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## SYMPOSIUM: ALTERNATIVE DISPUTE RESOLUTION IN THE TWENTY-FIRST CENTURY

### **DOES ADR OFFER SECOND CLASS JUSTICE?**

Martin A. Frey\*

A first class dispute resolution process, whether litigation or an alternative process, must offer the disputants impartiality, a just process and a just result. Some dispute resolution processes are unilateral in nature, some involve both disputing parties, and others include a neutral third party. If a neutral third party has a role in the process, he or she must be impartial in performing his or her role in the process. If that party also has a role in deciding the outcome, that function must be performed impartially as well. If the dispute resolution process involves communications between the parties, a just process provides each party with an opportunity to present his or her side of the dispute to the other and to have the other party and any third party who participates, listen. The disputing parties must feel that they had the opportunity to weigh the advantages and disadvantages of pursuing one course of action over another without coercion. A just result must be a fair result and, if based on the law, one that at least attempts

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to produce a correct legal outcome.<sup>1</sup>

A second class justice system is a justice system a cut below the best. A system that is second class is second rate, inferior or mediocre. The query itself—“Does ADR Offer Second Class Justice”—leads the reader to believe that if ADR is second class, then possibly what is not ADR is first class. Since negotiation, mediation, and arbitration are typically classified as ADR methods, litigation would be the non-ADR method and at least, arguably, the first class method. But does litigation provide a first class method and do the other methods of dispute resolution provide second rate, inferior, or mediocre justice? This article compares and contrasts the attributes of the various dispute resolution processes and probes whether one method serves justice better than the others. The evaluation of whether a dispute resolution process is less than first class will consider impartiality in the process and the formulation of the outcome, fairness in the process, and fairness and correctness in the outcome.

## I. THE ARRAY OF DISPUTE RESOLUTION PROCESSES

The range of dispute resolution processes forms a continuum beginning with the least intrusive where one disputant resolves the dispute through inaction, unilateral action, or to the most intrusive where one or both parties invite a third

1. Webster's Unabridged Dictionary provides the following definition for justice:

**just'ice, n.** [O.Fr., from L. *justitia*, justice, from *justus*, lawful, rightful, just, from *jus*, law, right.]

1. the quality of being righteous; honesty.
2. impartiality; fair representation of facts.
3. the quality of being correct or right; as, he proved the *justice* of his claim.
4. vindictive retribution; merited reward or punishment; as, *justice* overtook the criminal.
5. sound reason; rightfulness; validity.
6. the use of authority and power to uphold what is right, just, or lawful.
7. the administration of law; procedure of a law court.
8. a judge.
9. a justice of the peace.

*justice of the peace*; a magistrate having the power to try minor cases, perform marriages, etc. within a specified district.

*to bring to justice*; to cause (a wrongdoer) to be tried in court and duly punished.

*to do justice to*; (a) to treat fitly or fairly, (b) to treat with due appreciation; to enjoy properly.

*to do oneself justice*; (a) to do something in a manner worthy of one's abilities; (b) to be fair to oneself.

**Syn.**—equity, law, impartiality, fairness, right, reasonableness, propriety, uprightness.

WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 993 (Unabridged 2d ed. 1978).

Roget's Thesaurus provides the following synonyms:

**justice, n.** fairness, fair play, fair treatment, equity (IMPARTIALITY); administration of justice, judicatory (COURT OF LAW). THE NEW ROGET'S THESAURUS 277 (Library ed. revised, updated 1978).

party to resolve the dispute for them. The continuum includes:

- A. Inaction
- B. Acquiescence
- C. Self-Help
- D. Negotiation
- E. Ombudsmanship (corporate, institution, and government sponsored)
- F. Mediation (private and court-sponsored)
- G. Arbitration (private and court-annexed)
- H. Litigation (court and private judging)<sup>2</sup>

#### A. *Inaction*

Inaction is the most common form of dispute resolution. Since a dispute requires at least two participants, if one party does not pursue the other, the dispute is resolved.

For example, when Kathleen purchased a BMW from Friendly Used Cars, Friendly represented that the vehicle had been inspected and was in “fine shape.” Within two weeks after the sale, the brakes failed and needed replacement. Rather than confront Friendly about its misrepresentation, Kathleen took her BMW to A-1 Brake and Muffler Company and had the brakes replaced. By not confronting Friendly, Kathleen chose inaction toward Friendly as her method of dispute resolution.

#### B. *Acquiescence*

Acquiescence is another common form of dispute resolution. If one party gives in to the other’s demands, that is he or she capitulates, the dispute is resolved.

For example, Steven leased an apartment from Buena Vista Apartments for one year. The lease stated that in the event Steven terminated his lease before its expiration, he would be required to pay three months rent as a penalty. Six months into his lease, Steven received a promotion at work that required him to move to another city. He gave Buena Vista written notice of his intent to terminate at the end of the following month. Buena Vista notified Steven that as

2. This list is not inclusive of all methods of dispute resolution but includes the most commonly used methods. Other methods of dispute resolution include mediation/arbitration (med/arb), summary jury trial and minitrial. For further discussion of these methods, see STEPHEN B. GOLDBERG ET AL., *NEGOTIATION, MEDIATIONS, AND OTHER PROCESSES* ch. 5 (2d ed. 1992).

Early Neutral Evaluation (ENE) is often included under alternative dispute resolution (ADR), although ENE itself is not a process by which a dispute is resolved. Under ENE, the litigants, their attorneys, and a neutral practitioner with subject matter expertise meet early in the pretrial period. At this confidential session, the litigants receive a non-binding assessment of their dispute. ENE expedites the pretrial and trial process by narrowing and clarifying the issues, streamlining discovery, and positioning the litigants for meaningful settlement discussion. *See, e.g.*, ADR in the Northern District of California, available at <http://www.adr.cand.uscourts.gov/adr/welcome.nsf/main/page> (last visited Apr. 15, 2001).

Conciliation is also included under ADR. Conciliation is similar to mediation in that it involves a neutral third party who tries to have the parties reconcile their differences. Conciliation is often sponsored by family law courts and religious institutions.

per the lease, he would be required to pay three months rent. Although Steven knew that the apartment occupancy rate was over 90% and that Buena Vista would have little trouble renting his apartment, he had neither the time nor the inclination to challenge Buena Vista's demand to the extra payment. Rather than confront Buena Vista, Steven vacated the apartment as planned and gave Buena Vista a check for three months rent. By not confronting Buena Vista, Steven chose acquiescence as his dispute resolution process.

### C. *Self-Help*

Self-help is another form of unilateral action as a method of dispute resolution. Self-help is the opposite of inaction. Inaction is passive; self-help is active. Inaction abandons rights; self-help asserts rights.

The Uniform Commercial Code (UCC), for example, provides a number of self-help remedies. UCC § 2-601 gives a buyer who receives goods (that are not delivered under an installment contract) that "fail in any respect to conform to the contract" the right to "(a) reject the whole; or (b) accept the whole; or (c) accept any commercial unit or units and reject the rest."<sup>3</sup> UCC § 2-608 authorizes a buyer to revoke acceptance of delivered goods and return them to the seller if the "non-conformity substantially impairs its value to him."<sup>4</sup> UCC § 2-717 gives the buyer the right to "deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract." Finally, UCC § 9-609 provides that a secured party "may take possession of the collateral . . . without judicial process, if [the secured party] proceeds without breach of the peace."<sup>5</sup>

### D. *Negotiation*

Negotiation is a voluntary, consensual, private dispute resolution process. Unlike inaction, acquiescence, and self-help where a party acts unilaterally, the parties in negotiation must work together to resolve their dispute. They do not involve a third party to either direct the discussion or resolve the dispute for them.

For example, the Johnsons contracted with Rio Rancho Cabinet Makers, Inc., for the remodeling of their kitchen. The contract price was \$12,000. The work was completed but not to the Johnsons' satisfaction. The Johnsons wanted some of the work redone but Rio Rancho said it could not schedule the work for

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3. UCC § 2-601 (1997). If the goods were the subject of an installment contract, the buyer's right to reject is more narrow and described in UCC § 2-612. Also, UCC § 2-601 is subject to cure under UCC § 2-508.

4. UCC § 2-608 (1997). This section further provides that the buyer must have accepted the goods:

- (a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or
- (b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurance.

*Id.*

5. UCC § 9-609(a)(1), (b)(2) (1999). These provisions of Revised Article 9 follow former § 9-503.

six months. The Johnsons told Rio Rancho that they needed the work done within the month. When Rio Rancho demanded payment of the contract price, the Johnsons refused. After thinking it over and finding another company that could satisfactorily complete the work within a month for \$3,000, the Johnsons sent Rio Rancho a check for \$9,000 with the notation: "the acceptance of this check constitutes payment in full." By sending the check with the "payment in full" notation, the Johnsons were making Rio Rancho an offer for an accord contract. When Rio Rancho deposited the Johnsons' check, an accord contract was formed and satisfaction (performance of the accord contract) was completed. Even though the parties did not discuss the Johnsons' offer, the accord and satisfaction was a negotiated settlement of the dispute.

### *E. Ombudsmanship*

Ombudsmanship adds a third party to the dispute resolution process. An ombudsman, as the concept developed in the late 1960s, is a member of the management team of a public or private organization.<sup>6</sup> "[T]he ombudsperson is a neutral member of the corporate structure, located outside the normal managerial chain of command and reporting directly to the president of the organization."<sup>7</sup> The ombudsman, through investigation and informal counseling, helps resolve corporate related disputes confidentially and before they develop into lawsuits. The ombudsman can also alert upper management to major problems as they arise. Management may then gain insight into ways to resolve these problems and take corrective action before these problems reach the litigation stage and become much more difficult to address.

Ombudsmanship has broad application. A corporation, large or small, could have an ombudsman to investigate employee complaints.<sup>8</sup> A hospital or a nursing home may have an ombudsman to investigate patient complaints. Licensing agencies, such as those that license nursing homes, have an ombudsman. An industry, such as the insurance industry or the securities dealers may have an ombudsman.<sup>9</sup> A number of colleges and universities have an ombudsman.<sup>10</sup>

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6. The ombudsman has long been used in Scandinavia as a method of dispute resolution. Unlike its American cousin, where the ombudsman is a member of management, in Scandinavia "the ombudsman is a public official appointed to hear citizen complaints and conduct independent fact-finding investigations, with the goal of correcting abuses of public administration." GOLDBERG ET AL., *supra* note 2, at 236-37.

7. *Id.* at 237.

8. The following corporations use an ombudsman: McDonald's, Federal Express, IBM, and Bank of America.

9. *See, e.g.*, The Office of the Ombudsman of the National Association of Securities Dealers, Inc., available at <http://www.nasd.com/corpinfo/ombudsman.html> (last visited Apr. 15, 2001).

10. The following are examples of colleges and universities using an ombudsman: Colorado State University, Office of the University Ombudsman, available at <http://www.sc.colostate.edu/ombudsman> (last visited Apr. 15, 2001); Cornell University, Office of the University Ombudsman, available at <http://cuinfo.cornell.edu/Admin/Ombudsman/home.htm> (last visited Apr. 15, 2001); University of Florida, available at <http://www.ufl.edu/suggest.htm> (last visited Apr. 15, 2001); University of Illinois at Chicago, Office of the Ombudsperson, available at <http://www.uic.edu/depts/publ/yp/production/UNIT1-349.html> (last visited Apr. 15, 2001); Michigan State University, Office of the Ombudsman, available at <http://www.msu.edu/unit/ombud> (last visited

The ombudsman need not be corporate or industry appointed. The ombudsman may be government sponsored. For example, on the federal level,<sup>11</sup> ombudsmanship offices include a Taxpayer Ombudsman of the Internal Revenue Service,<sup>12</sup> a Student Financial Assistance Ombudsman,<sup>13</sup> the Small Business and Agriculture Regulatory Enforcement Ombudsman,<sup>14</sup> FDIC Office of the Ombudsman,<sup>15</sup> and the CDER Ombudsman.<sup>16</sup>

On the state level, ombudsmanship offices have become a regular feature of government. It is common to see an Ombudsman for Injured Workers,<sup>17</sup> a Long Term Care Ombudsman,<sup>18</sup> an Ombudsman for Mental Health and Mental Retardation,<sup>19</sup> an Office of Taxpayer Ombudsman,<sup>20</sup> and a more general Ombudsman-Citizens' Aide.<sup>21</sup>

Apr. 15, 2001); Stanford University, Ombudsperson's Office and Mediation Center, *available at* <http://www.stanford.edu/dept/ocr/ombudsperson> (last visited Apr. 15, 2001); University of Texas at Austin, Office of the Ombudsman, *available at* <http://www.utexas.edu/student/registrar/catalogs/gen-info/students2.html> (last visited Apr. 15, 2001); Washington State University, Office of the Ombudsman, *available at* <http://www.wsu.edu/~ombuds> (last visited Apr. 15, 2001); University of Western Michigan, University Ombudsman, *available at* <http://www.wmich.edu/ombudsman/standards.htm> (last visited Apr. 15, 2001).

Some graduate schools have their own ombudsman. *See, e.g.*, University of Maryland, Ombud's Office for Graduate Students, *available at* <http://www.gradschool.umd.edu/Ombuds/index.html> (last visited Apr. 15, 2001).

Some K-12 school districts have their own ombudsman. *See, e.g.*, Arlington, Texas Independent School District, AISD Parent/School Ombudsman Service, *available at* <http://www.arlington.k12.tx.us/information/conduct.shtml> (last visited Apr. 15, 2001).

11. Jeffrey S. Lubbers, *Ombudsman Offices in the Federal Government — An Emerging Trend?*, 22 ADMINISTRATIVE & REGULATORY LAW NEWS (Summer 1997), *available at* <http://www.abanet.org/adminlaw/news/vol22no4/Ombudsmn.html> (last visited Apr. 15, 2001).

12. Internal Revenue Service, *Taxpayer Rights Corner*, *available at* [http://www.irs.ustreas.gov/plain/ind\\_info/txpyr\\_rights/index.html](http://www.irs.ustreas.gov/plain/ind_info/txpyr_rights/index.html) (last visited Apr. 15, 2001); Robert E. McKenzie, *Taxpayer Assistance Orders*, *available at* <http://www.mckenzielaw.com/atao.html> (last visited Apr. 15, 2001).

13. Office of Student Financial Assistance Programs, Ombudsman, *available at* <http://www.sfahelp.ed.gov/index.cfm> (last visited Apr. 15, 2001).

14. U.S. Small Business Administration, *available at* <http://www.sba.gov/regfair> (last visited Apr. 15, 2001).

15. Federal Deposit Insurance Corporation, Office of the Ombudsman, *available at* <http://www.fdic.gov/about/contact/office/index.html> (last visited Apr. 15, 2001).

16. Center for Drug Evaluation and Research, *available at* <http://www.fda.gov/cder/ombud.htm> (last visited Apr. 15, 2001).

17. Oregon Dep't of Consumer and Business Services, Ombudsman for Injured Workers, *available at* <http://www.cbs.state.or.us/external/wco/index.html> (last visited Apr. 15, 2001).

18. Arkansas Long Term Care Ombudsman Program, *available at* <http://www.arombudsman.com> (last visited Apr. 15, 2001); Northern Virginia Long-Term Care Ombudsman Program, *available at* [http://www.co.fairfax.va.us/service/aaa/html/Ombud\\_main.htm](http://www.co.fairfax.va.us/service/aaa/html/Ombud_main.htm) (last visited Apr. 15, 2001). *See also Real People Real Problems: An Evaluation of the Long-Term Care Ombudsman Programs of the Older American Act (Summary)*, *available at* <http://www.nap.edu/readingroom/boods/rprp/summary.html> (last visited Apr. 15, 2001).

19. Minnesota Office of the Ombudsman for Mental Health and Mental Retardation, *available at* <http://www.ombudmhm.state.mn.us> (last visited Apr. 15, 2001).

20. Kentucky Revenue Cabinet, Online Taxpayer Service Center, Officer of Taxpayer Ombudsman, *available at* <http://www.state.ky.us/agencies/revenue/ombudsman.htm> (last visited Apr. 15, 2001).

21. Arizona Ombudsman-Citizens' Aide, *available at* <http://www.azleg.state.az.us/ombuds/about.htm> (last visited Apr. 15, 2001) (to help Arizona citizens "when they feel they have been treated unfairly by a state administrator, agency, department, board or commission").

## F. Mediation

Mediation, like ombudsmanship, adds a third party to the dispute resolution process. In mediation, the third party is neutral and is invited to participate in the process.

Mediation has traditionally been a private, consensual process. This means that either prior to or during the litigation, the parties decide that they should use mediation to attempt to resolve their dispute. Because mediation is private, the procedural and evidentiary rules of the process are those agreed to by the disputants. Rather than fashion their own rules, the disputants may agree to have the mediator determine the rules for them.<sup>22</sup>

The mediator facilitates the discussion between the parties in an attempt to help the parties resolve their dispute. The mediator controls only the process, and the parties negotiate through the mediator. The mediator does not resolve the dispute. The facilitative mediator refrains from suggesting solutions, but does assist the parties in focusing on the nature of their problem, their interests, and an array of resolutions they suggest for their dispute. The mediator who adds early neutral evaluation evaluates the problem and suggests solutions as he or she assists the parties in working through a process. Even if the mediator suggests solutions, the parties ultimately must resolve their own dispute.

Although traditionally, mediation has been a private process (the parties hire and pay the mediator), in recent years a number of courts have added mediation to the litigation process.<sup>23</sup> If the mediator is a judge, magistrate judge, or adjunct settlement judge, the process is called a settlement conference.<sup>24</sup> In a

22. The American Arbitration Association, for example, is a service that provides mediators along with the rules for the mediation process. American Arbitration Association, *available at* <http://www.adr.org/contents2.htm> (last visited Apr. 15, 2001). *See also* CPR Institute for Dispute Resolution, *available at* <http://www.cpradr.org/home1.htm> (last visited Apr. 15, 2001); United States Arbitration & Mediation (USA&M), *available at* <http://www.usam.com> (last visited Apr. 15, 2001); International Chamber of Commerce, Court of Arbitration, *available at* [http://www.iccwbo.org/index\\_court.asp](http://www.iccwbo.org/index_court.asp) (last visited Apr. 15, 2001). A number of other international, national, regional, and local services exist.

A number of specialized mediation services also exist. *See, e.g.*, National Mediation Board, *available at* <http://www.nmb.gov> (last visited Apr. 15, 2001) (mediating collective bargaining disputes in the railroad and airline industries); Federal Mediation and Conciliation Service, *available at* <http://www.fmcs.gov/aboutfmcs.htm> (last visited Apr. 15, 2001) (mediating disputes in contract negotiations between employers and unions representing employees in the private, public, and federal sectors); State Mediation & Conciliation Service, *available at* <http://www.dir.ca.gov/csmcs/smcs.html> (last visited Apr. 15, 2001) (investigates and mediates labor disputes in both the public and private sectors).

A number of specialized mediation services specialize in domestic disputes. These include mediation and conciliation services sponsored by religious institutions.

23. The Federal Judiciary has a homepage that links to the United States Supreme Court, the Courts of Appeals, the District Courts and the Bankruptcy Courts. Each court's website describes their ADR programs. The Federal Judiciary Homepage, *available at* <http://www.uscourts.gov/links.html> (last visited Apr. 15, 2001). Congress has mandated that each United States District Court have a civil justice expense and delay reduction plan that included ADR. 28 U.S.C. §§ 471-473 (2000).

The National Center for State Courts has a homepage that links to a number of websites of various state courts. National Center for State Courts, *available at* <http://www.ncsconline.org> (last visited Apr. 15, 2001). If a court has an ADR program, it will be listed.

24. *See, e.g.*, United States District Court for the Northern District of California, *available at*



court-sponsored or court-annexed settlement conference, the litigants participate in the process before they have an opportunity to appear in court to litigate their dispute.<sup>25</sup> The settlement conference is conducted by a neutral third party (judge, magistrate judge, or court appointed adjunct settlement judge) and is held privately at the courthouse.<sup>26</sup> The neutral third party may or may not have been selected because of his or her specialized subject expertise. A non-robed judge sitting at a conference table with the litigants and their attorneys contrasts nicely with the robed judge sitting behind an elevated bench in a formal courtroom.

The settlement conference is informal but structured by the settlement judge. The proceedings give the attorneys for each litigant an opportunity to explore the factors that might lead to settlement.<sup>27</sup> These factors include: the legal aspects of the dispute, the extent of the injury (and how sympathetic the victim will look at trial), a defendant's ability to pay a judgment or settlement, the cost of litigation, the home town aspects of the case (whether a local litigant will have an

<http://www.adr.cand.uscourts.gov/adr> (last visited Apr. 15, 2001); United States District Court for the Western District of Oklahoma, *available at* <http://www.okwd.uscourts.gov/adr.htm> (last visited Apr. 15, 2001). The United States District Court for the Northern District of California differentiates between the mediation process and the settlement conference process as follows:

Process [mediation]:

Mediation is a flexible, non-binding, confidential process in which a neutral mediator facilitates settlement negotiations. The informal session typically begins with presentations of each side's view of the case, through counsel or clients. The mediator, who may meet with the parties in joint or separate sessions, works to:

- \*improve communication across party lines
- \*help parties clarify and communicate their interests and understand those of their opponent
- \*probe the strengths and weaknesses of each party's legal position
- \*identify areas of agreement and help generate options for a mutually agreeable resolution

The mediator generally does not give an overall evaluation of the case. Mediation can extend beyond traditional settlement discussion to broaden the range of resolution options, often by exploring litigants' needs and interests that may be independent of the legal issues in controversy.

Process [settlement conference]:

A judicial officer, usually a magistrate judge, helps the parties negotiate. Some settlement judges also use mediation techniques to improve communication among the parties, probe barriers to settlement and assist in formulating resolutions. Settlement judges might articulate views about the merits of the case or the relative strengths and weaknesses of the parties' legal positions. Other settlement judges meet with one side at a time, and some settlement judges rely primarily on meetings with counsel.

United States District Court for the Northern District of California, *available at* <http://www.adr.cand.uscourts.gov/adr> (last visited Apr. 15, 2001).

25. Court-sponsored mediation is also being used after trial while a case is on appeal. *See, e.g.*, the Civil Appeals Management Program (CAMP) of the United States First Circuit Court of Appeals, the Settlement Program of the United States Eighth Circuit Court of Appeals, and the Circuit Mediation Office of the United States Tenth Circuit Court of Appeals, *available at* <http://air.fjc.gov/public/fjcweb.nsf/> (last visited Apr. 15, 2001). *See generally*, ROBERT J. NIEMIC, *MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS* (Federal Judicial Center 1997).

26. Some practitioners who are appointed adjunct settlement judges prefer, for convenience, to conduct their settlement conferences in their own conference rooms.

27. The settlement conference also provides a litigant the opportunity to sit face to face with his or her adversary and to hear, first hand, the adversary and his or her attorney give their impressions of the problem and their ideas on how the problem may be resolved.

advantage over an out-of-towner), the attractiveness of the parties and the witnesses to the jury, the fairness of the result, and the individual concerns of the parties. If settlement is not reached, the settlement conference can be used to establish timetables and streamline the issues for trial. If settlement is achieved, a mutually acceptable agreement is attained. The agreement is the litigants' agreement and not a resolution imposed by the settlement judge. The agreement need not parallel the "legal" resolution of the dispute before the court.<sup>28</sup>

### G. Arbitration

Arbitration is at the intrusive end of the dispute resolution spectrum. In arbitration, the disputants come before a third party, the arbitrator,<sup>29</sup> relate the nature of their dispute to the arbitrator, and the arbitrator resolves the dispute. Because the third party resolves the dispute, the disputants have lost control over the outcome of their dispute.

Arbitration has traditionally been a private, consensual process. This means that either prior to or during the dispute, the disputants decide that the dispute should be resolved by an arbitrator. Since arbitration is private, the procedural and evidentiary rules of the process are those agreed to by the disputants. Rather than fashion their own rules, the disputants may agree to have the arbitrator determine the rules for them.<sup>30</sup>

In the 1980s, Congress funded ten federal district courts to experiment with mandatory programs of court-annexed, non-binding arbitration as part of the public adjudication process.<sup>31</sup> In 1988, Congress authorized the continuation of these mandatory pilot programs and authorized additional voluntary pilot programs.<sup>32</sup>

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28. For easy access to the mediation type programs of the federal district courts, see ADR and Settlement Programs in the Federal District Courts: A Sourcebook for Judges and Lawyers, available at <http://air.fjc.gov/public/fjcweb.nsf/> (last visited Apr. 15, 2001).

29. In more complex cases, the process may call for or permit three arbitrators. If three arbitrators are used, the process may permit each party to select one arbitrator and the two selected arbitrators will select a third.

30. The American Arbitration Association, for example, is a service that provides arbitrators and supplies the rules for the arbitration process. See American Arbitration Association, available at <http://www.adr.org/contents2.htm> (last visited Apr. 15, 2001). See also CPR Institute for Dispute Resolution, available at <http://www.cpradr.org/home1.htm> (last visited Apr. 15, 2001); United States Arbitration & Mediation (USA&M), available at <http://www.usam.com> (last visited Apr. 15, 2001); International Chamber of Commerce, Court of Arbitration, available at <http://www.jus.uio.no/Im/icc.html> (last visited Apr. 15, 2001). A number of other international, national, regional, and local services exist.

31. The ten federal district courts were: Northern District of California, Middle District of Florida, Western District of Michigan, Western District of Missouri, District of New Jersey, Eastern District of New York, Middle District of North Carolina, Western District of Oklahoma, Eastern District of Pennsylvania, and Western District of Texas.

32. For an evaluation of the ten original mandatory programs, see BARBARA S. MEIERHOEFER, COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS (Federal Judicial Center 1990).

For easy access to the court-annexed arbitration programs of the federal district courts, see ADR AND SETTLEMENT PROGRAMS IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS (Federal Judicial Center & CPR Institute for Dispute Resolution 1996) available at <http://www.air.fjc.gov/public/fjcweb.net> (last visited Mar. 25, 2001)

An industry may set up arbitration as the process for resolved disputes among its members. For example, in professional baseball, high/low arbitration is used for salary disputes between players and owners.<sup>33</sup>

#### H. Litigation

Litigation is at the most intrusive end of the dispute resolution spectrum. Litigation may proceed through a public (governmental) forum—a court—or before a privately created forum—a rent-a-judge. Litigation in a court is initiated by one of the disputants who becomes the plaintiff. The other party involuntarily becomes the defendant. The procedural and evidentiary rules of the court apply to this dispute and to these litigants as well as to all disputes and all litigants coming before this court.

In litigation, the disputants come before a third party or third parties, depending on whether the case is being tried before a judge (as the trier of the law) and jury (as the trier of the facts) or only before a judge (as the trier of both the law and the facts). Through a formal presentation of evidence, choreographed by the litigants' attorneys, the litigants' cases are presented to the trier of the facts and the trier of the law and the trier of fact and the trier of law resolve the dispute and inform the litigants of how it shall be. The decision of the trial court may be appealed to a higher court but again it will be third parties who tell the litigants how it shall be. Since the third parties have resolved the dispute, the litigants have lost control over the outcome of their dispute.

Parties have experimented with private judging or rent-a-judge as part of the private adjudication process. The parties must negotiate the procedural and evidentiary rules as well as the extent of pretrial discovery, whether the trial will be before a judge and jury or only a judge, who will be the judge, who will pay the judge and how much, where and when the trial will be held, how long the trial will last, and whether the judge's decision will be advisory or binding. In private litigation, the parties' attorneys choreograph the presentation of facts and law and the third party or parties (the judge or the jury and judge) resolve the dispute. The dispute is resolved according to "the law" and if the decision is binding, rather than advisory, it may not be appealed to a higher tribunal.

## II. SELECTING A DISPUTE RESOLUTION PROCESS

What motivates a party to select one dispute resolution process over

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33. In high/low arbitration, each party will submit his or her final dollar amount to the arbitrator and the arbitrator must select one or the other. The arbitrator has no discretion to select another dollar amount. High/low arbitration tends to make the parties more reasonable in their submissions because a party who submits an unreasonable request knows that his or her request will not be selected by the arbitrator. This form of arbitration is also called "last best offer," "final offer," or "baseball" arbitration. See William A. Stricklin, "Baseball" Mediation/Arbitration . . . BaseBall?, available at <http://www.webcourt.com/baseball.htm> (last visited Apr. 15, 2001).

The use of high/low arbitration is not limited to salary disputes in sports. It may be used for any arbitration where the parties can agree before the arbitration to limit the arbitrator's discretion to two figures.

another? In 1945, George Orwell wrote “All animals are equal, but some animals are more equal than others.”<sup>34</sup> The same may be said about the parties to a dispute. Every disputant is equal but some are more equal than others. The playing field is seldom, if ever, level. To one party, time may be an ally, to the other an enemy.<sup>35</sup> The transaction costs inherent in a process may appear insignificant to one party but oppressive to the other.<sup>36</sup> The risk of an adverse outcome may be inconsequential to one party and overwhelming to the other party who is risk averse.<sup>37</sup>

A private process may be essential for one disputant because the very airing of the dispute may threaten his or her reputation while a public airing will have little if any impact on the other’s reputation. One party may need an early resolution of the dispute while the other party may have no need to resolve this dispute at all. In fact, one party may know that the resolution of the dispute will cost him or her money so it would be better to pay later (or not at all) rather than pay now. One may even have a better legal position than the other.

Certain personality traits play a significant role. Often a party articulates that he or she seeks “justice.” Whether the quest for “justice” is really a motivating factor or merely an easy verbalization for underlying feelings (e.g., angry, resentful, hurt, humiliated, cheated, mistreated, worried, threatened, frustrated, outraged) masks the bottom line issue of costs and savings.

Control over the process outcome may be extremely important to a party. Without the control, a party may feel that he or she risks gaining too little or losing too much. By selecting one process over another a party may dictate, or at least influence, the outcome.

Therefore, the bottom line is what does a party gain by selecting one dispute resolution process over another? Moreover, does such gain fulfill his or her needs and interests?

#### A. *Inaction*

The decision whether to take or not take further action is based on personal and business factors as well as an assessment of what might be the law. The party who decides to take no further action weighs the known gains attributable to inaction against the hypothetical gains that another process might produce. What does a party gain by selecting inaction as the method of dispute resolution?

Inaction is quick, producing an immediate resolution of the dispute. When this method of dispute resolution is selected, the outcome is known. Uncertainty as to the outcome is eliminated.

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34. GEORGE ORWELL, *ANIMAL FARM* ch. 10 (1945).

35. The recounting of the Florida ballots in the presidential election of 2000 dramatically illustrates that time can be the friend of one Presidential candidate and the enemy of the other. *See Bush v. Gore*, 531 U.S. 98 (2000).

36. Consider how many personal injury cases would be filed before the courts if the contingent fee payment arrangement did not exist.

37. Some parties prefer “the bird in the hand to the two in the bush.” Others prefer the two in the bush.

Selecting inaction guarantees that transaction costs will be dramatically reduced because there will be no further discovery, no attorneys, and no filing fees. The party who decides to take no further action decides that the dispute is simply not worth the additional personal and business time. Devoting this time to something else may be more important and have greater value than a possible but uncertain gain that could be achieved by continuing the dispute.

The successful pursuit of the grievance by another dispute resolution process may yield a monetary gain and a psychological victory. Pursuing a grievance, however, does not come without risks and costs. Transaction costs (time, money) accumulate and worse yet, the pursuit may prove to be unsuccessful. This effort may involve conflict that spawns psychological trauma. Even when a successful result is achieved, the transaction costs must be factored into the outcome to produce a net gain.

When selecting inaction, the party weighs the need to resolve the dispute now against what might happen if the dispute is resolved later. The party may have a need to resolve the dispute now in order to put the problem behind himself or herself and to move on. Delaying resolution does not guarantee that the dispute will be resolved favorably to the party who decides against inaction.

Controlling the process and the outcome may be very important to a party. If a party elects to take no further action, it is he or she alone who makes the selection and who controls his or her own destiny. The decision to take no further action is one party's, and one party's only. Neither the other party nor a neutral third party must give acquiescence or consent to the decision.

The party selecting inaction controls not only the process but also the outcome and that outcome is known when the process is selected. The process is private with no public airing of the dispute. Unless the party selecting inaction later decides to pursue a remedy or unless the other party has a pursuable claim, the resolution of the dispute is final.

### *B. Acquiescence*

As with inaction, the decision whether to acquiesce in the demands of the other party is based on personal and business factors as well as on what is perceived to be the law. The party who decides to acquiesce weighs the gains attributable to acquiescence against the hypothetical gains that another process might produce. What does a party gain by selecting acquiescence as the method of dispute resolution?

Acquiescence is quick and the resolution of the dispute is immediate. When selecting acquiescence, the party weighs the need to resolve the dispute now against what might happen if the dispute is resolved later. The party may have a need to resolve the dispute now to put the problem behind himself and herself and to move on. Delaying the resolution of the dispute does not guarantee that the dispute will be resolved favorably to the party who decides against acquiescence.

Control of the process may be very important to a party. If a party elects to acquiesce, it is he or she alone who makes the selection and it is he or she who

controls his or her own destiny. The decision to take action is that party's and that party's only. Neither the other party nor a neutral third party must give acquiescence or consent to the decision.

The party selecting acquiescence controls not only the process but also the outcome, and the outcome is known when the process is selected. Acquiescence more likely than not will have up front costs. Acquiescence may involve payment to the other side. The amount of the payment, however, is known when acquiescence is decided upon. The risk that the amount will change over time has been eliminated. Also, the risk of having to pay the transaction costs of the other side has been eliminated.

As with inaction, the party who decides to acquiesce decides that continuing the dispute is simply not worth the costs. Continuing the dispute will mean that he or she will be required to devote additional personal time to this dispute. Saving this time may be more important and have greater value to the party than a possible but uncertain gain that could be achieved by continuing the dispute. Additional time will include the additional effort on the part of the party that will need to be committed to the dispute. This effort may involve conflict that spawns psychological trauma. Selecting acquiescence will guarantee that transaction costs will be dramatically reduced since there will be no discovery, no attorneys, and no filing fees.

The process is private with no public airing of the dispute. When a party selects acquiescence as the method of dispute resolution, he or she foregoes the opportunity to pursue the dispute. Unless the party selecting acquiescence later decides to pursue a remedy,<sup>38</sup> the resolution of the dispute is final.

### C. *Self-Help*

Parties who pursue self-help select a more active method of dispute resolution than the passive methods of inaction or acquiescence. Parties who select inaction walk away from confrontation. Parties who select acquiescence capitulate to the other parties' demands. Self-help is more aggressive and requires affirmative action. Rather than abandoning potential rights, the party pursuing self-help exercises those rights. For example, if the transaction is governed by a contract, one party may in some circumstances withhold performance if the other party breaches the contract.<sup>39</sup>

The decision of whether to exercise self-help must be based upon a careful

38. A party may decide to pay now and sue later. For example, if Sally took her car to the local garage for a new transmission and when the work was done, Sally refused to pay claiming that the work was not done in a workmanlike manner. When Sally refused to pay, the garage refused to return her car claiming a mechanics lien. In order to get her car, Sally paid and then sued the garage for breach of contract.

39. This involves the doctrine of substantial performance (construction contracts), material breach (employment contracts), and substantial impairment of the value of the performance (installment contracts involving sales of goods). UCC § 2-612(2) (1997).

In labor/management disputes, self-help may take the form of a strike, a walk-out, or a lock out. Note in these situations, self-help is a step in the dispute resolution process and not the final method of dispute resolution.

consideration of the law and not just on business factors. A party who exercises self-help must have the legal right to self-help and must exercise that right appropriately. For example, under UCC § 2-601 (non-installment contract), the right to reject goods under the perfect tender rule is contingent on the seller's right to cure under UCC § 2-508. If the seller has a right to cure under UCC § 2-508 and the buyer does not permit cure, the buyer has no right to reject under UCC § 2-601.<sup>40</sup>

Even when a party has the legal right to self-help and has exercised the right appropriately, self-help may not result in finality of the dispute. The dispute may be such that if one party decides to exercise self-help, the other party may have a choice whether or not to acquiesce in the action taken. For example, if a contractor builds a house for owner and owner exercises self-help by withholding part of the final payment over a dispute as to workmanship, the contractor may decide to pursue the owner for the balance due.<sup>41</sup>

The party who decides to exercise self-help must weigh the gains attributable to self-help against the hypothetical gains another process might produce. What does a party gain by selecting self-help as the method of dispute resolution? Self-help resolves the dispute quickly and immediately.<sup>42</sup> The party who decides to exercise self-help seeks to maximize his or her recovery while minimizing transaction costs. For example, a lender (secured party) loans \$150,000 to a debtor and takes a security interest in all of the borrower's (debtor's) inventory. After paying \$50,000 on the loan, the debtor defaults. If the secured party exercised its right to repossess the debtor's inventory and resold it for \$110,000, the secured party has satisfied the debtor's outstanding loan and has \$10,000 to return to the debtor. The secured party has no transaction costs except for the repossession and the resale. If the resale has brought only \$75,000, the secured party has satisfied \$75,000 of the debtor's outstanding loan and the secured party has a claim against the debtor for the remaining \$25,000. If the secured party had decided to seek a judgment rather than use self-help (repossession), the debtor could have disposed of all of its inventory (and all of its other assets) before the sheriff was able to execute the judgment. The secured party would then have a claim against the debtor for \$100,000 and would need to get in line with the debtor's other creditors. The secured party would also face the transaction costs inherent in converting its claim to dollars (assuming that full or partial recovery is even possible).

The self-help process is private with no public airing of the dispute. The

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40. *D.P. Technology Corp. v. Sherwood Tool, Inc.*, 751 F. Supp. 1038 (D. Conn. 1990). Under UCC § 9-609(b)(2) (1999), a secured party who chooses to repossess collateral without judicial process must do so "without breach of the peace." The secured party who breaches the peace while repossessing is subject to the debtor's remedies in UCC § 9-625 (1999).

41. *See, e.g., Jacob & Youngs v. Kent*, 129 N.E. 889 (N.Y. 1921).

42. Self-help may resolve a part but not the entire dispute. For example, if a debtor defaults on a secured loan with an outstanding balance of \$100,000, and the collateral after repossession and resale brings only \$75,000, the debtor still owes the creditor a deficiency of \$25,000, even though the creditor has exercised self-help.

telltale signs of the self-help event, however, may be in the public domain. For example, the act of repossession of a motor vehicle may occur where members of the general public may witness the event.

Control of the process and the outcome may be very important to a party. If a party elects to exercise self-help, it is his or her decision alone and it is he or she who controls his or her own destiny. Neither the other party nor a neutral third party must give acquiescence or consent to this decision.

The party selecting self-help controls not only the process but also the outcome, and the outcome is known when the process is selected and implemented. For example, the buyer of goods who deducts damages for breach of contract from the price still due knows the amount that he or she is deducting.<sup>43</sup> The secured party knows the amount of the outstanding balance of the loan that will be satisfied with the resale of repossessed collateral after the collateral has been resold.<sup>44</sup>

#### *D. Negotiation*

Inaction, acquiescence and self-help are unilateral in nature. Only one of the disputing parties selects the process of dispute resolution. The selection is made independent of input from the other party. Negotiation, on the other hand, requires participation by both parties. They must agree to negotiate.<sup>45</sup>

The decision of whether to negotiate is based on business factors and not on the law. The parties weigh the gains attributable through negotiation against the hypothetical gains that another process might produce. What does a party gain by selecting negotiation as the method of dispute resolution?

Negotiation as a method of dispute resolution offers the parties complete flexibility. They can negotiate themselves or through their attorneys. They can begin when they want to begin. If they are so minded, negotiations may begin immediately and the dispute can be resolved by the end of the process. The parties can establish their own timetable and are not bound by the artificial constraints established by someone else. The parties, by their conduct, establish their own procedural and substantive rules for the negotiation. The parties can be creative in formulating a solution and their creativity is not limited by legal principles. A negotiated agreement generally accommodates at least some of the interests of both parties. Negotiating to an agreement will guarantee that transaction costs will be dramatically reduced because there will be no discovery and no filing fees.

The parties are not required to reach an agreement. When a party believes

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43. UCC § 2-717 (1997).

44. In either case, the exercise of self-help may lead to additional problems between the buyer and seller, as well as between the secured party and the debtor since the seller may claim that the buyer did not give appropriate notice or miscalculated the damages, and the debtor may claim that the repossession was wrongful or the resale was not conducted in a commercially reasonable manner.

45. This agreement to negotiate may be the result of an active decision to negotiate ("Let's negotiate") or negotiations may just happen. The parties often begin substantive discussions without discussing whether they will begin discussions.



that his or her interests are not being addressed, he or she may end the negotiation and proceed to another form of dispute resolution. Continuing the dispute will mean that he or she will be required to expend additional personal time on this dispute and incur the costs associated with the newly selected process. Spending this time and money to seek an uncertain gain may have greater value to the party than the certain gain that the negotiation could produce.

When selecting negotiation, the parties weigh the need to resolve the dispute now against what might happen if the dispute is resolved later. The parties may have a need to resolve the dispute now so they can put the problem behind them and move on. Delaying the resolution of the dispute does not guarantee that the dispute will be resolved more favorably to the party who decides against negotiation.

Control of the process and the outcome may be very important to a party. If a party elects to negotiate and the other party agrees, it is the parties who control their own destinies. No neutral third party must acquiesce or consent to the decision.

The parties selecting negotiation control not only the process but also the outcome, and the outcome is known when the process has been completed. The process is private with no public airing of the dispute. Unless a party later decides to breach the negotiated agreement, the resolution of the dispute is final.

Parties who select negotiation as their method of dispute resolution do not forego the opportunity to pursue the dispute if the negotiation does not produce an agreement. The successful pursuit of the dispute by another dispute resolution process may yield a monetary gain and a psychological victory. The opportunity to pursue the dispute, however, does not come without costs and risks. Transaction costs (time, money, psychological trauma) accumulate and worse yet, the end result may not be favorable. Even when a successful outcome is achieved, the transaction costs must be factored into the outcome to produce a net gain.

#### *E. Ombudsmanship*

Although ombudsmanship as a process moves beyond what one party can do unilaterally, only one party is needed to initiate this process. The selection of ombudsmanship is made independent of input from the other party and begins with the aggrieved party contacting the Office of the Ombudsman. Ombudsmanship, however, is only available in a limited number of settings. The Office of the Ombudsman must have been created by a corporation, industry, governmental entity, or educational institution and is created to address certain types of grievances. Therefore, ombudsmanship may not be an available option in most disputes.

If ombudsmanship is an option for a grievance, the decision to visit the ombudsman is based on nonlegal factors. A party who seeks the aid of an ombudsman seeks a quick, inexpensive (generally free), and confidential counseling as to how to conquer the bureaucratic maze and red tape facing the party. Often the ombudsman can intercede for the party who has been frustrated

by the system so the party's needs can be addressed. The party seeking the assistance of an ombudsman weighs the gains attributable to this process against the hypothetical gains that another more lengthy and costly process might produce.

If the intercession of the ombudsman does not produce a resolution of the grievance, the party can proceed to another form of dispute resolution.

#### *F. Mediation*

Mediation, as is the case with ombudsmanship, adds a third party neutral to the process. Mediation may be either private or court-sponsored.

##### 1. Private Mediation

The parties may select private mediation either before or after litigation has been instituted.<sup>46</sup> This decision to mediate requires participation by both parties. They must agree to mediate.<sup>47</sup>

The decision whether to mediate is based on business factors and not on the law. The parties weigh the gains attributable to mediation against the hypothetical gains that another process might produce. What does a party gain by selecting mediation as the method of dispute resolution?

Mediation offers the parties complete flexibility. They can arrange when the mediation will begin, where the mediation will be held, and how the mediation will be conducted.<sup>48</sup> They must agree upon the selection of the mediator and how the mediator will be compensated. In short, they can negotiate all the details about the mediation or they can leave the details to the mediator.<sup>49</sup> Although negotiation and mediation are both informal, mediation will appear more formal since the mediator controls the process and directs the discussion.

As is the case with negotiation, mediation does not guarantee that the dispute will be resolved by the end of the process. In mediation, the mediator only provides the process. The parties must agree on how the dispute will be resolved. The parties can be creative in formulating a solution, and their creativity is not limited by legal principles. A mediated agreement generally accommodates at least some of the interests of both parties.

The parties are not required to reach an agreement. When a party believes that his or her interests are not being addressed, he or she may end the mediation

46. The filing of a complaint seeking litigation may act as an incentive to bring a reluctant party to the mediation table. This opens two avenues of dispute resolution and each will progress along its own timetable. If the parties resolve their dispute through private mediation, they will terminate the litigation process by filing joint motions to dismiss with prejudice.

47. Unlike negotiation which may just happen, the decision to mediate requires actual consent and planning by both parties because a third party neutral will participate in the process.

48. Will the mediator act only as a facilitator or will the mediator play a more active role by providing an early neutral evaluation?

49. If the mediator comes from a group such as the American Arbitration Association, that organization will provide the mediator, the rules for the mediation, and a fee structure. *See*, American Arbitration Association, *available at* <http://www.adr.org/contents2.htm> (last visited Apr. 15, 2001). A number of international, national, regional, and local services exist.

and proceed to another form of dispute resolution. Continuing the dispute will mean that he or she will be required to devote additional personal time to this dispute and incur the costs associated with the newly selected process. Spending this time and money to seek an uncertain gain may have greater value to the party than the certain gain that the mediation could produce.

Mediating an agreement will guarantee that transaction costs will be dramatically reduced. The reduction, however, is not as great as if the parties had negotiated their agreement without mediation. Before the mediation process has begun, the parties may have hired attorneys, and their attorneys may have begun discovery.<sup>50</sup> If the mediation begins after litigation has been initiated, filing fees have been incurred, and motions and briefs may have been filed with the court, thus, driving up the transaction costs.

When selecting mediation (as was the case with selecting negotiation), the parties weigh the need to try to resolve the dispute now against what might happen if the dispute is resolved later. The parties may have a need to resolve the dispute now so they can put the problem behind them and move on. Delaying the resolution of the dispute does not guarantee that the dispute will be resolved more favorably to the party who decides against mediation.

Control of the process and the outcome may be very important to a party. If a party elects to mediate, and the other party agrees, then the parties control their own destinies. No neutral third party must acquiesce or consent to this decision.

The parties selecting mediation control not only the process but also the outcome, and the outcome is known when the process has been completed. The process is private and confidential with no public airing of the dispute. Unless a party later decides to breach the mediated agreement, the resolution of the dispute is final.<sup>51</sup>

Parties who select mediation as their method of dispute resolution do not forego the opportunity to pursue the dispute if the mediation does not produce an agreement. The opportunity to pursue the dispute, however, does not come without costs. Transaction costs (time, money, psychological trauma) accumulate and worse yet, the end result may not be favorable to the party who could have chosen a mediated agreement. Even when a successful result is achieved through another process, the transaction costs must be factored into the outcome to produce a net gain.

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50. How much information does an attorney need before he or she feels comfortable mediating a dispute? Some attorneys feel they need to have completed discovery so they have a full understanding of the case. Others like to mediate before much discovery has been done. This reduces the transaction costs and mediation can be used as a discovery tool. If mediation is conducted after litigation has been filed, some attorneys would like all dispositive motions to have been decided before mediation. Others like the uncertainty created by pending dispositive motions.

51. When parties mediate an agreement, they almost always perform the agreement because the mediation has been thorough and the agreement has been carefully drafted so each party knows what is expected of him or her. In those cases where a party fails to perform, the mediated agreement may be the basis for a breach of contract action.

## 2. Court-Sponsored Mediation

Although the parties have the luxury to select or not to select private mediation, they may not have the same luxury when it comes to court-sponsored mediation (i.e., the settlement conference). When a judge recommends a court-sponsored mediation to the litigants, few attorneys will advise their clients to refuse the judge's invitation.<sup>52</sup> Once the litigants consent to mediation, the court's settlement conference procedure goes into effect. The court may schedule the time and the place for the mediation, select the mediator, and provide the parties (attorneys and clients) and the mediator with the rules for the settlement conference.<sup>53</sup>

As was the case with private mediation, court-sponsored mediation does not guarantee that the dispute will be resolved by the end of the process. Because the mediator only provides the process, the parties must agree on how the dispute will be resolved. The parties can be creative in formulating a solution, and their creativity is not limited by legal principles. A mediated agreement (settlement agreement) generally accommodates at least some of the interests of both parties.

Mediating an agreement through a court-sponsored process will guarantee that transaction costs will be reduced. The reduction, however, is not as great as if the parties had negotiated or privately mediated their dispute without filing litigation. Because the case is before the court, the parties will have hired attorneys and their attorneys will have begun discovery, and motions and briefs may have been filed with the court, driving up the transaction costs.

Court-sponsored mediation provides the parties with an opportunity to weigh the need to try to resolve the dispute now against what might happen if the dispute is resolved later by the triers of fact and law. The parties may have a need to resolve the dispute now so they can put the problem behind them and move on. Delaying the resolution of the dispute does not guarantee that the dispute will be resolved more favorably to the party who decides against a mediated agreement.

Although the parties do not have control of the process, they do have control over the outcome, and this control may be extremely important to a party. If a settlement agreement can be reached, the parties control their own destinies. No neutral third party must consent to the parties' agreement.

Although the litigants participating in a settlement conference do not control the process, they do control the outcome and the outcome is known if the mediation produces a written settlement agreement. The settlement conference is

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52. In some jurisdictions, court-sponsored settlement conferences have been so successful that they have been made available to disputants before they have filed for litigation.

53. See, e.g., N.D. Okla. R. 16.3, available at <http://207.41.19.205/okndpub1/welcome.nsf/main/page> (last visited Apr. 15, 2001). Each court follows its own procedure. Compare the procedure of the United States District Court for the Northern District of Oklahoma with the procedure of the United States District Court for the Western District of Oklahoma. Western District of Oklahoma Guidelines for Mediators, available at <http://www.okwd.uscourts.gov/adr.htm> (last visited Mar. 23, 2001). In the Western District the parties select a mediator from the Court's list of the Panel of Mediators, arrange the scheduling of the mediation, and discuss the fee with the selected mediator. In the Northern District, the mediator does not receive compensation.

private and confidential with no public airing of the dispute. Unless a party later decides to breach the settlement agreement, the resolution of the dispute is final.<sup>54</sup>

Parties who participate in court-sponsored mediation do not forego the opportunity to continue with the litigation of the dispute if the settlement conference does not produce an agreement. The opportunity to pursue the dispute, however, does not come without costs. Transaction costs (time, money, psychological trauma) accumulate and worse yet, the end result may not be favorable to the party who could have chosen a mediated agreement. Even when a successful result is achieved through another process, the transaction costs must be factored into the outcome to produce a net gain.

### *G. Arbitration*

Arbitration, as is the case with ombudsmanship and mediation, adds a third party neutral to the process. Unlike ombudsmanship where the ombudsman investigates and advises or mediation where the mediator directs the discussion but does not resolve the dispute for the parties, arbitration has the arbitrator directing the presentation of evidence and making the decision as to how the dispute will be resolved. As is the case with mediation, arbitration may be either private or court-sponsored.

#### 1. Private Arbitration

The parties may select private arbitration either before or after a dispute arises. Often a contract will include a predispute binding arbitration provision.

The parties to this contract agree that any dispute arising from or relating to this contract, or to any breach of this contract, shall be settled by binding arbitration. The dispute shall be submitted to [identify the arbitration service] for arbitration under its rules and procedures. The prevailing party may enter the arbitrator's award as a judgment in any court having competent jurisdiction.

If the parties, prior to the dispute, have not contracted for arbitration, the decision to arbitrate will require the participation by both parties. They must agree to private arbitration.<sup>55</sup>

If the decision to arbitrate a future dispute is made by contract (predispute binding arbitration provision), the arrangement smacks of overreaching by the party who drafted the contract. These contracts are adhesion contracts and the party who agrees to arbitrate has little or no power to negotiate for the exclusion of the arbitration provision, even if he or she knew the implications of the provision. This issue has been litigated with the courts generally upholding the

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54. When parties mediate an agreement, they almost always perform the agreement because the agreement incorporates their interests and has been carefully drafted so each party knows what to expect. In those cases where a party fails to perform, a breach of contract action may be maintained. In some cases where the outcome of the dispute need not be kept confidential and the parties would like the settlement agreement to be treated as more than a contract, the settlement agreement could be entered as a consent judgment and would have the same effect as a court judgment.

55. Unlike negotiation, which may just happen, the decision to arbitrate requires actual consent and planning by both parties because a third party neutral will participate in the process.

predispute provision.<sup>56</sup>

In those cases where parties negotiate whether to arbitrate and the decision to arbitrate is made after the dispute has arisen, that decision is based on personal and business factors and not on the law. The parties weigh the gains attributable through arbitration against the hypothetical gains that another process might produce. What does a party gain by selecting private arbitration as the method of dispute resolution?

Private arbitration, as with negotiation and private mediation, offers the parties complete flexibility. They can arrange when the arbitration will begin, where the arbitration will be held, and how the arbitration will be conducted. The parties must agree upon the selection of the arbitrator and how the arbitrator will be compensated. In short, they can negotiate all the details about the arbitration<sup>57</sup> or they can leave the details to the arbitrator.<sup>58</sup> Most arbitrators are not lawyers but rather have expertise in the subject being arbitrated.

Private arbitration, although informal, is significantly more formal than private mediation. The arbitrator controls the process, directs the presentation of evidence, and decides the outcome of the dispute.

Unlike negotiation and mediation, private arbitration guarantees the parties that the dispute will be resolved by the end of the process (unless the parties decided before the arbitration that the arbitrator's award would be advisory and nonbinding). In private arbitration, the arbitrator not only provides the process, but as the trier of both the facts and the law, the arbitrator also makes the award that resolves the dispute. The arbitrator decides how the dispute will be resolved. The Uniform Arbitration Act, the Federal Arbitration Act, and state arbitration statutes do not direct the arbitrator to apply the law to the dispute. Rather, legislation is silent on this matter. The parties, however, may specify the rules to be followed, in their arbitration agreement, in resolving the dispute and the arbitrator is obligated to adhere to this directive. Without such a directive, the arbitrator is not bound by the law or by precedent and will resolve the dispute according to his or her sense of justice.<sup>59</sup> The parties, in their opening statements and summations, will advise the arbitrator how they believe the dispute should be resolved but the ultimate decision is that of the arbitrator.

The arbitrator is required to render an award. Depending on the preestablished procedural rules for the arbitration, the award may be rendered at the close of the arbitration or at a later date. If at a later date, the time within which the award must be made is stated in the procedural rules for the arbitration. The award is generally made as a brief written statement with no supporting explanations or reasons.

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56. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995); Anna Brafford, Note, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Weary?*, 21 J. CORP. L. 331, 356 (1996).

57. The parties can decide whether the decision of the arbitration is binding or advisory.

58. If the arbitrator comes from a service, the service will provide the arbitrator, the rules for the arbitration, and the fee structure for the arbitration. See, e.g., American Arbitration Association, available at <http://www.adr.org> (last visited Apr. 17, 2001).

59. JACQUELINE M. NOLAN-HALEY, *ALTERNATIVE DISPUTE RESOLUTION* 155-56 (1992).

A private arbitration may reduce transaction costs but the reduction often will not be dramatic when compared to litigation. The parties will still be represented by counsel and discovery will still be conducted. The case will still be presented to a trier of fact and of law through the use of opening statements, direct and cross-examination of witnesses including expert witnesses, exhibits, and summation. Adding to the transaction costs are the administrative costs of the private arbitration, which may exceed the court costs associated with litigation.

When selecting private arbitration, the parties weigh the necessity of having the dispute resolved now by arbitration against what might happen if the dispute is not resolved now by this process. This involves weighing arbitration against all the other ADR processes (inaction, acquiescence, self-help, ombudsmanship, negotiation, and private mediation) and against litigation.

The parties selecting private arbitration control only the initiation of the process (including the procedural and substantive rules, and the number, qualifications, and identification of the arbitrators). Once appointed, the arbitrator takes over control of the process and of the outcome. Generally, the arbitration is private and confidential with no public airing of the dispute. Unless a party later decides not to comply with the arbitrator's decree, the resolution of the dispute is final.

Generally the party dissatisfied with the arbitrator's award has no ground to appeal to a court. Since the grounds for appeal are quite limited, the arbitration award is virtually unreviewable.<sup>60</sup>

Parties who select private arbitration as their method of dispute resolution forego the opportunity to litigate. Only when the arbitration award is advisory can the parties litigate before a court. The fact that a party receives a favorable award from the arbitrator does not necessarily mean that the other party will comply. Enforcement of the decree may be present a problem. The prevailing party may, however, confirm the arbitration award into a judgment. A confirmed award has the same effect as a judgment and the prevailing party may use any of the means available to enforce a judgment.<sup>61</sup>

Finally, although the arbitration process will be less formal than that of litigation, the award in private arbitration will provide the parties with a

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60. Judicial review of the arbitration award is generally limited to the following:

- \* Did a valid agreement to arbitrate not exist?
- \* Was the agreement to arbitrate not complied with property?
- \* Did corruption, fraud or misconduct occur during the arbitration?
- \* Did the arbitrator exceed his or her power?
- \* Were the agreed upon procedures not followed during the arbitration hearing?
- \* Were the parties denied a fair and impartial hearing?
- \* Was the arbitrated claim barred by the statute of limitations?

STEPHEN PATRICK DOYLE & ROBERT SILVE HAYDOCK, WITHOUT THE PUNCHES: RESOLVING DISPUTES WITHOUT LITIGATION 67 (1991).

61. *Id.* at 66, 157-61. The latter is a chart summarizing the procedures to confirm arbitration awards in all 50 states.

“win/lose” outcome and do little to promote a continuing business relationship between the parties.

## 2. Court-Annexed Arbitration

Litigants do not select court-annexed arbitration but rather are required to participate in this process by the court if the court has such a process and if their case comes within the guidelines for cases subject to arbitration.<sup>62</sup> The court provides the rules for the arbitration and provides the arbitrator. Unlike private arbitration where the parties control creating the rules for the arbitration, in court-annexed arbitration the local court rules govern the process.<sup>63</sup>

Unlike private arbitration, which can guaranty finality at the end of the process, court-annexed arbitration makes no such guarantee. One party has begun the process by filing a complaint before a court and has been diverted to arbitration under the local court rules. After an expedient, adversarial hearing, the arbitrator will issue a non-binding judgment (“award”) on the merits. Either litigant may reject the non-binding award and request a trial *de novo*.<sup>64</sup> If neither litigant files a demand for trial *de novo* within 30 days after the Clerk of the Court seals the award and mails notice to the parties, the Clerk enters judgment on the arbitration award. The judgment is treated as any other civil judgment except it “shall not be subject to review in any court by appeal or otherwise.”<sup>65</sup> A party who requests a trial *de novo* runs the risk that the trial court judgment will place him or her in a lesser position than the arbitration award. In addition to this risk,

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62. In the United States District Court for the Eastern District of New York, court-annexed arbitration is mandatory for

all civil cases (excluding Social Security cases, tax matters, prisoners’ civil rights cases and any action based on an alleged violation of a right secured by the Constitution of the United States or if jurisdiction is based in whole or in part on Title 28, U.S.C. § 1343) wherein money damages only are being sought in an amount not in excess of \$150,000.00 exclusive of interest and costs.

United States District Court for the Eastern District of New York, Dispute Resolution Procedures, available at [http://www.nyed.uscourts.gov/adr/Arbitration/Local\\_Rule\\_8310/local\\_rule\\_8310.html](http://www.nyed.uscourts.gov/adr/Arbitration/Local_Rule_8310/local_rule_8310.html) (last visited Apr. 17, 2001).

Compare the actions subject to court-annexed arbitration in the Eastern District of New York with the actions subject to court-annexed arbitration in the Western District of Michigan. In the United States District Court for the Western District of Michigan:

(i)*Court-Annexed Arbitration by Order.* All cases seeking only money damages in an amount not in excess of \$100,000, exclusive of punitive damages, interest, costs, and attorney fees, may be ordered to court-annexed arbitration. In all cases which would be subject to this rule except that they include a claim for non-monetary relief, the judge or magistrate judge assigned to the case may determine whether, for purposes of this rule, the claim for non-monetary relief is insubstantial.

(ii)*Court-Annexed Arbitration by Consent.* Any case based in whole or in part on an alleged violation of a right secured by the Constitution of the United States, and any case in which jurisdiction is based in whole or in part on 28 U.S.C. § 1343 may not be referred to arbitration without the consent of all parties.

W.D. MICH. R. 16.6(b)(i), (ii).

63. See, e.g., N.D. CAL. R. 4-01 to 4-14, available at <http://www.adr.cand.uscourts.gov> (last visited Apr. 17, 2001).

64. *Id.*

65. *Id.* at R. 4-11.



some jurisdictions place a premium on not improving one's position from the arbitration award.<sup>66</sup> Also, the costs of the court-annexed arbitration only add to the litigants' transaction costs.<sup>67</sup>

The fact that a party receives a favorable award from the arbitrator does not necessarily mean that the other party will comply. The decree will be entered as a judgment and the prevailing party will have the opportunity to enforce this judgment in the same manner as any other judgment.<sup>68</sup>

## H. Litigation

Litigation, as is the case with arbitration, adds a third party neutral to the process. As with arbitration, the litigants have lost control over the outcome and do not resolve their own dispute. Depending on the nature of the dispute, the third party may be third parties—a judge and a jury—rather than just a third party. The judge will control the pretrial conferences and the presentation of evidence at trial. If the case is before a jury, the jury will decide questions of fact while the judge will decide questions of law. As is the case with mediation and arbitration, litigation may be either private (a rent-a-judge) or public (the courts).

### 1. The Courts

Unlike court-sponsored mediation and court-annexed arbitration, the parties know that at the end of the court process (i.e., the trial), the judge will issue a ruling (judgment or decree) that resolves their dispute. The plaintiff also knows that the judge's ruling will resolve the dispute according to the law, independent of the parties' needs or interests. When selecting litigation, a party must carefully consider the strength of his or her legal claim. If a party's legal position is not very strong, or if the evidence needed to present this claim is unavailable, litigation may not be well suited to the dispute. On the other hand, if a careful assessment of the law and the facts would lead a party to believe that there is a high degree of probability of success at trial, the filing of a complaint may be the appropriate

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66. In some federal districts, a litigant who requests a trial *de novo* runs the risk of paying a penalty if his or her position has not been improved by trial. For example, in the United States District Court for the Western District of Oklahoma, the party demanding the trial *de novo* must deposit with the Clerk \$150 for a single arbitrator or \$300 for a panel of three arbitrators. This money will be returned if:

(1) the party demanding the trial *de novo* obtains a final judgment, exclusive of interest and costs, more favorable than the arbitration award, or

(2) the Court determines that the demand for trial *de novo* was made for good cause.

W.D. OKLA. R. 5.10(b), (c) (emphasis added). See also W.D. MICH. R. 16.6(j); E.D. PA. R. 53.2(7)(E).

67. In addition to the extra transaction costs for presenting the case to a trier of fact and law twice, the attorneys now know how the other side will present their case. Each attorney has been given a sneak preview. Some courts believe the imminence of the arbitration hearing will encourage the attorneys to carefully evaluate their cases and to enter serious settlement discussion before the hearing is held. Some courts also view the arbitration award as a useful starting point for settlement discussions. See, e.g., United States District Court for the Eastern District of New York, Dispute Resolution Procedures, available at [http://www.nyed.uscourts.gov/adr/Dispute\\_Resolution\\_Procedures/dispute\\_resolution\\_procedures.html](http://www.nyed.uscourts.gov/adr/Dispute_Resolution_Procedures/dispute_resolution_procedures.html) (last visited Apr. 17, 2001).

68. See, e.g., W.D. OKLA. R. 5.9(d).

course of action.

Filing a complaint for a trial before a court does not necessarily mean that the case will be resolved by a court through a judgment or decree. Most cases, well over 90%, are resolved before a judgment or decree is ever rendered. Filing a complaint has proven to be a tactical weapon to stimulate serious negotiation and mediation. Also, if a court has a court-annexed arbitration program, the filing of a complaint may be designed to take advantage of that program.

If a case does proceed through trial to judgment or decree, the judge's ruling may be important to establish precedent. Examples include a case with constitutional issues, a case establishing new boundaries for a cause of action such as products liability, or a case challenging an archaic definition of mental incapacity in a breach of contract action. Bad precedent, however, may be worse than no precedent at all. The judge's ruling may also be important to force action where a party is reluctant to act, even though it might be the right thing to do. For example, a public official may refuse to make an unpopular, but legally necessary decision for fear of not being reelected. By having the judge make the unpopular decision, the public official can say to his or her constituents, "the judge made me do it."

The plaintiff knows that at trial, both sides will be given an opportunity to present their cases to the trier of fact and to the trier of law and that the playing field will be leveled because what will matter at the conclusion of the trial will be whether the plaintiff has proved his or her cause of action by a preponderance of the evidence. A trial will also give the plaintiff's grievance public exposure since the trial will be open to the public, including the press.

The plaintiff must consider that whoever "loses" at the trial court may appeal to a higher court, thereby increasing the already substantial transaction costs. The plaintiff must also consider that even if he or she "wins," the defendant may not voluntarily "pay up" and the judgment will need to be enforced.

## 2. Private Judging—Rent-a-Judge

Private judging differs from litigation in the courts in that private judging is consensual. The parties must agree to private judging. What does a party gain by selecting private judging as the method of dispute resolution?

Private judging, unlike litigation before a court, offers the parties flexibility. They can arrange when the trial will begin, where the trial will be held, and how the trial will be conducted. They must agree upon the selection of the judge and how the judge will be compensated. In short, they can negotiate all the details about the litigation or they can leave the details to the party they select as judge. Private judging can reduce discovery and shorten the trial. The parties can decide whether a jury will participate. The judge controls the process, directs the presentation of evidence, and decides the outcome of the dispute. The parties control whether the judge's decision will be binding or only advisory. Unlike litigation before a court, the judge's decision, if binding, will be final and cannot be appealed to a "higher court."

Private judging, if the outcome is final, may reduce transaction costs somewhat when compared to litigation in the courts. The parties, however, will be represented by counsel and discovery will be performed. Adding to the transaction costs are the administrative costs of the private judging, which may exceed the court costs associated with litigation before a court.

When selecting private judging, the parties weigh the necessity to have the dispute resolved now, in a process where they have some control, and in a process that is private against what might happen if the dispute is not resolved by this process.

Parties who select private judging as their method of dispute resolution forego the opportunity to litigate. Only when the judge's decision is advisory, can the parties litigate before a court. The fact that a party receives a favorable decision from the judge does not necessarily mean that the other party will comply. Enforcement of the judge's decision may present a problem. Some states have enacted statutes whereby a private judge's judgment will be enforced as if it were a court's judgment.<sup>69</sup> Finally, since the judgment is based on the law, private judging will provide the parties with a "win/lose" outcome and do little to promote their continuing business relationship.

### III. EVALUATING THE METHODS OF DISPUTE RESOLUTION FOR IMPARTIALITY, FAIRNESS IN THE PROCESS, AND FAIRNESS AND CORRECTNESS IN THE OUTCOME

This article begins by stating that the common threads of impartiality in the process and in the formulation of the outcome, fairness in the process, and fairness and correctness in the outcome are essential to a first class justice system. How does the array of dispute resolution processes measure up?

#### A. *Inaction*

Does the party who elects to take no further action select a process that provides him or her with impartiality, fairness in the process and fairness and correctness in the outcome? Certainly by being the only party involved in the process, the party who selects inaction cannot claim a lack of impartiality on the part of a third party. Also, by deciding to take no further action, the party who elects to take no further action must believe the process itself is fair.

By electing not to take further action, a party may feel that he or she has given away a legal right and the other party has received a windfall, something that he or she has no legal right to retain. A party electing to take no further action knows, however, that he or she is saving transaction costs and is eliminating the risk of receiving little or nothing under a different process. Although the party electing to take no further action may believe that the outcome is less than fair, he or she knows that the decision makes good sense under the circumstances.

Finally, can the other party to the dispute claim to be treated unjustly by the

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69. DOYLE & HAYDOCK, *supra* note 60, at 11.

party's election not to act? The fact that one person has a grievance with another does not necessarily mean that the other party is even aware that a potential dispute was brewing. Even if he or she knows of the dispute, the decision of the other party to take no action certainly will not be viewed with disfavor. Rather, that party should be more than pleased that the other party chose not to actively pursue the dispute.

*B. Acquiescence*

Does a party who selects acquiescence select a process that provides impartiality, fairness in the process, and fairness and correctness in the outcome? Certainly by being the only party involved in the selection process, the party who decides to acquiesce to the other's demands makes his or her own decision and cannot claim a lack of impartiality on the part of a third party. He or she also cannot claim that the process of acquiescence itself is unfair.

As is the case with inaction, although the party electing to acquiesce feels that he or she has given away a legal right, the decision is his or her own. The party who decides to acquiesce may feel forced into making this decision by the circumstances (transaction costs, the risks of an unfavorable outcome, need for an immediate resolution that is final, and a greater need to use time and money in other endeavors) but without coercion or duress, the outcome is to that party, at that moment, a correct decision.

*C. Self-Help*

Does a party who selects self-help select a process that provides impartiality, fairness in the process, and fairness and correctness in the outcome? As with inaction and acquiescence, the lack of a "neutral" third party eliminates the impartiality issue. And by deciding to pursue self-help, the party selecting the process must believe the process is fair.

As to the outcome, the party selecting self-help gives away nothing and gains the full measure of his or her right at the expense of the other party. The party selecting self-help precludes the other party from receiving a windfall because the decision to exercise self-help prevents the other party from retaining what he or she has no legal right to retain. So the party selecting self-help believes that the outcome is legal, fair and makes good sense.

Is the outcome correct? Legally, a person pursuing self-help exercises his or her rights to the extent provided by law, as he or she perceives the law to be. The outstanding question is whether the legal right to self-help did in fact exist and whether the exercise of self-help conforms with the law. The exercise of self-help may not end the dispute if the party against whom self-help was exercised challenges the existence of the legal right to self-help under the circumstances or the manner in which that right was carried out.

Finally, can the other party to the dispute claim to be treated unfairly by the first party's election of self-help? As long as the right to self-help exists and the exercise of self-help does not exceed what is authorized by statute or common law,

the party who is the subject of self-help cannot be heard to complain. If any complaint exists it is with the legislature and the courts that created the right of self-help.

#### *D. Negotiation*

Do the parties who select negotiation select a process that provides them with impartiality, fairness in the process, and fairness and correctness in the outcome? With both parties being the only parties involved in the negotiation process, neither can claim a lack of impartiality on the part of a third party.

During the negotiating process one party will try to entice the other to do something that is not consistent with his or her interests. When parties negotiate, the playing field is seldom level. Fairness, however, does not require that the process protect a party against the other's actions. Since each party has the power to terminate the negotiation at any time, each must protect himself or herself during the negotiations. Furthermore, a party is not required to negotiate in good faith.<sup>70</sup> This is not to say that there are no standards of conduct for the negotiation process. Some conduct such as fraud, coercion, duress and undue influence exceed what is permissible. Unless such conduct has been present, neither party can claim that the process is unfair.<sup>71</sup>

If the negotiations produce an agreement, the dispute is settled on the terms agreed to by the parties. When a party agrees to a negotiated solution, he or she may feel that something is being given away but something is being gained in return. What is gained is usually at the expense of the other party.<sup>72</sup> Even if a party feels that the negotiated agreement is less than fair, he or she will agree because it makes good personal and business sense to do so. If one party feels the terms of the proposed agreement are unfair, he or she should not have accepted that agreement. The playing field may not have begun level with one party having little to offer and few options. Accepting the best offer under the circumstances does not mean that a party is being treated unfairly.

Is the outcome correct? The parties in a negotiated agreement may elect to give up their legal rights in exchange for an outcome that makes sense to them. A negotiated agreement is very personal to the parties who negotiate it. Each party

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70. Neither party has a duty to negotiate in good faith. The duty of good faith only arises after the agreement has been created. For example, the Uniform Commercial Code, section 1-203, provides that "[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." UCC § 1-203 (1996). This section mandates good faith in the performance of an agreement subject to the Uniform Commercial Code but does not mandate good faith in the negotiation of that agreement.

71. The fairness claim will arise out of the negotiated agreement. The agreement may be challenged based on how it was negotiated. Fraud in the inducement, coercion, duress, and undue influence are common challenges. MARTIN A. FREY & PHYLLIS HURLEY FREY, *ESSENTIALS OF CONTRACT LAW* ch. 8 (2000).

72. The outcome of a position based negotiation results in a redistribution of wealth. One party gains and the other party loses. The fixed pie is distributed. The outcome of interest based negotiation also results in a redistribution but both parties gain. The pie is expanded. *See, e.g.*, ROGER FISHER & WILLIAM URY, *GETTING TO YES* (Penguin Books, 2d ed. 1991); WILLIAM URY, *GETTING PAST NO* (1993).

determines what is important to him or her. In general terms, however, the negotiated agreement puts an end to the dispute, establishes certainty as to the rights and duties of the parties, and permits the parties to move forward. If the parties have a continuing business or personal relationship, a negotiated agreement furthers that relationship.

Finally, what might be considered the correct outcome for one party might not be correct for another. Parties come to the negotiating table with different strengths and weaknesses. Some are more skilled at negotiating, have stronger personalities, superior social standing, greater wealth, or a dominant and more secure negotiating position. They are able to negotiate a more favorable agreement than someone with less skill, weaker personality, lesser social standing, lack of wealth, or a less defensible negotiating position. For example, an employee who attempts to negotiate a promotion or a raise comes into the negotiation from a weaker position than does his or her employer. Time, another factor, almost always favors one party over the other. For example, a party who is negotiating for payment of a medical claim needs payment now while the party responsible to pay the claim prefers to pay at a much later date or not at all. The urgency for payment may persuade the party seeking payment to accept less now rather than a possibility of more later. The negotiating playing field is seldom level and correctness of the agreement must be left to the parties, their short term and long term interests, and their perceptions.

### *E. Ombudsmanship*

Does a party who elects to pursue the solution of his or her complaint through an ombudsman select a process that provides impartiality, fairness in the process, and fairness and correctness in the outcome? By visiting an ombudsman, the party with a grievance invites a third party into the dispute resolution process. This third party is a part of the management structure of the party against whom the complaint is brought. This third party, however, must function in an impartial fashion as he or she investigates the complaint and counsels the complainant. Failure to act impartially, destroys the credibility of the office of the ombudsman in that setting and casts a shadow over ombudsmanship in general.

A number of organizations have formulated codes of conduct for their ombudsmen.<sup>73</sup> These codes require confidentiality (including the name of complainant),<sup>74</sup> objectivity, and impartiality. They also seek to treat communications with the ombudsman as privileged.<sup>75</sup> Although the ombudsman

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73. The Ombudsman Association (TOA), a non-profit, international organization of professional organizational ombudspople, has both a Code of Ethics and Standards of Practice. The Ombudsman Association, *available at* <http://web.mit.edu/negotiation/toa/TOAintro.html> (last visited Apr. 17, 2001). The United States Ombudsman Association, a national organization for public sector ombudsman professionals also has a website. The United States Ombudsman Association, *available at* <http://www.usombudsman.org/AboutUSOA/association.htm> (last visited Apr. 17, 2001).

74. The person seeking the assistance of the ombudsman must feel that seeking assistance will not lead to reprisals from the organization or institution.

75. The Code of Ethics of The Ombudsman Association states: "The ombudsman should not testify

is within the management structure of the organization or institution, he or she must be able to act independently of the organization or institution so there will be no real or perceived conflict of interest. It is only when these ethical and procedural guidelines are violated, or are perceived to be violated, that impartiality and fairness of the ombudsmanship process come into question.

Although the role of the ombudsman is not to resolve the complaint, the complaint often is resolved due to the interaction of the ombudsman with the organizational or institutional party who the aggrieved complainant perceives to be the source of the problem. The party who seeks the assistance of an ombudsman does not abandon a legal right by selecting this process. Only when the ombudsman reports the fruits of his or her investigation may the complainant face the choice of which solution to choose. This choice may or may not require an abandonment of a legal right. The decision at this point is that of the complainant and is his or her decision alone.

While the ombudsman may benefit the party with a complaint, the interfacing of the ombudsman with the organizational or institutional managers may also benefit others who have not come forward with their complaints. The activities of the ombudsman constitute an early warning to those in management that an organizational or institutional problem is brewing that needs to be addressed. In this fashion, the ombudsman serves the greater good of both the individuals and the organization or institution.

#### F. Mediation

Do parties who select private mediation or who participate in court-sponsored mediation participate in a process that provides them with impartiality, fairness in the process, and fairness and correctness in the outcome?

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in any formal judicial or administrative hearing about concerns brought to his/her attention." The Ombudsman Association, Code of Ethics, *available at*

<http://www.web.mit.edu/negotiation/toa/TOAcoe.html> (last visited Apr. 17, 2001).

The Standards of Practice of The Ombudsman Association states:

3. We assert that there is a *privilege* with respect to communications with the ombudsman and we resist testifying in any formal process inside or outside the organization.
- 3.1 Communications between an ombudsman and others (made while the ombudsman is serving in that capacity) are considered privileged. Others cannot waive this privilege.
- 3.2. We do not serve in any additional function in the organization which would undermine the privileged nature of our work (such as compliance officer, arbitrator, etc.).
- 3.3. An ombudsman keeps no case records on behalf of the organization. If an ombudsman finds case notes necessary to manage the work, the ombudsman should establish and follow a consistent and standard practice for the destruction of any such written notes.
- 3.4. When necessary, the ombudsman's office will seek judicial protection for staff and records of the office. It may be necessary to seek representation by separate legal counsel to protect the privilege of the office.

The Ombudsman Association (TOA), Standards of Practice, *available at* <http://web.mit.edu/negotiation/toa/TOAsop.html> (last visited Apr. 17, 2001) (hypertext link in original; italics added).

## 1. Private Mediation

As is the case with ombudsmanship, mediation adds a “neutral” third party. But is this party always impartial? In private mediation, the parties select the mediator or at least the organization that provides the mediator. If a party frequently uses mediation, will he or she tend to favor the selection of a mediator who has participated in mediations where the party was able to negotiate favorable outcomes? Would this party also tend to favor a mediator who has in the past favored the party’s position or industry?<sup>76</sup> Would this party tend to favor a mediator who is a member of his or her profession, trade, political party, country club, church, or civic organization? Would this party also tend to favor a mediator whom he or she knows personally rather than someone whom he or she does not know?<sup>77</sup> Does one party to the mediation know more about the mediators being considered than does the other party?

If a mediator has a conflict of interest with either of the parties, his or her impartiality comes into issue. Although the mediator represents neither party at the mediation and is not practicing law when mediating, the mediator may not be fit to serve as the mediator. Attorney-mediators, due to their special relationships with clients, will have more conflicts of interest problems than will mediators who are non-attorneys.<sup>78</sup>

Although the outcome of the mediation remains the decision of the parties, the mediator’s active participation certainly influences the direction of the discussion and leads the parties away from some outcomes and toward the others. Therefore, at least hypothetically, the mediator in a private mediation may be less than impartial.<sup>79</sup>

As with negotiation, each party in a private mediation has the power to terminate the process. Therefore, each party has the power to terminate what he or she perceives to be an unfair process. The inequality of the parties, however, may cause a party to be reluctant to exercise this power.<sup>80</sup>

76. Should the parties select an environmentalist to mediate a dispute between an oil drilling company and the Sierra Club? The question could be asked in a different way. For example, who should not mediate a child custody, an employment discrimination, or a labor/management dispute?

77. If both parties do not pay the mediator equally, would the mediator favor the party who pays more?

78. The Model Standards of Conduct for Mediators of the American Arbitration Association, Standard III, reads:

III. Conflicts of Interest: A Mediator shall Disclose all Actual and Potential Conflicts of Interest Reasonably Known to the Mediator. After Disclosure, the Mediator shall Decline to Mediate unless all Parties Choose to Retain the Mediator. The Need to Protect Against Conflicts of Interest also Governs Conduct that Occurs During and After the Mediation.

The Model Standards of Conduct for Mediators of the American Arbitration Association, Standard III, available at <http://www.adr.org/rules/ethics/standard.html> (last visited Apr. 17, 2001).

79. A mediator who is impartial becomes less than impartial if one of the parties perceives the mediator to be either partial or hostile toward him or her personally or toward his or her performance or position at the mediation.

80. While a party may be perfectly comfortable walking out of a negotiation, he or she may be uncomfortable or even embarrassed to walk out of a mediation because of the presence of the mediator, the location of the mediation, the loss of control over the process, and the greater formality of the process.



Neither party can claim to be treated unfairly by the other party.<sup>81</sup> If mediation produces an agreement, the dispute is settled on the terms agreed to by the parties. If one party feels the terms of the proposed agreement are unfair, he or she should not have accepted the proposed agreement. The playing field may not have begun as level with one party having little to offer and few options. Accepting the best offer under the circumstances, however, does not mean that a party is treated unfairly.

Can the outcome be unfair? Although one party may try to entice the other to do something that is not consistent with his or her interests, fairness does not require that a party be protected from himself or herself. When a party agrees to a mediated solution, he or she feels that something has been given away, but something has been gained in return as well. What is gained is usually at the expense of the other party. Even if a party feels that the agreement is less than fair, he or she will agree because it makes good personal and business sense to do so.

Does the mediator have the duty to protect a party from making an unwise decision even when the mediator knows the playing field is not level? For example, what is the role of the mediator when the parties are on the verge of settling a dispute when the proposed settlement has significant tax consequences and one of the parties is totally ignorant of these consequences? Should the mediator give the party tax advice or should the mediator advise the party to consult a tax advisor before entering into the agreement?<sup>82</sup> Does this participation by the mediator reduce his or her impartiality?

Is the outcome correct? The parties in a mediated agreement may elect to give up their legal rights in exchange for an outcome that makes personal or business sense. The mediated agreement ends the dispute, establishes certainty as to the rights and duties of the parties, and permits the parties to move forward. At times, the parties have a continuing business relationship that is enhanced by the mediated agreement.

Finally, what might be considered the correct outcome for one party might not be the correct outcome for another. Because the outcome has been influenced more by personal and business factors and less by the law, there is no abstract standard by which to evaluate "correctness." Correctness depends on the perception of the party who accepts the mediated agreement.

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81. As with a negotiation without a mediator, in mediation neither party has a duty to negotiate in good faith.

82. The Model Standards of Conduct for Mediators of the American Arbitration Association state in the Comments after Standard I on Self-Determination that "[a] mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but it is a good practice for the mediator to make the parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions." The Model Standards of Conduct for Mediators of the American Arbitration Association, Standard I, available at <http://www.adr.org/rules/ethics/standard.html> (last visited Apr. 17, 2001).

## 2. Court-Sponsored Mediation

In court-sponsored mediation, the mediator may be a member of the court or a court appointed local practitioner. If the mediator is a practitioner, his or her selection will follow the court's local rules, which differ from court to court. In some courts, the litigants select a mediator from a list provided by the administrator of the court-sponsored mediation program. In other courts, the administrator matches a mediator to the case.

Whether the mediation is private or court-sponsored, the impartiality of the non-judicial mediator is an issue. Would a non-judicial mediator favor one attorney over another, one litigant over another, or one solution over another? Some courts have a formal evaluation system whereby litigants and their attorneys can systematically inform the program's administrator of a mediator's performance, including lack of impartiality. Another check on impartiality is the fact that mediation is voluntary and continues so long as the parties wish it to continue. If a party perceives that a mediator is less than impartial and that this lack of impartiality may adversely affect the mediation, the party can terminate the mediation. The litigant may request the appointment of a new mediator or may continue with the litigation process.

When a member of the court acts as the mediator and demonstrates a lack of impartiality, the problem is more difficult to address. Unlike the court appointed practitioner mediator whose only contact with the litigants' attorneys (through the practice of law) is often adversarial, the judge mediator holds a special position in relation to the litigants' attorneys. These attorneys may come before the mediator in his or her role as judge on a fairly regular basis. Thus, a complaint concerning impartiality filed against a judge mediator may have adverse repercussions beyond the mediation.

As with private mediation, each party in a court-sponsored mediation has the power to terminate the process. Therefore, each party has the power to terminate what he or she perceives to be an unfair process. The inequality between the parties, however, may cause a party to be reluctant to exercise this power. Also, if the mediator is a judge, an attorney and his or her client may be reluctant to terminate the mediation for fear of showing disrespect to the court.

The mediation process may lack fairness when a practitioner mediator tries too hard to settle a case. Often a practitioner wants to be a court appointed mediator to increase his or her visibility with the court and other members of the practicing bar. This desire to be recognized carries over to the mediation when the practitioner mediator wants to impress the court with his or her statistics in settling cases.<sup>83</sup> At times a mediator may press settlement when the case is not ripe for settlement.<sup>84</sup>

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83. Each case settled by a practitioner mediator is another case stricken from a judge's docket. Often the settlement conference occurs after substantial discovery and after discovery and dispositive motions have been filed. Settlement eliminates the need to rule on these pending motions.

84. In most cases, timing is extremely important for settlement. A case must be ripe for settlement. Enough discovery must be done so the attorneys know the strengths and weaknesses of their cases.

The mediation process lacks fairness when the trial judge acts as the mediator in his or her own case. Mediation is a confidential process where the litigants and their attorneys have the opportunity to fully explore settlement with the other side. This requires an open discussion between the litigants, their attorneys, and the mediator. A litigant and his or her attorney will share information with the mediator that they are not willing to share with the other side or with the trial judge. Using the trial judge as his or her own mediator either limits the free flow of confidential information in the mediation or provides the trial judge with information that will not be presented as evidence at trial.

Often at mediation an offer is made by one of the parties, or a suggestion is made by the mediator, that should be the basis for a settlement, at least in the mind of the mediator. The offer or suggestion seems reasonable and meets all of the parties articulated interests. One side, however, for some unstated reason, may refuse to accept the proposed settlement. If the mediator has expended substantial time and effort into getting the parties to the point of settlement and one party will simply not accept this "reasonable" proposal, the mediator may feel a sense of frustration. If the mediator was not the trial judge for the case, the mediator merely walks away from the mediation and wishes the parties well. With a wall of silence separating the mediator from the trial judge, all the trial judge knows is what he or she reads on the docket sheet: the case was before court-sponsored mediation and the case did not settle. If the mediator is the trial judge, the wall of silence no longer exists, and the judge knows that one of the parties has bypassed a reasonable settlement that he or she worked so hard to achieve.

Can the outcome of a court-sponsored mediation be unfair? Normally at a court-sponsored mediation, the litigants are represented by their attorneys. When one party tries to entice the other to do something that is not consistent with his or her interests, fairness does not require that a party be protected from himself or herself. The party is represented by counsel, and it is counsel's responsibility to advise his or her client what should or should not be accepted. However, when a judge mediator badgers a litigant and his or her attorney to settle, the litigant may be coerced to do something that is inconsistent with his or her interests.

Does the mediator have a duty to protect a party from making an unwise decision especially when the judge mediator knows the playing field is not level? For example, what is the role of the mediator when he or she knows that a party is receiving inadequate representation by his or her attorney? Should the mediator so inform the party in a private caucus, terminate the mediation with or without giving a reason, take the attorney aside and inform him or her that his or her client is not being adequately represented, report the attorney to the local bar association, or report the attorney to the court's disciplinary panel?<sup>85</sup>

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Enough time must pass for the mediator to have the opportunity to help the litigants get beyond the emotions of their cases and face the difficult business choices inherent in settlement.

The value of a case changes over time. As more information is gathered through discovery, as the court rules on the parties' motions, and as the parties' needs change, the value of the case for settlement purposes changes.

85. Should the judge mediator's responsibility be different depending on whether the case is before

Should a mediator give the parties legal advice? For example, what is the role of the mediator when the parties are on the verge of settling a dispute in which the proposed settlement has significant tax consequences and one of the parties is totally ignorant of these consequences? Should the mediator give the party tax advice or should the mediator advise the party to consult a tax advisor before entering into the settlement agreement? Has the mediator crossed the boundary of impartiality?

### *G. Arbitration*

Are parties who select private arbitration or who participate in court-annexed arbitration involved in a process that provides them with impartiality, fairness in the process, and fairness and correctness in the outcome?

#### 1. Private Arbitration

As with private mediation, private arbitration adds a “neutral” third party. But is this party always impartial? When a contract includes a predispute mandatory arbitration provision, the drafter of the contract is seeking a substantial advantage over the other contracting party. Such arbitration will place the non-drafting party at a disadvantage if a dispute arises. The party who promoted arbitration selects the arbitration service provider, the location, and all of the rules that govern the arbitration. The arbitration service provider looks to the party who drafted the predispute arbitration provision to continue to utilize its services. This creates, at a minimum, the appearance of bias and the potential for a lack of impartiality on the part of the arbitrator.

If private arbitration comes about after a dispute arises and is by consent of the parties (i.e., without a predispute mandatory arbitration provision), the parties jointly select the arbitrator or at least the organization that provides the arbitrator. If one party frequently uses the arbitrator or the arbitration service and the other party is either an infrequent user or a one-time user, the potential exists for the arbitrator to favor the frequent user since being an arbitrator depends on demand for one’s services. Therefore, at least hypothetically, the arbitrator in a private arbitration may be less than totally impartial.

Does the fact that arbitration has no jury mean the process is less fair than litigation where, except in equitable matters, the opportunity for a jury may exist? The jury, while instructed on the law, may in fact deviate from the law when it feels “justice” demands it. The jury, although not instructed to do so, may act as the great leveler in the justice system. With the arbitrator being both the trier of fact and the trier of law, the process lacks the jury’s influence on the fairness of the process.

Unlike negotiation and mediation where the parties may terminate the process, once arbitration begins, neither party has the power to terminate the process. Therefore, neither party has the power to terminate what he or she

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him or her as a mediator or as a trial judge?

perceives to be an unfair process.

Can the outcome of private arbitration be incorrect? The parties in a private mediation may elect to give up their legal rights in exchange for an outcome that makes personal or business sense. The parties in a private arbitration give up their power to make sense of the dispute in exchange for the resolution of the dispute to be based on what they may think will be their legal rights. Unless the parties direct the arbitrator to follow the law, the arbitrator may or may not follow the law. The arbitrator's award may be made on what he or she perceives as a reasonable outcome. Since arbitration seldom yields a written, reasoned opinion for the award, there is little, if any, precedent generated. Thus, predicting the outcome at arbitration may be difficult at best. The arbitrator's award, regardless of its basis, will end the dispute, establish certainty as to the rights and duties of the parties, and permit the parties to move forward.

Finally, the arbitrator's award may not be legally correct. The arbitrator may not be required to deliver a written reasoned opinion. The arbitrator may only be required to state, orally or in writing, his or her decision and award. The parties may never know why the arbitrator reached his or her decision. Even if the arbitrator has issued a written, reasoned opinion, the grounds for appeal to a court are extremely limited; thus, judicial oversight of private arbitration is limited as well.

## 2. Court-Annexed Arbitration

In those jurisdictions that have court-annexed arbitration, it is generally mandatory arbitration and is a prerequisite to trial. Therefore, the litigants have no choice whether they will participate in the process and may have no choice as to the arbitrator. The arbitrator will be a member of the practicing bar and, as with court-sponsored mediation, is designated as "neutral." But is this party always impartial? Many of the same concerns that exist with the impartiality of the court appointed mediator and with the private arbitrator also exist with the court appointed arbitrator.

Does the fact that court-annexed arbitration has no jury mean that the process is less fair than litigation where, except in equitable matters, the opportunity for a jury may exist? Unlike the arbitrator in a private arbitration who replaces the jury as the "great leveler," the arbitrator in court-annexed arbitration is instructed to follow the law. Therefore, some of the fairness factors found in private arbitration awards are missing in court-annexed arbitration awards. But unlike private binding arbitration where the arbitration award is virtually unreviewable by a court, the arbitration award in a court-annexed arbitration can be set aside if a party requests a trial *de novo*. At the trial, a jury may or may not be available, depending on the nature of the case.

In court-annexed arbitration, as well as in private mediation, neither party has the power to terminate what he or she perceives to be an unfair process. In court-annexed arbitration, however, an unfair process can be nullified by a trial *de novo*.

Litigants are required to participate in court-annexed arbitration, and must reveal their cases to opposing counsel prior to trial. In addition, they cannot terminate the arbitration if counsel perceives the process to be unfair, and will incur additional costs if they decide to proceed to a trial *de novo*. Do these requirements and restrictions create the potential for an unfair process? By not settling before the case goes to court-annexed arbitration, the litigants have exchanged their power to formulate an outcome that makes personal or business sense for an outcome based on the law as perceived by a practitioner arbitrator. The practitioner arbitrator's award will end the dispute, establish certainty as to the rights and duties of the parties, and permit the parties to move forward unless one of the parties decides to assume the risks involved with a trial *de novo*.<sup>86</sup> By placing additional burdens on the litigants, has the litigation process become less than fair?

Finally, the practitioner arbitrator's award may not be legally correct. The local court rules may not require the arbitrator to deliver a written, reasoned opinion. The arbitrator may only be required to state, in writing, his or her decision and award.<sup>87</sup> The litigants may never know why the arbitrator reached his or her decision. Even if the arbitrator has issued a written, reasoned opinion, any alleged errors will not form the basis for appeal to a court but rather for a trial *de novo*. Therefore, rather than saving the litigants time and money, the arbitration has increased the time and money spent to reach a final decision in the case.

#### H. Litigation

Do the parties who participate in litigation participate in a process that provides them with impartiality, fairness in the process, and fairness and correctness in the outcome?

##### 1. The Courts

Does one party always have the advantage by going to trial? Litigation carries the inherent problems of time, money and the risk of losing. Also, issues of bias and impartiality of a judge and a jury are also present.

Litigation is designed to produce a decision based on the law. The trial courts, however, do not always produce the correct result under the law. If a litigant has the resources and the will to take an appeal, errors of the trial court may, but not necessarily will, be corrected. Even if the judgment is legally correct, is the result based on the law always a fair result?

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86. The litigants may still settle their case even after the arbitration award and before or during the trial *de novo*. Settlement always remains a viable method of dispute resolution.

87. Local Rule 5.9(b) in Oklahoma's Western District provides that "[t]he purpose of the award is to indicate the arbitrator's view as to the probable outcome if the case is tried, including the dollar value of each claim and counterclaim, if any." W.D. OKLA. R. 5.9(b).

## 2. Private Judging

What do litigants gain by selecting private judging? Certainly they gain control, although shared, over the process. They can limit discovery, select the judge, design the trial (including the rules of procedure and evidence and whether a jury will participate), and plan the scheduling. They can instruct the judge whether the judgment will be advisory or binding. In short, the litigants have input into the impartiality of the judge (if the judge is selected wisely), the fairness of the process, and the fairness and correctness of the outcome. In addition, the litigants gain privacy and a date certain when the dispute will be resolved.

Private judging, however, does not come free. In addition to the transaction costs inherent in all litigation, the litigants who select private judging must pay for the judge and the other expenses of the trial itself. The litigants also give up the right to appeal what may be perceived by one or the other as an erroneous judgment.

## IV. IS THERE A FIRST CLASS JUSTICE SYSTEM?

If the common threads of impartiality in the process and the formulation of the outcome, fairness in the process, and fairness and correctness in the outcome are essential to a first class justice system, is litigation a first class justice system and the various other methods of dispute resolution less than first class? Processes such as inaction, acquiescence, self-help, and negotiation do not involve a third party, so the impartiality of the “neutral” is not in issue. With inaction, acquiescence, and self-help, the complainant is the sole party who controls the process. In negotiation and mediation, either party can terminate the process and select another process so both parties in effect control the process. With processes such as inaction, acquiescence, and self-help, the party who controls the selection of the process also knows or can predict the outcome and decide whether to go forward with the process. Negotiation, ombudsmanship, and mediation all require the parties to assess the likely outcome or offer and decide whether to accept or reject it. Certainly the power to control the outcome creates fairness in the outcome. If the proposed outcome is rejected, the complainant may seek a solution through another form of dispute resolution, thus providing an additional degree of fairness.

Only in ombudsmanship, court-sponsored mediation, court-annexed arbitration, and litigation (court), is the process created and controlled by a “neutral” third party. And only in arbitration (private or court-annexed) and litigation (court or private judging) is the third party empowered to resolve the dispute for the parties.

Inaction, acquiescence, negotiation, and mediation are not designed to level the playing field. Ombudsmanship levels the field by providing the complainant with an opportunity to cut through the red tape of the corporation, institution, or government entity and for no charge. Arbitration and litigation are designed to treat all litigants equally according to the law but the arbitrator can be perceived as less than impartial and his or her award cannot, in most instances, be reviewed

by a court for errors. Litigation, while treating all litigants equally under the law, can still be used by the party with more power as a threat to a less empowered party.

With this said, should the conclusion be that litigation is the first class justice system and the others something less? The court reporters with their published judicial opinions are replete with cases where litigation has been challenged on the lack of impartiality, fairness in the process, and fairness and correctness in the outcome. Therefore, litigation, as a first class method of dispute resolution, is not without its problems.

The perception whether litigation is a first class justice system and the other dispute resolution methods are inferior may stem from the unavailability of litigation to a large segment of the population. Litigation is by far the most expensive form of dispute resolution and carries with it the greatest risk of wealth reallocation.<sup>88</sup> For those who can afford to litigate, the filing of a complaint acts as a leveling influence of an unlevel playing field. The filing of a complaint may also act to tilt the playing field in the direction of the party filing the complaint. It may be used as an incentive to acquiescence, or a negotiated or mediated settlement. Those who cannot afford to select litigation as their method of dispute resolution lose the threat that litigation provides. Those who find themselves in litigation and cannot afford the transaction costs or survive the risk of an adverse outcome, have little choice but to acquiesce or participate in a negotiated or mediated settlement. To them, the litigation process may be perceived as less than fair.

Should a first class justice system provide the absolute correct outcome, no matter how long it takes, or finality? A judgment arrived at through litigation may not necessarily be correct. To insure that errors made at the trial court are corrected, the judicial system incorporates the right to appeal. The transaction costs involved in an appeal and the delay, until the resolution of the dispute is final, dissuades a number of parties from taking an appeal. For those parties who do not take an appeal, one wonders how many erroneous trial court decisions are left standing.<sup>89</sup>

In other methods of dispute resolution where personal and business factors, rather than merely reliance on the law, influence the outcome, the conclusion of legally correct or incorrect is displaced by the parties needs and interests. In these instances, however, the levelness of the playing field often influences the outcome. Is an imposed result more just than an agreed upon result?

Does fairness depend on a disputant's perception? In litigation, the winner

88. Litigation results in a winner and a loser. Only in limited situations, such as in a comparative negligence jurisdiction, is a compromise struck. In rare instances, punitive damages are awarded in litigation. Whether punitive damages may be awarded in arbitration has courts divided. "Generally, punitive damages are disfavored in labor arbitration unless the collective bargaining agreement specifically provides for them. . . . Less consensus exists, however, with respect to commercial arbitration." NOLAN-HALEY, *supra* note 59, at 160 (second quoted sentence in a separate paragraph in original).

89. One calculation could be based on the number of cases appealed and the number of reversals that occur on appeal and then multiplying this percentage by the number of cases where the judgment was not appealed and became the final resolution of the case.



almost always thinks the judgment is fair and the loser always thinks it is unfair. With inaction and acquiescence the complainant either walks away or pays up. In self-help the complainant takes matters into his or her own hands and runs the risk of acting beyond the law. In negotiation and mediation, a party may be forced to accept, because of his or her inferior bargaining position, a settlement that was less than preferred.

The quest for a first class dispute resolution process lies not in the strength of any one dispute resolution process but in the totality of the system. It is a diverse system that provides choices. Often the dispute resolution strategy does not rest with one process but with several. The dispute resolution plan can call for using several methods simultaneously or for one to follow another.<sup>90</sup> With such a broad array of dispute resolution processes available, parties must be adequately informed about each process and select the process or processes that most closely accommodate their own objectives.

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90. Even in those cases that reach a final judgment in litigation, the parties may continue their settlement discussion and ultimately agree upon a final outcome that differs from that handed down by the courts.