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Civil Justice and Dispute Resolution in the Twenty-first Century: Mediation and Arbitration Mow and for the Future

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CIVIL JUSTICE AND DISPUTE RESOLUTION IN THE TWENTY-FIRST CENTURY: MEDIATION AND ARBITRATION NOW AND FOR THE FUTURE

Roger S. Haydock[†]

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I. INTRODUCTION

“Where Weaver’s Needle casts its long shadow at four in the afternoon, there you will find a vein of rose quartz laced with gold wire—and you will be rich beyond your wildest dreams.”

—The Legend of the Lost Gold Mine and Superstition Mountain

Welcome to your civil justice dispute center. We are sorry that you have a dispute but you now have an opportunity to have your dispute resolved quickly and fairly. The costs are very reasonable and affordable. Small claim disputes

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cost very little. Larger claims cost proportionally more. The rules are simple and the proceedings are easy to understand. You can choose to have a lawyer represent you if you prefer. You can obtain useful information from the other side before the hearing. You can select from a variety of hearings: paper documents, computer on line, telephone, video conference, or in person hearings. An expert, impartial arbitrator will review or hear the facts and decide your case based on the law. If you win, you can celebrate. If you lose, you can appeal to a judge who will determine whether your case was rightfully decided on the merits. If you decide to compromise, you can settle your dispute with the assistance of a mediator, for even less money and time. At the end, you will have experienced a responsive, affordable, and fair civil justice system.

This is a reality, today. The dream of a fast, inexpensive, and fair dispute resolution system has come true. Well, almost. We have within our grasp the opportunity to implement this system. We need only embrace arbitration, mediation, and a reasonable litigation system, and our fairy tale legal fantasy will happily end with final, enforceable, and fair resolutions.

II. THE BEGINNING AND THE END

“What hath God wrought?”

—Numbers 23:23

Disputes are inevitable. Two or more parties engaged in a business or other relationship may very well end up with a dispute over something important. Rational, reasonable folks decide to plan for this potential problem and select a rational, reasonable process to resolve the dispute, before the dispute arises.

The need for a dispute resolution system exists when the disputants have been unable to resolve the dispute on their own or with the assistance of lawyers. The most common—as well as the most efficient, economic, and satisfying, perhaps—is a settlement reached by the parties or their legal representatives. The parties know what is best for them and assistance, if needed, from lawyers can provide them with a legal framework for a final settlement, al-

leviating the need for a dispute resolution forum.¹

III. WHAT PEOPLE WANT

*"If you are going to play the game properly,
you'd better know every rule."*

—Barbara Jordan

When people need help to resolve disputes, what will they want? Consumers, business folks, employees, corporate executives, and individuals should and will prefer: a (1) prompt, (2) affordable, (3) fair proceeding conducted by a (4) neutral expert who decides the case (5) based on the merits. These five factors reflect the basic elements of a fair hearing: (1) speed—reasonably prompt, (2) cost—affordable and proportional, (3) an accessible proceeding comporting with "due process" standards, (4) a wise, impartial decision maker—who knows the applicable law, and (5) a predictable decision based on the facts and law—and not a compromise or "split the baby" decision.

The optimum dispute resolution system in the twenty-first century will reflect these five factors as the needs and interests of individuals and businesspersons evolve. Throughout the century and beyond infinity, disputants will have two continuing needs: they will need help resolving their problems, and they will need someone else to decide their dispute. These ongoing needs, coupled with specific interests reflected by the particular type of dispute, will shape the future of dispute resolution as time progresses.²

IV. THE FUTURE JUSTICE SYSTEM: PUBLIC AND PRIVATE MAGISTRATES

*"Four things belong to a judge:
To hear courteously,
To answer wisely,*

1. Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 4-5 (1992); John Dwight Ingram, *Why Aren't More Cases Settled?*, 45 S.D. L. REV. 94, 95-96 (2000).

2. Robert A. Baruch Bush, *Alternative Futures: Imagining How ADR May Affect the Court System in Coming Decades*, 15 REV. LITIG. 455, 456-57 (1996); Adam Furlan Gislason, *Demystifying ADR Neutral Regulation in Minnesota: The Need for Uniformity and Public Trust in the Twenty-First Century ADR System*, 83 MINN. L. REV. 1839, 1839 (1999).

*To consider sobriety,
And to decide impartially.”*
—Socrates

The twenty-first century dispute resolution system begins where the twentieth century system ends: mediation, arbitration, litigation, and administrative proceedings are the available forums. The phrase “alternative dispute resolution” is no longer reflective of these available methods. There was a time when litigation was the dominant method of dispute resolution, and administrative proceedings resolved ancillary cases, and mediation and arbitration were “alternative” methods. By the end of the twentieth century, litigation became the least used method to resolve common legal problems. Administrative proceedings replaced many judicial cases.³ Judicial cases usually were resolved through settlement and mediation, and seldom were resolved by trial.⁴ Arbitration became the fastest growing method selected by parties to resolve their disputes.⁵

The United States Supreme Court has recognized the need for arbitration. Its decisions over the last two decades of the twentieth century have restated a strong preference for arbitration for businesses, individuals, and corporations.⁶ The Federal Arbitration Act evidences Congress’ intent to promote the use of arbitration and preempts conflicting state laws.⁷

Rational and reasonable judges and legislators have provided disputants with fast, affordable, and fair ways to resolve their disputes by using administrative proceedings and arbitration instead of litigation and judicial trials.⁸ Arbitration and administrative proceedings have inherent advantages over litigation in resolving a

3. Johnny C. Burris, *Administrative Law*, 14 NOVA L. REV. 583, 584 (1990).

4. Rita Lowery Gitchell & Andrew Plattner, *Mediation: A Viable Alternative to Litigation for Medical Malpractice Cases*, 2 DEPAUL J. HEALTH CARE L. 421, 454 (1999).

5. Bruce Benson, *An Exploration for the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States*, 11 J. L. ECON. & ORG. 479, 490 (1995).

6. *Allied Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 274-75 (1995); *Gilmer v. Interstate/Johnson Lane Co.*, 500 U.S. 20, 26 (1991); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217-18 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519-20 (1974).

7. *Doctor’s Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996); *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

8. James J. Myers, *Survival Kit for Complex Construction Arbitration in the 1990’s*, 49 DISP. RESOL. J., 53, 53 (Sept. 1994).

wide variety of legal disputes: (1) the preparation, filing, and service of claims and responses are much easier and faster, (2) relevant and reliable information can be or is more effectively exchanged between parties before a hearing, (3) there is no need for costly and lengthy motion proceedings, (4) parties can, when they are able to, represent themselves or choose to have an attorney represent them, (5) the rules are much fewer in number and much easier to understand, (6) the rules of evidence readily allow relevant and reliable information and do not restrict or complicate the admission of evidence, (7) the hearing procedures are more informal and less complex, (8) the arbitrator or administrative judge is a procedural and substantive law expert, (9) the arbitrator and administrative judge have more flexibility in allowing the parties to present the information they need to present, (10) the type of hearing can vary and allow parties and witnesses to participate by written documents, telephone, e-mail, video conference, and by personal appearance, (11) the day and time of the hearing can be specifically scheduled assuring parties that their case will be heard as scheduled, and (12) the entire proceeding, from beginning to end, may take a few months instead of years.

The future dispute resolution system will be a blend of the best features of mediation, arbitration, administrative proceedings, and litigation. Parties will continue to settle most of their problems on their own, by negotiating with each other. If they fail, they may choose to compromise their dispute and use the services of a skilled mediator. If they prefer to have their dispute decided by a neutral expert, they will select an experienced arbitrator. This arbitrator is, in effect, a private magistrate of the court system with the decision of the arbitrator being reviewable by a public judge. In federal and state court systems, judicial judges and magistrates can review arbitration awards. Arbitrators are an integral part of this litigation system, with the arbitrator being a private adjunct of the public process. Administrative law judges will continue to resolve administrative law cases.

The public court system will continue to be the best way for some disputes to be resolved, particularly matters of constitutional significance. The use and availability of arbitration awards depends upon statutes, and the public judicial system to recognize and enforce awards. As with other facets of society, the future civil justice system will continue to integrate private and public proceedings to best meet the needs and interests of parties.

V. MEDIATION

*"There are four sides to every answer:
Right and Wrong, yours and mine."
—Bo Hamilton*

Mediation continues to be used in arbitral, administrative, and judicial forums to resolve cases. This settlement method can be an excellent way for the parties to compromise their positions and agree to a reasonable resolution. The parties can specifically shape settlement terms to meet their exact needs and interests. The experience and wisdom of the mediator can assist the parties, and their lawyers, in reaching a mutually satisfactory solution. Some judicial judges are retiring or returning to practice as mediators to provide parties with their expertise. These and other advantages of mediation will continue to be used as the century progresses.⁹

The primary disadvantage of mediation reflects one of its primary advantages: compromise. Parties reaching mediated settlements change their positions to accommodate the needs and interests of the other side. This approach is very effective when compromise is the best way to resolve a problem. If each party to a two party dispute recognizes that they are both partially responsible for the problem, then compromise makes sense. But if the parties feel compelled to compromise or decide they have to compromise because they have no other practical resolution available, then mediation is a poor choice. Litigating parties may decide to mediate a settlement because the current litigation system does not practically allow them their day in court. Parties should voluntarily mediate because they want to, not because they have to. Arbitration proceedings provide them with a choice, as an adjunct to the court system.¹⁰

VI. PARTY DISSATISFACTION WITH LITIGATION

*"I can't get no satisfaction. I can't get no satisfaction."
—Mick Jagger and Keith Richards*

9. Charles R. Pyle, *Mediation and Judicial Settlement Conferences: Different Rides on the Road to Resolution*, 33 ARIZ. ATT'Y 20, 55-56 (Nov. 1996) (discussing the differences between mediation and judicial settlement conferences).

10. Roscoe Pound, *The Causes of Popular Dissatisfaction With the Administration of Justice*, 29 ARIZ. A.B.A. ANN. REP. 395, 395 (1906).

Litigation has provided many parties with satisfactory resolutions for their civil disputes. Many other parties and many Americans believe that the litigation process needs to be substantially improved and that there ought to be other dispute resolution forums available. Specific complaints parties have about the litigation process, which deny them an opportunity for civil justice, include the following:

- There is no readily affordable access to litigation. Surveys suggest that almost 200 million Americans believe they cannot afford the cost of justice.¹¹ Parties do not have affordable access to lawyers who can help them resolve their common disputes.¹²
- The civil trial system is overloaded.¹³ There are too many cases for too few judges to try. Criminal trials take preference over civil trials, as it should be. This scheduling preference also makes it difficult to schedule civil trials for specific days and results in civil trials being repeatedly delayed. Parties, including those who operate a business and those who work for a living, have to schedule their lives around a changing trial calendar. These interminable delays cause them a great deal of wasted preparation time and ongoing frustration. Too often cases settle on the courthouse steps because the parties cannot get into the courthouse for a civil trial.
- Parties perceive that many civil trial judges do not know as much as they should about the disputed legal issues.¹⁴

11. *How The Public Views The State Courts: A 1999 National Survey*. National Conference on Public Trust and Confidence in the Justice System (May 14, 1999) at <http://www.ncsc.dni.us/PTC/results.htm>; Supreme Court of Texas, Office of Court Administration and State Board of Texas, *Public Trust and Confidence in the Courts and the Legal Profession in Texas Summary Report* 6 (1999).

12. *Infra* note 26.

13. Lisa Combs Foster, *Section 1447(e)'s Discretionary Joinder and Remand: Speedy Justice or Docket Clearing?*, 1990 DUKE L.J. 118, 118 (1990); Victor Williams, *A Constitutional Charge and a Comparative Vision to Substantially Expand and Subject Matter Specialize the Federal Judiciary: A Preliminary Blueprint for Remodeling Our National Houses of Justice and Establishing a Separate System of Federal Criminal Courts*, 37 WM. & MARY L. REV. 535, 575 (1996).

14. *American Bar Association Report on Perceptions U.S. Justice System*, 62 ALB. L. REV. 1307, 1320 (1999); Leonard E. Gross, *Judicial Speech: Discipline and the First Amendment*, 36 SYRACUSE L. REV. 1181, 1205-06 (1986).

Many judges have exclusive criminal lawyer backgrounds as prosecutors or public defenders and have little practice experience with civil disputes. Judges may know a lot about areas of the law but find themselves enmeshed in a myriad of civil cases that present, for them, new and novel issues. It is difficult, if not practically impossible, for general jurisdiction judges to know what they need to know to resolve many types of civil disputes as effectively and efficiently as needed.

- The litigation process takes way too long.¹⁵ Parties expect and need a final result within a reasonable time period. Few want to wait several years for a verdict. Fewer want to wait until after one or two or more appeals.

- Discovery has become too expensive and invasive for parties.¹⁶ Clients pay lawyers an enormous amount of money to conduct and defend discovery. Equally expensive to them is the time they need to respond to discovery requests that seem to unnecessarily poke and prod their business and personal lives. The invasive nature of discovery can readily create very difficult problems for parties. Discovery was developed by the courts to help parties pursue their legal dreams and rightfully win lawsuits. For many parties, discovery has become a nightmare. They cannot afford to pursue their legal dreams, or they typically do not have the time, resources, or energy to prosecute or defend a case.

- Parties expect a trial verdict but instead spend their money and time on too many motions.¹⁷ They hope there will eventually be a trial, but find their case mired down in seemingly endless motion disputes. It is difficult for par-

15. Michael L. Seigel, *Pragmatism Applied: Imaging a Solution to the Problem of Court Congestion*, 22 HOFSTRA L. REV. 567, 569 (1994).

16. DAVID F. HERR & ROGER S. HAYDOCK, DISCOVERY PRACTICE at INTRODUCTION AND CHAPTER 3 (Aspen 3d ed. 2000); Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1408-1414 (1994); Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 531-32 (1998).

17. DAVID F. HERR ET AL., MOTION PRACTICE, INTRODUCTION AND CHAPTERS 1 AND 2 (Aspen 3d ed. 2000); Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 632-34 (1994).

ties to understand that summary judgment motions may make sense because the litigation system makes it so expensive and time consuming to try a case to a jury. Parties perceive motions as not making sense because their imposition substantially increases costs for them, delays the time a jury could decide a case, and consists of so many unnecessary delays.

•Parties who study the results of bench and jury trials or find themselves enmeshed in more than several lawsuits conclude that the results are often unpredictable.¹⁸ To them, the civil trial system seems to result in decisions not necessarily based on a reasonable interpretation of the facts or application of the law. This conclusion is supported by what may happen within the civil trial system. First, some lawyers seek a panel of biased jurors who favor their client or disfavor the other side, or both. Second, six person juries in civil cases can be susceptible to exercising questionable judgment. One or two individual jurors may dominate the deliberations and try to impose their will on the other jurors, and in these cases the less likely the verdict will reflect the judgment of the entire panel. And, in the many jurisdictions that permit a final verdict by fewer members of the panel, the less representative the verdict becomes. Third, jurors want to do the right thing, which will result in a decision that reflects their values, principles, and norms. It is highly unlikely jurors will render a decision that violates their conscience. Forty-five percent of prospective jurors say they would not follow the law but would follow their conscience in deciding a case.¹⁹ This results in divergent decisions by jurors as well as judges of the same issues being decided in different jurisdictions. This accounts for widely disparate verdicts by more than one summary jury trial panel or by mock jurors who hear the same facts and apply the same law. Fourth, it may not be possible to provide jurors with the information they really need to properly decide the case. The facts may take too long to tell, the law may too complicated, the lawyer may not be as skilled as needed, and the client cannot afford to pay for the time needed to tell the story.

18. A.L.I., *Study on Paths to a Better Way: Litigation Alternatives and Accommodation*, Working Paper, July 1987, at 39-40; Kent D. Syverud, *ADR and the Decline of the American Civil Jury*, 44 *UCLA L. REV.* 1935, 1935 (1997).

19. NAT'L L. J., Oct. 23, 2000, at A-9.

•Clients may believe that their lawyers may have little incentive to be efficient in preparing or presenting a case. They perceive that what is economically good for the client can be financially bad for the lawyer.²⁰ There can be a financial incentive for litigators to pursue discovery and bring lots of motions. Clients may wonder how this economic pressure unduly influences their lawyer.

•One party to a case may want to increase the costs, time, and pain caused by litigation, and fairly or unfairly take advantage of the litigation system. A party with resources or with wishes to be vengeful may attempt to use pleadings, discovery, and motions to their advantage and the other side's great disadvantage. Many parties will perceive this to be unfair, even if the other party is properly exercising all their options in pursuing or defending a case.

•The legal remedies the parties thought would resolve their problem will not do so. Parties may spend substantial amounts of time and money in litigation only to later realize that they are much better off trying to resolve the case through negotiation rather than litigation. This misperception may be caused by their own shortsightedness, or by poor counseling by their lawyer, or by efforts by the opposing party to prolong litigation, but parties tend to blame the judicial system for the lack of a real, practical remedy.²¹

•Parties may settle because they give up and can no longer take what is happening to them. Parties during litigation will suffer substantial waste of time, severe emotional and psychological suffering, and substantial losses of money and income. The time away from their family or business, the sleepless nights, the headaches, the anxiety, the continuous payments to their lawyers, the prospects of more money being wasted even if they were to win, all overcome their ability to proceed to trial. They may legitimately feel

20. Dick Dahl, *Share the Pain, Share the Gain*, 82 A.B.A. J. 68, 69-70 (June 1996); William G. Ross, *The Ethics of Hourly Billing*, 44 RUTGERS L. REV. 1, 2-3 (1991).

21. Bundy, *supra* note 1, at 57; Gerald R. Mason, *Image Building Starts One on One*, 19 WYO. LAW. 4, 4 (April 1996).

they have no alternative but to settle. Plaintiffs who want to proceed to trial cannot afford to pay for the expenses necessary to prepare and present the case or cannot afford to take the time off from their job to spend in pre-trial and trial proceedings. Defendants who want to go to trial figure out it is cheaper for them to pay the plaintiff off rather than pay their lawyer to try the case. Litigation transaction costs force parties to settle.

For all these, and other reasons, parties settle. Win or lose, parties in litigation ought to have far different reactions. Too many parties perceive that the litigation system too often fails to meet their needs and interests.²² They experience a litigation system that is very lengthy, cumbersome, highly expensive, confusing, and extraordinarily painful.²³ Parties conclude the current civil judicial system does not—and cannot—meet the civil justice standard for society—equal, affordable, and reasonable justice for all.²⁴

VII. AN INACCESSIBLE LITIGATION SYSTEM

*“Burning with curiosity she went in...
Never once considering how...she was to get out.”
—Lewis Carroll’s Alice’s Adventures in Wonderland*

The reality is that for most Americans a litigation resolution forum is unavailable.²⁵ The American Bar Association calculates that 100 million Americans are locked out of the court system by high legal costs.²⁶ The ABA Journal reports that most lawyers will not begin a lawsuit worth less than \$20,000.²⁷ Attorney fees and

22. Jon O. Newman, *Litigation Reforms and the Dangers of Growth of the Federal Judiciary*, 70 TEMP. L. REV. 1125, 1125 (1997); Tom R. Tyler, *Citizen Discontent With Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 871 (1997).

23. R. William Ide, *Wisconsin’s Journey to Just Solutions*, 80 MARQ. L. REV. 737, 737 (1997); Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 ST. JOHN’S L. REV. 85, 109-110 (1994).

24. John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers’ and Executives’ Opinions*, 3 HARV. NEGOT. L. REV. 1, 1 (1998); Tom R. Tyler, *Public Mistrust of the Law: A Political Perspective*, 66 U. CIN. L. REV. 847, 847 (1998).

25. James W. Meeker & John Dombrink, *Access to the Civil Courts for Those of Low and Moderate Means*, 66 S. CAL. L. REV. 2217, 2218 (1993).

26. *Public Loses as Lawyers Block Access to Cheaper Legal Help*, USA TODAY, Feb. 19, 1999, at 14A.

27. Jill Schachner Chanen, *Pumping Up Small Claims: Reformers Seek \$20K Court Limits—With No Lawyers*, A.B.A. J., Dec. 1998, at 18. The minimum for employees who seek a lawyer may be closer to \$60,000. Lewis Maltby, *Private Justice: Employ-*

litigation expenses prevent disputants from filing claims and seeking relief from wrongdoers. Individuals, consumers, employees, and small businesses cannot afford to pay lawyers to litigate cases.

Is litigation likely to change in the new millennium? There are some forces within litigation that make change difficult, unlikely, or highly unlikely. One force comes from lawyers. Some of them sincerely believe that the current litigation system is the best system for disputants and do not want any significant changes. Other lawyers realize that they make a lot of money from the current system and are not interested in changing it. Another force comes from the monopolistic nature of the legal system. The law, by its nature, is relatively slow to change. It practically or legally requires a party to hire a lawyer to litigate a case, and monopolies are not commonly reformed by monopolists, no matter how well intended. Still another force comes from historical inertia and the supposed nature of the law to be quite slow to change. There is a perception that whatever legal changes are necessary will evolve over a sufficiently lengthy period of time.

VIII. THE FUTURE IS HERE AND NOW

"Oh, do not ask, 'What is it?'

Let us and go and make our visit."

—T.S. Eliot, The Love Song of J. Alfred Prufrock

What is changing, and what has changed, are the needs of disputing parties. Lawyers, judges, and legislators who understand these interests also understand the need for change within the legal dispute resolution system. These changes include:

- Modern transaction needs. The last decade of the twentieth century has seen significant transaction changes. The speed of communication has jumped to warp speed. Agreements and legal relationships can be completed in an eye blink. What once would take a few months or several days to consummate occurs within a day or an hour or a minute. Consequently, problems stemming from these fast transactions need similarly to be resolved quickly, within weeks or months, instead of years.²⁸

ment Arbitration and Civil Rights, in *Arbitration Now* 25 (Paul H. Haagan & ABA Section of Dispute Resolution eds., 1999).

28. John K. Halvey, *The Virtual Marketplace*, 45 EMORY L.J. 959, 959 (1996); Mi-

•Technological advances. There now exist a variety of ways to communicate that were practically and economically unavailable in the near past. E-mail with document attachments, electronic signatures, video transmissions, telephone conferencing, and related methods now replace or supplement written correspondence and person-to-person meetings. Litigation has long been based on written documents and formal hearings and trials. Disputants now presume that the ways they use to create relationships and transactions ought to be available to resolve problems.²⁹

•Realistic Expectations. Facets that underlie the litigation system are no longer used or relied in many serious transactions. Significant financial and business decisions occur today without the expectation or need that litigation proceedings require. For example, financial events that are as legally significant as service of process occur by computer transmissions. For another example, judicial hearings and trials require the personal attendance of a variety of parties and witnesses. Equally serious business transactions rely on telephone communications and video conferencing.³⁰

•One nation, one method. Disputes at the beginning of the twentieth century were largely local and readily resolved by resort to local rules. Later in the century, many disputes occurred within the same state and state procedures applied. Disputes today frequently involve parties living or doing business in different states. The notions that led to the development of local and state rules now require the development of national, uniform rules.³¹

chael MacClary, *Personal Jurisdiction and the Internet*, 3 SUFFOLK J. TRIAL & APP. ADVOC. 93, 93 (1998).

29. Scott E. Bain, *Examining Traditional Legal Paradigms in a Non-Physical Environment: Need We Invent New Rules of the Road for the Information Superhighway?*, 12 BERKELEY TECH. L.J. 231, 233-38 (1997); Frank A. Cona, *Application of Online Systems in Alternative Dispute Resolution*, 45 BUFF. L. REV. 975,975 (1997); George H. Friedman, *Alternative Dispute Resolution and Emerging Technologies: Challenges and Opportunities*, 19 HASTINGS COMM. & ENT. L.J. 695, 697(1997); David R. Johnson, *Screening the Future For Virtual ADR*, 51 DISP. RESOL. J. 117, 117-18 (Sept. 1996).

30. Paul J. Johns, *Technology-Augmented Advocacy: Raising the Trial Lawyer's Standard of Care; Changing Traditional Legal Education; And Creating New Judicial Responsibilities*, 25 OHIO N.U. L. REV. 569, 569 (1999).

31. Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 953 (1986); Carl Tobias, *Civil Justice Reform Sunset*, 1998 U. ILL. L. REV. 547, 550 (1998).

•One world, one method. The globalization of transactions and relationships has now created the need for a worldwide, uniform dispute resolution system. Ideally, the same system that provides a national forum will provide a worldwide forum. A party living and doing business in Belgium or Nigeria or Argentina with an American in Minnesota will not want a Minnesota or United States court to decide a dispute. Similarly, the American is unlikely to want to travel abroad for a resolution by a judge of another country.³²

•Consumer interests. Consumers need and want an accessible and affordable way to seek relief from problems. Consumers actually prefer arbitration instead of litigation to resolve their disputes. Fifty-nine percent of respondents to a Roper Survey for the ADR Institute selected arbitration over litigation as a way to resolve claims for money.³³ That percentage grew to 83% when respondents were informed that arbitration could save 75% of the cost of litigation.³⁴ Ninety-two percent of participants in securities arbitrations responded favorable to the experience.³⁵ An ABA study of consumer attitudes toward arbitration reached similar results.³⁶

•Business Interests. Businesses need and want to provide the best customer relationships and an accessible and affordable way to resolve customer/business disputes, to enforce rights, and to recover unpaid debts. Including an arbitration clause in a consumer transaction is a way the company can demonstrate to the consumer that it cares enough to provide a way for the consumer to pursue possible complaints in the future. Planning for dispute resolution is driven as much by the corporate concern for customer satisfaction as it is by the resulting lower transaction costs, which in turn can be passed on to the consumer,

32. Alfred C. Aman, Jr., *The Globalizing State: A Future-Orientated Perspective on the Public/Private Distinction, Federalism, and Democracy*, 31 VAND. J. TRANSNAT'L L. 769, 783 (1998); *First Global Research Facility Dedicated to ADR Launched*, 54 DISP. RESOL. J. 4 (Aug. 1999)

33. Roper Starch Worldwide, Inc., *Legal Dispute Study* (Sept. 1999), available at <http://www.arb-forum.com>.

34. *Id.*

35. *Poll Shows Most See Broker—Client Arbitration Process as Fair*, Knight-Rider News Service, Aug. 6, 1999.

36. Jessica Pearson, *An Evaluation of Alternatives to Court Adjudication, in Consumer Dispute Resolution* 44 ABA SPECIAL COMM'N ON DISP. RESOL. (1983).

enhancing customer satisfaction.³⁷

What is a solution that will satisfy these modern needs and interests? The answer may be: Uniform global arbitration and mediation rules that reflect modern communication and decision-making processes. These rules exist now, and these arbitration and mediation forums exist now.³⁸ And more will be developed and shaped by the future. Parties can choose from among a variety of dispute resolution methods and forums.

IX. ARBITRATION MYTHS

*"Few Things are harder to put up with
Than the annoyance of a good example."
—Mark Twain*

Not everyone has wildly hailed these choices. Why aren't these methods being universally accepted? Various myths about the viability of arbitration and mediation influence their use, or non-use. An analysis of these myths demonstrates why arbitration and mediation will grow in use and become the dominant way most disputes are resolved. Clients, consumers, businesses, individuals, employees, corporations, organizations, judges, and legislators will understand and appreciate the importance of using arbitration and mediation to achieve civil justice for all.

Myth Number One: Arbitration and mediation are too expensive. Wrong. Arbitrating a dispute is far less expensive than litigating a dispute to resolution. Arbitration filing fees and hearing fees, and elective attorney fees, are much less than the total of litigation costs and expenses and mandatory attorney fees.³⁹ Further, businesses and employers may voluntarily pay, or may have to pay, for all or part of the costs of arbitrations for their consumer customers and employees.⁴⁰ The use of a paid mediator typi-

37. Todd B. Carver, *ADR-The Competitive Imperative*, 561 PLI/LIT 59, 64-66 (1997); *AAA Adopts Due Process Protocol for Consumer Dispute Resolution*, 9 WORLD ARB. & MEDIATION REP. 203 (1998).

38. JAY E. GRENIG, *ALTERNATIVE DISPUTE RESOLUTION* §§ 1.50-1.57, 12.20-12.28 (West Group 2d ed. 1997).

39. *E.g.*, National Arbitration Forum (NAF) Appendix C available at <http://www.arb-forum.com>.

40. *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1483-85 (D.C. Cir. 1997); *in-*

cally saves the parties other expenses and fees because their problem has been resolved without the need for arbitration.

Myth Number Two: Litigation is the traditional, time-honored way to resolve problems. Inaccurate. Arbitration dates back to the Old Testament in the Bible, predating litigation by several thousand years.⁴¹ Arbitration and judicial systems akin to arbitration are used much more frequently in many countries. Mediation and early neutral evaluation, as well as arbitration, is either suggested or mandated by many judges before a case will be tried in court.⁴²

Myth Number Three: Americans have a right to have their civil disputes resolved by a jury. Incorrect. Americans do have an opportunity to demand that jurors decide some of their civil disputes. If they choose to go to court, they may demand their constitutional right to a jury trial. But, Americans also have a right to choose another way to seek relief.⁴³ Moreover, very few parties can afford to try a case before a jury and are financially and practically denied this opportunity.

Myth Number Four: Arbitration denies parties their substantive rights and remedies. Wrong. Parties may assert the same substantive rights and seek the same remedies they can in court. A party can assert common law, statutory, contractual, and other types of claims in arbitration.⁴⁴ An arbitrator has the same power as a judge to award monetary damages, injunctive relief, and other legal and equitable remedies. Arbitration provides a different forum, but does not restrict the rights and remedies available to a party.

fra note 45.

41. "If only there were someone to arbitrate between us, to lay his hand upon us both, someone to remove god's rod from me, so that his terror would frighten me no more." *Job* 9:33. (NIV Version).

42. *E.g.* CONS. MINN. GEN. R. OF PRAC. 114; 42; PA. CONS. STAT. ANN. §§ 1301-1314; 28 U.S.C. § 471; Wayne Brazil, *A Close Look at Three Court Sponsored ADR Programs*, 1990 U. CHI. LEGAL F. 303, 303.

43. *Johnson v. W. Suburban Bank*, 225 F.3d 266 (3d Cir. 2000); *Stout v. J.D. Byrider*, No. 99-3854, 2000 WL 1269402 (6th Cir., Sept. 8, 2000).

44. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

Myth Number Five: Arbitration denies parties due process and other procedural rights. Wrong again. Arbitration organizations and arbitrators follow due process standards that apply to judicial proceedings.⁴⁵ Parties have the same opportunity to present a case before an arbitrator as they do before a judge, and a judge has the opportunity after the arbitration process to make sure due process standards were followed.

Myth Number Six: Arbitration does not allow parties to seek discovery from each other. Incorrect. Arbitration rules and procedures either specifically authorize discovery requests or allow arbitrators to permit discovery at their discretion.⁴⁶ The same useful discovery methods including document production and depositions available in litigation may be available in arbitration proceedings. Discovery in arbitration may be properly limited to affordable disclosures of relevant and reliable information.

Myth Number Seven: Arbitrators can decide however they want and they do not have to follow the law. Wrong. Arbitration rules require arbitrators to follow the law, holding them to the same standards as a judicial judge.⁴⁷ Arbitration clauses may also contain this requirement. Also, judges can review awards to make certain that the arbitrator applied the right law.

Myth Number Eight: Arbitration and mediation are only for large claims. Inaccurate. Arbitration procedures exist for small claims and for claims of all sizes and types, from less than \$1000 to over \$1,000,000. Arbitration filing fees be-

45. National Arbitration Forum, *Arbitration Bill of Rights* at <http://www.arbforum.com>; American Arbitration Association Due Process Protocol at <http://www.adr.org>; *Armendariz v. Found. Health Psychcare Svcs. Inc.*, 99 Cal. Rptr. 2d 745, 745 (Cal. 2000).

46. National Arbitration Forum Rule 29—Discovery; American Arbitration Association Rule R-23—Exchange of Information; Judicial Arbitration Mediation Services Rule 1—Exchange of Information; DAVID F. HERR & ROGER S. HAYDOCK, *DISCOVERY PRACTICE* at § 10.3 (Aspen, 3d ed. 2000); ROGER S. HAYDOCK, ET AL., *FUNDAMENTALS OF PRETRIAL LITIGATION*, § 5.1.2, § 5.3.1 (Aspen, 4th ed. 2000).

47. National Arbitration Forum Rule 1—Arbitration Agreement; Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 57 (1999).

gin at \$49 for a small claim.⁴⁸ Mediation can also be used to resolve all kinds of disputes. Mediation fees of several hundreds of dollars can easily settle disputes involving tens of thousands of dollars.

Myth Number Nine: Arbitration denies parties relief only available in class actions. Wrong Question. Litigation class actions have been necessary in America because individual parties cannot afford to sue and seek relief. Class actions may also be available in arbitrations.⁴⁹ The American class action rule was primarily adopted as a procedural rule because litigation made it too expensive and complicated for individuals to bring small claims. Arbitration readily permits consumers and employees and other individuals with complaints against businesses to get back everything they may have lost, without having to pay lawyers a substantial amount of money for their fees. Further, when necessary, public lawyers and state attorneys general can pursue class actions and obtain public relief for a class of individuals. Government lawyers can retain private lawyers and work together with them on behalf of the public. The class action rule was implemented at a time when there were few cases being brought by public lawyers on behalf of the public and individuals. Now it is much more common for the government to sue on behalf of a class of individuals. Private arbitration cases and public class action cases can together provide comprehensive and effective enforcement of the laws. Private class actions can continue to be used in appropriate cases.

Myth Number Ten: Arbitration proceedings are conducted in secret proceedings and awards are not made public. Inaccurate. Arbitration rules and proceedings are public and readily available.⁵⁰ Arbitration awards are published at the request of a party or as required by law. Arbitration

48. National Arbitration Forum Appendix C, available at <http://www.arb-forum.com>.

49. Johnson v. W. Suburban Bank, 225 F.3d 266 (3d Cir. 2000); Stout v. Byrider, No. 99-3854, 2000 WL 1269402 at *7 (6th Cir., Sept. 8, 2000); Bette J. Roth, et al., *The Alternative Dispute Resolution Guide*, §§ 15.1 - 15.13 (West Group 1999).

50. National Arbitration Forum at <http://www.arb-forum.com>; American Arbitration Association at <http://www.adr.org>; Judicial Arbitration Mediation Services at <http://www.jamsadr.com>.

organizations may publish arbitration awards.⁵¹ Awards are also reported when they are confirmed as civil judgments. Judges can review arbitration proceedings, hearings, and awards in open court.

Myth Number Eleven: Arbitration awards cannot be appealed. Inaccurate. The court of the state or country where the arbitration award is sought to be enforced can review the award to determine if it is legal and enforceable.⁵² The court can review de novo whether the arbitrator who was compelled to follow the law did do. The Federal Arbitration Act and state arbitration acts permit judges to review an arbitration award.⁵³

Myth Number Twelve: Litigation decisions are more enforceable than arbitration awards. False. A party who seeks to enforce an arbitration award must seek relief from a judge in a judicial forum, and a party who seeks to challenge or vacate an arbitration award must seek this relief from a judicial judge.⁵⁴ Federal and State arbitration acts require American courts to recognize and enforce awards entered in different states. Treaties require foreign courts to enforce arbitration awards entered in different countries. It is easier to enforce an arbitration award in a foreign country than it is to enforce a civil judicial decision largely because arbitration proceedings are very similar worldwide while trial proceedings are markedly different among countries.

X. CHOICES, CHOICES

“Ask and you shall receive.

Seek and you will find.”

—*Matthew 7:7*

The most effective, efficient, and fair way to have disputes re-

51. National Arbitration Forum ICANN at <http://www.arb.forum.com/-domains/>.

52. 9 U.S.C.A. § 9 (2000); *Blanchard and Co. v. Heritage Capital Corp.*, No. 3:97-CV-0690-H, 2000 WL 1281205 at *3-4 (N.D. Tex. Sept. 11, 2000).

53. Roth, *supra* note 49, § 14.1-14.17, 19.1-19.27.

54. GRENIG, *supra* note 38, §§ 20.10 - 20.49.

solved may well be through the use of mediation and arbitration. Rational, reasonable people can prefer mediation and arbitration to litigation. Litigation can provide some parties with appropriate relief, and it will and should continue to do so in appropriate cases. And judicial review will always be available for arbitrated and mediated resolutions, as permitted by law.

The availability of arbitration and mediation provide parties with choices. Parties entering into transactions and relationships may well prefer to agree to a pre-dispute mediation and/or arbitration clause. The preferred choice is to include a pre-dispute clause in an agreement or within a transaction at the time the contract or relationship is established. This is the best way to plan for the resolution of a possible, future dispute. The inclusion of an arbitration agreement requires the parties to later arbitrate instead of litigating.⁵⁵

The notion that after a dispute arises parties are better off deciding how they want to resolve the problem is fraught with major problems. First, the disputants will not be communicating with each other in a positive, constructive way. The dispute has likely upset them, and they are not likely to engage in reasonable discourse to select a dispute resolution method. The best time to choose a dispute resolution method is before the dispute occurs while the parties are cooperative and reasonable. Second, it is usually to one party's advantage not to resolve a dispute reasonably, quickly, and inexpensively. A consumer who wants to pursue a claim against a company may find that the company has no interest in mediating or arbitrating the problem. Or, a debtor who owes a creditor money may similarly decline to use fast, affordable arbitration. The optimum time to agree to a dispute resolution forum is before one of the parties does not want the dispute to be resolved. Third, the choice of how a potential problem is to be resolved ought to be one of the essential terms in any contract or agreement. Postponing or delaying this choice is not a good choice.

Wise legal counselors typically advise their clients to include a dispute resolution clause at the beginning so that there can be a prompt, inexpensive ending, if necessary.⁵⁶ Wise parties should do the same.

55. *Oakwood Mobile Homes, Inc. v. Barger*, No. 1981749, 2000 WL 739596 at *5 (Ala. June 9, 2000).

56. GRENIG *supra* note 38 at § 1:1; Roth, *supra* note 49.

XI. ADVANTAGES OF ARBITRATION AND MEDIATION

"I need to know."

—*Marc Anthony*

What are the specific advantages in using arbitration and mediation that have parties willing and eager to include these methods in pre-dispute clauses? There are many.

Reasonable Cost.

Arbitration is significantly less expensive than litigation. The costs associated with arbitration include filing fees, which are proportional to the amount of the dispute, and hearing fees, which can be minimal especially if document, telephone, or on-line hearings are used. The major costs of litigation are avoided while parties are reasonably provided with an opportunity to have their case heard and decided.⁵⁷

Reasonable Speed.

Arbitration documents are simple to complete, discovery is limited, the hearing is held at a scheduled time and efficiently conducted, and the award is promptly completed.⁵⁸ Compared to litigation, arbitration can be very fast.

Flexibility and Adaptability.

Parties can choose in their arbitration agreement the arbitration organization and accompanying set of rules that will govern the arbitration. They can review the code of procedures of available arbitration administrators and select the code that best meets their needs.⁵⁹ Similarly, they can select a mediation organization.

57. NATIONAL ARBITRATION FORUM R. 44 available at <http://www.arbforum.com>; AMERICAN ARBITRATION ASSOCIATION COMMERCIAL DISPUTE RESOLUTION PROCEDURES, R. O-8; JUDICIAL ARBITRATION MEDIATION SERVICES R. 29; *McCaskill v. SCI Mgmt. Corp.*, No. 00 C 1543, 2000 WL 875396 at *3-4 (N.D. Ill. June 22, 2000).

58. NATIONAL ARBITRATION FORUM R. 9, R. 10 available at <http://www.arbforum.com>; AMERICAN ARBITRATION ASSOCIATION R. 24; JUDICIAL ARBITRATION MEDIATION SERVICES R. 14.

59. NATIONAL ARBITRATION FORUM R. 1 available at <http://www.arbforum.com>; AMERICAN ARBITRATION ASSOCIATION R.1; JUDICIAL ARBITRATION MEDIATION SERVICES R. 2.

Customization.

Parties can include in their arbitration agreement terms that modify the procedures of a selected code of procedure. Because arbitration is contractual, the parties can include their own reasonable procedures that best meet their interests.⁶⁰ A well-drafted code of procedure implemented by a professional arbitration organization will contain appropriate rules to govern arbitration, and the parties can decide not to make any additions or deletions from these rules.⁶¹

Party Participation.

The simplicity of arbitration proceedings allows a party in many cases to decide to represent themselves, without the need to retain a lawyer. Or a party may prefer to have a lawyer represent them, especially in complex cases or multiple party cases.⁶²

Understandable Process.

The uniform rules of an arbitration organization provide parties with an understandable and predictable process. Parties who may have disputes with companies or individuals located in different states or countries may have the same uniform arbitration rules apply, rather than the many diverse and complicated regional litigation procedures and rules.⁶³

Expertise of Arbitrator.

Arbitrators are commonly experts in the area of the dispute. This expertise assures the parties the arbitrator will understand the applicable laws, customs, and practices involved in the dispute.⁶⁴

60. Roger S. Haydock et. al., *Lawyering: Practice and Planning*, 109-123 (West Publishing 1996).

61. GRENIG *supra* note 38, § 1.50-1.57.

62. NATIONAL ARBITRATION FORUM R. 3, available at <http://www.arbforum.com>; AMERICAN ARBITRATION ASSOCIATION R. 26; JUDICIAL ARBITRATION MEDIATION SERVICES R. 11; ROGER S. HAYDOCK & JOHN SONGSTENG, *ADVOCACY: PLANNING TO WIN*, §§ 3.51-3.55 (West Publishing 1994).

63. Revised Uniform Arbitration Act, available at <http://www.nccusl.com>.

64. NATIONAL ARBITRATION FORUM R. 21; AMERICAN ARBITRATION ASSOC. R.12; JUDICIAL ARBITRATION MEDIATION SERVICES R. 14.

Neutrality of Arbitrator.

The appointed arbitrator, like a judge, needs to be neutral and impartial toward both parties in the case. The parties will have had an opportunity to receive and review a resume of the arbitrator, and, similar to litigation procedures, be able to remove this arbitrator if bias or prejudice exists. The impartiality, independence, and neutrality of the arbitrator result in a fair process, hearing, and award.⁶⁵

Procedural Advantages.

Useful and affordable arbitration discovery has limitations designed to avoid wasteful, expensive, and irrelevant discovery. Motions are typically unnecessary because the hearing is promptly scheduled and the arbitrator can decide all issues at the final hearing.⁶⁶ The rules of evidence permit relevant and reliable evidence to be introduced, eliminating the complexity and formalism of trial rules of evidence.⁶⁷

Privacy and Public Interest.

The rules of arbitration organizations are public.⁶⁸ The process involving specific parties during arbitration is often private, which is why many individuals and companies prefer arbitration. The arbitration award may be made public. These procedures provide parties with reasonable confidentiality and the public with assurances that the results of the process are open and fair. Awards are also subject to judicial, public scrutiny.

Finality of Decision.

A binding arbitration clause results in an award that is both binding and final.⁶⁹ This award is reviewable by a judge to determine whether it is valid and enforceable, pursuant to the applicable

65. GRENIG *supra* note 38, §§ 4.40–4.46.

66. HERR, *supra* note 17, § 10.4.8.

67. NATIONAL ARBITRATION FORUM CODE OF PROCEDURE R. 29, R. 35 (1996); AMERICAN ARBITRATION ASSOC. R. 23; JUDICIAL ARBITRATION MEDIATION SERVICES R. 20.

68. *Supra* note 50.

69. NATIONAL ARBITRATION FORUM CODE R. 37, R. 39 (1996); AMERICAN ARBITRATION ASSOCIATION R. 45 (1996); JUDICIAL ARBITRATION MEDIATION SERVICES R. 22 (1996).

federal laws.⁷⁰

Enforceability.

Domestic arbitration awards are easily confirmed into an enforceable state or federal court civil judgment.⁷¹ International awards are readily recognized and enforced as judgments by foreign courts. International treaties readily recognize the enforceability of arbitration awards.⁷²

Party Satisfaction.

Overall, arbitration is faster, less expensive, and easier to use than litigation. These factors provide parties with reasons to be satisfied with the process. Even losing parties to a case perceive that while it hurts to lose the arbitration, the process was reasonable and fair and that they would use it again. Mediation, by its nature, also provides a reasonable level of satisfaction for parties.

Not all disputes can or should be arbitrated. The judicial or administrative forum may be the better forum for resolving certain types of disputes. Legislators and judges can make these determinations.

XII. DRAFTING ENFORCEABLE DISPUTE RESOLUTION CLAUSES

"Every private contract of real consequence to the parties ought to be treated as a candidate for binding private arbitration."

—Chief Justice Warren E. Burger

What is to be included in drafting a pre-dispute resolution clause? There are several provisions that need to be considered:

*The Type of Resolution Method to be Used.*⁷³

The most common choices are arbitration and mediation. It is

70. 9 U.S.C.A. §§ 9-11 (2000); Roth, *supra*, note 49, § 14.

71. Daniel D. Derner & Roger S. Haydock, *Confirming an Arbitration Award*, 23 WM. MITCHELL L. REV. 879, 881-883 (1997).

72. Robert Donald Fischer & Roger S. Haydock, *International Commercial Disputes Drafting an Enforceable Arbitration Agreement*, 21 WM. MITCHELL L. REV. 941, 956 (1996); Jane L. Volz & Roger S. Haydock, *Foreign Arbitral Awards: Enforcing the Award Against the Recalcitrant Loser*, 21 WM. MITCHELL L. REV. 867, 883 (1996).

73. GRENIG, *supra* note 38, § 2.

common for many parties to include a pre-dispute arbitration clause in their agreements.⁷⁴ Some parties prefer to also include a pre-dispute mediation clause, requiring the parties to first attempt to mediate in good faith a resolution before submitting the dispute to arbitration. Even if the parties do not include a mediation clause, they may still choose to mediate, or, more commonly, attempt to negotiate with each other before seeking an arbitral result.

The Scope of the Arbitration Clause.

A broad clause will allow any dispute between parties to be arbitrated, including the validity of the arbitration agreement.⁷⁵ Parties may restrict the type of disputes to be arbitrated by including restrictive language in the clause.⁷⁶

Mutuality.

Arbitration clauses that mutually bind the parties to use arbitration are readily enforceable. A unilateral arbitration clause that binds only one party and allows another party to use litigation may be unenforceable unless the parties have equal bargaining power and willingly negotiated this difference. One party who binds another to arbitration in an adhesion contract situation may also need to agree to bind itself to arbitration.⁷⁷ This makes good business and consumer sense because arbitration will equally benefit all parties. Some clauses may unilaterally and successfully bind only one party. In a business/consumer transaction, the business may be able to bind itself and require the consumer to submit to non-binding arbitration, allowing the consumer to reject an arbitration award and litigate the dispute. In these situations, consumers may readily accept the arbitration result instead of litigating.

74. *S. Energy Homes, Inc. v. Ard*, No. 1971998, 2000 WL 709500 at *7 (Ala. June 2, 2000).

75. *Blount v. Nat'l Lending Corp.*, 108 F. Supp. 2d 666, 669 (S.D. Miss. 2000).

76. *Ala. Catalog Sales v. Harris*, Nos. 1981594 and 1981612, 2000 WL 1310579 at *2 (Ala. Sept. 15, 2000); *Green v. Bank One LaGrange*, 641 N.E.2d 1207, 1210 (Ill. App. Ct. 1994) (holding that an agreement stating that any claim "arising out of or relating to this [agreement]" should be submitted to arbitration indicated the parties' desire to submit to arbitration all issues concerning the contract); MAURO RUBINO-SUMMARTANO, *INTERNATIONAL ARBITRATION LAW*, 475-502 (1990) (discussing the contractual nature of the arbitration agreement).

77. *Showmethemoney Check Cashiers, Inc. v. Williams*, No. 99-1398, 2000 WL 1357726 at *5 (Ark. Sept. 21, 2000).

The Choice of an Administrative Organization.

It is usually preferable for parties to select an arbitration organization to administer the arbitration. The American Arbitration Association, the National Arbitration Forum, and JAMS are organizations that administer arbitrations in the United States.⁷⁸ The International Arbitration Forum, the London Court of Arbitration, and the International Chamber of Commerce in Paris are organizations that administer international arbitrations.⁷⁹ Arbitration-Forum.com and other organizations provide electronic on-line arbitration services where everything is done through computer Internet and e-mail communications, including the electronic filing of claims and responses, service of process, and hearing, and the issuance of the award. Cases involving domain name disputes, as governed by the ICANN rules, are commonly and fairly resolved using this modern process.⁸⁰ It is also useful to identify a mediation organization in an agreement. The same arbitration organizations listed above can provide qualified, experienced mediators. Also, other organizations like Claim Resolver, provide efficient, very affordable on-line methods to mediate results by easy to use computer transmissions.⁸¹

Applicable Rules of Procedure.

Parties also usually select the rules that will govern the arbitration. They may do so by explicitly including an arbitration organization to administer the arbitration under its rules, or they may refer to a specific code of procedure to govern the arbitration, or they may adopt the rules of an organization with modifications. It is common to include in the arbitration clause a specific reference to the arbitration organization and the rules selected. The advantage in specifically selecting an arbitration organization or adopting a specific set of rules is that the parties can easily rely on these proceedings without having to develop their own rules.⁸²

78. *Supra* note 50; GREINIG, *supra* note 38, §1F.

79. Fischer & Haydock, *supra* note 72 at appendix.

80. National Arbitration Forum, *supra* note 50.

81. Claim Resolver Website at <http://www.claimresolver.com>.

82. American Arbitration Association Rules at <http://www.adv.org>; Judicial Arbitration Mediation Services, at http://www.jansadr.com/streamlined_arb_rules.asp; National Forum Arbitration Rules at <http://www.arb-forum.com>.

Arbitration Procedures.

The adopted rules selected by the parties typically cover all facets of the arbitration proceeding, eliminating the need for the parties to create or add procedures. These rules govern the filing and service of claims and responses, the availability of discovery, other pre-hearing processes, and the issuance of the award.⁸³

Type of Arbitration Hearing.

The parties may have a preference for a type of hearing that best serves their interests. Parties may select from a document hearing (all evidence is submitted in writing to the arbitrator), an on-line hearing (all evidence is submitted electronically to the arbitrator), a telephone hearing (witnesses testify and the parties present their case over the telephone), a video conference hearing (parties and witnesses appear on a video monitor), participatory hearings (parties and witnesses personally attend, akin to a bench trial), or a combination of these types of hearings.⁸⁴ Or parties may select the type of hearing they want after an arbitration case is brought. The selected arbitration code of procedure will list the available types of hearings. Arbitration provides parties with choices that litigation does not and cannot provide.

Location of arbitration hearing.

In arbitrations involving individuals, the common location for in-person hearings is the community where the respondent, consumer claimant, or employee lives or works.⁸⁵ In commercial arbitrations involving businesses, the clause agreed to by the parties may designate a specific, neutral site. If the clause is silent, the applicable code of procedure of the arbitration administrator controls the location and typically provides a convenient location for one or both of the parties. Arbitration rules, reflecting due process standards, typically designate a convenient community hearing location for respondents, consumer claimants, former or current employees, and other individuals.⁸⁶

83. GRENIG, *supra* note 38, § 5; Roth, *supra* note 56, §§ 11, 12.

84. NATIONAL ARBITRATION FORUM CODE OF PROC. R. 26, 27, 28 (1996); AMERICAN ARBITRATION ASSOCIATION R. 24; JUDICIAL ARBITRATION MEDIATION SERVICES R. 17.

85. GRENIG, *supra* note 38, § 5.50.

86. NATIONAL ARBITRATION FORUM CODE OF PROC. R. 26.

Arbitrator or Mediator.

The selection of an arbitration organization to administer the arbitration makes this provision unnecessary because the arbitration forum will have a panel of arbitrators and the applicable rules will govern the selection, removal, and challenge process.⁸⁷ Some parties may prefer to identify an arbitrator or mediator by name, but this is risky because of the potential unavailability of that particular arbitrator in the future. Some parties prefer a panel of three arbitrators with each party selecting one and those two selecting a third neutral, impartial arbitrator; this is more common in major international or significant commercial arbitration cases. The clause may also indicate the mediation organization to be used, commonly the same arbitration organization which will offer mediation services as well.

Type of award.

Arbitration awards are usually a summary, concise award, or an award that contains findings of fact and conclusions of law, or an award that contains an explanation of the reasons supporting the award. The arbitration rules commonly provide for one of these formats unless the parties identify a specific type of award in their arbitration agreement. Usually, arbitration rules permit one or more parties to request the type of award they want, or the rules designate what type will be entered.⁸⁸

Compliance with applicable laws.

Arbitration clauses commonly contain a reference to the applicable arbitration law. For example, in domestic arbitration cases, it is common for a specific reference to be made to the applicability of the Federal Arbitration Act.⁸⁹ This Federal Act automatically applies and preempts state arbitration acts in interstate commerce contracts and transactions, but its inclusion notifies the parties and others of its clear applicability.⁹⁰

87. Roth, *supra* note 49, § 10.

88. AMERICAN ARBITRATION ASSOC. R. 44, 45 (1996); NATIONAL ARBITRATION FORUM CODE OF PROC. R. 37 (1996); JUDICIAL ARBITRATION MEDIATION SERVICES R. 45 (1996); GREINIG *supra* note 39, § 6A.

89. 9 U.S.C.A. § 10 (2000).

90. Doctor's Assocs. v. Casarotto, 517 U.S. 681, 687 (1996); Southland Corp. v. Keating, 465 U.S. 1, 16 (1984).

Specific language.

Arbitration clauses also commonly contain language that states: "An arbitration award may be enforced in any court of competent jurisdiction." Federal and state acts may appear to mandate this language and this clause advises the parties of the potential impact of the award.⁹¹

Explanatory information.

Arbitration clauses that are part of an adhesion contract, which may include consumer/business contracts, are enforceable as all other terms of the adhesion contract are enforceable: the terms cannot be unconscionable.⁹² Some parties, who draft the adhesion contract, prefer to explain to the other party the effect of the dispute resolution clause, so they may choose not to accept the clause. For example: "We prefer and agree to arbitrate any disputes between us. We choose not to litigate in court before a judge or jury." For another example: "This arbitration clause requires us to arbitrate disputes and have an arbitrator decide a case. This means both of us give up an opportunity to go to trial and have a judge or jury decide our case." An arbitration clause may designate the forum that will resolve a dispute and does not limit a party's substantive legal rights. A party who is presented with an arbitration clause can choose to strike the clause. An individual party commonly has the opportunity to de-select the clause by advising the drafting party before the contract is formed that arbitration is not preferred. A commercial party may decide to do business elsewhere, as may an individual. All parties may attempt to negotiate a modified dispute resolution clause.

Remedies.

Parties of equal bargaining strength may agree to limit their legal remedies. For example, they may decide to prohibit the availability of uncertain damages as a remedy. Parties who draft adhesion contracts may not restrict remedies in an arbitration clause, unless allowed by law.⁹³ For example, it is improper for a company

91. GRENIG, *supra* note 38, §4.2

92. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991); GRENIG, *supra* note 38, at § 3.50.

93. *Sankey v. Sears, Roebuck and Co.*, 100 F. Supp. 2d 1290, 1299 (M.D. Ala.

to limit statutory remedies available to a consumer, unless permitted by the applicable law. The purpose of the arbitration clause is to designate a forum and not to limit remedies.⁹⁴

Related provisions.

Other clauses may also be included with an arbitration clause. It may be wise to include a choice of laws provision so it is clear what governing law will apply. Ordinarily, the state or country selected has a relationship with a party or the transaction. Additional, specific remedies may be included, such as the recovery of attorney's fees to the prevailing party in arbitration.

XIII. CONFIRMING AND ENFORCING ARBITRATION AWARDS

"Where you are a well deserving pillar, Proceed to judgment."

—*Shakespeare, Merchant of Venice, Act IV, Scene I*

Another important factor in using arbitration is the enforceability of the award. If the losing party to arbitration refuses to pay or comply with the award, the winning party may need to seek enforcement of the award. An arbitration is voluntarily self-enforcing, and losing parties ought to accept the consequences of the award. An arbitration award is enforceable as a civil judicial judgment.⁹⁵ It needs to be converted into a judgment, and this confirmation process is simple and straightforward.

An arbitration award can be enforced in any court that has jurisdiction. For domestic arbitrations, the Federal Arbitration Act and all the fifty-state arbitration acts provide courts with jurisdiction and allow enforcement of an arbitration award. For international arbitrations, treaties establish jurisdiction and readily allow for the enforcement of foreign arbitration awards.⁹⁶ An arbitration hearing may be held elsewhere and an award entered elsewhere, and the party seeking to enforce the award may confirm it in any judicial forum, which has jurisdiction. Judicial forums which commonly have jurisdiction include those venues where the hearing was conducted, the award was signed, the award was issued, the los-

2000).

94. Roth, *supra* note 49, §§ 5.1-5.8.

95. Flint Warm Air Supply Co., Inc. v. York Int'l Corp., 2000 WL 1481329 at *5 (E.D. Mich. Sept. 29, 2000).

96. GRENIG, *supra* note 38, §§ 6.50-6.52; Roth, *supra* note 49, §§ 14, 19.

ing party lives or does business or has property, a forum has minimum contacts with a party, or where a statute or contract allows a court to enter judgment. The confirmation process converts the award into a judgment that is as valid and enforceable as a civil judgment originally granted by a court.

State, federal, or national laws and rules regulate the confirmation process. The Federal Arbitration Act requires that awards be confirmed within one year after the arbitrator makes the award. State arbitration acts may have different deadlines, with some significantly shorter. The process typically involves the following: The prevailing party files a petition or motion with the court along with the arbitration agreement, the award, and a fee. Service may be achieved by mail, personal service, or by other means depending upon the applicable law, agreement of the parties, and arbitration rules. The prevailing party submits a proposed order entering judgment on the award. A court official, either a judge or a clerk, reviews the documents. An appearance by an attorney for the prevailing party before a judge or at a hearing may be required or may be preferable in some cases. A judgment is ordered and entered. The award is now enforceable as any civil judicial judgment.⁹⁷

It is also during the confirmation process that the losing party can challenge an award. It is at this stage of the arbitration process, that one or more of the parties can request that a judge approve, review, modify, or vacate an arbitration award. The Federal Arbitration Act and state arbitration acts allow a party to seek vacation or modification of an award.⁹⁸ This process may be triggered when the other party seeks to enforce the award. A judge has the opportunity to review the award, the neutrality of the arbitrator, the arbitration hearing procedures, and the entire arbitration process to determine if the award is valid. This review process is similar to a judicial appeal. The judge cannot vacate or modify the arbitrator's assessment of the facts unless a party was denied a fair opportunity to appear and defend a case or another ground for reversal or modification exists.⁹⁹

A judge may be able to review the legal determinations of the

97. Derner & Haydock, *supra* note 71.

98. GRENIG, *supra* note 38, §§ 20.10 - 20.49.

99. *E.g.*, Painewebber, Inc. v. Barca, Nos. C 00-00544 CRB and C 00-00898 CRB, 2000 WL 1071836, at *3 (N.D. Cal. July 28, 2000); Bendel Feed and Flour Mill, Ltd. v. Seaboard Corp., No. 99CIV.4054(HB), 2000 WL 1051870, at *3 (S.D.N.Y. 2000 July 28, 2000).

arbitrator de novo. If the arbitration code or clause requires the arbitrator to apply and follow the applicable law, the judge can review the legal conclusions to determine if the arbitrator did comply with the law.¹⁰⁰ This process can be identical to judicial appellate de novo review of legal decisions made by a trial judge. If an arbitrator can decide a case without this standard, the reviewing judge can only vacate or modify the award if manifest disregard of the law occurred.¹⁰¹ In this situation where the arbitrator has broad discretion to issue an award there is very little for the reviewing judge to review. In the situation where the arbitrator is bound to follow the law, the reviewing court, and a subsequent appellate court, may review the propriety of the law applied, in effect providing significant judicial scrutiny of arbitration awards.

XIV. A BETTER DISPUTE RESOLUTION WORLD

"The best way to win an argument is to begin by being right...."
—Jill Ruckelhaus

Civil justice in the twenty-first century will be a blend of integrated public and private forums. Negotiations between parties and their lawyers will continue to be the most frequent way parties will solve their problems. The litigation system, arbitration, mediation, and administrative proceedings will be the primary methods parties will use to resolve their legal disputes. The major change in the new millennium will be the growing use of private forums and private dispute resolution organizations selected by disputing parties or mandated by the courts.

The limits of the public dispute resolution system will require parties and judges to rely on private dispute resolution experts to help them. Criminal and related cases require public judges to provide society with protection from crimes and afford defendants their constitutional rights. Judicial judges who are skilled, trained, and appointed to be public decision makers need not become mediators and try to confidentially settle cases for parties. Private mediators can do that well. The litigation system does not allow most parties with access to a prompt and affordable trial. Arbitrators can

100. *Supra* note 47.

101. *Wilks v. Swan*, 346 U.S. 427, 436-37 (1953); *Drayer v. Krasner*, 572 F.2d 348, 348 (2d Cir. 1978); *Aimsworth v. Skurmick*, 960 F.2d 939, 939 (11th Cir. 1992).

do that fairly. Administrative law judges who are similarly experienced at and selected to resolve public problems need not become involved in private disputes involving money. Mediators and arbitrators can do that effectively.

Lawyers will represent more clients before mediators and arbitrators. Parties will first mediate many of their disputes before filing an arbitration case. Cases will be submitted to arbitrators based on written and electronic documents and telephonic and video conferencing presentations in addition to face-to-face hearings. Experienced lawyers, law professors, and former judges will serve as professional mediators and arbitrators providing these valuable services. Public judges will continue to do what they do best and be available to review the results of mediations and arbitrations.

This integrated dispute resolution system will blend the best of public proceedings with private proceedings and provide civil justice to all. What a wonderful dispute resolution world it will be.¹⁰²

102. Comments and questions regarding the content of this article may be sent to Professor Roger S. Haydock at rhaydock@wmitchell.edu or William Mitchell College of Law, 875 Summit Avenue, St. Paul, Minnesota, 55347, United States. Telephone: 651.290.6355. Fax: 651.290.6407. © Copyright 2000 Roger S. Haydock. No portions of this article may be reprinted or used for any purpose without the express consent of the author.
