SCHOOL OF LAW
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Canada-United States Law Journal

Volume 17 | Issue 2 Article 41

January 1991

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George W. Coombe, *The Future: Implementing New Approaches to the Settlement of Transnational Commercial Disputes*, 17 Can.-U.S. L.J. 533 (1991)
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The Future: Implementing New Approaches to the Settlement of Transnational Commercial Disputes

*George W. Coombe**

I. INTRODUCTION

The resolution of domestic commercial disputes continues to absorb the attention of business and the bar in both Canada and the United States. Until recently, those disputes have been addressed almost exclusively by the international arbitration bar. However, the Canada-U.S. Free Trade Agreement, with its constructive emphasis upon dispute resolution, must be considered an important harbinger of things to come, and not only for the resolution of transnational disputes between or involving governments.[1] The question then arises whether domestic dispute reso-

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[1] During the negotiation of the Canada-United States Trade Agreement, in 1987, a Joint Working Group of the American and Canadian Bar Associations advanced certain "Guiding Principles" as useful guidelines to the negotiations in addressing the dispute settlement provisions of the Free Trade Agreement. Those principles included the following:

Principle 1

Any free trade agreement between Canada and the United States must include an effective dispute settlement system designed specifically for a free trade area.

Principle 2

Such a system for dispute settlement should consist of a variety of dispute settlement means and techniques.

Principle 3

The system should facilitate the presentation to the two governments of recommendations with respect to each subject matter or stage of a dispute, suggesting the means or techniques to be used to solve the problems. However, the parties, by agreement, should be able to substitute other means if they feel that they would be more likely to reach a solution thereby. . .

Each principle, and the accompanying commentary, find a pragmatic analogue in the address of domestic disputes. Thus, Principle 1 supports the idea of a resolution mechanism responsive to the specific needs of an industry and the prospective party disputants; Principle 2 encourages a sequential or structured approach; and Principle 3 suggests address by several layers of management. Together with other principles, the group thereby recommends the creation of a preventive law, legal compliance, dispute resolution environment. *See* 22 No. 3 THE INTERNATIONAL LAWYER, 879 *et seq.* (Fall 1988)

The dispute resolution procedures (Chapters 18 and 19) of the Free Trade Agreement reflect the spirit of the Principles enunciated by the Joint Working Group. *See*, Ince and Sherman, *Binational Panel Reviews Under Article 19 of the U.S.-Canada Free Trade Agreement: A Novel Approach to International Dispute Resolution*, 37 No. 3 FEDERAL BAR NEWS & JOURNAL 136 (March/Arpril 1990); Horlick and Valentine, *Improvements in Trade Remedy Law and Procedures Under the Canada-United States Free Trade Agreement*, FEDERAL BAR NEWS & JOURNAL, Special Report 3-88. In contrast, the dispute resolution system established by the General Agreement on Tariffs and Trade (GATT) was fragmented and controversial. A major goal of the United States in the Uruguay Round of trade negotiations was to improve the functioning of that system. In early 1989, major

Published by Case Western Reserve University School of Law Scholarly Commons, 1991

lution principles can be applied to transnational business. The answer will be found in the nature of the underlying transactions, evolving international political and economic change, and the expectations of the parties concerned. A brief consideration of these derivatives will prove helpful in the evaluation of any proposed transnational dispute resolution mechanism.

The advent of profound political, social, and cultural change within the European Community (Europe 1992), the North American continent (Canada-United States Free Trade Agreement; proposed Mexico-United States Free Trade Agreement), and throughout Eastern Europe and the Pacific Rim, has been accompanied by the expansion of free societies and the ongoing transition from socialism to capitalism. Some prominent observers opine that the resolution of transnational business disputes closely relates to such change. They emphasize that expanding freedom will motivate international, regional, and national support for trade and investment. In turn, business dispute mechanisms will expand and gain legislative and judicial recognition. These observers perceive an appropriate and sympathetic response by national civil justice systems to encourage the process.[2] Again, the Canada-U.S. Free Trade Agreement is an important manifestation of that encouragement.

Consider the response of business to this changing global environment. Today, the complexity of transnational commercial transactions reflect a willingness of the parties to create and sustain a comprehensive endeavor in the expectation of mutual economic benefit extended over a substantial period of time. These contemporary endeavors are far more complex than those traditional undertakings, essentially simple and discrete, identified with a world prior to the 1957 Treaty of Rome. The legal attributes of those earlier business transactions appear, in retrospect, rather mundane: letters of credit; bankers acceptances; and the conformity of the quality of merchandise to contractual standards. Commercial disputes derived from those earlier transactions were resolved within specialized industries (such as international shipping and insurance) or through international commercial arbitration, institutional or *ad hoc*. In short, the nature of the underlying transactions provided a convenient framework for dispute resolution by settlement, arbitration, or litigation. Phrased another way, dispute techniques related to discrete

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institutional changes, the only concrete achievement of the Uruguay Round, to insure timely and efficient dispute settlement in GATT and the implementation of a new system of national trade policy scrutiny, were adopted by the GATT Council. In general, these changes responded to the concerns of the United States and others by making the dispute process more legalistic and less diplomatic, thereby resolving trade disputes on a more technical basis primarily by reference to the existing rules. Accordingly, future disputes should be resolved under the procedures by stricter adherence to precedents. The interpretation and clarification of GATT rules through case law development also should be encouraged. See GATT Newsletter — FOCUS, No. 62 — June 1989, at 1, 4.

2 Unpublished papers of the Rt. Hon. Lord Goff of Chievely, and Arthur L. Marriott, Esq. presented to the Chartered Institute of Arbitration at its 75th anniversary Conference, London, England, October 1990.

transactions, producing "win-lose," "yes-no" resolution of precisely framed issues.

This is in contrast to the world today, where disputes typically arise within the context of: joint ventures between two or more transnationals to establish research and development, marketing, or manufacturing facilities in a third country; joint ventures between private investors and state owned enterprises for large-scale industrial and agribusiness development projects in the Third World; co-financing projects involving the World Bank, the International Finance Corporation, private investors, and state and parastatal enterprises; and participation agreements in natural resource projects. Today, expectations of the parties to such transnational transactions must, out of necessity, include the probability that disputes will arise in direct relationship to the complexity and duration of the several mutual undertakings.[3] Accordingly, senior corporate executives have become more demanding and sophisticated in their expectations pertaining to the management of legal support services and the containment of corporate legal expense, both domestic and international. A brief description of those expectations provides a convenient point of departure for consideration of new approaches in the settlement of transnational disputes.

II. Client Expectations

Client sensitivities to exposure litigation and the need for active client participation in early recognition of that exposure have become increasingly evident. Corporate executives now assume an aggressive role in the review and appraisal of major litigation and in the charting of a critical path to an efficacious resolution of the underlying controversy. Briefly stated, management's objective is to create a preventive legal environment, to reduce legal risk, and contain legal expense, particularly litigation expense. An important component of that environment is management understanding of alternative dispute resolutions ("ADR").

It is a reasonable assumption that, if properly informed, most individuals and most business entities would rather resolve their disputes in a timely and non-adversarial manner than be preoccupied with an interminable formal legal process. Business related controversies rarely involve matters of principle or morality. Generally, the single question involves money, and corporate officers are able to manage that problem. Accordingly, many U.S. corporations, whether conducting domestic or international business, and regardless of size, have created a preventive legal environment. In that regard, the corporate commitment begins with the

[3] An early analysis of the changing nature of transnational business disputes is found in Carter, *Matching Technique To Need In The Resolution Of International Business Disputes*, a Discussion Paper, presented to the Center of Public Resources Intercorporate Disputes Task Force Workshop in April 1982; *see also*, Dankmeyer, *Long Term Contracts and Change*, an unpublished paper presented to the International Symposium on Pacific Basin Dispute Resolutions, May 1987.

chief executive, extends to all senior executives, including the general counsel, and on to every line manager. Often that commitment is manifested by a public statement of a corporate "pledge" to use ADR. The described environment relies heavily, in many corporations, upon the instruction of line officers in dispute resolution techniques with particular emphasis upon negotiation strategies to minimize future disputes. The ability of those officers to resolve business disputes, without the assistance of counsel, remains critical to the success of any such instructional effort. Finally, corporations are re-examining transactional documentation and attendant policies and procedures to assure a consistent and viable position in the event of any dispute involving their business activities.[4]

Not surprisingly, the described client expectations are beginning to make a profound impression upon the private bar in the United States. That impression now includes a recognition that the client is entitled to the full range of legal services, including ADR techniques. For its part, law firm management has begun to create a professional culture receptive to ADR within the firm. Several major law firms have reacted positively to these developments and have created formal ADR policies. Some resistance by the litigation bar has been noted, but this should dissipate in light of overall realities underlying law firm client relations. Indeed, selling ADR services to the firm management should not prove difficult. Today, there is little doubt that ADR responds to expanding client expectations. Basic law firm economics compel the introduction of ADR support to augment existing capabilities and to meet comprehensive demands for preventive legal services. And, of course, competitive realities dictate a positive approach, regardless of the size of the client. It should be a short step from the successful resolution of a given dispute to a legal audit of the client's activities for the purpose of obviating future disputes. Thus, ADR, coupled with client satisfaction, should reaffirm client loyalty and augment firm income.[5]

It is also important for the firm management to understand that ADR is an "adjunct practice." It is not a substitute for litigation or any other substantive service. Accordingly, the internal emphasis should be on educating all firm professionals with specific examples of ADR success and positive client reactions. Through such an effort, opportunities for cross-marketing within the firm should become evident. Attorneys should see the opportunities for dispute resolution that exist at different stages of a business relationship: prospectively, during the negotiation of a given transaction; contemporaneously, when a dispute arises and the parties seek to resolve it, and yet maintain their relationship; and, retro-

[4] George W. Coombe, *Anatomy of a Business Dispute - Successful ADR Analysis by the Office of General Counsel*, 45 ARBITRATION JOURNAL 4 (September 1990).

[5] George W. Coombe, *Dispute Resolution and the Corporate Law Firm: Toward A Full-Service Legal Practice*, 45 ARB. J. 29 (March 1990).

spectively, following termination of the transaction, when faced with the threat of litigation resulting from problems encountered.

The need at most firms is for information pertaining to ADR; convenient access to ongoing ADR developments; training and development of lawyers in ADR techniques; analysis of existing cases for appropriate application of ADR opportunities; screening of new cases for potential ADR adaptations; and perhaps most important, the drafting of dispute resolution provisions for application by lawyers in the several substantive groups within the firm. Already, a growing number of major U.S. law firms and offices of general counsel have found ADR to be a helpful component in meeting growing client expectations for full service legal representation. ADR has gained considerable momentum in the U.S. corporate arena; as more business executives become familiar with its benefits, ADR will move closer to earning a permanent place in standard legal practice.[6]

Despite the foregoing recitation of ADR progress, I doubt very much that the business of traditional litigation, domestic or transnational, will measurably diminish. Identification of the realities underlying traditional transnational commercial litigation will set the stage for consideration of alternatives for the resolution of private transnational commercial disputes

III. THE REALITIES OF LITIGATION

Today, dispute resolution has become the subject of serious discussions during the negotiation of most transnational business transactions. Indeed, the pragmatic question for counsel now is how much to yield on other issues to obtain an appropriate ADR provision for the client and avoid resort to the legal system of the other party. Traditionally, in the absence of any dispute resolution clause, the only "alternative" when a dispute arose was to initiate litigation. Unlike domestic litigation, counsel then faced two formidable concerns: will the forum chosen accept jurisdiction; and will the client be able to make effective use of the judgment or decree that emerges from the litigation. Some uncertainty could be removed if the parties agreed that any controversy would be resolved by a designated national court. However, questions remained regarding the extent to which such "exclusivity" provisions, choice of forum and choice of law, would be honored. The scope of party autonomy in that regard might be constrained by the law of the forum, or by that of another country under choice of law principles. Accordingly, it was not surprising that counsel and client often concluded that an arbitration clause could accomplish all of the objectives of the choice of forum provision while avoiding many of the inevitable litigation burdens.[7]

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[6] Freyer, *The Integration of ADR into Corporate Law Firm Practice*, 45 ARB. J. 3 (December 1990).

[7] The transnational aspects of adjudicating jurisdiction, including a review of recent cases, are

Those burdens have overwhelmed the civil justice system throughout the United States.[8] The expense and frustration derived from an adversarial and adjudicatorial system are self-evident to counsel and client alike: i.e., congested dockets; extended pretrial and discovery; escalating costs and counsel fees; and a substantial commitment of the client's time and emotion. For most clients, placing dispute resolution within the context of transnational litigation sharply reduces that expense and frustration.

Domestic litigation is, at best, a difficult learning experience for most business clients, most becoming exasperated by their inability to manage and control the process. Consider, then, a typical transnational lawsuit introducing the uncertainties of a foreign jurisprudence, procedural idiosyncracies, the threat of concurrent jurisdiction and multiple litigation, and subtle nuances in the application of public policy considerations to the dispute and its resolution.

Recently, however, legislatures and the judiciary in the United States, both federal and state, have started to address many of the described realities. A brief summary of these initiatives permits some hope that the civil justice system may yet respond constructively to the overriding expectations of every litigant: the fair, timely, and efficacious resolution of a dispute, whether domestic or transnational.

Dispute resolution procedures in the United States District Court for the Northern District of California provide a representative and convenient example.[9] There, the Court urges counsel to share with the client material, prepared by the Court, explaining the full range of dispute resolution and case management methods available. These methods sponsored by the Court, include:

> *Early Neutral Evaluation*
> Under this program, a neutral, experienced, respected private lawyer assists the parties and their counsel, prior to discovery, to analyze the critical contested issues, their discovery needs, their relative strengths and weaknesses, and the overall value of the case. The evaluator candidly assesses these items and helps the litigants devise a plan for sharing information and/or conducting discovery that will posture the case for serious settlement negotiations as expeditiously as possible.
>
> *Court-Annexed Arbitration*
> This is a compulsory, non-binding arbitration program for contract or

discussed in Steiner and Vagts, TRANSNAT'L LEGAL PROBS., 23-49 (3d ed. 1986). Problems pertaining to the enforcement of foreign-country judgments are also discussed in Steiner and Vagts, *id.* at 50-78.

8 A succinct description of the problems of cost and delay in the civil justice system, together with recommendations for procedural reform, are set forth in *Justice For All, Reducing Costs and Delay In Civil Litigation*, A Report of the Brookings Task Force On Civil Justice Reform, (1989), The Brookings Institution, Washington, D.C.

9 *See* pamphlet, DISPUTE RESOLUTION PROCEDURES IN THE NORTHERN DISTRICT OF CALIFORNIA, published by the Court.

tort cases involving not more than $150,000 (exclusive of punitive or exemplary damages, interest and costs). The Court also encourages voluntary, non-binding arbitration for cases involving any amount in controversy or subject matter by stipulation of the parties and permission of the judge assigned the action. Court-annexed arbitration is distinct from private sector arbitration, which is usually voluntary and binding. The parties may stipulate, however, that the award in court-annexed arbitration shall be final and binding.

Non-Binding Summary Jury or Bench Trials

These procedures are designed to permit an opportunity for each party to present its case in an abbreviated form, and to gain insights from the judge or jury reaction. The jury is chosen by the selection process used in a formal trial but the verdict is advisory only. The procedures typically take about one day and were designed for complex civil trials that could occupy a courtroom for weeks or months. Representatives of the parties with authority to settle normally are required to attend. After the advisory verdict or judgment is rendered, the parties and counsel are afforded an opportunity to question the judge and jurors. Settlement negotiations are expected to take place thereafter.

Consent to Jury or Court Trial Before a Magistrate

By written stipulation, the parties to any civil action may elect to have a magistrate of their choice (instead of the assigned judge) conduct all proceedings in any civil case, including presiding over a jury or non-jury trial. A trial before a magistrate is governed by exactly the same procedural and evidentiary rules as trial before a district judge, and a right of appeal is automatically preserved under the same standards which govern appeals from district court judgments. Parties often consent to resolution of their civil disputes by magistrate bench or jury trial because magistrates have less crowded calendars, permitting the parties to secure an earlier and firm trial date, and the parties may elect any available magistrate within the Northern District.

Settlement Conferences Conducted by a Judge or Magistrate

A judicially conducted settlement conference may be held at any time during the pendency of a civil case. Normally, the settlement process is initiated upon the request of a party or on the motion of the judge to whom the action is assigned. The judge or magistrate who would preside at trial does not conduct the settlement conference unless the parties so request. Counsel who attend the conference are required to be thoroughly familiar with the case and have authority to negotiate a settlement. Many judges have standing orders that require the attendance of the parties or that require them to be available by telephone for consultation with the judge or magistrate. The settlement judge or magistrate acts as a mediator or facilitator at the settlement conference, promoting communications among the parties, holding one-on-one sessions with each side, offering an objective assessment of the case, and suggesting settlement options. The magistrate or judge has no power to impose settlement, and does not attempt to coerce a party to accept any proposed terms. If settlement is reached, the parties will sign an agreement, thereby avoiding the cost of trial or other litigation.

If no settlement is reached, the case proceeds to trial before the judge to whom the action is assigned.

Special Master
A special master is a private lawyer, a retired judge, law professor, or other person who may be appointed to perform any of a wide range of tasks, including case management, discovery resolution, fact-finding and settlement. A master may be appointed in response to a motion or on the court's own initiative. Masters can reduce dramatically the time to resolve pretrial disputes. The master's immediate availability and thorough familiarity with the details of the case can discourage litigants from taking disruptive and costly positions. The master can bring expertise in a specialized field to the case that a generalist judge may not have. Parties retain the right to have the court review the decisions made by the master. The use of a master is generally appropriate in matters where the amount in controversy is substantial and technical issues are involved.

Recently enacted federal statutes have provided the authority for many of the described initiatives. Thus, the court-annexed arbitration programs are derived from the Judicial Improvements and Access to Justice Act of 1988.[10] Last year, a Federal Courts Study Commission created by that Act completed a comprehensive examination of the federal court system. Among its recommendations are a variety of ADR suggestions that may well make ADR the mainstay of the federal justice system. "Experience to date provides solid justification for allowing individual federal courts to institute ADR techniques," the Commission declares in its final report. "The movement to infuse these techniques into the federal courts no longer need be limited to local experiments." The basic recommendation of the report is for a congressional "green light" to local courts to devise ADR programs adapted to local conditions. In addition to urging Congress to grant the courts this broad statutory authorization for ADR, the Commission also recommends sustained federal funding for judicial ADR experimentation, and the creation of a national committee under the auspices of the Federal Judicial Center to provide advice to federal courts about ADR.[11]

Three major pieces of ADR legislation were enacted by the 101st Congress in 1990. Two of those laws are intended to expedite federal agency proceedings by reducing costly and time-consuming litigation. By enacting the Administrative Disputes Resolution Act[12] ("ADR Act") and the Negotiating Rulemaking Act of 1990 ("Reg Neg Act"),[13] Congress has strongly endorsed a greater use of alternative dispute resolution procedures in federal agency proceedings. The ADR Act requires fed-

10 Judicial Improvements and Access to Justice Act of 1988, Title IX, Pub. L. No. 100-702 (1988) (codified at 28 U.S.C. §§ 651-658).

11 Report, *The Federal Courts Study Commission*, April 1990.

12 Administrative Disputes Resolution Act, Pub. L. No. 101-552 (1990).

13 Negotiating Rulemaking Act of 1990, Pub.L. No. 101-6648 (1990).

eral agencies to adopt a policy that promotes the use of alternative dispute resolution in formal and informal agency proceedings and actions; requires each agency to appoint a dispute resolution specialist who will oversee implementation of agency policy under the Act; encourages and facilitates the use of "neutrals" to assist the parties in resolving disputes; and includes highly detailed provisions governing the use of binding arbitration in agency proceedings. The purpose of the Reg Neg Act is to foster, but not compel, negotiated rather than adversarial rulemaking by federal agencies. It establishes guidelines for drafting administrative rules and regulations.

Even prior to this legislation, there had been a strong push by the Administrative Congress of the United States ("ACUS") to get federal agencies to use ADR. Since 1986, the ACUS has issued a series of recommendations urging increased use by the agencies of fact-finding, mini-trials, mediation, arbitration, facilitating, and negotiation, and encouraging the referral of disputes to private organizations as an alternative to direct agency action.

The third law enacted last year, expanding ADR opportunities throughout the federal court system, is the Civil Justice Reform Act of 1990.[14] Under Title I of the Act, each of the nation's ninety-four federal district courts will be required to implement a "civil justice expense and delay reduction plan," to be developed by the district or adopted from a model plan to be enacted by the Judicial Conference of the United States. Among the Act's findings is that an effective litigation management and cost and delay reduction program should incorporate ADR procedures in appropriate cases, and the Act so provides. The Act authorizes the district courts to refer appropriate cases to ADR programs and directs the courts to consider a neutral evaluation program. Title II of the Act creates seventy-four new district court judgeships and eleven new court of appeals judgeships.

This advent of change in the United States federal civil justice system has been accompanied by comparable developments throughout the civil justice systems of the fifty states. It is reasonable to assume such change will encourage both domestic and transnational suitors. However, largely in response to the problems inherent in transnational litigation, international practitioners over the years have increasingly turned to commercial arbitration as the alternative mechanism for dispute resolution. A consideration of this traditional, formal adjudicatory procedure, together with its shortcomings, will assist in the comparative analysis of other alternatives for transnational dispute resolution.

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[14] Civil Justice Reform Act of 1990, Pub.L. No. 101-650 (1990).

IV. INTERNATIONAL COMMERCIAL ARBITRATION AS AN ALTERNATIVE

The relative attractiveness of international commercial arbitration is a reflection of the shortcomings of the civil justice system. Arbitration is often described as everything that civil litigation is not. Observers frequently depict arbitration as a speedy and economical process characterized by informal hearings before one or more arbitrators selected on the basis of knowledge and expertise in the commercial context of the dispute. There is no extensive pretrial practice and very little possibility of successful appeal. The scheduling and location of the hearings may be arranged for the parties' convenience, and the proceedings conducted in privacy.

Despite the current popularity of arbitration, its future remains in doubt. Even now, proponents, as well as critics of arbitration, observe that it frequently fails to live up to its billing as a "speedy and economical" substitute for litigation, especially in large or complex disputes. If the contemporary variety of procedural alternatives results in significant improvements to the civil justice system, arbitration may become a less viable option. In short, while international arbitration is superior to litigation, it is often characterized as a dispute resolution technique accompanied by high costs, procedural uncertainties depending upon the arbitral forum, absence of party involvement, uncertainty in application of regulatory law by foreign arbitrators, and lack of uniformity regarding enforcement of awards against foreign nationals.[15]

Critics of arbitration have observed that arbitration often fails to meet popular expectations. There have been efforts towards procedural reform by international arbitration institutions but little experimentation with new techniques. Even adherents of the process acknowledge that the perceived blessings of arbitration may occasionally prove to be a bane. As a system founded on private agreement and largely independent of the judicial process, arbitration has built-in limitations which must be recognized and addressed whenever it is considered as an alternative form of dispute resolution. Some limitations, such as those associated with procedural or multiparty issues, are a by-product of arbitration's roots in contract. Other, less foreseeable limitations may arise as a result of the flexibility inherent in the process and the degree to which it depends upon the cooperation of the parties and the personal qualities of those who administer the case. In short, institutional arbitration has inherent structural deficiencies which severely limit its usefulness for the resolution of disputes arising during the course of jointly conducted, long-term international business undertakings.

Regardless of the care with which an arbitration agreement has been structured, problems of formality and procedure persist. Thus, getting to

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[15] Stipanovich, *Rethinking American Arbitration*, 63 IND. L. J. 425 (1988).

arbitration may prove a major hurdle. Resort to the judicial process may be necessary to address various preliminary issues. These issues include the enforceability of the arbitration provision, the arbitrability of the dispute, compliance with preconditions to arbitration, waiver of the right to arbitrate, and problems relating to multiparty disputes. Once arbitration begins, the informality of the process may produce frustrations for those accustomed to the traditional civil process. The absence of pre-hearing discovery and detailed pleadings may mean that a party comes to the hearings without a complete understanding of the character of the opposition's case, let alone knowledge of what documents are to be relied upon or what witnesses are to be called. Further, the failure to define disputed issues at the pre-hearing stage may have a dramatic impact on the presentation of evidence and the final resolution of the dispute. Difficulties also may arise when arbitrators are required to deal with procedural issues not specifically addressed by the arbitration rules. However, many in the business community believe that the most significant problems with modern arbitration do not relate to formal inadequacies but rather the increasing formalization of the process brought about by the legal profession. And finally, serious problems may be encountered in the drafting of an arbitral award and its subsequent enforceability.

Concerns regarding arbitrator selection and competence are also manifested with some regularity by critics of the arbitration process. In short, they assert that the selection process simply fails to produce capable arbitrators. Often, the quality of a panel may suffer as the result of the unavailability of experienced arbitrators. Arbitrators have potentially greater control over the procedure and outcome of the dispute resolution process than either judges or juries. Accordingly, their inability to come to grips with the fundamental issues in a case may lead to a poor decision.

Despite popular depictions of the process as a fast, efficient method of dispute resolution, there are numerous opportunities for a reluctant party to frustrate the goals of speed and economy and administrative delays are common. Delay, of course, leads to increased costs. Today a frequent critical observation is that arbitration often is more expensive than litigation, especially in cases which involve large amounts of money or complex issues.

The foregoing reveals a wide divergence of opinion regarding the arbitration process. While arbitration holds onto the promise of "a better way to do it," evidence indicates that for many that promise has not been fulfilled. On the other hand, efforts to evaluate and to improve the process have traditionally been frustrated by the scarcity of empirical information from user groups. Nevertheless, stimulated by a growing recognition of the counterproductive features of formal adjudicatory procedures, such as litigation and arbitration, many within the legal profession have begun to concentrate on a search for better ways to resolve legal disputes. The principal objectives which have motivated the search

for alternative procedures is a mirror image of the list of problems which have been identified as inherent in the conventional procedures: i.e., the desire for management participation; the need to resolve the dispute without terminating the underlying business relationship or destroying the mutual confidence on which it is based; the need to focus the attention of the parties upon the main issues in the dispute and to minimize the diversions of time and energy to procedural and other ancillary issues; and the encouragement of free dialogue.

In light of the foregoing considerations, and to take advantage of the non-binding alternative procedures hereinafter discussed (mediation and minitrial) to address transnational disputes, those procedures can be structured within the framework of arbitration proceedings. The arbitral framework affords the parties great flexibility which will permit them to define the scope and mechanics of the proceeding so as to accomplish the main objectives of the alternative procedures and still lead to a final adjudication in the event that a negotiated settlement is not reached.[16]

Any such framework must be carefully designed or the alternative procedures may undermine the effectiveness of the arbitration agreement if arbitration is eventually required. On the other hand, incorporation of the alternative procedures into a properly structured arbitration agreement may offer the best means of avoiding some of the problems and complications arising out of differences in national laws and judicial proceedings. The incorporation of provisions for the use of alternative procedures into an arbitration agreement may be of substantial assistance in ensuring that the alternative procedures will work as intended and will not produce any unanticipated results. This consequence flows both from the latitude afforded the parties in construing arbitral procedures and from the international protection against judicial intervention provided by the New York Convention. For example, it would be possible to design arbitration agreements under which the demand for arbitration would automatically trigger preliminary non-binding procedures prior to the appointment of arbitrators. If properly structured, such provisions would not only insulate those procedures from judicial interference, but also enable the party invoking the alternative procedures to obtain the assistance of the court in compelling a recalcitrant opponent to go forward with those procedures as an integral part of the arbitration.

At present, use of the arbitral framework offers the most promising approach for the application of alternative non-binding procedures to international commercial disputes. Consideration of two such procedures, mediation and the minitrial, and their compatibility with the business objectives pertaining to dispute resolution, follows.

[16] Perlman and Nelson, *New approaches to the Resolution of International Commercial Disputes*, 17 INT'L LAW. 215 (1983).

Mediation of Transnational Disputes

Mediation is expanding rapidly as a most useful alternative for the resolution of domestic business disputes in the United States. It has been characterized as the "sleeping giant" of business dispute resolution because it is potentially the most powerful means of bringing the parties to terms. Unlike the arbitrator or the judge, the mediator has no authority to make a binding decision. For that matter, the mediator has no authority to make any sort of determination. The mediator's role is purely facilitative; he helps bring the parties together by listening, counseling, guiding, suggesting, and persuading the parties to come to terms. As a neutral party, the mediator is an agent for neither of the parties, a member of neither of the negotiating teams. He is an adjunct to negotiations that the parties might carry on directly.

Mediation succeeds by blending two key factors in any negotiation: communication and trust. The mediator must be a person whom the parties trust sufficiently to communicate confidentially their real positions in the dispute. A mediator should have the respect of each party, so that each will entrust to the mediator a statement of what that party "really wants." This is the crux of the process. A person who knows the facts, and who also has intimate details of both positions, will be able to gauge the difference that lies between them in a way that negotiators who know only their own side never can. With this knowledge, the mediator will be able to forge options that the parties themselves might never have conceived. When the parties agree, it is their own agreement. No one has forced them to do it. No coercion is ever used, because the mediator has no power to impose a settlement. And since the agreement is one the parties mutually arrive at, they generally accept it and live by it with far less resentment than they would a court decree.[17]

Since mediation is a process as unstructured and informal as direct negotiation, it has no required ground rules. Mediators may work in a variety of ways, suiting their mediating styles to the personalities and needs of the parties in each instance. Nevertheless, there is a core responsibility: to respect the confidentiality of disclosures made by each party. If the mediator deems it strategically necessary that one side learn something of the other's case, he may ask permission to disclose all or part of what has been revealed. The mediator must keep secret what has been confided as a secret. Trained mediators understand that part of their role is to defuse the hostilities that have built up during the prior course of dealing between the parties. As neutral third party intermediaries, mediators can deflect the raw emotion that so often prevents the parties from negotiating directly.

In seeking to facilitate agreement, mediators may propose steps to be taken, partial solutions, or a comprehensive deal. Good mediators

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[17] A pragmatic description of mediation and the underlying negotiating process is found in Henry & Lieberman, THE MANAGER'S GUIDE TO RESOLVING LEGAL DISPUTES 57-68 (1985).

will accomplish this by respecting the parties' wishes and by helping them negotiate their own solution. They will rarely take over the negotiations on their own. Many commentators have compared the mediator to a catalyst, one who prompts action by others through identification of issues, clarification of facts, reason and persuasion. As a catalyst, mediators will help educate each party (at least those with a continuing relationship) not merely for the resolution of the present dispute, but for the resolution and even prevention of future disputes.

Any private civil case may go to mediation; no law restricts its use or governs its availability. The parties simply need to agree, either in advance of a dispute or during one, to call in a mediator to help them iron out their differences. Most observers feel that mediation is appropriate only when the parties voluntarily agree to it; the prospects of its being productive seem to be greatest when the parties feel real incentives to reach a negotiated solution. If one or more of the parties is not interested in resolving the matter, at least at the point at which the mediation would be held, the likelihood of its being successful is not good. In other words, for mediation to be successful, it usually is important that all parties want it to work.[18]

Consider the kinds of cases where mediation would be most useful:

(1) *Ongoing Relationships*
Parties who have an ongoing relationship or who can see benefits from forming a relationship in the future have special incentives to find, quickly, a solution that does as little damage as possible not only to their underlying independent interests but also to the relationship itself.

(2) *Willingness to Compromise*
Mediation tends to work best for parties who are comfortable with the idea of compromise, who do not view a willingness to search for compromise solutions as a sign of some reprehensible form of weakness. By contrast, parties who want the outcome of a dispute to hurt their opponent, and who view every gain by another party as a loss to themselves, are poor candidates for mediation. The "winner-take-all" mentality is ill suited to mediation.

(3) *Poor Communication as a Major Source of the Problems*
Another situation in which mediation might be appropriate arises when the primary source of the problems between the parties is a simple misunderstanding of each other's positions or the reasoning behind them. One of the principal contributions a good mediator can provide is the clearing of lines of communication between the parties. In so doing, a mediator might well be able to eliminate misunderstandings that have prevented the parties from finding common ground on their own.

(4) *Privacy*
Mediation can be attractive to parties who are especially desirous

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[18] Brazil, EFFECTIVE APPROACHES TO SETTLEMENT: A HANDBOOK FOR LAWYERS AND JUDGES 17-26 (1988).

of resolving their disputes in private. Parties who have a particularly intense interest in privacy should attempt to mediate before filing a lawsuit. Parties who are concerned about keeping the nature of the dispute, and its resolution, out of the press may find mediation attractive.

(5) *Multiple Parties*
A mediator can be exceedingly helpful in resolving a dispute involving multiple parties. This is a role some judges now play in court when a case involves several parties. If the issues are complex enough, and the parties numerous enough, a mediator might be the only person who can bring about a settlement because he can manage the process when no one else is in charge.

By contrast, consider the situations where mediation would appear inappropriate.

(1) *Absence of Will to Settle*
The most obvious case is one where the parties clearly understand one another's positions and the bases for those positions, but remain wholly uninterested in possible compromise solutions. When there is no will to settle, mediation is not likely to create it.

(2) *Distrust*
Mediation may be inappropriate in cases where one or more of the parties is profoundly distrustful of the other and thus not likely to believe any communication, even if forwarded through the neutral party.

(3) *Need for Forthright Independent Evaluation*
Mediation also would not be the preferred procedure if what the parties need most in their search for settlement is forthright independent evaluation of the relative strengths and weaknesses of their evidence and legal arguments. When the principal obstacles to settlement are differences of opinion among the parties about the persuasive power of known information, classic mediation, which emphasizes the importance of the neutral playing a nonjudgmental role, is not likely to advance the case.

(4) *Widely Differing Views of the Merits*
Mediation would not be called for when the parties have widely differing views of the value or merits of the case but lack confidence in those views and look to an experienced neutral for validation or contradiction. In other words, when the principal need is for a reality check, or for "objective" feedback, classic mediation is not the answer.

(5) *Substantial Party Imbalance*
Counsel also should be cautious about turning to mediation when there is a substantial imbalance in the power or negotiating skills of the parties. In mediation, it is the parties themselves who fashion the solution to their problem. The neutral has no power and offers no independent critique of positions or proposed solutions. Thus, the neutral cannot correct power imbalances or errors of judgment. The neutral cannot protect a clearly weaker party, or counsel, from a stronger or more subtle opponent. If free competi-

tion between the parties is not likely to yield a balanced result, mediation should be avoided.

(6) *Absence of Sufficient Information*
Another situation in which mediation might not be appropriate arises when the parties have not yet developed sufficient information to have confidence in their ability to generate and assess various possible bases for mediation. If a dispute is in this sense informatively immature, mediation should at least be postponed.

The foregoing analysis would appear to apply comfortably to any dispute, domestic or transnational. Indeed the *in terrorem* effect of transnational litigation (previously discussed) should portend an even greater chance for successful resolution of the transnational dispute than the impressive 80% success rate achieved in domestic mediations. And, of course, typical dimensions of the transnational dispute, usually intertwined with a complex and continuing business relationship, encourages both parties to assume an active and involved management posture from its inception until its resolution, and to maintain control of the process throughout. Further, the use of mediation can also avoid the deficiencies of international arbitration if the parties structure a procedure that emphasizes negotiation rather than adjudication and substitutes conciliation for adversarial confrontation. However, the ultimate resolution of the dispute must be faced; many domestic mediations fail, and some failure must be anticipated on the transnational side.

Accordingly, a growing number of practitioners addressing transnational dispute contingencies encourage a structured process facilitating negotiated settlement of disputes as they arise and ultimate binding determination through arbitration when negotiation fails. Thereby, successful use of mediation (or negotiation) is encouraged and unanticipated results derived from judicial intervention avoided. This approach represents the transnational equivalent of the domestic "med-arb" procedure. The introduction of a "structured process" provides a convenient transition to the minitrial and its contribution to the resolution of transnational disputes.

V. STRUCTURED NEGOTIATION: THE USE OF THE MINITRIAL TO RESOLVE TRANSNATIONAL DISPUTES

Briefly stated, the minitrial is a structured negotiation that normally takes the form of a non-binding information exchange conducted before high level executives or representative of the disputing parties, and sometimes includes a neutral advisor who may serve a variety of functions. After the minitrial, the parties representatives may ask the neutral advisor for an opinion on likely trial outcomes. If the case is not settled, the parties are free to resume any other dispute resolution process, including litigation. However, for the several reasons herein discussed, the most appropriate ultimate adjudicatory alternative within the transnational dispute context undoubtedly is arbitration. It is usually agreed that the

entire process will be confidential and inadmissible in any subsequent proceedings between the parties.

It now is generally perceived that structured negotiation in the form of the minitrial, with its many adaptations, presents the most efficient ADR technique for the resolution of transnational disputes. Because the minitrial is a voluntary method of resolving business disputes, its form is flexible. However, whatever its final form, the essence of its underlying negotiation process remains the same: direct provision to the parties of relevant information pertaining to the dispute and the strength of the parties' positions, thereby permitting and motivating the parties to conduct better informed and more productive settlement negotiations. Indeed, one of the virtues of the minitrial is that it may be tailored to the specific requirements of the dispute, the parties, and the personalities of the executives and counsel involved. Nevertheless, most minitrials succeed because they have incorporated certain procedures into the ground rules drawn up by the parties.[19]

Perhaps the most important procedure is that relating to the negotiation process. The parties seek agreement not only to conduct a minitrial, but also with regard to the ground rules, or "protocol," to guide the participants before and during the minitrial itself.[20] That protocol should address at least eleven concerns.

(1) *The Issues to be Discussed*
Although the non-binding status of the minitrial means the parties need not be concerned about rigidly enforcing restrictions on certain issues, it makes sense to have at least a general idea about which issues are to be discussed and which are out of bounds.

(2) *The Amount of Allowable Discovery*
In the usual case, discovery will be relatively limited. If the parties are in the midst of litigation, much discovery will already have taken place anyway.

(3) *Obligations to Present and Negotiate*
The protocol should obligate the parties to present their best cases and to negotiate following the presentation of evidence.

(4) *Persons to be Present*
The names of the business principals to be present, the number of lawyers, experts, and other witnesses should be aired and agreed upon at this time. Most importantly, the protocol should set forth the status of the business representatives and state their authority to settle.

(5) *Time, Place and Schedule*
The ground rules should set forth the date, time, and place of the minitrial. It should also provide a schedule of events - how much

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19 *The Effectiveness of the Mini-Trial In Resolving Complex Commercial Disputes: A Survey*, 1986 Report of A.B.A. Section of Litigation Sub-Committee On Alternative Means Of Dispute Resolution, Committee On Corporate Counsel.

20 Henry & Lieberman, *supra* note 17 at 19-56.

time to be allocated to the parties' direct case, to rebuttal, to questions, and so on.

(5) *Rules of Evidence*
No formal rules of evidence are required, but if certain rules are to be followed, these should be stated formally in the protocol.

(6) *Exchange of Briefs and Other Documents*
It may make sense for the parties to exchange briefs and other documents in advance of the minitrial. Again, these should be specified in the protocol, along with the timetable for their submission.

(7) *Neutral Advisor*
There should be agreement by the parties on whether to use a neutral advisor and, if so, how that advisor will be selected. When selected, the neutral advisor's name should be incorporated in the protocol.

(8) *Confidentiality*
The protocol should provide for the confidentiality of all documents exchanged and statements made, and for their inadmissibility (and the inadmissibility of any opinion given by the neutral advisor) in any future proceeding. There are two types of confidentiality to be concerned about: to prevent the information divulged in the proceedings from subsequent disclosure at trial; and to keep all news of the proceeding private, so that the dispute is not aired in public.

(10) *Apportionment of Costs*
The parties should agree at the outset on how costs of the witnesses, neutral advisor, and any other should be apportioned.

(11) *Pending Litigation*
The parties should agree on how to handle any litigation currently pending. Usually, the parties agree to suspend discovery and to stay litigation until the minitrial is complete and they have had some period of time to negotiate a settlement.

The minitrial alternative will succeed only if the parties manifest a determination for settlement. Assuming such determination, several types of disputes appear suitable for minitrial address and disposition. Cases involving long-term business relationships come immediately to mind. There, the minitrial, with its emphasis upon brevity and informality, encourages a conciliatory posture by the parties. The adversarial threat is reduced, good feeling prevails, and the business relationship desired usually survives the resolution of the dispute. The minitrial would appear appropriate where the parties agree on the liability or fault involved, but differ on the amount of damages. Again, the situation usually involves parties who desire to settle but do not know how. The minitrial permits up front discussion of the damage issue with insights from an advisor whose recommendations need not be binding. The minitrial encourages successful dispute resolution in those situations where a key obstacle to settlement of the dispute is lack of communication and the need for the parties to face up to realities. And, of course, the com-

plex, transnational dispute increasingly has attracted parties to the minitrial technique to obviate the threat of litigating in a foreign adversary's civil justice system.[21]

By contrast, the minitrial does not appear appropriate to address cases involving: an individual against a corporate entity (high emotional content or desire for punitive damages); action in equity (difficult to compromise); and those involving government (lack of flexibility to settle). The presence of numerous parties to the dispute creates difficulties within a minitrial setting. Finally, the minitrial does not lend itself comfortably to cases that turn largely upon the resolution of pure questions of law or assessment by the trier of fact of the relative credibility of key witnesses.

Evaluating a given case for minitrial suitability should involve a multistep analysis. Perhaps the most important factor to determine from the client is the importance of maintaining the commercial relationship with the other party. In turn, that determination should portend the possibility of reaching agreement with the other party as to the form, the selection of the neutral expert, and all other aspects of the minitrial process. Other considerations are: the extent to which the case lends itself to summary judgment; the cost savings to be anticipated; and any problems pertaining to disclosure to third parties of client information presented at the minitrial.

The minitrial has proved increasingly attractive to parties and counsel considering dispute resolution alternatives during the negotiation of a transnational business agreement. The flexibility that can inhere in such an approach is responsive to the concerns of business executives anxious to maintain control over the process and encourage a continuation of the business relationship. Accordingly, the strength of the minitrial appears in the use of business representatives as primary decision makers and the use of expert advisors or neutrals as facilitators, especially where the underlying issues present highly technical problems requiring specific expertise. There is a growing understanding that agreement on the minitrial approach should be accompanied by agreement on the basic rules previously described. Any such agreement should avoid replication of the judicial process with its emphasis upon the adversarial. Indeed, the parties should allow for occasional departures from the agreement during its application. The encouragement of a continuing working relationship during the address of a dispute may, in less complex cases, cause the parties to dispense with the use of a neutral and thereby save substantial costs. That working relationship will be enhanced if the parties, through use of a corporate policy statement, have publically manifested their prior commitment to ADR.

Here, as in the prior consideration of the mediation of transnational disputes, the question remains: what happens if the dispute settlement negotiation encouraged by the minitrial fails and the parties cannot

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[21] Brazil, *supra* note 18 at 54-63.

Canada-United States Law Journal, Vol. 17 [1991], Iss. 2, Art. 41

agree? The inevitable answer is some binding adjudicatory process, either litigation or arbitration. The wiser choice probably will be arbitration in most instances. The problems associated with international arbitration have been addressed. However, the benefits of arbitration, particularly within the transnational context, have caused many to advocate adoption of structured settlement procedures, such as the minitrial, as preliminary steps in resolving disputes before arbitration is utilized. The legal and practical arguments for this multistep approach have been discussed.

The corollary to using these structured multistep resolution devices is the need to carefully craft contract provisions to trigger their use. Once properly crafted in the form of a minitrial, the application of those provisions should preserve all of the advantages derived from active and obligatory participation of senior executives with settlement authority and also provide a convenient framework for final resolution should the negotiations fail. This phased technique provides the additional advantage gained through continuity of use of a dispute resolution technique specifically conceived to meet the ongoing needs of a long-term relationship. Time expended and costs incurred would be substantially less than litigation or *de novo* arbitration.

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The CPR legal Program has earned national recognition as the leading authority on the development of alternative dispute resolution (ADR) devices for significant business and public disputes.

Today, CPR is an alliance of over 400 lawyers, including general counsel of major corporations, partners of leading law firms, prominent legal academics and a growing number of federal judges. CPR's goal is to integrate ADR techniques into the mainstream of legal practice. It does so by developing new ADR procedures, educating departments and firms about ADR, advocating ADR methods among the bar and top business management and, through the CPR panels, applying ADR techniques to the resolution of major disputes.

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APPENDIX A
MEDIATION OF BUSINESS DISPUTES*

II. THE MODEL PROCEDURE

A. PROPOSING MEDIATION

Any party to a business dispute may unilaterally initiate a mediation process by contacting the other party or parties, orally or in writing, and suggesting the use of a neutral mediator to mediate efforts to arrive at a resolution. If the parties have made a contractual commitment to mediate disputes between them, or if they have subscribed to the CPR Corporate Policy Statement on Alternatives to Litigation, that commitment or policy will be invoked.

B. SELECTING THE MEDIATOR

Once the parties have agreed in principle to a mediation process, or at least to seriously consider mediation, they will discuss the selection of a mediator. Any party may suggest one or more candidates, or they may request a neutral organization, such as CPR, to propose candidates. The mediator must be selected by agreement of all parties.

Any candidate for the role of mediator shall promptly disclose to the parties any circumstances known to him or her which would cause reasonable doubt regarding the candidate's impartiality. Each party shall promptly disclose any such circumstances to the other party or parties. These disclosure obligations shall be continuing until the mediation is concluded. If any such circumstances have been disclosed, before or after the individual's appointment as mediator, the individual shall not serve, unless all parties agree.

The mediator's compensation rate will be determined before appointment. Such compensation, and any other costs of the process, will be shared equally by the parties, unless they otherwise agree. If a party withdraws but the procedure continues, the withdrawing party will not be responsible for any costs incurred after its withdrawal. Before appointment the mediator will assure the parties of his or her availability to conduct the proceeding expeditiously.

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C. GROUNDRULES OF PROCEEDING

Once a mediator has been selected and has agreed to serve, the representatives of the parties will meet jointly with the mediator to discuss the following groundrules and any different or additional groundrules the mediator or a party wishes to propose as to the manner in which the process is to be conducted.

1. The process is voluntary and non-binding.
2. Each party may withdraw at any time after attending the first session and prior to execution of a written settlement agreement.
3. The mediator shall be neutral and impartial.
4. The mediator controls the procedural aspects of the mediation. The parties will cooperate fully with the mediator.
   (a) The mediator is free to meet and communicate separately with each party.
   (b) The mediator will decide when to hold joint meetings with the parties and when to hold separate meetings. The mediator will fix the time and place of each session and the agenda, in consultation with the parties. There shall be no stenographic record of any meeting. Formal rules of evidence will not apply.
   (c) The mediator may request that there be no direct communication between the parties or between their attorneys without the concurrence of the mediator.
5. Each party may be represented by more than one person, e.g. a business executive and an attorney. Participation of a business executive is to be particularly encouraged. The mediator may limit the number of persons representing each party. At least one representative of each party will be authorized to negotiate a settlement of the dispute.
6. The process will be conducted expeditiously. Each representative will make every effort to be available for meetings.
7. The mediator will not transmit information received from any party to another party or any third party unless authorized to do so by the party transmitting the information.
8. The entire process is confidential. The parties and the mediator will not disclose information regarding the process, including settlement terms, to third parties, unless the parties otherwise agree. The process shall be treated as a compromise negotiation for purposes of the Federal Rules of Evidence and state rules of evidence.

9. The parties will refrain from pursuing administrative and/or judicial remedies during the mediation process, insofar as they can do so without prejudicing their legal rights.
10. Unless all parties and the mediator otherwise agree in writing,
    (a) the mediator will be disqualified as a witness, consultant or expert in any pending or future investigation, action or proceeding relating to the subject matter of the mediation (including any investigation, action or proceeding which involves persons not party to this mediation); and
    (b) The mediator and any documents and information in the mediator's possession will not be subpoenaed in any such investigation, action or proceeding, and all parties will oppose any effort to have the mediator and documents subpoenaed.
11. If the dispute goes into arbitration, the mediator shall not serve as an arbitrator, unless the parties and the mediator otherwise agree in writing.
12. The mediator, if a lawyer, may freely express views to the parties on the legal issues of the dispute.
13. The mediator may obtain assistance and independent expert advice with the agreement of and at the expense of the parties. The disclosures required by the second paragraph of Section II.B. shall apply to independent experts.
14. Neither CPR nor the mediator shall be liable for any act or omission in connection with the mediation.
15. The mediator may withdraw at any time by written notice to the parties (i) for overriding personal reasons, (ii) if the mediator believes that a party is not acting in good faith, or (iii) if the mediator concludes that further mediation efforts would not be useful.
16. At the inception of the mediation process, each party and representative will agree in writing to all provisions of this Model Procedure, as modified by agreement of the parties. A model Submission Agreement is attached hereto as Appendix B.

D. PRESENTATION TO THE MEDIATOR

Upon entering into mediation each party will submit to the mediator a statement summarizing the background and present status of the dispute and such other material and information as it deems necessary to familiarize the mediator with the dispute. Submissions may be made in writing and orally. The parties may agree to submit jointly certain records and other materials.

The mediator may request any party to provide clarification and additional information. The mediator may raise legal questions and arguments and may request any party's attorney to brief legal issues.

The mediator may request each party, separately or at a joint meeting, to present its case informally to the mediator.

The parties are encouraged to exchange written statements and other materials they submit to the mediator. Such an exchange is likely to further each party's understanding of the other party's viewpoint. Except as the parties otherwise agree, the mediator shall keep confidential any submitted written materials or information. The parties and their representatives are not entitled to receive or review any such materials or information submitted to the mediator by another party or representative, without the concurrence of the latter. At the conclusion of the mediation process, upon request of a party the mediator will return to that party all written materials and information which that party had provided to the mediator.

E. EXCHANGE OF INFORMATION

If any party has a substantial need for documents or other material in the possession of another party, the parties shall attempt to agree on the exchange of requested documents or other material. Should they fail to agree, either party may request a joint meeting with the mediator who shall assist the parties in reaching agreement. At the conclusion of the mediation process, upon the request of a party which provided documents or other material to one or more other parties, the recipients shall return the same to the originating party without retaining copies thereof.

F. NEGOTIATION OF TERMS

The mediator may promote settlement in any manner the mediator believes is appropriate. Once the mediator is familiar with the case, the mediator will hold discussions with the parties' representatives. The mediator will decide when to hold joint meetings and when to meet or confer separately with each party.

The parties are expected to initiate proposals for settlement unless, by prior agreement, they expect the mediator to be the first to propose the terms of settlement. Each party or the mediator shall provide a rationale for any settlement terms proposed.

If the parties fail to develop mutually acceptable settlement terms, before terminating the procedure the mediator may submit to the parties a final settlement proposal which the mediator considers fair and equitable to all parties. The parties will carefully consider the mediator's proposal and, at the request of the mediator, will discuss the proposal with the mediator. If a party does not accept the final proposal, it shall advise the mediator of the specific reasons why the proposal is unacceptable.

Efforts to reach a settlement will continue until (a) a written settlement is reached, or (b) the mediator concludes and informs the parties that further efforts would not be useful, or (c) one of the parties or the mediator withdraws from the process; provided that if there are more than two parties, the remaining parties may elect to continue following the withdrawal of a party.

G. SETTLEMENT

If a settlement is reached, the mediator, or a representative of a party, will draft a written settlement document incorporating all settlement terms, including mutual general releases from all liability which may relate to the subject matter of the dispute. This draft will be circulated among the parties, amended as necessary, and formally executed.

If litigation is pending, the settlement may provide that the parties will arrange for dismissal of the case promptly upon execution of the settlement agreement. The parties also may request the court to enter the settlement agreement as a consent judgment.

III. COMMENTARY

A. SUITABILITY FOR MEDIATION

Most bona fide disputes are amenable to settlement by negotiation. Mediation is a facilitated form of negotiation. Virtually every case in which negotiation is appropriate but difficult is suitable for facilitated negotiation or mediation, whether or not unassisted negotiations have taken place,and whether or not litigation is pending between the parties regarding the subject matter. Mediation can be particularly helpful when the opportunity exists to structure a creative business solution. When a dispute involves several or many parties it may not be essential for all to be at the table, but any party crucial to a settlement must be represented.

Among the many types of domestic and transnational business disputes that have been successfully mediated are disputes relating to:

- commercial, financial and real estate transactions,
- construction,
- technology,
- product liability,
- trademarks and unfair competition,
- dealerships or franchises,
- private antitrust,
- insurance coverage,
- partnerships or joint ventures,
- mineral extraction,
- employee discrimination, and *
- defamation.

Attached as Appendix D are brief summaries of a great variety of actual disputes which have been successfully mediated in the recent past.

Outlined below are factors to be considered in deciding whether mediation is appropriate.

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* CPR's report on ADR in Employment Disputes includes an adaptation of the mediation model procedure designed specifically for disputes with non-union employees.

1. **The Parties**

The factors favoring mediation are likely to be particularly strong when the parties wish, or are contractually obligated, to continue a business relationship. The settlement then may well take the form of a renegotiated contract or some other business deal.

Where the parties are unevenly matched with respect to business sophistication, economic staying power, or information concerning the underlying facts, the "stronger" party may be able to impose lopsided settlement terms; however, the imbalance may well be offset by the calibre of the person(s) representing the "weaker" party; and that party may have a greater interest in a prompt solution, and in avoiding the high costs and burdens of litigation.

Personality and emotional factors cannot be ignored. The existence of animosity is likely to get in the way of unaided negotiation and to underline the need for skillful mediation. A key function of a mediator is to defuse hostility and distrust and to encourage cooperation, however wary.

Agreement by a party to mediate implies (a) a recognition that a bona fide dispute exists, and (b) confidence that the other party or parties can be trusted to negotiate in good faith.

Bringing about a settlement may be more difficult if there are numerous parties with dissimilar interests; however, mediations involving many parties have been successfully concluded, and courts are not well equipped to handle such cases.

2. **The Case**

a. Fact Issues Predominate

Cases involving predominantly fact issues or mixed questions of fact and law tend to be well suited for mediation. Certain cases are document intensive, such as claims arising out of a major construction project. When necessary, the production of voluminous documents can be accomplished in a mediation proceeding. If one of the parties perceives a strong need for a judicial determination, it will be disinclined to opt for mediation.

Coombe: The Future: Implementing New Approaches to the Settlement of Tran

b. Stakes

A party for which a vital interest rides on the outcome of a case is likely to favor mediation over the uncertain decision of a judge or arbitrator. If the stakes are moderate, mediation also may well be appealing; for one thing, the cost and burdens of litigation may be disproportionate even for the nominal winner of a lawsuit.

c. Opportunities for Joint Gains

Many business disputes are not zero sum games; the issue is not, or need not be solely, whether X owes Y money, and if so, how much. Frequently, there are opportunities for non-cash settlements which a court generally cannot impose. Even if the subject matter is limited to money, there may be differences in the availability and cost of credit to the parties, and delayed payments may be very meaningful to the debtor. Development of "value-creating" solutions requires cooperation between the parties and must come from a consensual resolution mechanism such as mediation.

d. Transaction Costs

The direct and indirect costs and burdens of a full-scale litigation are likely to be of a different order of magnitude for each party from those of mediation. Even parties with ample resources are not likely to ignore the potential savings in transaction costs.

e. Confidentiality

Parties to a business dispute frequently are anxious to avoid placing the details of their transactions in the public record and exposing them to publicity. The privacy and confidentiality of mediations are likely to be seen as significant advantages.

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3. Barriers to Settlement

Only 5-10% of all civil lawsuits are tried. Most settle eventually, unless they are dismissed on motion or abandoned. The primary aim is to facilitate faster, less costly and more productive settlements for the bulk of cases that settle. Common barriers to settlement are outlined below. These barriers should be identified and addressed in a mediation proceeding, and often they can be overcome.

a. Differing Perceptions

Perceptions can differ about a number of issues relevant to settlement. Do the parties have different views regarding what the facts are? Do they disagree about what proposition the facts prove? Is this disagreement based on each side having access to limited information? Is disagreement primarily the result of each side's partisan assessments of the evidence and its implications? Do the parties have different views as to how the law will be applied or as to the likelihood of success at trial? Do the parties have different views of what is at stake in the litigation? Do they make different assessments concerning the value of those stakes? It is very common for each party to be unduly optimistic as to its chances of success at trial; particularly so during the early stages of litigation. A mediation proceeding is likely to lead to a much more realistic appraisal and thereby greatly enhance prospects for settlement.

b. Extrinsic Pressures, Linkage

Are there pressures working on one or more parties that cut against prompt settlement? Do time constraints operate differently on the parties? Is resolution of this dispute linked to other similar disputes, pending or contemplated? Does either side have constituencies that would criticize a settlement? Are there "strategic" considerations to avoid settlement, e.g., to discourage other suits?

c. Process Failures

Communication problems between the parties or their lawyers are a common barrier. Does the negotiation process afford sufficient opportunities to devise and explore settlement options? Do the lawyers or negotiation representatives have different incentives than the parties in interest?

d. Delay Considered Advantageous

A party may believe, rightly or wrongly, that it will benefit from delay. When a dispute arises while a business relationship is ongoing, both parties have an incentive to put the matter behind them. Even when there is no continuing relationship there are likely to be advantages to all parties in having the matter resolved.

B. THE MEDIATION PROCESS

The human dimension of conflict is most significant. Once a dispute has erupted, anger, combativeness, a need to win or "get even" easily become barriers to a solution in the best interests of both parties. Typically, both believe they are in the right. Even the objectivity of an experienced lawyer can become impaired when acting as an advocate.

A critical event in the mediation process is the first step -- getting agreement to use it. At that point the parties' attitude usually begins to shift toward problem solving and cooperation. A skillful mediator will reinforce this change in attitude and will defuse hostility. In the mediation process psychology works for settlement. The party representatives and the mediator are challenged to be creative, to brainstorm, to "invent" new solutions. The dynamics of mediation lead toward settlement. Settlement equals success.

As stated in the Introduction to this paper, there is no one right way to conduct a mediation. The outline set forth in Section II and below represents an approach which appears logical and has proven effective in numerous cases.

Phase I. Initial Meeting with Mediator

The initial meeting of the parties with the mediator serves several purposes:

- The meeting gives the parties an opportunity to meet and size up the mediator. If one or more parties do not gain a favorable impression, a substitution may be proposed.
- The mediator will discuss the entire mediation process, including the groundrules, with the parties. They may agree on modifications. A meeting schedule also may be discussed.
- The parties will discuss with the mediator the role(s) they expect the mediator to play.
- The parties will begin to familiarize the mediator with the dispute.
- The mediator can confirm that the parties have a genuine interest in resolving their dispute through the mediation process.
- The parties' representatives will begin to talk to each other in a manner appropriate to their joint goal of reaching an accommodation.
- There will be discussion of who will represent the parties at future sessions, and the extent of their authority. If the stakes are large, it may not be possible for the negotiators to have complete authority to sign a settlement agreement, but each should have authority to negotiate a settlement, and the authority of the negotiators should be comparable. The exchange of certain documents also may be discussed, as well as a form of mini-discovery if necessary.
- If litigation is pending between the parties regarding the subject matter of the mediation, the parties and the mediator will discuss the suspension or curtailment of discovery and other pre-trial activities. They also will discuss whether the court should be informed of the mediation, and whether court approval of suspension of pre-trial activities is required.

Phase II. Familiarizing the Mediator with the Case

Next, the mediator must be familiarized with the dispute, and the parties must be given an opportunity to state their case. The mediator will ask the parties to submit on an agreed time schedule such written materials as they consider necessary or advisable.

A statement summarizing the background and status of the dispute is likely to be the principal document. If litigation is pending, court documents such as pleadings and briefs may be submitted. If an exchange of certain documents between the parties has been agreed upon, that exchange also should occur during this phase of the proceeding.

Following submission of these materials, a second joint session is likely to be scheduled, at which the parties' representatives will state their views orally in an informal manner and will rebut the conflicting views of other parties. Each party should present its position in what it considers the most effective manner. Rules of evidence will not apply and the presentations will not be transcribed. The mediator will prescribe the sequence of presentations, may impose time limits and is likely to ask clarifying questions.

Following the joint session, the mediator is likely to caucus with each party. The parties tend to be more candid in such a private meeting. The mediator may well elicit in confidence information not disclosed at the joint session. The mediator may explore certain aspects of the party's presentation and may request additional materials or the briefing of certain legal issues. The mediator must understand the case fully from each side's perspective; the mediator should then assure that each side better understands how the case looks from the other side's viewpoint. The mediator should avoid expressing views on legal or other issues until fully familiar with the case. Some believe that if the mediator does not spend comparable time caucusing with each party, an appearance of partiality may be created.

The mediator, to be effective, must keep fully informed of all developments and must be able to control dialogue between the parties. The mediator may conclude at a given stage that it is preferable to keep the parties apart. The mediator may request that the parties and their attorneys do not communicate with each other directly without the mediator's concurrence.

Phase III. Determining the Facts

Even when there are no issues of credibility, the "facts" relevant to a dispute can be elusive. The party submissions to the mediator or statements made in meetings may well indicate that the parties see the facts differently, or draw different conclusions from

them. At times, it will be useful for the mediator to address any such differences and seek to bring about agreement on the facts and the issues of the dispute. At other times, focusing on the facts may be counterproductive if it will encourage the parties to focus on past disputes, rather than on reaching an arrangement that will enable them to better deal with each other in the future. No generalizations are possible. This is a case-by-case decision for the mediator.

Phase IV. Negotiation of Settlement Terms

Negotiation is most productive when the parties focus on their underlying interests and concerns, avoiding fixed positions which often obscure what a party really wants. The mediator can help the parties adopt a problem solving perspective, crystallize their own interests and understand each other's interests; defuse adversarial stances and develop a cooperative, problem solving approach. The mediator can narrow the range of issues, pinpoint the most serious concerns of each party, and generate new ideas for settlement. The legal rights of the parties and how their dispute is likely to be decided in court are considerations which need not be ignored.

Professionals debate whether the parties should be urged to make initial settlement proposals or whether the mediator, following a caucus with each party, should take the initiative in that regard. Again, there is no single "correct" approach. If one of the parties wishes to put forward to the other(s) a concrete proposal previously discussed with the mediator, the mediator probably would not intervene unless he or she believes that the proposal is ill-conceived or ill-timed. A mediator proposal is likely to be founded on in-depth exploration of the parties' interests and an exchange of views as to their realistic expectations. If the proceeding involves many parties, it becomes a virtual necessity for the mediator to propose settlement terms.

The first settlement proposal, by whomever made, is not likely to be the last. Hopefully, it will be "in the ballpark" and provide a basis for negotiation. At this juncture, some experienced mediators usually will engage in "shuttle diplomacy," i.e. meet with the parties individually to try to bridge a gap or develop a more acceptable solution; other mediators are likely to conduct joint sessions to bring the parties together. On rare occasions, the mediator may consider it advisable to meet with the principals of the parties, separately or together, outside the presence of counsel.

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Certain mediators favor a "one-text" approach. They will prepare a first draft of a settlement agreement, seek the parties' comments, and prepare successive drafts until all parties are in agreement.

Some controversies hinge on key factual issues which often can be resolved by an independent expert, operating under groundrules on which the parties have agreed. Does the machine perform in accordance with contractual specifications? Is the former executive using information proprietary to the former employer? Were the soil conditions as represented to the contractor, and if not, how much additional expense was incurred. Once such critical questions have been answered by a neutral expert, the controversy may, as a practical matter, resolve itself. In appropriate cases, the parties and the mediator should consider retaining an independent expert.

Once agreement is reached on settlement terms, by whatever technique, a settlement agreement is drafted by the mediator or a party representative, circulated, edited as necessary and executed.

C. LENGTH OF PROCEDURE

The length of a mediation depends on factors such as the complexity of the case, the number and availability of the parties, the urgency, and the difficulty of reaching agreement on the facts and on settlement terms. In any event, length will be measured in months, weeks or even days, not in years. During the initial meeting, the mediator should give the parties an estimate of the length of time required for each phase of the proceeding. Moreover, even during the early phases of the procedure the party representatives will develop a sense of the likelihood of success and of the approximate length of time which will be required. Under Rule C-2 of the CPR Model Procedure any party may withdraw from the mediation at any time after attending the first session.

It is not uncommon for parties to agree to mediation on the expressed condition that a party will be permitted to commence litigation or arbitration if the mediation is not concluded within a specified period. Presumably, that option will not be exercised if, when the deadline is reached, the prospective plaintiff is optimistic as to the outcome of the mediation.

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D. THE MEDIATOR

The selection of a highly capable mediator is vital. A mediator is not vested with the legal authority of a judge or arbitrator but must rely on his or her own resources.

To effectively mediate a major, complex business dispute a mediator must possess a rare combination of qualifications. The mediator must:

- be absolutely impartial and fair and so perceived;
- inspire trust and motivate people to confide in him or her;
- be able to size up people, understand their motivations, relate easily to them;
- set a tone of civility and consideration in dealings with others;
- be a good listener;
- be capable of understanding thoroughly the law and facts of a dispute, including surrounding circumstances;
- quickly analyze complex problems and get to the core;
- know when to intervene, and when to stay out of the way;
- be creative, imaginative and ingenious in developing proposals that will "fly" and know when to make such proposals;
- be a problem solver;
- be articulate and persuasive;
- be flexible;
- possess a thorough understanding of the negotiating process;
- be patient, persistent, indefatigable, and "upbeat" in the face of difficulties;
- be an energetic leader, a person who can stimulate others and make things happen;
- have a personal stature that commands respect,
- have experience as a mediator.

The size and complexity of the case will influence the selection of the mediator. In a major case, the mediator might be a former judge, a senior executive, a leading attorney, the dean or a professor of a law school or business school, or a skilled conflict resolution professional.

When legal issues are critical, there are significant advantages to selecting a lawyer or legal academic as the mediator. When the subject matter is technical, it may be desirable to select a person who has an understanding of the technology, but lack of subject matter expertise is rarely a serious problem. The parties will often welcome the opportunity to educate the mediator, who brings no preconceived notions or views about the subject matter underlying the dispute.

In most cases a single mediator will be used; however, in complex cases the mediator is likely to need assistance, and it is helpful for the mediator to be able to discuss issues or possible solutions with another neutral person familiar with the case. Occasionally, using two mediators may have advantages. They could represent different disciplines relevant to the dispute, e.g. science and law; and by conferring with each other they may develop additional settlement options.

The mediator's role can run the gamut from that of a facilitator who arranges meetings in a conducive setting, to that of an activist who will early on announce settlement terms and will urge the parties to accept those terms. There is a continuum in terms of how large a role mediators play:

- urging the parties to agree to talk,
- helping parties understand the mediation process,
- providing a suitable environment for negotiation,
- helping parties agree on an agenda,
- setting an agenda,
- maintaining order and civility,
- helping the participants understand the problem(s),
- helping the participants to ascertain the facts and to "face the facts",
- helping the participants develop their own proposals,
- carrying messages between parties,
- helping the participants negotiate,
- suggesting solutions,
- persuading participants to accept a particular settlement.

When entering into mediation the parties should reach an understanding as to the roles they expect the mediator to play and should communicate that understanding to the mediator. Indeed, the parties' expectations on this score are likely to influence the selection of the mediator.

What a mediator will do also will depend on the mediator's personality, experience, judgment, and intuition; on the nature of the dispute, on the kind and number of parties involved, and on their relationship with each other and with the mediator.

Generally speaking, we believe a mediator is most likely to succeed by "taking charge" early on; by setting the agenda; by guiding the process with a combination of firmness and diplomacy; by playing an active role in the development of solutions; and finally if need be by persuading the parties to accept a specific settlement. The greater the number of parties, the stronger the case for this style of mediation.

The mediator's fee and other expenses of a mediation are normally shared equally. However, it is not uncommon for a party proposing mediation to offer to bear the expense of the early phase or phases of the procedure in order to induce the other party or parties to try the process. There also may be reasons not to allocate expenses on a per capita basis.

The mediator may well need administrative assistance, legal research, or other forms of assistance. It is desirable for the mediator and the parties to discuss early on the types of assistance likely to be needed and the mediator's resources for obtaining the same.

E. THE ROLES OF EXECUTIVES AND LAWYERS

Executives are accustomed to turning dispute management over to their attorneys. In an important intercorporate mediation the company's interests are likely to be represented most effectively by a team consisting of a senior executive and senior attorney who are in sync and supplement each other. In-house attorneys frequently participate.

Understanding is best promoted when executives explain their positions directly to their counterparts, rather than communicating indirectly through surrogates. Executives have the best understanding of their company's interests, of what is truly important. They have business-oriented settlement options not available to adjudicators or attorneys and are the most likely to develop creative, mutually advantageous solutions.

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It is preferable for a company to be represented by an executive who does not feel a need to defend past actions and who relates well to his opposite number. Each executive should be a decision maker authorized to negotiate a settlement, subject to board of directors approval if need be.

Some attorneys feel uneasy at the prospect of letting the client speak. The executive representing the company in a mediation should be an experienced negotiator, and success in negotiation, as at trial, depends on thorough preparation on the part of each participant, including discussion between executive and attorney. They should agree on who will be the principal spokesperson in presenting the company's views in the early phases of the mediation. When it comes to discussing terms of settlement, the executive should be "front and center."

Even if an executive assumes an active role, there remain essential functions for the attorney, who may be an in-house or outside lawyer. These include:

- Counseling on the advisability of settlement and mediation.
- Persuading the adversary to agree to the process.
- Educating the executive as to the legal issues.
- Drafting statements for submission to the mediator and otherwise preparing for effective presentation.
- Serving as a sounding board for the executive and discussing settlement options as the mediation progresses.
- Assuring confidentiality of the proceeding and avoiding compromising the company's litigation position, should the mediation fail.
- Drafting the settlement agreement and assuring its enforceability.
- Dealing with the court if litigation is pending.

The attorney should appreciate that in mediation the primary focus is on finding a solution rather than debating legal issues, that a mediation session is not a trial and that being argumentative usually is unproductive.

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F. ROLE OF NEUTRAL ORGANIZATION

"Mediation services" are being offered by an increasing number of national, regional and local organizations. Essentially, three types of services may be provided:

1. Help bring parties to the table, i.e. secure their agreement to participate in the process.

2. Identify candidates well qualified to serve as mediator in the particular dispute, secure the agreement of all parties to the retention of one of the candidates, recruit that person and make compensation arrangements.

3. Administer the proceeding.

Once an adversarial relationship has developed, a party which wishes to engage in mediation may be reluctant to take the lead in "selling" mediation to its adversaries or may have difficulty persuading them to mediate. A neutral organization can play a useful role in explaining the mediation process and its advantages to parties whose agreement to participate is being sought. CPR has successfully played that role in cases involving few and very large numbers of parties.

Selection of a well qualified mediator in whom all parties have confidence is the most critical step in assuring the success of the mediation. Parties often need the assistance of a neutral organization in the selection process. CPR's panels of neutrals include persons having the highest qualifications, and CPR regularly assists parties in selecting the "right" mediator.

Given the highly informal and voluntary nature of mediation, CPR believes that once the mediator is in place, the parties and the mediator usually have little need for the services of a neutral organization as an "administrator" of the process; however, a number of organizations also offer that service.

G. ROLE OF INSURERS

In certain cases one or more insurers are direct parties to the dispute, as in a coverage dispute with a policyholder or in an allocation dispute among insurers. Obviously, these insurers must be at the table.

In other cases, the immediate parties are not insurers, but one or more insurers are expected to bear all or part of the liability of a party, and any settlement will be subject to their approval. Under these circumstances, it appears essential for the policyholder to assure in advance that the insurers do not object to the insured's participation in the mediation. It will be desirable for the insurers to agree informally in advance to the parameters of a settlement, and for the insured to keep the insurers informed as the mediation progresses. Representation of the insurers in the mediation, or in certain phases, can be considered. Before agreeing to a settlement the policyholder would need to assure that the terms are acceptable to the insurers. Reaching an agreement with the other side, subject to uncertain insurer approval, is not a desirable solution.

If the insurers are denying coverage to which the policyholder believes it is entitled, or if differences exist among two or more insurers as to allocation of coverage among them, a second mediation may be in order, entirely separate from mediation of the underlying dispute or meshed with it.

H. WHY MEDIATION WORKS

The record is replete with mediation successes: cases in which a settlement of a business dispute was forged in a mediation proceeding.

Since mediation of business disputes is normally private, there are no statistics on numbers of non-administered cases or results. Examples of successfully concluded cases, intended primarily to illustrate their range, are listed in Appendix D of this paper. It is the consensus of our committee members, based in large part on their own experience, that a high percentage of mediations of business disputes - some say over 90 percent - result in a settlement. Even if settlement does not occur during the proceeding, the greatly enhanced mutual understanding substantially improves the prospects for a later settlement.

What are the reasons for the dramatic success of the process? There is of course no single explanation, and each case has unique aspects, but the following factors are common:

- Just as the imminence of a trial often induces litigants to stop posturing and to seriously seek a settlement, commitment of the parties to a mediation is likely to motivate them to "bite the bullet" rather than to postpone unpleasant decisions. The mediator will reinforce this motivation. Indeed, this is why the parties agree to mediate in the first place - a desire to resolve the dispute without resorting to costly, time-consuming litigation.
- Even disputes nominally between corporations involve human beings endowed with emotions. When the adversaries face each other at the conference table in the presence of the mediator any antagonism is likely to subside. Direct discussions tend to reduce misunderstandings. Real concerns, not just legal issues, are discussed. The process becomes a challenge to resolve problems. The momentum of mediation leads to accommodation. Settlement represents success.
- The mediator can establish groundrules designed to maximize the chances of success.
- The mediator typically will first urge discussion of subjects which are non-controversial or as to which agreement is readily achieved, postponing consideration of difficult issues. These early discussions build a spirit of cooperation.
- The mediator can help identify and overcome barriers to settlement, such as those recited in Section III-A.3 of this paper. Mediation provides the parties with a form of mini-discovery; the opportunity - at little or no risk - to crystalize issues and learn more about the other parties' perceptions of the pertinent facts.
- In caucusing with each party, the mediator will diplomatically compel that party to face facts and will dispel unrealistic expectations. For instance, overoptimism by both sides regarding their chances of prevailing in court is common, especially early in litigation. The mediator, if a lawyer, can point to the weaknesses of each party's case, as well as to the costs and burdens of prolonged litigation.

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- Once the mediator understands the true interests of each party, what is important and what is not, what they can "live with," the mediator is well positioned to propose solutions which accommodate those interests.
- The mediator may well see and point out opportunities for common gains. Many business disputes are resolved through new business arrangements, rather than by one party's agreeing to pay "damages" to another.

I. "SELLING" MEDIATION TO OTHER PARTIES

Proposing mediation is not a sign of weakness. Other parties may well have to be "sold" on mediation, especially if they lack prior experience. A pro forma proposal may not suffice. The advantages of mediation to both sides should be carefully explained. The proposer should emphasize that:

- the procedure is voluntary, nonbinding and confidential;
- the parties retain control over the outcome;
- a party may withdraw at any time after the first session;
- the mediator must be acceptable to all parties;
- the groundrules must be acceptable to all parties;
- time limits may be established;
- the cost of the procedure is likely to be modest;
- experience shows that the chances of success are very high, but little is lost and something will be gained through better mutual understanding even if the procedure should not succeed;
- by its nature the case is well suited to mediation.
- the proposer will negotiate in good faith and trusts the other party/parties to do likewise.

The initiating party may offer to bear more than its share of the cost of the procedure. In some instances the proposer has offered to bear the mediator's fees for the early phase of the procedure -- familiarizing the mediator with the case. The initiating party may invite the other party to propose candidates for the mediator role, or may do so itself.

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If the parties have a contractual relationship and the contract calls for ADR, of course the relevant clause should be invoked. If the initiating party has subscribed to a CPR policy on ADR, the policy should be invoked, even if the other party is not a subscriber.

Consideration should be given to who should approach whom. Who is most likely to be receptive to early settlement and ADR? Who has had prior ADR experience? Who appears to be the principal decisionmaker on the issue? Success will depend in part on the persuasiveness of the proposer.

If the persons to be induced to mediate are not familiar with the process, it may help to provide them with a copy of this paper or with other reading material (see the bibliography in Appendix C). Moreover, a neutral organization, such as CPR, may play a useful role in persuading parties of the advantages of mediation (see Section III.F above).

J. CONFIDENTIALITY

Parties entering into mediation typically are anxious to protect statements made and documents generated during the process against disclosure to outsiders. Use of the materials and statements in litigation between the parties, should mediation fail, are particular concerns. A combination of legal, contractual and practical approaches can give the parties a high level of protection, although not an absolute guaranty, against disclosure.

- A mediation is a settlement negotiation and as such is entitled to the protection accorded by Rule 408 of the Federal Rules of Evidence and state counterparts. Rule 408 is couched in terms of admissibility in evidence. Courts are split on whether to apply Rule 408 in the discovery context.

- The legislatures of over forty states, wishing to encourage disputants to mediate, rather than litigate, have enacted statutes broadening the protection given by Rule 408 and its counterparts. These statutes differ from each other; and many are limited to particular kinds of mediation; typically they are designed, inter alia, to assure that the mediator will not be compelled to testify as to the mediation process. [*]

- If the parties adopt the CPR Model Procedure set forth in Section II above, Rule C-8 will provide contractual assurance of confidentiality as between the parties; Rule C-4(c) proscribes transcription of meetings; and Rules D and E require the mediator and each party upon request to return all written materials to the originating party.

- Rule C-10 prohibits the mediator from serving as a witness, consultant or expert in an action relating to the subject matter of the mediation.

- The mediator should agree in writing to be bound by the above Rules. The mediator and the parties may supplement these rules.

- If litigation is pending, the court may be requested to issue a confidentiality order.

Only rarely have mediators been compelled to testify or disclose materials as to a mediation proceeding, and then usually for reasons of overriding public interest, e.g. knowledge of a felony.

K. COURT RELATED MEDIATION

Trial judges have been urging litigants to mediate certain cases and have appointed mediators to conduct the process. This practice is likely to become more common as federal courts develop and implement "expense and delay reduction plans"

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[*] Rogers and McEwen, Mediation Law, Policy, Practice (1989, Cum. Supp. 1990 and 1991) contains a detailed treatment of the subject of confidentiality and summaries of all state laws protecting the mediation process.

pursuant to the Civil Justice Reform Act of 1990. The model procedure set forth in Section II above is readily adaptable for court-related mediation. The court also may have its own groundrules, or the judge or mediator may establish procedures considered suitable for the particular case. Even if a court suggests or orders mediation, the parties may well be in a position to select their own mediator.

IV. CONTRACT CLAUSES

The best time by far to agree on a sensible way to resolve a business dispute is before any dispute has arisen. Once one has erupted, it is much more difficult for parties to agree about anything. CPR strongly encourages the inclusion of multistep ADR clauses in business agreements. Arbitration clauses are, of course, common. CPR favors clauses calling for the following steps, with appropriate time limits on steps 1 and 2.

1. Negotiation between executives
2. Mediation or a Minitrial
3. Arbitration or Litigation

Based on a few early decisions, it is likely but not certain that agreements to negotiate or conduct a nonbinding ADR proceeding are legally enforceable, but perhaps not through summary enforcement proceedings as in arbitration. The CPR Model Mediation and Minitrial Procedures permit either party to withdraw. In any event, such pre-dispute agreements between responsible companies should carry considerable weight and should substantially increase the likelihood of a consensual resolution.

Attached as Appendix A are three forms of sample ADR clauses which call for incorporation by reference of CPR model rules/procedures.

Whether or not the parties' business agreement provides for mediation, they may enter into a submission agreement such as that attached as Appendix B once a dispute has arisen and they have agreed to engage in mediation.

APPENDIX B

SETTLEMENT OF TRANSNATIONAL BUSINESS DISPUTES*

Most bona fide disagreements or disputes between reputable companies, and in particular disputes between companies in different countries, are best regarded as business problems, to be resolved promptly through business-oriented negotiations. If such negotiations become deadlocked, before resorting to litigation or arbitration, the parties should consider a non-adjudicative dispute resolution process designed to facilitate settlement.

The CPR procedure ("the procedure") set forth herein is private, informal, expeditious, and far less expensive or disruptive of business relationships than litigation or arbitration. The procedure does not result in an adjudication. The parties fashion their own solution. Experience shows that the chances of arriving at a solution are high. Administrative involvement of an institution is not required.

The businessmen, who have the best understanding of their underlying interests and have settlement options not available to adjudicators, play a central role in the process. The solution they develop may well be more constructive than the win-lose decision of a tribunal.

The procedure is particularly suitable when difficulties arise out of complex, long term transnational undertakings, such as take-or-pay contracts, joint ventures, participation agreements, major construction projects, or technology arrangements. Such difficulties are best resolved amicably and rapidly, with the least damage to the business relationship.

The procedure consists essentially of

- an "initiating agreement;"
- a "formal meeting" at which lawyers or other representatives of both parties present their case to a senior executive of each party, usually in the presence of a Neutral Advisor selected by the parties;
- followed by settlement negotiations between the senior executives.

The parties are free to modify this model procedure. For example, they may elect to conduct the procedure without a Neutral Advisor.

Parties can use this procedure, whether or not their dispute is in litigation. The procedure also can be used when more than two parties

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are involved in a dispute.

A party may withdraw from the procedure at any time. The procedure is without prejudice to the rights and remedies of the parties, should the settlement efforts not succeed.

The procedure is an adaptation of a process used with great success in the United States to settle business disputes, there commonly referred to as the "mini-trial."

MODEL PROCEDURE

1. INSTITUTION OF PROCEEDING

The parties will commence the procedure by signing a written agreement (the "initiating agreement"), substantially in the form attached hereto as Appendix A. The party proposing the procedure will submit to the other(s) a draft of the initiating agreement. The parties will resolve any differences regarding such draft, whereupon the parties will sign the initiating agreement.

2. NEUTRAL ADVISOR

The parties will select a mutually acceptable Neutral Advisor, who shall have the functions stated in this procedure or in the initiating agreement.

Unless the parties otherwise agree, an individual shall not serve as Neutral Advisor if circumstances exist which would cause reasonable doubt regarding his impartiality. Any such circumstances shall be promptly disclosed.

Prior to the formal meeting, no party, nor anyone acting on its behalf, may unilaterally communicate with the Neutral Advisor, except as specifically provided for herein or otherwise agreed.

The Neutral Advisor's fee or time charge rate will be established at the time of his appointment.

3. EXCHANGE OF INFORMATION

Before the formal meeting, and by the date specified in the initiating agreement, the parties shall exchange, and submit to the Neutral Advisor, concise memoranda, stating the issues in the dispute and their position, as well as all documents and other exhibits on which the parties intend to rely during such meeting, or which are helpful in understanding their position. Only those documents and exhibits which

have an important and direct bearing on the issues in the dispute are to be submitted. Documents and exhibits presented, if not in the language(s) of the procedure, will be accompanied by a translation into the language(s) of the procedure, unless the parties otherwise agree.

4. FORMAL MEETING

A formal meeting (the "formal meeting") will be held before a panel consisting of the Neutral Advisor and one Management Representative of each party who shall have authority to negotiate a settlement on behalf of the party he represents. The Neutral Advisor will supervise the conduct of the formal meeting.

The formal meeting shall be held at the place and time, and in the manner, designated in the initiating agreement.

During the formal meeting each party will make an oral presentation of its case, and each party shall be entitled to a reply. The presentations and replies may be made in any form, and by any individuals, other than the Management Representatives, as desired by each party, and may be supported by any of, but only, the memoranda, documents and other exhibits submitted in accordance with Section 3 hereof. The use of witnesses and experts shall be permitted. Presentations may not be interrupted, except that the Neutral Advisor and the Management Representatives may ask clarifying questions.

The meeting shall not be recorded. However, persons attending may take notes. Each Management Representative may have not more than two advisors in attendance.

5. NEGOTIATIONS BETWEEN MANAGEMENT REPRESENTATIVES

At the conclusion of the formal meeting, the Management Representatives shall make all reasonable efforts to agree on a resolution of the dispute. They shall meet one or more times, as necessary. By mutual agreement, other members of their teams and an interpreter may be invited to attend the negotiations. At the request of either Management Representative, the Neutral Advisor will attend the negotiations and will give an oral opinion as to the issues raised during the formal meeting. At the request of both Management Representatives, the Neutral Advisor also will submit a written opinion as to the aforesaid issues, make a settlement proposal or mediate the negotiations.

The terms of any settlement are to be set out in a written agreement which is to be signed by the Management Representatives as soon as possible after the conclusion of the negotiations and will, once signed, be legally binding on the parties.

6. CONFIDENTIALITY

By entering into this procedure the parties shall be taken to agree that the entire proceeding is confidential; that the parties, their representatives and the Neutral Advisor must keep confidential all statements, whether oral or written, made in this proceeding, and all other matters relating to the proceeding, including the settlement agreement, except when, and insofar as, its disclosure is necessary to implement and enforce such agreement. All such matters will be inadmissible and not subject to discovery in any litigation, arbitration, or other proceeding.

The Neutral Advisor will be disqualified as a witness, consultant, or expert for any party to this proceeding, and his opinions in this proceeding will be inadmissible in any litigation, arbitration or other proceeding.

7. LEGAL PROCEEDINGS

The parties will not commence or continue arbitration or court proceedings while this proceeding is pending, insofar as they do not thereby materially prejudice their legal position.

If this proceeding should not result in a settlement, the parties may pursue legal remedies following termination of this proceeding.

8. COSTS

Unless the parties otherwise agree, (a) the fees and expenses of the Neutral Advisor, as well as any other expenses of the proceeding, will be borne equally by the parties; and (b) each party shall bear its own costs of the proceeding.

9. TERMINATION OF PROCEEDING

The proceeding shall be deemed terminated if and when (a) the parties have not executed a written settlement agreement within forty-five days following conclusion of the formal meeting (which deadline may be extended by mutual agreement), or (b) either party serves on the other party and on the Neutral Advisor a written notice of withdrawal from the proceeding.

APPENDIX A

AGREEMENT TO INITIATE CPR PROCEDURE FOR SETTLEMENT OF TRANSNATIONAL BUSINESS DISPUTES

BETWEEN

......................................[Name].("Party A")
....[full address].

..................................[Name].("Party B")
....[full address].

MATTER

[Title/subject matter, parties, and date of contract to which dispute relates] ("the Contract").

DISPUTE

[Identify briefly nature of dispute including reference to relevant provision in the Contract.] ("the dispute")

TERMS OF AGREEMENT

1. CPR Procedure

By this agreement we agree to seek to resolve the dispute by adopting and using the CPR Model Procedure for Settlement of Transnational Business Disputes ("the CPR Procedure") as modified by the provisions of this agreement.

2. Management Representatives

....
[Name of Management Representative of Party A and corporate title.]

....
[Name of Management Representative of Party B and corporate title.]

Each of the above persons ("the Management Representatives") will represent their respective companies at the formal meeting and will have full authority to settle the dispute.

3. Place and Time of Formal Meeting

A formal meeting ("the formal meeting") will take place in the manner set out in Section 4 of the CPR Procedure at:

....
....[full address].

at .... o'clock on .... [date].

4. Language of Proceedings

The proceedings are to be conducted in .... [language(s)].

5. Exchange of Information

The parties shall comply with the provisions of Section 3 ("Exchange of Information") of the CPR Procedure by .... [date].

6. Conduct of Formal Meeting and Negotiations

The formal meeting will be conducted, as provided by Section 4 of the CPR Procedure, as follows:-

.... o'clock to .... o'clock
Presentation by Party A of its case.

.... o'clock to .... o'clock
Reply by Party B.

.... o'clock to .... o'clock
Presentation by Party B of its case.

.... o'clock to .... o'clock
Reply by Party A.

The Management Representatives will meet for negotiations to settle the dispute at .... o'clock on .... [date - if possible, immediately after formal meeting].

7. Suspension of Legal Proceedings

The following steps will be taken, as provided by Section 7 of the CPR Procedure, to suspend the legal proceedings/arbitration (if any) relating to the dispute:-

If no legal proceedings/arbitration have been commenced, it is agreed that none will be commenced until the termination of this agreement, in accordance with Section 9 of the CPR Procedure.

8. Neutral Advisor

The Neutral Advisor will be .... [name]. [Delete if no Neutral Advisor to be appointed]

[Or]

The nomination of Neutral Advisor is to be agreed between the parties by the date specified in para. 5 above. The Neutral Advisor is to be qualified as the following:-

......................[professional qualifications]
......................[linguistic ability]
......................[nationality]

SIGNED: ....

.... [NAME]
For and on behalf of Party A

SIGNED: ....

.... [NAME]
For and on behalf of Party B

COMMENTARY ON MODEL AGREEMENT

Length of Proceeding. The simplicity of the procedure permits rapid completion. The period from signing the initiating agreement to settlement might be about sixty days. Of course, the length of the process will vary from case to case. The formal meeting usually would be completed in one day. A sample time schedule follows.

The Formal Meeting. A key feature of this procedure is the formal meeting. Why hold such a meeting? Executives often lack a thorough understanding of the adversary's side of a dispute, and each party is best able to present its own position in a persuasive manner. The formal meeting enables each party to present the essentials of its case to the Management Representative of the other party. Such a presentation usually gives each executive a much better understanding of the dispute and leads to his taking a more realistic position in the settlement negotiations which follow. Participation in the process also tends to defuse hostility and to strengthen the resolve of both Management Representatives to find a solution and to avoid litigation or arbitration.

The Management Representatives. The negotiations are more likely to succeed if the negotiators do not feel a need to defend past actions. The settlement may well entail a new business deal in which neither party loses. The more senior the Management Representatives, the greater the range of options for a constructive solution they are likely to perceive.

The Neutral Advisor. A highly qualified Neutral Advisor, in whose impartiality and judgment the parties have confidence, can significantly enhance the prospects for success. It might be desirable to select as the Neutral Advisor a respected jurist with a thorough knowledge of the applicable law and the ability to facilitate the conduct of the process. Such a jurist can give the executives his educated, objective views on the legal issues and on the likely outcome of a lawsuit or arbitration. Otherwise, the Neutral Advisor should be experienced in the field to which the dispute relates.

With the concurrence of the executives, the Neutral Advisor also can play a mediating role in their negotiations and make a settlement proposal. If need be, an appointing organization, such as CPR, can assist in the selection of a Neutral Advisor. The parties have the option of dispensing with a Neutral Advisor.

The parties should enter into an agreement with the Neutral Advisor, by which the latter agrees to be bound by the provisions of Section 6 (Confidentiality) of the procedure, and covering the Neutral Advisor's fee or time charges and such other matters as the parties and the Neutral Advisor see fit.

Neutral Expert. If the parties need independent expert advice on critical technical or legal issues, and the Neutral Advisor does not possess the required expertise, they may agree on the selection of a neutral expert or empower the Neutral Advisor to select one.

The Locale. Parties of different nationalities often are reluctant to litigate or arbitrate in each other's country. They should be less reluctant to hold this proceeding in each other's country, since the objective is a settlement negotiated by the parties, not adjudication. In any event, the parties may meet in a third country of their choice.

Legal Proceedings. If no litigation is pending between the parties with respect to the subject matter of the dispute, and if a statute of limitations would expire while the procedure is being conducted, the parties should consider the feasibility of suspending such statute of limitations by agreement for the duration of the procedure.

Commercial Agreement Clauses. Persons drafting a commercial agreement are urged to incorporate the model procedure by reference. The following contract clause is suggested:

> "The parties will attempt in good faith to resolve any controversy or claim arising out of or relating to this agreement in accordance with the CPR Model Procedure for Settlement of Transnational Business Disputes."

The above clause may well not be legally enforceable. Between reputable companies an expression of intent, enforceable or not, should carry considerable weight. If a dispute arises, the above contract clause would substantially increase the likelihood that the parties would make a serious effort to arrive at a compromise through this process, rather than seeking an adjudicative solution.

The commercial agreement also could provide that if a controversy arises, negotiations between executives would be the first step in attempting resolution; this procedure the second step. A suggested contract clause is attached. The clause represents an expression of intent and states that either party may withdraw at any time and may institute legal proceedings.

SAMPLE TIME SCHEDULE

Commencement Date (CD): Date of last signature on the initiating agreement.

CD + 20: Parties agree on Neutral Advisor

CD + 30: Parties exchange and send the Neutral Advisor memoranda and documents and exhibits to be used at the formal meeting.

CD + 45: Formal Meeting

9:00 - 11:00	Party A's presentation
11:00 - 12:00	Party B's reply
14:00 - 16:00	Party B's presentation
16:00 - 17:00	Party A's reply

CD + 46: Settlement negotiations begin. Neutral Advisor submits oral opinion.

CD + 49: Parties agree on settlement terms.

CD + 50: A written settlement agreement is prepared and signed.

NEGOTIATION CLAUSE FOR TRANSNATIONAL COMMERCIAL AGREEMENT

The parties will attempt in good faith to resolve any controversy or claim arising out of or relating to this agreement promptly by negotiations between executives of the parties.

If a controversy or claim should arise, ____________________ of X Co. and ______________________ of Y Co., or their respective successors in the positions they now hold (herein called the "project managers"), will meet at least once and will attempt to resolve the matter. Either project manager may request the other to meet within twenty-one days, at a mutually agreed time.

If the matter shall not have been resolved within thirty days of their first meeting, the project managers shall refer the matter to senior executives, who shall have authority to settle the dispute (herein called "the senior executives"). Thereupon, the project managers shall promptly prepare and exchange memoranda stating the issues in dispute and their positions, summarizing the negotiations which have taken place, and attaching relevant documents. The senior executives will meet for negotiations within twenty-one days of the end of the thirty-day period referred to above, at a mutually agreed time.

The first meeting shall be held at the offices of the project manager receiving the request to meet. If more than one meeting is held, the meetings shall be held in rotation at the offices of X Co. and Y Co.

If the controversy or claim has not been resolved within thirty days of the meeting of the senior executives, either party may initiate the CPR Model Procedure for Settlement of Transnational Business Disputes.

The parties intend to cooperate in implementing the above procedures; however, either party may withdraw at any time upon written notice to the other from the negotiations or from the aforesaid CPR procedure and may institute (litigation) (arbitration proceedings).

(An arbitration clause may be added here.)

APPENDIX C

CENTER FOR PUBLIC RESOURCES

MODEL MINITRIAL PROCEDURE (REVISED 1989)

INTRODUCTION

Most bona fide disagreements or disputes between reputable companies are best regarded as business problems, to be resolved promptly through business-oriented negotiations. If such negotiations become deadlocked, the parties should consider a non-adjudicative dispute resolution process designed to facilitate settlement.

The informal procedure known as a minitrial, consisting of an adversarial "information exchange", followed by management negotiations, has become a highly successful form of private business dispute resolution.

The Model Minitrial Procedure ("the procedure") set forth herein reflects the experience of a committee of leading minitrial practitioners and neutral advisors convened by the Center for Public Resources (CPR). The procedure is private, informal, expeditious, and far less expensive or disruptive of business relationships than litigation or arbitration. The procedure does not result in an adjudication. The parties fashion their own solution. Experience shows that the chances of arriving at a solution are very high. The procedure serves to penetrate impasses caused by good faith disagreements on the merits of each party's position. Administrative involvement of an institution is not required.

The business executives, who have the best understanding of their underlying interests and have settlement options not available to adjudicators or attorneys, play a central role in the process. The solution they develop is likely to be more creative and business oriented than the win-lose decision of a tribunal.

The procedure is particularly suitable when difficulties arise out of complex, long term undertakings, such as take-or-pay contracts, joint ventures, major construction projects, or technology arrangements. Such difficulties are best resolved amicably and rapidly, with the least damage to the business relationship. Minitrials also have been successful in one-shot situations in which no business relationship exists, such as securities fraud, wrongful termination, partnership dissolution, antitrust and product liability disputes.

The success of minitrials has been due in large part to the voluntary nature and flexibility of the process and to the cooperation, flexibility and creativity of disputants' counsel in developing and implementing procedures best suited for their particular situations. CPR encourages parties to modify this model. For example, they may provide for a minitrial without a neutral

advisor or may alter the role of the neutral advisor. The model is readily adaptable to a dispute among more than two parties.

The minitrial can be used in a variety of circumstances. Parties to an existing dispute can use the model procedure, whether or not the dispute is in litigation. The model procedure can be adopted for disputes between U.S. companies and for disputes involving foreign companies, and, with minor modifications, for disputes between a government entity and a private company. The model procedure may be incorporated by reference in business agreement clauses providing for private dispute resolution.

The model procedure is not self-executing, but is to be invoked through execution of an "initiating agreement". A party may withdraw from the process at any time before its conclusion. The procedure is without prejudice to the rights and remedies of the parties, should the settlement efforts fail.

A commentary and a sample time schedule follow the model procedure. The schedule is illustrative of the time typically required for the various phases of the proceeding.

Mediation is another highly effective and widely used form of collaborative dispute resolution. Features of mediation and the minitrial can be combined. The minitrial neutral advisor can play a mediating role in the executives' negotiations, and a mediator conducting a mediation proceeding may find it advantageous to stage a meeting resembling the minitrial information exchange.

The CPR Model Procedure for Settlement of Transnational Business Disputes represents an adaptation of the minitrial procedure for disputes involving foreign companies.

CPR has established the CPR Panels, consisting of eminent former judges, legal academics and other leaders of the bar who may assist in structuring a minitrial and may serve as a neutral advisor in a minitrial. In conjunction with its Panel services, CPR is available, at the request of a party to a dispute, to interest the other party or parties in entering into a minitrial or other form of private dispute resolution. A brochure listing the members of the Panels and describing services they may perform is available.

The *CPR Mini-Trial Workbook* and the *CPR Practice Guide on The Mini-Trial* contain reference material useful to the practitioner.

MODEL MINITRIAL PROCEDURE

1. INSTITUTION OF PROCEEDING

The parties will commence the proceeding by entering into a written agreement (the "initiating agreement"), substantially in the form attached hereto as Appendix A. The date of the initiating agreement is called the "commencement date".

2. THE MINITRIAL PANEL

2.1. The minitrial panel shall consist of one member of management from each party (the "management representative"), who shall have authority to negotiate a settlement on behalf of the party represented, and a neutral advisor (the "Neutral Advisor").

2.2. If the management representatives are not designated in the initiating agreement, each party shall name its management representative within thirty days from the commencement date by written notice to the other party and the Neutral Advisor. Each party thereafter may designate a different management representative by written notice to the other party and the Neutral Advisor.

3. .THE NEUTRAL ADVISOR

3.1. The Neutral Advisor, who shall be independent and impartial, will perform the functions stated in this procedure, and any additional functions on which the parties may hereafter agree.

3.2. If the Neutral Advisor is not named in the initiating agreement, the parties will attempt to select a Neutral Advisor by mutual agreement.

3.3. If the parties have not agreed on a Neutral Advisor within fifteen days from the commencement date, either party may request the Center for Public Resources (CPR) in writing, with copy to the other party, to assist in the selection of a Neutral Advisor. A copy of the initiating agreement shall be attached to such request.

CPR shall then proceed as follows:

(a) Promptly following receipt by it of the request, CPR shall convene the parties in person or by telephone one or more times to attempt to select the Neutral Advisor by agreement of the parties.

(b) If the procedure provided for in (a) does not result in the selection of the Neutral Advisor, CPR shall submit to the parties a list of not less than three candidates. Such list shall include a brief statement of each candidate's qualifications. Each party shall strike from the list any candidate it finds unacceptable, shall number the remaining candidates in order of preference, and shall deliver the list so marked to CPR. CPR shall designate as Neutral Advisor the nominee willing to serve for whom the parties collectively have indicated the highest preference and who does not have a conflict of interest (see paragraph 3.4.). If a tie should result between two candidates, CPR may designate either candidate. If this procedure for any reason should fail to result in designation of the Neutral Advisor, the parties may request CPR to repeat the procedure, proposing a list of not less than three new candidates.

3.4. Each party shall promptly disclose to the other party any circumstances known to it which would cause justifiable doubt regarding the independence or impartiality of an individual under consideration or appointed as Neutral Advisor. Any such individual shall promptly disclose any such circumstances to the parties. If any such circumstances have been disclosed, the individual shall not serve as Neutral Advisor, unless all parties agree.

3.5. No party, nor anyone acting on its behalf, shall unilaterally communicate with the Neutral Advisor on any matter of substance, except as specifically provided for herein or agreed between the parties.

3.6. The parties will promptly send to the Neutral Advisor such materials as they may agree upon for the purpose of familiarizing the Neutral Advisor with the facts and issues in the dispute. The parties shall comply promptly with any requests by the Neutral Advisor for additional documents or information relevant to the dispute.

3.7. The parties may jointly seek the advice and assistance of the Neutral Advisor or CPR in interpreting this procedure and on procedural matters.

3.8. The Neutral Advisor's per diem or hourly charge will be established at the time of appointment. Unless the parties otherwise agree, (a) the fees and expenses of the Neutral Advisor, CPR's time charges, and any other expenses of the proceeding will be borne equally by the parties; and (b) each party shall bear it own costs of the proceeding.

4. DISCOVERY

4.1. If either or both parties have a substantial need for discovery to prepare for the information exchange, the parties shall attempt in good faith to agree on a plan for strictly necessary, expeditious discovery. Should they fail to agree, either party may request a joint meeting with the Neutral Advisor, who shall assist the parties in formulating a discovery plan.

4.2. Should the minitrial not result in a settlement of the dispute, discovery taken in the proceeding may be used in any pending or future proceeding between the parties relating to the dispute, unless the parties otherwise agree. Such discovery shall not restrict a party's ability to take additional discovery in any such proceeding.

5. BRIEFS AND EXHIBITS

Before the information exchange, the parties shall exchange, and submit to the Neutral Advisor, briefs, as well as all documents or other exhibits on which the parties intend to rely during the information exchange. The parties shall agree upon the length of such briefs, and on the date on which such briefs, documents and other exhibits are to be exchanged.

6. THE MINITRIAL INFORMATION EXCHANGE

6.1. The minitrial information exchange shall be held before the minitrial panel at a place and time stated in the initiating agreement or thereafter agreed to by the parties and the Neutral Advisor.

6.2. During the information exchange each party shall make a presentation of its best case, and each party shall be entitled to a rebuttal. The order and permissible length of presentations and rebuttals shall be determined by agreement between the parties, or failing such agreement, by the Neutral Advisor.

6.3. The Neutral Advisor will moderate the information exchange.

6.4. The presentations and rebuttals of each party may be made in any form, and by any individuals, as desired by such party. Presentations by fact witnesses and expert witnesses shall be permitted.

6.5. Presentations may not be interrupted, except that during each party's presentation, and following such presentation, any member of the panel may ask clarifying questions of counsel or other persons appearing on that party's behalf. No member of the panel may limit the scope or substance of a party's presentation. No rules of evidence, including rules of relevance, will apply at the information exchange, except that the rules pertaining to privileged communications and attorney work product will apply.

6.6 Members of the panel, and if the parties so agree, each party and counsel, may ask questions of opposing counsel and witnesses during scheduled open question and answer exchanges, and during that party's rebuttal time.

6.7. The information exchange shall not be recorded by any means. However, subject to Section 8, persons attending the information exchange may take notes of the proceedings.

6.8. In addition to counsel, each management representative may have advisors in attendance at the information exchange, provided that the other party and the Neutral Advisor shall have been notified of the identity of such advisors at least five days before commencement of the information exchange.

7. *NEGOTIATIONS BETWEEN MANAGEMENT REPRESENTATIVES*

7.1. At the conclusion of the information exchange, the management representatives shall meet one or more times, as necessary, by themselves, and shall make all reasonable efforts to agree on a resolution of the dispute. By agreement, other members of their teams may be invited to participate in the meetings.

7.2. At the request of either management representative, the Neutral Advisor will meet with the management representatives jointly or separately at his or her discretion, and will give an oral opinion as to the issues raised during the information exchange and as to the likely outcome at trial of each issue. Thereupon, the management representatives will again attempt to resolve the dispute. If either management representative requests a written opinion on such matters, the Neutral Advisor shall promptly render such an opinion. Thereupon, the management representatives will again attempt to resolve the dispute. At the request of the management representatives, the Neutral Advisor may at any time mediate the negotiations and may propose settlement terms.

7.3. The terms of any settlement are to be set out in a written agreement which is to be signed by the management representatives as soon as possible after conclusion of the negotiations and will, once signed, be legally binding on the parties.

8. CONFIDENTIALITY

8.1. The entire process is a compromise negotiation. All offers, promises, conduct and statements, whether oral or written, made in the course of the proceeding by any of the parties, their agents, employees, experts and attorneys, and by the Neutral Advisor are confidential. Such offers, promises, conduct and statements are privileged under any applicable mediation privilege, and are subject to FRE 408 and any state counterpart rules or doctrine and are inadmissible and not discoverable for any purpose, including impeachment, in litigation between the parties to the minitrial or other litigation. However, evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its presentation or use at the minitrial. The Neutral Advisor is the parties' joint counsel, or agent if not an attorney.

8.2. The Neutral Advisor will be disqualified as a witness, consultant, or expert for any party, and as an arbitrator between the parties, and his or her oral and written opinions will be inadmissible for all purposes in this or any other dispute involving the parties hereto.

9. COURT PROCEEDINGS

9.1. If on the commencement date no litigation is pending between the parties with respect to the subject matter of the minitrial, no party shall commence such litigation until the minitrial proceedings have terminated in accordance with Section 10 hereof. Execution of the initiating agreement shall toll all applicable statutes of limitation until the minitrial proceedings have terminated. The parties will take such other action, if any, required to effectuate such tolling.

9.2. If on the commencement date litigation is pending between the parties with respect to the subject matter of the minitrial, the parties may promptly (a) present a joint motion to the court to request a stay of all proceedings pending conclusion of the minitrial proceedings; and (b) request the court to enter an order protecting the confidentiality of the minitrial and barring any collateral use by the parties of any aspect of the minitrial in any pending or future litigation. The grant of such stay and protective order shall not be a condition to the continuation of the minitrial proceeding.

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10. TERMINATION OF PROCEEDING

The proceeding shall be deemed terminated if and when (a) the parties have not executed a written settlement of their dispute on or before the thirtieth day following conclusion of the information exchange (which deadline may be extended by mutual agreement), or (b) either party serves on the other party and on the Neutral Advisor a written notice of withdrawal from the proceeding.

11. ACTIONS AGAINST THE NEUTRAL ADVISOR OR CPR

Neither the Neutral Advisor nor CPR shall be liable to any party for any act or omission in connection with the minitrial proceeding.

Published by Case Western Reserve University School of Law Scholarly Commons, 1991

APPENDIX A

AGREEMENT TO INITIATE MINITRIAL PROCEEDING

BETWEEN

________________________________ [Name]. ("Party A")

________________________________ [address].

________________________________ [Name]. ("Party B")

________________________________ [address].

MATTER

[Title/subject matter, parties, and date of contract to which dispute relates] ("the Contract").

DISPUTE

[Identify briefly nature of dispute including reference to relevant provision in the Contract.] ("the dispute")

TERMS OF AGREEMENT

1. CPR Procedure

By this agreement we agree to seek to resolve the dispute by adopting and using the CPR Model Minitrial Procedure ("the CPR Procedure") as modified by the provisions of this agreement and as attached hereto.

2. Management Representatives

____
[Name of Management Representative of Party A and corporate title.]

____
[Name of Management Representative of Party B and corporate title.]

Each of the above persons ("the Management Representatives") will represent their respective companies at the information exchange and will have full authority to negotiate a settlement of the dispute.

3. Place and Time of Information Exchange

The information exchange will take place in the manner set out in Section 6 of the CPR Procedure at:

____

______________________________ [address].

on ______________ at __________ [date and time].

4. Neutral Advisor

The Neutral Advisor will be ____________ [name]. [Delete if no Neutral Advisor to be appointed]

[Or]

The Neutral Advisor will be selected in accordance with Section 3 of the CPR Procedure.

SIGNED: ______________________________

______________________________ [NAME]
For and on behalf of Party A

SIGNED: ______________________________

______________________________ [NAME]
For and on behalf of Party B

COMMENTARY ON MODEL MINITRIAL PROCEDURE

Length of Proceeding. The simplicity of the procedure permits rapid completion. The period from signing the initiating agreement to settlement might be about ninety days. Of course, the length of the process will vary from case to case. The information exchange frequently can be completed in one day. A sample time schedule is attached.

Discovery. Discovery, if any, should be limited to that for which each party has a substantial need for purposes of the minitrial information exchange. As a rule, such discovery would be far less extensive and less formal than discovery conducted in preparation for a trial. The objective is to enable the parties, through limited discovery on the merits, in a short period to define the issues and to learn the principal strengths and weaknesses of their cases. If litigation between the parties is pending, any prior discovery in that litigation should be taken into account in determining the need for additional discovery. The principal form of discovery normally should be the production of relevant documents. Interrogatories generally are not appropriate. Depositions, if any, should be taken only of one or a few key witnesses, and should be confined in scope to the minimum necessary to prepare for the information exchange.

The Information Exchange. A key feature of this procedure is the information exchange. Why hold such an exchange? Executives often lack a thorough understanding of the adversary's side of a dispute, and each party is best able to present its own position in a persuasive manner. The information exchange leads each party to focus on the most important issues in presenting its case to the management representative of the other party. Such a presentation usually gives each executive a much better understanding of the dispute and leads to a more realistic position in the settlement negotiations which follow. Participation in the process also tends to defuse hostility and to strengthen the resolve of both management representatives to find a solution. The tone of the minitrial should be one of business-like problem solving. Nevertheless, counsel are expected to vigorously advocate their positions during the information exchange.

The Management Representatives. The negotiations are more likely to succeed if the negotiators have not been directly involved in the dispute and therefore do not feel a need to defend past actions. The settlement may well entail a new business deal in which neither party loses. The more senior the management representatives, the greater the range of options for a constructive solution they are likely to perceive. In some circumstances negotiations will be more productive if more than one representative of each party participates.

The prospects for success of the process are likely to be enhanced if the management representatives are evenly matched and command the respect of the other party. Therefore, the parties should consult on the selection of their management representatives.

The Neutral Advisor. A highly qualified Neutral Advisor, in whose impartiality and judgment the parties have confidence, can significantly enhance the prospects for success. It may well be desirable to select as the Neutral Advisor a respected former judge, senior lawyer or legal scholar with a thorough knowledge of the applicable law and the ability to facilitate the conduct of the process, including if necessary mediation between the parties. Such a person can give the executives educated, objective views on the legal issues and on the likely outcome of a lawsuit or arbitration. The Neutral Advisor also could be a person experienced in the field to which the dispute relates.

With the concurrence of the executives, the Neutral Advisor also can play a mediating role in their negotiations and make settlement proposals. If need be, CPR can assist in the selection of a Neutral Advisor. The parties have the option of dispensing with a Neutral Advisor.

The parties should enter into an agreement with the Neutral Advisor, by which the latter agrees to be bound by the provisions of Section 8 (Confidentiality) of the procedure, and covering the Neutral Advisor's fee or time charges and such other matters as the parties and the Neutral Advisor see fit.

Neutral Expert. If the parties need independent expert advice on critical technical or legal issues, and the Neutral Advisor does not possess the required expertise, they may agree on the selection of a neutral expert or empower the Neutral Advisor to select one.

Termination. Section 10 of the model procedure permits either party to withdraw from the proceeding at any time by notice to the other party and the Neutral Advisor. The parties may wish to modify this provision to call for a notice period or to impose a monetary sanction on a party which withdraws before the proceeding has run its course.

Business Agreement Clauses. Persons drafting a business agreement are urged to incorporate the model procedure by reference. The following contract clause is suggested:

> "The parties will attempt in good faith to resolve any controversy or claim arising out of or relating to this agreement in accordance with the CPR Model Minitrial Procedure and will enter into an initiating agreement in the form annexed to such Procedure."

The above clause may not be legally enforceable. Moreover, the minitrial procedure is terminable at will. However, between reputable companies an expression of intent, enforceable or not, carries considerable weight. If a dispute arises, the above contract clause would substantially increase the likelihood that the parties will make a serious effort to arrive at a compromise through this process, rather than seeking an adjudicative solution.

The business agreement could provide that if a controversy arises, negotiations between executives would be the first step in attempting resolution; this procedure the second step. The agreement also could provide that if the minitrial should not result in a settlement, the dispute will be settled by arbitration in accordance with the CPR Rules for Non-Administered Arbitration of Business Disputes. Suggested contract clauses are attached.

SAMPLE MINITRIAL SCHEDULE

Before the Information Exchange

Commencement Date (CD): Parties sign initiating agreement (Sec. 1).

CD + 10: Parties agree on Neutral Advisor [NA], if not named in the initiating agreement (para 3.2).

CD + 10: If litigation is pending, parties' attorneys move to stay proceedings (para. 9.2.).

CD + 15: Parties' attorneys agree on discovery plan including a 30 day discovery schedule (para. 4.1.).

CD + 20: Parties' attorneys send material on dispute to NA (para. 3.6.).

CD + 30: Parties' attorneys agree on place and date for minitrial (if not agreed in initiating agreement) and on length of presentations, rebuttals, and responses (para. 6.1).

CD + 30: Parties determine form of briefs and date for submission of briefs and exhibits (Sec. 5.).

CD + 45: Discovery is completed.

CD + 60: Parties exchange briefs and exhibits (para. 5.1.).

CD + 65: Parties give notice of advisors who will attend information exchange (para. 6.8.).

CD + 70: Information exchange begins (para. 6.2).

At the Information Exchange

CD + 70	-	9:00 - 12:00	Plaintiff's case-in-chief
		1:00 - 2:00	Defendant's rebuttal
		2:00 - 3:00	Open question and answer exchange
CD + 71	-	9:00 - 12:00	Defendant's case-in-chief
		1:00 - 2:00	Plaintiff's rebuttal
		2:00 - 3:00	Open question and answer exchange

Management Negotiations

CD + 71: 3:00 - 5:00 Negotiations

CD + 72 - 85: Negotiation period (para. 7.1.).

CD + 85: Parties agree on settlement terms.

CD + 90: A written settlement agreement is signed.

Canada-United States Law Journal, Vol. 17 [1991], Iss. 2, Art. 41

BUSINESS AGREEMENT DISPUTE RESOLUTION CLAUSE
(Two Step Negotiation - Minitrial - Arbitration)

The parties will attempt in good faith to resolve any controversy or claim arising out of or relating to this agreement promptly by negotiations between executives of the parties.

If a controversy or claim should arise, ________________ of X Co. and ____________________ of Y Co., or their respective successors in the positions they now hold (herein called the "project managers"), will meet at least once and will attempt to resolve the matter. Either project manager may request the other to meet within fourteen days, at a mutually agreed time.

If the matter has not been resolved within twenty days of their first meeting, the project managers shall refer the matter to senior executives, who shall have authority to settle the dispute (herein called "the senior executives"). Thereupon, the project managers shall promptly prepare and exchange memoranda stating the issues in dispute and their positions, summarizing the negotiations which have taken place, and attaching relevant documents. The senior executives will meet for negotiations within fourteen days of the end of the twenty-day period referred to above, at a mutually agreed time.

The first meeting shall be held at the offices of the project manager receiving the request to meet. If more than one meeting is held, the meetings shall be held in rotation at the offices of X Co. and Y Co.

If the matter has not been resolved within thirty days of the first meeting of the senior executives (which period may be extended by mutual agreement), the parties will attempt in good faith to resolve the controversy or claim in accordance with the Center for Public Resources Model Minitrial Procedure.

If the matter has not been resolved pursuant to the aforesaid minitrial procedure within ninety days of the commencement of such procedure (which period may be extended by mutual agreement), the controversy shall be settled by arbitration in accordance with the Federal Arbitration Act, exclusively, and under the Center for Public Resources Rules for Non-Administered Arbitration of Business Disputes, by (a sole arbitrator) (three arbitrators, of whom each party shall appoint one) (three arbitrators, none of whom shall be appointed by either party). Judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof.

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