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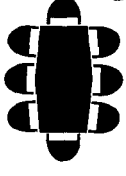
Introduction: What ADR Means Today

Theodore J. St. Antoine
University of Michigan Law School

How ADR Works

Norman Brand
Editor



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Chapter 1

Introduction: What ADR Means Today

*Theodore J. St. Antoine**

I. Overview

The sort of cachet a Hollywood screenplay once ascribed to "plastics" seems today to have adhered to "ADR." ADR stands, of course, for alternative dispute resolution. It refers to various methods by which neutral third parties assist persons engaged in a conflict to settle their differences without invoking the decisionmaking power of the state. And for many people, ADR has become the byword for a much-needed panacea for an overly litigious society. This book is designed to get behind the mystique of ADR, to show how it really works, and to enhance the skills of anyone interested in exploiting its genuine potential for reducing human discord.

*University of Michigan Law School, Ann Arbor, Michigan.

II. ADR IN GENERAL

ADR covers both mediation and arbitration. In mediation,[1] the neutral seeks to get the parties to agree on a mutually acceptable solution. In arbitration, the neutral imposes a solution after presentations by the contending parties. In each instance the procedure is a substitute for a more formal adversarial action before a court or administrative agency. In many cases, however, the mediator is a federal or state employee. Most arbitrators are private persons, chosen by the parties themselves but often with the aid of a public or private "designating agency." At their best, mediation and arbitration have the advantages of speed, cost savings, and informality over court or administrative proceedings.

Mediation and arbitration in the context of collective bargaining between unions and employers have probably received the most scholarly attention[2] and may be the most systematized. The National Academy of Arbitrators (NAA), despite its unqualified title, consists exclusively of persons who have established themselves in the arbitration of labor-management disputes. Yet ADR has long extended to commercial disputes, construction disputes, and even international disputes. Today it is an ever-expanding field, covering disputes between employers and individual employees, professional athletes and their clubs and agents, consumers and retailers, physicians and hospitals and patients, landlords and tenants, husbands and wives and their exes, environmentalists and alleged polluters, dog owners and dog haters, and on and on. In the pages that follow, labor and employment arbitration seems to be the center of gravity. But most of the teachings of the nationally renowned band of mediators, arbitrators, and practitioners assembled by Editor Norman Brand are readily transferable to the whole field of ADR.

Almost any Tom, Dick, or Mary can set themselves up as mediators and arbitrators—or at least try. There is as yet no major movement toward officially sanctioned certification procedures. So far both certification and mandatory training in ADR

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[1]A third term, "conciliation," is sometimes used and generally connotes a milder form of intervention than mediation. A conciliator may simply get the parties talking and do little to direct the course of their exchanges. A mediator usually aims at a more structured dialogue.

[2]The best sources of written material on the substance and procedure of labor arbitration are the annual Proceedings of the National Academy of Arbitrators, published by the Bureau of National Affairs.

techniques have been successfully resisted on the grounds that the savvy, experienced persons who employ ADR services will know enough about the skills and integrity of the people they retain to make informed selections. As mediation and arbitration increasingly involve isolated individuals, however, the pressures for certification and mandatory educational programs will inevitably rise. This is not likely to be an issue resolved on the basis of *a priori* arguments. If the voluntary training offered by various nonprofit and commercial organizations succeeds in preventing an influx of incompetents into the field, the attractiveness of the traditional free market and unlimited choice may prevail over the calls for certification. But if there is a rash of scandalous behavior by ill-trained or unscrupulous mediators and arbitrators, the cozy, self-regulated world of ADR that we have known, unburdened by formal rules of entry, might well become a thing of the past.

III. MEDIATION

A typical mediator and a typical arbitrator may exhibit rather different personality profiles, although many persons have the capacity—some perhaps with reluctance, and with greater or lesser degrees of success—to assume both roles. Not long ago I was told about a stellar mediator who retired from his government agency and was besieged by both unions and employers to take up arbitration. He did so and had a full docket almost overnight. After only a few months, however, he quit arbitrating. He explained tersely: "I love helping people come together. But I hate trying to play God!" That exemplifies the empathetic, accommodating, therapeutic style I associate with mediators, while arbitrators in handling a case tend to be more impersonal and decision-oriented.

The more important practical question is when, if at all, a person should try to perform as both mediator and arbitrator in the same proceeding. I am satisfied the answers will vary considerably depending on the temperament of the arbitrator, the chemistry existing between a given arbitrator and the disputants, and a subtle intuition of what the particular circumstances permit or ordain. Everyone recognizes that there is one substantial risk: If mediation is attempted and fails, the would-be arbitrator may by then be privy to confidential disclosures from one or both sides—the parties' "bottom line" for settlement, for example—that could be highly prejudicial when the arbitrator moves

into a decisionmaking mode. Once one has been told about elephants, it is hard to put them out of mind. Yet the pragmatic response is that mediation before arbitration often works, and when it does, it saves all concerned much time, money, and psychic wear and tear. That has led to the process known as "med-arb."

Some arbitrators take a middle course and invariably give the parties one last chance to settle on their own before opening the hearing. That does not necessarily require any further intervention by the neutral at all. One arbitrator told me this stratagem succeeds for him more often than not. I am of the old school that believes if the parties have engaged someone as an arbitrator, they ordinarily want an arbitrator, not a mediator. In more than 30 years of arbitrating, I have rarely attempted any preliminary mediating, except at the joint instigation of the parties. Even then I was careful to warn them about the "elephant phenomenon" and the inhibitions I might feel in probing too deeply into confidential matters on either side.

The procedures in both mediation and arbitration are likely to vary considerably, depending on the personal style of the neutral. That is especially true of mediation, which by its very nature is the more informal of the two processes. For example, one of the eminent mediators who explains his approach in this volume emphasizes that he makes it a point to address himself primarily to the parties themselves and not to their representatives. Yet a second eminent mediator says no such thing, even though she stresses the value of letting clients on occasion speak for themselves. I gather that this mediator would tend to deal with the parties through their attorneys or representatives, as is also usually the case in arbitration.

Various classifications have been devised for analyzing different approaches to mediation. These are not watertight categories, and the same mediator may shift from one type to another, even in the same proceeding. But one classification scheme I have found helpful is the following, listed in ascending order of intervention by the neutral:

- *Transformative or collaborative mediation.* The focus here is on the state of the parties' relationship. The mediator does not so much try to lead as to get the parties to discover their own separate and mutual resources and to understand the other party's point of view. This is a good starting point from which to move on, if necessary, to other forms

of mediation. It is not easy, however, to shift back to transformative mediation from a more active type.

- *Evaluative mediation.* Here the mediator does not attempt to come up with a specific solution but concentrates on showing the respective strengths and weaknesses of each party's position. Mediators using this technique may begin by holding separate meetings with the parties in an effort to fully understand their points of view. Thereafter, especially if the parties have had a longstanding relationship, the effort will generally be to keep them together as much as possible, talking and listening to the mediator and to each other.
- *Directive or result-oriented mediation.* Here, quite deliberately, the aim is to bring the parties to a certain goal that the mediator, at some point in the process, has concluded is appropriate and achievable. Some mediators employing this approach will sit down with both parties and let them talk to the mediator, not to each other, with the more agitated going first. Yet each party hears the other's story with the fervor behind it. The ground rules will forbid personal attacks by the speaker or interruptions by the listener. Even so, caucuses may be required from time to time to cool tempers, to permit confidential communications to the mediator, and to move the negotiations along toward closure. Other mediators will spend the bulk of their time meeting separately with the opposing parties.

Transcending all these questions of technique is a very simple human factor that constitutes a key ingredient of success in mediation: the trust and confidence the parties come to repose in the neutral third party. Whatever their stylistic differences may be, the mediators contributing to this volume agree on that. And for me that reflects the principal glory of the mediation process. Other aspects of dispute resolution, both traditional and alternative, may be more intellectually challenging and philosophically oriented. But in mediation the emphasis is on the total input of all three participants—the claimant, the respondent, and the neutral—in working together to reach a solution that is mutually acceptable to the contending parties. The result may lack the coherence and elegance of a finely reasoned judicial or arbitral opinion. Yet the mediation product is a joint, voluntary creation, and its frequent rough edges bear testimony to its source in multiple human hands. Even as mediators may wince

at the imperfections of the final settlement, they can take pride in the knowledge that the trust and confidence they generated led two opposing camps to find their own common ground, without the fiat of some external force.[3]

IV. ARBITRATION

The virtues of arbitration are different from those of mediation.[4] The respective parties or their representatives may carefully prepare and present their case. They may make eloquent closing arguments or file persuasive posthearing briefs. But in the end, it comes down to the judgment of the arbitrator, usually one individual or the impartial chair of a tripartite panel. Generally, of course, arbitration shares with mediation an element of voluntariness. The parties have agreed, either before the dispute or after it has arisen, to use this device as an alternative to litigation or self-help such as a strike or work stoppage. They have also agreed on the arbitrator or on the manner of choosing that person. In addition, they can agree, but seldom do, on various procedural details for the conduct of the arbitration. Yet once the proceedings are under way, the arbitrator is largely in charge. Lacking are much of the informality and nearly all the sense of a voice in decisionmaking that characterize mediation.

For certain intractable disputes, however, mediation would be futile and arbitration is the only viable recourse short of "going to law." The intractability may be a matter of ideology, economics, institutional politics, personality, or whatever, but that need not detain us. The demand is for an imposed solution, which the parties must accept whether they like it or not. Nonetheless, arbitration still shines in letting determined combatants meet in an arena that is less intimidating, less rule-driven, and less likely to disrupt ongoing relationships than a courtroom or an administrative agency. And if administered intelligently, arbi-

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[3]One of the best general treatments of mediation is WILLIAM E. SIMKIN & NICHOLAS A. FIDANDIS, MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING (BNA Books 2d ed. 1986).

[4]Standard works on arbitration include ELKOURI & ELKOURI: HOW ARBITRATION WORKS (Marlin Volz & Edward P. Goggin eds., BNA Books 5th ed. 1997 & 1999 Supp.); THE COMMON LAW OF THE WORKPLACE: THE VIEWS OF ARBITRATORS (Theodore J. St. Antoine ed., BNA Books 1998); ARBITRATION IN PRACTICE (Arnold M. Zack ed., 1984); LABOR ARBITRATION: A PRACTICAL GUIDE FOR ADVOCATES (Max Zimny et al. eds., BNA Books 1990); and DISCIPLINE AND DISCHARGE IN ARBITRATION (Norman Brand ed., BNA Books 1999 & 2001 Supp.).

tration can also be gentler on the parties' pocketbooks, time sheets, and psyches.

The biblical King Solomon is often cited as the first arbitrator. In deciding between the two women claiming the one surviving infant, Solomon relied much more on his assessment of maternal instincts than on technical niceties like rules of evidence and burden of proof. It almost seems as if arguments have raged ever since about whether creeping legalism would be the ruination of arbitration. In the labor field, the divergent philosophies were reflected in the clash of two pioneering titans. On the one hand, George Taylor expounded the view that labor arbitration was an extension of collective bargaining. It followed that hearings should be relaxed and informal, and the parties' needs and purposes should count as much as the literal wording of their agreements. On the other hand, Noble Braden of the American Arbitration Association (AAA) treated labor arbitration as a substitute for litigation. The courts' procedures and substantive principles were thus his touchstone. The parties and their representatives came to prefer the predictability and autonomy afforded them by the Braden model—which allowed arbitrators considerably less discretion than Taylor's model—and Braden ultimately prevailed, especially on the standards for contract interpretation.[5]

Nevertheless, the battles continue about the conduct of the hearing, the rules of evidence, the burden and standard of proof, and the like. The differences may be more apparent than real. For example, while some arbitrators say they do not apply the rules of evidence as such, they still tend to follow the underlying principles, consciously or otherwise. Most will accept certain forms of hearsay, such as the physician's routine certification of the illness of an absent employee, but they will ordinarily not sustain a discharge wholly on the basis of hearsay. Arbitrators recognize the importance of cross-examination and will discount even admissible hearsay accordingly. On the burden of proof, there are respected arbitrators who insist it is a meaningless concept; they feel they eventually have to decide which party is more convincing. Once in a great while, however, I find I cannot reach that conclusion—the evidence is in equilibrium. It is then

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[5]The Taylor-Braden debate and its outcome are recounted in Richard Mittenthal, *Whither Arbitration? in* ARBITRATION 1991: THE CHANGING FACE OF ARBITRATION IN THEORY & PRACTICE, PROCEEDINGS OF THE 44TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 35 (Gladys Gruenberg ed., BNA Books 1992).

that burden of proof comes into play, and the party bearing it loses. There are similar variations in arbitrators' attitudes about the standard of proof, especially in discharge cases. Is it a simple preponderance of the evidence, or something more? If the latter, what is it?

Another example appears in an article in this volume. One of the country's premier arbitrators declares that he will not provide a full-fledged opinion with an award in the absence of a transcript. This approach is supported on the ground that arbitration is usually the final resolution of a dispute and so it is doubly important to "get it right" the first time. Yet other arbitrators would insist that this effort at perfection may come at too high a cost, in terms of both time and money. Arbitration was designed to secure reasonably fair results without great outlays. Except in quite complicated cases, no need is said to exist for the whole cumbersome apparatus of transcripts, discovery, and briefs that we associate with court trials. Who is right?

Several comments seem apropos of these—and numerous other—persisting problems in the arbitration procedure. A few years ago, there was a proposal within the NAA to draft a "restatement" of arbitral principles developed over the past half century, akin to the Restatements of the Law produced by the American Law Institute. The idea was rejected. The Academy membership opposed the notion that there was one right set of answers to the many questions on which arbitrators differed. In any event, parties were entitled to the personal judgment of the individual arbitrator they had chosen and should not be subjected to the collective rulings of a faceless group. Some opponents feared that any such restatement might become a *vade mecum*, a handy reference work to solve all problems, without the irksome task of grubbing for the specifics of particular facts and particular contracts.

The upshot of these deliberations was a compromise. An effort would be made to sum up in brief compass some of the major principles enunciated by labor arbitrators during the first 50 years of the NAA. But where reputable arbitrators took differing positions, those divisions would be recognized. There would be no attempt at a definitive resolution of the conflicts. This compromise reflected much wisdom about the nature of arbitration and ADR in general. Like any other developing institution, it can profit greatly from the cumulative experience of the past. At the same time, an evolving field can always expect further refinements and shifts of direction in light of new data and unforeseen events.

V. THE FUTURE OF ADR

What is the future of ADR? If I guess right, it will not be as tidy or autonomous a world as the one we have known. ADR is shooting out in all directions, assuming many new forms and embracing much new subject matter. To the dismay of numerous past champions, ADR will lose much of its formerly private character. That can happen in a couple of different ways. First, courts and administrative agencies, facing a rising tide of litigation, will increasingly refer cases out for mediation or arbitration. A number of states have already provided for "mandatory mediation" or "advisory arbitration" before trial in almost any civil action for damages. In one format, a panel of three lawyers drawn from the plaintiffs' bar, the defendants' bar, and a nonspecialists' bar listens to a half-hour presentation of the case by the parties' attorneys, with little or no evidence being offered. The panel arrives at a recommended settlement figure in another 10 or 20 minutes. No one is bound by the result. But if one party accepts it and the other declines, the holdout must better the recommendation by 10 percent at trial or else be liable for all the other party's attorney's fees incurred after the date of the ADR proceedings.

Another way in which ADR procedures can become less private and more public is through the parties' own agreements. They may provide that all disputes between them arising out of an employment relationship, a consumer transaction, or a hospitalization will be subject to final and binding arbitration rather than court action. The claims involved may be statutory as well as contractual, for example, the rights of employees under civil rights statutes not to be discriminated against because of race, sex, age, disability, and so on, or the rights of consumers to truth in lending.

A red flag immediately goes up, however, if the party in the stronger bargaining position, such as an employer, imposes so-called "mandatory arbitration" as a condition of employment, and the coverage includes claims of discrimination in violation of applicable federal or state statutes. On its face, that amounts to a blatant affront to the public policy of letting employees (or individual consumers) place such claims before a judge and jury. Yet the U.S. Supreme Court has approved these mandatory arbitration arrangements for individual employees.[6] And there are

[6]Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 55 FEP Cases 1116 (1991). *Cf.* Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 84 FEP

several studies indicating that employees actually succeed more often in pursuing discrimination claims in employer-established arbitration systems than in the courts (although winners in court win bigger).[7] It may well be that, as a practical matter, the concern should be more with ensuring employees and other individuals due process safeguards in mandated arbitrations[8] than with theoretical objections to the compulsory nature of the process. In any event, we can be confident that the courts will be taking a closer look at the way arbitrators apply the law in these statutory cases than is true when courts are reviewing arbitrators' awards in disputes over collective bargaining agreements or other private contracts. When statutory rights are at stake, arbitrators should write their decisions defensively and with deliberation, just as if a federal judge were looking over their shoulder, scrutinizing their every word.

That does not mean that a court should review an arbitral award dealing with a statutory issue in the same way an appellate court reviews a trial court's decision. The parties have agreed that the arbitrator's award shall be "final and binding." As between parties of equivalent bargaining power—General Motors and U.S. Steel, even General Motors and the United Auto Workers—and especially in the absence of sensitive civil rights' issues, an agreement to submit statutory claims to arbitral resolution should be treated much like an agreement to submit contractual claims. Although the decisions are somewhat divided, there is clear judicial authority that arbitrators may be the final judges of law as well as fact, and that awards based on a misconception of the law will be upheld.[9] Technically, as I would analyze it, the arbitrators in such instances are still rendering a contractual ruling rather than a statutory one; they are applying not the statute directly, but the parties' agreement to be bound by the arbitrator's determination.

Certain distinctions must be recognized. As the Supreme Court has held, some statutory rights, such as those under the

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Cases 769 (2000) (mobile home financing agreement). *See also* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 85 FEP Cases 266 (2001).

[7]*See, e.g.*, Lewis Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUMAN RTS. L. REV. 31, 46–50 (1998); and *infra* Chapter 51.

[8]*See, e.g.*, Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 72 FEP Cases 1775 (D.C. Cir. 1997).

[9]*See* Annot., 112 A.L.R. 873 (1938); George Day Constr. Co. v. Carpenters Local 354, 722 F.2d 1471, 1477, 115 LRRM 2459 (9th Cir. 1984).

Fair Labor Standards Act (FLSA), "devolve on employees as individual workers, not as members of a collective organization" and are "not waivable" by the employees' union.[10] In those situations the courts will not defer to the arbitrator's erroneous denial of employee rights. Similarly, if an arbitrator's interpretation of an Occupational Safety and Health Act requirement ignores applicable legal precedent and does not adequately protect the employees, a court would not be bound by it. But if an arbitrator imposes more stringent requirements than the statute, I would say that the award should be enforced. The parties agreed to abide by that result, and their agreement should be accorded the same finality as any other arbitration contract.

A middle position may be taken when workers' collective statutory rights are in dispute. An example would be the right of employees under the National Labor Relations Act not to be discriminated against because of union activity. There the National Labor Relations Board and the courts will honor the arbitrator's award so long as it is not "palpably wrong" and "clearly repugnant" to the Act.[11] That ought to be a loose enough rein to let most arbitral awards pass review.

The greatest potential for the expansion of employment arbitration lies in the nonunion workplace. With the steep decline in private sector union membership, from over 35 percent half a century ago to less than 10 percent today, the vast majority of American workers are subject to employment at will. They can be fired for any reason, arbitrary or otherwise, so long as it does not violate a specific statute or a basic public policy. The United States is the last major industrial democracy in the world that countenances such a doctrine. Changes could come through contracts, statutes, or unilaterally adopted employer programs.

During the 1980s the courts of most states engrafted limited exceptions onto at-will employment. Employer assurances (oral or via employee handbooks) of continued employment were often treated as binding contracts. But employers could simply refrain from such assurances or rescind them with adequate notice. In 1991, the Uniform Law Commissioners (ULC) adopted the Model Employment Termination Act, under which most employees with

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[10]Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 745, 24 WH Cases 1284 (1981) (FLSA). *See also* Alexander v. Gardner-Denver Co., 415 U.S. 36, 7 FEP Cases 81 (1974) (Title VII of the Civil Rights Act).

[11]Spielberg Mfg. Co., 112 NLRB 1080, 1082, 36 LRRM 1152 (1955); Olin Corp., 268 NLRB 573, 115 LRRM 1056 (1984); Hammontree v. NLRB, 925 F.2d 1486, 136 LRRM 2478 (1991) (en banc).

more than one year of service would be protected against discharge without "good cause." The preferred method of enforcement would be through private arbitrators. Despite the high prestige of the ULC, however, no state has thus far adopted this proposed legislation. If good cause for dismissal became a national standard and arbitration the principal forum, I calculate there would be at least 30,000 awards per year in discharge cases in the private sector. I base that projection on the estimated 25,000 annual labor arbitrations in the mid 1990s, of which 10,000 involved discipline, including suspensions.

The most immediate sources of growth in employment arbitration are the relatively new employer-promulgated plans. One estimate is that mandatory plans now cover around 16 million employees—about the number covered by collective bargaining agreements. Many employers are willing to arbitrate more total cases to avoid the costs and large jury verdicts they encounter in court. In addition, numerous retailers, utilities, insurers, lenders, medical caregivers, and other providers have analogous agreements with customers, insureds, debtors, patients, and assorted consumers of goods and services. These are typically contracts of adhesion, and the courts should be quick to strike down those that are too "one-sided" in favor of the party imposing them.[12]

Regardless of that, and regardless of the superior record of claimants in arbitration compared to those in court litigation, opponents of mandatory arbitration are now carrying the battle to Congress. More than a dozen bills have been introduced to limit ADR, most of which would prohibit predispute agreements to arbitrate. Predispute agreements are concededly less "knowing and voluntary" than postdispute agreements. In the latter instance, the triggering event has occurred, and what is at stake is much more obvious—the parties can make a more informed and freer judgment about how to proceed. But postdispute agreements, although theoretically ideal, are unlikely to be acceptable to either employers or employees, and perhaps to several other classes of disputants. Employers will not arbitrate with employees with small claims, knowing they are unlikely to find a lawyer willing to spend the time and money to take their case to court. Conversely, employees with large claims and with lawyers

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[12]*See, e.g.*, Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938, 79 FEP Cases 629 (4th Cir. 1999); Armendariz v. Foundation Health Psychare Servs., 24 Cal. 4th 83, 6 P.3d 669, 83 FEP Cases 1172 (2000).

operating on a contingent fee basis will usually be eager to get before a judge and jury. The choice would thus seem to be predispute agreements to arbitrate employment disputes (and other kinds of disputes as well) or few if any arbitration agreements at all.

Those who object on principle to mandatory arbitration are more willing to accept mandatory mediation—that is, an agreement "imposed" on employees, customers, or patients not to sue until they have exhausted internal procedures whereby a neutral third party tries to secure a voluntary settlement. In such situations, of course, the "weaker" party can always withhold consent to the proposed resolution. This has added impetus to the movement for mediation in all types of disputes. Academics, practitioners, and organizations interested in mediation have formed the Alliance for Education in Dispute Resolution to promote the process. The AAA has renamed its venerable *Arbitration Journal* the *Journal of Dispute Resolution*, and many articles on mediation now appear in its pages. And a Cornell study has reported a crass sign of the times: mediation now commands higher daily fees for the neutral than does arbitration.[13]

VI. CONCLUSION

The past decade has been a boom time for ADR. Besides the developments already discussed, the evidence ranges all the way from the Supreme Court's sharp limiting of the most common grounds for seeking vacatur of a labor arbitration award—the "public policy" objection[14]—to the AAA opening its first office in Europe, the International Center for Dispute Resolution-Dublin.[15] With California in the lead, the country has also seen a rash of "intermediation" and "rent-a-judge" services to compete with the more traditional designating agencies. Some of these for-profit operations must be eyed with concern. Excessive fees and other unsavory practices could, if left unchecked, taint the whole arbitration and mediation profession.

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[13]Michel Picher, Ronald L. Seeber, & David B. Lipsky, *The Arbitration Profession in Transition, in* ARBITRATION 2000: WORKPLACE JUSTICE AND EFFICIENCY IN THE 21ST CENTURY, PROCEEDINGS OF THE 53RD ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 267, 299 (Steven Briggs & Jay E. Grenig eds., 2001).

[14]Eastern Assoc. Coal Corp. v. Mine Workers (UMW) Dist. 17, 531 U.S. 57, 165 LRRM 2865 (2000).

[15]56 DISP. RESOL. J. 6 (May–July 2001).

On balance, however, I am optimistic about the future of ADR. Any abuses will be remedied, if not by self-regulation, then by public intervention. Whatever may be its shortcomings, the sturdy virtues of ADR still remain. Properly administered, it does not entail the cost, time, or trauma of a court suit. Beyond that, ADR exhibits one supreme attribute: it maximizes the involvement of the disputing parties. This is preeminently true of mediation, of course, where nothing is final until the parties themselves say so. Yet even in arbitration they have a major voice. Typically they can select the arbitrator, frame the issue, define the remedies, and even spell out procedural details. Participation is the essence of ADR. And the resolution of any dispute is most likely to be accepted and lasting when the contending parties have had a hand in its fashioning.