Alternatives
TO THE HIGH COST OF LITIGATION
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International ADR

International Commercial Courts and International Commercial Arbitration: Why Have Both?

BY S.I. STRONG

While international commercial arbitration is frequently touted as the preferred method of resolving multinational business disputes, the process is not universally beloved. Instead, certain segments of the bench, bar, and academia believe that all legal disputes–including those in the cross-border commercial context–should be decided in court rather than in arbitration.

Over the years, philosophical concerns have typically given way to practical considerations, since international litigation has not been as effective or attractive as international commercial arbitration. Not only has the procedural flexibility of arbitration allowed parties to appoint neutral, expert decision-makers and adopt uniquely cross-cultural procedures that would be unavailable in national courts, but the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 3, best known as the New York Convention (see www.newyorkconvention.org/english), has made enforcement of cross-border arbitration agreements and arbitral awards cheaper, easier, and more predictable than enforcement of foreign judgments.

Rather than cede to arbitral hegemony, proponents of judicial dispute resolution have recently decided that the best way to compete with arbitration is to bring various attributes of arbitration into the litigation context. Two different techniques have been used.

The author—D.Phil., University of Oxford; Ph.D., University of Cambridge; J.D., Duke University—who is qualified to practice as an attorney in New York and Illinois and as a solicitor in England and Wales, is the K.H. Gyr Professor of Private International Law at Emory University School of Law in Atlanta.

First, the Hague Conference on Private International Law (available at https://www.hcch.net/en/home) promulgated two instruments—the Hague Convention on Choice of Court Agreements (June 30, 2005), 44 I.L.M. 1294 (available at https://bit.ly/3zurEzv), and the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (July 2, 2019) (available at https://bit.ly/3RWwKLk)—that seek to mimic the effects of the New York Convention by allowing the easy enforcement of exclusive choice of court agreements and foreign money judgments.

Second, though entirely independently, numerous countries in the Middle East, Asia, and Europe have created special international commercial courts that seek to duplicate many of the procedural benefits of international commercial arbitration.

Though each of the new international commercial courts is unique, they share a number of similarities. For example, many of the new courts use English as the language of the proceedings, even if English is not a national language of the court in question; incorporate common-law procedures, even if the forum country does not follow the common law tradition; and/or appoint judges from foreign countries and, in some

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CPR News

Now Open: 2024 CPR Annual Award Competition; Highlights from Last Year's Winners

The International Institute for Conflict Prevention and Resolution (CPR) has announced the opening of the 2024 CPR Annual Awards program, which honors advances in conflict resolution thought leadership in books and professional and student articles.

This year's awards program will cover the publication period of November 2024 to October 2024.

The CPR Institute's Annual Awards criteria focuses on scholarship that addresses the resolution, prevention or creative management of major disputes involving public or business institutions between corporations, between government and corporations, or among multiple parties. The review committee comprises judges and lawyers from leading corporations, top law firms and academic institutions across the U.S.

This year's expected categories—to be presented at CPR's Annual Meeting 2025 in Miami, which runs from Feb. 5-7 (information available at www.cpradr.org/events/2025-annual-meeting)—are:

- *Book Award*—A book published by academics and other professionals during the publication period that advances understanding in the ADR field. Books must be submitted in pdf or similar format. CPR regrets that it cannot accept hard-copy submissions.
- *James F. Henry Award*—Beginning in 2002, the James F. Henry Award honors outstanding achievement by individuals for distinguished, sustained contributions to ADR. Candidates for the James F. Henry Award—named for CPR's late founder—will be evaluated for leadership, innovation and sustaining commitment to the field.
- *Joseph T. McLaughlin Original Student Article or Paper*—The Joseph T. McLaughlin Original Student Article or Paper award focuses on events or issues in ADR. Outstanding papers prepared for courses requiring papers as a substantial part of a course grade must be recommended for submission by a professor. The award is named for a former CPR board member. See "CPR Board Member Joseph T. Mclaughlin, Remembered," CPR News, 30 *Alternatives* 31 (February 2012).
- *Professional Article & Short Article*—The awards for Professional Article & Short Article published by academics and other professionals advance understanding in ADR.

Alternatives articles aren't eligible for CPR Awards consideration.

Mark your calendar for next month: The closing date for submissions is Nov. 14. For full details, including past award winners and a list of awards judges, see www.cpradr.org/annual-awards.

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In Memoriam, Jeffrey Krivis, 1956-2024

Alternatives

CPR

Editor:
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Back to School on Dispute Management

Unpacking the 75-Year History of Prevention

BY KATE VITASEK

Recall from last month's *Back to School on Dispute Management* column the emphasis on the concept of ADR, with the "R" standing for "resolution," and which is designed to resolve questions of fault, liability, damages or other legal exposure.

In this month's column, I want to focus on dispute prevention, which is the purposeful use of a suite of mechanisms—processes, tools, and practices—that can prevent, if not avoid, disputes altogether. The most traditional and popular dispute prevention mechanisms are used while the parties formalize and manage the business relationship. Dispute prevention techniques, however, can also be deployed even before a business relationship begins by helping contracting parties lay the foundation for a strong relationship.

The concept of dispute prevention is relatively young compared to dispute resolution. In the spirit of going back to school, I am dedicating this month's column to a history lesson on the evolution of dispute prevention.

To help me develop an accurate history, I turned to Jim Groton—a retired partner of the law firm of Sutherland, Asbill & Brennan, now Eversheds Sutherland—where he led the firm's Construction Practice and Dispute Prevention and Resolution. Jim–now 97 years young–has had front row seat witnessing and actively participating in the evolution of dispute prevention.

For those who don't know Groton: CPR created a dispute prevention award in 2022 in honor of his leadership in dispute prevention, the James P. Groton Award for Outstanding Leadership in Dispute Prevention. [*Editor's note*: Details on the latest CPR dispute prevention award, presented to *Back to School on Dispute Management* author Kate Vitasek, can be found here: www.cpradr.org/news/2023-dispute-prevention-award. CPR publishes *Alternatives*.]

Kate Vitasek is the author of this monthly column, Back to School on Dispute Management. She is a Distinguished Fellow in the Global Supply Chain Institute at the Haslam College of Business at the University of Tennessee in Knoxville, Tenn. Her university webpage can be found at https://haslam.utk.edu/people/profile/kate-vitasek/.

The Birth of 'Preventive Law'

The birth of dispute prevention originated in the revolutionary 1950 book "Preventive Law," authored by Louis Brown. He famously wrote, "It costs less to avoid getting into trouble than to pay for getting out of trouble." Louis M. Brown, Manual of Preventive Law (Prentice-Hall, 1st ed. 1950). In his book, he described practical techniques and steps, which he called "preventive law," that lawyers could employ to keep their clients out of trouble.

Today, Brown is aptly called the father of preventive law.

Throughout his career—both as a practicing lawyer and law professor—Brown laid the foundation of the dispute prevention movement by putting the preventive law concept into practice. In addition, his role as a professor allowed him to impact thousands of others by teaching practical steps for anticipating, avoiding and preventing legal risks.

Brown also encouraged law schools to teach students how to use preventive law in their practices. Brown—a true pioneer—founded the National Center for Preventive Law (NCPL) to continue his work, aided by Dean Edward A. Dauer at the University of Denver Sturm College of Law, now Dean Emeritus, and Southern California collaborative law developer and mediator Forrest S. Mosten.

Construction Industry Innovation

Two decades later, prompted by an explosion of claims and litigation in the construction industry, some smart construction leaders began inventing practical pre-dispute techniques and mechanisms that either proactively prevented construction problems or enabled them to be solved in real time before they could escalate into disputes.

The first of these, in 1975, was the use of a "dispute review board" of independent experts to provide instantaneous advice to solve problems. A. A. Mathews, Robert J. Smith, and Paul E. Sperry (Authors), and Robert M. Matyas (Author, Editor), Construction Dispute Review Board Manual, (McGraw-Hill 1995).

During the next 15 years other new mechanisms were invented, including the concept of allocating risks to the party best able to manage, control, or insure against specific risks; using "partnering" techniques to bring parties into alignment, and using economic incentives to encourage cooperation.

In 1991, CPR, recognizing how these developments had created a new "dispute prevention movement," studied these new prevention mechanisms in depth and presented them to the construction industry in the seminal book "Preventing and Resolving Construction Disputes," and discussed in these pages at "Special Supplement: Preventing and Resolving Construction Disputes," 9 *Alternatives* 182 (1991) (available at https://bit.ly/4fLYKvI).

Following immediately on CPR's work, the Construction Industry Institute, or CII—the premier research arm of the construction industry—researched, validated and improved on these prevention techniques and reported its results to the construction industry. M. C. Vorster, Alternative Dispute Resolution in Construction With Emphasis on Dispute Review Boards (CII Source Document SD-95 1993).

In recognition of this work, CPR presented its award for "Outstanding Practical Achievement in Dispute Resolution" to CII's Dispute Prevention and Resolution Research Team.

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Dispute Management

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Expanding Business Relationships

Beginning in the mid-1990s and extending into the early 2000s, there was a period of experimentation with variations on these new construction dispute prevention techniques, during which forward-looking business leaders began to adapt those techniques for other areas of business activity.

By 2005, the dispute prevention movement was well underway. In that year, CPR changed its name from "Center for Public Resources" to "International Institute for Conflict Prevention and Resolution," putting the concept of prevention at the center of its focus. One of its key initiatives was to appoint a Prevention Research Committee which developed CPR's "Prevention Initiative" and the "CPR Prevention Practice Materials," which were introduced at CPR's 2010 Annual Meeting. The keynote address at that meeting was presented by Richard Susskind, a prominent dispute prevention advocate in England.

Leading scholars also emerged as pioneers of the promote-dispute-prevention movement. For example, Thomas Barton, coordinator of the National Center for Preventive Law, then hosted by California Western School of Law, carried on Louis Brown's work. And Joan Stearns Johnsen, Master Lecturer and Master Legal Skills Professor at the University of Florida Levin School of Law—a winner of CPR's Groton dispute prevention award—introduced studies of dispute prevention into the American Bar Association and pioneered in the development using a neutral for deal facilitation.

Moving 'Upstream'

Beginning in 2003 and continuing to the present, there was a continuing fifth major development in dispute prevention where new mechanisms were developed which moved dispute prevention upstream.

The Haslam School of Business at the University of Tennessee began to undertake research initiatives into collaborative business practices to improve the results of strategic procurement contracts. I have had the privilege of leading UT's research, which is now front and center in bringing dispute prevention practices to the business world. My research–originally funded by the U.S. Air Force–set out to study highly collaborative business relationships achieving transformational, game-changing, and often award-winning results.

While I never set out to study dispute prevention, my research and many of the collaborative business mechanisms I teach have been linked to creating alignments among business partners that can also be classified as dispute prevention mechanisms.

Back to the Future

This month's column: Where did the formal idea of dispute prevention come from?

The purpose: Historical context will move your system and process development upstream more effectively.

The evolution: The inventors and the thought leaders' ideas work and are adaptable. More on how soon.

It was also during this time a number of legal scholars and practitioners in the Nordic countries began promoting progressive contracting concepts. Most notable are Helena Haapio, of the University of Vasso, Vasso, Finland; Petra Hietanen-Kunwald, of Aalto University, Espoo, Finland, and Stefania Passera, of Helsinki, Finland, who have pioneered the concept of contract design and visualization techniques. See Petra Hietanen-Kunwald and Helena Haapio, "Effective Dispute Prevention and Resolution Through Proactive Contract Design, 5(1-2) J.S.C.A.N., 6-7 (2021) (available at https://bit.ly/4dIhNVC), and Stefania Passera and Helena Haapio, "Facilitating collaboration through contract visualization and modularization," ECCE '11: Proceedings of the 29th Annual European Conference on Cognitive Ergonomics 57 (2011) (available at https://bit.ly/3YCLhQC) (how graphic visualizations can prevent confusion).

Today these concepts are openly taught as a best practice by the World Commerce and Contracting Association which offers a free contract design pattern library. See https://contract-design.worldcc.com.

> Business mechanisms have been linked to creating alignments among partners that can also be classified as dispute prevention.

Worldwide Recognition

In 2016, the International Mediation Institute, recognizing problems that had been developing in ADR practices, organized a series of worldwide conferences to evaluate and explore improvements in dispute resolution. The series of conferences was called the Global Pound Conference (GPC), 40 years after the original Pound Conference which had catapulted the popularity of ADR. See https://imimediation.org/research/gpc/gpc-about.

A key milestone in the dispute prevention movement occurred when Jim Groton convinced the GPC's Academic Committee—which had initially rejected including dispute prevention as a subject to be considered—to include the concept of dispute prevention in its deliberations.

I point to this as a milestone because when the delegates to 29 conferences, including users, providers, advisers and academics in the dispute field were asked to vote on which dispute resolution processes should be prioritized to improve the field, they resoundingly voted in favor of dispute prevention. The overall cumulative voting recorded a substantial preference for "pre-dispute or pre-escalation processes to prevent disputes" over all other dispute-resolution processes.

Groton commented on this critical vote: "For the first time in the history of the dispute prevention movement, there was a worldwide recognition of the importance of dispute prevention."

Celebrating the History

Next year, 2025, will be the 75th anniversary of the publication of Prof. Brown's revolutionary work. It will also be the 50th anniversary of the invention of the dispute review board, the first proactive pre-dispute prevention technique.

Looking back on the history of the dispute prevention movement, I am proud to recognize some of the inventors and thought leaders who have pioneered in advancing that movement. And I'd like to give a special thanks to Jim Groton for helping me compile this useful history lesson for my column. (See box at right.)

To enhance those celebrations, I am pleased to announce that the prevention movement is gaining even more ground. The American Bar Association is publishing a book devoted to dispute prevention authored by myself, Jim Groton, CPR Institute Vice President, Advocacy & Educational Outreach Ellen Waldman and former CPR Institute President Allen Waxman, who is now of counsel at DLA Piper in New York.

A key part of the book is a Continuum of all dispute management mechanisms, including 18 specific dispute prevention mechanisms. I will introduce the Continuum in next month's column.

Honoring the Pioneers of Dispute Prevention

In presenting history in the accompanying column this month, thoughts turned to the people who made dispute prevention a profession. My list:

- Prof. Louis Brown, the father of "Preventive Law."
- Construction industry leaders, too numerous to name, who invented the first proactive dispute prevention mechanisms: dispute review boards, realistic risk allocation, partnering, and incentives.
- Thomas Barton, coordinator of the National Center for Preventive Law, who has continued Louis Brown's work.
- Jim Groton, editor of the 1991 CPR dispute prevention book discussed in the accompanying article, chair of the Prevention Study Committee which led to CPR's 2010 prevention initiative, and who convinced the Global Pound Conference that dispute prevention should be included in its deliberations.
- Helena Haapio, assistant professor of business law at the University of Vaasa, Finland, a leader in developing dispute prevention in the Nordic countries, founder of the Proactive Think Tank, and advocate of modern contract language to improve contracting practices.
- Joan Stearns Johnsen, Master Lecturer and Master Legal Skills Professor at the University of Florida Levin School of Law, former chair of the American Bar Association Section of Dispute Resolution who introduced studies of dispute prevention in that organization, and a pioneer in the development of the deal facilitation mechanism.
- Allen Waxman, former president and chief executive officer of *Alternatives*' publisher, the CPR Institute, who vastly expanded CPR's dispute prevention work and is the originator of the CPR Dispute Prevention Pledge for Business Relations (available at https://www.cpradr.org/dispute-prevention-pledge-for-business-relationships), which encourages corporate commitment to exploring ways to prevent disputes through early identification of conflict and constructively addressing it before it becomes a costly dispute.

— *Kate Vitasek*

Court Decisions

The Euro Perspective: Loosening up with the Supremes

BY ADAM SAMUEL

The U.S. Supreme Court's output on arbitration caught the international imagination in the mid-1980s.

Inspired by its chief justice's conviction that litigation costs and case backlogs were irredeemable, the Burger court and its successor Rehnquist panel rapidly shot away the protections from mandatory arbitration thought to have been given to small businesses (*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614 (1985) (available at https://bit.ly/4cxzl6S), securities customers (*Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477 (1989) (available at https://bit.ly/3WJFZAk)) and employees (*Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (available at https://bit.ly/3AiXCza)).

It received praise for establishing the preemption and preeminence of the 1925 Federal Arbitration Act over state law (*Southland Corp. v. Keating*, 465 U.S. 1 (1984) (https://bit.ly/3Alxt2W) and *Mastrobuono v. Shearson Lehman Hutton Inc.*, 514 U.S. 52 (1995) (available at https://bit.ly/46NHRfV)) and its refusal to allow apparent exclusive jurisdiction provisions in statutes to bar arbitration (*Shearson/American Express v. McMahon*, 482 U.S. 220 (1987) (available at https://bit.ly/3YMWnT4).

Otherwise, the Rehnquist court was broadly orthodox on arbitration although

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Court Decisions

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occasionally incoherent (*Volt Information Sciences Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989) (available at https://bit.ly/4cpMEp1) (holding that the FAA didn't pre-empt state law incorporated into the arbitration contract) and *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003) (available at https://bit.ly/3AoHOuV)) (holding that that an arbitrator must determine whether the contracts forbid class arbitration).

Chief Justice John G. Roberts Jr. continued this until the court hit a peculiarly bad patch in 2010 (*Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010) (available at https://bit.ly/3SR72Z7), *Rent-A-Center, West Inc. v. Jackson*, 561 U.S. 63 (2010) (available at https://bit.ly/4cpTf2S), and *Granite Rock Co. v. Teamsters*, 561 U.S. 287 (2010) (available at https://bit.ly/4dkn8mv), covered in my "The U.S. Supreme Court's Undistinguished 2010 Trilogy: An English View," 66(1) *Dispute Resolution Journal* 32 (Feb.-April 2011).

More recently, it has become fashionable to decry the Roberts Court's pro-business support for mandatory arbitration. Against that background, it seemed time to go through each of its recent cases from a European perspective and see what if anything has been "going wrong."

The impression left is that actually the removal of consumer and employee protection is really the product of 1984-1995. Congress, not the Court, is largely to blame for not realizing that legislation, coming up to its centenary largely unamended in the areas that matter, is creaking. Federal legislators have also failed to address the consumer and employee protection issues in the dispute resolution context knowing full well the Supreme Court's view of Sections 2-4 of 1925's Federal Arbitration Act that a number of European countries have tackled with varying degrees of effectiveness.

A look at the Court's work over the past five years reveals an expansion of—at least the perception of—the transportation workers exemption from the FAA and some solid decisions on traditional jurisdictional challenges.

For the rest, the majority is rarely wrong and, even when it is, the difference made is marginal in practice. One area where it can still irritate is in the way in which it resolves individual points of law and remands cases, producing the type of yo-yo effect found in *Henry Schein Inc. v. Archer & White Sales Inc.*, 586 U.S. ___ (2019) (available at https://bit.ly/4dG4rcp) and *Henry Schein Inc. v. Archer and White Sales Inc.*, 592 U.S. ___ (2021) (available at https://bit.ly/3X3K9Ej). It would have been much simpler if the Supreme Court had just decided on the first appeal whether the arbitrator had jurisdiction but just could not grant the injunctive relief sought.

FAA §1's Scope

Around the same time, *New Prime Inc. v. Oliveira*, 586 U.S. 105 (2019) (available at https://bit.ly/4dLcMvp), set up what seemed at the time a refreshingly new approach to Federal Arbitration Act Section 1:

> [N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

New Prime hired drivers of its trucks as "independent contractors" to move its clients' goods across state lines. Justice Neil Gorsuch rightly concluded that the court has to decide whether the exemption applies, not an arbitrator selected for this purpose under the delegation provision of the challenged agreement.

He clearly states that the delegation clause is actually a separate arbitration agreement subject to the usual scrutiny of any such stipulation. "Contracts of employment" of "workers" not employees encompassed contractors. In 1925, such contracts were agreements to perform work. Oliveira was clearly a worker engaged in interstate commerce.

The curious English analogous case here is *Jivraj v. Hashwani* [2011] UKSC 40 (available at https://bit.ly/3YMdB2O), where the U.K. Supreme Court rejected the Court of Appeal's view that an arbitrator as someone operating under a contract to provide services was subject to European Union anti-discrimination legislation. It was hoped at one point that the proposed Arbitration Bill would stop parties mindlessly discriminating on grounds of race, religion, colour, creed, disability, and sexual orientation but this has not made it into the current draft.

In 2022's *Southwest Airlines Co. v. Saxon*, 596 U.S. 450 (2022) (available at https://bit.ly/3RIdDp0), Justice Clarence Thomas, writing for the court, looked at the question of who were a "class of workers engaged in foreign or interstate commerce" in the context of an airline ramp supervisor "frequently" engaged with those she supervises in loading and unloading baggage, mail and commercial cargo from planes.

Section 1's clumsy, outdated drafting becomes apparent here. Thomas has to find a "class of workers" as those loading and unloading cargo regularly. He then had to apply the bizarre ruling in *Circuit City Stores Inc. v. Adams*, 532 U.S. 105 (2001) (available at https://bit.ly/46Ohgzk) (confining the FAA Sec. 1 exemption to transportation workers), and the peculiar *ejusdem generis* and meaningful variation rules to limit workers to those involved in transportation even though the section makes no such mention. (*Ejusdem generis* is "of the same kind," the statutory and contractual principle that when general words or phrases follow specific words, the general words are limited to the same class as the specific words.)

These are more Talmudic—think the Baraita of Rabbi Yishmael (see https://bit.ly/3WNbDg1)—than modern concepts of statutory interpretation. Justice Thomas, though, plows on to reach the reasonably coherent position, focusing on the activities of loading and unloading, that Saxon was clearly directly involved in, in the interstate transportation of

The Right and The Wrong

The view: As the U.S. Supreme Court reconvenes for its 2024-2025 term, our London columnist sizes up current arbitration jurisprudence with a distinct U.K. view.

The overall view: There's a lot to like. But the Court's most recent June arbitration decision? Not so much.

The final overall view: Congress needs to get involved.

things, unlike perhaps other employees of the same company.

The Court continued on this path in 2024 in *Bissonnette v. LePage Bakeries Park St., LLC,* (April 12, 2024) (available at https://bit.ly/4avulyl), moving away a little from finding an analogy with the seamen and railroad employees mentioned elsewhere in Section 1. One just needs a transportation worker playing a "direct and necessary role in the free flow of goods across borders."

The complainants were franchisees of parent Flowers Foods Inc. who picked up baked goods from a warehouse and distributed them to local shops and found new retail shops. The Court rejected the attempt to evade the FAA Sec. 1 exemption by the company by categorizing the franchisees as being in the baking business rather than the transportation industry. It is about what the individuals do, not the nature of their or their employer's business.

Congress clearly needs to reconsider Sec. 1 and decide what it wants the Federal Arbitration Act to cover and what it wants to do with the group of cases that fall outside the act but which come within the Commerce Clause and jurisprudence on interstate commerce. U.S. Constitution, Article 1, Section 8, Clause 3.

Justice Gorsuch sidestepped an argument based on the court's inherent jurisdiction in *New Prime* but it would be better if a new act replaced the current exclusion with a provision allowing the application of Sections 2-4 only at the request of the employee and—it could be suggested—a consumer.

This would bring the United States into line with England and much of the European Union. See *Clyde & Co LLP & Anor v. Winkelhof* [2011] EWHC 668 (QB) para. 21 (available at https://bit.ly/3SLnMB5); English Consumer Rights Act 2015, section 63 and Sch. 2, para. 20 (research briefing available at https://bit.ly/3WX1HC7), and Council Directive 93/13/EEC (April 5, 1993) on unfair terms in consumer contracts, Article 6(1) & Annex 1(q) (available at https://bit.ly/4di24gl).

Classic Jurisdictional Cases

On conventional jurisdiction disputes, the court has been fairly orthodox in recent years.

In *Coinbase v. Suski*, 602 U.S. ___ (May 23, 2024) (available at https://bit.ly/4fNzd52), the Court rejected the idea that a delegation clause in an arbitration agreement could entitle the arbitrator rather than the court to decide whether conflicting arbitration and exclusive jurisdiction clauses in separate contracts should determine the forum for any disputes.

Justice Ketanji Brown Jackson neatly lists four layers of arbitration disputes: merits, arbitrability, who decides arbitrability, and who sorts out the clash of agreements about the third item. That almost inevitably will decide the third layer question and often the second one as well.

It would have been helpful if the court had also taken the question of whether the forum clause, which was later in time, superseded the arbitration agreement. This is the *Henry Schein* procedural problem all over again.

GE Energy Power Conversion France SAS v. Outokumpu Stainless USA LLC, 590 U.S. ___ (2020) (available at https://bit.ly/3MqQC6p), is an unusual visit for the Supreme Court into the New York Convention's Article II. The conclusion (based on Justice Thomas' opinion) has to be right. The reasoning, although never wrong, could do with some tightening up.

The Eleventh Circuit wrongly required GE to have signed the arbitration clause, which involves a misreading of Convention Article II(2), which allows the agreement to be found in an exchange of letters or telegrams. This unfortunately leads the court to refer to non-signatories throughout.

The court is right, though (at 440), to reject the view adopted traditionally by some Swiss writers (J-F Poudret, "La clause arbitrale par reference selon la Convention de New York et l'art. 6 Concordat sur l'arbitrage," Melanges Guy Flattet, Lausanne 1985, 523, discussed by this author in "Arbitration clauses incorporated by general reference and formal validity under article II(2) of the New York Convention.").

In J. Haldy, J.M Rapp and P. Ferrari, eds., "Etudes de procedure et d'arbitrage en l'honneur de Jean-François Poudret," 505 (University of Lausanne 1999), Convention Article II(3) limits the enforcement of arbitration agreements to those signed by the parties or contained in an exchange of letters of telegrams between them. Article II was inserted at the last minute into the Convention in the hope of making it easier to enforce agreements than had previously been the case. It involved the removal of the Geneva Protocol on Arbitration Clauses 1923's requirement (Arts. 1 and 4) that both parties be nationals of contracting states, which made a huge difference.

At New York, the form requirement of Article II(2) was never discussed. Except for Switzerland, everyone else has used its own laws to enforce agreements under the Convention that do not meet the Article II(2) requirements, notably England in *Zambia Steel & Building Supplies Ltd. v. James Clark & Eaton Ltd*, [1986] 2 Lloyd's Rep. 225 (available at https://bit.ly/3M7KgbM).

It might be more precise to characterize those rules as laying down the maximum formal validity requirements that contracting states could impose for the enforcement of agreements. It is noticeable that in Switzerland, until Jan. 1, 1989, all arbitration agreements had to be signed by the parties. See "Société des grands travaux de Marseille c/ République populaire du Bangladesh, Bangladesh industrial development corp.," 102 *Ia* 574 (Swiss Federal Ct. 1976) (available at https://bit.ly/4fENYqV).

This requirement did not apply where Article II was thought to extend (cases where the seat of arbitration was outside Switzerland (*Tradax Export SA v. Amoco Iran Oil Co.* ATF 110 54 (1984) (available at https://bit.ly/3Am7mc1)). Even Albert Jan van den Berg, who advocated a uniform interpretation to the New York Convention, accepts that waiver can be used to overcome the formal validity rules (A.J. van den Berg, The New York Arbitration Convention of 1958, 265 (Kluwer 1981)); this was referred to with approval by Lord Collins in *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, para. 127 (available at https://bit.ly/3WOALTA).

In *Morgan v. Sundance Inc.*, 596 U.S. ___ (2022) (available at https://bit.ly/3NywXj5), the U.S. Supreme Court was on surer ground in finding that there was no need to prove prejudice to conclude that an employer had waived its right to arbitrate. Sundance filed a defense, issued an unsuccessful motion to dismiss, and attended an unsuccessful mediation—then eight months after the start of the case mentioned the arbitration clause.

Justice Elena Kagan writing for the Court rejected the creation of a special rule for arbitration requiring prejudice. The "intentional relinquishment or abandonment of a known

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Court Decisions

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right" is all that is needed in federal civil procedure.

The effect on the other side is irrelevant. Her throwaway reliance on FAA Section 6 ("Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided") is unnecessary and probably wrong. Otherwise, this seems hard to criticize.

Class Action Arbitration

Things become more complicated with two class action cases.

Outside the United States, class action arbitration is unknown and would be considered in the absence of reasonably clear consent a breach of confidentiality—sometimes unreasonably—expected of the arbitral process.

For many years, though, parties have agreed to hold cases concurrently. In the Netherlands and Hong Kong, there are statutory provisions allowing for the court and now arbitration organizations to consolidate cases with matching arbitration clauses (Burgerlijke Rechtsvordering, art. 1046 (available at https://nai.nl/dutch-arbitration-act), and Hong Kong Arbitration Ordinance, Schedule 2, para. 2 (available at https://bit.ly/3MaRmMs)). This, though, is totally different from a class action arbitration.

Class actions are much less common outside the United States anyway, although in the competition law area, England is starting to develop an approach *Merricks v. Mastercard Inc.*, [2024] EWCA Civ. 759 (available at https://bit.ly/3SNQ0eq).

In 1925, there is no evidence that Congress considered that it was creating a class action arbitration idea. Although such litigation had existed since 1820, the key addition of Federal Rules of Civil Procedure 23 was 13 years away. That itself should not shut the door to class action arbitration.

The problem, though, comes to a head if one tries to replicate the litigation process in arbitration through a process which does not fit it. The certification of the class is a judicial matter which courts have to deal with, not arbitrators. Most traditional arbitration practitioners would favor the majority conservative view on the Supreme Court, which assumes that no class action arbitration has been agreed to.

Unfortunately, the same court made a complete mess of this subject by ignoring the submission agreement in *Stolt-Nielsen S. A.*, linked above, by which the parties gave the arbitrator the option of deciding in favor of a class action case.

To describe a clearly wrong decision as an excess of jurisdiction put the Court out-of-line with the rest of the major arbitration countries, notably the English House of Lords in *Lesotho Highlands Develop. Auth. v. Impregilo SpA*, [2005] UKHL 43 (available at https://bit.ly/4ctRKAB).

Notwithstanding the unanimous decision in *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013) (available at https://bit.ly/4guASwC), the U.S. Supreme Court has polarized around two positions for or against class action arbitration. Congress has not intervened as it should have done to protect workers and consumers where they need the protection of either a class action, a specialized municipal court, or an Ombudsman scheme.

The result is that the majority in *Lamps Plus Inc. v. Varela*, 139 S. Ct. 1407 (2019) (available at https://bit.ly/47EkhAS) seems to have been right to construe a badly drafted arbitration clause as presumptively excluding a class action case. (For an English view, see *Oxford Shipping Co. Ltd. v. Nippon Yusen Kaisha (The Eastern Saga)*, [19841 3 All ER 835 (available at https://bit.ly/3X3z2ev).) The minority led by Justice Kagan is effectively trying close the Congress-created gap.

The idea of using the state *contra proferentem* rule to create a class-action arbitration would seem completely aberrant to most European practitioners. Until *Stolt-Nielsen*, they would never have heard of such a process.

In any event, the English Supreme Court has all but abolished that rule, requiring contracts to be construed in accordance with their natural meaning instead. *Wood v. Capita Insurance Services Ltd.* [2017] UKSC 24 (available at https://bit.ly/4dzYFJG), and *Rainy Sky SA v. Kookmin Bank* [2011] 1 WLR 2900 (available at https://bit.ly/4dFFNc0).

Consumer and labor advocates may wish to think about the problem in another way. The February 2023 "Mass Arbitration Shakedown: Coercing Unjustified Settlements" paper of the U.S. Chamber of Commerce Institute for Legal Reform shows how mass filing of arbitration claims can effectively force settlements on firms seeking to rely on arbitration clauses as forms of class action waivers. See https://bit.ly/3SLHQn4 at pages 18-31.

In the United Kingdom in 1981, it was the insurance industry that created the Insurance Ombudsman Bureau, the forerunner of today's Financial Ombudsman Service. This was done for a variety of reasons. No major financial institution would argue for the abandonment of this process through which banks pay out vast sums in compensation because of the effect of having to litigate many of the disputes concerned. (As already indicated above, the English Consumer Rights Act 2015 would render arbitration clauses unenforceable by the banks.)

In PAGA's Wake

Returning to the U.S., nobody could find *Viking River Cruises Inc. v. Moriana*, 596 U.S. ___ (2022) (available at https://bit.ly/4ctzgQP), a straightforward case. The California Private Attorneys General Act allows employees to file suit against past employers on behalf of present and past employees but only to recover what the state could have collected through enforcement action. The state Labor and Workforce Development Agency is entitled to keep 75% of the damages with the rest distributed among the employees affected.

California must have known that an arbitration clause with a class-action waiver would always defeat a claim made by an employee in this situation. Moriana's individual PAGA claim basically ended up in arbitration.

The rule that such a claim cannot be brought without being tied to all other employees' complaints is essentially preempted by the FAA when the underlying contract contains an arbitration clause. The non-private claim collapsed because Moriana now lacked any interest in the outcome and was barred by the arbitration clause from proceeding. In the circumstances, one can almost enjoy Justice Thomas' ritual dissent on the basis that the FAA was never intended to apply to state courts.

The decision urged the state to clean up the problems with the statute. It did. To keep

a measure that would have put the effects of PAGA to a state referendum in November off the ballot, the California Legislature, working with the governor and business and employee interests, reformed the statute. You can see Gov. Gavin Newsom's July 1 statement upon signing it into law at https://bit.ly/3ASBlsr.

Ah, Procedure

Coinbase Inc. v. Bielski, 599 U.S. ___ (2023) (available at https://bit.ly/3D4eDLw), takes us into the recondite world of court and arbitration procedure. The majority read into the FAA a requirement for courts to stay proceedings while an appeal is pending against its rejection of an application to refer the parties to arbitration.

As the majority accepts, FAA Section 16(a), which allows such an appeal as of right, says nothing on this subject. It would make more sense to allow the judge to make the decision as to whether to stop the case pending the decision on the appeal. This could be important bearing in mind the absence of any filter or cert process in such a case. The yo-yo effect of some U.S. appeals processes and the consequent delay in disposing of such cases makes this decision genuinely not a good one.

Section 16(a) is of relatively recent vintage—1988. You would think that Congress would have imposed a mandatory stay if it wanted one. The majority argued that the jurisdiction rule in *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 58 (1982) (available at https://bit.ly/44zRrAE), creates the opposite presumption.

Justice Jackson's dissent is far more convincing. *Griggs* deals with a different problem of an appeal against a judgment where the lower court was considering adjusting its ruling. It would make more sense to allow the appellant to ask first the court proceeding on the merits for a stay and then, if necessary, the appeals court. That would be the English approach (CPR 52.16, available at https://bit.ly/3WPaaG6). For more on the *Bielski* decision and dissent, see Russ Bleemer & Cenadra Gopala-Foster, "Supreme Court: While a Denial of Arbitrability Is Appealed, a Stay of Litigation Is Mandatory," *CPR Speaks* (June 23, 2023) (available at https://bit.ly/3XbKvZT).

Smith v. Spizzirri, 601 U.S. ___ (2024) (available at https://bit.ly/3wWvalv), takes us into some splendidly obscure territory. The Court correctly insisted that when referring parties to arbitration, the court should stay, not dismiss, its proceedings. This follows exactly the approach taken in Section 9 of the English Arbitration Act 1996 (available at https://bit.ly/3M7QPey).

As *Spizzirri* footnote 2 indicates, the court can always dismiss for other reasons. The importance of staying, however, is that if the arbitration reference fails for some reason, or the parties agree not to go ahead with it, they can revive the court proceedings immediately.

As Justice Sonia Sotomayor notes, FAA Section 3 requires a stay, not a dismissal of proceedings. There are countries that simply lack this mechanism, notably in parts of continental Europe (see the Swiss LDIP art. 7, available at https://bit.ly/3SQcFXs). But that is a matter for their statutes and processes.

ZF Automotive U.S. Inc. v. Luxshare, Ltd., 596 U.S. ___ (2022) (available at https://bit.ly/3X3FVfR), deals with the entirely U.S. idea of applying Section 1782(a)—under the U.S Evidence Code, "28 U.S. Code § 1782—Assistance to foreign and international tribunals and to litigants before such tribunals" (available at https://bit.ly/4ctBf7J)—to allow a district court to order the production of evidence for use in a proceeding in a foreign or international tribunal.

The two consolidated cases involved differed. The first was a purely commercial arbitration under a big German arbitration provider. The second case was an ad hoc United Nations Commission on International Trade Law (UNCITRAL) rules case brought under a bilateral investment treaty. The Fund in the second case representing private individuals had selected this option from those provided by the bilateral investment treaty.

The venue, the International Centre for Settlement of Investment Disputes, best known as ICSID, is clearly not a foreign or international tribunal (see *Webuild S.P.A. v. WSP USA Inc.,* 2024 WL 3463380 (2d Cir. July 19, 2024)), although something like the Iran-U.S. Claims Tribunal probably is. The real point here is that by agreeing to arbitrate outside the United States, one does not expect to trigger the right to a court application for discovery on a scale not contemplated by the arbitration agreement, the tribunal, or the seat of arbitration.

The Section 1782(a) point disguises a much bigger issue: the level of cooperation available around the world for the enforcement of arbitrators' orders in this area, particularly where the seat of arbitration is in a different location.

The final case in this collection, *Badgerow v. Walters*, 596 U.S. ___ (2022) (available at https://bit.ly/3X310XV) is a peculiarly U.S. confection, denying federal court jurisdiction over vacatur and confirmation proceedings in the absence of diversity or a federal law question. The majority judgment of Justice Kagan appears to be sound.

> 'To describe a clearly wrong decision as an excess of jurisdiction put the Court out-of-line with the rest of the major arbitration countries.'

But these types of obscure highly domestic distinctions deter foreign litigants from agreeing to arbitrate in the United States. It really is important for arbitration participants to know exactly which courts will and will not have jurisdiction over this type of case. Any re-draft of the Federal Arbitration Act needs to deal with this one way or another.

* * *

The Supreme Court comes out of this review with a much higher grade than one might have expected. Only *Bielski* appears to be wrongly decided as such. The Court's polarization on class action arbitration feels undignified. The majority's position, however, does have a sound basis in notions of privacy and confidentiality that underpin much understanding of commercial arbitration.

The problem is that the effect of the federal preemption cases of the 1980s and 1990s blocks state attempts to provide labor and consumer protection. The push has to come from Congress, as it needs to do a general overhaul of the FAA.

In the United Kingdom, there is a long tradition of reforming arbitration law when the government loses control of Parliament and struggles to implement its mainstream program—1950, 1979, and 1996 are well-known examples. Concerned U.S. senators or members of the House should have draft legislation ready to go.

ADR Processes

The Subtle Role of Legal Reasoning in Mediation

BY UNYIME MORGAN

It is not coincidental that some mediation practices are annexed to courts and every year court refers many cases to mediators for mediation.

In most jurisdictions, civil procedure rules or specialized legal regulations define mediators' minimum training, ethics, and code of conduct. Evidently, mediation is an integral part of the judicial system, governed by legal rules and principles, with its inherent procedural flexibility. And the flexibility of the mediation process and the diversity of disputes presented for mediation support the emergence of mediators from every walk of life.

Mandating elaborate legal education and/or methodology may frustrate the mediation process and outcome. There is, however, no consensus on whether the law should play a more dominant role in the mediation process. See Jacqueline Nolan-Haley, "Court Mediation and the Search for Justice through Law," 74 *Washington U. L. Q.* 47 (1996) (available at https://bit.ly/3TccJky). Nevertheless, a basic knowledge of legal principles and rationales could positively enhance parties' and mediators' experiences.

Legal reasoning inspires legal drafting, lawmaking, legal administration, court trials, alternative dispute resolution, and other legal activities. See, e.g., Encyclopedia.com, "Legal Reasoning" (available at https://tinyurl.com/2p9c58xd).

It is the intellectual process that sustains and justifies the rationality and uniformity of legal doctrines. Ibid. It is generally agreed that offering professional advice, such as legal counsel, to any of the disputants, is not permitted during mediation, as such advice may engender bias. Distinguished from professional legal advice, which is disallowed to preserve mediators' neutrality, legal reasoning guides mediators toward successful and valid mediations.

The courts retain supervisory powers to uphold or vacate an invalid mediation settlement agreement. Given this fact, mediators, especially private practitioners, should be additionally cautious in deciding the suitability of cases for mediation, as courts usually sift through the facts and legal issues associated with each case before referring parties to court-annexed mediation.

Furthermore, courts maintain legal oversight over court-annexed sessions and outcomes by accepting and adopting settlement agreements. Independent mediators would have to make these decisions by themselves.

Given the foregoing, what knowledge of legal reasoning should mediators be armed with? The following underlying non-exhaustive scenarios are examples of where knowledge of legal reasoning would prove profitable to mediators and the parties who engage in their service.

1. *Legal Categorization.* First, mediators should have an idea of categories of legal issues that can be mediated, cannot be mediated, or require the court's authorization before mediation. For instance, while mediators cannot initiate mediation in a murder case, a judge may refer a murder case for mediation if the judge thinks that parties/families can benefit from rebuilt relationships.

Second, mediators must determine whether to mediate in borderline cases which sit between criminal and civil categorization. For example, theft can be classified as a crime when the offender is prosecuted for stealing.

Based on the same facts and of course, parties' disposition to mediation, mediators can attempt settlement where the dispute is treated as civil misappropriation or conversion. If the alleged offender was armed, it is a crime over which only designated courts have jurisdiction.

> What knowledge of legal reasoning should mediators be armed with?

While a mediator may not need to learn the fine distinctions in the categorization of legal actions such as contract, property, tort, etc., it seems that it would suffice to distinguish between civil and criminal actions to determine whether a case can be mediated. It is noteworthy that most civil actions can prima facie be mediated, but many criminal actions can only be mediated at the court's instance.

2. *Court Proceedings.* The court proceeding has been defined as any legal step or action taken at the direction of, or by the authority of, a court or agency; any measures necessary to prosecute or defend an action. Encyclopedia.com, "Proceeding" (available at https://tinyurl.com/mvs3h45u).

Mediators can benefit from a peripheral understanding of court proceedings, particularly case history, timing, and orders. This information can prevent mediators from interfering with court decisions, overstepping professional legal boundaries and ultimately, the risk of committing contempt of court.

It is particularly important that, where a case has been referred by the court, mediators should understand the scope of the court's reference as this would determine the legitimacy of settlement terms drawn up. In instances

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where a court has made preliminary rulings, mediators should respect the boundaries of court rulings because acting otherwise may amount to contempt of the court's order and risk the unpleasant consequences of an invalid mediation.

A practical scenario is where a losing party attempts to mediate a decided case or review an unfavorable court's decision, often via an independent or private mediator, hoping the mediator can offer more lenient settlement terms.

To avoid this trap, it is professional and prudent to ask an initiating party whether the dispute has been adjudicated, arbitrated, or mediated in any other forum. If the party answers in the affirmative, it would be reassuring to view and review official documents ensuing from such proceedings.

Regarding the court's timelines, mediators should be mindful to mediate within the timeframe allocated by law or the court. If there is good reason to mediate court-referred matters beyond the time allocated by the court, such an extension of time should be sought and obtained from the court before the time originally allocated for mediation elapses.

It is noteworthy that several aspects of mediation, including issues covered by the 2005 Models Standards of Conduct, may be affected by relevant court rules to which parties are subject. See Note on Construction, 2005 Model Standards of Conduct for Mediators (available at https://bit.ly/3rl9htb). Mediators should take cognizance of relevant court rules.

3. Knowledge of Vitiating Factors. Mediators should have a fundamental knowledge of factors that can invalidate mediation to prevent an unfruitful waste of time and resources. If a settlement agreement is based on falsified information presented by a party, the innocent party can present evidence of false information and request that the court vacate the settlement agreement. Additionally, the presence of duress, undue influence, fraud, illegality, and unconscionable bargains may threaten the validity of mediated settlements.

For instance, unconscionability can be inferred from a mediation bargain if the bargain is unjust or unduly one-sided in favor of the party who has the superior bargaining power. Encyclopedia.com "Unconscionable Contracts" (available at https://tinyurl.com/4faa4e2c). It can be ascertained by examining the parties' circumstances when the contractual bargain was made. Ibid.

A review of an unfavorable bargain may be entertained by the court where it would be an affront to the integrity of the judicial system to enforce such a bargain. Ibid. Unlike professional commercial contracts, where unconscionable bargains are examined with suspicion because courts consider how a reasonable profit-seeking businessperson would act, unconscionable bargains in settlement agreements may be viewed differently.

Perfectly Legal

The practice point: Know the legalities of the case you are mediating.

The technique: Thoroughness.

The obstacle: Particularly in court mediations where limits are well defined, rote practices can accidentally slip over the letter-of-the-law line. Don't take the parameters of the process for granted.

Unconscionable bargains at mediation sessions may not prima facie vitiate a settlement agreement because the flexibility and empathy that characterizes mediation support trade-offs among parties, especially where a party admits wrongdoing and requests for pardon. Ultimately, the prerogative to determine whether a mediation agreement should be vitiated rests on the court.

4. The Legal Boundaries of Mediation. Mediators should be mindful of the legal boundaries of mediation. Compared to litigation, mediation admits considerable flexibilities. Nevertheless, there are legal boundaries that define the ambit of mediation. In other words, whether a mediator's conduct would be subject to mediation/confidentiality privilege is a legal issue. Thus, established legal machinery will check the excesses that leap outside the legal boundaries of mediation.

What constitutes legal boundaries in mediation? Standard I to VI of the 2005 Model Standards of Conduct for Mediators (linked above) provides guidance on the ambit of the mediator's activities, demeanor, and expertise. Mediators' conduct that breaches the principles of self-determination, impartiality, conflicts of interest, and confidentiality or does not measure up to the required mediation quality or expertise is unlikely to be upheld in a judicial contest. See Standard I to VI of the 2005 Model Standards of Conduct for Mediators.

In most jurisdictions, the essentials of mediation are communicated at mandatory, pre-certification training required for the commencement of mediation practice. Practical interpretation and application of the principles are entrenched in the mediator during coaching, debriefing and prescribed continuing education. Keeping within the legal boundaries of mediation is important to enable parties to obtain a valid mediation settlement agreement.

5. Reaching a Settlement Agreement. Mediation does not require elaborate documentation and record-keeping like litigation. Where mediation is successful, however, documentation of a settlement agreement is usually evidence of a successful mediation. A settlement agreement is a legal document that bears a record of disputed facts, persons involved, terms of settlement and timelines for their execution where applicable. It can be presented in court as evidence of dispute resolution.

Beyond the simplicity of presenting the outcome of a mediation session, legal reasoning is required to identify and resolve legal and practical issues that may emerge from the agreed terms of settlement. For example, in a debt-recovery mediation where parties have mutually consented to payment by installments, parties should agree on the consequences of non-payment or incomplete payment to prevent re-opening a closed mediation in the future.

Attention should also be paid to the legitimacy of the principles and processes that lead parties to a settlement agreement. For instance, the importance

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of self-determination in obtaining parties' agreement cannot be overemphasized. Model Standards of Conduct for Mediators Standard VI(A)(10) 2005 requires that the mediator explore the circumstances, potential accommodations, modifications, or adjustments that would facilitate the party's capacity to comprehend, participate and exercise self-determination.

6. Knowledge of Appropriate Laws/Regulations. Simple research on laws regulating the mediated subject matter can be tremendously time and cost-saving for mediators and parties. Specialized mediators focusing on specific industries would typically be well-versed with regulations surrounding their respective professions. While one should not be unnecessarily bogged with legal provisions and court decisions, mediators should know where to find important regulations when the need arises.

In the face of changing laws, regulations and policies, mediators should not be reluctant to reach out to legal and other subject-specific professionals for guidance. It is prudent that mediators get acquainted with regulations and policies that are likely to interact with the facts of the dispute the mediator has committed to mediate. See Michael Colatrella Jr., "Informed Consent in Mediation, Promoting Pro Se Parties' Informed Settlement Choice While Honoring the Mediator's Ethical Duties," 15 *Cardozo J. of Conflict Resolution* 705 (2014) (available at https://bit.ly/4d684YN).

Knowledge of laws and regulations should not be translated to legal advice to any of the parties, to maintain neutrality and prevent allegations of unauthorized practice of law where the mediator is a not legal practitioner. See David Hoffman and Natasha Affolder, "A Well-Founded Fear of Prosecution: Mediation and the Unauthorized Practice of Law" (2000) (available at https://bit.ly/4e7MILf). Rather, such knowledge should be employed to facilitate parties' bargains and agreements within the borders of law and public policy.

How does the 2005 U.S. Model Standards of Conduct for Mediators interact with applicable laws? The Model Standards recognize the application of laws to parties who have opted for mediation (See the Note on Construction, 2005 Model Standards of Conduct for Mediators, linked above). It highlights the possibility of conflict with and subjugation of its principles to an applicable law. Ibid.

In the resolution of such conflict, mediators should comply with the spirit and intent of the Model Standards and honor all outstanding standards that are not in conflict with an applicable law. Ibid. The Model Standards establish a standard of care for mediators, and it acquires the force of law upon adoption by courts and regulatory authorities. See Jing Zhi Wong, "Is Mediation a Process of 'Law'? A Hart-Ian Perspective," 28 *JUUM* 18, 22 (2021) (available at https://bit.ly/4e6m5Xg), to the effect that mediation may, constitute valid law when it is, through a legal system's rule of change, received into law. The guidance provided by the note on the model standards' construction is an indication that mediators should not be ignorant of applicable laws.

* * *

The mediator's knowledge of legal reasoning is beneficial to the parties, the mediator, and the machinery of justice.

Legal reasoning can be gleaned from research, training sessions, and observing experienced mediators and practices at court-annexed mediation sessions. Despite

> The importance of self-determination in obtaining parties' agreement cannot be overemphasized.

the significant role that legal reasoning plays, mediation should retain its simplicity, flexibility and accessibility to parties and mediators from all vocations.

Legal reasoning is a veritable tool for safeguarding justice … but a very unruly horse when misused. There should be a conscious limit to the application of legal doctrines in mediation. To maintain neutrality, knowledge of legal reasoning should not be applied toward advising any party, predicting the outcome of the dispute if adjudicated, because litigation often presents a win-lose outcome to parties, and the party with more prospect to win may adopt a rigid position that can frustrate the mediation process. Also, the mediator's knowledge of legal reasoning should not be used for coercing parties to a presumed "appropriate resolution," or for intimidating parties and/or co-mediators.

In the words of Henry Adams, "… [R]esponsibility is restraint. …" (see quote at https://tinyurl.com/49d9sr9b)

International ADR

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cases, arbitrators from foreign countries, to the bench.

While some commentators have suggested that these innovations are meant to allow the new courts to compete with longstanding commercial courts such as the English Commercial Court (established in 1895) or the New York Commercial Division (introduced in 1993), the adopted mechanisms seem more akin to international commercial arbitration than existing courts. See S.I. Strong, "Judging Judiciaries: How Sticky Defaults, Status Quo Bias, and the Sovereign Prerogative Influence the Perceived Legitimacy of the New International Commercial Courts," 74 *American University Law Review* __ (forthcoming 2025) [hereinafter: Strong, New Courts], (draft available at https://bit.ly/3WbQVYf).

These developments seem odd when viewed from a law and economics perspective. Not only does creation of these new courts produce significant transaction costs, but economic theory suggests that litigation should seek to deviate from rather than duplicate arbitral procedures if it is to retain its distinctiveness and existing market share. See Peter B. Rutledge, "Convergence and Divergence in International Dispute Resolution," 2012 *J. of Disp.*

Resol. 49, 50 (2012) (available at https://bit.ly/3VUDlaj).

Why, then, have proponents of international litigation designed these new international commercial courts to be so similar to international commercial arbitration?

Becoming a Major Player

Most commentators believe that developing an international commercial court allows a state to attract the financial and reputational benefits that accrue to major players in the global litigation market. See Strong, New Courts, supra. While this rationale might be plausible for those jurisdictions (such as Singapore and Dubai) that have pre-existing reputations as international financial centers, it makes less sense for countries like Cambodia, which has recently announced an intent to create a new international commercial court despite the lack of any commensurate experience in international commercial matters.

The market-benefits argument is also problematic because many if not all of the enunciated benefits could be obtained simply by improving the state's reputation as an arbitral situs.

Lucy Reed, a New York-based arbitrator and past president of the American Society of International Law, has suggested the drive to develop new international commercial courts is fueled by nostalgia for a mythical bygone era, when international commercial litigation predominated over international commercial arbitration. See Lucy Reed, "International Dispute Resolution Courts: Retreat or Advance?" 4 *McGill J. of Disp. Resol.* 129, 132 (2018) (available at https://bit.ly/3xJE2vb).

It is unclear, however, whether any so-called golden age of litigation ever actually existed. International commercial arbitration has been in existence longer than international commercial litigation, predating the latter by more than two millennia due to the late development of both the Westphalian state and the field of private international law, and there is no evidence that commercial parties universally favored litigation at any point in history, instead preferring the speed, privacy, and business-friendly qualities commonly associated with international arbitration.

Reed's observation about the motivation for the creation of international commercial courts is consistent with recent studies suggesting that people continue to challenge the legitimacy of international arbitration not because of any empirically defensible concerns but because of certain cognitive distortions, including biases in favor of the status quo and legal defaults. See S.I. Strong, "Truth in a Post-Truth Society: How Sticky Defaults, Status Quo Bias and the Sovereign Prerogative Influence the Perceived Legitimacy of International Arbitration," 2018 *U. of Ill. L. Rev.* 533, 576 (2018) (available at https://bit.ly/2IAD07Q).

Those same biases, however, do not appear to explain the development of the new international commercial courts, since those courts neither reflect the status quo nor operate as default mechanisms. See Strong, New Courts, supra. Furthermore, states have no sovereign prerogative in favor of judicial resolution of commercial matters in the cross-border context. See id.

More Court Time

The dispute resolution vehicle: A new wave of international commercial courts.

The ADR component: These courts vary but they mimic features of long-running international arbitration processes, and build in familiar settlement enforcement protocols.

What's going on here? It's simple: the belief that these courts will encourage business.

Affected by Terminology

Recent studies have suggested that people's perception of the legitimacy of a particular dispute resolution mechanism is affected by the terminology used to describe the procedure as much as if not more than the actual nature of the procedure. See id. In other words, the new international commercial courts may be embraced by proponents of litigation simply because of the use of the term "courts," even though the actual procedures resemble international arbitration far more than litigation in the forum country.

Psychologists refer to this type of mental shortcut as a heuristic. While heuristics seem logical in the moment, they ignore nuance and are least helpful when applied to novel problems, as would be the case with the new international commercial courts. See Jeffrey J. Rachlinski, "Selling Heuristics," 64 *Alabama L. Rev.* 389, 401 (2012) (available at https://bit.ly/3LeUS8f).

Furthermore, people who rely on heuristics tend to be more confident in their conclusions–even their erroneous conclusion–than people who have engaged in thoughtful deliberation on a subject. See id. at 398. Thus, those who unconsciously rely on simple linguistic analyses relating to the propriety of international commercial courts may be both very confident in the rectitude of their conclusions and highly unwilling to consider whether their thinking may be mistaken.

Although "reliance on mental shortcuts is inevitable and … efforts to facilitate more complex thinking are apt to be somewhat futile," id. at 392, that does not mean the discussion about international commercial courts should stop. At this point, there is no way to halt the evolution of international commercial courts, nor would it be necessary or appropriate to do so. Even the most stalwart proponent of international commercial arbitration would agree that there are times when other procedures–including both litigation and mediation–are superior to arbitration. But there are also times when arbitration is the best alternative for parties and for society as a whole.

It is therefore important for the dispute resolution community to recognize the role that unconscious biases and heuristics play in determinations about the use, legitimacy, and shape of new international commercial courts. Not only would more clear-headed analyses help countries avoid incurring transaction costs associated with developing new courts that are unnecessary or suboptimal, but a more honest recognition of the various cognitive distortions at play in this analysis would help parties make better decisions when determining which dispute resolution mechanism to use in individual transactions.

CPR News

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Send electronic file nominations, in PDF or MS Word format, to CPR Institute Senior Vice President Helena Tavares Erickson at herickson@cpradr.org. Submissions should be led by a cover letter with name, address, telephone, and email address. Submissions on behalf of others should supply the author's contact information as well.

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Alternatives has highlighted last year's individual awards—presented on March 6 at the 2024 CPR Annual Meeting in Philadelphia—previously. For details on the James F. Henry Award for outstanding ADR leadership, last year presented to former CPR board chair William H. Webster, a former federal judge who also served as Director of the Federal Bureau of Investigation and Director of the Central Intelligence Agency, see CPR News Special, "CPR Founder's Award Goes to Former Chair William H. Webster," 42 *Alternatives* 72 (May 2024).

Emilia Onyema, a professor at School of Oriental and African Studies-University of London and an independent arbitrator, was presented with CPR's 2023 Outstanding Contribution to Diversity in ADR award. See "London Educator/Arbitrator Emilia Onyema Receives CPR's ADR Diversity Award," 42 *Alternatives* 92 (June 2024).

The James P. Groton Award for Outstanding Dispute Prevention Leadership was presented to University of Tennessee's Kate Vitasek. See "Kate Vitasek Receives Groton Award for Award for Dispute Prevention Leadership," 42 *Alternatives* 108 (July/August 2024). Vitasek has since begun a monthly column on the subject in these pages. Her third installment appears on page 143 of this issue.

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The Outstanding Book Award last year was presented to Conna A. Weiner and Bennett Picker for "Commercial Mediation Practice Guide: A Practical Handbook for Lawyers and their Business Clients," published by the American Bar Association last year.

The book—actually, the third edition of the volume—is an advanced practical guide to mediation. It provides a straightforward understanding of key suitability, preparation and advocacy issues in mediation.

The authors are longtime leaders in the field. Conna A. Weiner is an attorney, arbitrator (a Fellow of the Chartered Institute of Arbitrators), a mediator and a referee/special master in ADR provider JAMS Inc.'s Boston office. She is also an arbitrator and mediator on CPR's Panel of Distinguished Neutrals [CPR, which publishes *Alternatives*, owns CPR Dispute Resolution Services LLC, which maintains the panel]. Weiner has extensive experience as an in-house counsel in the pharmaceutical industry.

Bennett G. Picker is a mediator and senior counsel at Philadelphia's Stradley Ronon Stevens & Young. He is also an arbitrator and mediator on the CPR Panel of Distinguished Neutrals. Picker wrote the first edition of the Commercial Mediation Practice Guide two decades ago.

This new edition includes chapters on the commercial mediation landscape; the decision to mediate; the typical stages of in-person and virtual commercial mediation; the mediator's role; overcoming the barriers to resolution; preparation; representing the client in the mediation; the business executive's role in mediation; special topics; case studies in commercial mediation; corporate and law firm dispute prevention and resolution strategies, and "reflections on how we got here."

In accepting the award, Picker told the awards dinner audience that he and Weiner sought "to discuss the consumers' interest in evaluative mediation and the best techniques for it, as opposed to the old continuum from facilitative." He added, "We saw an opportunity to talk about some of the new strategies to overcome the …barriers to rational decision making, and new issues like best practices in virtual mediation."

"The mission of CPR really was reflected in what we did together," added Weiner, "because after all, joining outside counsel and client perspectives informed by a collaborative, intellectually honest, respectful integrity, all leading to innovative new ways of thinking that advance ADR, is so very honorably CPR."

She concluded, "I am so pleased and honored to receive this award from CPR. Ben and I deliberately mined our different, pre-ADR backgrounds for the book—he as a former advocate and me as a former advocate and inside counsel—and that mirrors what CPR has done so well as an organization for so many years, bring outside counsel and inside counsel together for the benefit of dispute resolution practice," said Weiner.

* * *

This year's Outstanding Professional Article Award was presented to Catherine A. Rogers for "Reconceptualizing the Party-Appointed Arbitrator and the Meaning of Impartiality" 64 *Harvard Int'l L. J.* 137 (2023) (available at https://bit.ly/3yLviFt).

The article makes a case for not only retaining party-appointed arbitrators—a tribunal slot that has fallen into disfavor because of the inherent biases it brings to an arbitration—but also for revitalizing and maximizing the positions.

Rogers, a veteran practitioner and law professor at Bocconi University in Milan, Italy, explains that empirical claims that purport to demonstrate the conflict between impartiality and the biases of party arbitrators are actually "deeply flawed both in their substance and methodology." She states that bias is inevitable in legal analysis, and instead needs to be analyzed: "Which forms of bias are legitimate? Who decides which forms of bias are legitimate? And how do we police the boundary between legitimate and illegitimate forms of bias?"

Rogers' conclusion is that party arbitrators can be beneficial to the process and should be included but managed differently by "reconceiving party-appointed arbitrators as a type of Devil's Advocate that guards against the cognitive biases that distort tribunal decision making."

Used to safeguard the process, Rogers writes, "party-appointed arbitrators serve three important functions: 1) They provide a check against individual- and group-based cognitive biases; 2) They also ensure representativeness on the tribunal; and 3) They provide a structural counterweight to the opposing party-appointed arbitrator."

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She concludes,

> Party appointment may not be ideal in every international adjudicatory context. A reconceptualization of the party-appointed arbitrator's inter-relational role, however, facilitates a more meaningful framework for evaluating the tradeoffs in permitting or prohibiting party appointment. … Today, the nature of impartiality and the legitimacy of party appointment on international tribunals are under increasing scrutiny. Some claim that we are seeing a shift away from the era in which international courts and tribunals proliferated, and toward[] an era in which those courts and tribunals are in decline or at least subject to reevaluation. At the heart of all these reform efforts are concerns about the legitimacy of such tribunals, as determined by perceptions about both the representativeness and the impartiality of their adjudicators. These reform efforts deserve a more rational understanding of party appointment and a more precise understanding of the impartiality obligations that flow from it.

Rogers appeared at the Philadelphia awards dinner in a video, thanking CPR for the award and its forums for assisting her work. She noted that "CPR has been a gateway and given me an opportunity to connect with practitioners at the very highest level in their field," moving to the practice beyond her usual teaching settings.

* * *

This year's Outstanding Short Article Award was presented to Donna Shestowsky and Jennifer Shack for "Ten Tips for Getting the Most Out of an Evaluation of Your ODR Program," 59 *Court Rev.* 6 (Spring 2023) (available at https://bit.ly/3ySaE6x).

The article notes that it is important to determine how much online dispute resolution helps court administrators and program designers meet their goals, and whether any post-launch changes might be worth considering. The authors maintain that objective evaluations are the best tools for helping make these determinations.

Shestowsky and Shack provide 10 suggestions for evaluating court ODR programs based on their research experience evaluating state court ODR programs—a guide for program managers. The tips include negotiating data access when contracting with an ODR provider; planning for appropriate timing; preparing to use data from a variety of sources, and surveying users and nonusers, among other points.

The question of who performs the program evaluation is also a key point. "Ideally, ODR evaluations will be conducted by neutral third parties who have no stake in the results and meet high research standards," conclude Shestowsky and Shack, adding "Neutral evaluations are uniquely situated to offer an outside perspective on what works well about a program and to suggest how it might be improved."

Donna Shestowsky is Senior Associate Dean for Academic Affairs and a law professor at the University of California, Davis, School of Law. She is also a faculty member of the Graduate Group in Psychology at UC Davis. Shack is the Director of Research at Resolution Systems Institute, a Chicago nonprofit organization that focuses on court ADR research and improving access and processes.

Shestowsky was unable to attend the awards event, but prepared a statement. "I am deeply honored to receive this CPR award," she wrote. "This acknowledgment reaffirms the importance of distilling practical experience gained from program evaluations into actionable advice for courts considering similar initiatives. I hope our article assists courts in their efforts to enhance the effectiveness and fairness of their ODR programs."

In accepting the award, Shack told the awards dinner attendees that the article arose from two court evaluation studies. "We recognized that there were a lot of difficulties caused by structural issues within the court," she said, adding that the authors wrote the article to help courts understand evaluation processes for their programs.

* * *

The Joseph T. McLaughlin Original Student Article or Paper Outstanding Student Article Award was presented to R. Daniel Knaap for "Arbitrator Conflict-of-Interest Arising from Third-Party Funding in Investment Treaty Arbitration" (2023).

Knaap's paper was prepared for a class at Columbia Law School. Knapp graduated in May and is a law clerk at Herbert Smith Freehills in New York. He was a Summer 2022 CPR Institute intern.

Knapp cited his work at CPR and with Columbia Law Prof. George Bermann—a former CPR board member who submitted the article for award consideration—who he credited, among others, with guidance for his paper and research. Knapp said he wrote it because it is "an issue that I think is salient today," adding, "It is one that has not yet been resolved: the extent to which disclosure can resolve conflict of interest with relation to third party funding."

"[T]he collision of these three Terms," wrote Knapp about conflicts, third-party funding, and investment treaty arbitration, "is a relatively new phenomenon and regulators have struggled with creating an effective disclosure regime." He added that "there seems to be an increasing push to either disclose the entire funding agreement or ban third-party funding in investment treaty arbitration altogether."

Knapp "analyzes the different solutions that have been adopted to resolve the issue of arbitrator conflict-of-interest arising out of third-party funding in investment treaty arbitration." Then, he proposes an approach to dealing with disclosures:

> Instead of focusing on the funded party, and placing the disclosure burden only on them, the solution to the conflict-of-interest problem is multifaceted. First, mandatory disclosure by the funded

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> party of the existence of third-party funding and the identity of the funder is necessary and sufficient for arbitrators to make their own conflict analysis. Second, arbitrators should disclose any interest they have in litigation funders, regardless of whether that funder is funding a party in the dispute before them. … Finally, third-party funders should take it upon themselves to create a harmonized ethics code in the same vein as arbitrators have created the [International Bar Association Guidelines on Conflicts of Interest in International Arbitration]. [Citations omitted.]

The judges also decided to recognize work done by a group of students at the Ohio State University Moritz College of Law with a special Student Innovation Award. The award was presented to Maxwell Herath, Julie Howard, Konner Kelly, and Meara Maccabee for "Initiating Constructive Conversations Among Polarized University Student Groups," at the Moritz College of Law's Divided Community Project.

The 26-page booklet, available at https://bit.ly/3zoDZ8N, is designed to help campus community members—"university faculty, administrators, students, or members or leaders of affected campus groups"—"initiate and organize constructive conversations between polarized groups in a college or university setting. It guides those taking the initiative through the entire process. The process begins with planning, moving to initial contacts before the discussions between groups begin. It includes suggestions during those conversations and afterward."

The paper, the introduction continues, "is tailored to help … navigate the unique needs and challenges of a college or university environment and student groups operating in good faith that become bitterly divided over issues such as politics or policy."

The four students prepared a video describing their work and acknowledging their recognition. The video was introduced by the students' adviser, former Moritz Dean and Prof. Nancy Rogers, and summarized on the video by Dean Emeritus and Associate Prof. Tom Gregoire.

Rogers said, "These students came up with a framework of skills to implement [their idea about addressing conflict]. They tried it out with two of the most polarized student groups on campus. And it worked successfully and they wanted to make it available."

Gregoire concluded the video, calling the work courageous in its efforts to move people past conflict. "They didn't just write a document," Gregoire said, "They implemented it. This is work in practice, and I have seen the difference that it made."

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CPR Institute members can view a video of the awards presentations at www.cpradr.org/2024-annual-meeting-videos.