation of a particular settlement was important; 85% said that suggesting possible options for settlement was important; while only 35% liked it when mediators were silent about their views. The article concludes that “[i]t would seem that in the Singapore context, a higher degree of mediator intervention is valued in order for parties to find mediation to be satisfactory.”

A breakdown of the ABA Report responses reveals a noteworthy divergence between mediators and users in their respective perceptions as to best practices. When asked about recommending a specific settlement, 84% of users thought it would be helpful in half or more cases, 75% thought it would be helpful in most or all cases; while only 18% of mediators thought it would be helpful in most or all cases, and only 38% of mediators thought it would be helpful in half or more cases. Similarly, when asked about applying some pressure to accept a specific solution, 64% of the users responded favorably for most or all cases and 75% for half or more cases. Among mediators, however, only 24%

---


6 *Id.; but see* Patrick Mc Dermott & Ruth Obar, *What’s Going on in Mediation: An Empirical Analysis of the Influence of the Mediator’s Style on Party Satisfaction and Monetary Benefit*, 9 HARV. NEG. L. REV. 75 (2004). Based on a survey of users of the mediation program at the Equal Employment Opportunity Commission, the authors found that a purely facilitative model was more satisfactory to the parties. This discrepancy in the findings as to satisfaction with a more facilitative model is likely related to the more personal nature of employment disputes as compared to commercial or construction cases, again demonstrating the need to match the style to the problem. It should be noted that the authors also found that monetary recoveries were higher with a more evaluative style of mediation.

7 ABA Report, *supra* note 2, at 15.
responded favorably for most or all cases, while only 30% responded favorably for half or more of their cases.\textsuperscript{8}

Though the ABA Report observes that there is no direct explanation for the substantial discrepancy in the survey responses between users and mediators with respect to pressure, it suggests two possible explanations. First, mediators are more conservative in applying pressure, as they are more aware of the possible disadvantages such as undermining self-determination or losing neutrality. Second, it is possible that mediators are using these techniques more often or more subtly than they realize and do not recognize that they are indeed applying pressure.\textsuperscript{9}

The ABA Pamphlet addresses, \textit{inter alia}, the subject of persistence and “follow-through” by the mediator. The Pamphlet notes that many commercial lawyers complain about mediators who throw in the towel when a mediation becomes difficult and want mediators who will help them work through the difficulty and help them achieve a settlement. The Pamphlet recommends a mediator consider whether, when, and how to exert modest and reasonable pressure to keep the parties progressing through the mediation while, at the same time, “consider how to avoid coercing the parties[,] recognizing that self-determination is the core principle of mediation and that coercion violates generally accepted mediation practice ethics.”\textsuperscript{10}

\section*{II. MEDIATOR STYLES AND ETHICS}

\subsection*{A. Mediator Styles}

The debate over facilitative versus evaluative mediation has a long history. A host of scholarly articles have been written on the subject and the various mediator styles have been exhaustively treated.\textsuperscript{11} Professor Riskind’s seminal work on the subject set up

\textsuperscript{8} Id.

\textsuperscript{9} Id. at 19.

\textsuperscript{10} ABA Pamphlet, \textit{supra} note 1, at 5-6.

\textsuperscript{11} For a review of the various styles of mediation, see Susan Nauss Exon, \textit{The Effects That Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation}, \textit{42 U.S.F. L. REV.} \textit{577} (2008)
a grid showing a continuum from facilitative to evaluative.\textsuperscript{12} Early commentators on the subject went so far as to say that "evaluative mediation is an oxymoron."\textsuperscript{13} More recently, however, others have posited that all commercial mediation has evaluative elements.\textsuperscript{14} Additional mediator approaches have been identified and include transformative,\textsuperscript{15} understanding-based\textsuperscript{16} and a process that focuses more on causes of conflict.\textsuperscript{17} Emerging from these discussions is the concept of informed consent, by which the mediator obtains consent in advance for the style of mediation to be employed, and also identifies for the parties the possibility that different mediation styles could be employed at different stages throughout the mediation.\textsuperscript{18}

Ethical considerations underlie this call for informed consent to mediator style. The Model Standards of Conduct for Mediators issued jointly in August of 2005, by the American Arbitration Association (American Bar Association’s Section of Dispute Resolution), and the Association for Conflict Resolution, provide that "mediation is a process in which an impartial third party facilitates communication and negotiation and promotes

\begin{itemize}
  
  \item \textsuperscript{13} Kimberlee K. Kovach & Lela P. Love, Evaluative Mediation is an Oxymoron, 14 ALTERNATIVES TO HIGH COST LITIG. 31 (1996).
  
  \item \textsuperscript{14} Kenneth Roberts, Mediating the Evaluative-Facilitative Debate: Why Both Parties are Wrong and a Proposal For Settlement, 39 LOY. U. CHI. L.J. 187, 209 (2007).
  
  \item \textsuperscript{15} ROBERT BUSH & JOSEPH FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994).
  
  \item \textsuperscript{16} Gary Friedman & Jack Himmelstein, Resolving Conflict Together: The Understanding-Based Model of Mediation, J. DISP. RES. 253 (2006).
  
  \item \textsuperscript{17} Kenneth Kressel, The Strategic Style of Mediation, 24 CONFLICT RES. Q. 251 (2007).
  
  \item \textsuperscript{18} Frank E. A. Sander, Achieving Meaningful Threshold Consent to Mediator Styles, 14:2 ABA DISP. RESOL. J. 8, 9 (Winter 2008).
\end{itemize}
voluntary decision making by the parties to the dispute.” Standard I states that:

A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

Thus voluntary, uncoerced self-determination by the parties is the fundamental bedrock of mediation. Yet mediators employ myriad approaches that can be described as deceptive or manipulative. James Coben writes about what he refers to as mediation’s “dirty little secrets,” but he recognizes that using techniques that foster settlement are consistent with the basic observation that “mediators, although neutral in relationship to the parties and generally impartial towards the substantive outcome, are directly involved in influencing disputants towards settlement.” Indeed, it is in part the mediator’s art that causes parties to seek mediation as opposed to just engaging in direct negotiation. Coben lists the myriad ways that mediators exercise pressure and persuasion including: managing the process, managing the communication, controlling the setting, timing decisions, managing the information exchange, and engineering who is involved and when. It is when practices used


20 Id., Standard I.

21 James R. Coben, Mediation’s Dirty Little Secret: Straight Talk About Mediator Manipulation and Deception Tactics, 10:1 Just Resols. 9 (2004), (a newsletter of the America Bar Association Section of Dispute Resolution).


23 For a discussion of the many advantages of mediation over direct negotiation, see Edna Sussman, The Reasons for Mediation’s Bright Future, 1:1 N.Y. Disp. Resol. Law 57 (Fall 2008) (a publication of the New York State Bar Association).
by mediators slip beyond such facilitative tools that an examination of whether mediator behavior is coercive or unethical is required.

B. Mediator Ethics

1. Duress and Coercion in Practice

Parties may feel that they are under duress and forced to settle for many reasons. A court date that is in the distant future, a dominant counter-party, economic pressure to conclude the dispute, can all cause parties to feel pressured into settlement. Such factors are intrinsic to many negotiations and do not raise questions as to mediator conduct. Other behavior, however, moves beyond self-determination to coercion. In a treatment of coercion and self determination in mediation, four different categories of coercion that may be created by the mediation process itself have been identified: coercion into mediation, coercion to continue with mediation, coercion to settle, and coercion applied through mandatory reporting to the courts. Our focus is on the second and third forms of coercion that pertain to all mediations whether court ordered or voluntary.

Ethical canons and court ADR rules plainly state that self-determination, voluntary and uncoerced, is the guiding principle

---

24 Coercion by the parties is outside the scope of this note but it is interesting to note the distinction drawn by the Tribunal in Desert Line Projects LLC v. The Republic of Yemen, ICSID Case No. ARB/05/17 at p. 39 (2008), in which the Tribunal observed: “since economic duress of a sort may be present in virtually any settlement, it must rest with judicial decisions to draw the line between on the one hand, economic compulsion exercised by the respondent . . . over the claimant in order to force him to settle and, on the other hand, the normal operation of economic forces.”

25 In the United States, under many court-annexed mediation programs, the parties may be required to participate in mediation, often with a good faith requirement. A different choice was made in the United Kingdom where the courts concluded that up-front consent to participation in mediation was required and therefore decided to impose costs on parties that unreasonably refuse to mediate. See Jacqueline Nolan-Haley, Consent in Mediation, 14:2 ABA Disp. Resol. J. 4, 6 (Winter 2008).

26 Timothy Hedeed, Coercion and Self Determination in Court-Connected Mediation: All Mediations are Voluntary, But Some are More Voluntary Than Others, 26 JUST. SYS. J. 273 (2005).
of mediation and that it is the parties who control whether the mediation continues. In fact, however, there is considerable evidence that mediators often exert considerable pressure and use their wiles to keep parties at the table and to pressure them into settlement. Coercion and duress in mediation are subjects that come up with some regularity in the case law in connection with actions to set aside a settlement agreement reached in mediation. Indeed, such cases are replete with complaints by parties who feel they were coerced into staying at the table and settling the case.

Courts generally adopt the basic contract tenet that a contract obtained through duress or coercion will not be enforced and they will require an evidentiary hearing if persuaded that sufficient facts are presented to raise a question of fact as to duress or coercion. Thus, for example, where it was alleged that the mediator imposed extreme time pressure, told the party that the court would have the embryos in issue destroyed rather than give them to her, that the property value in issue was grossly disproportionate to the cost of litigating further, and that she would have a chance to protest any provisions of the agreement at a final hearing even if she signed the mediation settlement agreement, the court required an evidentiary hearing as — if it was found that the mediator in fact engaged in such conduct — the agreement would not be enforceable.27

The courts have identified seven factors illustrative of excessive pressure in a mediation: (1) discussion of the transaction at an unusual or inappropriate time, (2) consummation of the transaction in an unusual place, (3) insistent demand that the business be finished at once, (4) extreme emphasis on the untoward consequences of delay, (5) use of multiple persuaders by the dominant side against a servient party, (6) absence of third-party advisors to the servient party, and (7) statements that there is no time to consult financial advisers or attorneys.28

While these seem to be appropriate measures against which conduct should be assessed, historically only in rare cases have

the courts been persuaded that duress or coercion sufficient to
defeat enforcement of a settlement agreement has been
demonstrated. These lawsuits in which the parties claimed that
they were coerced to continue with the mediation and to settle
the case provide an interesting set of factual patterns for
discussion as to mediator conduct.

Many cases involve significant undue pressure to keep parties
at the table. Cases reviewed by the courts include a party’s
testimony that he was not permitted to leave the room
throughout a lengthy mediation and had been sapped of his free
will; the testimony of a 65-year-old woman claiming duress at a
mediation which started at 10 AM and was concluded at 1 AM the
next morning, while she suffered from high blood pressure,
intestinal pain and headaches and was told by both the mediator
and her lawyer that if she went to trial she would lose her
house; and a party’s testimony that he was diabetic and his
blood sugar went up, was in severe pain, was prevented from
leaving the building when he wanted to terminate the
negotiations and his attorney would not let him leave without
signing the agreement. Despite the apparent egregiousness of
each of these circumstances, however, the courts refused to set
aside the settlement agreement in all of these cases.

Other cases discuss the mediator’s statements to pressure a
party into settlement as a basis for a claim of duress and coercion.
The courts have reviewed a case where a party contended that
she was warned by the mediator of claims of insurance fraud
against her, that the mediator bullied her, and that she cried for
an hour and no consideration was given to her distress. In
another case, the party testified that he was threatened with
prosecution in bankruptcy court. Another litigant claimed that
statements by the mediator as to the substantial legal fees that

would be incurred made the party feel financially threatened and under duress.\textsuperscript{34} Again, the courts enforced the mediation settlement agreement in all of these cases.

The Second Circuit Court of Appeals addressed the question of whether a mediation settlement agreement can be set aside based on an inaccurate assessment of the case by the mediator. In that case, the plaintiff had attended a mediation session with his lawyer. He claimed that the opposing counsel had given the mediator a copy of his bankruptcy petition and that, based on that document, the mediator explained that since the lawsuit was not listed in the petition, any recovery would go to creditors directly. The mediator was alleged to have said “you have no case” because the case belongs to the bankruptcy trustee and the only way the plaintiff “would ever see a dime” would be if “he agreed to the mediated settlement then and there.” Based on this “harangue,” the plaintiff settled. Subsequently plaintiff consulted bankruptcy counsel and learned that his claim was insulated from creditors of the estate. He opposed a motion made by defendant to enforce the settlement on the grounds that the agreement was voidable because he justifiably relied on the mediator’s fraudulent or material misrepresentation. Continuing the observed trend of enforcement, the Second Circuit upheld enforcement of the settlement agreement stating that “the nature of mediation is such that a mediator’s statement regarding the predicted litigation value of a claim where that prediction is based on a fact that can be readily verified, cannot be relied on by a counseled litigant whose counsel is present when the statement is made.”\textsuperscript{35} Indeed, where the party seeking to back out is represented by counsel at the mediation and had an opportunity to reflect, an attack on the mediation settlement agreement based on duress and coercion is much less likely to succeed.\textsuperscript{36}

\textsuperscript{34} Marriage of Banks, 887 S.W.2d 160 (Tex. App. 1994).


\textsuperscript{36} Advantage Properties, Inc. v. Commerce Bank N.A., 242 F.3d 387 (10th Cir. 2000).
2. Mediator Liability for Duress and Coercion: The Tapoohi Decision

Thus it seems the courts will generally uphold a settlement agreement reached in mediation in most cases, notwithstanding claims of coercion and duress. The question of how the courts would view a case brought against the mediator for damages alleged to have been caused by mediator conduct, however, has not been the subject of extensive discussion by the courts. The decision by the Australian court in Tapoohi v. Lewenberg, in which claims against the mediator for damages were asserted, provides a cautionary tale as to potential mediator liability.

No reported cases were found in the United States in which the mediator was held personally liable for his or her conduct at the mediation and only one case was found in which it was discussed. The Tapoohi decision is therefore the leading case to date which discusses possible mediator liability. The case provides a road map to some of the dangers that may be occasioned by a more assertive approach to mediation as it explores some of the potential contours of mediator liability. While the decision was one on summary judgment in which all of the assertions had to be regarded as true, it evokes serious questions about mediator conduct.

---


39 The Mediation Case Law Project at the Hamline University, School of Law, Dispute Resolution Institute tracks and reports on all cases involving mediation and segregates them in various categories. There are virtually no cases reflecting suits against mediators and none where recovery was obtained. The case reports are available at http://law.hamline.edu/adr/dispute-resolution-institute-hamline.html.

40 See Lange v. Marshall, 622 S.W.2d 237 (Mo. Ct. App. 1981) in which the court, without reaching the question of what duties the mediator had to the parties who were not represented by their own counsel, found that the plaintiff did not sustain any damage as a proximate result of the mediator's conduct.
The mediator in Tapoohi was an experienced and highly-regarded barrister with extensive experience as a mediator and arbitrator in commercial matters. He was not conducting the mediation pursuant to an order of a court, which in many jurisdictions would have given him immunity from suit, and he was not conducting the mediation pursuant to a written mediation agreement as many mediators do. The Tapoohi case arose in the context of a family property dispute and centered on a bitter disagreement over property in the estate of the parties’ mother. Millions of dollars were involved. One of the parties, Lewenberg, attended the mediation in person with her solicitors and barristers while the other party, her sister Tapoohi, who was overseas at the time, attended by telephone, but was represented in the mediation room by barristers and solicitors. An agreement as to key points was reached and a written agreement was signed by Lewenberg in person and by fax by Tapoohi. After the mediation, Tapoohi discovered that, as a result of the settlement, she was liable for a significant capital gains tax. She filed a suit to have the settlement agreement set aside asserting: 

(a) that the agreement was subject to an express oral term that the parties would seek tax advice, after which they would negotiate the final terms of the agreement; and

(b) that the parties had not reached a definitive binding agreement on the matters subject to the settlement.

Among others, Tapoohi sued her solicitors for their failure to ensure that tax advice was obtained before any final settlement. The solicitors brought a third party claim against the barrister and the mediator seeking contribution.

The affidavit evidence, which was accepted by the court for purposes of considering a summary judgment motion made by the mediator, was that Tapoohi’s solicitor emphasized the importance of the tax implications in any settlement and said that a resolution could not be achieved until advice on the tax consequences was obtained. He said at the mediation that he was not sufficiently familiar with the tax implications and the settlement would have to wait until advice on those issues was obtained.

At 8 PM, by which time two of the legal advisers had left the meeting, an agreement in principle had been reached. Tapoohi’s legal advisers suggested that it was late and they were not comfortable signing that night. The mediator said “you have got to
stay, you have got to do the terms of settlement tonight.” He stated that, in light of the acrimony between the parties, there had to be a written settlement agreement that night, that it was in the parties’ interest to sign something before they went home, and that he always did it that way. It was stated that he spoke very forcefully and that those assembled acquiesced to his direction because he was an experienced mediator and they viewed a direction from the mediator as giving them no choice but to stay. In their affidavits they said that otherwise they would have adjourned the mediation.

The mediator dictated the terms of the settlement in detail; the lawyers were not actively involved. Tapoohi’s solicitor said that he attempted to raise the question of advice on taxes but the mediator pressed forward, saying that he wished to continue to dictate the settlement terms. A stumbling block arose in recording the consideration for the transfer of shares in a company. The mediator suggested a figure of $1 as nominal consideration and that led to a further comment from the solicitor that tax advice would be needed before the consideration issue could be finalized. The $1 sum was recorded in the document, however. Minor changes were made to the draft settlement but ultimately all parties signed the agreement. There was no term in the settlement agreement to the effect that it was subject to receipt of advice on tax issues being received to the satisfaction of the parties or that it was not intended to be final and binding but subject to further negotiations. Following the mediation it was discovered that the $1 price suggested by the mediator created serious tax problems and subsequent attempts to vary that price failed.

While the parties and counsel all received the draft of the settlement agreement and had the opportunity to read it and make changes and corrections, the hour was late and no one caught the omission. Counsel said that, at no time during the mediation, did he believe a binding agreement was being entered into and he only passed the document along to his client based on his reliance on the mediator.

The court, in considering the mediator’s motion for summary judgment, reviewed Tapoohi’s position that the mediator had taken it upon himself to give advice as to matters that concerned her interests by taking these various actions. The court
considered the duties of the mediator and noted that this was an area of the law as yet undeveloped. The court opined that it was loath to dismiss a claim where the duty owed to arguably vulnerable parties was uncertain. The court specifically cited to, *inter alia*, the alleged duty of a senior lawyer specializing in arbitration and mediation to exercise care and skill and not to act in a manner contrary to the interest of a party, and not to coerce or induce a settlement when there was a substantial risk that the settlement was contrary to the interests of a party.

The court raised the question of whether the mediator had contractually assumed an obligation to offer advice as to legal implications. The judge dismissed the application for summary judgment, saying that it was for a trial court after hearing the evidence to determine the applicable legal standard and whether there had been an imposition of undue pressure upon resistant parties, at the end of a long and tiring mediation, to execute an unconditional final agreement settling their disputes where it was apparent that they . . . wanted to seek further advice . . . or where it was apparent that the agreement was not unconditional, or where the agreement was of such complexity that it required further consideration.41

The court noted the mediator's defenses relating to causation and damages, issues as to which proof would be exceedingly difficult, and the claimed lack of any duty on the part of the mediator and the claim of judicial immunity. The court rejected those arguments on summary judgment and found that those issues required further consideration and review at trial.42

3. Considerations for the Mediator

While many might agree that the mediator in *Tapoohi* clearly stepped over the line of acceptable and ethical behavior, some of the conduct complained of is commonplace in mediation and may

---

41 Tapoohi v. Lewenberg, VSC 410 at ¶ 86.

42 It is the author's understanding that the *Tapoohi* case was subsequently settled.
well represent precisely the kind of pressure users seek. The prospect that a court could entertain the imposition of personal liability on a mediator, especially where the parties were represented by able counsel and had every opportunity to review the draft settlement agreement, requires an assessment of some specific practices of mediators. When and how it is acceptable to try to keep people negotiating and what is proper and ethical to say to foster settlement are not easy questions.

A review of the patterns of conduct that emerge from complaints lodged by disgruntled mediation parties and discussed in the published court decisions provides a road map for conduct as to which mediators should be especially cautious. They include:

1. Strong arming the parties into not leaving when they want to or when they want to suspend the mediation to consult others;
2. Strong arming the parties into not leaving when they are feeling indisposed;
3. Strong arming the parties into working late into the night;
4. Strong arming the parties into writing an agreement on the spot;
5. The mediator writing the settlement agreement draft;
6. The mediator talking about the cost of litigation;
7. Mediator discussions/warnings/threats about additional legal action that would result;
8. Mediator discussions of other consequences of failure to settle;
9. Mediator evaluations and discussions of likelihood of success in the dispute; and
10. Mediator giving legal advice.

a. Keeping the parties in the mediation

There has been relatively little scholarly commentary about mediators coercing parties into continuing with the mediation despite a party saying he or she wants to leave, does not feel well,
or it is too late to continue. As such situations are intensely fact based, the dearth of writing on the subject is not surprising. As the ABA Report warns, “it is important to note the obvious distinction between ‘pressure’ on the one hand and coercion or intimidation on the other.” 43 This is a crucial distinction and one that must be kept well in mind by all mediators to avoid stepping beyond ethical bounds when urging parties to continue working on resolution.

Parties often look to mediators to keep the negotiation alive, however, and some persuasion by the mediator may be essential to assisting the parties in continuing to negotiate. In addition, persuasion, properly handled in appropriate circumstances, would be viewed by many as part of the mediator’s job. In the exercise of such persuasion, however, mediators should be sensitive to physical impediments, to a stated need to consult others, or to other circumstances that suggest that suspension is in order, and at all times should respect the parties right to control their participation.44

b. Encouraging a written agreement at the mediation

Mediators often encourage the parties to commit the agreement reached to a binding writing at the mediation knowing that, without such a writing, “settler’s remorse” might set in and the deal might disappear.45 Telling the parties that recording the agreement on the spot makes the completion of the agreement more likely and enables the parties to flush out any latent areas of dispute so that they can be resolved while those with authority are present and focused on the matter. Such activities would seem

43 ABA Report, supra note 2, at 18

44 Many court-ordered mediations require the parties to participate in the mediation in good faith and limit somewhat the parties’ control over participation and the level of their engagement.

to many to be part of the mediator’s task in assisting the parties to achieve a resolution. But, again, the distinction between persuasion and coercion must be carefully observed by the mediator so as not to force a writing before the parties are truly prepared to commit with finality.

Having the parties themselves be the ones to actually write up the settlement agreement rather than the mediator is a subject of some discussion among mediators. Many mediators absolutely refuse to be the scriveners of the agreement, while others do so in order to expedite the process, while giving ample opportunity to counsel to review and revise the draft. The *Tapoohi* case suggests that mediators should carefully consider whether they should record the terms of the agreement or leave such to counsel.

c. *Advising on Unfavorable Consequences*

Asking the parties if they have considered the costs of litigation and encouraging them to quantify that cost is a common tool used by mediators and does not seem objectionable when properly posited. Asking questions that aid the parties in assessing how their interests outside the immediate dispute might be affected is also part of the mediator’s job in helping the parties identify their interests. However, threatening language by the mediator and coercive statements that go beyond opening up a conversation about such collateral impacts should be viewed as being in breach of ethical requirements.

d. *Evaluating the merits*

In a thesis by John Cooley and Lela Love that directly addresses the question of ethics and mediator evaluations, it has been suggested that, before evaluations of the merits are conducted, the mediator should obtain informed consent from the parties.\(^{46}\) Speaking not to reality-testing questions but rather to a concrete evaluation of the merits by the mediator, the dangers of giving an evaluation of the case are identified as jeopardizing neutrality,

interfering with self-determination, and creating a risk that insufficient information may lead to an erroneous analysis and conclusion. The risk that information obtained in caucus may not be the same as a judge or jury would have before it, that an evaluation may end negotiations, and that parties anticipating such an evaluation may be less candid with the mediator, are also noted.47

Cooley and Love caution that a failure to warn parties about a mediator’s desire to provide evaluative commentary may be actionable under tort and contract theories that may attribute liability to the mediator. Informed consent would serve to obviate such claims as well as serve to assure party self-determination, if properly and carefully couched, so as to clearly communicate the basis for and limits of the evaluation to be given.

Whether the evaluation is given in a separate caucus session with one of the parties, or before all parties in a joint session, is of course a significant difference but, even in caucus, before turning from a reality-testing questioning mode to an evaluation, a mediator would do well to caution both parties as to the many limits on his or her ability to predict any result with certainty. Moreover, careful consideration should be given as to whether what might be viewed as legal advice should be given in an area in which the mediator is not expert.48

e. Mediator Responses to Liability Potential

A mediator would be well advised, if not protected by quasi-judicial immunity as a court appointed mediator, to develop a well-crafted mediation agreement that sets out the scope of the mediator’s responsibilities. While, of course, one cannot fully and

47 Some court-annexed mediation rules do not permit evaluations by the mediator. See, e.g., Florida Rules for Certified and Court-Appointed Mediators § 10.370 (“A mediator shall not offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute.”).

48 Recently issued rules for neutrals in the New York State court-annexed mediation program provide for two categories of neutrals: neutral evaluators and mediators. Neutral evaluators must have five years of substantial experience in the specific subject area of the cases while mediators must have recent experience mediating actual cases in the subject area of the types of cases referred to them. New York Administrative Order of the Chief Administrative Judge of the Courts § 146 (2008).
effectively deflect liability for mediator misconduct by agreement, the scope of the mediator’s responsibilities and the nature of the reliance that can be placed by the parties on the mediator’s statements can be enunciated and create a framework for mediation expectations. Mediators must be vigilant to ensure that their efforts to persuade do not lapse into coercion and should carefully consider whether they should be the ones recording the agreement of the parties. A mediator also would be well advised to delineate the limits of his or her ability to accurately predict outcomes and to obtain explicit consent from all parties for any evaluation of the merits in joint session.

III. Conclusion

A significant number of mediation users have expressed the view that they appreciate evaluative mediators who exert some pressure to promote settlement. While user preferences cannot dictate mediator conduct, mediation is a tool used by parties to achieve settlement. As is often said in the context of arbitration, it is “the parties’ process.” With informed consent to a particular practice, mediators should be able to provide the service sought and provide evaluations as requested.

Pressure can be viewed as being in direct conflict with the mediator’s ethical obligations which call for party self-determination and a voluntary, uncoerced decision. The mediation users’ preference for some pressure to settle thus requires further empirical study. Numerous questions need to be answered: What kind of pressure do users find helpful? Do parties prefer further discussion of the merits of the case or imposition of more tangible strictures, such as not letting people leave the mediation or requiring that a writing be prepared? What kind of pressure do users find unacceptable? How different should the answer be, if at all, depending on the nature of the case and the presence and quality of counsel? Should there be a difference in the types of pressure that may be applied in a court ordered mediation as opposed to a voluntary mediation?

Ultimately the analysis will undoubtedly result in an “I know it when I see it” litmus test, as each mediation presents its own unique challenges and requires an individualized process design and constant adjustments in approach as the mediation
progresses. But a further exploration of the subject of appropriate mediator “pressure” and where and how it slips into “coercion” can lead to a better understanding by mediators of some of the limits they should impose on themselves in managing the mediation process. Best practices also can be developed consistent with these ethical obligations. The ABA Report concludes that further examination be conducted to consider whether the recommendations made are useful in other practice areas, and whether there are any implications from the work product for how mediators should be trained and how mediators can offer high quality services using various techniques.

**EDNA SUSSMAN**

Edna Sussman is a full-time arbitrator and mediator, principal of SussmanADR LLC and the Distinguished ADR Practitioner in Residence at Fordham University School of Law. She was formerly of counsel at Hoguet Newman Regal & Kenney LLP and a partner at the law firm of White & Case LLP. She serves as an arbitrator and mediator on commercial, energy and environmental matters, both domestic and international, for several of the leading dispute resolution institutions including the AAA, ICDR, CPR, CEAC, WIPO and FINRA. As a court-certified mediator, Ms. Sussman serves on the mediation panels of the federal, state and bankruptcy courts in New York. She is also certified as a mediator by the International Mediation Institute.

Ms. Sussman is Chair-Elect of the Dispute Resolution Section of the New York State Bar Association and serves as editor-in-chief of New York Dispute Resolution Lawyer. She is the former chair of the Energy Committee of the New York City Bar Association and is a vice-chair of the International Commercial Disputes Resolution Committee of the Section of International Law of the American Bar Association, where she also chairs the Alternative Dispute Resolution Committee of the Environment Energy and Resources Section. Ms. Sussman has been selected as a Best Lawyer for Alternative Dispute Resolution for 2009 and named as an Outstanding Woman in Energy Law by Energy Law 360. She can be reached at esussman@SussmanADR.com.
A Stitch in Time: Preventing the Escalation of Conflict
By Patrick Green

Mediation is evolving and flourishing. It is not a panacea, but a process which is apt both to resolve disputes and to prevent them. This article looks at innovations in the application of mediation and related tools to prevent the escalation of inevitable differences into unnecessary conflict. I hope that readers will forgive a brief tour d’horizon through some preliminary observations against the background of which some recent innovations may make more sense.

What Is Mediation?
When people confuse mediation and arbitration, my heart sinks. This is not because of some messianic devotion to mediation or some false comparison between two essential dispute resolution processes; rather, it is for the lack of understanding of mediation and its potential. As a process, mediation is uniquely solutions focused, as opposed to rights limited. Through the integration of interests (as opposed to the determination of rights), it also offers the possibility of creating value in the making of deals and the resolution of differences or disputes.

This, however, is not universally understood. I recently heard a respected arbitrator describing what he had done in an arbitration (recommending that a settlement of claims be considered), as mediation. Whilst the recommendation may have been wise or insightful, it was certainly not the product of a process which would be recognised as mediation, nor could it have harnessed the opportunities presented by the without prejudice arena of mediation, in which an expert third party facilitates the design of a creative solution. It betrayed a striking poverty of understanding of the process of mediation. It is difficult to convey, to those who have not seen it for themselves, the power of a solution designed from information or options which would fall well outside the field of enquiry in litigation or arbitration, and which, in some cases, the parties may not have previously acknowledged even to themselves.

Fans and Foes
Among fans of mediation, litigation and arbitration are often used as totems of expense, delay and bitterness. This is simply not fair. ‘Vanilla’ mediation (resolving mature disputes before trial) relies heavily, for its teeth, on developed systems of litigation or arbitration, by which the parties can properly assess their alternative to a mediated settlement.

Among the foes of mediation, there is the old joke, tellingly made by lawyers not clients, that ADR stands for Alarming Drop in Revenue. Behind every joke, however, there is a kernel of truth. For lawyers, a mediation which prevents a case going to trial does result in a huge drop in revenue, from that case—but maybe not, in the medium term or longer term, from that client.

Contracted Mediation
Contracted Mediation was born of work which began in 2000, when Stephen Woodward, a project manager, and I began trying to design a process to prevent contract differences escalating into disputes in the first place. The process had to work both in theory and on the ground and it had to make sense to users.

If prevention of escalation could be achieved by using mediation much earlier, that ought to be welcomed. We thought that where there was an ongoing commercial relationship, the benefits of this approach would be even more important. An obvious testing ground was the field of construction projects (frequently late, over budget and plagued with disputes). The idea was to support project delivery and reduce project risk. This process became Contracted Mediation, by which a commitment to the use of mediation, by which a commitment to the use of mediation was made by those on the ground, in the contract, in the culture on the project and through the confidence of those people (not their lawyers) in the safety and sense of the mediation process. Instead of mediation being a process of last resort to resolve cases in the lead-up to trial, it becomes a business tool, as to the use of which the parties look to their lawyers for advice, but nonetheless feel that they retain some control (unlike litigation). Businesses like this. And they like their lawyers for putting it in place and helping them to use it effectively.

Jersey Airport was one of the early adopters of Contracted Mediation and allowed the experience there to be used as a case study. In short, Contracted Mediation worked. After a dispute arose in the middle of the project, mediation was used quickly to resolve the dispute and a host of other issues, in one day of face-to-face meetings. The parties went on to finish this publicly funded project one day early; £850,000 under budget; and with no claims. The parties went on to finish this publicly funded project one day early; £850,000 under budget; and with no claims.

Among the foes of mediation, there is the old joke, tellingly made by lawyers not clients, that ADR stands for Alarming Drop in Revenue. Behind every joke, however, there is a kernel of truth. For lawyers, a mediation which prevents a case going to trial does result in a huge drop in revenue, from that case—but maybe not, in the medium term or longer term, from that client.

As Mike Lanyon, Director, Jersey Airport, said: “I always had faith in this process. It introduces a team approach to resolving differences for the common good of the project and enables the parties to continue to work in the spirit of partnership… it’s much quicker and less costly and allows all parties to stay in control…it should be standard practice.”

In parallel, Dispute Review Boards (and developments from them) were also being used successfully on projects around the world, which clearly reflected common thinking that there was a real demand for more efficient and effective dispute resolution options. Initially, many DRBs in the US proposed non-binding recommendations to resolve disputes. In 2004, the ICC created the Combined Dispute Board (CDB), which is a hybrid of Dispute Review Boards and Dispute Adjudication Boards and may make either a recommendation or a decision, depending on party wishes and the circumstances. Some Dispute Board processes were designed with tiered stages of mediation and adjudication.
What seemed clear was that the commercial world valued such processes, which had a clear role to play both in more effective management of venture risk. Perhaps uniquely, mediation could add the dimension of actively supporting venture or project relationships.

**The Need for a Bird’s Eye View**

Not content with Contracted Mediation, back in London, the thinking moved on as a result of requests made by the National Health Service. A tool for harvesting information in contractual relationships was needed if identifying the opportunity to use mediation was to be brought any earlier along the timeline. A process was necessary that would watch the project like a hawk, so that the benefits of Contracted Mediation would not solely rely on the parties themselves realising that there were issues which needed addressing. To work, this would have to be cost-effective.

A software system was developed to meet this need. It uses apparently simple information, including regular intuitive feedback, harvested from project participants via a web-based interface. Importantly, the parties agree in advance that this information is confidential and without prejudice; and the parties may neither use it nor seek to use any litigation, arbitration or adjudication. This allows real candour from the project participants and gives the neutral mediation and risk experts a unique bird’s eye view of the project.

The information is analysed with the aid of proprietary software, to spot emerging risks on the horizon and to help to facilitate their early resolution, thereby providing a uniquely effective additional risk mitigation tool. In short, this system builds elasticity into otherwise brittle contractual relationships by providing the opportunity to make more minor adjustments at a much earlier stage, with greater insight, thereby flexing rather than breaking the contractual framework. The effective use of this technology allows this to be done at that (crucially) early stage.

Even when designing Contracted Mediation, it was clear that there was real value to capturing the platform of information necessary to resolve a dispute early and before the knowledge base had decayed through the lapse of time and changes of personnel. The diagram below shows how that decay happens over time and is then repaired by the industry of lawyers and clients working together (at considerable expense) to recreate the knowledge base.

**The valley of the Knowledge Curve shows the area where the potential for resolution is significantly impeded by the uncertainties which result from the decay of the knowledge base. From an economic perspective, there is a perfectly reasonable case for arguing that, if it costs $500,000 to rebuild the knowledge base towards trial and it would only have cost $100,000 to analyse and complete it at the time, the knowledge base at the time is worth $400,000.**

“*The intelligent and creative use of mediation offers us the chance to prevent the unnecessary escalation of differences and to welcome honest disagreement…*”

**Wider Application**

This technology has now been further developed for new applications, such as employee and community engagement, and consultation for the engagement of large numbers of diverse stakeholders in the community context, for example, in the context of planning and development. These and other applications are, of course, free-standing tools; but they have been designed to allow the use of the process of mediation, to best advantage, early and in a way which is tailored to the particular context in which they are deployed. It is absolutely central to understanding the link between these applications and mediation to appreciate the advantage of the open range of enquiry which is at the core of these processes—modelled on the unlimited but structured enquiry and exploration which takes place in a really good mediation, uncovering pieces of the puzzle, from which the ultimate resolution takes its shape. For lawyers, innovations such as these provide an opportunity to integrate the provision of valuable advice to clients more directly and effectively into the client’s business and, often, at a much earlier stage.

Ghandi said, “Honest disagreement is often a good sign of progress.” The intelligent and creative use of mediation offers us the chance to prevent the unnecessary escalation of differences and to welcome honest disagreement, without inviting its sometime but unwelcome bedfellow, bitter conflict.

**Endnotes**

1. For a mediation organisation called ResoLex, based at the International Dispute Resolution Centre in London.
2. The X-Tracker™ system was originally designed for construction projects but has since been adapted and applied more widely, in other ongoing commercial joint ventures.

Patrick Green, PGreen@hendersonchambers.co.uk, is a barrister and mediator at Henderson Chambers in London. He is a founder of ResoLex, www.resolex.com, and a Visiting Fellow at the London School of Economics and Political Science.
The International Task Force On Mixed Mode Dispute Resolution: Exploring The Interplay Between Mediation, Evaluation And Arbitration In Commercial Cases

Thomas J. Stipanowich* Véronique Fraser†
THE INTERNATIONAL TASK FORCE ON MIXED MODE DISPUTE RESOLUTION: EXPLORING THE INTERPLAY BETWEEN MEDIATION, EVALUATION AND ARBITRATION IN COMMERCIAL CASES

Thomas J. Stipanowich* & Véronique Fraser**

INTRODUCTION—INTERNATIONAL DISPUTE RESOLUTION PRACTICE GUIDELINES: IMPERATIVES, OPPORTUNITIES, CHALLENGES .......... 841
A. The Need for International Practice Guidelines for Commercial Dispute Resolution ............................................... 841
B. Challenges Associated with Complex Dispute Resolution: “Mixed Mode” Scenarios ........................................... 843
I. COMMON SCENARIOS INVOLVING MIXED MODE PROCESSES ........................................................................... 846

* William H. Webster Chair in Dispute Resolution and Professor of Law, Pepperdine Ph.D, LL.M., LL.B/J.D. Assistant Professor of Law, Faculty of Law, University of Sherbrooke (Québec, Canada) and Scholar-in-Residence, Straus Institute for Dispute Resolution, Pepperdine University School of Law (Malibu, California). The author is grateful to Samuel Grondin, candidate to the Master’s in Prevention and Resolution of Disputes, Faculty of Law, University of Sherbrooke, who was absolutely indefatigable and indispensable in providing research assistance and helping to review the vast literature on mixed modes.

** Ph.D, LL.M., LL.B/J.D. Assistant Professor of Law, Pepperdine University School of Law (Malibu, California). The author is grateful to Samuel Grondin, candidate to the Master’s in Prevention and Resolution of Disputes, Faculty of Law, University of Sherbrooke, who was absolutely indefatigable and indispensable in providing research assistance and helping to review the vast literature on mixed modes.
A. SCENARIO 1: Mediators Using Nonbinding Evaluation or Mediator Proposals as a Means of Encouraging Settlement .................................................... 847

B. SCENARIO 2: Mediators “Setting the Stage” for Adjudication and Other Dispute Resolution Options ...... 848

C. SCENARIO 3: "Switching Hats": Mediators Shifting to the Role of Arbitrator; Arbitrators Shifting to the Role of Mediator or Conciliator ........................................ 850

D. SCENARIO 4: Arbitrators Setting the Stage for Settlement .......................................................................... 856

   SCENARIO 4.1: Arbitrators Setting the Stage for Settlement of Substantive Disputes by Handling Key Procedural Issue(s) .............................................. 858

   SCENARIO 4.2: Arbitrators Setting the Stage for Settlement of Substantive Disputes by Promoting Use of Mediation ......................................................... 859

   SCENARIO 4.3: Arbitrators Setting the Stage for Settlement of Substantive Disputes by Issuing Preliminary Views, Etc. ...................................................... 860

E. SCENARIO 5: Arbitrators Rendering Decision Based on a Settlement Agreement (Consent Awards) ............... 861

F. SCENARIO 6: Other Kinds of Interaction between Evaluation, Mediation, Arbitration or Litigation ........ 862

   Scenario 6.1: Interplay Between Mediation and Arbitration or Litigation ...................................................... 862

   SCENARIO 6.2: Interplay between Nonbinding Evaluation and Mediation, Arbitration or Litigation .......................................................... 863

G. Special Considerations Involving Relational Platforms ..... 864

   Standing Neutrals ............................................................................. 865

II. PHASE ONE: DEVELOPING A TEMPLATE FOR IDENTIFYING AND UNDERSTANDING VARIATIONS IN MIXED MODE COMMERCIAL DISPUTE RESOLUTION ........................................................................................................... 866

   A. Developing “Basic Building Blocks” to Promote Mutual Understanding and Facilitate Analysis of Our Varying Approaches to Mixed Mode Processes .......... 867

      1. A Basic Taxonomy of Dispute Resolution Processes ... 867

         A Taxonomy of Basic Dispute Resolution Terms ...... 869
2017] MEDIATION EVALUATION & ARBITRATION 841

Adjudicative Processes .................................................. 871
Non-Adjudicative Processes ............................................ 871

2. Identifying goals and values that underpin practices
and perspectives on commercial dispute resolution
processes ........................................................................ 877

B. Exploring the Landscape: Developing Profiles of
International Practice and Representative National
Cultures / Legal Systems ................................................... 880
C. Challenges for Phase One ............................................ 881

III. PHASE TWO: DEVELOPING INTERNATIONAL
GUIDANCE FOR MORE EFFECTIVE MIXED MODE
PRACTICE .............................................................................. 883
A. Preliminary Considerations ........................................... 883
B. Guidelines for Practice .................................................. 884
C. Forms and Procedures ................................................... 885
D. Training and education .................................................. 885
E. Other Possible Results .................................................... 885
CONCLUSION ........................................................................... 885

INTRODUCTION—INTERNATIONAL DISPUTE RESOLUTION
PRACTICE GUIDELINES: IMPERATIVES, OPPORTUNITIES,
CHALLENGES

A. The Need for International Practice Guidelines for Commercial
Dispute Resolution

Today as never before, opportunities and challenges are
presented to business planners by trends toward globalization and the
expansion of international commerce as well as our growing
experience with varied, often multifaceted processes for the
management and resolution of conflict. These complexities are
reinforced by differences in culture and legal systems. Given present
trends, there is a critical and growing need for dialogue and
deliberation among practitioners and thinkers from different cultures
and legal systems regarding the management and resolution of
conflict in both public and private spheres and the roles of third party
interveners (which for the sake of convenience we will refer to throughout this paper as “neutrals”).

As mediation and other settlement-oriented intervention strategies have come into broader use in commercial dispute resolution, different views have emerged regarding the nature and purpose of some of these processes as a result of both individual choice and apparent cultural or systemic factors. For example, a recent study of commercial mediators from different parts of the world suggests that while mediators frequently have different perspectives and employ different “default practices,” identifiable trends have emerged from region to region. These realities, underpinned by cultural and legal traditions, contribute to difficulties

1. The term “neutral” is often used as a term of convenience to describe mediators, arbitrators and other third parties in the resolution of disputes. See, e.g., Neutral, in DICTIONARY OF CONFLICT RESOLUTION (Douglas H. Yarn ed. 1999). Its wide use may be attributed primarily to prevailing norms and standards that establish requirements or aspirations of even-handedness, impartiality and independence for mediators and arbitrators. See, e.g. IMI CODE OF PROFESSIONAL CONDUCT § 2.2 (IMI); IBA GUIDELINES ON CONFLICTS OF INTEREST IN INT’L ARB. Part I (2014); MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard II (ABA & AAA, 2005); CODE OF ETHICS FOR ARB. IN COMM. DISP., Canon I (AAA, 2004). However, particularly in US tradition, there are situations in which the agreement of the parties or surrounding circumstances make it permissible for third party interveners to be predisposed toward a party or perhaps even take an advocacy role as arbitrator. See Thomas J. Stipanowich, Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals, 25 AM. REV. INT’L ARB. 297, 368-74 (2014), available at http://ssrn.com/abstract=2519084 (discussing perceptions and practices of party-appointed arbitrators on tripartite panels in US domestic arbitration and in international arbitration).


4. See, e.g., Kaufmann-Kohler & Kun, Integrating Mediation into Arbitration, supra note 2, at 479-82. See also Michael Mellwraith & Henri Alvarez, Common and Civil Law Approaches to Procedure: Party and Arbitrator Perspectives, in INTERNATIONAL COMMERCIAL ARBITRATION PRACTICE: 21ST CENTURY PERSPECTIVES 2-1 - 2-4 (Horacio A. Grigera Naon & Paul E. Mason eds., 2015); see also Thomas J. Stipanowich, Arbitration: The
in mutual understanding, at the most basic level, of concepts such as “mediation” and “conciliation.”

B. Challenges Associated with Complex Dispute Resolution: “Mixed Mode” Scenarios

The potential for divergent perspectives or practices is enhanced when dispute resolution processes are mixed or matched. A varied spectrum of complex situations, which may be described collectively as “mixed mode scenarios,” includes several kinds of interplay between arbitration (or public adjudication), evaluation and mediation, or other processes aimed at facilitating an agreement of some kind. Mixed mode approaches are an increasingly important feature of both international and domestic commercial dispute resolution, but they are sometimes viewed from dramatically different perspectives by those of different cultures and legal systems. Thus, a lawyer, arbitrator, or mediator from the United States, and counterparts from China, Germany, or Brazil may respond in very different ways to questions that are of growing import in our increasingly global society, including the following:

- In what circumstances, if ever, should mediators engage in forms of non-binding evaluation, or make proposals for the resolution of disputes in the course of promoting settlement?
- In what ways might neutrals appropriately help parties tailor better dispute resolution processes, as, for example, where mediators help “set the stage” for arbitration?


6. See infra Section I.


8. See supra note 4.
Since, according to some recent data, settlement appears to be becoming increasingly likely during the course of commercial arbitration, should arbitrators be more deliberate about helping to set the stage for potential settlement? If so, what are appropriate methods of accomplishing this goal?

Under what circumstances, if any, might it be appropriate for a mediator to “switch hats” and become an arbitrator or judge, or for an arbitrator or judge to become a mediator, during the course of resolving a dispute?

What is the proper protocol for arbitrators or institutions to follow when parties ask them to convert a settlement agreement into an arbitration award?

In what ways, if any, might mediators and other “non-adjudicative neutrals” and adjudicative neutrals appropriately communicate in the course of resolving disputes, whether sequential, parallel or integrated?

With such questions in mind, the International Task Force on Mixed Mode Dispute Resolution (“Task Force”) was established as a joint initiative of the International Mediation Institute (“IMI”), the College of Commercial Arbitrators (“CCA”), and the Straus Institute for Dispute Resolution, Pepperdine Law School (“Straus Institute”).


10. See Section II.A.1. for a basic taxonomy of dispute resolution terminology.

11. See generally Joint International Task Force on Mixed Mode Dispute Resolution, IMI INTERNATIONAL MEDIATION INSTITUTE, available at https://imimediation.org/imi-mixed-mode-mediation-task-force (last visited Jan. 13, 2017) (Note, the correct name of the Task Force is as stated in this article). The Executive Committee of the Task Force has primary responsibility for coordinating and overseeing this effort. The members of the Executive Committee, comprised of designees of the sponsoring organizations, include: Jeremy Lack, a member of IMI’s Independent Standards Commission, Switzerland and UK; Deborah Masucci, Chair, Board of Directors, International Mediation Institute; Prof. Moti Mironi, Haifa University, Law Faculty, Israel; Kathleen Paisley, Ambos NBGO, Belgium and UK; Thomas J. Stipanowich, Academic Director, Straus Institute for Dispute Resolution, William H. Webster Chair in Dispute Resolution, and Professor of Law, Pepperdine University, USA; and Edna Sussman, President, College of Commercial Arbitrators (2015-16). In support of the work of the Task Force, the Straus Institute is developing white papers on some related subjects under the supervision of Prof. Stipanowich and Prof. Veronique Fraser, Sherbrooke University Faculty of Law, Quebec, Canada with valuable contributions by Straus Research Fellow Karinya Verghese, an experienced attorney from Australia who completed her LL.M in 2015 and a team of graduate students, most of whom are obtaining LL.Ms in international commercial arbitration. The first meeting of the Task Force was conducted at Pepperdine University in September, 2016. See generally Summary of Proceedings, International Task
The Task Force brings together more than sixty scholars, lawyers and dispute resolution professionals from countries around the world to engage in dialogue and mutual exploration to promote understanding and appreciation of our varied practices and perspectives regarding many different kinds of complex commercial dispute resolution scenarios, including:

Situations in which non-adjudicative neutrals who are charged with helping to facilitate settlement (for example, mediators) “mix modes” by:

- not only facilitating interest-based bargaining, but also using some form of nonbinding evaluation as a means of encouraging settlement;
- helping parties to design a dispute resolution process, or “setting the stage” for a tailored dispute resolution process that may ultimately be adjudicative or non-adjudicative or a combination of the two; or even
- “switching hats” by shifting from the role of mediator to that of adjudicator (as in “med-arb”).

Situations in which adjudicators (arbitrators or judges) “mix modes” by:

- facilitating discussions and possible agreements on scheduling, discovery and other procedural matters;
- helping “set the stage” for settlement through management of the prehearing process, making decisions on information exchange, ruling on dispositive motions, and the like; promoting use of mediation; and offering preliminary views on a case or presenting proposals for settlement;
- rendering consent awards based on settlement agreements; or
- “switching hats” by shifting from the role of adjudicator to that of mediator on substantive issues (sometimes referred to under the heading “arb-med”);
- Scenarios involving the interplay between non-adjudicative neutrals (e.g., mediators/conciliators/facilitators) and adjudicators (arbitrators and judges)
including, for example, sequential use of mediation and arbitration, simultaneous (parallel) mediation and arbitration, and integrated “team” approaches, as well as the use of independent experts.

- Relational platforms such as “project partnering” (used in government, construction, technology and other significant long-term contracts) in which third parties facilitate better communication and mutual trust at the beginning of (and perhaps during) the contractual relationship, thereby helping to manage conflict and promote more effective use of adjudicative and non-adjudicative processes.

The Task Force’s efforts to facilitate research, investigations, and discussions regarding the management and resolution of business disputes in different settings and cultures may contribute to the development of useful practice guidelines, form agreements and educational tools to advance mutual understanding, and improve the management and resolution of commercial disputes around the world.

In Part I of this paper, we will provide a novel overview of the spectrum of scenarios that might be advantageously examined collectively for the first time under the rubric of “mixed modes.” In Part II we will offer a blueprint for more systematically examining and comparing our varied practices and perspectives to these scenarios in light of disputes resolution process goals; culture, legal tradition, and other factors. Part III will explore the development of guidelines and other materials to facilitate more informed and effective international practice.

I. COMMON SCENARIOS INVOLVING MIXED MODE PROCESSES

A variety of dispute resolution processes might be characterized as involving a “mixing of modes.”

12. Jeremy Lack, Appropriate Dispute Resolution (ADR): The Spectrum of Hybrid Techniques Available to the Parties, in ADR in Business: Practice and Issues Across Countries and Cultures, Vol. II, 339, 371 (Arnold Ingen-Housz ed., 2010) [hereinafter Lack, Appropriate Dispute Resolution] (“It can thus be seen that ADR, if seen as a collection of Appropriate Dispute Resolution tools, can be used sequentially, in parallel or in combination, to create a broad range of hybrid processes. The type of process used should depend on the parties’ circumstances and needs.”).
attempting to systematically group together and analyze such processes is novel.\textsuperscript{13} Our discussion will focus on scenarios falling into six general categories (we also allude to a possible seventh category comprising “relational platforms”). These six mixed mode scenarios are discussed in the following pages.

Throughout this discussion, considerable emphasis is placed on arbitration. It should be understood, however, that (at least in some jurisdictions) many of our observations and reflections regarding arbitration and arbitrators may apply to some degree (or perhaps with equal force) to other forms of adjudication, including court litigation and administrative procedures.

\textbf{A. SCENARIO 1: Mediators Using Nonbinding Evaluation or Mediator Proposals as a Means of Encouraging Settlement}

One of the most common forms of mixed mode practice occurs when mediators or conciliators engage in forms of evaluation in addition to using non-evaluative techniques and approaches.\textsuperscript{14} For example, in the United States as well as some other jurisdictions, mediators not only facilitate discussions regarding the parties’ interests and concerns to promote settlement, but also offer their predictions as to likely litigation or arbitration outcomes and assessments of the parties’ factual or legal arguments.\textsuperscript{15} Some mediators may also offer their own proposals for the resolution of the dispute. In other cultures and legal systems, however, case evaluations and neutral proposals are viewed as beyond the province

\footnotesize{\begin{itemize}
\item The present grouping was foreshadowed by Stipanowich & Ulrich, \textit{Commercial Arbitration and Settlement}, supra note 9, at 1, 16-19. The term “mixed mode” and the spectrum of scenarios was first offered during a presentation by Professor Stipanowich. \textit{See} Thomas J. Stipanowich, Arbitration and Settlement: Can We Develop Principled Approaches to Mixed Mode Processes?, at the College of Commercial Arbitrators Annual Meeting (Oct. 24, 2015) (categorizing groups of scenarios similar to those now used by the Task Force).
\end{itemize}}
of mediators; they are instead often seen as within the domain of “conciliation” processes. 16

Because perspectives on mediation and mediator practices vary greatly, there has been considerable debate regarding employing evaluative methods, whether any process involving evaluation should fall within the definition of mediation, 17 and even what constitutes “evaluation.” 18 As mediation practice develops around the globe, these issues become ever more compelling subjects for deliberation and debate.

B. SCENARIO 2: Mediators “Setting the Stage” for Adjudication and Other Dispute Resolution Options

Although discussions of the roles of mediators often focus on the resolution of substantive disputes, many experienced mediators bring their skills to bear on process management—not just in regards to the


17. For some early and differing perspectives from the US, see, e.g., Kimberlee K. Kovach & Lela P. Love, “Evaluative” Mediation Is An Oxymoron, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 31 (1996); L. Randolph Lowry, To Evaluate or Not. That is Not the Question!, 38 FAM. & CONCILIATION CTS. REV. 48 (2000); Ellen A. Waldman, The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence, 82 MARQ. L. REV. 155 (1998). For an example of this debate through a comparison of the processes of early neutral evaluation and mediation, see Wayne Brazil, Early Neutral Evaluation or Mediation - When Might ENE Delivery More Value, DISP. RESOL. MAG., Fall 2007, at 10 (2007). For general considerations regarding the use of different approaches in mediation—whether directive or facilitative, non-evaluative or evaluative—and the consequences of moving from one approach to another, see Jeremy Lack, A Mindful Approach to Evaluative Mediation, 3 TJDSCHRIFT CONFLICTHANTERING 18, 20-21, fig. 1 (2014); Lack, Appropriate Dispute Resolution, supra note 12, at 353-57.

18. At the inaugural Summit of the Task Force on Mixed Modes Dispute Resolution, a group discussion highlighted a spectrum of mediator activities that could be considered to fall within the rubric of “evaluation,” from (1) forms of questioning (including non-leading questions, leading questions, “devil’s advocacy” questions, and pointed questions), to (2) comments on substantive aspects of a dispute, to (3) evaluations (to an individual party in caucus) of the strength of their case or its chances in adjudication. See International Task Force Summary supra note 11, at 9.
mediation process, but also with respect to alternative process options that may be necessary or appropriate steps in the final resolution of disputes. In this way, mediators sometimes help “set the stage” for adjudication of a dispute, by working with parties to tailor procedures for arbitration or litigation.

This may take a variety of forms. Where mediation fails to resolve some or all of the issues in dispute, for example, a mediator is sometimes able to facilitate an agreement on appropriate arbitration procedures or assist the parties in selecting the arbitrators. In other situations, parties retain mediators for the sole purpose of facilitating the tailoring of an appropriate dispute resolution process. An example of the latter is “Guided Choice.” These scenarios are most likely to

---


20. See Stipanowich & Kaskell, supra note 19 (discussing possible roles for mediators in facilitating arbitration procedures).

21. Author Tom Stipanowich recounted a pertinent personal experience at the inaugural Mixed Mode Task Force Summit:

Tom acted as standing mediator on a construction project, facilitating weekly or bi-weekly discussions about emerging issues from a date mid-way through construction to the end of the project. He was able to help the parties prevent issues turn into legal disputes and keep the project on track. However, the foundation for a major delay claim had been established before Tom’s appointment. Tom approached counsel and asked if he might be able to help resolve the claim. The parties were far apart, but agreed to have Tom help them create an arbitration procedure to resolve the matter. (There was no arbitration provision in the contract and neither party was enthusiastic about an institutionally-administered arbitration.) Each side had very different preferences for arbitrators, and they ended up with a three-member panel in which each party picked a wing arbitrator. But the approach was novel because Tom helped them find arbitrators based on what they wanted, but, after discussing the matter with the parties, Tom made the approaches to the potential arbitrators so the latter did not know who picked them. This “screened” approach has been incorporated as an option in the CPR Non-administrated Arbitration Rules.

22. See Lurie & Lack, supra note 19, at 168. According to Lurie and Lack:

Guided Choice is a mediation process in which a mediator is appointed to initially focus on process issues to help the parties identify and address proactively potential impediments to settlement. Mediation confidentiality is a powerful tool to help the parties safely explore ways of setting up a cheaper, faster and better process to explore and address those impediments. Although this person works essentially as a mediator, in Guided Choice the mediator does not focus initially on settling the case. Instead, the mediator works with the parties to first facilitate a discussion on
occur where mediators facilitate arbitration procedures. However, there may also be instances in which a mediator is empowered to facilitate and promote the exploration of settlement in the course of managing a case headed for litigation.

C. SCENARIO 3: “Switching Hats”: Mediators Shifting to the Role of Arbitrator; Arbitrators Shifting to the Role of Mediator or Conciliator

Of all of the forms of mixed mode processes, none have stirred more debate than those where neutrals assisting parties in a settlement-oriented process shift roles and become adjudicators (or vice-versa). Perceptions of these approaches—which are closely procedural and potential impasse issues, and help them analyze the causes of the dispute and determine their information needs for settlement.

Id. See also Paul M. Lurie, Using the Guided Choice Process to Reduce the Cost of Resolving Construction Disputes, 9 CONSTR. L. INT’L 18, 19 (2014). Providing further explanation:

The Guided Choice system recognizes that not all disputes can be settled without some formal or informal information exchange process. . . . Under Guided Choice, when it is apparent that information is necessary for position change, but not voluntarily available to break impasse, the Guided choice mediator facilitates the customization of arbitration, litigation or dispute review board processes focused on the impasse issues, which require more information – or even decisions.

Id.

23. US neutral Laura Kaster offered the following example at the inaugural Mixed Mode Task Force Summit:

Laura applied a Guided Choice process in a court-mandated mediation involving the sale of an orthodontic practice. The parties were a professor at dental school and a student. There were allegations that the business had been fraudulently evaluated, and the purchaser was misled in the belief that she was buying a valuable practice but instead ended up facing significant claims from patients. Using the Guided Choice process, Laura was able to help the parties establish a novel process arrangement to deal with patient claims: it was agreed that a knowledgeable practitioner would both parties trusted would evaluate claims and determine what amount should be paid [by the seller to the buyer] for its satisfaction up to a ceiling amount.

International Task Force Summary, supra note 11.

24. In some US court systems, for example, magistrates or special masters have played these roles as a part of their responsibilities for case management. See Thomas J. Stipanowich, The Multi-Door Contract and Other Possibilities, 13 OHIO STATE J. ON DISP. RES. 303, 324-28 (1998).

25. See Stipanowich & Ulrich, Commercial Arbitration and Settlement, supra note 13, at 14-15, 25-28; see also STIPANOWICH & KASKELL, supra note 19, at 20-22, 29-30 (discussing concerns associated with a mediator playing the role of an arbitrator in the same dispute and vice-versa); Edna Sussman, Combinations and Permutations of Arbitration and Mediation: Issues and Solutions, in 2 ADR IN BUSINESS, PRACTICE AND ISSUES ACROSS COUNTRIES AND CULTURES 381, 383-86 (Arnold Ingen-Housz ed., 2011) (discussing issues and solution when the same neutral act as both mediator and arbitrator); Kristen M. Blankley, Keeping a Secret From Yourself? Confidentiality When the Same Neutral Serves Both as Mediator and as
related to, and overlap to some extent with, situations in which arbitrators “conciliate” (Scenario 4.3 below)—are heavily influenced by culture and legal tradition.\(^\text{26}\) However, the subject has attained

---

\(^{26}\) See Shahla F. Ali, The Arbitrator’s Perspective: Cultural Issues in International Arbitration, in INTERNATIONAL COMMERCIAL ARBITRATION PRACTICE: 21\(^{\text{ST}}\) CENTURY PERSPECTIVES § 6.01-6.08 (Horacio A. Grigera Naon & Paul E. Mason eds., 2010); see also Bernd Ehle, The Arbitrator as a Settlement Facilitator, in WALKING A THIN LINE 79 (Olivier Caprasse et al. eds., 2010). As explained by Ehle:

Based on varying practices and traditions in diverse legal cultures, the perceived role of the arbitrator ranges from absolute approval to unconditional rejection of the arbitrator’s encouragement of settlement negotiations. In general, while most civil law legal systems have traditionally considered it a primary duty of judges and arbitrators to promote settlement, their common law counterparts have not been allowed to be actively involved in settlement facilitation, or at least have not dared to actively contribute to the amicable settlement of the dispute out of fear of being perceived as impartial if the settlement efforts fail.

\textit{Id.} at 79-80. On the other hand, Chinese practice takes a different approach:

For the Chinese, the problem of caucusing is much less serious in practice than it is in theory, as they believe that the parties are not likely to reveal to the mediator damaging facts during the mediation phase that the mediation/arbitrator could not have found out from the record. . . . The Chinese believe that if the judge are trusted to be capable of disregarding inadmissible evidence when they make the adjudication, there should be no reason to doubt those well-trained arbitrators in their ability to remain impartial despite the information obtained during mediation.
enhanced importance in recent years, as reflected in recent changes to the \textit{UNCITRAL Notes on Organizing Arbitral Proceedings}.\footnote{27}

Sometimes, a mediator charged with facilitating the settlement of disputes shifts to the role of adjudicator. For example, where mediation is unsuccessful in resolving some or all disputes, mediators sometimes “switch hats” and take on the role of arbitrator in order to

\begin{quote}

[The final report of the 2009 Rules of the Centre for Effective Dispute Resolution (CEDR) for the Facilitation of Settlement in International Arbitration notes that the] sharp difference in attitude between those arbitrators willing to act as settlement facilitators, and those reluctant to take on such a role [is linked] . . . to cultural factors and background, namely according to whether the arbitrator hails from a common law or a civil law background. . . . The Commission . . . starts from the premise that differences in views regarding the role of settlement facilitator by arbitrators appear rooted in cultural factors and (in psychological parlance) related to the different social values and value-based attitudes held by arbitrators from different backgrounds.

\textit{Id.} (footnote omitted).
\end{quote}

\footnote{27. On 7 July 2016, the UNCITRAL Commission adopted a revised and updated version of the UNCITRAL Notes on Organizing Arbitral Proceedings. The Notes are non-binding but aim to flag procedural issues typically associated with arbitral proceedings. UNCITRAL, Notes on Organizing Arbitral Proceedings, para. 72 (UNCITRAL 2016, pre-release publication). This publication provides: “. . . Where the applicable arbitration law permits the arbitral tribunal to facilitate a settlement, it may, if so requested by the parties, guide or assist the parties in their negotiations.” \textit{Id.} Facilitating the settlement of the dispute is a case management technique recognized by the ICC that can be used by the arbitral tribunal (and the parties) for controlling time and cost. See ICC, ICC RULES OF ARB., append. IV, para. h(ii) (2012) (“. . . where agreed between the parties and the arbitral tribunal, the arbitral tribunal may take steps to facilitate settlement of the dispute, provided that every effort is made to ensure that any subsequent award is enforceable at law.”). Earlier, the London based mediation institution CEDR developed procedures for the facilitation of settlement in the context of arbitration. CEDR, \textit{RULES FOR THE FACILITATION OF SETTLEMENT IN INT’L ARB.}, art. 5, paras. 1.3 and 1.4 (CEDR, 2009). The procedures state:

1. Unless otherwise agreed by the Parties in writing, the Arbitral Tribunal may, if it considers it helpful to do so, take one or more of the following steps to facilitate a settlement of part or all of the Parties’ dispute:

\begin{itemize}
\item 1.3. where requested by the parties in writing, offer suggested terms of settlement as a basis for further negotiation.
\item 1.4. where requested by the Parties in writing, chair one or more settlement meetings attended by representatives of the Parties at which possible terms of settlement may be negotiated.
\end{itemize}

\textit{Id.}
render a binding decision—a process often referred to as “med-arb.” Such procedures include variants such as mediation followed by last-offer arbitration (sometimes referred to by the acronym “MEDALOA”), in which the discretion of the mediator-turned-arbitrator is limited to adopting one or the other of the parties’ final offers in his/her award.

In other cases, an adjudicator shifts to the role of mediator (a scenario sometimes designated by the acronym “arb-med”) or the role of conciliator. For example, in some arbitration proceedings arrangements may be made for the arbitrator to switch hats and act as a mediator or conciliator in order to try to help the parties attain an amicable settlement of disputes. If settlement is not thereby achieved, the neutral may in some cases be authorized to resume the arbitral role (essentially, “arb-med-arb”). In one form of arb-med, however, the arbitrator does not shift to the role of mediator until after hearings are concluded and an award is written but not yet published or disclosed to the parties.

---

29. Stipanowich & Kaskell, supra note 19, at §§ 20-24 (describing the process of MEDALOA and explaining its potential advantages and concerns); Dendorfer & Lack, supra note 7, at 76, 82, 92-94 (providing an analysis of the implications, advantages, and disadvantages of “MEDALOA”).
33. Michael Leathes, formerly head of intellectual property for British-American Tobacco and a leading proponent of mediation, employed this approach and widely touted the experience. See Michael Leathes et al., Einstein’s Lesson in Mediation, MANAGING IP 24 (July-Aug. 2006). For a general description of the procedure, see also McILWRATH &
In some situations, the possibility of the neutral shifting roles is agreed to by participants, or understood as a matter of practice or procedure, before the neutral is engaged.\(^{34}\) Sometimes the approach is enshrined in well-established procedural rules, such as the Chinese practice of “conciliation within arbitration” as defined by the rules of official arbitration commissions like the China International Economic and Trade Arbitration Commission (“CIETAC”)\(^{35}\) and the Beijing Arbitration Commission (“BAC”)\(^{36}\)—a process sometimes referred to as “arb-med.”\(^{37}\) Moreover, German arbitrators sometimes engage in what some might describe as forms of conciliation.\(^{38}\) In practice, however, a Chinese arbitrator-conciliator (or arbitrator-mediator) may function somewhat differently from a German counterpart.\(^{39}\) In other situations, a “change of hats” is requested by


\(^{36}\) BAC ARB. RULES art. 42 (BEIJING ARB. COMM’N, 2014).


\(^{38}\) DIS ARBITRATION RULES §32.1 (GERMAN INSTITUTION OF ARB., 1998) (“... at every stage of the proceedings, the arbitral tribunal should seek to encourage an amicable settlement of the dispute or of individual issues in dispute.”) Such practice is described by Professor Hilmar Raechke Kessler an experienced German arbitrator in Hilmar Raechke-Kessler, *The Arbitrator as Settlement Facilitator*, 21 ARB. INT’L 523, 534-36 (2005). It is also consistent with judges acting as conciliator as provided for in Zivilprozessordnung [ZPO] (CODE OF CIVIL PROCEDURE), §278(2) (Ger.), translation available at http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p1021. Moreover, it has been reported that there is a longstanding tradition of German judges facilitating settlement as it can be traced back in JINGER REICHSABSCHIED, § 110 (1654), the text of which was integrated in Section 278 of the German Code of Civil Procedure. See Kaufmann-Kohler, *supra* note 25, at 190 n.6.

one or both parties or proposed by the third party neutral during the course of dispute resolution.

As reflected above, attitudes toward an outright shifting of roles are heavily colored by the cultural traditions of participants. In China, for example, long-standing emphasis on the stability and harmony of the society and on deference to authority have underpinned the practice of conciliation by arbitrators or judges, and in Germany, there is a long tradition of adjudicators engaging in settlement-oriented activities. In the United States, however, heavy emphasis on individualism, personal autonomy, and related concerns about assent, self-determination, and procedural due process lead many attorneys and neutrals to avoid situations in which neutrals switch roles during the course of resolving a dispute, or in which arbitrators

40. See STIPANOWICH & KASKELL, COMMERCIAL ARBITRATION AT ITS BEST, supra note 19, at 39-45 (proposing “Guidelines for situations where parties desire a mediator to assume the role of arbitrator”). But see INT’L BAR ASS’N [IBA], IBA GUIDELINES ON CONFLICTS OF INTEREST IN INT’L ARB. § 4(d) (Oct. 23, 2014) (“Informed consent by the parties to such a process prior to its beginning should be regarded as an effective waiver of a potential conflict of interest . . . . In addition, in order to avoid parties using an arbitrator as mediator as a means of disqualifying the arbitrator, the General Standard makes clear that the waiver should remain effective, if the mediation is unsuccessful. In giving their express consent, the parties should realise the consequences of the arbitrator assisting them in a settlement process, including the risk of the resignation of the arbitrator.”).

41. Many commentators have reported a common practice of Chinese arbitrators of systematically asking the parties whether they would like assistance in settling the dispute. See, e.g., Kaufmann-Kohler & Kun, supra note 2, at 487; Michael Hwang, THE ROLE OF §1q ARBITRATORS AS SETTLEMENT FACILITATORS – COMMENTARY, IN NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND 571 (Albert Jan van den Berg, ed., 2005); Johannes Trappe, CONCILIATION IN THE FAR EAST, 5 ARB. INT’L 173, 176, passim (1989); Raeschke-Kessler, THE ARBITRATOR AS SETTLEMENT FACILITATOR, supra note 38, at 525.


43. See infra note 53 and accompanying text.

44. Deason, supra note 25 at 228-29; Blankley, supra note 25, at 332-37; Pappas, MED-ARB AND THE LEGALIZATION OF ALTERNATIVE DISPUTE RESOLUTION, supra note 27, at 176-78; Carlos de Vera, supra note 42, at 185, 192-193; Antaki, supra note 4, at 113; M. Scott Donahue, SEEKING HARMONY - IS THE ASIAN CONCEPT OF THE CONCILIATOR/ARBITRATOR APPLICABLE IN THE WEST?, DISP. RESOL. J. 74, 76-77 (Apr. 1995).
focus on settlement-oriented activities. Even in the United States, however, parties may in specific circumstances still embrace the opportunity for neutrals to wear multiple hats. There is evidence that many neutrals have been given opportunities to employ such approaches, and they often have accepted the challenge.

D. SCENARIO 4: Arbitrators Setting the Stage for Settlement

It is generally understood that, within the bounds of the parties’ agreement, arbitrators have a good deal of authority respecting the handling of procedural matters in arbitration. A recent study of experienced arbitrators surfaced a good deal of information regarding the role of arbitrators in facilitating (or, as some arbitrators indicated,


46. Those fifty-nine Survey respondents who indicated they were at least “sometimes” concerned with the informal settlement of cases before them were asked about their experiences changing roles or playing multiple roles (that is, as both an arbitrator and mediator) in a particular case. Of those fifty-nine individuals, just under half (45.8%) indicated that they had “sometimes” mediated a dispute in which they had been appointed an arbitrator. Additionally:

The respondent sub-group was also asked, “Have you served as both a mediator and arbitrator with respect to the same dispute, where during arbitration, the parties asked you to switch to the role of an arbitrator?” More than nine-tenths of the group (25 of 27, or 92.6%) answered, “Yes.” In response to the further question, “Have you served as both a mediator and arbitrator with respect to the same dispute, where the parties agreed beforehand to have you first mediate and then arbitrate, if necessary?” two-thirds of the group (18 of 27, or 66.7%) responded affirmatively. Thus, there is support for the notion that despite conventional concerns among U.S. advocates and arbitrators respecting neutrals wearing multiple hats, quite a few arbitrators have experience with forms of single neutral med-arb.


“mediating”) discussions between counsel in the course of helping to “flesh out” the agreement of the parties respecting arbitration procedures. 48 In the event no agreement can be reached on a particular issue, arbitrators typically resolve the issue by making a decision. 49

The precise dynamics of arbitrators’ management of procedural matters might be better understood; in particular, there are important questions surrounding the roles of arbitrators (or judges) in helping to set the stage for settlement through negotiation or mediation. Such activity may take a variety of forms. Arbitrators and other adjudicators are sometimes able to enhance the possibility of settlement by making decisions on discovery/information exchange issues, or by ruling on motions which dispose of some aspect(s) of the dispute. 50 Moreover, adjudicators sometimes advance the use of mediation by working with the parties to arrange “mediation windows” in the adjudication timetable. 51 Others may go so far as to suggest, encourage, or even order mediation or some other non-adjudicative procedure to promote settlement. 52 Finally, adjudicators in some jurisdictions have been known to encourage settlement by offering parties preliminary views on issues in dispute or issuing preliminary findings of fact or conclusions of law. 53 However, many

48. Stipanowich & Ulrich, supra note 46, at 444-448 (reporting the results of a survey indicating that experienced U.S. arbitrators frequently engaged in various pre-management activities in order to set the stage for settlement).
51. In the United States, there is a general understanding that the arbitrators can go as far as encouraging the use of mediation, but to order mediation would fall beyond the scope of their ethical obligations. See, e.g., AAA, CODE OF ETHICS FOR ARB. IN COMM. DISP. (2004) (Canon IV(F): “Although it is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement or the use of mediation, or other dispute resolution processes, an arbitrator should not exert pressure on any party to settle or to utilize other dispute resolution processes. An arbitrator should not be present or otherwise participate in settlement discussions or act as a mediator unless requested to do so by all parties.”). For a discussion on this subject, see Ehle, supra note 26, at 84-85; see also Daniele Favalli & Max K. Hasenclever, The Role of Arbitrators in Settlement Proceedings, 23 MEALEY’S INT’L ARB. REP. 1, 3 (July 2008).
52. In the United States, there is a general understanding that the arbitrators can go as far as encouraging the use of mediation, but to order mediation would fall beyond the scope of their ethical obligations. See, e.g., AAA, CODE OF ETHICS FOR ARB. IN COMM. DISP. (2004) (Canon IV(F): “Although it is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement or the use of mediation, or other dispute resolution processes, an arbitrator should not exert pressure on any party to settle or to utilize other dispute resolution processes. An arbitrator should not be present or otherwise participate in settlement discussions or act as a mediator unless requested to do so by all parties.”). For a discussion on this subject, see Ehle, supra note 26, at 84-85; see also Daniele Favalli & Max K. Hasenclever, The Role of Arbitrators in Settlement Proceedings, 23 MEALEY’S INT’L ARB. REP. 1, 3 (July 2008).
53. Such practice has been reported to exist in Germany. See supra note 38 and accompanying text. The possibility for an arbitrator to offer preliminary views about the parties’ dispute is explicitly provided for in CEDR RULES FOR THE FACILITATION OF SETTLEMENT IN INT’L ARB. PROC. art. 5.1 (CEDR, 2009):
arbitrators view their role strictly as a matter of preparing a case for adjudication, and therefore regard settlement as a collateral prospect. The role of arbitrators in setting the stage for settlement has been a focus of discussion only recently, and is ripe for thoughtful deliberation and debate. Specific scenarios involving arbitrators include the following:

SCENARIO 4.1: Arbitrators Setting the Stage for Settlement of Substantive Disputes by Handling Key Procedural Issue(s)

Responses to a recent survey of experienced US arbitrators indicate that, generally speaking, arbitrators are perceiving increased

Art. 5.1: Unless otherwise agreed by the Parties in writing, the Arbitral Tribunal may, if it considers it helpful to do so, take one or more of the following steps to facilitate a settlement of part or all of the Parties’ dispute:

1.1. provide all Parties with the Arbitral Tribunal’s preliminary views on the issues in dispute in the arbitration and what the Arbitral Tribunal considers will be necessary in terms of evidence from each Party in order to prevail on those issues;
1.2. provide all Parties with preliminary non-binding findings on law or fact on key issues in the arbitration.

It has been reported that VIAC is currently working on drafting new rules on early neutral evaluation. See Revision of the VIAC Conciliation Rules, VIAC, http://www.viac.eu/en/photogallery/image.raw?type=img&id=79 (last visited Jan. 13, 2017). The acceptability of such practice differs among common law and civil law jurisdictions. See Ehle, supra note 26, at 80-84. According to Ehle:

In certain civil law countries, the parties and their lawyers clearly expect that the arbitrator will at some stage in the procedure—*ex officio*—express a preliminary but clear view on the merits of the case and explicitly encourage an amicable settlement. . . . The common law approach differs from the civil law approach in that even the arbitrator’s preliminary views of the merits of the case create discomfort. If the settlement attempt fails, the parties may consider that the arbitrator was unduly influenced by this prior assessment.


54. See Stipanowich & Ulrich, *supra* note 46, at 459-60 (“Survey participants were also asked, ‘How often, if ever, are you concerned with informal settlement of the cases before you as an arbitrator?’ . . . [M]ore than half of participants responded, ‘Never.’ . . . For some or all of the foregoing reasons [not transcribed here], many experienced commercial arbitrators are reticent about the arbitral role in settlement. However, the Survey results also indicate that many arbitrators tend to recognize and actively embrace opportunities to promote settlement of arbitrated cases through their management of the arbitration process.”)

levels of settlement in the cases they arbitrate in recent years.\textsuperscript{55} Moreover, many arbitrators see a connection between their process management activities, particularly at the pre-hearing stage, and the possible settlement of the underlying dispute.\textsuperscript{56} Arbitrators regularly work with parties to identify and address important issues to be decided including key discovery issues and dispositive motions; some arbitrators perceive that the way they address these issues sometimes plays a role in settling a case, while others do not.\textsuperscript{57}

SCENARIO 4.2: Arbitrators Setting the Stage for Settlement of Substantive Disputes by Promoting Use of Mediation

In jurisdictions where mediation is an established element of the dispute resolution landscape, arbitrators often include mediation on the agenda for a preliminary hearing or prehearing conference.\textsuperscript{58} The

\footnotesize

\textsuperscript{55} Stipanowich & Ulrich, \textit{Commercial Arbitration and Settlement}, supra note 9, at 16-19; Stipanowich & Ulrich, \textit{Arbitration in Evolution}, supra note 46, at 458. Specifically: The majority of respondents indicated that higher proportions of their caseloads settled pre-hearing during the last five years than prior to that time. This trend is indicated both by a relative decrease in respondents reporting lower proportions of their caseloads as having settled (\textit{e.g.}, fewer respondents reporting that “31\% to 40\%,” or less, of their caseload settled pre-hearing) and by a relative increase in respondents reporting higher proportions of their caseloads having settled (\textit{e.g.}, more respondents reporting that “41\% to 50\%” and “[m]ore than 50\%” of their caseloads settled pre-hearing).

The Survey also asked respondents, “Roughly what percentage of cases in which you were an arbitrator settled at any time prior to award?” Chart PP [not reproduced] shows results comparing respondent estimates of settlement rates for the past five years with their estimates of settlement rates for earlier years.

\textit{Id.}

\textsuperscript{56} Stipanowich & Ulrich, \textit{Arbitration in Evolution}, supra note 46, at 460 The findings showed that: Each of the 59 respondents who reported concerning themselves with informal settlement at least “sometimes” were asked to estimate the frequency with which they engage in particular behaviors that may increase the likelihood of informal settlement. As reported in Table 7 [not reproduced], the large majority of this group indicated that their management of the pre-hearing process, summary disposition of issues, and rulings on discovery matters prompt settlement in at least some cases. Indeed, nearly one-fourth of respondents (23.7\%) indicated that their summary disposition of issues prompts informal settlement in about half or more of their cases, and more than a quarter (25.4\%) responded that their management of pre-hearing processes plays an important role in pre-hearing settlements in about half or more of their cases.

\textit{Id.}


\textsuperscript{58} \textit{See supra} notes 51-52 and accompanying text.
resulting timetable for the arbitration process may include one or more windows for mediation. Some arbitrators may go so far as to encourage or order parties to mediate the dispute, although others regard such activity as inappropriate.59

SCENARIO 4.3: Arbitrators Setting the Stage for Settlement of Substantive Disputes by Issuing Preliminary Views, Etc.

Is it ever appropriate for arbitrators to offer parties preliminary views on issues in dispute, including information regarding what additional proof the arbitrator believes might be necessary for parties to establish their case, in order to help stimulate settlement? Should they ever issue preliminary findings of fact and conclusions of law with the same end in mind, or even offer proposals for settlement? As discussed above, culture and legal tradition may play an important role in determining how neutrals and counsel answer these questions,60 much the same way that they affect perceptions of neutrals switching roles in med-arb.61

Although the final report of a commission convened by the Centre for Effective Dispute Resolution (“CEDR”) offered affirmative support for such activities,62 there are indications that arbitrators in some jurisdictions, including the United States, may be extremely reluctant to take such steps.63

59. Paragraph 72 of UNCITRAL’s recently revised 2016 Notes on Organizing Arbitral Proceedings now recognized that it may be appropriate, in some circumstances, for the arbitral tribunal to raise the possibility of a settlement between the parties. See 2016 UNCITRAL NOTES ON ORGANIZING ARB. PROC. para. 72 (UNCITRAL 2016, pre-release publication). See also supra note 27 and accompanying text.

60. See supra note 52 and accompanying text. Favalli & Hasenclever, supra note 52, at 2 (“The arbitration practices in England and the U.S. have never given much consideration to the role of the arbitral tribunal in regard to settlements. On the contrary, the possibility of the arbitral tribunal’s involvement was excluded. […] In other jurisdictions, such as Germany or Switzerland, the arbitrator’s involvement in settlement proceedings is a common practice.”).

61. See supra note 25 and accompanying text.

62. See supra note 52 and accompanying text. For a critique of the rules provided by the Centre for Effective Dispute Resolution (“CEDR”) based on a psychological perspective, see Nappert & Flader, A Psychological Perspective on the Facilitation of Settlement in International Arbitration, supra note 26.

63. See Lack, Appropriate Dispute Resolution, supra note 12, at 359 (“Some civil law arbitrators will hold a meeting at some stage of the process to provide preliminary views, or to provide a draft or oral version of the tribunal’s award in order to promote the opportunity of a final settlement before issuing its award. This process is relatively unknown, however, in most common law jurisdictions and may even be frowned upon by common law arbitrators as an improper form of ‘appeal before verdict’ or risking exposure of a subsequent award to possible attack for bias, depending on when the preliminary views were given”).
E. SCENARIO 5: Arbitrators Rendering Decision Based on a Settlement Agreement (Consent Awards)

Arbitrators sometimes encounter requests from parties that have reached a negotiated settlement agreement to incorporate or convert the terms of their settlement into an arbitral award—a consent award. This step may afford parties the opportunity to avail themselves of the enforcement mechanisms under arbitration law. However, depending on the circumstances, such arrangements may raise questions of enforceability and even public policy.

64. The possibility of consent award is explicitly provided for in a number of international arbitration rules. See, e.g., ICC, ICC RULES OF ARB. art. 32 (2012); HKIA, ADMINISTERED ARB. RULES art. 36.1 (2013); ICDR, INT’L ARB. RULES art. 32.1 (2014); LCIA, LCIA ARB. RULES art. 26.9 (2014); SIAC, ARB. RULES OF THE SING.INT’L ARB. CTR., art. 28.8 (2013); SCC, ARB. RULES OF THE ARB. INST. OF THE STOCKHOLM CHAMBER OF COMM. 39.1 (2010); UNCITRAL, UNCITRAL MODEL L ON INT’L COMM. ARB. art.30 (1985, with amendment as adopted in 2006); VIAC, VIENNA INT’L ARB. CTR. RULES OF ARB. art.38 (2013). See also Yaraslau Kryvoi & Dmitry Davydenko, Consent Awards in International Arbitration: From Settlement to Enforcement, 40 BROOK. J. INT’L L. 827 (2015) (providing a detailed analysis of the concept of consent award).

65. The greatest appeal of consent awards is their potential for enforceability under the 1958 New York Convention, which allows cross-border enforcement of arbitration awards, i.e. the recognition and enforcement of awards made in other contracting states in the state where recognition and enforcement sought. See New York Convention on Recognition and Enforcement of Foreign Arbitral Awards art. I, (June 10, 1958), 21 U.S.T 2517, 330 U.N.T.S. 38. Settlement agreements, on the other hand, are simple contracts between the parties to a dispute (or an arbitration procedure), and therefore, do not benefit from cross-border enforcement and recognition under international law. For a general discussion concerning the avenues of enforcement of mediated settlement agreements, see Edna Sussman, Combinations and Permutations of Arbitration and Mediation, supra note 25, at 391-98.

66. The issue of the enforceability of a consent award remains unclear in international arbitration. See GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3021 (2d ed. 2014); Kryvoi & Davydenko, Consent Awards in International Arbitration, supra note 64, at 850 (“The New York Convention neither defines the term “arbitral award” nor mentions consent awards. This silence raises the question of whether consent awards qualify as arbitral awards under the Convention. The answer to this question may depend on whether a consent award is a genuine arbitral award, or whether it remains merely a contract.”); see also Giacomo Marchisio, A Comparative Analysis of Consent Awards: Accepting Their Reality, 32 ARBITRATION INT’L L. 331 (2016) (discussing the enforceability of consent awards in light of a comparative study of French and English law).

67. Kryvoi & Davydenko, Consent Awards in International Arbitration, supra note 64, at 856. The authors state:

Nearly all arbitration rules allow a tribunal to decline recording a settlement agreement as a consent award only if a tribunal has a good reason to believe that the arbitration or the settlement agreement is used for an improper cause. For instance, such improper cause can consist of an abuse of one’s rights, money laundering, bribery, financing terrorism, and breaches of competition law or covering other illegal activities. [footnotes omitted]
F. SCENARIO 6: Other Kinds of Interaction between Evaluation, Mediation, Arbitration, or Litigation

When multiple discrete dispute resolution processes, each involving separate neutrals, are being employed in the course of resolving a particular dispute, what special opportunities and concerns come into play? Much depends on the nature of the processes, roles the neutrals play, the relative timing of their activities, and their level of interaction.

Scenario 6.1: Interplay Between Mediation and Arbitration or Litigation

Similarly, it is appropriate to consider the potential interplay between mediation and arbitration, and the level of interaction between mediators and arbitrators. Where mediation is an accepted element of commercial dispute resolution, mediation may precede arbitration or take place during the course of arbitration proceedings. In some cases, special arrangements are made to

---

[1] In order to determine whether the settlement agreement serves an improper purpose and should not be recorded as a consent award, a tribunal needs to consider public policy, the law of the seat of arbitration, the substantive law of the transaction and perhaps the law of the jurisdiction in which enforcement is likely to be sought. Id. at 860. See also Marchisio, A Comparative Analysis of Consent Awards, supra note 66, at 334-35 (discussing the concerns that consent awards may be used for facilitating tax deductions or money laundering through the creation of a fictitious dispute designed to create a payment obligation).

68. The Centre for Mediation and Arbitration of Paris (CMAP) makes available a set of rules, referred to as “Simultaneous Med-Arb Rules” specially tailored specifically to a process where mediation takes place simultaneously with arbitration during a period of three months, except otherwise agreed by the parties, see RÈGLEMENT DE MED-ARB SIMULTANÈS Arts. 8.1 and 9 (CMAP 2007) [as translated in Lack, Appropriate Dispute Resolution, supra note 12, at 363-65]:

Article 9: INDEPENDENCE OF THE PROCEDURES. The mediation and arbitration take place independently of one-another. The Centre does not allow the mediator to know the name(s) of the arbitrator(s) and vice versa. The mediator and the arbitrator(s) are forbidden to discuss the matter between themselves should they happen to know one-another.

In addition to simultaneous mediation and arbitration, parallel processes can take a variety of forms, such as “carve-outs” and “shadow mediation.” See Lack, Appropriate Dispute Resolution, supra note 12, at 364-65; see also Michael E. Schneider, Combining Arbitration with Conciliation, ICCA Congress Series 8, International Arbitration Conference (Seoul, Oct. 10-12, 1996) 71-77, http://www.lalive.ch/data/publications/mes_combining_arbitration_with_conciliation.pdf (recommending steps to follow for a simultaneous mediation and arbitration process).
coordinate the activities of mediators and arbitrators. Again, questions abound.

Where mediation is an accepted element of commercial dispute resolution, mediation may precede arbitration or litigation, or take place during the course of arbitration proceedings or litigation. Where mediations take place in parallel to ongoing litigation or arbitration, conventional wisdom in some countries is that what happens in mediation (and sometimes the very fact of mediation) is not disclosed to judges or arbitrators. Furthermore, interactions between mediators and judges or arbitrators, if any, should be subject to parties’ express consent. Nevertheless, it is appropriate to consider the potential interplay between mediation and litigation/arbitration, and the appropriate level of interaction between mediators and judges/arbitrators. What historical examples are there? What kinds of interactions might be appropriate? Can such interactions contribute to better and/or more cost-effective resolutions of particular disputes?

SCENARIO 6.2: Interplay between Nonbinding Evaluation and Mediation, Arbitration or Litigation

Parties also sometimes agree to a nonbinding evaluation of some kind in order to promote settlement of disputes between parties; examples of such approaches include: advisory appraisal, advisory expert determination, advisory/nonbinding arbitration, early neutral evaluation, and mini-trial. In such situations it is appropriate to

69. This is notably the case of a process that has been referred to as “shadow mediation”: [The shadow mediator] may follow and advise on what is happening in another process and possibly also make procedural suggestions that may help the parties and the neutrals in the other process. An example of this is a shadow mediator monitoring arbitration proceedings, receiving a copy of all the pleadings and possibly auditing the hearings with the tribunal. The shadow mediator (with the consent of the parties and the other neutrals) may even speak to the tribunal or actively participate in the arbitration process.

Lack, Appropriate Dispute Resolution, supra note 12, at 364-65; see also Dendorfer & Lack, The Interaction Between Arbitration and Mediation, supra note 9, at 91-92.

70. See, e.g., RÈGLEMENT DE MED-ARB SIMULTANÈS Art. 9 (CMAP, 2007); Lack, Appropriate Dispute Resolution, supra note 12, at 363-64.

71. In appropriate cases, long-time mediator Jonathan Marks arranges for the parties to have an agreed protocol for limited communication with the court respecting mediation proceedings. See International Task Force Summary, supra note 11.

72. Although third parties are sometimes retained by a single party for the purpose of providing a confidential evaluation to that party in the course of preparing for dispute resolution, our focus here is on nonbinding evaluations provided to both/all parties. See, e.g.,
consider what relationship, if any, such activities have (or should have) to discrete efforts to mediate or to arbitrate the same matter, or to ongoing litigation of the matter. This includes what level of interplay, if any, is appropriate between the respective processes or the neutrals.73

G. Special Considerations Involving Relational Platforms

Finally, there are approaches that place special emphasis on addressing conflict in the course of commercial relationships—that is, in “real time”—and may even promote greater trust and respect among business partners or co-venturers.74 Much more needs to be understood about the operation and potential benefits of these relational platforms, including opportunities to use these mechanisms to tailor other appropriate dispute resolution approaches.75


73. Eric Green, *Re-Examining Mediator and Judicial Roles in Large, Complex Litigation: Lessons From Microsoft and Other Megacases*, 86 B.U. L. Rev. 1171, 1171 and 1201-06 (2006) (noting that the author, a mediator with extensive experience, argues that big cases present huge challenges and that their resolution and management “require a re-examination of the roles played by neutrals – judges and mediators.” He raises questions and presents possible avenues of development to replace traditional models, “requiring a passive and detached judge and a non-evaluative mediation”, by “a more expansive and flexible paradigm.”); Green Eric & Jonathan B. Marks, *Mediating Microsoft*, Boston Globe, November 15, 2001, at A23, Section Op-Ed (describing Microsoft’s settlements with the Department of Justice and with at least 9 states due to the decision of the Judge to suspend litigation and order settlement negotiations); Lack, *Appropriate Dispute Resolution*, supra note 12, at 369-73 (providing a discussion of a process referred to as Combined Neutrals, which is not used frequently, and general considerations regarding future development of hybrid processes).


Standing Neutrals

Standing neutrals or neutral panels are sometimes employed on construction projects. The appointment of a “standing” dispute resolution professional to mediate issues as they arise during the course of a construction project has proven valuable in keeping the job on track and helping to limit the number of claims that must be subjected to more formal and expensive dispute resolution procedures.76 Standing dispute boards frequently offer advisory decisions on current controversies affecting major infrastructure projects.77

Construction projects also furnished a setting for other approaches aimed at proactive management of conflict within commercial relationships. “Project partnering”, a concept borrowed from the manufacturing and distribution sectors and pioneered by the US Army Corps of Engineers, was designed to encourage collaboration and teamwork by implementing deliberate early efforts to create an atmosphere of trust and cooperation on projects.78

“Facilitated partnering workshops were commonly conducted shortly after contract signing and attended by owner representatives and key members of the design and construction team. The aim was stronger individual bonds, better understanding of each other’s objectives and expectations, and non-adversarial approaches for resolving problems.

76. NICHOLAS GOULD, CLAIRE KING AND PHILIP BRITTON, CTR. OF CONSTRUCTION L. & DISP. RESOL., KING’S COLLEGE LONDON, MEDIATING CONSTRUCTION DISPUTES: AN EVALUATION OF EXISTING PRACTICE 14-16 (2010) (discussing the use of various models of standing neutrals in construction projects, such as “independent intervener” or “dispute resolution adviser”); James P. Groton, The Standing Neutral: A ‘Real Time’ Resolution Procedure that also Can Prevent Disputes, 27 ALTERNATIVES 177 (Dec. 2009).


There were also indications that partnering might be useful in other kinds of long-term commercial relationships. However, partnering usage has not expanded beyond its early roots.

Another exemplary relational conflict management platform was a customized program with tight time frames for jobsite decision-making and handling of claims, and a flexible, dynamic dispute resolution system centered upon the figure of a Dispute Resolution Advisor (“DRA”): a construction expert with dispute resolution skills who would remain throughout the project. The DRA first met with job participants to explain and build support for a cooperative approach to problem solving. Thereafter, the DRA made monthly visits to the site to monitor the status of the job and facilitate discussions regarding emerging issues. If negotiation failed, the DRA could make arrangements for mediation, mini-trial or expert fact-finding. Although the DRA model has apparently not been widely replicated, many of its benefits may be achieved through the use of an approach like Guided Choice.

II. PHASE ONE: DEVELOPING A TEMPLATE FOR IDENTIFYING AND UNDERSTANDING VARIATIONS IN MIXED MODE COMMERCIAL DISPUTE RESOLUTION

In Part I of this article we identified a range of situations that might be termed mixed mode scenarios in light of the fact that they all involve one or more dispute resolution neutrals engaged in a mix of

79. Stipanowich, Managing Construction Conflicts, supra note 77, at 4 Partnering is principally used in United-States, United-Kingdom, The Netherlands, and in Switzerland. See Clive Seddon, Partnering: The UK Experience, 1 INTERNATIONAL LAW FORUM DU DROIT INTERNATIONAL 73 (1999); Geert Dewulf & Anna Kadefors, Trust Development in Partnering Contracts, in WORKING PAPER PROCEEDINGS, ENGINEERING PROJECT ORGANIZATIONS CONFERENCE, SOUTH LAKE TAHOE 1, 1 (Nov. 4-7, 2010).


81. Partnering has been used principally in the construction and engineering sectors. See Erik Eriksson, Brian Atkin & TorBjörn Nilsson, Overcoming Barriers to Partnering through Cooperative Procurement Procedures, 16 EVIDENCE-BASED COMPLEMENTARY & ALTERNATIVE MED. 598 (2009).


83. See supra text accompanying text note 24.
activities. Most of these entail some kind of effort to facilitate mutual agreement on substantive or procedural issues in the course of arbitration or litigation. These situations are increasingly visible in domestic and international commercial dispute resolution, but they have inspired highly varied, often conflicting perspectives and practices in different regions and legal systems. These realities inspired the creation of the International Task Force on Mixed Mode Dispute Resolution, for which this white paper was prepared.

In this Part, we propose an analytical construct for achieving an unprecedented appreciation of not only very different practices and perspectives respecting mixed mode approaches in different countries and regions, but also the process goals and cultural values and dimensions that underpin them. These descriptive and analytical aspects are to be addressed in Phase One of the Task Force’s efforts. Once that signal task is accomplished, the Task Force will hopefully be equipped—in Phase Two—to consider the development of more effective guidance for the employment of mixed mode approaches in international commercial settings.

A. Developing “Basic Building Blocks” to Promote Mutual Understanding and Facilitate Analysis of Our Varying Approaches to Mixed Mode Processes

1. A Basic Taxonomy of Dispute Resolution Processes

As noted previously, a primary international barrier to mutual understanding with regard to dispute resolution has to do with the difficulty of agreeing on basic terminology. There is no commonly accepted glossary of terms identifying conflict resolution processes, and a variety of descriptors are employed with various degrees of precision, masking areas of fundamental divergence. The most notorious example of the latter involves the confusion surrounding use of the terms “conciliation” and “mediation.” Both terms refer to processes involving a third-party neutral who engages in activities aimed at helping to promote settlement but who does not render a legally binding decision. However, although the terms are sometimes used synonymously, they are also frequently perceived as distinct
practices involving different activities—perceptions sometimes reflected in positive law.84

To some extent, these areas of divergence are produced by different legal traditions and various national, professional, industry and organizational cultures—subjects touched upon above.85 Whatever their origin, differences in the language we use to describe different ways third parties intervene in conflict stand in the way of understanding each other. For that reason, we need to develop a common dispute resolution language or taxonomy that systematically captures the spectrum of dispute resolution processes and serves as a foundation for discussion. Agreement on basic terms is, among other things, a critical first step to deconstructing and understanding our perspectives and practices regarding mixed mode processes.

For the purpose of this study, then, an initial step was to develop a basic taxonomy of dispute resolution processes, including key terms and definitions.86 As indicated in the chart on the following page, the two basic groupings are adjudicative processes, which include arbitration and court litigation, and non-adjudicative processes, which include a wide range of non-binding evaluative processes (e.g., advisory appraisal, advisory expert determination, advisory/non-binding arbitration, conciliation, evaluative mediation, dispute boards, early neutral evaluation, mini-trial) and non-evaluative processes (e.g., non-evaluative forms of mediation). As explained above, moreover, some mediators “mix modes” and engage in both non-evaluative and evaluative activities during the course of attempting to assist parties reach informal resolution of disputes.87

The following terms and definitions are intended to provide a basis for mutual discussions regarding important practice issues. Some of the definitions overlap and some definitions take account of differences in practice among jurisdictions, programs, or personal practices. It is expected that they will be further refined during the course of the Task Force’s work.

84. See infra note 98 and accompanying text (discussing the definition of the term “conciliation,” under non-adjudicative processes).
85. See supra notes 17-18 and accompanying text.
86. The authors thank Jeremy Lack for his contributions to the development of the taxonomy depicted in Chart A.
87. See supra notes 17-18 and accompanying text; Section I.C., notes 54, 62-63 and accompanying text.
A Taxonomy of Basic Dispute Resolution Terms

*Third party neutral:* An individual who assists parties in resolving issues in dispute (e.g. mediator, conciliator, fact-finder, arbitrators, etc.) The term “neutral” reflects the normal expectation that the third party will act independently and impartially.88

---

88. *Neutral,* in *Dictionary of Conflict Resolution* (Douglas H. Yarn ed., 1999). These golden standards are found across the board in all codes of ethics of mediators or arbitrators in Western societies. See e.g. IMI, IMI CODE OF PROCEDURAL CONDUCT § 2.2; IBA, IBA GUIDELINES ON CONFLICTS OF INTEREST IN INT’L ARB. Part 1 (2014); ABA & AAA, MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard II (2005); AAA, CODE OF ETHICS FOR ARB. IN COMM. DISP., Canon I (2004).
CHART A. BASIC TAXONOMY OF DISPUTE RESOLUTION PROCESSES

Dispute Resolution Processes

Adjudicative Process
- Arbitration
  - Binding Expert Determination
- Litigation

Non-Adjudicative Process
- Evaluative Processes (non-binding evaluations)
  - Advisory Appraisal
  - Advisory Expert Determination
  - Advisory/Non-binding Arbitration
  - Conciliation
  - Dispute Boards (decisions may in some cases be binding)
  - Early Neutral Evaluation
  - Evaluative Mediation
  - Mint-Trial
  - Facilitative/Non-Evaluative Mediation
  - Transformative Mediation

Non-Evaluative Process (some forms of mediation)
Adjudicative Processes

Adjudicative processes refer to dispute resolution processes leading to a binding decision in arbitration or in court.89

- **Arbitration (binding arbitration):** A process in which the parties to a dispute present arguments and evidence to a third party neutral or a panel of neutrals (the arbitrator/s) who make/s a determination (the award). Commercial arbitration agreements typically provide for the arbitral award to be binding and enforceable in court.90 In this survey, the term “arbitration” is intended to refer to “binding arbitration” unless otherwise noted.

- **Litigation:** The process of bringing a dispute to court for resolution.91

Non-Adjudicative Processes

- **Binding Evaluations:** Binding evaluations involve an assessment by an independent third party with specific expertise of a disputed issue that is binding on the parties.

- **Binding expert determination:** A process that is extensively used for international commercial disputes in a variety of sectors in order to provide a contractually final and binding decision on technical issues, such as accounting, gas pricing, engineering, and the like. (Some processes involving binding determinations by experts may be treated as binding arbitration under applicable law.92)

---


Evaluative Processes (Processes involving non-binding evaluation): Non-adjudicative (nonbinding) evaluative processes involve an advisory assessment by a third party neutral of the likely outcome of a dispute being adjudicated, the merits of the case, and/or the value of an asset or claim. They include the following assortment of processes, which may overlap in concept:

- **Advisory appraisal**: A process in which a third party neutral offers advice on the valuation of assets and/or property in dispute between the parties. “Case appraisal,” on the other hand, is often understood to mean a process in which a third party neutral investigates the dispute and provides advice on possible and desirable outcomes and the means by which these may be achieved.

- **Advisory expert determination**: A process in which a third party neutral with relevant expertise makes a non-binding decision on a specific (often technical) issue in dispute.

- **Advisory / Nonbinding arbitration**: A type of arbitration in which the arbitrator makes a decision regarding issues in dispute, which decision does not constitute a binding or legally enforceable award. The “award” is in effect an advisory opinion.

- **Conciliation**: A process in which the third party neutral, while facilitating settlement negotiations between disputing parties, offers some form of evaluation of parties’ “cases” or of

---

93. Although third parties are sometimes retained by a single party for the purpose of providing a confidential evaluation to that party in the course of preparation for dispute resolution, the focus of this study is uniquely on nonbinding evaluations provided to both/all parties.

94. Cf. note 94 (referring to binding appraisal processes).


96. For a discussion of the treatment of non-binding arbitration under U.S. arbitration law, see Stipanowich, Arbitration Penumbra, supra note 90, at 448-56.

possible outcomes in adjudication, or offers the parties a proposal
for settlement of the dispute. Conciliation may be understood as

98. This definition reflects a broadly shared view among several jurisdictions and
corresponds to the concept of conciliation embraced at the international level. See e.g. Lack,
*Appropriate Dispute Resolution*, supra note 12, at 352-53, in which the author describes the
 distinction between the processes of mediation and conciliation from a Swiss perspective:

> [M]ediation is a non-evaluative process in which no coalition is being sought with
the neutral, whereas in conciliation, the neutral’s subject matter expertise is
typically being sought to set norms or make proposals in a somewhat evaluative
manner [...]. Conciliation is thus a process that can be procedurally facilitative, but
that is substantively evaluative, because possible outcomes are identified and
resolved by means of objective norms and criteria. In mediation, there is no ZOPA
[Zone of Possible Agreement] and the neutral should refrain from making proposals.

Id. See also Alessandra Sgubini, Mara Prieditis & Andrea Marighetto, *Arbitration, Mediation
and Conciliation: differences and similarities from an International and Italian business
perspective* (Aug. 2004), http://www.mediate.com/articles/sgubiniA2.cfm, which describes the
concept of conciliation as found in Italy:

Conciliation tries to individualize the optimal solution and direct parties toward a
satisfactory common agreement. Although this sounds strikingly similar to
mediation, there are important differences between the two methods of dispute
resolution. In conciliation, the conciliator plays a relatively direct role in the actual
resolution of a dispute and even advises the parties on certain solutions by making
proposals for settlement. In conciliation, the neutral is usually seen as an authority
figure who is responsible for the figuring out the best solution for the parties. The
conciliator, not the parties, often develops and proposes the terms of settlement. The
parties come to the conciliator seeking guidance and the parties make decisions
about proposals made by conciliators.

Id. See also Robert Virasin, *Arbitration, Mediation, and Conciliation in Thailand* (Apr. 10,
thailand/, which describes the process of conciliation in Thailand as follows:

Conciliation is different from mediation. In mediation, the mediator is a neutral third
party. While in conciliation, the conciliator is an active party in the discussion to
bring the parties to an agreement. In contrast to just listening and being empathetic,
a conciliator is generally an expert in the field and will actively discuss the issue
with each party. The conciliator attempts to bring the parties from the issue of what
they “want” to what will probably happen if the dispute is placed in front of the
court. The conciliation procedure is outlined in Section 22 of the Labor Protection
Act.

Id. See also JEAN-PIERRE COT, *INTERNATIONAL CONCILIATION* 9 (R. Myers trans.,, 1972),
which defines the process of conciliation as understood as the international level:

[Intervention in the settlement of an international dispute by a body having no
political authority of its own, but enjoying the confidence of the parties to the
dispute and entrusted with the task of investigating every aspect of the dispute and
of proposing a solution which is not binding on the parties.

Id. See also CEDR, *Guidance Notes for Customers: Conciliation* (2015) at 1,
https://www.cedr.com/idrs/documents/151029172414-conciliation-guidance-notes-for-
consumers.pdf, which states:

Conciliation is an informal process for settling disputes through direct negotiations.
A conciliator contacts the parties directly, usually by telephone, to attempt to
encourage a negotiated settlement between them. The conciliator allows the parties
functionally equivalent to a kind of early neutral evaluation discussed below under “Evaluative mediation.” In some places, conciliation may be employed as a general synonym for mediation, including non-evaluative as well as evaluative mediation processes, but distinctions usually emerge on careful examination.\textsuperscript{99} For example, in France, it has been observed that the legal distinction between the concepts of mediation and conciliation is unclear due to a confusion created by positive law codification and literature. In practice, however, mediation is generally understood as a process taking place in multidisciplinary fields (such as psychology, philosophy medicine and law) where the mediator is focused on reestablishing communications between the parties, finding a solution and reestablishing the parties’ relationship. On the other hand, conciliation is a term used exclusively in the legal field, wherein the neutral is either a judge or a legal practitioner who assists the parties to resolve their legal dispute.\textsuperscript{100} Similarly, in Brazil,\textsuperscript{101} as well as in Canada,\textsuperscript{102} the concepts of “conciliation” and “mediation” are understood as synonyms, with the important distinction that the term “conciliation” is generally reserved for the function of the judge (the conciliator judge) who assists the parties in reaching a negotiated solution, a process also referred to as “settlement conference” in the Canadian context.\textsuperscript{103}

- **Dispute boards:** Dispute boards are used to provide a relatively quick and efficient method for resolving disputes on construction and other large, long-term projects. There are two


\textsuperscript{100} Audrerie, Médiation et conciliation, supra note 5, at 124-27.

\textsuperscript{101} JOSE, CAHALI, CURSO DE ARBITRAGEM, MEDIACÃO, CONCILIAÇÃO 40 (2013).


\textsuperscript{103} Id. By way of contrast, one US source defines the term conciliation as a more “passive, less structured form of intervention than mediation”, where the conciliator encourages the parties to reach an agreement on their own and may act as a “go-between” to facilitate communication. See Conciliation, in DICTIONARY OF CONFLICT RESOLUTION (1999).
main forms of dispute boards, Dispute review boards ("DRB") and Dispute adjudication boards ("DAB"). Dispute boards are most often employed on large public infrastructure projects and other sophisticated long-term projects and may consist of a single person, or a panel of three or five members (often with relevant expertise in the type of project/industry). The individual or panel is appointed at the commencement of a project before any disputes arise, permitting the board to become familiar with project personnel, technical aspects, and project progress. When disputes arise, the panel hears presentations from the parties. This process is informal and typically does not involve legal arguments and witness examinations. Following its inquiry into a dispute, the panel deliberates and produces a decision complete with supporting rationale.104 DRBs typically produce decisions that are treated as nonbinding recommendations or proposals.105 DAB decisions are typically preliminarily binding on the parties, subject to the right of either party to "appeal" the matter to determination by a court or arbitration tribunal.106

- Early neutral evaluation: A non-binding process usually conducted early in litigation (before much discovery has taken place) in which a third party neutral (the evaluator) conducts a session with the parties and counsel to hear both sides of the case and offers a non-binding assessment of the case. If the parties so agree or the applicable rules so provide, the evaluator may also help with case planning by helping to clarify arguments and issues, and may even mediate settlement discussions.107

104. For more detailed information about dispute boards, see RANDY HAFER & CPR CONSTRUCTION ADVISORY COMMITTEE DISPUTE RESOLUTION BOARD SUBCOMMITTEE, DISPUTE REVIEW BOARDS AND OTHER STANDING NEUTRALS. ACHIEVING “REAL TIME” RESOLUTION AND PREVENTION OF DISPUTES, CPR Dispute Prevention Briefing (2010); GWYN OWEN, DISPUTE BOARDS: PROCEDURES AND PRACTICE (2007); see also CYRIL CHERN, CHERN ON DISPUTE BOARDS (2d. ed. 2011).

105. Stipanowich, Beyond Arbitration, supra note 77, at 126; see also Dispute Review Board (DRB), DICTIONARY OF CONFLICT RESOLUTION (Douglas H. Yarn ed., 1999).

106. See, e.g., INTERNATIONAL CHAMBER OF COMMERCE, DISPUTE BOARD RULES, Article 5 Dispute Adjudication Board (Effective Oct. 1, 2015).

• **Evaluative mediation:** A process in which a third party neutral (the mediator) uses a directive approach to move the parties toward settlement.\(^{108}\) To achieve this aim, the mediator may adopt a variety of techniques, such as urging the parties to accept settlement, proposing or developing an agreement for the parties to accept, predicting adjudication outcome or the impact of not settling in terms of parties’ interests, assessing the strengths and weaknesses of the parties’ respective legal case, or evaluating parties’ options in light of their interests.\(^{109}\) Several techniques used in evaluative mediation converge with what is understood as “Conciliation” as described in this taxonomy.

• **Mini-trial:** A settlement process in which the parties present tightly summarized versions of their respective cases to a panel comprised of principals of each party who have authority to negotiate a settlement of the dispute and a third party neutral. After the parties have presented their best case, the panel convenes and tries to settle the matter. In some cases the third party neutral offers an advisory evaluation of the dispute.\(^{110}\)

• **Non-evaluative Processes:** Non-evaluative processes include forms of mediation that do not involve nonbinding evaluation.

• **Non-evaluative mediation (sometimes referred to as “facilitative mediation”):** A process in which a third party neutral (the mediator) assists disputing parties by facilitating settlement negotiations and, perhaps, improving the parties’ relationship or
ability to communicate. In this form of mediation, the mediator elicit the parties’ stories, their sense of meaning, and their solutions. The mediator may use reality-testing techniques to help the parties understand their interests or the strengths and weaknesses of their legal case, assist them to evaluate proposals, generate options that respond to their interests, or develop and exchange proposals. One form of non-evaluative mediation, sometimes referred to as “transformative mediation,” aims to empower parties to more effectively communicate in order to resolve disputes and improve their relationship.

2. Identifying goals and values that underpin practices and perspectives on commercial dispute resolution processes

The first objective of the Task Force is to fill the many gaps in our knowledge and understanding of the range of current approaches and attitudes toward mixed mode practices. Forming a coherent and meaningful picture of the “crazy quilt” of practices and perspectives regarding mixed mode dispute resolution processes requires a systematic approach: a detailed assessment of the character of mixed mode practice in the international sphere and in a representative range of countries. We must take account not only of the international spectrum of published norms and observed practices, but also dig deeper, to underlying motivations and their root causes—be they the manifestations of longstanding national or regional cultural traditions and legal cultures, industry or organizational cultures, or creative adaptations to specific circumstances.

111. See Riskin, Decisionmaking in Mediation, supra note 108, at 30-33.
112. See id.
114. Culture is acquired through the process of socialization and underpins shared values, norms, customs, ideologies and roles within the members of a group. It can have a considerable conscious or unconscious impact on the parties’ motivations in conflict resolution and their attitudes toward neutrals’ practices. See George Peter Murdock, The Cross Cultural Survey, 5 AM. SOC. REV. 361 (1940) (providing more information on the sources of culture from an anthropologist and sociologist perspective); Ruth Benedict, Patterns of Culture 34 (1934); Edward Sapir, Conceptual Categories in Primitive Languages, 74 SCIENCE 578
In order to “deconstruct” present dispute resolution practices and provide a basis for comparison among divergent approaches, we will focus on the process goals and values that underlie these practices. In the four decades since the advent of the Quiet Revolution in dispute resolution, the growing use of mediation and other intervention strategies aimed at informal resolution of disputes and the dramatic expansion of consensual binding arbitration offered commercial parties a wide range of process choices. 119 Moreover, these developments fundamentally provided opportunities to more effectively address the various aims, priorities, and agendas parties bring to the table. We have become accustomed, therefore, to speak of processes in terms of how they serve, or may be designed to serve, various goals or values. 120 A list of process goals or values that serve

(1951); Socialization and Society 5 (John A. Clausen ed. 1968). See also supra note 26 and accompanying text (discussing the impact of culture on conflict resolution).

115. The legal profession exercises far-reaching influence on dispute resolution processes, which are often controlled by lawyers actively involved in negotiating contracts with dispute resolution clauses and in post-dispute counseling and advocacy See Stipanowich, Reflections on the State and Future of Commercial Arbitration, supra note 1, at 313-14. Moreover, neutrals’ and lawyers’ perceptions about their role in dispute resolution is largely influenced by the professional culture and the legal system from which they belong. See Michael McIlwrath & Henri Alvarez, Common and Civil Law Approaches to Procedure: Party and Arbitrator Perspectives, in International Commercial Arbitration Practice: 21st Century Perspectives 2-1, 2-4 (Horacio A. Grigera Naon & Paul E. Mason eds., 2015).

116. Industry has had a leading influence on the development of dispute resolutions processes. The construction industry has been on the cutting edge of conflict management practices, including partnering, standing neutrals and dispute boards. See supra notes 76-82 and accompanying text.

117. Organizations’ preferences regarding dispute resolution processes may be influenced by a number of factors, including the specific circumstances surrounding the business’ activities, the national macro-culture(s) with which it is affiliated through its geographical location, as well as the nationality and preferences of its head management executives and/or employees, the company’s industry or line in business, its conflict history and orientation toward risk-taking, etc. See Thomas J. Stipanowich & Veronique Fraser, “Mixing Modes” in International Commercial Dispute Resolution: Forms of Interplay between Mediation, Arbitration and Evaluation, and the Impact of Culture, Legal Tradition and Choice (publication forthcoming) (on file with authors).


119. See, e.g., Stipanowich, Reflections on the State and Future of Commercial Arbitration, supra note 1, at 308-321; Stipanowich, Arbitration and Choice, supra note 118.

120. See, e.g., Lack, Appropriate Dispute Resolution, supra, note 12, at 339. The author provides, at page 372, a “check-list of factors that can be taken into account when designing such combined processes” (figure 17-17 entitled “Process Design: Combining ADR Options”).
as criteria for shaping processes for the resolution of commercial disputes might include the following:

a. Party control over the process and outcome (informed decision-making and consent; self-determination; flexible / dynamic / tailored process);

b. Independent and impartial neutral;

c. Competent and/or authoritative neutrals (neutrals with necessary skills, experience, authority, respect);

d. Fair process and outcome;

e. Cost-effective / efficient / “proportional” process and outcome;

f. Avoidance of adjudication; promotion of a negotiated outcome;

g. Confidentiality

h. Finality; enforceability of outcome

i. Maintaining or improving relationship; reconciliation

j. Maintaining community or societal stability and harmony.

In a separate article, we will explore the ways in which the priorities assigned to different process goals and values by national cultures and legal traditions, as well as industries and organizations, factor into parties’ practices and perspectives in dispute resolution.

See also Jean François Guillemin, Reasons for Choosing Alternative Dispute Resolution, in ADR IN BUSINESS: PRACTICE AND ISSUES ACROSS COUNTRIES AND CULTURES, VOL. II, 13 (Arnold Ingen-Housz ed., 2010); Stipanowich, Arbitration and Choice, supra note 118.

121. The list includes many of the process goals and criteria discussed at the inaugural Summit of the International Task Force on Mixed Mode Dispute Resolution, September 23-24, 2017. See International Task Force Summary, supra note 11. Other process goals discussed at the Summit included: “transparent process”; “inclusive process” (including all stakeholders whose interests are affected); “legitimate outcome”; “predictable outcome”; and “feasible outcome” (potential to create clear obligation). The authors elected not to include these in the present discuss either because they overlapped with other listed goals or because they were not as likely to be among the priorities for parties to commercial disputes.

B. Exploring the Landscape: Developing Profiles of International Practice and Representative National Cultures / Legal Systems

Although much has been written on various mixed mode approaches, the bulk of published treatments and guidance tend to reflect the values and preferences of particular national cultures or legal traditions. Therefore, the most critical element of Phase I is the examination of norms, practices and perceptions within exemplary countries around the world, laying the groundwork for an eventual comparison of variations in practice and the different process goals and values that underlie these variances.

A range of countries with different traditions and legal systems may be selected as exemplars for comparison of practices and perspectives regarding specific mixed mode scenarios. The investigation would develop relevant information from each country in several key categories:

- **Published norms and standards** would include pertinent provisions of statutes/civil codes and case law; public and private institutional procedures affecting commercial disputes, and ethical standards.

- **Practices and perspectives**, a considerably more elusive category of information, must be garnered from a variety of sources including published materials offering comparisons of mediation practice in different countries and input from experienced individual lawyers, neutrals or practice-oriented scholars.

- **Underlying motivations and values**. Efforts should be made to identify the interests, goals and values that inspired the use of

---

123. Although the CEDR Commission was an important step forward in addressing roles arbitrators might play in the settlement of related disputes, portions of the Commission’s findings were reflective of practice in countries such as Germany, Switzerland and Austria, but would raise concerns among practitioners in some other countries. See Stipanowich, *Commercial Arbitration and Settlement*, supra note 9, at 14-15.


particular mixed mode approaches. To restate the point, although in some cases these drivers may be the product of deliberate choices made by parties in particular circumstances, they are most likely to reflect preferences and priorities associated with national or regional cultures and legal traditions, or industry or organizational cultures. In looking at particular practices, and the extent to which, within a given legal system, use of a mixed mode approach may be the product of active choice at the time of contracting or after disputes arise, as opposed to a “default” process determined by, or strongly encouraged (or discouraged or prohibited) by, legal traditions and cultural influences.

C. Challenges for Phase One

First, as stated above, there is the challenge of learning about and “capturing” experiences with private dispute resolution. It is one thing to capture published norms, but another to explore the broader realm of practice and the motivations and agendas that underlie mixed mode approaches in a particular legal and cultural milieu. Moreover, many such experiences are cloaked in secrecy, or remain undocumented in any level of detail.

Second, surveys with specific questions designed to ferret out perspectives and practices can become very cumbersome, especially given the scope of this initiative and the wide range of mixed mode practice. Moreover, surfacing reasonably detailed information about pertinent experience has proven difficult, apparently because, for all of the talk about mixed mode approaches, most people have little or no experience with some of the scenarios. A preliminary survey of Task Force members revealed a relatively high degree of interest in, and a strong acknowledgement of, the practical significance of mixed mode approaches. However, even within this group of individuals selected on the basis of their experience as legal advocates, dispute resolution professionals, and/or scholars, the level of actual experience with mixed mode approaches was surprisingly low.\textsuperscript{126} Therefore, although considerable effort was devoted to drafting detailed templates for extensive surveys of members of leading institutions, the nuggets of useful data are likely to be mere needles in a haystack.

\textsuperscript{126} See International Task Force on Mixed Modes Dispute Resolution, Preliminary Survey (July-Sept. 2016) [unpublished] (on file with authors).
A more promising alternative to a highly detailed survey instrument may be to reach out widely to stakeholder groups and use open-ended questions to invite input on specific scenarios regarding which individuals have relevant experience and/or perspectives. This might be done by means of an interactive platform like Google Docs. Respondents providing comments might be prompted to address a series of more targeted follow-up queries, and might also be asked if they would be willing to provide further information if asked.

Third, input should be sought from all of the stakeholder groups represented on the Task Force (namely, dispute resolution professionals, legal advocates and corporate counsel, and scholars) as well as business users.) Based on recent experience, dispute resolution professionals are likely to be the most accessible, along with legal advocates. However, individuals in each of these groups may have personal agendas that are different from those of the business parties with whom they interact. Moreover, there may be a degree of interest bias in reporting positive personal dispute resolution experiences. Unfortunately, based on our experience, corporate in-house counsels tend to be less willing to participate in empirical studies, and business clients with any level of knowledge and interest in dispute resolution are extremely difficult to identify and engage.

Finally, personal interviews or facilitated discussions are other sources of potentially useful information regarding mixed mode approaches. These might be designed as facilitated, videotaped conversations of small groups of interested invitees (who have

127. Task Force members suggested employing listservs, blogs (such as the Wolters Kluwer blog), and the websites of, or outreach through, leading international and national dispute resolution institutions (including IMI and the Global Pound Conference (“GPC”) series; International Academy of Mediators; International Bar Association; Corporate Counsel International Arbitration Group (“CCIAG”); Chartered Institute of Arbitrators; College of Commercial Arbitrators; American Bar Association (“ABA”) Section on Dispute Resolution; Maryland Mediation & Conflict Resolution Office (“MACRO”); Straus Institute for Dispute Resolution; Resolution Systems Institute (“RSI” (Chicago)); Dispute Resolution Institute (“DRI” (Carbondale)); Singapore International Mediation Academy, and other interested organizations (such as, for example, Association of Corporate Counsel (“ACC”); International Judicial College, Claims & Litigation Management Alliance (“CLM”); United States Council for International Business, The Business Roundtable, Society of Construction Lawyers; ABA Forum on the Construction Industry, American College of Construction Lawyers; ABA Tort Trial and Insurance Practice Section ABA Section on Business Law).

129. Id.
perhaps been pre-screened using the procedure above) from specific countries or regions.

III. PHASE TWO: DEVELOPING INTERNATIONAL GUIDANCE FOR MORE EFFECTIVE MIXED MODE PRACTICE

The ultimate goal of the International Task Force on Mixed Mode Dispute Resolution is to provide practical tools to help business users and counsel make the most effective use of mixed mode processes, and avoid common pitfalls and problems. The intent is to create user-friendly guidance in several forms or formats, ranging from a relatively short and succinct statement of very basic, concrete, and persuasive insights to more extensive supporting commentary, including treatment of subjects touched upon in this article.

A. Preliminary Considerations

Our abiding self-admonition is first, to do no harm. Because the current initiative was motivated in part by encouraging more effective use of the autonomy that parties in dispute resolution enjoy in tailoring processes to needs and circumstances, and because in many places mediation and mixed mode practice are still in the early stages of evolution, it is critical that impediments to choice be avoided as much as possible. To the extent possible, the emphasis should be not on hard and fast rules or limitations, but signposts and templates that promote good decisions by users and counsel.

Another priority of the Task Force is to pay deliberate attention to and seek to accommodate fundamental cultural differences in the guidance we develop. For this reason, it is important to surface cultural biases and ensure that our product is not driven to an inappropriate degree by a particular set of cultural preferences.

Finally, our intent is to produce international guidelines that are authoritative. For this reason, a number of organizations and widely diverse group of experienced practitioners and scholars from all over

130. The concerns associated with rulemaking in a complex environment in which dispute resolution practice is still in the early stages of evolution may be appreciated by examining the recently passed Brazilian mediation law, which establishes a number of limitations on mediation process that many practitioners might consider unnecessary or unwise. See Stipanowich, The International Evolution of Mediation, supra note 2, at 1208-09.

131. See supra note 123 and accompanying text.
the world have been assembled. In the coming months, additional organizations and individuals may be enlisted in order to further strengthen the bona fides of the Task Force.

B. Guidelines for Practice

Following the comparative analysis of and reflections on the materials assembled in Phase One, the Task Force will establish a set of guidelines for practice for each of the mixed mode scenarios within the scope of our initiative. Step-by-step, straightforward guidance should be offered for the negotiation and drafting of appropriate contract provisions, and, separately, for post-dispute arrangements or issues that arise in the course of dispute resolution. The intent will be to provide practical responses to address key questions, including: (1) *What approaches may be broadly acceptable or even preferable, regardless of the cultural backgrounds and interests of parties?* (2) *How do cultural preferences, legal traditions or other factors that place priorities on different goals and values in dispute resolution affect what process choices are permissible/appropriate or preferable?*

Given the fact that several groups of stakeholders play active roles in the drafting of dispute resolution provisions and post-dispute discussions regarding process, it is appropriate to provide guidance aimed at each of these groups: neutrals, business users and counsel, legal advocates, and institutions that sponsor or administer dispute resolution services.132 The guidelines will be presented first in short and succinct statements that set forth clear practical steps. They will be accompanied by an in-depth commentary supporting each element of the guidelines. Supporting materials will include the products of Phase One, including (a) the basic taxonomy of dispute resolution approaches, with clarifying definitions; (b) treatment of the relationships between mixed mode approaches and different process goals and values; and (c) summaries of, and comparisons between, practices and perspectives in different representative countries, with appropriate emphasis on the role of culture and legal tradition.

---

C. Forms and Procedures

In order to put the guidelines into practice, the Task Force will also develop exemplary templates, including suggested formats for contractual dispute resolution provisions or guidance in the form of a “clause generator.” These will be accompanied by suggested mixed mode procedures adaptable for use with leading institutional mediation and/or arbitration procedures.

D. Training and Education

The products of the Mixed Mode Task Force will be readily adaptable for academic courses or training programs. It is possible that these may form the basis of credentialing by sponsoring institutions.

E. Other Possible Results

At the inaugural Summit, Task Force members discussed a number of other possible outcomes of the initiative. These include international ethical standards addressing mixed mode scenarios, a database of arbitrators and institutions with experience in or resources focused on mixed mode practice, and collected summaries of experiences of different kinds with mixed mode scenarios.

CONCLUSION

The launching of the International Task Force on Mixed Mode Dispute Resolution in 2016 demonstrated the impetus for encouraging further examination of an international dialogue to enhance our understanding of perceptions and practices involving a mixing of modes in dispute resolution. More than sixty experienced lawyers, scholars and dispute resolution professionals from six continents are now participating in the Task Force, nearly all of these individuals responded to a preliminary survey last summer; fully two-thirds gathered for the inaugural Summit of the Task Force in September, 2016. The active engagement of this group of experts will lead to the systematic collection of information about existing norms, standards, practices and perspectives regarding mixed modes, and the development of new analytic tools to create a platform for the comparison of approaches on the basis of underlying process goals and values associated with national culture and legal tradition,
industry and organizational culture. The hoped-for result will be
guidelines to assist dispute resolution professionals and users in the
use of mixed modes, as well as information to strengthen active
choice making in dispute resolution.
To Be or Not to Be—That Is the Question: Is a DRB Right for Your Project?

Kathleen M. J. Harmon, Ph.D.

Abstract: Dispute review boards (DRBs) have been used on a wide variety of projects both in the United States and abroad. However, this alternative dispute resolution methodology has been around for over 3 decades and as of 2006 has been used on over 1,434 projects according to the Dispute Resolution Board Foundation; therefore, now is the time to consider whether the benefits of a DRB outweigh its potential downsides. Some DRBs are successful in that all issues have been resolved prior to the close of the project, while others have failed and caused the issues to travel the continuum to litigation and/or arbitration. The writer’s first experience with a DRB was one that failed and the issues continued to both arbitration and litigation at great expense to both the owner and the contractor. The purpose of this paper is to explore the questions that need to be asked to determine whether or not a DRB is right for your project. It will outline the history and development of a DRB as well as its use in the United States and abroad. It will evaluate the advantages and disadvantages of using a DRB to permit a deliberate decision on whether or not a DRB is right for your project.

DOI: 10.1061/(ASCE)LA.1943-4170.0000051

CE Database subject headings: Dispute resolution; Contracts; Arbitration.

Author keywords: Dispute review board; ADR; Contracts.

Introduction

The construction industry is a leading economic indicator with construction spending in February 2010 that estimated at $846.2 billion (U.S. Census Bureau News 2010). The construction industry touches every part of our lives, from the homes we live in to the roads, bridges, and tunnels we drive on. It encompasses hospitals, malls, theaters, power plants, wastewater treatment plants, oil drilling platforms, airports, hotels, apartments, nuclear generating facilities, water and sewer lines, and more. As of the most current yearly statistics in 2008, it employed approximately 7.2 million people in 884,300 U.S. construction companies (U.S. Bureau of Labor Statistics 2010). Considering these impressive numbers, it behoves this industry to look for innovative ways to reduce inefficiency and waste created by conflicts and disputes which is reported to cost over $11 billion a year (Michel 1998). Weeks (1992) noted that if conflict resolution is to be effective, all the parties need to believe they received something of value from the process (p. 26). Unresolved conflict takes time and energy away from other business pursuits and often results in a conflict spiral wherein the disputants continually engage in increasingly contentious heavy tactics (Pruitt and Kim 2004). The Dispute review board (DRB) is an alternative dispute resolution methodology, but is it right for your project? Does a DRB help to reduce time and money on projects? What are its advantages and disadvantages?

 restrict to primary author. For secondary authors, please use author keywords.

History of the DRB

In 1972, the U.S. National Committee on Tunneling Technology Standing Subcommittee No. 4 conducted a study and made recommendations for improving U.S. tunneling contracting methods. Aside from certain recommendations, this report also described the harmful effects of delays, claims, disputes, and litigation on the construction process (National Academy of Sciences 1974). In 1978, in a follow up report entitled Better Management of Major Underground Construction Projects, the National Academy of Sciences detailed 34 separate recommendations to enhance the construction of underground projects. Chief among those recommendations was an innovative methodology for resolving disputes contemporaneously with their occurrence and the implementation of a “professional review board to assist in the settlement of construction claims and disputes” (p. 76). The recommendations detailed an independent board consisting of three to five members “professional, qualified, well-respected experts in their particular discipline who possess demonstrated characteristics of integrity and justice” (p. 76). This report also suggested that the review board have the power to make binding decisions on liability but not costs, if so agreed by the contractor (National Academy of Sciences 1978, p. 76).

The first DRB was the second bore of the Eisenhower Tunnel at Loveland Pass, Colorado (Harmon 2009). The project was started in May 1975 and opened to traffic on December 21, 1979. It was valued at approximately $106 million (Harmon 2009). In the contract documents for the second bore, the Colorado Depart-
ment of Highways required a review board to make nonbinding recommendations concerning disputes that arose during the course of the project. This development was a result of the financial disaster encountered on the first bore which commenced in 1968 (contract award November 1967, first bore in 1968) with a contract value set at approximately $50 million and an anticipated completion in 1971 (Harmon 2009). However, due to project delays and conflicts, it was 2 years late, opened to traffic on March 8, 1973 at a cost of $108 million (Harmon 2009; Mathews 1997). The project owner, the Colorado Department of Highways, determined that differing site condition disputes were likely because of the unique and complex geological aspects of the project. The Colorado Department of Highways aimed to avoid the problems encountered on the first bore (Bramble and Cipollini 1995; Zuckerman 1999). Although the contract for the second bore did not require organization of the DRB until it was needed, the parties agreed to organize the board at the beginning of the project. The project had four disputes heard by the DRB and all were resolved prior to the contract closeout and without litigation (Bramble and Cipollini 1995; Mathews 1997). Because of the success with the second bore project, the Colorado Department of Highways used DRBs on the electrical and finish work on the tunnel as well as on two later tunnel contracts and two large bridge projects.

As the first-ever DRB, the Eisenhower Tunnel DRB had to determine its role in the project because the contract documents did not delineate it. This difficulty has been eliminated in many current contracts (e.g., University of Washington, Florida DOT, Boston Central Artery/Tunnels project, California DOT, New York City Metropolitan Transportation Authority, etc.), which specify the DRB's role by defining the processes needed for the selection of members, the role of the DRB, the processes the DRB may use, and payment for services.

Since its inception in 1975, DRBs have been used on over 2,150 projects including tunnels, highways, bridges, airports, buildings, schools, hospitals, baseball stadiums, subways, and others both in the United States and abroad (Dispute Resolution Board Foundation 2010) but the question of whether it is the right alternative dispute resolution (ADR) methodology for your project, whether it should be included as one of many ADR options in your contract, or whether the disadvantages outweigh the advantages needs to be carefully considered.

**DRB Process and Panel**

On projects that have DRBs, the contract often contains a DRB provision which outlines the roles and responsibilities of a DRB. A DRB can also be added by change order if agreed to by the contractual parties, but as of this date, the writer knows of no such project using a DRB that has been added by change order. The DRB contract section generally contains the selection and term of panel, disputes governed by the DRB, rules of operation, the dispute review process, etc. It will also include third party agreements the panel executes as well as any requirement for consolidation or bifurcation of disputes.

**DRB Process**

The DRB is set up at the start of the project and is given a set of contract documents. They visit the job periodically as detailed in the specifications or as agreed to by the contractual parties. These jobsite visits occur whether or not any unresolved disputes are present. As a result of the regular site visits, panelists become familiar with the parties and project. In between site visits, the panel receives updates via meeting minutes, RFI logs, change order logs, project schedules, and/or selected correspondence. The information provided to the panel is generally discussed during the first meeting and agreed to by both the panel and contractual parties.

There are, of course, variations in the standard DRB process, such as if it is comprised of (1) just one person; (2) or all attorneys; (3) members not chosen jointly by the contractor and owner; (4) members who are biased toward the party that appointed them; (5) or if the board is empaneled only if a dispute is unresolved; (6) or serve as arbitration panels issuing final and binding decisions as to disputes under a certain dollar amount, and issuing only recommendations as to disputes exceeding that dollar amount; (7) is set up by region rather than by project; and (8) is set up after construction is substantially completed (Rubin 2006). These variations may have their uses; however, this discussion is beyond the scope of this paper.

A great advantage of a standard DRB is the way the process is framed, so if an unresolved issue is brought before the DRB, the contractual parties do not need to educate the DRB on the workings of the project, the conditions of the work, or virtually any other project or industry specific information other than the conditions and events around which the conflict revolves. This saves enormous amounts of time and money when compared to arbitration, litigation, or even mediation where third party fact finders need to be educated on almost every aspect of the contract, project, and dynamics of the parties' relationship. So if a dispute does occur, the cost to resolve it may be minimal as compared with other methodologies. Nevertheless, rarely is the DRB the only mechanism for resolving a dispute. Most contracts have a stepped dispute resolution process where the dispute is first attempted to be resolved by field staff, then upper management, then a possible additional step for non-project-involved executives to get together to resolve the dispute. Finally, it may be brought before the DRB. The advantage to a stepped dispute resolution process is that the dispute can be resolved at the lowest level in the field. However, if the dispute travels along this continuum, then there is a chance that the parties' positions can become hardened especially when there is an extended amount of time between when the dispute is first discussed on the field level to when it finally gets to the DRB. In some contracts, this duration can be between 10-12 months, as it was in the Central Artery/Tunnel project (Harmon 2009).

Disputes that arise in tort for injunctive relief—relating to terminations by the owner, a determination of insurance coverage, and labor agreements or safety issues—should not be heard by DRB since they involve legal rather than technical issues. The advantage in specifically outlining the authority of the panel and the disputes it is permitted to hear is that the interpretation of sophisticated legal issues are best left to experienced construction attorneys. Even if an experienced construction attorney is a member of the panel, the restrictions on what should and should not be brought to the DRB should be defined. Because not all DRB contract provisions contain restrictions on what can and cannot be brought to the board, the DRB itself determines what it will hear. Moreover, DRBs can overstep their authority and decide it will hear issues as noted above if its responsibilities are not clearly defined. Clearly defining the authority of the DRB in the contract may assuage but not necessarily eliminate this problem. If the DRB oversteps its authority and that action is not contemporaneously objected to by either owner or contractor, then this stretch-
ing of the DRBs action is not an issue; but if one party objects, bringing in a panelist (in-house or outside) to address this may be one way to alleviate this potential problem.

Another topic which needs to be clearly defined is that of subcontractor claims. Contractor disputes will sometimes involve subcontractor subject matters. In a 2003 case, the court determined that a subcontractor was not required to bring its dispute to the DRB prior to filing suit because although the subcontractor requested it be permitted to select a DRB panelist, the general contractor would not allow it the right to appoint, approve, or reject any member of the panel in an attempt to make the DRB more balanced and impartial. The court determined that under those circumstances, the DRB was “presumptively aligned” with the general contractor and owner “and presumptively biased in their favor, excusing the subcontractor from any obligation to comply with the DRB process before filing” (Schulster Tunnels/Pre-Con versus Traylor Brothers/Obayashi 2003). The court went further by stating:

“An ADR clause in a contract that excludes one of the parties to a dispute from any voice in the selection of the “neutrals” cannot be enforced; that provision conflicts with our fundamental notions of fairness and tends to defeat ADR’s ostensible goals of expeditious and equitable dispute resolution.” (Schulster Tunnels/Pre-Con versus Traylor Brothers/Obayashi 2003).

The advantage in allowing subcontractors to have a voice in the DRB selection process is that it will not have the “unfairness of the process” argument and therefore would need to bring those matters before the DRB prior to seeking resolution via a binding dispute resolution process. The question is: where is the line drawing for subcontractor participation? Do all the subcontractors get a voice in the choosing of the DRB panel, or just the major subcontractors? Or do you set up the panel, then attempt to get subcontractor approval of the panel? Even if they have no opportunity to appoint, approve or reject a DRB panelist but they are “encouraged” to approve the panel, will that circumvent the implications of the above noted ruling? This is an important quandary which needs to be discussed with counsel when determining what subcontractor participation will be permitted when choosing the DRB panel.

**Composition and Selection of the DRB Panel**

The mechanism for setting up a DRB is contained in the contract between the owner and contractor. It details the requirements of the panel and spells out the methodology for choosing a panel. In most cases, the DRB comprises a panel of three experienced construction or engineering individuals jointly selected by the owner and the contractor. One panel member is proposed by the owner and the second by the contractor, with each party approving the other party’s candidate. The third panelist may be selected by the first two members, but may also be nominated by mutual agreement of the contractual parties and the chosen DRB panelists. The third member generally acts as chairperson for all DRB activities. This member’s qualifications may supplement those of the first two DRB members. Moreover, it is suggested that panel members should be “team players,” open-minded and “totally committed to the successful operation of the DRB” (Shadbolt 1999 p. 108) with no employment or consulting ties with the contractual parties. The result of the selection process is expected to be a neutral panel of respected construction industry personnel that is acceptable to both the contractor and owner whose experience and insight is sought after by the parties when an unresolved disagreement arises.

**Panel Selection, Authority, and Responsibilities**

As with any ADR mechanism, the DRB depends on the quality and qualifications of the neutrals involved; therefore, it is vital that both parties take the choosing of the panel very seriously and take whatever steps are necessary to assure their confidence in the panel’s experience, expertise, and standing in the industry. The advantage of jointly choosing/agreeing to panel member is that the joint participation in its formation allows the party to bestow the panel an implied authority. They are experienced, you have agreed to their selection, and you professionally respect their opinions, so the implied authority of the panel can be a factor in reducing disputes (Cox 2000).

Individuals who are not familiar with the DRB process though they may have experience pertinent to the project may be biased toward the party that put their name forward as a panelist. These individuals become advocates for their appointing party’s position. The bias of a DRB member, whether real or perceived, undermines the confidence placed in the DRB (McSpedon 1995). As noted in a 2003 decision, stated, in part:

“Although contractual provisions governing the DRB process suggest that all DRB members must be neutral, pragmatically it is recognized that the two party-appointed members as a matter of appearance are considered biased in favor the party who appointed them. The selection process, like tripartite arbitration, necessarily implies by appearance that two of the members may function as advocates. Therefore, the established selection process as to the third member is designed to bring objective balance to the panel.” (Schulster Tunnels/Pre-Con versus Traylor Brothers/Obayashi 2003).

In a perfect world, if one party loses confidence in a panelist, that panelist should resign, though seldom does this happen. Some panelists who are appointed believe that they are hired for the duration of the project, no matter what. As noted in one court decision, a DRB is not vested with tenure over the life of the project (Los Angeles County Metropolitan Transportation Authority versus Shea-Kiewit-Kenny 1997). It stands to reason that if either party loses confidence in the DRB as a whole or any of its individual members, it is likely that party will not give the DRB recommendation consideration it may deserve (Los Angeles County Metropolitan Authority versus Shea-Kiewit-Kenny 1997).

In such a case, the purpose of the DRB will be compromised and its effectiveness negated (Technical Committee on Contracting Practices of the Underground Technology Council 1991). Frankly, who would accept the recommendation of an individual that they suspect of bias or do not professionally and/or personally respect? It is a waste of both time and money to have this panelist remain.

Distrust is costly and inefficient, unpleasant, humiliating, and just plain lousy. One way to circumvent this issue is to place in the contract a provision to allow for the removal of a panelist with or without cause. However, if a panelist is removed, the replacement panelist will have to be brought fully up to speed on the project, lacking the project’s living history. The remaining panelists will have this historical knowledge so the effects may be minor.

Because of the experience requirement of the panels, it is likely that the proposed panel members are both professionally and personally known by some members of the contractual parties. This is no unusual inasmuch as the construction industry is a small society where the theory of six degrees of separation might actually be smaller than the six steps (six degrees of separation refers to the idea that everyone is at most six steps away from any other person on Earth, so that a chain of, “a friend of a
The basic recommendations concerning the disposition of a dispute, in general, seldom involve the health of the proposed panelists. This is that a panel of industry experts will not have to be educated on construction management or means and method advice. They are engineers and/or contractors. So while they hold the title of "esquire" but are experienced in issues such as the interpretation of state or federal precedent. If the recommendation goes against precedent, it is problematic and an appearance of bias could undermine the process. The disadvantage in having a panel of experts is the perception of bias, each party may nominate several candidates for the role of chairperson, from which both the contractor and the owner can choose. In addition, the DRB contract provisions note that communication concerning a project, submitted claim or dispute is prohibited. To do so would undermine the appearance of neutrality, a cornerstone of the DRB process. Any communication transmitted to the DRB, generally the chairman, is to be simultaneously transmitted in the same manner to the opposing party.

Individuals who have sat on DRBs, as well as other members in the industry have a prejudice against having attorneys sit as DRB members or be involved in the process at all (Appel 2001). The often mentioned fear at the DRRF annual meeting is that attorneys will bring more formality to the process and legalize it. Having it then suffer the same fate as arbitration. The "no attorney" rule can also be an advantage since the attorneys, not legal counsel, can control the process. But having a no attorney rule can also be a disadvantage since many construction disputes concern contract interpretations. A DRB membership comprised of construction industry experts, not judges, not attorneys, and not professional arbitrators will not have a deep learning of construction law. This may play an important role in the recommendation. If the recommendation goes against state or federal precedent, it may not be accepted by both parties. That being said, business decisions, in general, seldom involve legal precedent. The basic question is what type of panel make up is important to you and the project? Will an attorney on the panel be helpful, remembering that the majority of construction attorneys have a deep background in various types of construction and some have been or are engineers and/or contractors. So while they hold the title of "esquire" that may not be a limitation but a great advantage.

The DRB has no other role under the contract other than to make recommendations concerning the disposition of a dispute, they are not consultants to the project, nor should they act in that manner. The disadvantage in having a panel of experts is the tendency of some to offer or request opinions and advice as to how the project is run and/or being constructed. Information or advice on construction management or means and method should not be petitioned nor should they be offered. The great advantage is that a panel of industry experts will not have to be educated on what a geotechnical report is or an understanding of it, how elements shown on the contract drawings will not work in the field, or any other type of construction or scheduling issue.

Another issue, which is not discussed in literature, is the age and health of the proposed panelists. This is a very real issue. The duration of the project as well as the panelists' age and health should be considered together. The site visit is more than a visit to a site office it is also a "field trip" to view the actual progress of construction. In addition, you should speak with those in the industry who may have recently had the proposed panelists as arbitrators, mediators, or as DRB members.

Unresolved Dispute—Hearing

The presentations are encouraged to be made as soon as it is apparent that the parties have reached a stalemate in their negotiations but before the parties' position become inextricably fixed. The advantage of this procedure is that it allows the parties to have their dispute determined rapidly (if somewhat roughly), without the dispute escalating and becoming a disruptive influence on the progress of the project. Therefore, when the parties agree that no further productive discussions can take place between themselves, they bring the dispute before the DRB and request the panel's recommendations as to how the particular dispute should be resolved. At the hearing itself, there is a strong bias against having counsel present or even present. This is a debate that has been discussed for years at the annual meeting of the Dispute Resolution Board Foundation with many members vehemently opposed to counsel being involved in the DRB process. Also, the contract under which the DRB is appointed may specify that the board's decision is to be either a nonbinding recommendation or interim binding for the duration of the project.

Prior to the actual hearing, the parties develop a written document that speaks to the issue(s) at hand and details each party's position and rebuttal. Depending on the DRB procedures in the contract, both sides may or may not get an advanced copy of the documents, position papers, damage calculations, etc., that is being brought to the DRB, or they may receive this information a few days before the hearing, making analysis of the documents and preparation of a rebuttal case difficult. Can party can be denied right to a fair hearing due to inadequate notice of revisions to a claim. Also, the panel is very liberal in admission of evidence. This can be both an advantage as well as a disadvantage depending on where you are sitting.

At the hearing, oral testimony is made by the actual project participants with firsthand knowledge of the unresolved issue. It typically entails significantly less preparation than even mediation and foregoes discovery and large document exchange. Occasionally, an expert is brought in if the contractual parties do not have the expertise to discuss the issue to the satisfaction of the panel. Moreover, all this goes on while the project is still moving forward, so project staff must work two jobs, so to speak: managing the project and advancing the work while also preparing for a presentation at the hearing.

The benefit to the parties in having the field personnel present their position is the reduced costs as opposed to consultants or attorneys presenting their position. Generally, the field personnel have established credibility because they have firsthand knowledge of the issue. Nevertheless, having field staff present their "case" is sometimes problematic since many are not used to preparing and/or presenting their case in a manner which is clear, concise, organized, and pithy (though some would argue attorneys are not pithy either!)

Additionally, parties may scale down their presentation by addressing only essential elements of their issues and proof of damages but in doing so may overlook some essential information such as the type of dispute condition; e.g., technical, contract interpretation, delay/disruption, etc., and what outcome they seek. Also, they may omit information such as what specifications, drawings, standards, shop drawings, and other technical documents to support their position.

Further disadvantages to having site personnel communicate their position concerning the dispute concern the act of presenting itself. There are numerous studies which show that the greatest fear is not of death but rather of public speaking. It is extremely painful, then, watching someone who is paralyzed with fear of public speaking struggle to get a point across. The DRB process is formulated so that the parties are familiar with the panel via the
regularly scheduled meetings, but the fear of "saying something wrong" can still be present. Additionally, no matter how informal the process is meant to be, as a contractor, you are bringing a matter before a panel that has the "power" to determine whether or not your position has merit. Money and sometimes also time extensions are on the line so an inarticulate presentation can be problematic.

The panel may or may not ask questions or challenge the statements by the presenter and/or witnesses—there is no cross examination allowed. To some, this can be a disadvantage since purposes of cross-examination are to elicit favorable facts from the witness, or to impeach the credibility of the testifying witness to lessen the weight of unfavorable testimony. Cross examination frequently produces critical evidence, especially if a witness contradicts previous testimony. So without the right to cross examine a witness, the ability to impeach a witness to less unfavorable testimony is not available. However, others consider the fact that witnesses cannot be cross examined an advantage since being a witness will be less stressful, there is generally less preparation required of the witness. Also, the panel is seeking the "truth" and as Mark Twain so aptly noted, "if you tell the truth, you don't have to remember anything."

There is also no discovery, which a British colleague described as the favorite indoor sport of American lawyers! Having no discovery can be both an advantage as well as a disadvantage. With the "no discovery" rule, the parties have no right to seek production of the opposing party's documents or to depose key employees before the hearing. The disadvantage is that even though discovery is time consuming and expensive, it exposes the strengths and weaknesses of each side's case. It also allows each party to further analyze the claims for damages. The advantage of having no discovery is that time and expenses are eliminated. There is no one rummaging around in your files trying to build their case. Further in construction, both sides generally have 90-95% of the relevant documents such as correspondence, e-mails, transmittals, contracts, and the like which are needed to support their position. Therefore, conducting discovery on a current project may not yield any benefits.

**Recommendation**

After a presentation is made by both parties and all documentation has been submitted as well as all queries answered, then the panel closes the hearing, discusses the issue(s) in a closed session, and within a certain number of days defined by the specification or by agreement of the parties, the DRB issues a nonbinding written recommendation as to the panel's opinion on the disposition of the conflict. This recommendation is either accepted or rejected, either resolving the dispute or allowing it to go forward to litigation or arbitration. Generally, a hearing and recommendation by the DRB is a condition precedent to either litigation or arbitration.

There are some contracts which allow DRB recommendation to be temporarily binding pending a final determination of the dispute by a court or arbitration panel per the FIDIC, World Bank, and ICC Dispute Board Rules. However, in a standard DRB, the recommendation is nonbinding. There are advantages and disadvantages to whichever position is decided upon. Nonbinding recommendations can seem less intimidating to the parties and can result in lower costs in relation to the DRB hearing, while interim binding decisions be ominous, but can provide greater certainty for both parties and induce early settlement. Also, the recommendation could be admissible or inadmissible in a trial or arbitration. The admissibility or nonadmissibility is defined in the contract.

The recommendation may give the contractual parties a view on how the dispute may be perceived by other third party fact finders such as an arbitration panel, judge, or jury (Harmon 2004). Nevertheless, at times the contract is considered one sided in that it strongly favors one of the contracting party, the owner, over the other, the contractor. There is a fear that the recommendation of the DRB will disregard the contract, with some concluding that a contracting party entering into a contract which is actually extremely unbalanced deserves equal protection. A DRB may interpret the contract not on what was written but what was intended to be written or it may seek to favor the parties a contract that they never made. Subjective intent of the parties is irrelevant if the intent can be determined from what actual words were used in the contract. There is the concept of fairness and equity which may be contrary to the contract requirements, thus the recommendation may be biased against the drafter of the contract in an effort to bring fairness and equity to the table. This goes right past bad and zooms solidly into offensive. Classical contract doctrine maintains that decision makers look only to the "four corners of the document" in identifying the content of the contractual relationship between the parties. Though the DRB is charged with this responsibility, it may not fulfill this responsibility.

Another issue can be the format of the recommendation itself; it could appear to be wrong, unsupported, poorly reasoned, lacking clarity or sufficient detail for application, etc. It also can be written with a manifest disregard for the law if counsel is neither present at the hearings nor sitting as a DRB member or unfamiliar with the law in the particular venue of the project. It is unlikely that the "losing" party will accept this recommendation if this is present. While these may not be an issue for a nonbinding recommendation, it could be with an interim binding recommendation or if the recommendation is admissible in another forum and may carry more weight than the losing party desires and somewhat "threatening" when going to arbitration or litigation; after all, here are three experienced industry professionals, chosen jointly, who made a recommendation based on their knowledge of the industry and the project itself. Nevertheless, DRB decision does not have the status of a court judgment and because the rules of evidence are not applied at the hearing, cross examination is not allowed, and discovery is not permitted, these concerns may be mitigated when a binding decision maker considers these arguments.

**Costs**

**Contract Drafting Costs**

One obstacle to the DRB process is that transactional lawyers may have little experience either with the nuts and bolts of construction conflicts or with binding dispute resolution mechanisms so they may not appreciate the advantages a DRB can bring to a project. Furthermore, a DRB is not inexpensive. The first cost is the initial set up costs. Counsel will have to incorporate the DRB into the contract, draft the third party agreement, and determine what procedures are warranted for choosing and removing DRB panels. Although there are published rules, agreements, etc., some will desire to tailor those rules and procedures to the specific project and that requires counsel's time and—if using outside
counsel—fees. However, once the DRB provisions have been drafted to an owner or agency’s satisfaction, these costs need not be repeated.

**Initial DRB Costs**

A panel comprised of three experienced industry individuals does not come cheap. Hourly rates for one panelist range from $165.002 to $350.003. After being empanelled, they receive a full set of contract documents (agreement, drawings, specifications, special conditions, etc.) which they review prior to the first meeting which incurs fees. There are both direct and indirect costs of gathering these documents, having copies made and shipping. While these are not significant, they will be incurred.

**Monthly DRB Costs**

The DRB also receive monthly updates, meeting minutes, change order logs, RFI logs, schedules, and the like. Reviewing these documents also incurs costs. There are also the indirect costs of gathering these documents and forwarding them to the DRB. To keep these costs contained, some owners set a maximum monthly time limit on the panels’ time charges for reviewing documents outside of a hearing.

**Site Visit Costs**

The periodic site visits also cause dollars to be expended, first are the travel and hourly fees of the panel themselves. Some contracting parties anticipate a partial four hour day for the periodic site visits but others anticipate an entire day, so the minimum cost for a panel to be present at a non-hearing can range from $2,000.00 to $9,000.00, plus expenses. The University of Washington anticipates the cost of a DRB panel’s monthly visits for a 2-year project to be approximately $47,520.00 plus travel time and expenses (University of Washington 2010). The costs are shared equally between parties to avoid any perception of allegiance to either party. The owner and contractor sometimes directly send the party their share of the panel’s costs, or in the case of Florida DOT, the cost of the panel is physically paid by the contractor but FDOT issues a change order to the contractor for the entire amount. Additionally, there are indirect costs of project personnel preparing to meet with the DRB, gathering any pertinent documents the panel desires to review outside of the document sent in the nonsite visit months.

**Hearing Costs**

If a hearing is held, the cost depends on the time required for review of the parties’ prehearing documents, the hearing itself, and the time required for the DRB to deliberate and prepare the written recommendation(s) with supporting rationale. There are also their indirect costs of the project staff to gather documents, draft narratives, provide supporting documentation, review the opposing party’s submissions, and prepare the presentation.

**Summary**

For smaller projects, the DRB can be cost prohibitive. Moreover, if disputes do not occur on the project and the DRB was not called upon to render any recommendations due to unresolved disputes, these costs are a job expense that reduce the contractor’s profit and increase the owner’s costs without benefiting the project.

However, if the contracting parties believe that no dispute will “ever” occur on the project, the fees paid to the panel can appear as an added cost to the project from both the contractor’s and owner’s perspectives. This thinking is akin with a newly married couple never believing that they will divorce! Conflicts on projects do happen, they sometimes happen frequently, and if they cannot be resolved contemporaneously, they may adversely impact the progress of the project as well as the individuals involved in the project. Resolving a dispute via the DRB process may save the contractual parties both time and money.

**Conclusions**

Since there are very few construction companies and virtually no owners who have not tasted the bitterness of litigation, exploring new options for ADR methodologies is a laudable task. Having a DRB has many advantages but also disadvantages; many of the advantages can also be seen as disadvantages, the double edged sword. Is it any wonder so many contracts and owners feel stuck between a rock and a hard place when attempting to determine what dispute resolution mechanism is appropriate for them, trying to figure out whether to give that same old thing another shot or to throw in all their chips and start from scratch? Some object to the use of a DRB because it is not “the way things were done” but one can find errors with old fashioned ways of doing things. There is never an easy answer to all of this. Somehow, juggling flaming swords while maintaining the proper posture needed to keep a book atop our heads, we must follow a complex blend of opposing bits of advice. Keep it together, while ripping it apart. Follow the rules and use the standard ADR methodologies, yet at the same time, rewrite the rules. Maintain consistency, without forgetting to try something new which might be better. So, before establishing a DRB process, owners should consider whether or not the advantages of the DRB outweigh disadvantages. Assess specific needs and goals to decide whether a DRB is the right choice for your project. The DRB process is flexible, informal, and private while allowing the disputants to control their destiny. It holds out a realistic promise of a reduction in the dispute cycle with little risk and relatively minor costs and time.

But some may argue that having a DRB provision in the contract encourages contractor claims because of the benefits they gain, including confidentiality, reduced costs, and quicker resolution, contractors may be more likely to assert claims against the owner under a DRB scheme than if they were forced to file a lawsuit or go to arbitration. It could be argued that contractors may be encouraged to challenge even the most minor owner decisions or issues.

Thirty years ago, I heard this same argument for including change order provisions in a contract: that it would encourage change orders. I do not believe that any experienced construction industry person holds this opinion today. The other side of the coin to the “it will encourage claims” argument is that some believe that the mere presence of a DRB may be a deterrent to marginal, frivolous, or spurious claims, and to protracted, intentional delays because of the potential for the claims and delays to be both unsuccessful and embarrassing (Barnett 1997; Silverman and Battelle 1997).

While DRBs can provide numerous benefits to both contractors and owners, it is not without cost. There is the cost initially to
include the DRB process in the contract documents, empaneling the DRB, regular site visits, monthly document reviews, and finally, the hearing and recommendation themselves. Moreover, if there are no unresolved disputes, the fees paid to the DRB can be seen as not adding any value to the project.

Nevertheless, the primary advantage of a DRB is not just speed, or economy, or neutral expertise, but rather the contractual party's ability to design the process to suit their needs. While a DRB cannot guarantee a resolution of disputes, it could prevent a delay on internal resources that might have been better focused on managing the project or gaining new business. Despite the benefits, a DRB is not a panacea for all of the ills associated with other ADR methodologies or binding dispute resolution mechanisms. If not implemented with careful consideration and planning, the process may not live up to expectations. Both the advantages and disadvantages should be considered before adopting a DRB program.

List of Cases


Endnotes

1Alternative Dispute Resolution (ADR) is defined as methods to resolve a dispute other than litigation such as negotiation, mediation, arbitration, mini trials, etc.

2The hourly rate for DRB Members on University of Washington projects is currently $165/hour (University of Washington 2010).

3The San Antonio Hospital DRB is going to pay up to $350/hour for its members, plus reasonable travel expenses.

References


USER PREFERENCES AND MEDIATOR PRACTICES:
CAN THEY BE RECONCILED WITHIN THE PARAMETERS SET BY ETHICAL CONSIDERATIONS

By Edna Sussman*

Recent surveys have shown that users of mediation in commercial disputes value active and directive techniques in mediation. It would seem that a large number of such mediation users want someone who can get the deal done and a great many of them believe an evaluative mediator, who applies pressure for resolution, is more successful in achieving this result. The progressive movement of mediation away from its roots in a more facilitative or transformative model to an increasingly common evaluative model in commercial cases raises a host of questions and concerns. This Article examines the question of what users really want and whether their wishes can appropriately be accommodated with current mediation models and practices within the parameters set by ethical standards. As the American Bar Association ("ABA") Dispute Resolution Section noted in its pamphlet, Improving Civil Litigation (hereinafter “ABA Pamphlet” or "Pamphlet"), while “there is great value in considering user’s thoughts and experiences” one should “not equate high quality mediation practice with what lawyers and parties want.”1

I. EMPIRICAL STUDIES ON MEDIATION SATISFACTION

The American Bar Association Task Force on Improving Mediation Quality (hereinafter “Task Force”) issued a report in

* Edna Sussman, of SussmanADR LLC, is the Distinguished ADR Practitioner in Residence at Fordham University School of Law and a seasoned arbitrator and mediator.

February of 2008 (hereinafter “ABA Report”) summarizing its findings, which were based on an extensive two-year-long outreach to users and mediators. To elicit data, the Task Force organized a series of well-attended focus groups in nine cities across the United States, collected over 100 responses to questionnaires and conducted telephone interviews. The participants included in-house and non-in-house attorneys whose responsibilities included working for parties in mediation, as well as experienced civil mediators. The Task Force’s work was limited to private civil cases in areas such as commercial, tort, construction and employment (where the parties are typically represented by counsel) and did not include domestic, family or community disputes.

The findings suggest that more evaluative mediation, with some pressure exerted on the parties, is preferred by many in the context of such disputes. Of those questioned, the following percentages thought the mediator undertaking the listed activities would be helpful in about half or more of their cases:

- 95%—ask pointed questions that raise issues;
- 95%—give analysis of case, including strengths and weaknesses;
- 60%—make prediction about likely court results;
- 100%—suggest possible ways to resolve issues;
- 84%—recommend a specific settlement; and
- 74%—apply some pressure to accept a specific solution.

As the ABA Report recognizes, mediator techniques could be very different in family mediation cases or cases where the parties are not represented by counsel. ABA Report, supra note 2, at 19.

However, almost half of those questioned felt that there were times when it was not appropriate for a mediator to assess strengths and weaknesses or even recommend a specific settlement. Thus mediators must be sensitive to what is appropriate in particular cases and work with the parties to tailor the process accordingly.

---


3 As the ABA Report recognizes, mediator techniques could be very different in family mediation cases or cases where the parties are not represented by counsel. ABA Report, supra note 2, at 19.

4 However, almost half of those questioned felt that there were times when it was not appropriate for a mediator to assess strengths or weaknesses or to recommend a specific settlement. Thus mediators must be sensitive to what is appropriate in particular cases and work with the parties to tailor the process accordingly.
Parallel results were found in a survey of 3,000 lawyers and parties over a six-year period conducted by the Singapore Mediation Centre. An article by the Executive Director of the Centre reports that, of the 87% of survey respondents who use mediation and who were highly satisfied with the mediation process: 83% said that an evaluation of the merits of the case was important; 89% said that assistance in evaluating the case was important; 68% said that recommendation of a particular settlement was important; 85% said that suggesting possible options for settlement was important; while only 35% liked it when mediators were silent about their views. The article concludes that “[i]t would seem that in the Singapore context, a higher degree of mediator intervention is valued in order for parties to find mediation to be satisfactory.”

A breakdown of the ABA Report responses reveals a noteworthy divergence between mediators and users in their respective perceptions as to best practices. When asked about recommending a specific settlement, 84% of users thought it would be helpful in half or more cases, 75% thought it would be helpful in most or all cases; while only 18% of mediators thought it would be helpful in most or all cases, and only 38% of mediators thought it would be helpful in half or more cases. Similarly, when asked about applying some pressure to accept a specific solution, 64% of the users responded favorably for most or all cases and 75% for half or more cases. Among mediators, however, only 24%

---


6 *Id.; but see* Patrick Mc Dermott & Ruth Obar, *What’s Going on in Mediation: An Empirical Analysis of the Influence of the Mediator’s Style on Party Satisfaction and Monetary Benefit*, 9 HARV. NEG. L. REV. 75 (2004). Based on a survey of users of the mediation program at the Equal Employment Opportunity Commission, the authors found that a purely facilitative model was more satisfactory to the parties. This discrepancy in the findings as to satisfaction with a more facilitative model is likely related to the more personal nature of employment disputes as compared to commercial or construction cases, again demonstrating the need to match the style to the problem. It should be noted that the authors also found that monetary recoveries were higher with a more evaluative style of mediation.

7 ABA Report, supra note 2, at 15.
responded favorably for most or all cases, while only 30% responded favorably for half or more of their cases.\(^8\)

Though the ABA Report observes that there is no direct explanation for the substantial discrepancy in the survey responses between users and mediators with respect to pressure, it suggests two possible explanations. First, mediators are more conservative in applying pressure, as they are more aware of the possible disadvantages such as undermining self-determination or losing neutrality. Second, it is possible that mediators are using these techniques more often or more subtly than they realize and do not recognize that they are indeed applying pressure.\(^9\)

The ABA Pamphlet addresses, *inter alia*, the subject of persistence and “follow-through” by the mediator. The Pamphlet notes that many commercial lawyers complain about mediators who throw in the towel when a mediation becomes difficult and want mediators who will help them work through the difficulty and help them achieve a settlement. The Pamphlet recommends a mediator consider whether, when, and how to exert modest and reasonable pressure to keep the parties progressing through the mediation while, at the same time, “consider how to avoid coercing the parties[,] recognizing that self-determination is the core principle of mediation and that coercion violates generally accepted mediation practice ethics.”\(^10\)

II. MEDIATOR STYLES AND ETHICS

A. Mediator Styles

The debate over facilitative versus evaluative mediation has a long history. A host of scholarly articles have been written on the subject and the various mediator styles have been exhaustively treated.\(^11\) Professor Riskind’s seminal work on the subject set up

---

\(^8\) *Id.*

\(^9\) *Id.* at 19.

\(^10\) ABA Pamphlet, *supra* note 1, at 5-6.

a grid showing a continuum from facilitative to evaluative.\textsuperscript{12} Early commentators on the subject went so far as to say that “evaluative mediation is an oxymoron.”\textsuperscript{13} More recently, however, others have posited that all commercial mediation has evaluative elements.\textsuperscript{14} Additional mediator approaches have been identified and include transformative,\textsuperscript{15} understanding-based\textsuperscript{16} and a process that focuses more on causes of conflict.\textsuperscript{17} Emerging from these discussions is the concept of informed consent, by which the mediator obtains consent in advance for the style of mediation to be employed, and also identifies for the parties the possibility that different mediation styles could be employed at different stages throughout the mediation.\textsuperscript{18}

Ethical considerations underlie this call for informed consent to mediator style. The Model Standards of Conduct for Mediators issued jointly in August of 2005, by the American Arbitration Association (American Bar Association’s Section of Dispute Resolution), and the Association for Conflict Resolution, provide that “mediation is a process in which an impartial third party facilitates communication and negotiation and promotes

\begin{itemize}
\item \textsuperscript{13} Kimberlee K. Kovach & Lela P. Love, \textit{Evaluative Mediation is an Oxymoron}, 14 ALTERNATIVES TO HIGH COST LITIG. 31 (1996).
\item \textsuperscript{15} ROBERT BUSH & JOSEPH FOLGER, \textit{The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition} (1994).
\item \textsuperscript{16} Gary Friedman & Jack Himmelstein, \textit{Resolving Conflict Together: The Understanding-Based Model of Mediation}, J. DISP. RES. 253 (2006).
\item \textsuperscript{17} Kenneth Kressel, \textit{The Strategic Style of Mediation}, 24 CONFLICT RES. Q. 251 (2007).
\item \textsuperscript{18} Frank E. A. Sander, \textit{Achieving Meaningful Threshold Consent to Mediator Styles}, 14:2 ABA DISP. RESOL. J. 8, 9 (Winter 2008).
\end{itemize}
voluntary decision making by the parties to the dispute." Standard I states that:

A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

Thus voluntary, uncoerced self-determination by the parties is the fundamental bedrock of mediation. Yet mediators employ myriad approaches that can be described as deceptive or manipulative. James Coben writes about what he refers to as mediation’s “dirty little secrets;” but he recognizes that using techniques that foster settlement are consistent with the basic observation that “mediators, although neutral in relationship to the parties and generally impartial towards the substantive outcome, are directly involved in influencing disputants towards settlement.” Indeed, it is in part the mediator’s art that causes parties to seek mediation as opposed to just engaging in direct negotiation. Coben lists the myriad ways that mediators exercise pressure and persuasion including: managing the process, managing the communication, controlling the setting, timing decisions, managing the information exchange, and engineering who is involved and when. It is when practices used


20 Id., Standard I.

21 James R. Coben, Mediation’s Dirty Little Secret: Straight Talk About Mediator Manipulation and Deception Tactics, 10:1 Just Resols. 9 (2004), (a newsletter of the America Bar Association Section of Dispute Resolution).


23 For a discussion of the many advantages of mediation over direct negotiation, see Edna Sussman, The Reasons for Mediation’s Bright Future, 1:1 N.Y. Disp. Resol. Law 57 (Fall 2008) (a publication of the New York State Bar Association).
by mediators slip beyond such facilitative tools that an examination of whether mediator behavior is coercive or unethical is required.

B. Mediator Ethics

1. Duress and Coercion in Practice

Parties may feel that they are under duress and forced to settle for many reasons. A court date that is in the distant future, a dominant counter-party, economic pressure to conclude the dispute, can all cause parties to feel pressured into settlement. Such factors are intrinsic to many negotiations and do not raise questions as to mediator conduct. Other behavior, however, moves beyond self-determination to coercion. In a treatment of coercion and self determination in mediation, four different categories of coercion that may be created by the mediation process itself have been identified: coercion into mediation, coercion to continue with mediation, coercion to settle, and coercion applied through mandatory reporting to the courts. Our focus is on the second and third forms of coercion that pertain to all mediations whether court ordered or voluntary.

Ethical canons and court ADR rules plainly state that self-determination, voluntary and uncoerced, is the guiding principle.

---

24 Coercion by the parties is outside the scope of this note but it is interesting to note the distinction drawn by the Tribunal in Desert Line Projects LLC v. The Republic of Yemen, ICSID Case No. ARB/05/17 at p. 39 (2008), in which the Tribunal observed: “since economic duress of a sort may be present in virtually any settlement, it must rest with judicial decisions to draw the line between on the one hand, economic compulsion exercised by the respondent...over the claimant in order to force him to settle and, on the other hand, the normal operation of economic forces.”

25 In the United States, under many court-annexed mediation programs, the parties may be required to participate in mediation, often with a good faith requirement. A different choice was made in the United Kingdom where the courts concluded that up-front consent to participation in mediation was required and therefore decided to impose costs on parties that unreasonably refuse to mediate. See Jacqueline Nolan-Haley, Consent in Mediation, 14:2 ABA DISP. RESOL. J. 4, 6 (Winter 2008).

26 Timothy Hedeed, Coercion and Self Determination in Court-Connected Mediation: All Mediations are Voluntary, But Some are More Voluntary Than Others, 26 JUST. SYS. J. 273 (2005).
of mediation and that it is the parties who control whether the mediation continues. In fact, however, there is considerable evidence that mediators often exert considerable pressure and use their wiles to keep parties at the table and to pressure them into settlement. Coercion and duress in mediation are subjects that come up with some regularity in the case law in connection with actions to set aside a settlement agreement reached in mediation. Indeed, such cases are replete with complaints by parties who feel they were coerced into staying at the table and settling the case.

Courts generally adopt the basic contract tenet that a contract obtained through duress or coercion will not be enforced and they will require an evidentiary hearing if persuaded that sufficient facts are presented to raise a question of fact as to duress or coercion. Thus, for example, where it was alleged that the mediator imposed extreme time pressure, told the party that the court would have the embryos in issue destroyed rather than give them to her, that the property value in issue was grossly disproportionate to the cost of litigating further, and that she would have a chance to protest any provisions of the agreement at a final hearing even if she signed the mediation settlement agreement, the court required an evidentiary hearing as — if it was found that the mediator in fact engaged in such conduct — the agreement would not be enforceable.27

The courts have identified seven factors illustrative of excessive pressure in a mediation: (1) discussion of the transaction at an unusual or inappropriate time, (2) consummation of the transaction in an unusual place, (3) insistent demand that the business be finished at once, (4) extreme emphasis on the untoward consequences of delay, (5) use of multiple persuaders by the dominant side against a servient party, (6) absence of third-party advisors to the servient party, and (7) statements that there is no time to consult financial advisers or attorneys.28

While these seem to be appropriate measures against which conduct should be assessed, historically only in rare cases have

the courts been persuaded that duress or coercion sufficient to defeat enforcement of a settlement agreement has been demonstrated. These lawsuits in which the parties claimed that they were coerced to continue with the mediation and to settle the case provide an interesting set of factual patterns for discussion as to mediator conduct.

Many cases involve significant undue pressure to keep parties at the table. Cases reviewed by the courts include a party’s testimony that he was not permitted to leave the room throughout a lengthy mediation and had been sapped of his free will; the testimony of a 65-year-old woman claiming duress at a mediation which started at 10 AM and was concluded at 1 AM the next morning, while she suffered from high blood pressure, intestinal pain and headaches and was told by both the mediator and her lawyer that if she went to trial she would lose her house; and a party’s testimony that he was diabetic and his blood sugar went up, was in severe pain, was prevented from leaving the building when he wanted to terminate the negotiations and his attorney would not let him leave without signing the agreement. Despite the apparent egregiousness of each of these circumstances, however, the courts refused to set aside the settlement agreement in all of these cases.

Other cases discuss the mediator’s statements to pressure a party into settlement as a basis for a claim of duress and coercion. The courts have reviewed a case where a party contended that she was warned by the mediator of claims of insurance fraud against her, that the mediator bullied her, and that she cried for an hour and no consideration was given to her distress. In another case, the party testified that he was threatened with prosecution in bankruptcy court. Another litigant claimed that statements by the mediator as to the substantial legal fees that

---

would be incurred made the party feel financially threatened and under duress.\textsuperscript{34} Again, the courts enforced the mediation settlement agreement in all of these cases.

The Second Circuit Court of Appeals addressed the question of whether a mediation settlement agreement can be set aside based on an inaccurate assessment of the case by the mediator. In that case, the plaintiff had attended a mediation session with his lawyer. He claimed that the opposing counsel had given the mediator a copy of his bankruptcy petition and that, based on that document, the mediator explained that since the lawsuit was not listed in the petition, any recovery would go to creditors directly. The mediator was alleged to have said “you have no case” because the case belongs to the bankruptcy trustee and the only way the plaintiff “would ever see a dime” would be if “he agreed to the mediated settlement then and there.” Based on this “harangue,” the plaintiff settled. Subsequently plaintiff consulted bankruptcy counsel and learned that his claim was insulated from creditors of the estate. He opposed a motion made by defendant to enforce the settlement on the grounds that the agreement was voidable because he justifiably relied on the mediator’s fraudulent or material misrepresentation. Continuing the observed trend of enforcement, the Second Circuit upheld enforcement of the settlement agreement stating that “the nature of mediation is such that a mediator’s statement regarding the predicted litigation value of a claim where that prediction is based on a fact that can be readily verified, cannot be relied on by a counseled litigant whose counsel is present when the statement is made.”\textsuperscript{35} Indeed, where the party seeking to back out is represented by counsel at the mediation and had an opportunity to reflect, an attack on the mediation settlement agreement based on duress and coercion is much less likely to succeed.\textsuperscript{36}

\textsuperscript{34} Marriage of Banks, 887 S.W.2d 160 (Tex. App. 1994).


\textsuperscript{36} Advantage Properties, Inc. v. Commerce Bank N.A., 242 F.3d 387 (10th Cir. 2000).
2. Mediator Liability for Duress and Coercion: The Tapoohi Decision

Thus it seems the courts will generally uphold a settlement agreement reached in mediation in most cases, notwithstanding claims of coercion and duress. The question of how the courts would view a case brought against the mediator for damages alleged to have been caused by mediator conduct, however, has not been the subject of extensive discussion by the courts.\(^{37}\) The decision by the Australian court in *Tapoohi v. Lewenberg*,\(^ {38}\) in which claims against the mediator for damages were asserted, provides a cautionary tale as to potential mediator liability.

No reported cases were found in the United States in which the mediator was held personally liable for his or her conduct at the mediation\(^ {39}\) and only one case was found in which it was discussed.\(^ {40}\) The *Tapoohi* decision is therefore the leading case to date which discusses possible mediator liability. The case provides a road map to some of the dangers that may be occasioned by a more assertive approach to mediation as it explores some of the potential contours of mediator liability. While the decision was one on summary judgment in which all of the assertions had to be regarded as true, it evokes serious questions about mediator conduct.

---


\(^{38}\) *Tapoohi v. Lewenberg*, VSC 410 (Oct. 21, 2003).

\(^{39}\) The Mediation Case Law Project at the Hamline University, School of Law, Dispute Resolution Institute tracks and reports on all cases involving mediation and segregates them in various categories. There are virtually no cases reflecting suits against mediators and none where recovery was obtained. The case reports are available at http://law.hamline.edu/adr/dispute-resolution-institute-hamline.html.

\(^{40}\) See *Lange v. Marshall*, 622 S.W.2d 237 (Mo. Ct. App. 1981) in which the court, without reaching the question of what duties the mediator had to the parties who were not represented by their own counsel, found that the plaintiff did not sustain any damage as a proximate result of the mediator’s conduct.
The mediator in Tapoohi was an experienced and highly-regarded barrister with extensive experience as a mediator and arbitrator in commercial matters. He was not conducting the mediation pursuant to an order of a court, which in many jurisdictions would have given him immunity from suit, and he was not conducting the mediation pursuant to a written mediation agreement as many mediators do. The Tapoohi case arose in the context of a family property dispute and centered on a bitter disagreement over property in the estate of the parties’ mother. Millions of dollars were involved. One of the parties, Lewenberg, attended the mediation in person with her solicitors and barristers while the other party, her sister Tapoohi, who was overseas at the time, attended by telephone, but was represented in the mediation room by barristers and solicitors. An agreement as to key points was reached and a written agreement was signed by Lewenberg in person and by fax by Tapoohi. After the mediation, Tapoohi discovered that, as a result of the settlement, she was liable for a significant capital gains tax. She filed a suit to have the settlement agreement set aside asserting: (a) that the agreement was subject to an express oral term that the parties would seek tax advice, after which they would negotiate the final terms of the agreement; and (b) that the parties had not reached a definitive binding agreement on the matters subject to the settlement.

Among others, Tapoohi sued her solicitors for their failure to ensure that tax advice was obtained before any final settlement. The solicitors brought a third party claim against the barrister and the mediator seeking contribution.

The affidavit evidence, which was accepted by the court for purposes of considering a summary judgment motion made by the mediator, was that Tapoohi’s solicitor emphasized the importance of the tax implications in any settlement and said that a resolution could not be achieved until advice on the tax consequences was obtained. He said at the mediation that he was not sufficiently familiar with the tax implications and the settlement would have to wait until advice on those issues was obtained.

At 8 PM, by which time two of the legal advisers had left the meeting, an agreement in principle had been reached. Tapoohi’s legal advisers suggested that it was late and they were not comfortable signing that night. The mediator said “you have got to
stay, you have got to do the terms of settlement tonight.” He stated that, in light of the acrimony between the parties, there had to be a written settlement agreement that night, that it was in the parties’ interest to sign something before they went home, and that he always did it that way. It was stated that he spoke very forcefully and that those assembled acquiesced to his direction because he was an experienced mediator and they viewed a direction from the mediator as giving them no choice but to stay. In their affidavits they said that otherwise they would have adjourned the mediation.

The mediator dictated the terms of the settlement in detail; the lawyers were not actively involved. Tapoohi’s solicitor said that he attempted to raise the question of advice on taxes but the mediator pressed forward, saying that he wished to continue to dictate the settlement terms. A stumbling block arose in recording the consideration for the transfer of shares in a company. The mediator suggested a figure of $1 as nominal consideration and that led to a further comment from the solicitor that tax advice would be needed before the consideration issue could be finalized. The $1 sum was recorded in the document, however. Minor changes were made to the draft settlement but ultimately all parties signed the agreement. There was no term in the settlement agreement to the effect that it was subject to receipt of advice on tax issues being received to the satisfaction of the parties or that it was not intended to be final and binding but subject to further negotiations. Following the mediation it was discovered that the $1 price suggested by the mediator created serious tax problems and subsequent attempts to vary that price failed.

While the parties and counsel all received the draft of the settlement agreement and had the opportunity to read it and make changes and corrections, the hour was late and no one caught the omission. Counsel said that, at no time during the mediation, did he believe a binding agreement was being entered into and he only passed the document along to his client based on his reliance on the mediator.

The court, in considering the mediator’s motion for summary judgment, reviewed Tapoohi’s position that the mediator had taken it upon himself to give advice as to matters that concerned her interests by taking these various actions. The court
considered the duties of the mediator and noted that this was an area of the law as yet undeveloped. The court opined that it was loath to dismiss a claim where the duty owed to arguably vulnerable parties was uncertain. The court specifically cited to, *inter alia*, the alleged duty of a senior lawyer specializing in arbitration and mediation to exercise care and skill and not to act in a manner contrary to the interest of a party, and not to coerce or induce a settlement when there was a substantial risk that the settlement was contrary to the interests of a party.

The court raised the question of whether the mediator had contractually assumed an obligation to offer advice as to legal implications. The judge dismissed the application for summary judgment, saying that it was for a trial court after hearing the evidence to determine the applicable legal standard and whether there had been an imposition of undue pressure upon resistant parties, at the end of a long and tiring mediation, to execute an unconditional final agreement settling their disputes where it was apparent that they . . . wanted to seek further advice . . . or where it was apparent that the agreement was not unconditional, or where the agreement was of such complexity that it required further consideration.  

The court noted the mediator's defenses relating to causation and damages, issues as to which proof would be exceedingly difficult, and the claimed lack of any duty on the part of the mediator and the claim of judicial immunity. The court rejected those arguments on summary judgment and found that those issues required further consideration and review at trial.

3. Considerations for the Mediator

While many might agree that the mediator in *Tapoohi* clearly stepped over the line of acceptable and ethical behavior, some of the conduct complained of is commonplace in mediation and may

---

41 Tapoohi v. Lewenberg, VSC 410 at ¶ 86.

42 It is the author's understanding that the *Tapoohi* case was subsequently settled.
well represent precisely the kind of pressure users seek. The prospect that a court could entertain the imposition of personal liability on a mediator, especially where the parties were represented by able counsel and had every opportunity to review the draft settlement agreement, requires an assessment of some specific practices of mediators. When and how it is acceptable to try to keep people negotiating and what is proper and ethical to say to foster settlement are not easy questions.

A review of the patterns of conduct that emerge from complaints lodged by disgruntled mediation parties and discussed in the published court decisions provides a road map for conduct as to which mediators should be especially cautious. They include:

1. Strong arming the parties into not leaving when they want to or when they want to suspend the mediation to consult others;
2. Strong arming the parties into not leaving when they are feeling indisposed;
3. Strong arming the parties into working late into the night;
4. Strong arming the parties into writing an agreement on the spot;
5. The mediator writing the settlement agreement draft;
6. The mediator talking about the cost of litigation;
7. Mediator discussions/warnings/threats about additional legal action that would result;
8. Mediator discussions of other consequences of failure to settle;
9. Mediator evaluations and discussions of likelihood of success in the dispute; and
10. Mediator giving legal advice.

a. Keeping the parties in the mediation

There has been relatively little scholarly commentary about mediators coercing parties into continuing with the mediation despite a party saying he or she wants to leave, does not feel well,
or it is too late to continue. As such situations are intensely fact based, the dearth of writing on the subject is not surprising. As the ABA Report warns, "it is important to note the obvious distinction between ‘pressure’ on the one hand and coercion or intimidation on the other." This is a crucial distinction and one that must be kept well in mind by all mediators to avoid stepping beyond ethical bounds when urging parties to continue working on resolution.

Parties often look to mediators to keep the negotiation alive, however, and some persuasion by the mediator may be essential to assisting the parties in continuing to negotiate. In addition, persuasion, properly handled in appropriate circumstances, would be viewed by many as part of the mediator's job. In the exercise of such persuasion, however, mediators should be sensitive to physical impediments, to a stated need to consult others, or to other circumstances that suggest that suspension is in order, and at all times should respect the parties right to control their participation.

b. Encouraging a written agreement at the mediation

Mediators often encourage the parties to commit the agreement reached to a binding writing at the mediation knowing that, without such a writing, "settler's remorse" might set in and the deal might disappear. Telling the parties that recording the agreement on the spot makes the completion of the agreement more likely and enables the parties to flush out any latent areas of dispute so that they can be resolved while those with authority are present and focused on the matter. Such activities would seem

43 ABA Report, supra note 2, at 18

44 Many court-ordered mediations require the parties to participate in the mediation in good faith and limit somewhat the parties' control over participation and the level of their engagement.

to many to be part of the mediator’s task in assisting the parties to achieve a resolution. But, again, the distinction between persuasion and coercion must be carefully observed by the mediator so as not to force a writing before the parties are truly prepared to commit with finality.

Having the parties themselves be the ones to actually write up the settlement agreement rather than the mediator is a subject of some discussion among mediators. Many mediators absolutely refuse to be the scriveners of the agreement, while others do so in order to expedite the process, while giving ample opportunity to counsel to review and revise the draft. The Tapoohi case suggests that mediators should carefully consider whether they should record the terms of the agreement or leave such to counsel.

c. Advising on Unfavorable Consequences

Asking the parties if they have considered the costs of litigation and encouraging them to quantify that cost is a common tool used by mediators and does not seem objectionable when properly posited. Asking questions that aid the parties in assessing how their interests outside the immediate dispute might be affected is also part of the mediator’s job in helping the parties identify their interests. However, threatening language by the mediator and coercive statements that go beyond opening up a conversation about such collateral impacts should be viewed as being in breach of ethical requirements.

d. Evaluating the merits

In a thesis by John Cooley and Lela Love that directly addresses the question of ethics and mediator evaluations, it has been suggested that, before evaluations of the merits are conducted, the mediator should obtain informed consent from the parties.46 Speaking not to reality-testing questions but rather to a concrete evaluation of the merits by the mediator, the dangers of giving an evaluation of the case are identified as jeopardizing neutrality,

---

interfering with self-determination, and creating a risk that insufficient information may lead to an erroneous analysis and conclusion. The risk that information obtained in caucus may not be the same as a judge or jury would have before it, that an evaluation may end negotiations, and that parties anticipating such an evaluation may be less candid with the mediator, are also noted.\textsuperscript{47}

Cooley and Love caution that a failure to warn parties about a mediator's desire to provide evaluative commentary may be actionable under tort and contract theories that may attribute liability to the mediator. Informed consent would serve to obviate such claims as well as serve to assure party self-determination, if properly and carefully couched, so as to clearly communicate the basis for and limits of the evaluation to be given.

Whether the evaluation is given in a separate caucus session with one of the parties, or before all parties in a joint session, is of course a significant difference but, even in caucus, before turning from a reality-testing questioning mode to an evaluation, a mediator would do well to caution both parties as to the many limits on his or her ability to predict any result with certainty. Moreover, careful consideration should be given as to whether what might be viewed as legal advice should be given in an area in which the mediator is not expert.\textsuperscript{48}

e. Mediator Responses to Liability Potential

A mediator would be well advised, if not protected by quasi-judicial immunity as a court appointed mediator, to develop a well-crafted mediation agreement that sets out the scope of the mediator's responsibilities. While, of course, one cannot fully and

\textsuperscript{47} Some court-annexed mediation rules do not permit evaluations by the mediator. \textit{See, e.g.}, Florida Rules for Certified and Court-Appointed Mediators § 10.370 ("A mediator shall not offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute.").

\textsuperscript{48} Recently issued rules for neutrals in the New York State court-annexed mediation program provide for two categories of neutrals: neutral evaluators and mediators. Neutral evaluators must have five years of substantial experience in the specific subject area of the cases while mediators must have recent experience mediating actual cases in the subject area of the types of cases referred to them. New York Administrative Order of the Chief Administrative Judge of the Courts § 146 (2008).
effectively deflect liability for mediator misconduct by agreement, the scope of the mediator’s responsibilities and the nature of the reliance that can be placed by the parties on the mediator’s statements can be enunciated and create a framework for mediation expectations. Mediators must be vigilant to ensure that their efforts to persuade do not lapse into coercion and should carefully consider whether they should be the ones recording the agreement of the parties. A mediator also would be well advised to delineate the limits of his or her ability to accurately predict outcomes and to obtain explicit consent from all parties for any evaluation of the merits in joint session.

III. Conclusion

A significant number of mediation users have expressed the view that they appreciate evaluative mediators who exert some pressure to promote settlement. While user preferences cannot dictate mediator conduct, mediation is a tool used by parties to achieve settlement. As is often said in the context of arbitration, it is “the parties’ process.” With informed consent to a particular practice, mediators should be able to provide the service sought and provide evaluations as requested.

Pressure can be viewed as being in direct conflict with the mediator’s ethical obligations which call for party self-determination and a voluntary, uncoerced decision. The mediation users’ preference for some pressure to settle thus requires further empirical study. Numerous questions need to be answered: What kind of pressure do users find helpful? Do parties prefer further discussion of the merits of the case or imposition of more tangible strictures, such as not letting people leave the mediation or requiring that a writing be prepared? What kind of pressure do users find unacceptable? How different should the answer be, if at all, depending on the nature of the case and the presence and quality of counsel? Should there be a difference in the types of pressure that may be applied in a court ordered mediation as opposed to a voluntary mediation?

Ultimately the analysis will undoubtedly result in an “I know it when I see it” litmus test, as each mediation presents its own unique challenges and requires an individualized process design and constant adjustments in approach as the mediation
progresses. But a further exploration of the subject of appropriate mediator “pressure” and where and how it slips into “coercion” can lead to a better understanding by mediators of some of the limits they should impose on themselves in managing the mediation process. Best practices also can be developed consistent with these ethical obligations. The ABA Report concludes that further examination be conducted to consider whether the recommendations made are useful in other practice areas, and whether there are any implications from the work product for how mediators should be trained and how mediators can offer high quality services using various techniques.

EDNA SUSSMAN

Edna Sussman is a full-time arbitrator and mediator, principal of SussmanADR LLC and the Distinguished ADR Practitioner in Residence at Fordham University School of Law. She was formerly of counsel at Hoguet Newman Regal & Kenney LLP and a partner at the law firm of White & Case LLP. She serves as an arbitrator and mediator on commercial, energy and environmental matters, both domestic and international, for several of the leading dispute resolution institutions including the AAA, ICDR, CPR, CEAC, WIPO and FINRA. As a court-certified mediator, Ms. Sussman serves on the mediation panels of the federal, state and bankruptcy courts in New York. She is also certified as a mediator by the International Mediation Institute.

Ms. Sussman is Chair-Elect of the Dispute Resolution Section of the New York State Bar Association and serves as editor-in-chief of New York Dispute Resolution Lawyer. She is the former chair of the Energy Committee of the New York City Bar Association and is a vice-chair of the International Commercial Disputes Resolution Committee of the Section of International Law of the American Bar Association, where she also chairs the Alternative Dispute Resolution Committee of the Environment Energy and Resources Section. Ms. Sussman has been selected as a Best Lawyer for Alternative Dispute Resolution for 2009 and named as an Outstanding Woman in Energy Law by Energy Law 360. She can be reached at esussman@SussmanADR.com.
A Call To Cyberarms: The International Arbitrator’s Duty To Avoid Digital Intrusion

Stephanie Cohen* Mark Morril†
A CALL TO CYBERARMS: THE INTERNATIONAL ARBITRATOR’S DUTY TO AVOID DIGITAL INTRUSION

Stephanie Cohen* & Mark Morril**

I. Introduction ............................................................................. 982
II. Data Security Threats in International Arbitration ................. 986
III. Sources of the Arbitrator’s Duty to Avoid Intrusion .......... 989
   A. Duty of Confidentiality ...................................................... 990
   B. Duty to Preserve and Protect the Integrity and Legitimacy of
   the Arbitral Process ................................................................. 994
   C. Duty of Competence ........................................................... 997
   D. Global Data Protection Laws and Regulations ............ 1002
IV. Nature and Scope of the Arbitrator’s Duty to Avoid
   Intrusion ................................................................................ 1004
   A. An Umbrella Obligation ................................................... 1004
   B. An Interdependent Landscape with Independent Duties .. 1005
   C. Personal Accountability ................................................... 1006
   D. Continuous and Evolving ................................................. 1009
   E. Bounded by Reasonableness ............................................ 1009
V. Implementing the Duty to Avoid Intrusion .......................... 1012

* Stephanie Cohen is a Canadian arbitrator of international and domestic commercial disputes based in New York City (www.cohenarbitration.com). Prior to establishing her practice as an arbitrator, she was Counsel in the international arbitration group at White & Case LLP.

** Mark Morril is an independent arbitrator and mediator based in New York City who focuses on complex commercial disputes (www.morriladr.com). Previously, he served as General Counsel of the publisher Simon & Schuster, then the world’s largest English language publisher, as Deputy General Counsel of the global media company Viacom and as a law firm partner.

The authors welcome comments addressed to cohen@cohenarbitration.com and mark.morril@morriladr.com.
A. Keeping Abreast of Developments in Relevant Technology and Understanding Associated Benefits and Risks ............... 1013
B. Implementing Baseline Security ...................................... 1014
C. Taking a Thoughtful Approach to Assets and Architecture ............................................................................................... 1015
D. Planning for a Data Breach .............................................. 1017
E. Case Management Considerations ................................... 1018
VI. Looking to the Future ......................................................... 1019

I. INTRODUCTION

International commercial arbitration rests on certain fundamental attributes that cut across the different rule sets and cultural and legal systems in which it operates. There is common ground that any international commercial arbitration regime must encompass integrity and fairness, uphold the legitimate expectations of commercial parties, and respect essential elements of due process such as equal treatment of the parties, a fair opportunity for each party to present its case and neutral adjudicatory proceedings, untainted by illegal conduct.¹

The system and its integrity depend substantially on the role of the arbitrator. As Professor Rogers has stated: [T]he authoritative nature of adjudicatory outcomes, as well as their existence within a larger system, imposes on adjudicators an obligation to preserve the integrity and legitimacy of the adjudicatory system in which they operate.² Cyberbreaches of the arbitral process, including intrusion

---


². CATHERINE ROGERS, ETHICS IN INTERNATIONAL ARBITRATION 283 (2014).
into arbitration-related data and transmissions, pose a direct and serious threat to the integrity and legitimacy of the process. This article posits that the arbitrator, as the presiding actor, has an important, front-line duty to avoid intrusion into the process.

The focus here on cyberintrusion into the arbitral process does not imply that international arbitration is uniquely vulnerable to data breaches, but only that international arbitration proceedings are not immune to increasingly pervasive cyberattacks against corporations, law firms, government agencies and officials and other custodians of large electronic data sets of sensitive information. Similarly, our focus on the role and responsibilities of the arbitrator should not obscure that cybersecurity is a shared responsibility and that other actors have independent obligations. Arbitrators are not uniquely vulnerable to data breaches and are not guarantors of cybersecurity. In the highly interdependent landscape of international commercial arbitration, data associated with any arbitration matter will only be as secure as the weakest link. Since data security ultimately depends on the responsible conduct and vigilance of individuals, any individual

3. Though we focus primarily on the threat of data breaches, the analysis here is generally applicable to other forms of unauthorized digital intrusion in proceedings, such as surreptitious surveillance of a hearing or of arbitration counsel in their offices, or the inadvertent recording and disclosure of an otherwise private conversation between members of the tribunal.

4. See infra Part II.

5. Most notably, counsel have ethical duties to protect client confidentiality and to keep abreast of the risks and benefits of technology related to their practice. Further, all actors in the process may have contractual or regulatory obligations to protect sensitive personal or commercial information. See infra Sections III.A and III.C.

6. High profile examples of arbitration-related cyberattacks or data breaches have involved arbitral institutions, counsel, and parties as targets. See Zachary Zagger, Hackers Target Anti-Doping, Appeals Bodies Amid Olympics, LAW360.COM, (Aug. 12, 2016), https://www.law360.com/articles/827062/hackers-target-anti-doping-appeals-bodies-amid-olympics (reporting that hackers attempted to infiltrate the website of the Court of Arbitration for Sport during the Rio Olympic Games); Alison Ross, Tribunal Rules on Admissibility of Hacked Kazakh Emails, GLOBAL ARBITRATION REV., (Sept. 22, 2015), http://globalarbitrationreview.com/article/1034787/tribunal-rules-on-admissibility-of-hacked-kazakh-emails (reporting that privileged e-mails between a government and its arbitration counsel were disclosed by hackers of the government’s internal network); Alison Ross, Cybersecurity and Confidentiality Shocks for PCA, GLOBAL ARBITRATION REV., (July 23, 2015), http://globalarbitrationreview.com/article/1034637/cybersecurity-and-confidentiality-shocks-for-the-pca (reporting that the Permanent Court of Arbitration website was hacked during a hearing of China-Philippines arbitration and counsel in a Russia-related arbitration received “Trojan downloaders” that, if opened, would have enabled hackers to listen in on conversations).
actor can be that weak link, whatever their practice setting, whatever the infrastructure they rely upon, and whatever role they play in an arbitration.7

We explore in Part II the threat that cybersecurity breaches pose to international commercial arbitrations, using some examples of high-profile breaches that already have occurred.8 We analyze in Part III the obligations that underpin the arbitrator’s duty to avoid intrusion. That duty, in our view, need not be created anew. Rather, it rests securely on well-established duties of arbitrators to safeguard both the confidentiality and the legitimacy and integrity of proceedings, as well as to be competent to handle each individual matter.9 In an era of significant cyberthreats to the international commercial arbitration process, the duty to avoid intrusion is an inherent duty that follows as a matter of necessity from these earlier identified duties.

We then discuss, in Part IV, the nature and scope of the arbitrator’s duty to avoid intrusion, which is bounded and fulfilled by taking reasonable measures to prevent unauthorized digital access to arbitration-related information. There is no bright line list of measures that will fulfill the duty. Rather, assessment of the cybersecurity necessary in international commercial arbitration is an ongoing, risk-

---


8. Although the focus of this article is on international commercial arbitration, many of the considerations discussed here will apply as well in investor-state and public international arbitration. Notably, some of the high profile data security breaches discussed in this article occurred in those contexts. See supra note 6. At the same time, however, there may be important differences between the scope of the arbitrator’s duty to avoid intrusion in the two regimes owing to the public interest in investor-state arbitration and initiatives to increase transparency in the settlement of investor-state disputes. See, e.g., UN Convention on Transparency in Treaty-Based Investor-State Arbitration (2015).

based process that requires all participating individuals to understand data security threats in context. As threats evolve, participants must know their own digital architecture and security vulnerabilities (including those that arise from their personal day-to-day work habits) in order to implement protective measures responsive to the threats that apply to their data landscape and individual matters.

The specific protective measures required to satisfy the duty will depend on an analysis of the security risks and on the measures that are practically available, as both will undoubtedly evolve from time to time. They will also depend upon considerations of convenience, cost and efficiency, as the arbitrator may need to balance the duty to avoid intrusion against other duties, including the duty to conduct proceedings in an expeditious and cost-effective manner10 and, in the absence of overriding considerations, consistent with the parties’ choices.11

Finally, in Part V, we address some practical considerations for arbitrators as they determine what measures to implement to avoid intrusion and, in Part VI, suggest for future dialogue some ways in which all participants in the international commercial arbitration system may collaborate to address the ongoing threats. The fundamentals of effective cybersecurity management are accessible and not unduly burdensome. The arbitrator who keeps abreast of risks and benefits of technology in the arbitration process, is conscious of his or her digital assets and infrastructure, and who implements

---

10. See Int’l Chamber of Commerce [ICC], Rules of Arbitration (2017) [hereinafter ICC RULES], art. 22(1) (tribunal shall make every effort to conduct the arbitration in an expeditious and cost-effective manner); Int’l Ctr. for Disp. Res., International Centre for Dispute Resolution International Arbitration Rules (2014) [hereinafter ICDR RULES], art. 20(2) (“The tribunal shall conduct the proceedings with a view to expediting the resolution of the dispute”); LCIA RULES, supra note 1, at art. 14.4(ii) (tribunal’s general duty to adopt suitable procedures, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties’ dispute).

11. See, e.g., UNCITRAL Model Law, supra note 1, at art. 34(2)(a)(iv), (award may be set aside if “the arbitral procedure was not in accordance with the parties’ agreement, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate”); LCIA RULES, supra note 1, at art. 14.2 (“The parties may agree on joint proposals for the conduct of their arbitration for consideration by the Arbitral Tribunal. They are encouraged to do so in consultation with the Arbitral Tribunal and consistent with the Arbitral Tribunal’s general duties . . .”); ICDR RULES, supra note 10, at 1 (rules apply “subject to modifications that the parties may adopt in writing” except that “where any rule[] is in conflict with any provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail”).
reasonable protective measures, will readily meet the obligation to avoid intrusion.

II. DATA SECURITY THREATS IN INTERNATIONAL ARBITRATION

Cyberintrusion, or hacking as it is more commonly known, is often in the news in respect to geo-politics and major corporate and government records data breaches. Law firms, too, are increasingly


reported as having fallen victim to cyberattacks.\textsuperscript{14} As awareness increases that corporations and players in the legal sector are attractive targets for cybercriminals, the multiple players involved in international private commercial arbitrations should realize that they too are vulnerable to cybercriminals.\textsuperscript{15} International commercial arbitrations routinely involve sensitive commercial and personal information, including information that is not publicly available and that has a potential to move markets or impact competition. Conveniently for hackers, this information is culled together in large data sets, ranging from pleadings and documents produced in disclosure, documentary evidence, witness statements, expert reports, memorials, transcripts, attorney work product, tribunal deliberation materials, and case management data. As the multiple players involved often live in different countries, the information is frequently exchanged and stored in electronic form, making it vulnerable to malevolent outside actors.

Data custodians, who hold sensitive data to varying degrees, include arbitral institutions, counsel, the parties and members of the arbitral tribunal (along with their respective support staff), as well as experts and vendors, including court reporters, translation services, couriers, and information technology ("IT") professionals, among others. Hackers may attack individual actors directly\textsuperscript{16} or the digital

\textsuperscript{14} See, e.g., Nate Raymond, \textit{U.S. Accuses Chinese Citizens of Hacking Law Firms}, \textit{INSIDER TRADING} (Dec. 28, 2016), http://www.reuters.com/article/us-cyber-insidertrading-idUSKBN14G1D5; Michael Schmidt and Steven Lee Myers, \textit{Panama Law Firm’s Leaked Files Detail Offshore Accounts Tied to World Leaders}, N.Y. TIMES (Apr. 3, 2016), https://www.nytimes.com/2016/04/04/us/politics/leaked-documents-offshore-accounts-putin.html (reporting that 11.5 million documents leaked from Panama law firm exposed the offshore accounts of 140 politicians and public officials). \textit{See also} New York State Bar Ass’n Ethics Opinion 1019 (Aug. 2014) ("Cyber-security issues have continued to be a major concern for lawyers, as cyber-criminals have begun to target lawyers to access client information, including trade secrets, business plans and personal data. Lawyers can no longer assume that their document systems are of no interest to cyber-crooks.").


\textsuperscript{16} A prevalent method of attack that capitalizes on human error is ransomware, a form of malware frequently distributed through spear phishing e-mails sent to targeted individuals. The FBI explains:
infrastructure of their organizations. Moreover, each smartphone, tablet, laptop, thumb drive, other digital device, and cloud service used for the transmission or hosting of arbitration-related data offers a potential portal for unauthorized outsiders to gain access.

The participants in international commercial arbitrations are, to a large degree, digitally interdependent, in that the process typically involves the transmission and hosting of data and collaborative elements such as communications relating to the arbitration. Consequently, any break in the custody of sensitive data has the potential to affect all participants. Indeed, since participants will frequently play host not only to their own sensitive data, but also to the sensitive data of others, intrusion into data held by one participant may injure another more than the one whose data security was compromised.

Unauthorized access of sensitive data may result in the disclosure, or even acceptance into evidence of, illegally obtained, confidential, or privileged matter in ways that undermine fundamental elements of the adjudicatory process and its baseline due process elements. Disclosure of commercially sensitive information, trade
secrets, or personal information may violate laws or contractual commitments in business-to-business or customer agreements, cause serious reputational and economic harm to individuals or businesses, trigger regulatory sanctions or negligence claims, and impact the integrity of public securities markets. Further, since the parties, counsel and arbitrators frequently reside in different countries and may be subject to differing data security law, privacy regimes and ethical standards, the legal effect of a data breach may be uncertain and complex. Last, and not least, data security breaches, particularly those resulting from a failure to implement reasonable security protocols, threaten to undermine public confidence in the very institution of international private commercial arbitration. We explore the latter consequence further below.

III. SOURCES OF THE ARBITRATOR’S DUTY TO AVOID INTRUSION

The arbitration rules, ethical codes, practice guidelines, and national laws that govern international commercial arbitration do not, by and large, establish an express duty for arbitrators or any other participant in the arbitral process to implement cybersecurity from Kazakhstan’s government computer network, yet excluding other documents on the basis of privilege.


21. See, e.g., Robert Burnson, Yahoo’s Massive Data Breach Draws Negligence Suits by Users, BLOOMBERG TECH. (Sept. 23, 2016), https://www.bloomberg.com/news/articles/2016-09-23/yahoo-s-massive-data-breach-draws-negligence-lawsuit-by-user; See also Shore et al. v. Johnson & Bell, Ltd., No. 1:16-cv-04363 (Verified Complaint) (N.D. Ill. Apr. 15, 2016) (class action alleging a Chicago law firm was negligent and engaged in malpractice by using security practices that left client information vulnerable to hacking, including, for example, a ten-year-old time-entry system that had not been updated with security patches).


measures. Why, then, does the arbitrator bear responsibility to avoid cybersecurity breaches? In our view, the arbitrator’s duty to avoid intrusion rests on well-established arbitral duties: (i) the duty to protect the confidentiality and privacy of the proceedings, which will vary in different arbitrations, but exists to some degree in all proceedings; (ii) a fundamental duty to preserve and protect the integrity and legitimacy of the arbitral process; and (iii) a duty to be competent. In addition to these general duties, some arbitrators may have express or implied cybersecurity obligations by virtue of attorney codes of conduct, national data protection laws or regulations, or agreement with the parties.

A. Duty of Confidentiality

It is by now well-established that although parties generally have a right to keep international commercial arbitrations private (i.e., to exclude third parties from hearings), it cannot be assumed that they have a general duty or right to keep arbitration-related information confidential (i.e., to refrain from disclosing, and to keep others from disclosing, such information to third parties). Arbitrators are on slightly different footing. Although applicable law, governing

24. See Section III.C for a discussion of the ethical obligations of lawyers under the ABA Model Rules of Professional Conduct, which regulate attorney conduct.

25. See Simon Crookenden, Who Should Decide Arbitration Confidentiality Issues? 25 ARB. INT’L 603, 603 (2009) (“The privacy of arbitration proceedings is generally recognised internationally.”); see also, e.g., ICC RULES, supra note 10, at art. 26(3): (“... Save with the approval of the arbitral tribunal and the parties, persons not involved in the proceedings shall not be admitted.”); ICDR RULES, supra note 10, at art. 23(6) (“Hearings are private unless the parties agree otherwise or the law provides to the contrary.”); LCIA RULES, supra note 1, at art. 19.4: (“All hearings shall be held in private, unless the parties agree otherwise in writing.”); SINGAPORE INT’L ARB. CTR., ARBITRATION RULES OF THE SINGAPORE INTERNATIONAL ARBITRATION CENTRE (2016) [hereinafter SIAC RULES], art. 24.4 (“Unless otherwise agreed by the parties, all meetings and hearings shall be in private, and any recordings, transcripts, or documents used in relation to the arbitral proceedings shall remain confidential.”).

26. UNCITRAL Notes on Organizing Arbitral Proceedings, ¶ 50 (2016) [hereinafter UNCITRAL Notes], (“there is no uniform approach in domestic laws or arbitration rules regarding the extent to which participants in an arbitration are under a duty to observe the confidentiality of information relating to the arbitral proceedings”); L. Yves Fortier, The Occasionally Unwarranted Assumption of Confidentiality, 15 ARB. INT’L 131 (1999); Leon Trakman, Confidentiality in International Commercial Arbitration, 18 ARB. INT’L 1 (2002).

27. More often than not, whether an arbitrator has a duty of confidentiality is not addressed by national legislation. See BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2003 (Wolters Kluwer, 2d ed. 2014); see also Joshua Karton, A Conflict of Interests: Seeking a
arbitration rules, and party agreement may vary in the extent to which they oblige an arbitrator to keep all aspects of an arbitration proceeding confidential, it is uncontroversial that the arbitrator has a fundamental duty to keep at least certain aspects of a proceeding confidential. Gary Born takes a broad view of the confidentiality obligation, stemming from the arbitrator’s adjudicatory role:

Even where confidentiality obligations are not imposed upon the parties by either their agreement or applicable national law, the arbitrators are subject to separate confidentiality obligations by virtue of their adjudicative function. One element of the arbitrator’s role is the duty to maintain the confidentiality of the parties’ written and oral submissions, evidence and other materials submitted in the arbitration. It is generally inconsistent with the arbitrator’s mandate to disclose materials from the arbitration to third parties.

The AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes is consistent with this view. Canon VI provides that “[a]n


28. Although they differ in scope, most institutional international arbitration rules, with the notable exception of the ICC Rules, impose an express obligation of confidentiality on arbitrators. See, e.g., ICDR RULES, supra note 10, at art. 37(1) (“Confidential information disclosed during the arbitration by the parties or by witnesses shall not be divulged by an arbitrator . . . . [T]he members of the arbitral tribunal . . . shall keep confidential all matters relating to the arbitration or the award.”); LCIA RULES, supra note 1, at art. 30.2 (“The deliberations of the Arbitral Tribunal shall remain confidential to its members . . . .”); SIAC RULES, supra note 25, at art. 39.1 (“Unless otherwise agreed by the parties, a party and any arbitrator, including any Emergency Arbitrator . . . shall at all times treat all matters relating to the proceedings and the Award as confidential. The discussions and deliberations of the Tribunal shall be confidential.”), art. 39.3 (“. . . matters relating to the proceedings” includes the existence of the proceedings, and the pleadings, evidence and other materials in the arbitral proceedings and all other documents produced by another party in the proceedings or the Award arising from the proceedings, but excludes any matter that is otherwise in the public domain”); JAMS FOUNDATION, JAMS INTERNATIONAL ARBITRATION RULES (2016), art. 17.1 (“Unless otherwise required by law, or unless the parties expressly agree, the Tribunal, the Administrator and JAMS International will maintain the confidentiality of the arbitration.”), art. 17.2 (“Unless otherwise required by law, an award will remain confidential, unless all of the parties consent to its publication.”); INT’L INST. FOR CONFLICT PREVENTION & RES., CPR 2014 RULES FOR ADMINISTERED ARBITRATION OF INTERNATIONAL DISPUTES (2014) [hereinafter CPR RULES], art. 20 (“Unless the parties agree otherwise, the parties, the arbitrators and CPR shall treat the proceedings, any related disclosure and the decisions of the Tribunal, as confidential . . . ”). But see ICC RULES, supra note 10, at app. 1, art. 6 (“The work of the [ICC] Court is of a confidential nature which must be respected by everyone who participates in that work in whatever capacity.”).

arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office.”

In particular, the arbitrator has a duty to “keep confidential all matters relating to the arbitration proceedings and decision” and “[i]n a proceeding in which there is more than one arbitrator, . . . [not to] inform anyone about the substance of the deliberations of the arbitrators.” Less comprehensively, the IBA Rules of Ethics for Arbitrators specify that the “deliberations of the arbitral tribunal and the contents of the award itself, remain confidential in perpetuity unless the parties release the arbitrators from this obligation.” At the same time, however, they encapsulate a general duty of confidentiality by stating that arbitrators should be “discreet.”

In contrast to arbitrators, who are thus bound by a duty of confidentiality, the parties themselves may not have a duty to keep

---

30. Similarly, the Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members (Oct. 2009) provides: “A member shall abide by the relationship of trust which exists between those involved in the dispute and (unless otherwise agreed by all the parties, or permitted or required by applicable law), both during and after completion of the dispute resolution process, shall not disclose or use any confidential information acquired in the course of or for the purposes of the process.” CHARTERED INST. OF ARBITRATORS, THE CHARTERED INSTITUTE OF ARBITRATORS CODE OF PROFESSIONAL AND ETHICAL CONDUCT FOR MEMBERS (Oct. 2009) [hereinafter CIARB ETHICS CODE], Rule 8.

31. AAA/ABA CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, Canon VI (B), (C). See also Canon I (I) (“An arbitrator who withdraws prior to the completion of the arbitration, whether upon the arbitrator’s initiative or upon the request of one or more of the parties, should take reasonable steps to protect the interests of the parties in the arbitration, including return of evidentiary materials and protection of confidentiality.”).

32. INT’L BAR ASSOC., IBA RULES OF ETHICS FOR ARBITRATORS, article 9. The IBA Rules of Ethics are not binding, but are deemed to reflect internationally acceptable guidelines developed by practicing lawyers from all continents. Id. at Introductory Note.

33. Id.

34. We note that while many arbitrators are lawyers and will have professional ethical obligations to preserve client confidentiality, by their terms, such obligations apply only when a lawyer is acting in a representative capacity for a client and not when serving as an arbitrator, who does not represent any party but has equal duties to all. BORN, supra note 27 at 1970; CPR-Georgetown Commission on Ethics and Standards in ADR, Proposed New Model Rule of Professional Conduct Rule 4.5: The Lawyer as Third-Party Neutral (2002), Rule 4.5.2, comments [1], [3]. Nonetheless, to the extent that lawyers’ duties of confidentiality have been updated to take account of cyberthreats, analysis of those duties may inform how the international arbitrator should view the nature and scope of his or her duty to avoid intrusion. See, e.g., U.K. Information Commission Office, Monetary Penalty Notice under the Data Protection Act 1998, Supervisory Powers of the Information Commissioner (Mar. 10, 2017), https://ico.org.uk/media/action-weve-taken/mpns/2013678/mpn-data-breach-barrister-20170316.pdf (fining UK family law barrister for failing to take “appropriate technical
arbitration proceedings or certain aspects of them confidential. Nonetheless, there is a common expectation among users of international commercial arbitration\(^{35}\) that the overall process will be confidential.\(^{36}\) More specifically, parties and institutions expect that the arbitrator will maintain the confidentiality of the arbitration.\(^{37}\)

measures against the unauthorised or unlawful processing of personal data” in relation to confidential client files where the barrister failed to encrypt such files on her home computer and her husband inadvertently made the files accessible on an online directory while attempting to update software, noting that the Bar Council and barrister’s chambers had issued guidance to barristers that a computer used by family members or others may require encryption of files to prevent unauthorized access to confidential material by shared users).

35. Notably, expectations of privacy and confidentiality may differ in investor-state arbitration. As explained in the UNCITRAL Notes on Organizing Arbitral Proceedings: "[t]he specific characteristics of investor-State arbitration arising under an investment treaty have prompted the development of transparency regimes for such arbitrations. The investment treaty under which the investor-State arbitration arises may include specific provisions on publication of documents, open hearings, and confidential or protected information. In addition, the applicable arbitration rules referred to in those investment treaties may contain specific provisions on transparency. Further, parties to a treaty-based arbitration may agree to apply certain transparency provisions.

UNCITRAL Notes, supra note 26, at ¶ 55.

36. Paul D. Friedland, Arbitration Clauses for International Contracts 21 (Juris, 2d ed. 2007) (“Notwithstanding the usual absence of prohibitions on party disclosure, there is an expectation and tradition of confidentiality in arbitration, which a party violates at its own peril vis-à-vis the arbitrators.”); Queen Mary Univ. of London Sch. of Int’l Arb., 2010 International Arbitration Survey: Choices in International Arbitration, at 29, http://www.whitecase.com/files/upload/fileRepository/2010International_Arbitration_Survey_Choices_in_International_Arbitration.pdf, 29 (Fifty percent of corporations indicated that they “consider that arbitration is confidential even where there is no specific clause to that effect in the arbitration rules . . . or agreement”); Int’l Inst. for Conflict Prevention & Res., General Commentary for CPR Rules for Administered Arbitration of International Disputes, available at https://www.cpradr.org/resource-center/rules/international-other/arbitration/international-administered-arbitration-rules (“Parties that choose arbitration over litigation of an international dispute do so primarily to avoid the unfamiliarity and uncertainty of litigation in a foreign court; also out of a need or desire for a proceeding that is confidential and relatively speedy.”); ICC International Court of Arbitration, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, ¶ 27 (July 13, 2016) (“The ICC Court endeavors to make the arbitration process more transparent in ways that do not compromise expectations of confidentiality that may be important to parties.”)

37. UNCITRAL Notes, supra note 26, at ¶ 53 (“Whereas the obligation of confidentiality imposed on the parties and their counsel may vary with the circumstances of the case as well as the applicable arbitration law and arbitration rules, arbitrators are generally expected to keep the arbitral proceedings, including any information related to or obtained during those proceedings, confidential.”) (emphasis added); LCIA Notes for Arbitrators, ¶ 6 (June 29, 2015) (“Parties to arbitrations are entitled to expect of the process a just, well-reasoned and enforceable award. To that end, they are entitled to expect arbitrators: . . . to maintain the confidentiality of the arbitration. . . .”) (emphasis added).
Moreover, in the adversarial and adjudicatory context, each actor in arbitration has legitimate expectations of privacy as to the data that defines or supports its role in the process. Irrespective of the extent to which the proceeding as a whole is entirely confidential or in some respects public, counsel and clients expect that they alone will have access to their communications and case strategy, for example, while arbitrators expect that no one else will have access to their deliberations or draft adjudicative documents and other work product. Those who intrude on these boundaries by hacking or other unauthorized access may break the law; at a minimum, they will threaten legitimate expectations as to privacy in any adjudicatory process and the integrity of the process as a whole. In sum, since cyberintrusion undermines or negates the legitimate expectations of confidentiality that exist in international commercial arbitration as well as the legitimate expectations of privacy that exist to some degree in all adjudicatory proceedings, it follows that the arbitrator’s special duty to protect confidentiality extends to an obligation to avoid intrusion by non-participants who are determined to defeat those expectations.

B. Duty to Preserve and Protect the Integrity and Legitimacy of the Arbitral Process

The arbitrator’s duty to avoid intrusion also rests on a duty to protect the integrity and legitimacy of the arbitral process. Unauthorized intrusion by hackers or other malevolent actors threatens more than confidentiality: it is a direct threat to the fair, neutral, and orderly process that underlies all arbitrations and to public trust in the arbitral process. If we accept that hacking threatens the integrity of the process, it follows that the arbitrator’s obligation to protect the integrity of the process encompasses some form of duty to avoid such intrusion.


39. See UNCITRAL Notes, supra note 26, at ¶ 58(b).
Our premise that the arbitrator has a duty to avoid intrusion does not require resolution of the ongoing debate as to whether a commercial arbitrator is a mere independent service provider to the parties or if the arbitrator has a broader, adjudicative role with responsibilities also to society and the rule of law. Recognizing the deference to party autonomy that characterizes international commercial arbitration, it is well-established that arbitrators also have important and independent responsibilities to maintain their own reputations and probity, to support the interests of society and to uphold the legitimacy and integrity of the arbitral process. Even the most articulate and well-respected proponents of the arbitrator as service provider model recognize that there are limits to party autonomy and to arbitrators’ fidelity to the parties’ instructions.

There is little doubt that the use in an arbitration of data illegally obtained by or on behalf of a party would irreparably taint


41. See e.g., Julie Bédard, Timothy Nelson and Amanda Kalantirsky, Arbitrating in Good Faith and Protecting the Integrity of the Arbitral Process, 3 Paris J. Int’l Arb. 737, 749 (2010); ABA/AAA Code of Ethics for Arbitrators in Com. Disputes, Canon 1 (“An arbitrator should uphold the integrity and fairness of the arbitration process . . . . An arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved.”); ICC Rules, supra note 10, at art. 5 (“[T]he emergency arbitrator shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case”); JAMS Foundation, JAMS Arbitrator Ethics Guidelines, 1 (“[A]n arbitrator should uphold the dignity and the integrity of the office of the arbitration process”); CIARB Ethics Code, supra note 30, at Part 2, Rule 2 (“A member shall maintain the integrity and fairness of the dispute resolution process.”).

42. See Luca G. Radicati di Brozolo, Party Autonomy and the Rules Governing the Merits of the Dispute in Commercial Arbitration, in Limits to Party Autonomy in International Commercial Arbitration, 339 (Jurus, 2016); see also Teresa Cheng, panelist, The Theory and Reality of the Arbitrator: What is an International Arbitrator?: 7 World Arb. & Med. Rev. 4, 639 (2013) (commenting at the 25th Annual Workshop of the Institute for Transnational Arbitration that although arbitrators are independent service providers, there is also a duty to oneself as well as a duty to the arbitral process); Rogers, supra note 2; ILA Report, infra note 47, at 17; Park, Arbitrators and Accuracy, supra note 1, at n.59 (stating faithfulness to the agreement would not justify violation of international public policy.)
proceedings. Different issues arise when external actors compromise the data security of arbitration-related information. Here, the participants are victims of the intrusion and the matter presumably may proceed, with such corrective or ongoing protective steps as the tribunal may deem appropriate. Nonetheless, such an incident, particularly if it follows from a failure to adequately secure data, inevitably will erode the confidence and trust of participants, and potentially the public, in the international private commercial arbitration process. The arbitrator, along with the parties, counsel, and other actors in the process, is in a position to take reasonable protective measures to avoid that risk.

While much attention has been focused on the implied powers of arbitrators to fill in gaps in institutional rules or the parties’ agreement where necessary to protect due process and the legitimacy of the process, less attention has been paid to the scope of the arbitrator’s duties. The ILA Arbitration Committee’s Final Report


44. See Caratube, supra note 18 (considering the admissibility of illegally obtained evidence, accepting some and excluding some).

45. See Jan Paulsson, Metaphors, Maxims and Other Mischief, The Freshfields Arbitration Lecture 2013, 30 ARB. INT’L 4, 630 (2014) (“[P]ublic confidence is perforce at stake in the arbitral context as well [as in the judicial process], because arbitration cannot thrive without the support of the general legal system.”); Charles Brower, Keynote Address: The Ethics of Arbitration: Perspectives from a Practicing International Arbitrator, 5 BERKELEY J. OF INT’L L. PUBLICIST, 1 (2010) (“[A]rbitrators and arbitral institutions also have an interest in maintaining legitimacy, both for the mutual acceptance of their awards by the parties before them and for broad public acceptance of the entire law-based system of which they are a part.”).

46. Two widely cited cases involving the appearance of new counsel after an ICSID tribunal was constituted focused on the arbitrator’s role in preserving the integrity of the arbitration proceedings. Although the tribunals reached differing results on applications to disqualify counsel and had differing views on the nature and extent of an arbitrator’s inherent powers, both stated that the arbitrators had some inherent power, and presumably some obligation, to protect the essential integrity of the proceeding. See Hrvatska Elektroprivreda d.d. v. Republic of Slovenia, ICSID Case No. ARB/05/24, 15, (2008) (Tribunal’s Ruling Regarding the Participation of David Mildon QC in further Stages of the Proceeding); Rompetrol Group NV v. Romania, ICSID Case No. ARB/06/03, 5-6 (2008) (Decision of the Tribunal on the Participation of a Counsel); see also Bédard, et al., supra note 41 at n.69. Similarly, in Caratube, although the tribunal found that the claimants failed to prove the respondent had engaged in any threatening or intimidating action that could cause an irreparable harm to the claimants’ rights in the arbitration, including a right to the “integrity and the legitimacy of the arbitration,” the tribunal implicitly recognized its authority to take
on The Inherent Powers of Arbitrator in International Commercial Arbitration noted that the implied powers necessary to protect the core functions of arbitration amount to affirmative arbitral duties:

It is in such situations that a third and final category of non-enumerated powers becomes relevant, encompassing that authority which can be said to be truly inherent, namely those powers necessary to safeguard a tribunal’s jurisdiction and the integrity of its proceedings. Stated differently, these powers are those required to decide a legal dispute fairly and in a manner consistent with at least the minimal requisites of due process and public policy. They trace their roots most clearly to the original notion of inherent powers as protecting jurisdiction and curtailing procedural abuses, and their exercise may justify overriding party preferences. . . . Such powers are so core to the function of arbitration that they might be more properly termed arbitral duties, the fulfillment of which is a necessary function of serving as a competent arbitrator.47

We conclude, then, that the arbitrator’s duty to uphold the legitimacy and integrity of the arbitral process, and to ensure confidence and trust in arbitration, further supports the premise that the arbitrator has a duty to avoid intrusion.

C. Duty of Competence

It is commonly accepted that an arbitrator has a duty of competence. 48 Various arbitrator ethics codes expressly require arbitrators to be “competent.” Canon 1 of the ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes, which requires an arbitrator to uphold the integrity and fairness of the arbitration process, provides that an arbitrator should accept appointment in a
particular matter only if fully satisfied that he or she is “competent to serve.” The IBA Rules of Ethics for International Arbitrators provide a more general requirement that “international arbitrators should be . . . competent” in addition to a specific requirement that the arbitrator be competent to determine the issues in dispute in a particular matter.49

While the arbitrator ethics codes do not define competence, important context and definition of the meaning of the term may be drawn from the evolution of lawyer ethics codes in recent years. Recognizing the need to provide some definition of competence and to update ethical codes to reflect the rise of globalization and technology, governing bar associations and disciplinary authorities have amended lawyer ethical codes to provide explicit linkage between general competence requirements and the need to keep abreast of technology.50 For example, the American Bar Association (“ABA”) Model Rules of Professional Conduct, first introduced by the ABA in 1983, and adopted over time in various forms by most states in the United States,51 provide the following lawyer competence requirement:

Rule 1.1 Competence
A lawyer shall provide competent representation to a client.
Competent representation requires the legal knowledge,

49. See Introductory Note and Rule 2.2; see also CIARB ETHICS CODE, supra note 30, at Part 2, Rule 4 “Competence” (“A member shall accept an appointment or act only if appropriately qualified or experienced.”).

50. Lawyer ethics rules obviously do not bind non-lawyer arbitrators. Indeed, some of the rules are limited to the context of client representation and thus do not expressly apply even to lawyers who, when serving as arbitrators, are not representing clients. For example, ABA Model Rule 1.1, standing alone in the form quoted in the accompanying text, does not apply directly to arbitrators, even if they are lawyers practicing in a jurisdiction where this version of the Model Rules applies. In France, the Règlement Intérieur National, the French code of ethics for lawyers, contains a general competency requirement in respect to client work in Article 1.3 (“L’avocat . . . fait preuve, à l’égard de ses clients, de compétence . . . .”), http://codedeonto.avocatparis.org/acces-article; see also UK SOLICITORS REGULATORY AUTHORITY, SRA CODE OF CONDUCT 2011 (Version 18, 2016) [hereinafter UK SRA CODE OF CONDUCT] at 0-1.5 (“[t]he service you provide to clients is competent . . . .”), http://www.sra.org.uk/solicitors/handbook/code/content.page.

51. A notable exception is California, which maintains its own Rules of Professional Conduct. California Rule 3-110 (A) provides a general competence requirement (“A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.”).
skill, thoroughness and preparation reasonably necessary for the representation.

Notably, ABA Model Rule 1.1 is limited by its terms to the lawyer serving in a representational function. However, the Preamble to the Model Rules notes that a lawyer may serve in other roles, including “as a third party neutral, a non-representational role helping the parties to resolve a dispute or other matter,” and goes on to state that, “[i]n all professional functions a lawyer should be competent, prompt and diligent.”

New York State did not adopt the Model Rules until 2009 and did not adopt the Preamble quoted above. However, Model Rule 1.1 as adopted in New York added a more general competency requirement, in addition to the client-oriented rule: “A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle . . . .”

Thus, at least as to lawyers working as arbitrators in jurisdictions that have adopted the ABA Preamble or who have adopted a rule similar to Rule 1.1(b) as in effect in New York State, there is a direct ethical obligation of competence.


54. Also useful by analogy is The Code of Conduct for Lawyers in the EU, issued by the Council of Bars and Law Societies of the European Union, which bridges the gap from the
on Ethics 20/20 recommended proposed amendments to the Model Rules to account for, among other things, rapid changes in technology affecting the practice of law. In 2012, the ABA House of Delegates adopted a revised Comment 8 to Model Rule 1.1, to provide in respect to competency, that “to maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with technology.” In amending Comment 8, the ABA took the position that the revised language did not impose any new obligations on lawyers, but, rather, simply reminded lawyers that in the current environment, an awareness of technology, including the benefits and risks associated with it, is part of the lawyer’s general ethical duty to remain competent. 55 The same may be said in respect to an arbitrator’s competence obligation.

In its 2014 report recommending that New York adopt the revised comment 8 to Model Rule 1.1, the New York State Bar Association Committee on Standards of Professional Conduct noted that:

... to keep abreast of changes in law practice, a lawyer needs to understand the risks and benefits of technology relevant to the lawyer’s particular practice. For example, if a lawyer’s clients are communicating with the lawyer by web-based document-sharing technology or by social media, the lawyer should have some understanding of how to ensure that confidential communications remain confidential. The proposed amendment impresses upon lawyers the key role that technology plays in law practice and creates the expectation that lawyers will keep abreast of the regulation of lawyers working in a representational capacity in the judicial system to those working in arbitration by providing that “[t]he rules governing a lawyer’s relations with the courts apply also to his relations with arbitrators.” CCBE, CODE OF CONDUCT FOR LAWYERS IN THE EUROPEAN UNION (2002) at art. 4.5, available at http://www.idhae.org/pdf/code2002_en.pdf.

benefits and risks associated with the technology relevant to their own legal practice.56

Whether or not adopted in the form encompassing the more general obligation provided in the New York version of the rules, the Model Rules, and particularly Comment 8 to Model Rule 1.1 as it now reads, are relevant to inform and define the meaning of competence as applied to arbitrators, as well as in their direct regulation of lawyer conduct.57

Achieving digital literacy, including an understanding of the measures reasonably necessary to avoid cyberintrusion in an arbitration, is also closely related to the attention institutions, users, and counsel have paid in recent years to the role of the arbitrator in


57. See, e.g., In re: Amendments to Rules Regulating the Florida Bar 4-1.1 and 6-10.3, No. SC16-574 (Sept. 29, 2016), at http://www.floridasupremecourt.org/decisions/2016/sc16-574.pdf (amending the comment to rule on competence to address technology); Law Society of Upper Canada, Technology Practice Management Guideline, Guideline 5.5 (“Competent Use of Information Technologies. Lawyers should have a reasonable understanding of the technologies used in their practice or should have access to someone who has such understanding”) & 5.10 (“Security Measures. Lawyers should be familiar with the security risks inherent in any of the information technologies used in their practices including unauthorized copying of electronic data, computer viruses which may destroy electronic information and hardware, hackers gaining access to lawyers’ electronic files, power failures and electronic storms resulting in damage to hardware or electronic information, theft of vast amounts of electronic information stored in stolen hardware. Lawyers should adopt adequate measures to protect against security threats and, if necessary, to replace hardware and reconstruct electronic information.”), available at http://www.lsuc.on.ca/with.aspx?id=2147491197 (last visited Jan. 22, 2017); Canadian Bar Association, Legal Ethics in a Digital World (Sept. 2, 2015), https://www.cba.org/getattachment/Sections/Ethics-and-Professional-Responsibility-Committee/Resources/Resources/2015/Legal-Ethics-in-a-Digital-World/guidelines-eng.pdf; Philipe Doyle Gray, The Pillars of Digital Security, BAR NEWS: J. OF THE NEW SOUTH WALES BAR ASSOCIATION (Summer 2014), http://www.philippedoylegray.com/content/view/56/45/ (although the Law Society of New South Wales has not adopted professional conduct rules addressing technology, it has published guidelines for lawyers about the use of technology such as cloud computing and social media); E-Law Committee of the Law Society of South Africa, LSSA Guidelines on the Use of Internet-Based Technologies in Legal Practice (2014), www.lssa.org.za/index.php?; see also UK SRA CODE OF CONDUCT, supra note 50, at O-4.5 (“You have effective systems and controls in place to enable you to identify risks to client confidentiality . . . .”); O-7.5 (“You comply with . . . data protection legislation.”); IB-7.5 (“Identifying and monitoring . . . IT failures and abuses.”).
case management. In the highly digitized and interdependent world of international arbitration, management of technology and baseline data security competence manifestly have become critical components of an arbitrator’s competence to organize and conduct arbitration proceedings.

D. Global Data Protection Laws and Regulations

In any given arbitration matter, data held by an arbitrator may be subject to specific cybersecurity obligations arising from international or national data protection laws and regulations that govern how certain information can be collected, stored, and transferred. While there is no universal international approach to data protection, nearly 110 countries have enacted laws aimed at protecting personal information by regulating categories of data or industry sectors, such as the financial and health care industries. As the key players in

---

58. See, e.g., ICC Rules, supra note 10, at app. IV (case management techniques); LCIA Rules, supra note 1, at art. 14 (conduct of the proceedings); ICDR Rules, supra note 10, at art. 20.2 (conduct of the proceedings) (“In establishing procedures for the case, the tribunal and the parties may consider how technology, including electronic communications, could be used to increase the efficiency and economy of the proceedings.”); College of Commercial Arbitrators, Protocols for Expeditious, Cost-Effective Commercial Arbitration (2010) 69 (arbitrators should take control of the arbitration and actively manage it from start to finish); ICC Commission Report, Controlling Time and Costs in Arbitration (2d. ed. 2012); Christopher Newmark, Controlling Time and Costs in Arbitration, in LEADING ARBITRATORS’ GUIDE TO INTERNATIONAL ARBITRATION supra note 1.

59. The UNCITRAL Notes on Organizing Arbitral Proceedings (2016) urge that arbitrators consider issues relating to the means of communication to be used during the proceedings at the outset, noting that the parties and the tribunal “may need to consider issues of compatibility, storage, access, data security as well as related costs when selecting electronic means of communication.” UNCITRAL Notes, supra note 26, at ¶¶ 56, 58.


61. See UNCTAD on Data Protection at 42 (108 countries have either comprehensive data protection laws or partial data protection laws).

62. In the United States, for example, there is no omnibus privacy or data protection legislation, but a patchwork of federal privacy laws that generally regulate security breach notification statutes by sector and state. See, e.g., Health Insurance Portability and Accountability Act, 42 U.S.C. § 1301 passim [hereinafter HIPPA] (health information); Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (consumer protection); Gramm-Leach-
international arbitrations frequently reside in different countries, resulting in continuous cross-border exchanges of information, it follows that the same data may be subject to multiple, and potentially inconsistent, laws. For example, the legal concept of “personal information” or “personally identifiable information” subject to reasonable protection from unauthorized access is defined more broadly under EU law than it is under US law.63

While it is beyond the scope of this article to address the complex conflict-of-law issues that may arise in these situations,64 the global proliferation of data protection laws indicates that: (i) participants in international arbitrations who share the sensitive information of others may have legal obligations to ensure that arbitrators, acting in the capacity of service providers, safeguard that information by complying with certain security standards65; and (ii) increasingly, both participants and non-participants in an arbitration may have legally enforceable interests (or rights)66 in the way that arbitrators secure and handle e-mail correspondence, witness statements,67 and other electronically-exchanged documents that routinely disclose personally identifiable information. Moreover,


63. See Practical Law, Expert Q&A on Data Security in Arbitration (Dec. 1, 2016) (stemming from the concept in EU countries that privacy is a fundamental human right, a person’s name and place of employment can be considered protected information).

64. Although not the focus of this article, we note that the potential for the application of disparate data protection laws strongly favors early discussions between opposing counsel about how arbitration-related data will be handled as well as discussion of data security with the tribunal by at least the first case management conference.

65. For example, an individual or organization that must comply with health information privacy rules under HIPPA is required to have any “business associate” it engages to help carry out its functions agree to comply with those rules as well. HIPPA, supra note 62. See also EU Directive 2016/1148 (July 6, 2016).

66. See, e.g., Charter of Fundamental Rights of the European Union (2012/C 326/02), art. 7 (“Everyone has the right to respect for his or her private and family life, home and communications”) & 8(1) (“Everyone has the right to the protection of personal data concerning him or her.”).

67. See INT’L BAR ASSOC., IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION (2010), art. 4(5) (specifying personal information to be included in fact witness statements).
when security incidents occur, a web of breach notification obligations may be triggered.68

Although it is not evident that the obligations or legal interests that may arise under the current global data protection regime create a bright-line duty, independent of any specific case, for arbitrators to avoid cyberintrusion, their prevalence at least supports the notion that to maintain user confidence in international arbitration process, arbitrators must not only be prepared and competent to handle sensitive information securely, but also appear to the public to be so prepared. Global data protection laws thus behoove arbitrators to be proactive (and not merely reactive, on a case-by-case basis) in dealing with cybersecurity.

IV. NATURE AND SCOPE OF THE ARBITRATOR’S DUTY TO AVOID INTRUSION

This article posits that the arbitrator’s duty in relation to cybersecurity is one of avoiding intrusion, which we define as the duty to take reasonable measures to prevent unauthorized digital access to arbitration-related information. In the following sections, we first explore the nature and scope of the duty and then discuss some practical measures that will assist the arbitrator in fulfilling the duty.

A. An Umbrella Obligation

As we have shown above, the arbitrator’s duty in relation to cybersecurity is not a new, independent obligation, but rather a natural extension in the digital age of an arbitrator’s existing duties to keep arbitration-related information confidential, to preserve and protect the integrity and legitimacy of the arbitral process, and to be competent. By grouping the implied cybersecurity responsibilities arising under each of these duties under the new umbrella of the “duty to avoid intrusion,” we recognize the unique challenges that cyberthreats pose to the practice of international arbitration in the digital age.

This is a matter of substance, not just terminology. Recognition of the threat and each actor’s acceptance of responsibility to take part in addressing it are key building blocks to effective cybersecurity in

68. Practical Law, supra note 63.
the international commercial arbitration regime. In this article, which focuses on the arbitrator’s role, we emphasize that the fulfillment of existing arbitrator duties in the digital age encompasses a duty to be proactive and vigilant in guarding against cyberintrusion.

**B. An Interdependent Landscape with Independent Duties**

Since the data arbitrators are entrusted to keep confidential generally originates in the arbitration from the parties and their counsel, it may be tempting for arbitrators to view cybersecurity as an issue for the parties, and particularly counsel, to address on a case-by-case basis. Parties and their counsel indisputably do have legal and ethical responsibilities to safeguard the data that they import into an arbitration.69 In many instances, they will be uniquely positioned to secure that data and to advise the arbitrator regarding specific security precautions necessary in the case or required by law. Any view that purports to isolate any one particular participant in the arbitration process as having sole responsibility for cybersecurity, however, or to relieve the arbitrator from any responsibility for cybersecurity outside of the bounds of individual cases, ignores the interdependent digital landscape discussed above and is shortsighted. Since any break in the custody of sensitive data may affect all participants in the arbitral process, cybersecurity is an inherently shared responsibility.

While interdependent with other actors, the arbitrator’s cybersecurity duty also stands alone. The arbitrator who takes the view that others are primarily responsible abjures the arbitrator’s special role as adjudicator as well as the arbitrator’s underlying duties to safeguard the integrity and legitimacy of the process and the confidentiality of arbitration-related information. The obligations of other players in the arbitral process (including the parties, counsel, arbitral institutions and third party service providers among others) may be governed by differing standards and other legal regimes, only some of which overlap with those governing arbitrators.

Moreover, the arbitrator’s day-to-day data security architecture and practices pre-exist individual matters and persist after the matter is concluded. Thus, the strength of the arbitrator’s routine cybersecurity practices will impact the overall security of arbitration-

---

69. See supra Section III.D (discussing national data protection laws and regulations); Section III.C (discussing cybersecurity obligations arising from attorney ethical codes).
related data from the first moment the arbitrator becomes involved with a case, before counsel or the parties have an opportunity to address security protocols that may be appropriate for the specific data involved in the matter, and will continue after the matter ends as the arbitrator maintains at least some data for conflicts or other record-keeping purposes.

C. Personal Accountability

As arbitrators are appointed for their personal qualifications and reputational standing, it is broadly accepted in international arbitration that the arbitrator’s mandate is personal and cannot be delegated. While this notion is raised most often in discussions about impermissible delegation of decision-making responsibilities to arbitral secretaries, the personal nature of the arbitrator’s mandate has implications for cybersecurity as well. In particular, it is important for arbitrators to recognize that even if the security of their digital infrastructure is established and monitored by IT personnel, or they work in a large law firm setting where they have little to no influence over firm-wide security policies, they cannot assume that their responsibilities in relation to cybersecurity have been met.

First, effective security depends on individual choices and conduct. Hackers’ most valuable currency is human carelessness.

70. Born, supra note 27, at 2013. (“Arbitrators are almost always selected because of their personal standing and reputation . . .”).
71. See Eric Schwartz, The Rights and Duties of ICC Arbitrators, in ICC International Court of Arbitration Bulletin, Special Supplement, The Status of the Arbitrator (1995) at 86; see also Born, supra note 27, at 1999. (“An arbitrator’s obligations include the duty not to delegate his or her responsibilities or tasks to third parties. … Most fundamentally, an arbitrator cannot delegate the duty of deciding a case, attending hearings or deliberations, or evaluating the parties’ submissions and evidence to others: these are the essence of the arbitrator’s adjudicative function and they are personal, non-delegable duties.”).
72. To highlight the fundamental role played by individuals in protecting confidential information, whether reliance is placed on notepads, mobile telephones, or the cloud, Philippe Doyle Gray shares this anecdote:

I regularly walk from the Supreme Court of New South Wales down King Street to stop at the intersection with Elizabeth Street. So too do other lawyers. When it’s raining we huddle under the awning of the Sydney University Law School, but in fine weather we gather around the traffic lights waiting for the signal that it’s safe for pedestrians to cross. Usually, I see paper files or lever-arch folders neatly stating the names of the clients concerned, and sometimes the nature of their confidential affairs. Often, I can’t help but overhear a colleague talking about his matter. A few
Even if an arbitrator operates in an environment with the digital architecture of Fort Knox, important security actions will always remain in the arbitrator’s personal control. Law firm or IT policy may dictate to an arbitrator, for example, that strong, complex passwords be used on all laptops and other devices and that passwords be changed regularly. However, an arbitrator risks completely undermining that security protocol by conveniently storing a reminder of the password du jour on a post-it note stuck to the cover of a laptop, and then working away on the laptop in an airport lounge or other public environment, or, worse, forgetting the laptop in the security line or the airplane seat pocket after a long international flight. Similarly, although IT policy may dictate that no USB drive can be used in a networked computer before it is manually scanned for viruses by the IT department, an arbitrator sitting in a hearing in Vienna may decide before the flight home to take the USB drive handed out at a recent arbitration conference and use it to transfer times, sensitive material was inadvertently broadcast to passers-by that happened to include me. Once, I even overheard a colleague—speaking on his mobile phone—discuss settlement negotiations during a mediation that had adjourned over lunch: he openly discussed not only the parties’ respective offers, but his own client’s bottom line. The real security problems lie not in CLOUD COMPUTING, but in ourselves.

Gray, supra note 57. See also Harleysville Ins. Co. v. Holding Funeral Home, Case No. 1:15cv00057 (W.D. Va., Feb. 9, 2017), http://bit.ly/2mSkyuu (court held that insurer’s attorney-client privilege was waived where entire claims file was loaded onto a cloud service and made accessible to anyone via hyperlink without password protection, stating this was the “cyber world equivalent of leaving its claims file on a bench in the public square”).

73. In December 2015, The Wall Street Journal reported that “[w]eeks after J.P. Morgan Chase & Co. was hit with a massive data breach that exposed information from 76 million households, the country’s biggest bank by assets sent a fake phishing email as a test to its more than 250,000 employees. Roughly 20% of them clicked on it, according to people familiar with the email.” Robin Sidel, Banks Battle Staffers’ Vulnerability to Hacks, WALL ST. J., Dec. 21, 2015, https://www.wsj.com/articles/the-weakest-link-in-banks-fight-against-hackers-1450607401. See Int’l Chamber of Commerce [ICC], Cyber Security Guide for Business, at 8, ICC Doc. 450/1081-5 (2015) (“35% of security incidents are a result of human error rather than deliberate attacks. More than half of the remaining security incidents were the result of a deliberate attack that could have been avoided if people had handled information in a more secure manner.”).

74. According to Verizon’s 2016 Data Breach Investigations Report, “63% of confirmed data breaches involved weak, default or stolen passwords.” Verizon Report, supra note 13, at 20. See also Fox-Brewster, supra note 7 (Sony hack revealed chief executive’s password was “guessable to any semi-skilled hacker” and that passwords to internal accounts were stored in a file marked “passwords”).

75. Laptops and other devices are reportedly lost over 100 times more frequently than they are stolen. Verizon Report, supra note 13, at 44.
notes from deliberations stored on her laptop to a public computer in the hotel business center for printing.

Second, there is danger in complacency. Arbitrators understandably want to spend time on the practice of arbitration, not on routine practice management. However, an arbitrator who dismisses cybersecurity as an “IT issue” and who assumes that “others are taking care of it” fails to appreciate how a failure to heed cybersecurity may undermine his or her ability to keep arbitration-related information confidential as well as user trust and confidence in the integrity of the international arbitration regime. Notwithstanding the steady flow of news reports about cyberbreaches, it appears that “many [attorneys and law firms] are not using security measures that are viewed as basic by security professionals and are used more frequently in other businesses and professions.”  

Arbitrators who rely on IT personnel to support their practice should thus bear in mind that their existing data security framework and digital architecture may well require an upgrade or adaptation to the unique aspects of international arbitration. Indeed, just as an arbitrator should not entrust (but may be aided by) the conflicts department in his or her law firm to determine whether he or she is bound to make any disclosures in an arbitration, an arbitrator may be assisted by, but should not entrust, an IT department to fulfill the duty to avoid intrusion.

---


D. Continuous and Evolving

The duty to avoid intrusion is a continuous obligation, which is not limited in time. In part, this follows from the nature of the arbitrator’s duty of confidentiality. Since arbitrators may maintain digital information from their cases beyond the lifetime of an individual matter, ranging from case administration data (including as part of conflicts or billing systems), correspondence, procedural decisions, awards, and parties’ evidentiary submissions, parties and other participants have a reasonable expectation that arbitrators will continue to safeguard the confidentiality of such information once a case ends. Furthermore, as we have discussed above, because arbitrators accept appointments in new matters with a digital architecture and certain security practices already in place, parties and other participants have a reasonable expectation that arbitrators will heed cybersecurity from the time of appointment (and necessarily before).

The ongoing nature of the arbitrator’s duty to avoid intrusion also flows from the underlying duty to be competent. Because cyberthreats are constantly evolving alongside advancing technology, an arbitrator cannot take effective steps to avoid intrusion unless he or she keeps abreast of the changing nature and scope of cyberrisks. Otherwise, the arbitrator will not be in any position to analyze risks and weigh appropriate responses, including, for example, with respect to whether new or additional security measures may be warranted, what work-arounds might be acceptable when complying with an established security protocol proves to be impossible or impractical, or whether a new product or service is adequately secure.

E. Bounded by Reasonableness

Cybersecurity professionals routinely advise that in today’s environment of ever-escalating data breaches, there is no longer any question of if one’s digital infrastructure and data will be hacked, but

79. Int’l Law Ass’n, Draft Report of the Committee on International Commercial Arbitration for the 2010 Hague Conference, Confidentiality in International Arbitration, at 18 (2010), http://www.ila-hq.org/en/committees/index.cfm/cid/19 (although there is uncertainty regarding the duration of duties of confidentiality in arbitration, the “fact that the duty of confidentiality usually covers the award seems to point to an expectation that the regime of confidentiality should outlive the arbitral proceedings and that the obligations will not cease after the end of the arbitration.”).
only when.\textsuperscript{80} As a practical reality, it follows that the arbitrator cannot guarantee that arbitration-related information will remain safe from hackers,\textsuperscript{81} but can only take steps to mitigate the risks of cyberintrusion. In \textit{LabMD, Inc. v. Federal Trade Commission}, the U.S. Federal Trade Commission ("FTC") explained why \textquotedblleft reasonableness," assessed \textquotedblleft in light of the sensitivity and volume of consumer information [a company] holds, the size and complexity of its business, and the cost of available tools to improve security and reduce vulnerabilities," is an appropriate touchstone for determining whether a company has implemented appropriate data security measures:

[The FTC] has made clear that it does not require perfect security; reasonable and appropriate security is a continuous process of assessing and addressing risks; there is no one-size-fits-all data security program; and the mere fact that a breach occurred does not mean that a company has violated the law.\textsuperscript{82}

Notably, reasonableness, not perfection, also bounds the lawyer's confidentiality duty under the ABA Model Rules to protect information relating to the representation of a client from unauthorized access.\textsuperscript{83}

\textsuperscript{80} U.S. Attorney Preet Bharara recently made such a pronouncement in announcing criminal indictments of hackers who traded on confidential law firm information, saying, "This case of cyber meets securities fraud should serve as a wake-up call for law firms around the world: you are and will be targets of cyber hacking, because you have information valuable to would-be criminals." Nate Raymond, \textit{U.S. Accuses Chinese Citizens of Hacking Law Firms}, \textit{Insider Trading}, \textit{REUTERS}, (Dec. 28, 2016), http://www.reuters.com/article/us-cyber-insidertrading-idUSKBN14G1D5. See also, e.g., Verizon Report, \textit{supra} note 13, at 3 ("No locale, industry or organization is bulletproof when it comes to the compromise of data."); ICC, \textit{Cyber Security Guide for Business}, \textit{supra} note 73, at 10 ("Even the best protected enterprise will at some point experience an information security breach. We live in an environment where this is a question of when, not if.").

\textsuperscript{81} ICC, \textit{Cyber Security Guide for Business}, \textit{supra} note 73, at 4 (2015) ("[A]ll business managers including executives and directors must recognize that cyber risk management is an on-going process where no absolute security is, or will be, available.").

\textsuperscript{82} \textit{LabMD, Inc.}, \textit{F.T.C.} No. 9357, 2016 WL 4128215 (F.T.C. July 28, 2016). California's Attorney General notes in her Breach Report 2016 that "reasonable security" is the general standard for information security adopted not only in California but also the major United States federal data security laws and regulations. \textit{See infra}, note 111.

\textsuperscript{83} Model Rule 1.6(c) provides [a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." \textit{MODEL RULES OF PROF'L CONDUCT}, r. 1.6(c) (AM. BAR ASS'N, 1983). (emphasis added)
A risk-based approach, bounded by reasonableness, is similarly appropriate as we examine the scope and boundaries of the arbitrator’s duty to avoid the ever-evolving threats of cyberintrusion in international commercial arbitration. It follows from the conclusion there is no one-size-fits-all data security program for consumer-facing corporations that there is no one-size fits-all data security program for international commercial arbitrators; any such program would risk obsolescence and fail to account for significant contextual differences. Furthermore, as Pastore argues, a de-contextualized approach to data security may be counterproductive “in that it over-designates [sensitive] information (desensitizing practitioners to the truly critical information) and results in overly cumbersome processes for information that, in reality, needs little to no additional protections.”

In addition, a standard of reasonableness under the circumstances is familiar in the law, particularly in areas where the facts and circumstances vary widely and evolve over time. The reasonableness approach enables consideration of the trade-offs that will sometimes exist between increased security measures and other interests. To the extent the arbitrator’s duty to avoid intrusion is in tension with other important values such as conducting the proceedings expeditiously and cost-effectively and in accordance with the parties’ preferences, arbitrators should be entitled to weigh all of the relevant circumstances to determine the correct balance. Arbitrators, institutions, users, and counsel should be able to understand and embrace such a standard for cybersecurity.

Accordingly, it is appropriate to limit the arbitrator’s duty to an obligation to take such measures to protect digital security as he or she deems reasonable in light of the relevant facts and circumstances, including developments in technology and evolving security risks, the arbitrator’s individual practice setting and digital architecture, the sensitivity of the data to be protected, and any party preferences or

84. Pastore, supra note 15.
85. See generally Pastore, supra note 15.
86. See supra note 10.
87. The UNCITRAL Notes on Organizing Arbitral Proceedings (2016) note that data security is but one factor to be considered when deciding whether to use electronic means of communication for proceedings. Other factors to be considered may include compatibility, storage, access and related costs. See UNCITRAL Notes, supra note 26.
other case-specific factors present in the matters over which the arbitrator presides.

V. IMPLEMENTING THE DUTY TO AVOID INTRUSION

In the absence of a detailed roadmap for data security, the challenge for international arbitrators is to determine what specific measures they should implement to avoid intrusion, in their own infrastructure and in arbitrations over which they preside, given that what constitutes “reasonable” measures will vary based on a risk assessment of the arbitrator’s individual digital architecture and data assets, the prevalent data security threats, available protective measures and, in relation to individual matters, case-specific factors.\(^8\) Although it is by no means comprehensive, in this Part, we aim to highlight certain practical measures and general principles that are likely to be relevant for all international arbitrators, regardless of practice setting and individual risk profile.\(^9\) In doing so, we further aim to show that the fundamentals of effective cyberrisk management need not be overwhelming or unduly burdensome. In addition, since cyberintrusion in the arbitral process can potentially arise from both intentional, targeted attacks on arbitral participants\(^9\) and from the

---


89. A recent working paper from the Washington Legal Foundation suggests eight data security best practices based on an analysis of FTC enforcement actions:
   - Limit the collection, retention, and use of sensitive data;
   - Restrict access to sensitive data;
   - Implement robust authentication procedures;
   - Store and transmit sensitive information securely;
   - Implement procedures to identify and address vulnerabilities;
   - Develop and test new products and services with privacy and security in mind;
   - Require service providers to implement appropriate security measures;
   - Properly secure documents, media, and devices.


90. See supra notes 13-14.
inadvertent disclosure or compromise of arbitration-related information (e.g., by way of a weak password, lost mobile device, or other human error), we discuss below potential responses to external threats and safeguards to prevent or mitigate damage if data security is compromised.

A. Keeping Abreast of Developments in Relevant Technology and Understanding Associated Benefits and Risks

There are readily accessible resources for arbitrators to educate themselves as to the evolving nature and scope of major data security threats, with a view to understanding the significance and effectiveness of specific security protocols, such as standards for passwords. These resources have been developed by bar associations, law firms, and others. For example, the ABA has taken the lead internationally in developing guidance for legal practitioners in responding to the challenges of the digital world and regularly posts short, digestible articles online on topics such as ransomware and encryption, in addition to offering educational webinars and seminars. Such resources frequently highlight ethical opinions from state bar associations on the responsible use of technology in the legal profession.

91. Even a single misdirected e-mail—within an arbitration proceeding—can have serious consequences for the perceived integrity and legitimacy of proceedings. In Horndom Ltd. v. White Sail Shipping, Optima Shipping and Integral Petroleum (SCC Arbitration V094/2011), the respondents challenged their own appointee to the tribunal after he accidentally copied one of the parties’ lawyers on an e-mail complaining that counsel were getting “above their station” and that he was “rather sick of these parties.” While the arbitrator admitted that disagreement over the hearing date resulted in his “frustration with procedural matters” and “intemperate expression,” according to the respondents, the inadvertent disclosure of this otherwise private exchange among tribunal members revealed the arbitrator’s “personal animosity” toward counsel and raised justifiable doubts about his impartiality. See also Alison Ross, Accidental cc Triggers Double Arbitrator Challenge in Stockholm, GLOB. ARB. REV. (Oct. 17, 2016), http://globalarbitrationreview.com/article/1069329/accidental-cc-triggers-double-arbitrator-challenge-in-stockholm.

92. An episode of the popular CBS TV show The Good Wife was based on the disclosure of confidential information resulting from an open feed when a video camera was mistakenly left on after a teleconferenced deposition. The Good Wife, (CBS, 2014), http://www.cbs.com/shows/the_good_wife/episodes/213197/.

93. See, e.g., supra note 88 and accompanying text.

profession. One particularly noteworthy resource, available only to ABA members, are e-mail alerts from the FBI about evolving cyberrisks and threats targeting law firms.

Other bar associations worldwide, such as the Law Society of Upper Canada, also have developed helpful online resources. For the most part, such resources are available for free online (i.e., to members and non-members alike) and can assist arbitrators in finding quick, practical answers to technical questions written for legal professionals (such as what are the risks of public wifi and what alternatives are available for mobile wifi access). Meanwhile, to keep a handle on evolving data protection obligations internationally, now that most major law firms have a dedicated data privacy or cybersecurity practice group, arbitrators may also find it helpful to sign up for e-mail alerts from several law firms based in different jurisdictions.

B. Implementing Baseline Security

Cybersecurity experts agree that good cyber “hygiene”—basic everyday habits relating to technological use—is essential to a strong, baseline defense. Significantly, these are habits that every arbitrator, regardless of practice setting, can readily implement, with minimal cost and without the need for IT support. Basic cyber hygiene best practices include:

- creating access controls, including strong, complex passwords and two-factor authentication when available;

95. See Technology Practice Tips, LAW SOCIETY OF UPPER CANADA http://www.lsuc.on.ca/technology-practice-tips-podcasts-list/ (podcasts on “everything you ever wanted to know about technology, but were afraid to ask” including “[p]ractical and important information about passwords, encryption, social media, smartphone security, websites and much more . . . in an accessible, conversational manner.”).


97. On some devices, including many phones and tablets, biometric authentication technologies such as fingerprint scanners now are available to perform the authentication and access control function. See PWC Report, supra note 13, at 9-12.

98. Many services and sites that store sensitive information, including cloud storage and e-mail providers, offer two-factor authentication whereby access requires a password plus something else that you have; typically, a security code that is either sent by text message or e-mail to a separate device or generated via an app that works offline such as Google Authenticator, or a biometric like a fingerprint. See Two-Factor Authentication for AppleID,
• guarding digital “perimeters” with firewalls, antivirus and antispyware software, operating system updates and other software patches;
• adopting secure protocols such as encryption for the storage and transmission of sensitive data;
• being mindful of public internet use in hotel lobbies, airports, coffee shops, and elsewhere and considering making use of personal cellular hotspots and virtual private networks; and
• being mindful of what one downloads.

C. Taking a Thoughtful Approach to Assets and Architecture

As Pastore explains, determining what cybersecurity should be implemented turns on knowledge of one’s “assets” and “architecture.” That is, what sensitive information do you have (e.g., customer lists of a client, sensitive trade secrets developed through substantial R&D expenditures, or potentially market-moving information about future business plans), and where do you store it (e.g., with a third-party cloud provider, on portable (and easily lost) external media like thumb drives, or on networks accessible by other practitioners in the firm without regard to whether the need access to such data). This exercise will be relevant in respect to the arbitrator’s own practice-related data, such as conflicts and billing records, closed case records, as well as the data received in matters where the arbitrator is presiding. If the arbitrator works in an organizational setting, it will also be relevant in respect to the arbitrator’s use of personal devices, which are often not subject to


100. See e.g., Alex Castle, How to Encrypt Almost Anything, PC WORLD, (Jan. 18, 2013), http://www.pcworld.com/article/2025462/how-to-encrypt-almost-anything.html.


102. See supra note 99.

103. In this article, we frequently refer synonymously to one’s digital “infrastructure.”

104. Pastore, supra note 15.
established security protocols.105

Once the arbitrator knows and classifies the sensitivity of the different data he or she holds and knows where it is located, the arbitrator will be in a position to assess what protocols may be appropriate for storage and transfer of the information.106 In addition, the arbitrator will be in a position to consider what steps can be taken to reduce the risk that sensitive data will be compromised in a cyberattack or following human error. For example:

- Though the arbitrator may own both a tablet and laptop, do arbitration-related documents need to be accessible on both devices, or is it sufficient that they are loaded on one? (Here, an important consideration is whether the data really needs to be loaded onto a portable device and subjected to the enhanced risks of travel.)
- Can the arbitrator enable notifications for e-mail107 or cloud services108 when unauthorized data access may have occurred and remotely revoke that access or wipe data?
- When working at home, does the arbitrator use a separate device in lieu of a shared family computer? If not, are there other steps the arbitrator can take to segregate business data (e.g., by using separate computer logins)?

By the same token, at the conclusion of a case, the arbitrator should seek to avoid holding onto case-related data longer than is necessary.

105. According to the ABA TechReport 2016, most lawyers (74%) use a personal rather than firm-issued phone for their legal work and a majority (51%) use a tablet for legal work, the vast majority of which (81%) are personal devices. Nonetheless, “only 43% of lawyers reported having a mobile technology policy for their firm, meaning the majority of law firms don’t even have a policy for how mobile devices should be used and how client data should be stored and transmitted on them.” Aaron Street, Mobile Technology, ABA TECHREPORT (2016), http://www.americanbar.org/publications/techreport/2016/mobile.html.

106. Pastore discusses this analysis in greater detail. See Pastore supra note 15.

107. Such measures are generally not available for free consumer e-mail services. Thus it is generally preferable to use paid professional versions of these services, which have more robust security protocols.

108. Numerous lawyer ethics opinions have considered whether the use of cloud services is compatible with an attorney’s obligation to maintain confidentiality. The decisions generally have concluded that lawyers may use the services, provided that they take reasonable steps to select a reliable vendor, implement available security and address the potential risks. See Cloud Ethics Opinions Around the U.S., AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resource_s/charts_fyis/cloud-ethics-chart.html
With a view to developing an individualized document retention policy, the arbitrator should give thought to what information will be kept, why, for how long, where case information resides now (across which devices and in what applications/programs), and where the materials will be stored. At a minimum, the arbitrator will want to retain basic case administration data for the purposes of future conflicts checks. Otherwise, the arbitrator may wish to consider questions such as:

- During the life of a case, can the arbitrator use file-naming conventions to facilitate identifying and segregating types of documents, such as pleadings and exhibits, that the arbitrator is unlikely to have any interest in retaining after a case ends?
- Does applicable law preclude the arbitrator from retaining certain data or mandate that it be stored or disposed of in any particular fashion?
- To the extent that it is desirable and appropriate to retain arbitrator work product, such as procedural orders and awards, for personal future reference, would it be workable to retain anonymized Word documents in lieu of final PDF copies?
- If the arbitrator practices in an organizational setting that has a document retention policy, are documents kept longer than necessary to comply with rules applicable to the attorney-client relationship, which do not apply to service as an arbitrator?

**D. Planning for a Data Breach**

Separate from considering data breach protocols for individual cases, there are a number of useful reasons for the arbitrator to consider more generally how he or she would respond to a data breach if and when one arises. First, by thinking through what steps should be taken in the event of various scenarios, the arbitrator may be able to identify and remediate security vulnerabilities that he or she had not considered. Second, the arbitrator will be in a better position to react quickly to control or limit the damage that flows from a security incident, and possibly avoid triggering duties to notify data owners, regulators, insurers, law enforcement, or others that a security breach has occurred.

---

incident occurred. This exercise is particularly important for international arbitrators for whom international travel is a fact of life, as travel creates special risks of inadvertent data loss and vulnerability to unlawful intrusion.

The prospect of a lost laptop, for example, may prompt an arbitrator to consider:

- Is the laptop protected by a strong password?
- Is full disk encryption enabled?
- Can the arbitrator make use of location tracking and/or remote data wiping to minimize potential disclosure of sensitive information?
- Can the arbitrator provide the police with the serial number for the laptop?
- Can the arbitrator avoid lost productivity by restoring information on the laptop from a back-up?
- Is there sensitive data on the laptop that could trigger breach notification duties? If so, could that data be handled differently (e.g., securely destroyed or encrypted)?

### E. Case Management Considerations

In our view, the arbitrator must be attuned to data security issues in the organizing phase of the arbitration. Taking into account such

110. See, e.g., U.S. Department of Health & Human Services, Guidance Regarding Methods for De-identification of Protected Health Information in Accordance with the Health Insurance Portability and Accountability Act (HIPAA), https://www.hhs.gov/hipaa/for-professionals/privacy/special-topics/de-identification/#_edn1 (last accessed Jan. 21, 2017) (explaining that there is often a safe harbor for data breach notification if sensitive information has been encrypted or otherwise de-sensitized); Kamala D. Harris, Attorney General California, Department of Justice, Breach Report 2016, available at https://oag.ca.gov/breachreport2016 (last accessed Jan. 21, 2017) (explaining major differences between state notification statutes); See Cal. Civil Code § 1798.82 (demonstrating that in 2016, California amended its data breach notification law effective January 1, 2017 to trigger notification obligations not only if unencrypted data is compromised, but also if encrypted data is breached along with any encryption key that could render the data readable or useable).


112. These measures are available for Apple devices including laptops, for example, but only if the “find my iPhone” feature has been activated first.
factors as the size and complexity of the case, the likelihood that confidential or sensitive data will be stored or transmitted, the parties’ resources, sophistication, and preferences, as well as potential legal obligations arising under applicable law or rules in relation to data privacy or confidentiality, the arbitrator should consider whether to raise the topic of data security at the initial case management or procedural conference. Thereafter, the continuing scope of the arbitrator’s duty will depend on factors such as the extent to which the parties or their counsel assume responsibility for data security and the arbitrator’s own assessment of the ongoing risks and the measures he or she can reasonably implement in addition to or in lieu of measures other actors are undertaking.

The arbitrator may also seek the cooperation of the parties and counsel in avoiding the unnecessary transmission of sensitive data to the tribunal. For example, at the outset of an arbitration, the arbitrator may consider telling counsel that, apart from reliance documents submitted with the parties’ memorials, the arbitrator is not to be copied on, or provided with, any pre-hearing disclosure that the parties may otherwise exchange. Likewise, if the arbitrator can anticipate that sensitive personal information (such as tax returns) or commercial information (such as pricing information or trade secrets) will be exchanged, consideration may be given to having irrelevant information redacted (e.g., to show only the last four digits of a social security number). Alternatively, it may be possible to aggregate or anonymize data before it is provided to the arbitrator without diminishing either party’s ability to fairly present its case.

VI. LOOKING TO THE FUTURE

We conclude this article with the well-worn maxim that “it takes a village.” We hope that the challenge we present to arbitrators will stimulate discussion in the international commercial arbitration community and prompt other participants to focus on their own responsibilities and how their individual security architecture and practices may undermine or support the security measures taken by

113. See UNCITRAL Notes, supra note 26. Consistent with the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings, we do not intend to suggest a binding requirement for the tribunal or parties to act in any particular manner.
others. As awareness of cybersecurity risks in arbitration increases, we hope to see dialogue around questions such as the following:

- Should arbitral institutions amend their rules to flag data security for consideration in the initial organizing phase of an arbitration, as their rules now do with respect to other important topics, and/or should they expressly establish duties for the parties, counsel, institution and arbitrators to implement reasonable measures to avoid intrusion?

- Should counsel be charged with developing a data security plan in individual arbitration matters and/or providing a secure platform for the transmission and storage of data in each matter?

- How should tribunals resolve party conflicts about appropriate security measures, breach notification obligations, and related costs?

- Should arbitrators routinely disclose their data security practices to parties and counsel (e.g., in relation to cloud computing or post-award document retention) and should those practices be subject to the parties’ comments and consent?

- Should arbitral institutions or other participants develop shared secured platforms for data storage and transmission that would be available to parties as a non-exclusive choice?

- What kinds of training and education programs should be developed for parties, counsel, arbitrators, and other participants to provide baseline knowledge, as well as updated information on evolving data security threats and updates on available protective measures?

114. See e.g., ICC RULES, supra note 10, at art. 22 (effective case management) and Appendix IV (case management techniques); ICDR RULES, supra note 10, at art. 20(2) (noting that the tribunal and the parties may consider how technology, including electronic communications, could be used to increase the efficiency and economy of the proceedings) and art. 20(7) (establishing the parties’ duty to avoid unnecessary delay and expense and the tribunal’s power to “allocate costs, draw adverse inferences, and take such additional steps as are necessary to protect the efficiency and integrity of the arbitration”); LCIA RULES, supra note 1, at art. 14 (avoiding unnecessary delay and expense) and art. 30 (confidentiality).

115. See David J. Kessler, et al., Protective Orders in the Age of Hacking, NYLJ, (Mar. 16, 2015), reprint at 1 (“In the age of cyber attacks, hacking, and digital corporate espionage… protective orders should be upgraded to require reasonable levels of security to protect an opponents’ data and more stringent notification requirements if unauthorized access does occur…”).
Should institutions that maintain rosters of arbitrators require their arbitrators to complete mandatory cybersecurity training?

Should arbitrator ethical codes be updated to define competence to include an obligation to keep abreast of new developments in arbitration and its practice, and to consider the benefits and risks associated with technology?

Should professional organizations like the International Bar Association or the Chartered Institute of Arbitrators develop cybersecurity checklists or guidance notes for arbitrators, counsel, or other participants?

There will no right answer to these and other relevant questions, but we are confident that dialogue will be constructive. What will constitute a reasonable data security program and what reasonable measures individual participants in the process should take will continue to evolve. Our hope is that increased awareness will ensure that a process will emerge in every arbitration to identify data security risks and develop a response, having regard to the nature and scope of the risks, the desires and resources of the parties, and other relevant factors.
The Knowledge Curve

As time passes, memories fade and the knowledge base degrades.

Parties, lawyers & experts try to reconstruct the knowledge base – with uncertain results …