Alternatives
TO THE HIGH COST OF LITIGATION

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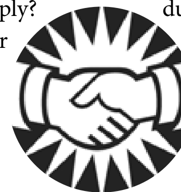
International ADR

To Litigate Abroad, Or to Arbitrate? That Is the Question.

BY NICHOLAS P. CONNON & ROBERT A. DE BY

At an American Bar Association/Los Angeles County Bar Association meeting on international arbitration last year, one of the speakers took the position that he preferred international litigation over international arbitration. It was a surprising and slightly discordant position because of the venue.

But because it came from in-house counsel, the sentiment expressed needs serious consideration. Are there valid reasons why a client should prefer international litigation over arbitration? And if so, what are they and under what circumstances do they apply?



Experience shows that the number of cases in which the parties agree to a submission clause and thus opt for arbitration after the dispute has arisen is, relatively speaking, very small.

Even smaller is the number of cases where there is an arbitration clause but both parties agree, nevertheless, to go to court.

And virtually nonexistent are cases where there is an arbitration clause but one of the parties succeeds in litigating the matter against the wishes of the other party.

Accordingly, the choice whether to litigate or arbitrate in international matters is rarely if ever available once the dispute has arisen. As a result, meaningful choice between these two options needs to be made at the contracting stage by either agreeing to an arbitration clause, or by leaving the matter subject to international litigation if a dispute were to arise during the parties' relationship.

The underlying reason why this particular in-house counsel preferred international litigation over arbitration is the often-heard lament that arbitration and arbitrators are getting slower and more expensive.

Assuming for argument's sake that this is true, the question is whether litigating instead will make the process any faster or cheaper. And even so, is what has to be given up to gain speed and save costs worth it? Another reason the in-house attorney at the seminar gave for his preference to litigate is that the resulting judgment would be easier to enforce overseas than an arbitration award.

SPOTTING THE DIFFERENCES

Let's assume for this article a complicated, high-value dispute typically found in international arbitrations between parties in countries whose legal systems differ significantly. Let's see how it may fare in a foreign court compared to an international arbitration.

Investigating the dispute, gathering the facts, and reviewing the evidence in the posses-

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CPR News

ANNUAL AWARDS PRESENTED FOR A COURT RESEARCH PAPER, PIONEERING EUROPEAN MEDIATION WORK, AND TO A DIVERSITY LEADER

The CPR Institute's 29th Annual Awards were led by presentations to an Italian conflict resolution provider, a website devoted to arbitration coverage, and for a professor's inquiry into court-annexed ADR.

And Elpidio Villarreal, senior vice president and head of global litigation of pharmaceutical maker GlaxoSmithKline in Philadelphia, was presented with the CPR Award for Outstanding Contribution to Diversity in ADR.

This year's awards focused on academic work that advances the conflict resolution field. They were presented at a dinner hosted by Weil, Gotshal & Manges at the firm's New York offices on Jan. 11, just before the 2012 CPR Annual Meeting.

The Outstanding Practical Achievement Award went to Italy's ADR Center, a Rome-based provider that through training and education over the past decade has been instrumental in changing attitudes about commercial conflict resolution first in Italy, and later throughout Europe.

An award for outstanding electronic media about ADR was presented to the Kluwer Arbitration Blog, which closely watches worldwide arbitration cases, statutes and corporate use of ADR processes.

The professional articles award went to Roselle L. Wissler, research director at the Lodestar Dispute Resolution Program at Arizona State University's Sandra Day O'Connor College of Law in Tempe, Ariz. She studied attorneys' comparative views of court-connected settlement programs, which concluded that mediation with court-staff mediators, rather than volunteer neutrals, got the most positive responses, and the least negative ratings.

The other January award winners were:

- Short article—S.I. Strong, for an exploration of class arbitration in Europe;
- Student articles—2011 Ohio State University Moritz College of Law graduate Michael Diamond's industry-specific law review

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Worldly Perspectives

Mediation Is Poised for a Finnish Take-off

BY GIUSEPPE DE PALO AND MARY B. TREVOR

Finland has a long tradition of mediation use in certain areas such as labor disputes. And the international mediation efforts of Finland's former president and the 2008 Nobel Peace Prize winner, Martti Ahtisaari, are widely known.

But the use of the process in commercial disputes is still in its initial stages.

The traditional method of resolving commercial disputes—both domestic and international—has been arbitration. There are signs, however, that mediation could be increasing in commercial disputes.

As opposed to most other countries, in Finland it is the bar that has been the forerunner in developing mediation as an alternative method of resolving commercial disputes. The Finnish Bar Association launched its mediation rules in 1998, and initiated public discussion on alternatives to the traditional win-lose methods of dispute resolution, i.e., litigation and arbitration.

Since then, the Finnish Bar Association has given basic training in mediation to about one-third of its 1,900 members, of which 317 also have completed an advanced mediation training module.

De Palo is cofounder and president of the ADR Center, the largest private ADR services provider in continental Europe and a member of JAMS International. He is based in Milan. He also is the first International Professor of ADR Law & Practice at Hamline University School of Law in St. Paul, Minn. Trevor is an associate professor of law and director of the legal research and writing department at Hamline. Flavia Orecchini and Lauren Keller, of the ADR Center International Projects Unit, assist the authors with research. This month's column was prepared in collaboration with Petri Taivalkoski, a partner at Roschier Attorneys Ltd., Helsinki. He focuses on dispute resolution. He has broad experience in cross-border litigation and arbitration in subjects such as energy, product liability, IP, agency and distribution relationships, competition law and white collar crime. Taivalkoski joined Roschier in 1991 and became Partner in 2000.

The use of mediation, nevertheless, remained at a rather low level during the early years of the past decade. There were only a few dozen completed mediations reported to the Finnish Bar Association. Since 2005, the Arbitration Institute of the Finland Chamber of Commerce, the nation's only arbitration institution of practical relevance, has allowed the appointment of mediators—"conciliators" in the institute's parlance—for commercial disputes. It has so far appointed a mediator in just one case.

THE ROLE OF JUDGES

All this changed rapidly following the Act on Mediation in Courts (1015/2005), which came into force on Jan, 1, 2006. On the basis of the act, judges in general courts of law were able to act as facilitative mediators in basically any sort of civil and commercial case.

By the end of 2010, about 600 completed court mediations had been reported to the Ministry of Justice. The act was repealed last year, when the Finnish Parliament implemented the European Directive on certain aspects of mediation in civil and com-

(continued on next page)

The Basics

Finland is the eighth largest country in Europe, covering an area of more than 338,000 square kilometers. Its neighboring countries are Sweden, Norway, and Russia; below the Gulf of Finland and to the south are the Baltic countries Estonia, Latvia and Lithuania. With a population of 5.4 million, Finland is one of the most sparsely populated countries in Europe.

Finland is a parliamentary democracy with a republican constitution. Before gaining independence in 1917, Finland had been a Grand Duchy under Russia since 1809. Prior to that, Finland was a province of the Kingdom of Sweden for 700 years. This common history is the basis of many similarities between Finnish and Swedish societies, which can be seen in the culture as well as in legal and political structures. Finland has been a European Union member since 1995, and has been part of the Euro area as of its formation.

Finland has traditionally been a small open economy with a large export sector in relation to GNP. Today, Finland's main industrial sectors that together account for more than 80% of the total exports are the metal, electronics, forestry, and chemicals industries.

The Finnish legal system has developed in close connection with that of the other Nordic countries—Sweden, Norway, Denmark and Iceland—and presently they contain the same general aspects. Finland has a statutory legal system with the primary source of law being the written law. The constitution and acts of a constitutional character, such as international treaties, form the highest level of the normative hierarchy. The most essential domestic sources of law are parliamentary acts and accessory decrees and orders issued by the government or ministries. EU law is applied simultaneously with Finnish law and takes precedence over national legislation.

According to the Finnish Constitution, judicial power is ascribed to independent courts of law, with the Supreme Court (in Finnish, *korkein oikeus*) and the Supreme Administrative Court (*korkein hallinto-oikeus*) exercising supreme jurisdiction as the courts of final instance.

[Key source: https://www.cia.gov/library/publications/the-world-factbook/geos/fi.html.]

Worldly Perspectives

(continued from previous page)
mercial matters (Directive 2008/52/EC), focused on cross-border matters, and which has been the subject of regular examination in this column. See, e.g., Giuseppe De Palo and Mary B. Trevor, "Update: Nations Are Sharing their Progress on Installing the Cross-Border Mediation Directive," 29 *Alternatives* 201 (December 2011). The directive was implemented by enacting the Act on Mediation and Confirming Settlements in Courts (394/2011, known as "the Mediation Act 2011"), which is discussed in more detail below.

As was the case with the Finnish Bar Association, Finland's Ministry of Justice quickly recognized that mediation is not something that lawyers are necessarily trained to do, and it requires specific skills and training.

Accordingly, the training required for judges that act as mediators is similar to the training organized by the Finnish Bar Association for its members. Both training processes were originally developed in cooperation with the English mediation specialists, Lawrence Kershen, accredited by London-based CEDR and a neutral with London's Tooks Chambers, and David Richbell, of Olney, England's Mediation & Training Alternatives, or MATA. The training emphasizes understanding the philosophy of facilitative mediation and the use of interactive role-play exercises.

Court mediation is thus based on the same principles as out-of-court mediation conducted by the Finnish Bar Association, i.e., it is voluntary, and the mediator's role is facilitative. Following the procedure, if the mediation does not lead to a settlement, the mediator judge is disqualified from taking any part in the handling of the dispute in court.

As to the legislative framework, there is no general legal statute regulating the accreditation of mediators. The Finnish Bar Association grants accreditation to those of its members who have completed the basic and advanced mediation training organized by the bar. Judges who act as mediators are required to complete the corresponding training organized by the Finnish Ministry of Justice.

MEDIATION, OUT-OF-COURT

Mediation services that are not court-annexed continue to be offered by the Finnish Bar Association. The bar association offers mediation in all disputes in which settlement is permitted—that is, those that do not require a court decision.

The mediation is entirely voluntary and confidential. The mediator is a member of the bar who impartially assists the parties in negotiating and reaching settlement. The mediator is not a judge and cannot make binding decisions concerning the dispute.

The bar association has its own mediation rules, which govern the procedure's voluntary and confidential aspects, among other points. But there is no set procedure for the mediation. Therefore, the parties can agree on procedural matters with the mediator at the beginning of the mediation. The bar association's website (www.asianajajat.fi/english) provides a list of members whom parties can appoint as mediators. The bar association also provides a model mediation agreement.

> ## The Rules Are Ready
>
> **The profile:** Finland.
>
> **Mediation prospects:** Outstanding. New laws and rules are in place. Growth numbers are appearing already.
>
> **Anything unusual?** Yes. What goes on in court mediation is basically public, despite confidentiality presumptions. Anticipate a move to private processes, or a change in the law.

IMPLEMENTING THE NEW LAW

The most recent development in the Finnish mediation scheme is the enactment of the new Mediation Act 2011.

It deals primarily with mediation in court in civil matters, and also includes some provisions regarding enforcement of settlement agreements made out-of-court. As stated above, the new Mediation Act 2011 repealed the 2005 mediation act, but the changes it brought were relatively small. Therefore, the implementation did not generate much debate.

Under the 2011 act, court mediation refers to a procedure in which the judge in court acts as the mediator, as opposed to a situation where the judge simply refers the parties to mediation out-of-court or to another mediator or organization. The purpose of these new features has been to create alternatives to court procedures and also, in a certain sense, to make courts more attractive to parties by giving them more possible modes to assist in resolving the dispute.

One of the few debated issues in the act's formulation was the confidentiality of the court mediation process. The Mediation Act 2011 presupposes that mediation is public, except for caucus sessions where only one party is present. The ministerial working group that prepared the government's proposal had explicitly emphasized confidentiality and privacy in court mediation.

But the parliamentary law committee, which was set to prepare the statutory provisions and present its reasoned recommendations, took a different view—it considered administrative transparency as paramount.

Similarly, the parliamentary ombudsman, whose function is to present his views and recommendations on legislative proposals to the parliamentary committees, supported the law committee's view by stating that privacy in court mediation might not comply with the Finnish Constitution. The argument remains, however, that mediation is not administration of justice, but assisted negotiation, which should be private and confidential.

Although it was difficult to accommodate these differing views at first, in practice the judge can order the mediation to be conducted behind closed doors, should the parties so request.

Yet confidentiality of the mediation process does not erase the problem that the me-

diation documents, like any other court documents, become public during the process. This is very different in comparison to other Nordic countries, where confidentiality in mediation is a basic concept.

On the other hand, in line with the Nordic tradition, out-of-court mediation under the Finnish Bar Association mediation rules is confidential. It is therefore possible that future statutory enactments or amendments will change the Finnish court mediation process by providing greater confidentiality protection.

REQUEST A JUDGE

Court mediation can be commenced either prior to or during pending court proceedings. Where the mediation is commenced prior to initiating proceedings, the parties must file an application for mediation with the court. When mediation is commenced during already pending proceedings, either of the parties can ask for mediation or the judge can suggest it.

When the application is filed prior to proceedings, the parties are permitted to present their request to the particular judge they wish to serve as the mediator. Clearly, the judge requested by the parties can no longer act as a judge in possible judicial proceedings between the parties in the matter.

By contrast, in mediation commenced during *pending* proceedings, the parties are not automatically guaranteed to have their choice of judge to sit as the mediator. Such requests nevertheless may be presented informally in the preparatory hearings.

The parties' ability to request the appointment of a particular judge as mediator was criticized by the parliamentary ombudsman during the preparatory works of the Mediation Act 2011. He considered that the ability to choose may endanger the neutrality and independence of the court or particular judge.

But this consideration was not as prominent in relation to mediation as it would have been in relation to adjudication, as the judge's role is entirely different: The judge acts as a facilitator to the agreement to be reached by the parties, and is not involved as a decision-maker.

The Mediation Act 2011 regulates the process of court mediation in more detail. It requires the mediation to be carried out expediently, respecting equality and impartiality. It provides an opportunity to hear both parties, and possibly also other persons or evidence. Where the parties agree, the mediator can negotiate privately with only one of the parties. Most other procedural issues are to be agreed between the parties and the mediator.

The court's formal decision to confirm the settlement reached between the parties during the court mediation process can be appealed by the parties in accordance with the appeal procedure that is generally applicable to the particular court's decisions.

But there is no possibility to appeal the decision on its merits, i.e., the contents of the settlement agreement. There is also no possibility for appealing a decision to commence court meditation, to dismiss the request to commence court mediation, or to end court mediation. The court's decision to confirm the settlement is enforceable under the Finnish Enforcement Code (2007/705).

OUT-OF-COURT'S ENFORCEMENT

With regard to settlement agreements achieved out-of-court, the Mediation Act 2011 enables confirmation in court, as a result of which these agreements become directly enforceable.

It follows that settlement agreements achieved in a mediation conducted under the mediation rules of the Finnish Bar Association are enforceable if confirmed this way by the court's decision. Prior to the Mediation Act 2011, settlement agreements were as a rule valid and binding, but not sufficient for enforcement without a suit on the merits. This act provision also is applicable to the enforcement of settlement agreements made in another EU member state.

The application for confirmation of the out-of-court settlement must be made in the form required by the act, and the court's confirmation decision can be appealed. It should be noted, however, that just as any documents processed during mediation in court become public, an out-of-court settlement agreement—and its attachments—become public during the confirmation application process in court.

COSTS, IN AND OUT OF COURT

Court mediation is subject to insignificant court charges only. The mediation conducted by a judge is offered as a public service in a similar manner as adjudication before courts of law.

Under the Finnish Bar Association mediation rules, the bar does not charge any administrative fees for nominating a mediator or making a proposal to this effect to the parties. The mediator charges an hourly fee to be agreed upon by the parties for the mediator's services, which, according to the main rule, is split equally between the parties.

As a point of comparison here, the fee of the Arbitration Institute of the Finland Chamber of Commerce for nominating a mediator is 5,000 Euros.

* * *

The parties' preference to choose facilitative mediation instead of litigation or other dispute resolution methods has clearly increased in Finland during the last years. One of the main reasons for the increase of mediation cases is the introduction of court mediation.

The Mediation Acts of 2005 and 2011 have done a great deal in facilitating mediation's growth as a dispute resolution method by providing an up-to-date framework for court mediation, and the enforcement of parties' out-of-court settlements.

This is a welcome development for both the Finnish court system and the parties. And the growing awareness of court mediation is also likely to increase the demand for out-of-court mediation services.

More information on mediation in Finland can be found at the Finnish Bar Association's website above, and at the site of the Central Chamber of Commerce of Finland, www.keskuskauppakamari.fi/site_eng/.

* * *

Next month, Worldly Perspectives *provides perspectives on women in international conflict resolution matters.*

(For bulk reprints of this article, please call (201) 748-8789.)

ADR Contracts

Your New Guide to Arbitration Clauses, Part IV

BY M. SCOTT DONAHEY

Editor's note: With this article, author M. Scott Donahey concludes his four-part series for Alternatives' *readers providing a new guide to arbitration clauses. He began his multi-part series in December by focusing on arbitration selection, with six contract options that can be adapted to fit drafters' requirements. In January, he shared three baseball arbitration options. Last month, the form clauses continued with a software development and installation ADR clause, and options for international patent arbitration.*

In this month's finale, Donahey provides his strategies for installing expedited arbitration rules in contracts, with two variations for international matters. He also provides forms for construction projects, including three consequential damages limitations, and six other important industry forms.

As noted at the outset of the previous installments, these clauses are not intended to be used in consumer or employment contracts. They are for commercial matters involving sophisticated entities of roughly equal bargaining power. The author uses the CPR Institute as the provider institution throughout these examples, since it can provide the assistance the parties request under the clauses. Other ADR institutions also may be able to provide such services, but parties should make certain that their chosen institution is able and willing to provide the requested services. Adjustments likely would be needed in the clauses for different providers. [The CPR Institute is publisher, with John Wiley & Sons' Jossey-Bass unit, of Alternatives.*]*

The author is a Palo Alto, Calif., neutral focusing exclusively on domestic and international arbitration, mediation, and domain names under the Uniform Domain Name Dispute Resolution Act. He has more than 25 years experience in arbitrating complex commercial, intellectual property, and international commercial disputes. He has decided more than 150 commercial arbitration cases and more than 300 disputes under the UDRP. For more information, see www.scottdonahey.com. For the author's full acknowledgments in preparing this multi-issue article, see "Your New Guide to Arbitration Clauses, Part I," 29 *Alternatives* 198 (December 2011). See also, "Your New Guide to Arbitration Clauses, Part II," 30 *Alternatives* 3 (January 2012), and "Your New Guide to Arbitration Clauses, Part III," 30 *Alternatives* 19 (February 2012).

* * *

I am sure that, somewhere, there must be in-house counsel who enjoy spending lots of their client's money on a protracted arbitration process that results in the drafting of an award that reads like a U.S. Supreme Court opinion, but is three times as long. Certainly, however, they are in the minority.

When discussing international arbitration with counsel, one hears that it takes too long, is too expensive, and is mired in its academic and anachronistic approach. Based on these discussions, here are two alternative clauses for speeding up the process and reducing the costs involved.

Expedited Arbitration Rules
Option 1—International Arbitration
Modified CPR International Rules with Strict Time Tables

Any dispute which may arise under or in connection with this Agreement shall be finally settled as follows:

1. A party must first send written notice of the dispute to the other party. The parties shall then attempt to resolve the dispute by good-faith negotiations between their respective Presidents (or their designees). If the parties, for whatever reason, fail to resolve the dispute within fifteen (15) days of receipt of such written notice, either party may initiate an arbitration proceeding as provided herein.
2. A "written notice" under this agreement shall constitute a communication by electronic mail to the other party, and, once selected and confirmed, to the Arbitrator(s), and upon the initiation of any arbitration, to CPR. Each party shall maintain copies of the electronic transmission showing to whom the transmission was sent, the date and time of its transmission, and the content thereof. Notices and communications shall be deemed to be effective as of the date of receipt. Proof of transmission shall be deemed prima facie proof of receipt of any notice or communication given under these or the CPR Rules for Non-Administered Arbitration of International Disputes (the "CPR International Rules")[available at www.cpradr.org]. This provision shall supersede Rule 2.1 of the International Rules. The following rules shall also be superseded or modified as follows:
   a. Rule 2.2 shall be superseded in its entirety;
   b. Rule 3 shall be superseded in its entirety;
   c. In Rule 5.1, the phrase, "as provided in International Rules 3.3 and 3.5" shall be deleted.
   d. Rule 6.4 shall be superseded in its entirety;
   e. In Rule 6.5, the clause, "Where a party has failed to appoint the arbitrator to be appointed by it," shall be deleted;
   f. In Rule 9.3: a) "pre-hearing" shall be replaced with "preparatory"; b) the clause "unless the Tribunal is of the view that further submissions from the parties are appropriate prior to such conference" is to be deleted; c) the clause, "Matters to be considered in the initial pre-hearing conference may include, inter alia, the following:" is to be deleted; d) subparts (a) through (e) and the one sentence paragraph immediately following shall be deleted.
   g. Rules 9.4 through 9.6 shall be superseded in their entirety.
3. Documents required to be served, filed or exchanged shall be transmitted by electronic mail to the parties and/or to the arbitrators. Each party shall maintain copies of the electronic transmission, showing to whom the transmission was sent, the date

and time of its transmission, and the contents thereof and any attachments thereto.

4. The written notice constituting the initiation of the arbitration proceeding as provided in Section 1, above, shall provide that the parties will conduct the arbitration under the International Rules, except as expressly modified herein or by written agreement of the parties during the course of the proceedings. The written notice shall include in the text or attachments thereto:
   a. The full names, descriptions, and addresses of the parties;
   b. A demand that the dispute be referred to arbitration pursuant to the CPR International Rules and the written modifications contained herein;
   c. The text of the arbitration clause or the separate arbitration agreement that is involved;
   d. A detailed Statement of Claim that contains a comprehensive statement of the facts and legal arguments supporting the claim, including a statement of relief sought, which includes, to the extent possible, an indication of any amount(s) claimed;
   e. To the extent possible, the Statement of Claim shall be accompanied by the documentary evidence upon which the Claimant relies, including the contract at issue, and supporting affidavits, together with a schedule of such documents. To the extent that such documentary evidence is voluminous, the information should be sent in a series of electronic messages sufficient to ensure transmission of all the information completely and securely;
   f. The name and contact information, including the E-mail address, of the arbitrator appointed by the Claimant, unless the parties have agreed that neither shall appoint an arbitrator. The arbitrator must execute a statement to the effect that he has reviewed these provisions and the International Rules (as modified hereby) and that he or she is willing and able to comply with all of the requirements and time limits set out herein.
5. Within sixty (60) days after receipt of the notice of arbitration, the Respondent shall serve and file a Statement of Defense. Failure to deliver a Statement of Defense within sixty (60) days shall not serve to delay the arbitration and, where each side is to appoint an arbitrator, it shall constitute a waiver of Respondent's right to appoint an arbitrator and the CPR shall make such appointment, unless Respondent timely requests and is granted by CPR a thirty (30)-day extension to file its Statement of Defense. No further extensions of time to file a Statement of Defense may be granted.

   The Statement of Defense shall reply to the particulars of the Statement of Claim and shall be accompanied by the corresponding documentary evidence as described in Sections 4 (d) through (f) above. The Respondent may include with its Statement of Defense any Counterclaim within the scope of the arbitration clause. If Respondent does so, the Counterclaim shall include the information set out in Sections 4 (a) through (f) above.

   If a Counterclaim is asserted, within 30 days after receipt thereof, Claimant shall serve and file a Statement of Defense to Counterclaim. The Statement of Defense to Counterclaim shall reply to the particulars of the Counterclaim and shall be accompanied by the corresponding documentary evidence as described in Sections 4(d) and (e) above. Upon request by Complainant, CPR may grant an extension of time in which to file the Statement of Defense to Counterclaim by fifteen (15) days. No further extensions of time to file a Statement of Defense may be granted.
6. Unless otherwise agreed in writing by the parties prior to the preparatory conference, the place of arbitration shall be San Francisco and the language of the arbitration shall be English.
7. The Arbitrator(s) may extend the time in which any task is to be performed under the International Rules only once, and for no more than thirty (30) days.
8. Within thirty (30) days of appointment, the Arbitrator(s) shall convene a preparatory conference. Prior to the date of the preparatory conference, the Arbitrator(s) shall circulate an agenda of the items to be discussed. Items to be discussed shall include, but not be limited to:
   a. dates for disclosure of documents;
   b. date for any requests for production of additional documents. No discovery other than one request for specific documents or limited categories of documents will be permitted;
   c. date for exchange and filing of exhibits;
   d. date for exchange and filing of memoranda (as more fully described in Rule 12.1 of the International Rules). Memoranda may not exceed twenty (20) pages in length, exclusive of exhibits and attachments;
   e. precise location of hearing;
   f. dates for and length of hearing. The length of the hearing may not exceed ten (10) days, and the hearing must be completed within ninety (90) days of the preparatory hearing conference. The Arbitrator(s) must issue a written reasoned award not to exceed twenty (20) pages in length within thirty (30) days of the close of the hearing.
9. There will be no formal motion practice. Parties who wish to bring a contested matter to the Arbitrator(s) will first meet and confer and attempt to resolve it amicably. Should the parties fail to resolve the contested matter, either party may give the Arbitrator(s) notice in writing of the nature of the contested matter in no more than two thousand (2000) words, including the party's proposed resolution, and the costs and fees involved in attempting to resolve the contested matter and in bring-

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Better Clauses, Round Four

The guide: New developments for controlling your arbitration results via better contract drafting.

The focus: Expediting international matters and construction projects.

The specialties: Three construction consequential damages exclusions, and three options for limiting interest awards.

ADR Contracts

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ing it to the attention of the Arbitrator(s). Within five (5) business days the other party shall respond by written notice of no more than two thousand (2000) words, including that party's proposed resolution, and the costs and fees involved in attempting to resolve the contested matter and in responding to the Arbitrator(s).

Within five (5) business days, the Arbitrator(s) shall give its determination of the contested matter and shall award fees and costs against the losing party.

Expedited Arbitration Rules
Option 2—International Arbitration
Fixed Time Table for Award Format with Arbitrator Discretion

Any dispute which may arise under or in connection with this Agreement shall be finally settled as follows:

1. A party must first send written notice of the dispute to the other party. The parties shall then attempt to resolve by good-faith negotiations between their respective Presidents (or their designees). If the parties, for whatever reason, fail to resolve the dispute within twenty-eight (28) days of receipt of such written notice, either party may initiate an arbitration proceeding as provided herein.
2. A "written notice" under this agreement shall constitute a communication by electronic mail to the other party, and, once selected and confirmed, to the Arbitrator(s), and upon the initiation of any arbitration, to CPR. Each party shall maintain copies of the electronic transmission showing to whom the transmission was sent, the date and time of its transmission, and the content thereof. Notices and communications shall be deemed to be effective as of the date of receipt. Proof of transmission shall be deemed prima facie proof of receipt of any notice or communication given under these procedures.
3. If the parties have agreed upon a procedure for selection of the Arbitrator(s), the filing party shall set out such procedure in its written notice of claim, and CPR shall follow that procedure. If the parties have not agreed on that procedure, CPR shall appoint three arbitrators to conduct the arbitration, taking into account the nationalities of the parties.
4. The written notice of claim as provided in Section 1, above, shall include in the text or in attachments thereto:
   a. The full names, descriptions and addresses of the parties;
   b. A demand that the dispute be referred to arbitration pursuant to the CPR Rules for the Non-Administered Arbitration of International Disputes (the "CPR International Rules")[available at www.cpradr.org] and the written modifications contained herein;
   c. The text of the arbitration clause or the separate arbitration agreement that is involved;
   d. A statement of the general nature of the Claimant's claim;
   e. The relief or remedy sought, and the name and contact information, including email of the arbitrator appointed by the Claimant, if the arbitration agreement calls for appointment of arbitrators by the parties.
5. Within 30 days of receipt of the written notice of arbitration, the Respondent shall file a written notice of defense. The written notice of defense shall include in the text or in attachments thereto:
   a. Any comments on items 4(a), (b), and (c) that the Respondent may deem appropriate;
   b. The statement of the general nature of Respondent's defense;
   c. The name and address of the arbitrator appointed by the Respondent, if the arbitration agreement calls for appointment of arbitrators by the parties.
6. If the Respondent wishes to file a Counterclaim, the Respondent may do so at the same time it gives its written notice of defense. The written notice of Counterclaim shall include in the text or attachments thereto, the information specified in 4(a) through (e) above.
7. The Arbitrator(s) must communicate their award to the parties and CPR within two hundred seventy (270) days of their appointment. Neither the arbitrator(s), nor CPR may extend this deadline. The arbitrator nominees must sign a statement attesting that they have read and will comply with this provision before they may be confirmed as Arbitrator(s).
8. Within forty-five (45) days of their appointment, the Arbitrator(s) shall convene a Scheduling Conference to schedule the following events:
   a. The filing of a detailed Statement of Claim, a detailed Statement of Defense, and, where appropriate, a detailed Statement of Counterclaim (the "Statements"). Each Statement shall include in the text or in attachments thereto a comprehensive statement of the facts, legal arguments supporting the claim, a specific statement of the relief sought, and the documentary evidence on which the party is relying, including affidavits;
   b. The service of a request for documents limited to specific documents or narrow categories of documents;
   c. The service of a response to the request for documents and the production of the documents called for;
   d. Any motions on which the parties agree or which the Arbitrator(s) agree to allow;
   e. The submission of lists of witnesses which each party intends to call;
   f. The submission of direct testimony in affidavit form;
   g. The deadline for the parties and the Arbitrator(s) to specify the affiants who must be produced at the hearing for cross-examination;
   h. The exchange and filing of exhibits;
   i. The filing of pre-hearing memoranda;
   j. The dates and location of the hearing, and
   k. Any other events on which the parties agree or which the Arbitrator(s) may require.
9. Documents required to be served, filed or exchanged shall be transmitted by electronic mail to the parties and/or to the arbitrators. Each party shall maintain copies of the electronic transmission, showing to whom the transmission was sent, the date and time of its transmission, and the contents thereof and any attachments thereto.

10. The Award of the Arbitrator(s) shall be in writing, shall state the date when and place where it was made. The Award shall give the reasons on which it is based. The Award shall be signed by the Arbitrator(s). The signature of the Award by a majority of the Arbitrator(s), or in the absence of a majority, by the presiding arbitrator, shall be sufficient. Where an arbitrator fails to sign, the Award shall state the reason for the absence of the signature.

The Arbitrator(s) shall formally communicate an original of the Award to each party, the Arbitrator(s), and CPR. At the request of a party, CPR shall provide a party, at cost, with a copy of the Award certified by CPR.

CONSTRUCTION ARBITRATION

CPR has an excellent set of rules for expedited arbitration drafted by experienced construction lawyers and arbitrators. In this specialized field, what seems of most concern to practitioners is the ability of the arbitrators to award unwarranted and exorbitant damages should liability be found, and the inability of the arbitrators to grant interim relief.

With many thanks to this author's brothers and sisters in the construction field, compiled below is a set of exclusionary and/or limitation clauses which circumscribe an arbitrators' power to award certain types of relief, and a provision that empowers the arbitrator to award interim relief.

The first three options deal with consequential damages.

The first consequential damages exclusion provision is written from the point of view of the owner. It attempts to exclude the types of damages to which an owner would take exception. The second exclusion provision covers the types of consequential damages that might be awarded against a contractor or design professional. The third example limits damages for overhead to an agreed per diem amount.

Construction Disputes
Expedited Arbitration
Consequential Damages Exclusion
Option 1-Owner Provision

1. The parties agree to resolve all disputes arising out of or in connection with this Agreement pursuant to the CPR Rules for Expedited Arbitration of Construction Disputes [available at www.cpradr.org], except as expressly modified herein.
2. The arbitrators shall have no authority to directly or indirectly award any form of consequential damages, as such damages have been waived by the parties to this Agreement. Such prohibited damages include, but are not limited to, lost profits, home office overhead, or any form of overhead not directly incurred at the project site; wage or salary increases; ripple or delay damages; loss of productivity; increased cost of funds for the project; extended capital costs; lost opportunity to work on other projects; inflation costs of labor, material or equipment; non-availability of labor, material, or equipment due to delays; increased cost of bonding due to delay; or any other indirect loss arising from the conduct of the parties to this contract.

Construction Disputes
Expedited Arbitration
Consequential Damages Exclusion
Option 2-Contractor or Design Professional Exclusion

1. The parties agree to resolve all disputes arising out of or in connection with this Agreement pursuant to the CPR Rules for Expedited Arbitration of Construction Disputes [available at www.cpradr.org], except as expressly modified herein.
2. The arbitrators shall have no authority to directly or indirectly award any form of consequential damages, as such damages that have been waived by the parties to this Agreement. Such prohibited damages include, but are not limited to, lost rent or revenue; rental payments for temporary offices; increased costs of administration or supervision; costs or delays suffered by others unable to commence work or provide services as previously scheduled, for which a party to this contract may be liable; increased costs of borrowing funds devoted to the project; delays in selling all or part of the project upon completion; termination of agreements to lease or buy all or part of the project, whether or not suffered before completion of services or work; forfeited bonds, deposits or other monetary costs or penalties due to delay of the project; increased taxes (federal, state, local, or international) due to delay or re-characterization of the project; lost tax credits or deductions due to delay; impairment of security; or any other indirect loss arising from the conduct of the parties to this contract.

Construction Disputes
Expedited Arbitration
Consequential Damages Exclusion
Option 3-Per Diem Limitation

1. The parties agree to resolve all disputes arising out of or in connection with this Agreement pursuant to the CPR Rules for Expedited Arbitration of Construction Disputes [available at www.cpradr.org], except as expressly modified herein.
2. The arbitrators shall award damages for increased overhead solely on the basis of $___ per calendar day of compensable delay. The arbitrators shall have no authority to award any other amount for home office or other project overhead.

The second set of exclusions and limitations cover prospective profits.

Construction Disputes
Expedited Arbitration
Option 1-Profits Exclusion

1. The parties agree to resolve all disputes arising out of or in connection with this Agreement pursuant to the CPR Rules for Expedited Arbitration of Construction Disputes [available at www.cpradr.org], except as expressly modified herein.
2. The arbitrators shall not award any profit computed on any damages, beyond claims for extra work or unpaid work under the contract provisions. No profit shall be awarded on any claims of disruption, interference or delay, whether or not part of claimed extra work.

Construction Disputes
Expedited Arbitration
Option 2-Profits Limitation

1. The parties agree to resolve all disputes arising out of or in connection with this

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ADR Contracts

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Agreement pursuant to the CPR Rules for Expedited Arbitration of Construction Disputes [available at www.cpradr.org], except as expressly modified herein.

2. The arbitrators shall award profit and overhead (both job site and home office) in the amount of $___ on any recovery for extra work not compensated under the contract, but shall make no other award for any form of extended overhead.

DEALING WITH INTEREST

The last set of exclusionary or limiting clauses deals with the arbitrator's ability to award interest. The first excludes interest except where bad faith is involved. The second excludes interest in excess of the amount of the claim as of a certain time. The third limits interest on claims to run from the date on which they are first asserted.

Construction Disputes
Expedited Arbitration
Option 1–Interest Exclusion

1. The parties agree to resolve all disputes arising out of or in connection with this Agreement pursuant to the CPR Rules for Expedited Arbitration of Construction Disputes [available at www.cpradr.org], except as expressly modified herein.
2. No pre-award interest may be provided by the arbitrators, absent an express finding that the party against whom an award is made acted in bad faith.

Construction Disputes
Expedited Arbitration
Option 2–Interest Only on Excess of Claim

1. The parties agree to resolve all disputes arising out of or in connection with this Agreement pursuant to the CPR Rules for Expedited Arbitration of Construction Disputes [available at www.cpradr.org], except as expressly modified herein.
2. Interest at ___% simple annual rate shall be awarded on any part of the claim which equals or exceeds the amount claimed for such part as measured **[CHOOSE ONE:]** [at the time of the award] [at the time the arbitration hearing commences] [at the time a claim is filed] or [at any time]. The arbitrator may not award any interest on sums which do not equal or exceed the amount so claimed.

Construction Disputes
Expedited Arbitration
Option 3–Interest Limitation as to Date of Claim

1. The parties agree to resolve all disputes arising out of or in connection with this Agreement pursuant to the CPR Rules for Expedited Arbitration of Construction Disputes [available at www.cpradr.org], except as expressly modified herein.
2. If the amount of a claim item is increased at any time, interest shall be awardable only as of the date that the new sum is first claimed.

INTERIM RELIEF

The final construction provision expressly empowers the arbitrators to grant interim relief.

Construction Disputes
Expedited Arbitration
Interim Relief

1. The parties agree to resolve all disputes arising out of or in connection with this Agreement pursuant to the CPR Rules for Expedited Arbitration of Construction Disputes [available at www.cpradr.org], except as expressly modified herein.
2. At the request of either party, the arbitrators shall take such interim measures or shall make such provisional orders as they deem necessary concerning the subject of the dispute. Any provisional remedy (including injunction or specific performance) which would be available from a court of law or in equity shall be available from the arbitrators pending completion of the arbitration. Such measures, orders or relief may include, but are not limited to, steps to preserve assets, set aside funds, provide security, maintain or protect material or equipment on or off the site, turnover or conserve plans, manuals, CAD files, spare parts or other things necessary for the completion of the project or its reasonable operation, or to avoid unreasonable damage or delay to the work. The benefited party of such provisional remedy or injunctive relief shall be entitled to enforce such remedy in court immediately, although a final arbitration award has not yet been rendered.
3. The arbitrators may require security for the costs of such measures, relief, or orders in such amount or under such conditions as they may see fit.
4. A request for interim measures, relief, or orders by a party to a court of competent jurisdiction shall not be deemed incompatible with the agreement to arbitrate, nor shall it be deemed a waiver of such arbitration provision. This clause applies to the filing of any stop payment notice, mechanics lien, payment bond claim, bankruptcy claim, temporary restraining order, preliminary or final injunction, or other similar form of relief.
5. Any such measure, relief or order shall be without prejudice to the final determination of the controversy by the arbitrators. At the request of either party, the arbitrators shall state whether the award encompasses the claims or rights subject to such interim measures, relief, or orders.

* * *

One size fits all arbitration clauses fit no better than one size fits all clothes. For those who have the time and skill to construct a bespoke clause to suit a particular contract or a submission agreement tailored to a singular dispute, such an approach is preferable to even these off-the-peg provisions.

Busy in-house counsel, however, often don't have the time or the opportunity to create clauses on the fly for particular situations. What in-house counsel do have is a need for arbitration provisions that provide for expeditious, cost-effective proceedings. This ties in perfectly to CPR's mission statement and the use of its rules in these four articles: to provide and promote new and better ways to not only resolve, but to prevent disputes. The author hopes these clauses will prove useful to fit particular disputes and will provide new alternatives to arbitrations that more and more are resembling litigation in national courts.

(For bulk reprints of this article, please call (201) 748-8789.)

ADR Brief

THE NEXT GENERATION: RESEARCH ON RESEARCH AT NEXT MONTH'S ABA DR SECTION CONFERENCE

A white paper has been circulating this winter that seeks direct action: to push the mediation profession's movers and shakers to incorporate more scientific investigation into quality initiatives. The objective is to translate those results to better ADR.

This second generation theory-to-practice effort sets out goals and an agenda for a mini-conference—two consecutive sessions that will be a part of next month's American Bar Association Section of Dispute Resolution 14th Annual Spring Conference in Washington, D.C.

Veteran California court ADR administrator Gary Weiner is the author of the 17-page memorandum that urges practitioners to revisit the fundamentals of alternative dispute resolution. The memo criticizes the lack of hard data on specific mediation room methods. He says that studies can be improved to provide better results that will lift the profession.

His main goal is to institutionalize a continual improvement in ADR processes—and to burst a few bubbles about accepted practices that may not be as important as conventional views have come to accept.

Many practitioners came to mediation "because it feels right," says Weiner, who is mediation program administrator in California's First District appellate court in San Francisco. "It always felt right. Now, we need to dig deeper."

Weiner points out that there isn't a shortage of data on program results. But on mediation methods and techniques, he says, research usually relies on asking neutrals what they do in the ADR session, rather than analyzing how those tactics produce settlement.

To build process improvement efforts, Weiner wants to instill rigorous scientific analysis on mediation practices. "If I was king," says Weiner, "I would want there to be an annual mediation research conference, just like any science or socio-psychological discipline."

For now, Weiner, who is chairing the ABA section's court ADR committee's quality assurance subcommittee, has set out an agenda for the April 19 sessions featuring top names in analytical ADR research. [One of the panelists will be Roselle Wissler, a recipient of one of the latest set of CPR Awards; details begin on page 66 of this issue.] The panelists will be asked about how to conduct mediation research, and develop and disseminate more empirical work, in a session called "Looking Forward."

That will be preceded by a seminar examining the history of mediation research, and a status update on research being conducted today.

Data Void

The problem: There is plenty of ADR research, but not enough data.

What's missing? We know program results, but we don't know well enough what mediation methods produce those results.

The future: Maybe annual mediation research conferences steeped in stats? This article is an advance look at next month's ABA DR Section conference on sessions that will push for more scientific study.

Weiner's memo, which he has been distributing to the panelists, DR section officials, and others with an interest in the subject, sets out the meeting agenda, but also serves as background on mediation quality issues, particularly in his area of expertise, court programs. The memo also "is a call to those in our profession to sharpen our conversation about mediation, to raise the bar on what we take to be "true." . . .

The point appears to be either take down accepted beliefs about what mediation is and what people want in it—or prove those tenets. "There are quasi-religious beliefs about how it should be done that never were derived from anything other than what we felt should be done—not science," says Weiner.

Weiner illustrates the point with the ubiquitous idea that mediation can allow parties to vent, which clears the air for positive discussions. "Now social- and neuroscience says it might not be such a good thing," he says. "It felt right, but that's not what you should always do. "

Similarly, reflective listening needs examination, he says: whether it is good, why it is good, and, most significantly, how it should be done. "Does it really increase understanding and does it produce really any valuable results that people understand?" asks Weiner. "Does that really encourage settlement?"

Weiner's paper also moves beyond the process techniques and goes after settlement itself. He writes that if a court

> emphasizes "settlement" as the primary goal of its mediation program, then we should know what mediators who work in the program ought to actually do that enhances the likelihood of settlement. I believe that the kind of "knowing" we should be aiming for is the kind that is derived from *statistically significant, verifiable, replicable empirical studies and experiment, not from opinion surveys or self reporting post hoc evaluations.* Those methods are notoriously unreliable. We should hold ourselves to the kind of rigorous standards we expect from any profession. . . .

(The emphasis is in the original.)

In the paper, Weiner explains that increasing settlements is not a given for a court program. Noting that some courts "have articulated a broader range of benchmarks for success," he cites the federal district court for California's Northern District as a location that doesn't measure its mediation program's utility with the settlement rate.

Weiner wrote that he was told that the California federal court mediation office "is concerned much more with the nature of the interaction that takes place. . . ." The program's goals, according to the memo, include:

- improved communication between litigants
- improved articulation of a litigant's own interests

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- improved understanding of the interests of their opponent
- participation in a robust examination of the legal positions taken by the litigants
- the identification of areas of agreement
- the development of options for resolution
- the thoughtful examination of matters that are important to the litigants but which are outside the scope of issues that litigation can resolve.

To make any court program improvements, the paper contends, the profession needs "to understand and identify the *behaviors* of the mediators themselves in cases who 'successfully' mediate in the [c]ourt program, however the particular court defines 'success.'" (Emphasis is in Weiner's original paper.)

Weiner praises studies on how programs operate, citing several statistical reports on mediation program issues. "But the next level down is where I got interested," he says. "Now we know how they provide systemic benefits," Weiner continues, "but how do we know the mediators that are mediating the cases are doing it as well as they can?"

Weiner says that if 100 business litigators were asked what they wanted out of mediation, "they would all say 'Settle!'" That may not be the case in, say, family court, where understanding the other side's position may be the key to the matter. But in commercial cases, notes Weiner, maintaining the relationship is almost always a consideration, too, if not a paramount concern by the time of ADR.

"Are the things the mediator is doing helping to ensure the relationship gets saved, or not?" he asks, concluding, "We can test that."

* * *

Gary Weiner says that people interested in getting involved in his subcommittee's research efforts may contact him at his work E-mail address, Gary.Weiner@jud.ca.gov.

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International ADR

(continued from front page)

sion of one's client and interviewing friendly witnesses is unlikely to be all that different whether one prepares for an international arbitration or for litigation abroad. But while there may be few savings as to time, nevertheless legal rates differ significantly depending on the country where counsel is located. Arguably, there may be some cost savings because of lower counsel fees.

Few clients, however, would feel comfortable dealing directly with counsel in a foreign or even exotic location. Besides language problems, there will be significant cultural and legal differences that need to be bridged.

Most clients would be well advised and served by dealing with counsel in their own country who has experience in the international arena even when litigating abroad. If the client opted for international arbitration, such counsel would suffice, while if it were to engage in litigation abroad the additional cost of foreign counsel—even at a potentially lower rate—would increase rather than decrease costs.

Is there then, perhaps, something to be gained time-wise by litigating abroad? Are foreign court proceedings quicker than international arbitration?

While it would in large part depend on the country's court system, there are no doubt countries in which this is true. Such gains in speed, however, are most likely to be the result of streamlined proceedings that do away with some of the procedural aspects found in international arbitrations.

The Big Decision

The goal: Settling an age-old settling question.

The inquiry: How do you really know whether an arbitration tribunal or court litigation is best for your high-stakes commercial matter?

The solution: The authors have devised a checklist. Score it, and your choice or your client advice will be much better.

For example, many foreign jurisdictions do not have any discovery. And while international arbitration provides far more limited discovery than would a U.S. court—albeit under the name of disclosure—rare is the international arbitration where the parties are not allowed to obtain any documents from their opponents.

Thus, insofar as the foreign litigation is faster for this reason, a client would not gain much if it came at the expense of obtaining necessary evidence from the other side.

Similarly, many foreign jurisdictions do not allow counsel to directly question or cross-examine opposing witnesses. While this too may make a foreign litigation quicker than an international arbitration where such is generally allowed, again such gains in speed come at significant cost.

FREE IS NICE . . .

One characteristic that virtually all court systems across the world share is that, besides some relatively minor filing fees, the proceedings and the court's involvement are free.

Arbitrators are not. There is no denying that the arbitrator's fees can be substantial and that litigating abroad may save costs in that regard. As is always the case when choices are made, however, the question here is whether quality and experience of the judiciary in the country where one would have to litigate is sufficient for the particular matter.

In addition, it is important to answer whether the option to choose one of the arbitrators and the experience and expertise the arbitration panel brings to the case merit the extra costs. One could easily imagine countries and cases for which this is true, and equally those for which it is not. Accordingly, whether arbitrators' fees are warranted will depend on

where the alternative foreign litigation will take place.

No doubt enforcement of a judgment in the country where it is rendered is cheaper and easier than enforcement of an international arbitration award. This is true even if the country where enforcement is sought is a member of a relevant convention, such as the New York Convention, formally known as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

This could be an area where choosing litigation over international arbitration results in cost savings. But given that most arbitration awards are complied with voluntarily, such an advantage is likely to be minor in most cases.

Another characteristic that all foreign legal and court systems have in common is that they are far more familiar to one's opponents. As a result, choosing to litigate abroad by necessity entails giving away the "home-court" advantage.

Moreover, such a choice entails giving up any advantages particular to international arbitration. For example, international arbitrations are a compromise between the characteristics found in the parties' respective home countries—procedurally speaking as well as when it comes to the applicable evidence rules (often chosen by the parties on an ad hoc basis or by opting for the International Bar Association Rules of Evidence).

And while in an arbitration the parties can agree on the language in which those proceedings will be conducted, the language of a foreign court proceeding is virtually always foreign. That means that both testimony and argument will be in a foreign language and that the client and at least some witnesses—most likely on the client's side—will need to participate by way of an interpreter.

YOUR CHECKLIST

In summary, while some cost and time savings may be gained by choosing to litigate abroad rather than to arbitrate, they do come at a cost. Whether it is worth it will depend in large part on the country where such foreign litigation is to take place.

The more foreign the jurisdiction is to a party, the higher the costs of any savings in time or expense. As a result, it seems that one rule one can draw in this area is that the attractiveness of international arbitration, as opposed to foreign litigation, increases depending on how different and unfamiliar the alternative, foreign court system is.

Another conclusion that seems warranted is that where the alternative is to litigate abroad in the country whose legal system is similar to one's own, and legal proceedings there are faster or cheaper than a comparable international arbitration, the alternative to litigate abroad may become more attractive.

Clients should consult with counsel with significant experience in both international litigation and arbitration in order to decide which dispute resolution mechanism is more appropriate to their particular case. In doing so, the following checklist may be of some help. For each category, assign a score of one to 10, with five being neutral. An average score above five means arbitration is the preferred path to resolution:

- Complexity of the dispute.
- Severity of conceding the "home-court advantage" to the opponent.
- Importance of arbitrators with specialized background or experience.
- Lack of sophistication or integrity of alternative foreign court system.
- The dispute's political nature or sensitivity.
- Standing and influence of opponent in the foreign jurisdiction.
- Importance of conducting proceedings in one's own language.
- Importance of securing at least minimal discovery.
- Cost savings because of the arbitration's location compared to foreign litigation.

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CPR News

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article on mediating controversial community disputes over the siting of interstate electric transmission lines, and an article that examines mediation use in "international cultural property disputes"—that is, the looting of antiquities, by another Moritz 2011 graduate, Nate Mealy.

- Book—"Elusive Peace: How Modern Diplomatic Strategies Could Better Resolve World Conflicts," by Douglas E. Noll, a neutral, trainer and consultant in Clovis, Calif.

The 2011 annual awards were sponsored by Upchurch Watson White & Max, a national ADR provider and consulting firm that is based in four southeast offices, three in Florida and one in Birmingham, Ala. (See uww-adr.com.) The student awards were sponsored by Kilpatrick Townsend & Stockton, an Atlanta-based firm with 21 offices worldwide. (See www.kilpatrickstockton.com.)

* * *

CPR's Award for Outstanding Contribution to Diversity in ADR was presented to GlaxoSmithKline's Elpidio Villarreal in recognition of his significant contributions to diversity in the ADR field.

In fact, Villarreal, known as "PD," has been active in the efforts of CPR's National Task Force on Diversity, which established the award and selects the recipients. (The academic awards are independently judged by a group of 21 practitioners; more information is available on CPR's website.)

The task force has produced an ADR Diversity audit (available at www.cpradr.org) which companies can use to analyze how their legal work is being performed. It helps companies measure and encourage the engage-

Elpidio Villarreal

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CPR News

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ment of professional women and minorities in settlement negotiations, arbitration and litigation by outside law firms.

The task force is considering a corporate commitment to diversity, an ADR mentoring program and an apprentice program designed to further diversity among neutrals chosen to mediate or arbitrate by large corporations.

But Villarreal's commitment to changing the legal profession has extended well beyond his conflict resolution work. He is a longtime board member of and advocate for LatinoJustice PRLDEF, an education and advocacy group that works throughout the Latin American community to encourage education and career building, and support civil rights.

Before joining GlaxoSmithKline—itself a recipient of CPR's 2011 Corporate Leadership Award (see CPR News, 29 *Alternatives* 146 (September 2011))—Villarreal was vice president for litigation at Schering-Plough from 2005 to 2009. For the previous decade, he was senior litigation counsel for General Electric Co. in Fairfield, Connecticut.

A former partner at Sonnenschein Nath & Rosenthal (now SNR Denton) in Chicago, Villarreal is a 1982 graduate of Columbia University (Magna Cum Laude, Phi Beta Kappa) and a 1985 graduate of the Yale Law School.

[Villarreal is a board member of the CPR Institute, which publishes this newsletter.]

"Diversity runs very deeply in our life," said Anne Weisberg, Villarreal's wife, in accepting the award on her husband's behalf at the CPR Awards dinner, adding, "In fact, it's how we met."

Weisberg recounted the story of the couple's introduction when she was working at Catalyst, which studies and advocates for women in the workplace. Villarreal, then at GE, called to commission a workforce study with the group.

And, on diversity, said Weisberg, "We actually live it." She said that her husband, a Mexican American, can't help but discuss their work and interests, since Weisberg is director of diversity inclusion at Blackrock Inc., a big New York-based investment management company.

Villarreal is known for systematizing corporate approaches to addressing caseloads with ADR practices, both quantitative and qualitative, in his work at GE, Schering Plough, and GlaxoSmithKline. He advocates for lowering caseloads with prevention techniques. He has frequently spoken at CPR Institute gatherings on the need for preventive ADR and limiting wasteful litigation spending.

"It has become commonplace that the lawyer of today must be willing and able to provide a full spectrum of solutions to his client's requirements and concerns," wrote Villarreal in these pages more than a decade ago. He continued:

> What I think has generally been lost, in the growing realization of the necessity for a more sophisticated, holistic approach to client needs, is the pivotal role played in this great awakening by ADR.
>
> . . .
>
> It is ADR which, in my view, has caused a whole generation of creative lawyers to realize that the great challenge lying before their profession is to change or die.

Elpidio Villarreal, "The Stream Becomes a Flood," 19 *Alternatives* 68–69 (January 2001).

In 2006, Villarreal accepted a leadership award from LatinoJustice PRLDEF, when the civil rights group was known as the Puerto Rican Legal Defense and Education Fund. Responding to attacks on immigrants from Mexico and Latin America by Republican law- and policy-makers, Villarreal reflected on his father and uncle, and the lives they led when they immigrated to the United States:

> I am sure they were both afraid. But both of them found the courage and the strength to keep moving forward—as we all must.
>
> . . .
>
> They led hard and unsentimental lives, as did all my grandparents and their children. But, in the end, they found a home here. This country was brave and strong enough to give their descendents a chance to succeed or fail—their own chance to "achieve the dream."
>
> One of my greatest fears is that we are seeing the passing of that Great Country—replaced by one governed by fear—of the future, of the present, and of "the other." Two paths are open to us. One path would keep us true to our fundamental values as a nation and a people. The other would lead us down a dark trail; one marked by 700-mile-long fences, emergency detention centers and vigilante border patrols.
>
> Because I really am an American, heart and soul, and because that means never being without hope, I still believe we will ultimately choose the right path. We have to.

* * *

The ADR Center of Italy received CPR's Outstanding Practical Achievement Award, which was accepted by managing director Leonardo D'Urso, a co-founder of the ADR provider and educational organization. The firm has pushed for ways to deal with the long backlogs in the Italian courts—which have had an extended effect of promoting mediation throughout Europe.

Those efforts have increased the use of mediation in Italian commercial cases. A proposal long backed by the ADR Center became law last year, making mediation mandatory, in the face of cases that regularly run for five to seven years.

CPR News

That effort met strong resistance from the nation's attorneys, which has been documented in *Alternatives* by ADR Center co-founder and president Giuseppe De Palo, who coauthors the monthly Worldly Perspectives column with Mary B. Trevor. See, e.g., "The ADR Strike Went On. And So Did the ADR." 29 *Alternatives* 105 (May 2011).

[The Worldly Perspectives feature usually profiles the current ADR laws and practices in a different nation each month; this month's column on Finland appears on page 67.]

De Palo and the ADR Center strongly supported the 2008 European Union mediation directive, which required member nations to pass laws by last May implementing mediation programs for cross-border cases involving commercial parties. Those efforts also have been followed closely in *Alternatives*. See, e.g., Giuseppe De Palo, "Update: Nations Are Sharing their Progress on Installing the Cross-Border Mediation Directive," 29 *Alternatives* 201 (December 2011).

The ADR Center has been instrumental in acclimating nations in Europe and Asia to commercial mediation. The center trained lawyers in ADR processes in 2005-2008 in the southern and eastern ends of the Mediterranean Sea, including Egypt, Greece, Jordan, Israel, Morocco, Palestine, Tunisia, and Turkey.

More recently, the center has been training judges with the European Union. The trainings focus on best practices in implementing the mediation directive, among other things. It conducted a training session for European judges in Rome early last month.

Meantime, back home, with the mandatory mediation law in place, the number of mediations in Italy has soared, with one million cases annually projected within a few years. That has been lucrative for the ADR Center, now an affiliate of JAMS International: The company has grown to 20 offices throughout Italy, including a 25-room mediation center in Milan, and roster of more than 100 mediators. It is authorized by the court system to hear the cases which must be mediated before a trial begins.

But the law has elevated the practice well beyond the ADR Center's offices. The nation now has more than 500 providers, and thousands of trained mediators, and a growing commercial conflict resolution culture that deemphasizes court fights.

Awards dinner master of ceremonies and veteran attorney-neutral John Upchurch, president of sponsor Upchurch Watson (and no stranger to challenging traditional law firm and ADR provider roles and pioneering new ADR business models; see "With Conflicts at Issue, Florida Firm and Its Former Partners Restructure ADR—Again," 15 *Alternatives* 131 (October 1997)), said in presenting the award to ADR Center that "Outstanding Practical Achievement [is] barely descriptive of the wonderful work done" by the Italian firm.

* * *

The Kluwer Arbitration Blog, which can be found at http://kluwerarbitrationblog.com, received the CPR Award for outstanding electronic ADR media.

The blog, which opened for business in January 2009, covers hot arbitration cases and events, including settlements and new laws. It looks at developments worldwide.

Awards judge and dinner presenter David Burt, corporate counsel at E.I. du Pont de Nemours & Co. in Delaware, said, "It's what the busy professional needs to stay the just-right amount of current."

Notre Dame University Law School Prof. Roger P. Alford is the blog's editor in chief, supervising 14 high-profile contributors. He accepted the CPR Award from Burt at the awards dinner.

The blog is published by Wolters Kluwer Law & Business, a big international publisher based in Alphen aan den Rijn, the Netherlands. It has a sister blog that focuses on mediation at http://kluwermediationblog.com.

* * *

The Outstanding Book award recognizes a work that advances understanding in the ADR field, and went to Douglas E. Noll, author of "Elusive Peace: How Modern Diplomatic Strategies Could Better Resolve World Conflicts," which was published last year by Prometheus Books in Amherst, N.Y.

Noll's book says that diplomatic missions aimed at tamping down international conflicts are misguided and often poorly conceived. Despite the negotiation experience of top-level government officials and diplomats, Noll contends, more mediation techniques need to be integrated into processes at international bargaining tables.

The book's thesis—demonstrated by examining numerous high-profile conflicts around the world along with a substantial dosage of neuroscience, decision-making processes, and tactics—is that "the modern science of mediation can aid in the possibility of transformation" and help establish peace. The title of Noll's first chapter is thematic: "Eighteenth-Century Diplomacy Will Not Solve Twenty-First-Century Problems."

"You chose a big subject—world peace," said awards judge David Burt, from DuPont, addressing both the author and the audience at the awards dinner. He continued: "Anyone who believes that the big stick or even a carrot is a way to [achieve] peace in the 21st Century is in need of this [book]. Sticks and carrots and hard swaps aren't going to bring a lasting peace."

Burt said that author Noll is building solutions to conflict to bring about peace by "applying things we know how to do, like de-escalating the conflict, reframing [issues], etc."

Burt said to Noll, "Congratulations on creating one of the most inventive teaching pieces ever about high-stakes mediation."

* * *

Coming soon: Details on the 2011 CPR Professional and Student Article Award winners.

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