Message from the Chair

Abigail Pessen

The mood of the country is unsettled these days. But while we are uncertain about where the nation is headed, the presidential election has provided likely answers to some important questions in the dispute resolution field. For example, the next Justice of the U.S. Supreme Court—not yet confirmed at press time—is expected to restore the high court's conservative majority. This portends a pro-arbitration ruling on whether bans on collective employment arbitration violate workers' rights to concerted action protected under the National Labor Relations Act; certiorari has been granted to resolve the circuit split on the issue. Likewise, the Obama administration's attempts via regulatory action to bar mandatory arbitration of financial services and nursing home disputes may very well be scuttled when the current heads of the Consumer Financial Protection Bureau and the Health and Human Services Department are replaced.

As a counterpoint to developments that likely favor mandatory arbitration clauses, public sentiment against "mandatory" or "forced" arbitration appears to be growing in the wake of a *New York Times* series of articles and editorials, Fox News anchor Gretchen Carlson's obligation to arbitrate her sexual harassment claim (now settled), and Wells Fargo customers being compelled to arbitrate their claims of fraudulent accounts.

Mandatory arbitration may indeed be a "mixed bag" for employees like Ms. Carlson, who are required as a condition of their employment to individually arbitrate all claims, including statutory discrimination claims, against their employers. In addition to forgoing a jury trial, participation in a class or collective action, and the right to appeal (since review of arbitration awards is very limited), employees cite the difficulty of discovering the existence and outcomes of similar discrimination claims against their employer, who invoke the confidentiality provisions in their arbitration agreements. Offsetting these drawbacks is the privacy afforded by arbitration, which is often a real—and overlooked—benefit to employees, protecting them from the prying eyes of Internet trolls scanning court filings for future employers eager to avoid hiring "troublemakers." The disallowance of employers' summary judgment motions in most arbitrations is another significant advantage. It is intriguing to wonder whether, if mandatory pre-dispute arbitration clauses were no longer enforceable in the employment context, employee-side counsel might opt for arbitration in some, or even many, cases, finding it a preferable alternative to court litigation.

In the meantime, one unexpected and noteworthy consequence of collective arbitration bans has been the initiation of numerous individual arbitrations by large employee-side law firms, creating employer exposure to multiple attorneys' fee awards and the risk of inconsistent outcomes. This has in turn led in some cases to agreements to engage in collective mediations seeking global resolution of all the individual cases.

Mediation is also on the rise as parties seek to control expense and state and federal trial and appellate courts seek to reduce their dockets by expanding court-annexed mediation programs.

A snapshot of dispute resolution in 2017 thus would show mediation gaining in popularity, while mandatory arbitration continues to fend off challenges which—even if unsuccessful in a conservative, pro-business environment—may sully the reputation of commercial arbitration in general, even when freely agreed to by parties eager for the choice of decision-maker, speed, cost savings, finality, and privacy it offers.

The snapshot would reveal another disquieting fact: despite research concluding that diversity among neutrals leads to better outcomes for the parties, opportunities for minority and female arbitrators and mediators still lag in comparison to their white, male counterparts. Some commentators explain this as a "pipeline" problem, i.e., a lack of minority and female attorneys possessing the needed experience and qualifications to be successful neutrals. However, the much larger numbers of women and minorities in the judiciary cast doubt on this explanation. Others note that end-users or their counsel are reluctant to risk selecting an untried mediator, or, even more so, an unknown arbitrator.

How can this cycle be broken? One suggestion is that ADR providers require that a certain percentage of minority or female neutrals be included in every list of mediators and arbitrators provided to their users. While

laudable, such a policy—already adopted by the American Arbitration Association—does not guarantee the selection of a minority or female neutral by the users. Another approach providers might consider would be to encourage party-appointed arbitrators to select a minority or female arbitrator as their chairperson.

Other suggested remedies call for companies to select neutrals as they select other vendors, requiring a certain percentage to be diverse or at least requiring year-to-year improvement. The New York State Bar Association is considering a recommendation that diversity-related content be made a mandatory part of CLE requirements. Our Section now insists on diverse presenters for all of its panels and programs. We've also started a diversity scholarship program, offering free mediation or arbitration training, Section membership, and mentoring to ten minority or female attorneys every year (see details at nysba.org/drs).

At a recent forum on this topic, dispute resolution processes were celebrated as the "thread" that sews together the gloriously diverse patchwork quilt of our country. If this thread itself can become multi-colored (and multi-gendered), the quality of ADR will be improved immeasurably for parties, advocates and neutrals alike. And that's a good thing.

Abigail Pessen

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Message from the Co-Editors-in-Chief

If you are reading this *Journal* you are part of a growth industry. This issue deals with an astounding breadth of worldwide developments. This scope makes clear that "alternative dispute resolution" is no longer of lesser status than litigation; it has gained worldwide acceptance, providing practical solutions both to routine and to bet your business disputes around the world.

Edna Sussman

Sherman Kahn

Laura A. Kaster

This issue demonstrates, among other things, that (1) cities and countries around the world are competing to attract international arbitration business and to routinize the administration of these matters; (2) champerty and maintenance restrictions have not impaired or slowed the development of third-party funding, a practice which has come into its own, requiring rules in Hong Kong and new concerns to evaluate in our Ethical Compass column; (3) there is a recognized need to establish a stronger regime under the Hague Convention for the enforcement of forum selection clauses and court judgments around the world to complement the dominance of the New York Convention in fostering the growth of arbitration; (4) and despite worldwide parallel development of ADR techniques, cultural differences still have an impact.

The upshot is that all lawyers must understand the worldwide ADR terrain in order to provide transactional and dispute-related advice that anticipates and minimizes the cost of business disputes and manages them when they arise.

We are proud to be the publication of our very dynamic section that is fostering New York as a critical center for these developments.

Laura A. Kaster, Edna Sussman and Sherman Kahn

We note with sorrow the death of renowned mediator Margaret Shaw, who contributed so much to our profession.
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