Message from the Chair

Why do parties seek to resolve disputes through alternatives to the court system? For those of us who have worked in the alternative dispute resolution field, the reasons roll off our tongues. Parties seek a more efficient, less costly method to resolve disputes and, if they use arbitration, often select persons knowledgeable in the subject matter of the dispute.

The last half of 2018 brought renewed attacks on the arbitration process. To be precise, the attacks are on the practice of including arbitration as a required process in pre-dispute agreements primarily in the consumer and employment context. The attacks are distressing, especially when they are based on misunderstandings about the process.

The inclusion of pre-dispute arbitration clauses in agreements has a long history in the United States. President George Washington included such a clause in his last will and testament. In his will, he expresses his hope that he was clear enough with his direction that there would not be any disputes over his bequests; however, in case a dispute arises, he provided that "all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding."[1]

Fast forward 100 years and we note that before Abraham Lincoln became President, he had a vibrant practice as an attorney and he actively advocated using alternative dispute resolution processes to resolve disputes. He regularly used binding arbitration to achieve client goals. He also used his personal experiences when he served as an arbitrator to reduce costs and time for disputing parties.[2]

Other Presidents supported using arbitration for a wide range of both domestic and international disputes including Presidents Ulysses Grant, Grover Cleveland, Theodore Roosevelt, Herbert Hoover, Calvin Coolidge, Woodrow Wilson, William Howard Taft, and Franklin Roosevelt. Herbert Hoover and Calvin Coolidge can be credited with the passage of the Federal Arbitration Act.[3]

Is arbitration perfect justice—no, it is not, but it is a way to meet clients' goals for dispute management and resolution. Is it the right process for every dispute? Again, the answer is no and for that reason, we have seen a rise in the use of mediation.

While arbitration is not perfect justice, some of the criticism we hear is directed toward specific issues and sometimes in specific types of disputes. In the era of the "#MeToo movement" confidentiality within the arbitration process is being criticized. But how confidential is arbitration? Under most domestic arbitration rules, only the forum and the arbitrators are required by the rules to maintain the confidentiality of arbitration proceedings. Absent an agreement or order of the tribunal, the parties may speak about the proceedings outside the hearings and may also talk to the press—but do they want to?

The American Arbitration Association (AAA) publishes all employment arbitration awards through Westlaw. The names of the parties are visible unless there is a request for redaction. So there is a way to find out about similar cases. Commonly, settlement agreements (even in court proceedings) contain non-disclosure clauses. Yes, this protects the perpetrator of harassment if that is the issue at bar, but it also protects the victim. Does a victim of harassment really want to be subjected to the publicity about the settlement and the circumstances leading to the settlement? Another twist is the passage of statutes and regulations that eliminate any tax benefits for settlements relating to sexual harassment when a non-disclosure clause is incorporated into a settlement agreement[4]—a trap if the lawyers negotiating the agreement are unaware of the different state and local statutes and regulations.

"A more recent attack on arbitration in general is the dearth of minorities and women on the rosters of arbitrators."

A more recent attack on arbitration in general is the dearth of minorities and women on the rosters of arbitrators. In the beginning of this column I highlighted that President Washington elected to have "men" appointed to arbitrate any disputes under his will. Unlike in the days when our nation was born, today's disputants and their lawyers are diverse and arbitration does serve as a substitute for public processes. Accordingly, the rosters from which disputants select arbitrators should be diverse.

All alternative dispute resolution providers have made strides to increase the number of women and minorities on their rosters. The AAA has been a leader through their Higginbotham Fellows Program. The AAA roster is comprised of 24 percent women and minorities.[5] The AAA requires women and minorities to be named on each list offered for selection by the parties.

In October 2018, JAMS announced the inclusion of a diversity rider in its arbitration clauses to encourage parties to select diverse neutrals.[6] CPR, which had formed a diversity task force and pioneered a diversity pledge for its member corporations, in March 2018 promulgated the Young Lawyer rule to provide opportunities for women and minorities to advocate in arbitration proceedings, thereby increasing opportunities for them to be recognized.[7]

All of these initiatives are increasing the number of choices that disputing parties have to select from, but placing names on a list doesn't get diverse neutrals selected. Disputing parties need to make a conscious effort to give diverse neutrals an opportunity to serve. Otherwise, like "wallflowers" at a ball never asked to dance, diverse neutrals will not be selected. In 2019, the Dispute Resolution Section will support and act to open the doors wider to encourage the selection of women and minorities. Look for our "Guide for Establishing an Alternative Dispute Resolution Practice" and our "Report on Women and Minorities in the Field."

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Endnotes

1. https://www.trans-lex.org/800900/_/arbitration-clause-in-the-will-of-george-washington-1799/#clause.
2. *See* https://law.pepperdine.edu/parris-institute/app/content/stipanowich-lincoln-article.pdf for a more extensive discussion about how Lincoln used mediation and arbitration.
3. *See* https://www.arbresolutions.com/presidents-and-arbitration/ for a summary of each Presidents' supporting actions.
4. *See* Federal Tax Cuts and Jobs Act of 2017 Section 162 (q) as an example.
5. https://www.adr.org/RosterDiversity.
6. https://www.jamsadr.com/pdf-viewer.aspx?pdf=/files/uploads/documents/articles/taylor-ccbj-model-arbitration-rider-encourages-diversity-in-selection-of-neutrals-october-2018.pdf.
7. https://www.cpradr.org/news-publications/press-releases/2018-02-20-cpr-incorporates-young-lawyer-rule-into-its-arbitration-rules.