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# Introduction to Volume 5 of the Yearbook on Arbitration and Mediation

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## INTRODUCTION

Nancy A. Welsh\*

I am delighted to write the introduction to Volume 5 of the *Yearbook on Arbitration and Mediation*. I begin by expressing my deep gratitude to all of the students who are members of the *Yearbook's* Editorial Board and staff, with special thanks to Editor-in-Chief Zach Morahan for all of his efforts. The *Yearbook* has made great strides in every year of its existence. This year is no exception. Indeed, its progress is especially notable on several fronts.

And now it is my pleasure to turn to the *Yearbook's* 2013 symposium: *The Role of the Courts: Judicial Review of Arbitral Awards and Mediated Settlement Agreements*. It is an honor to introduce the articles written for this symposium, which was designed to capture, and contribute to, three different dialogues: 1) the dialogue that is taking place between our public courts and private arbitration, regarding the place of arbitration; 2) the similar dialogue that is occurring between our public courts and mediation; and 3) the dialogue that sometimes occurs between those who identify more with arbitration and those who tend to favor mediation.

The first dialogue—which has had its ups and downs—is most obvious. As anyone interested in arbitration in the U.S. must know by now, our courts initially were hostile to arbitration. The merchants who had inserted these clauses in their contracts, though, asserted their right to self-determination. They had selected this dispute resolution procedure in order to vest procedural and decision-making power in arbitrators who would understand and enforce the merchants' procedural and substantive norms. Congress responded with the Federal Arbitration Act, compelling courts to enforce arbitration agreements as they would any other contracts.

From the perspective of someone like myself, who has focused primarily on mediation, a period of relative calm ensued. Arbitration appeared to operate quite self-sufficiently within its own self-contained sphere of influence in the commercial sector.<sup>1</sup> But even for me, it was clear that the situation changed dramatically in 1991. That year, in *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>2</sup> the Supreme Court opened the door to the use of arbitration to decide all sorts of statutory, civil rights claims arising out of contracts of adhesion. While merchants and commercial arbitrators had hailed arbitration as an expression of self-determination, the Supreme Court had apparently spied a tool for the provision of streamlined, inexpensive, individualized adjudication that could relieve courts' burgeoning dockets.

The enforcement of arbitration clauses has been the focus of an extraordinary number of recent Supreme Court decisions. The ultimate power of arbitration, however, lies in its ability to produce outcomes that actually will be implemented. When arbitration was truly private, and was the result of arms-length negotiation among

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<sup>1</sup> The same was true in the labor sector.

<sup>2</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

merchants, arbitration proponents could count on the process being perceived as fair and worthy of voluntary compliance. That is much less true today. When arbitration is the “creature” of a contract of adhesion, and when courts have forced arbitration on unwilling parties, the stage is set for skepticism about arbitration’s fairness and compliance with arbitral awards cannot be assumed. Winning parties are more likely to turn to the courts for help once again, this time with the enforcement of the award produced by court-ordered arbitration. Should courts *always* enforce these awards? Does every arbitral award *deserve* enforcement?

At this point in the evolution of mandatory predispute arbitration, judicial review is the slender reed that remains to ensure that the procedure is sufficiently accountable to merit access to the enforcement power of the state. Consistent with this new reality, Professor Jeffrey Stempel urges that the Supreme Court’s expansive enforcement of arbitration agreements must be matched by an equally-expansive jurisprudence regarding the grounds for judicial review. He urges, in particular, that if arbitral awards reflect clear errors of factual determination or application of law, they should be interpreted as imperfect executions of arbitrators’ power and should be vacated for failing to meet the requirement of “a mutual, final, and definite award upon the subject matter submitted.”<sup>3</sup> In a similar vein, Professor Maureen Weston highlights the far-reaching (but largely under-appreciated) decision of *Preston v. Ferrer*,<sup>4</sup> in which the Supreme Court announced that “[w]hen parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative.”<sup>5</sup> Professor Weston fears *Preston*’s preemptive effect. Specifically, she anticipates that arbitration will be used to undermine state agencies’ ability to protect citizens and implement public policy, subject to state-defined grounds for judicial review. She calls for Congress to rein in the “monster” that the FAA has become, and ensure that private arbitration is required to operate *within* the bounds of state and federal law, not as a means *around* those laws.<sup>6</sup> Sounding substantially more optimistic, Professor Allen Blair suggests that even though the Supreme Court made clear in *Hall Street Associates, L.L.C. v. Mattel, Inc.*<sup>7</sup> that contracting parties may not dictate additional grounds for judicial review to federal courts, state courts may want to seize the opportunity to innovate and respond to parties’ preferences in this area.<sup>8</sup>

The second dialogue, between public courts and mediation, obviously is different in some ways. It is much less likely that courts will be asked to enforce a mediation clause contained in a contract, although that is changing as companies adopt “tiered” dispute resolution clauses. Rather, much mediation occurs *within* the courts as part of court-connected mediation programs. Courts often order or strongly encourage parties to use mediation. They can do this because mediation is a consensual process, and courts

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<sup>3</sup> Jeffrey W. Stempel, *Asymmetric Dynamism and Acceptable Judicial Review of Arbitration Awards*, 5 PENN ST. Y.B. ARB. & MEDIATION 1 (2013).

<sup>4</sup> *Preston v. Ferrer*, 552 U.S. 346 (2008).

<sup>5</sup> *Id.* at 349.

<sup>6</sup> Maureen A. Weston, *The Accidental Preemption Statute: The Federal Arbitration Act and Displacement of Agency Regulation*, 5 PENN ST. Y.B. ARB. & MEDIATION 59 (2013).

<sup>7</sup> *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008).

<sup>8</sup> Allen Blair, *Is Less Really More? Hall Street Associates, Private Procedural Ordering and Expanded Review of Arbitral Awards in State Courts*, 5 PENN ST. Y.B. ARB. & MEDIATION 74 (2013).

are not depriving parties of their day in court. They are merely conditioning access upon an attempt to reach settlement through mediation.

As soon as we scratch the surface, though, we find dynamics in this dialogue that are much like those that exist in the dialogue between the courts and arbitration. Mediation, like arbitration, is grounded in self-determination. Proponents laud its ability to: enhance the content and civility of parties' communication and negotiation; permit the parties' uncovering of the underlying interests and norms that are important to them; and produce customized, creative solutions. As Professor Jennifer Reynolds observes, some judges value these aspects of mediation, especially if the judges serve as mediators themselves or care about the "fit" between the social role of our courts and mediation.<sup>9</sup> But according to Professor Reynolds, when judges focus on their obligation to process cases, they are much more likely to see mediation's potential to clear court dockets, reduce expenses for the parties and courts, and whittle away at case disposition times. In other words, when the institutional needs of the courts dominate, the efficiency of settlement becomes much more salient than parties' self-determination.

Professor Jacqueline Nolan-Haley expresses concerns about court-connected mediation's focus on settlement. In particular, she points to evidence that parties increasingly are objecting to the enforcement of mediated settlement agreements, arguing that there was never a meeting of the minds or that the agreements were the product of manipulation or even outright coercion. Professor Nolan-Haley, therefore, proposes an end to court-ordered mediation. She suggests using incentives instead. Specifically, U.S. courts could borrow a page from the U.K. and authorize judges to approve fee-shifting if a party's refusal to mediate was not reasonable.<sup>10</sup> Last, Professor James Coben examines the role of mediators in helping class counsel and class representatives settle class actions. Importantly, Professor Coben reveals the very substantial deference that judges grant to these mediators as the judges determine whether or not to approve class settlements. Professor Coben expresses great skepticism about the wisdom of judges' reliance on mediators' presence as a sort of heuristic for procedural and substantive fairness. He therefore proposes that mediators should be replaced with special masters who should be required to file reports explaining why settlements are non-collusive and sufficiently fair to absent class members.<sup>11</sup>

The final dialogue, between mediation sympathizers and arbitration proponents, might not be obvious to anyone outside the dispute resolution family.<sup>12</sup> As should already be clear, arbitration and mediation share a common grounding in self-

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<sup>9</sup> Jennifer W. Reynolds, *Judicial Reviews: What Judges Write When They Write About Mediation*, 5 PENN ST. Y.B. ARB. & MEDIATION 111 (2013).

<sup>10</sup> Jacqueline M. Nolan-Haley, *Judicial Review of Mediated Settlement Agreements: Improving Mediation with Consent*, 5 PENN ST. Y.B. ARB. & MEDIATION 152 (2013).

<sup>11</sup> James R. Coben, *Creating a 21<sup>st</sup> Century Oligarchy: Judicial Abdication to Class Action Mediators*, 5 PENN ST. Y.B. ARB. & MEDIATION 162 (2013).

<sup>12</sup> Amusingly enough, the family name is somewhat contested. Should it be "dispute resolution"—or "alternative dispute resolution" or "appropriate dispute resolution?" Or perhaps it should go by the name of "arbitration and dispute resolution," or "dispute resolution and advocacy," or perhaps even "procedural law." Fortunately, Professor Reynolds has begun to turn her attention to the naming of this fractious, blended family. See Jennifer W. Reynolds, *The Lawyer with the ADR Tattoo*, 14 CARDOZO J. CONFLICT RESOL. 395, 414-415 (2013). See also Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L. J. 2663, 2689 (1995) (introducing the concept of "appropriate dispute resolution" rather than "alternative dispute resolution").

determination. But they are also quite different. In this, they resemble siblings in many families. Mediation looks like a meeting (or series of *ex parte* meetings); it is described as “consensual;” and it produces settlement agreements, a type of contract. Arbitration is the “the creature of contract,” but it generally looks like a hearing (that includes all of the parties); it is described as “adjudicative;” and it produces an award.

What happens when mediation and arbitration, like some siblings, are forced to work together? It’s complicated. Imagine that the parties use one neutral, who serves first as a mediator. In that role, he meets privately with each side and learns confidential information. The matter fails to settle. The mediator then becomes an arbitrator. He now knows “secret information” which may or may not be disclosed during the arbitration proceeding. This “secret information” may find its way into his award. Professor Ellen Deason grapples with these issues and focuses particularly on the appropriate standard of judicial review for the award produced by med-arb. Very interestingly, she begins by concluding that the FAA would not apply, because the med-arb process differs so materially from arbitration. She then emphasizes the need for courts to engage in rigorous examination of a party’s consent to waive the fundamental due process rights of equal treatment and an opportunity to be heard. Finally, Professor Deason explains what courts should demand before they deem such consent to be sufficiently knowing and voluntary.<sup>13</sup> Professor Andrea Schneider tackles a different relationship between consensual and adjudicative processes, in the investment treaty arbitration context. She examines what sort of consensual process is needed to address the role of, and norms guiding, the annulment committees that review arbitral panels’ awards. On this increasingly important and contentious topic, she urges the inclusion of all stakeholders in a transparent and procedurally just process to clarify what “error correction” should mean and how it can best be accomplished (which may include considering the merits of an appeal process compared to annulment, as well a quasi-political process compared to a quasi-judicial process).<sup>14</sup>

All of these articles reflect the authors’ great respect (and even affection) for arbitration, mediation and the new hybrids that are developing. All of them also reflect these authors’ recognition of the need for hard-headed examination and skepticism regarding the claims made by any process, as well as need to consider context. Inevitably, all of these articles affirm the key role played by courts in their exercise of judicial review. Today, judicial review represents the most important procedural counterweight to assure arbitration’s accountability.

There is great dynamism in the world (or worlds) of arbitration and mediation today. So many relationships, so much reason for dialogue. We hope that you enjoy (and use) this volume of the *Yearbook on Arbitration and Mediation*.

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<sup>13</sup> Ellen E. Deason, *Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review*, 5 PENN ST. Y.B. ARB. & MEDIATION 219 (2013).

<sup>14</sup> Andrea Kupfer Schneider, *Error Correction and Dispute System Design in Investor-State Arbitration*, 5 PENN ST. Y.B. ARB. & MEDIATION 194 (2013).