

Canadian Arbitration and Mediation Journal

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LEADING DISPUTE RESOLUTION IN CANADA
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Message from the Editor

Welcome to this issue of the *Canadian Arbitration and Mediation Journal*.

Welcome to this issue of the *Canadian Arbitration and Mediation Journal*. We hope you like our new look with improvements and enhancements based on reader input and professional design advice. Our aim is to make your reading experience comfortable and efficient. Feel free to share it with colleagues, clients, and friends.

Before getting into the content of this issue, a shout out goes to **Bill Horton** who served as Editor-in-Chief of the Journal for many years over many issues. Thank you, Bill. We are pleased that you will continue on the editorial board, and we hope to receive submissions from you for publication in future issues.

This issue illustrates the wonderful diversity of ADR, and it contains articles on a wide variety of

topics relevant to practitioners in Canada and elsewhere. **Rick Weiler** graciously agreed to be interviewed and trusted us with his personal insights about ADR as a vocation.

Ruth Corbin, with her background in psychology and law, invites us to take an evidence-based approach to mediation and directs us to current research. **Daniel Brantes**, Editor-in-Chief of the *Brazilian Journal of Alternative Dispute Resolution*, gives us an introduction to ADR in Brazil, and in the first of a two-part article, **Joel Richler** shows how to run an arbitration process that does not merely replicate legal proceedings. **Paul Fauteux** explores the development and application in Quebec of PARLe, the Platform to Assist in the Resolution of Litigation Electronically.



GENEVIEVE A. CHORNENKI, LL.M. (ADR), C.MED, C.ARB

Genevieve has served as mediator, arbitrator, ADR consultant and trainer since 1989. She is a director of the Condominium Authority of Ontario and co-author of *Bypass Court: A Dispute Resolution Handbook*. She was inaugural chair of the Ontario Bar Association's ADR Section and received its first ADR Award of Excellence.

Bouchra Azizy and Olatunji

Oniyaomebi explain their own cultural identities and walk us through a case study where a culturally-aware mediator makes a difference. **Michael Schafler, Christina Porretta, and Marina Sampson** comment on *Wellman v. TELUS Communications Inc.*, a case that reinforces party autonomy in the context of class proceedings. **Max Blitt** reviews *Understanding Sharia, Islamic Law in a Globalised World*, and **Adesina Temitayo Bello** explains how class arbitration waivers in the United States can lead to injustice.

Putting out a journal is a collective undertaking. Thank you to all who made this issue possible: our contributors, the helpful staff at the ADRIC office, our volunteer editorial board, and to you, our readers. Please be in touch. Your feedback, submissions, and pitches are always welcome. 🏠

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President's Message

There has been a great deal of activity since ADRIc's AGM last November:

Our **office** has undergone renovations to increase space to accommodate the increased work and to be ready for future business opportunities, including increased use of conferencing technology.

The **MoU** was signed by all members of the Federation of ADR Institutes with a renewed effort to build on our strengths and assist in resolving challenges.

We have set up and/or refreshed **ADRIc's rosters**: For Arbitrators, these include rosters for Interim Measures, Commercial Disputes and AMEX Canada. We also assisted Canadian Transportation Agency in broadening their Arbitrator roster and we have refreshed our Mutual Insurance Companies Ombudservice Mediator roster.

ADRIc's **Research Project focusing on Return on Investment** is well underway to gather ADR statistics across Canada. The project is being led by former ADRIc Director Jennifer Schulz with Ruth Corbin, PhD and Jean-François Roberge as primary researchers.

The **Mediation Rules Working Group** has reviewed and revised the Rules and these are currently being edited by a wordsmith to ensure both clarity and simplicity.

ADRIc's **Med-Arb Working Group** has developed a suite of materials to establish and maintain high standards for those who practice this specialized process. The Rules, Agreement Templates and criteria for designations will be officially launched at ADRIc's 2019 conference in Victoria, BC. We have enjoyed some media coverage on this fairly new process and have an international distribution waiting list of those who want to see the materials.

The **ODR Task Force** conducted a member survey, has done much research and has provided a report to the ADRIc Board. Next steps include assessing various platforms to determine which might be ideal for ADRIc's members.

ADRIc's **Course Accreditation Policy** is nearly complete after consultations with affiliates. When approved, ADRIc, and interested affiliates, will be able to review courses against ADRIc's criteria for designations, allowing students to select approved providers. Call us for more information.

The **Government Relations committee** (GRC) is geared up to make the upcoming Federal Election (October 21) an opportunity to advocate for ADR. They will be providing members with materials to assist in the advocacy work – watch your inboxes. They are also planning to hold an advocacy event for the BC legislature during ADRIc's 2019 conference at 7pm, Wednesday November 20th.

ADRIc has submitted an Expression of Interest and Information in response to a Federal **Construction Adjudication** call. The ADRIc Federal AA (Adjudication Authority) Working Group is now considering what we may need in order to submit a bid to become the Federal Adjudication Authority. A survey has gone out to members and friends via our affiliates to gauge how many of our members may already have the skills required to do construction dispute adjudication.

ADRIc continues to monitor the national ADR environment and as a result of requests from some affiliates and governments, has agreed to develop **new criteria and designations** for Family ADR practitioners and Parenting Coordinators. Special committees have conducted cross-country feedback fo-



**ANDREW D. BUTT, M.S.T.,
B.ED., B.SC., C.MED, C.ARB**

Andy has 20 years of experience in executive management positions with large corporations, 15 years of extensive experience in mediating workplace disputes, completing workplace assessments, conflict coaching and training with managers and leaders in conflict management situations.

rum and will be using information gathered to develop the criteria.

You may have seen a survey about our **Canadian Arbitration and Mediation Journal**. We requested readers' feedback on its format, content, length of articles, etc. Thanks to all those who participated. With this information, and because it was time, the Journal has undergone a re-design. We hope you like it.

Finally, I would like to remind you about **sponsorship opportunities** for the conference: your sponsorship not only reaches a unique target group, but is the only source of funding for the conference, supporting all logistics and keeping registration rates reasonable. Please support ADRIc and ADR by sponsoring; see the website for details or call the office.

We welcome your feedback on any of these initiatives, or let us know if you are interested to participate in any way.

I hope to see you at the conference. 

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- "Very creative! Thank You!" – Maude Adam-Joly, Borden Ladner Gervais
- "Excellent presentation. Very relevant to workplace situations." – Steve Porter
- "Wonderful and practical approach to conflict in workplaces. Thank you for your candour!" – Nancy Watson
- "Shared experiences allow [us] to build tool box of approach, questions, etc." – Arielle Ross
- "Appreciated the excellent facilitation of group discussion. Thanks!" – Shelley Chrest
- "Very interesting topic – I came away with lots of questions and ideas. So the talk hit the mark. Very compelling."



Listen In

A Conversation with Rick Weiler and Editor-in-Chief Genevieve Chornenki, C.Arb, C.Med

1. Rick, thank you for being willing to share your thoughts with me and Journal readers. You've been in ADR for almost thirty years. What kind of practice do you have?

Right now I predominantly do mediation with arbitration taking a much smaller part. This process mix has been pretty consistent through the years. About 70 per cent of my current mandates are long-term disability claims, cases where there are often issues relating to conditions like chronic pain or fibromyalgia where objective evidence is hard to come by. Both claimants and insurance company representatives attend along with their respective lawyers. The remaining 30 percent of my practice is a mixture. Things like historic sexual abuse claims, environmental spills, nuisance, employment issues, and, less frequently, partner or shareholder disputes. Starting last fall I also teach an elective called "Mediation Theory and Practice" to undergraduates at the University of Ottawa Law School and my goal there is to encourage reflective ADR practice by lawyers whether they served as advocates or neutrals in a process. Over the years, I've also done facilitation, ADR systems design, training and consulting, but as time went on my preference for mediation led that portion of my practice to grow. Most of my referrals come from practising lawyers and I generally don't do cases involving self-represented individuals.

2. What attracted you to ADR in the first place? How did you get into the field?

I literally stumbled across ADR in 1990. I had been making a good living for ten

years as a corporate lawyer, but was deeply dissatisfied. Practising law wasn't what I imagined it would be. Something was missing, and I'd taken a year off to see if I could find out what that was. Should I write the Great Canadian novel, drive a truck, teach? Seriously, I considered all those possibilities. Then, one day I saw an advertisement for mediation training, whatever that was. Curious, I registered for a two-day course conducted by a company called Canadian Dispute Resolution Corporation (CDRC). On the first evening, within fifteen or twenty minutes, the hair on the back of my neck was standing on end. Here was the missing piece. We're supposed to be of service to our fellow man—that was my conviction—and here was a way to earn a living by making a meaningful difference in the lives of others, by helping them resolve disputes. A whole new vista opened up for me, and I never looked back. Being added to the CDRC roster of mediators was also a huge break—as it was for many other mediators in the early 90s—because it got me into the chair, mediating real cases very early and because it exposed me to a variety of other mediators from whom I could learn and grow.

3. So, do you consider mediation to be a vocation?

Yes, I do. I consider being a mediator and working in ADR as a calling, and I've had that feeling pretty much consistently over the years. Called by who or what? That I can't say. I can only describe it as a very strong feeling that this is work I ought to be doing. My temperament, my aptitudes, my skills, my enthusiasm all align with the work, and I remain passionate about it.



RICK WEILER

Rick Weiler has almost three decades of experience mediating disputes involving a wide range of subject matter. Rick teaches Mediation at the University of Ottawa Law School where he also sponsors the Weiler ADR Prize for Mediation. He is the author of the Mediation Chapter in [Canadian Legal Practice](#).

After I completed my initial training and started doing personal injury mediation, which was the first kind of civil mediation in Canada, I took other courses and began to read everything about ADR that I could lay my hands on. I still make a point of keeping up with developments in the field and I follow the research.

4. In almost thirty years of working with people in dispute you must have seen some pretty unsavoury aspects of human nature. What sorts of behaviours have you seen? And how do you keep from becoming cynical about people?

I tend to be philosophical about things and I'm reluctant to judge or generalize

about people except to say that we're all flawed and struggling. Research shows how very hard it is for us to make good decisions given our many ingrained biases. I'm also convinced that we're all in this world together. I know that sounds like a cliché, but it does seem to me that some sort of "oneness" connects us. And so, when I encounter behaviours in mediation that appear motivated by greed or cruelty or some other negative human emotion, or when I work with people who come across as bullies I try to respond with compassion and return the individual's focus to the lodestar of "what is the *good* decision you need to make?"

5. Does that mean you've never lost it with people? I wish I could say the same.

Sadly, I *have* lost it. I have a hard time with what I would call a grotesque lack of professionalism, extreme rudeness, and aggressiveness to the point of ridiculousness, especially on the part of people's professional advisors. Fortunately, it is rare for me to come across those behaviours. But once I got completely out of patience with opposing counsel, neither of whom was making any effort to settle the file. "This is f...ing nonsense," I said to them. "It's ridiculous. You are wasting my bloody time." This is not a moment I'm proud of, of course, and I feel some amount of shame con-

fessing it to you; losing my temper is not part of my usual repertoire. But guess what happened next? One lawyer turned to the other and said, "He's right," and the case ultimately settled. So maybe there is something to "The Surprising Effectiveness of Hostile Mediators" that I've recently been reading about.

6. Dispute resolution can also reveal touching or moving things too, and maybe we in the field don't acknowledge that enough. What's the most poignant thing you ever witnessed in ADR?

Years ago I mediated a case where a woman had lost control of her vehicle while driving on a country road. When I met privately with her, her husband, and her lawyer she described being dragged from her overturned car by a woman who later disappeared. "That's not right," her husband said. "It was the farmer who moved you away." But the woman persisted in her story, and suddenly I understood what she was trying to convey. "You believe that an angel saved you that day," I said, and she replied, "Exactly." It was clear to me that allowing her to voice her personal experience in an unedited way was pivotal to settling the file, and I set about making that happen. I don't know why, but over the years that woman's story has stayed with me. I'm insatiably curious about all manner

of things, including the nature of consciousness, and I expect that what has persistently intrigued me is what her experience might imply about the nature of reality. I've been thinking about that file lately and at some point will likely do something with it. I don't yet know what that will be.

7. You serve as both a mediator and an arbitrator in civil disputes. Do you prefer one process over the other?

I am at ease acting as either a mediator or arbitrator, but my comfort level is naturally higher when I am a mediator. Over the years I have happily performed mandates where I listened to evidence and argument of the parties and decided whose case should prevail, but philosophically I just believe that it's better if people work things out on their own so one of them does not end up as a "winner" and the other a "loser." It seems to me that consensual resolution and the cooperation that goes with it is better for us as a species. It is more socially productive, if you like. But there's also a personal aspect to my preference for mediation, going back to my feeling that it is my vocation; the process is more aligned with my temperament and my natural inclinations. I also like the finality at the end of mediation: one day, six hours, a deal, it's done without the need for follow up or further proceedings. Ar-

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bitration, on the other hand, carries on and is more episodic. I should add that I was a solicitor not a barrister in my past professional life, so the rituals of adversarial proceedings comes less naturally to me.

8. Are there personal attributes that you think an ADR practitioner should bring to the table?

The personal attributes of a good mediator or arbitrator will be very similar to those frequently found in “what employers are looking for” lists: good communication skills, honesty, technical competence, strong work ethic, flexibility, ability to work with others, willingness to learn—all these play a role. But if I had to pick one, it would be “perseverance.” In my experience perseverance is a critical factor leading to a positive outcome, especially in mediation. Perseverance comes into play in at least half of the mandates that I take on. When the people and their counsel have essentially quit, optimism is gone and everyone is ready to pack up, when I too feel all is done for the day, then the observer within me looks around and nudges me. It is then that I say to myself, “No. I am not done. I will not quit,” and I come up with a new intervention. The frequent triumph of optimism over rationality pleases me.

9. When everyone else is prepared to throw in the towel and you decide to persevere, is it your creativity that gets triggered or your ego?

I haven’t completely defeated the dragon of ego, so I expect that when everyone else wants to throw in the towel, I interpret that as a challenge, a personal one, to push myself further and see what I can accomplish. After all, they didn’t hire me to give up. That said, I do get excited about the prospect of creativity and in figuring out how to reengage people, which is key to conversations based on trust and good will. In many mediations, money is an issue and there is ultimately a ritualistic dancing of numbers back and forth. As I lead that dance I try to engage the people involved. What’s going on for them? What are their attitudes really about? My natural and persistent curiosity is at play. Then, when the process bogs down or stalls, I put my mind to doing something different or trying something new. In my experience, perseverance pays off in surprising ways.

10. You’ve participated in the evolution of ADR in Canada over many years. Does it concern you that ADR remains an unregulated business in Canada?

No. It does not concern me that regulation has not been imposed on mediation.

The evidence is scant of harm perpetrated by unregulated mediators. In a jurisdiction where hairdressers and masseurs are regulated it may seem odd that government hasn’t stepped in on mediators, but this may reflect a wisdom that if you try to regulate an activity so common as one person helping two others through a conflict then what area of human behaviour will not be regulated?

11. What does your crystal ball tell you about the future of ADR?

I see the word “Algorithm.” That’s the future. I predict more and more computer-assisted resolution, and in Canada I see the beginnings of that in the Civil Resolutions Tribunal in British Columbia and the Condominium Authority Tribunal in Ontario. Online dispute resolution is going to play a huge role on a go-forward basis. That is both understandable and inevitable given the way humanity has embraced technology, but we’re going to have to take care that we don’t convert an essentially human process into a mechanistic one.

12. What about your future? Any plans for retirement?

None. I do not intend to voluntarily put down my tools any time soon. 🏠

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Mediation Psychology: Seven Science-based Insights

Looking past rationality

Twenty-first century cognitive science has significantly heightened our understanding of how people think and reason. To call it a paradigm shift would not be an overstatement.¹

This dramatic change has nothing to do with technology. It is about cognitive scientists coming to terms with the imperfect reasoning processes of humans and urging us to abandon the single-minded pursuit of an objectively rational outcome when more than facts or basic arithmetic are at issue. What can be “rationalized” is a function of any one person’s experience, values, and context.

Mediators and legal advisors will have learned from experience, long before now, that clients do not always act “rationally.” Current academic research takes this insight further by focussing on how judgments—conclusions that drive actions—get formed in the first place² within any given context. This research allows professionals to understand and anticipate what influences the thinking of parties to a mediation. Mediators and legal advisors then have the opportunity to manage those influences, rather than react to them, in order to improve the odds of a satisfactory outcome.

In this article I identify seven basic factors that shape people’s judgments. References in the footnotes³ cite scientific research and entertaining examples to support these well-established principles. I encourage readers to explore the references at their convenience because even those experienced in mediation will benefit from being more curious about

the invisible thought bubbles that operate in people’s minds. Private, unstated thoughts blur the process of “interest-based negotiation”—the model preferred by so many mediators. Indeed, the interests that people state out loud to a mediator may be unreliable or incomplete when they are weighed down by unspoken emotions, frustrations or fears.

Settlement is First Prize—What gets in its way?

There is more than one way to measure the success of a mediation. Progress toward an out-of-court resolution or even toward a more focussed court resolution are achievements in their own right on the part of all participants.⁴ For present purposes, however, a collectively satisfactory settlement will be regarded as the ultimate first prize. Attaining that prize is in large part determined by the attitudes and behaviours of the participants, and those are mostly unpredictable and unique to each fact situation. Still, there are opportunities for mediators and legal advisors to take proactive steps to avoid or defuse attitudes and behaviours that undermine a settlement. One need not accept that settlement is the only goal, or even a goal that is always possible to do so. Marking certain psychological factors as ones that either impede or facilitate settlement will help mediators and legal advisors recognize factors as they occur and turn them to advantage.

Spoiler alert: mediators and legal advisors themselves can be the carriers of impediments.

Seven basic factors—what should be done about them?

New directions in cognitive science have broad applications in dispute resolution; harnessing them for success in mediation is one of their more recent applications. Below are seven well-established psychological influences that operate in mediations. (Others that could be enumerated are contained in several of the footnoted references.) The challenge for mediators and aspiring mediators is to determine how to lead the mediation process so that these factors enable, rather than obstruct, the path to settlement.

1. **Role playing is a powerful force.**⁵ Mediation participants—clients, legal advisors, mediators—



RUTH M. CORBIN, PH.D., LL.D.

Dr. Ruth M. Corbin, Ph.D., LL.D., is Chair of forensic research firm CorbinPartners Inc., Adjunct Professor at Osgoode Hall Law School, and an accredited mediator specializing in the resolution of expert evidence disputes in litigation and ADR forums. A member of the ADR Committee of the International Trademarks Association, she will lead a seminar on “mediating across cultures” in Singapore in 2020.

are actors for the day, playing out their respective roles. They come to a mediation with a pre-thought interpretation of how their role should be played, and they may even plan certain speech-lines and behaviours in advance. In corporate mediations, role playing is fortified with participants carrying the additional identifier of their job titles. Furthermore, participants relate to the mediator in ways congruent with how the mediator has communicated his/her own role; their relationship may be affected by the extent to which participants feel they know the mediator as a person. For example, maintaining the respect of the mediator may become important to them. For their own part, legal advisors explicitly or implicitly give stage cues that sustain how their clients interpret their role. The bottom line is that as long as people remain on stage, they have difficulty shaking off their role duties.

2. People are wired to be overconfident in their positions and over-optimistic about their chances of winning gambles such as letting a dispute go to court.⁶ Their legal advisors' confidence fortifies their tendency towards optimism.⁷ People filter facts. Positive facts (ones that support their position) carry greater weight in their judgments than negative facts (ones that would lead them to doubt their position). While it may be an error or bias on their part to give some facts more weight than others, people are usually able to justify, in what sounds like rational terms, their preferences for certain facts over others. But note this caveat: overconfidence is more prevalent in situations where people have little or nothing to lose from the *status quo*. When

presented with even modest risks of losing a lot (despite the chance of making gains), people tend to place more weight on avoiding large losses than on the prospect of enjoying gains.

3. People have an instinctive bias toward attributing motive to those who have harmed them (while attributing their own harmful behaviour to outside factors), and they tend to regard opponents as individuals with bad intentions. Psychologists attribute this tendency to our need for an ordered world of cause-and-effect, rather than one that operates on the basis of

random, unpredictable forces.⁸

4. People prefer outcomes that maintain their sense of dignity and self-determination. Dignity is delivered by a demonstration of respect. The likelihood that participants will accept a settlement option increases if they are treated with respect by their adversary, if the mediator's support for it is accompanied by respect for their point of view, and if they have been part of shaping the option. Contrariwise, perceived disrespect or unfair treatment can impede settlement for the very same option. Something other than objective (arithmetic) rationality is



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clearly at play.⁹

5. **Non-verbal behaviours are not guaranteed “tells” of what a participant is thinking.** It would be risky for mediators to rely on body language “tells” to guide their coaching to participants.¹⁰ In mediation the effect of non-verbal behaviours on other participants in the room is more significant.
6. **Context and framing are determinative factors,** even “irrationally” so. Context affects people’s perception of both physical objects and ideas.¹¹ People analyze and reason within a framework of the moment and are not inclined to reach into their memories for relevant detail. It’s the “WYSIATI” principle (“what you see is all there is.”)¹² People’s judgments tend to be determined by the immediate context of other

players and information, and what mindset they have brought with them.

7. **People’s thinking is wired to fall back on “heuristics”,** simple paths of analysis or rules of thumb that justify their choices, even when their choices are not mathematically optimal. One of the heuristics most familiar to lawyers is “anchoring and adjustment,” whereby people accept a number as a plausible starting point and adjust up or down to reflect other factors. But note: if a proposed starting point is not seen as plausible (like an offer perceived as ridiculous), then that heuristic will not be applied.

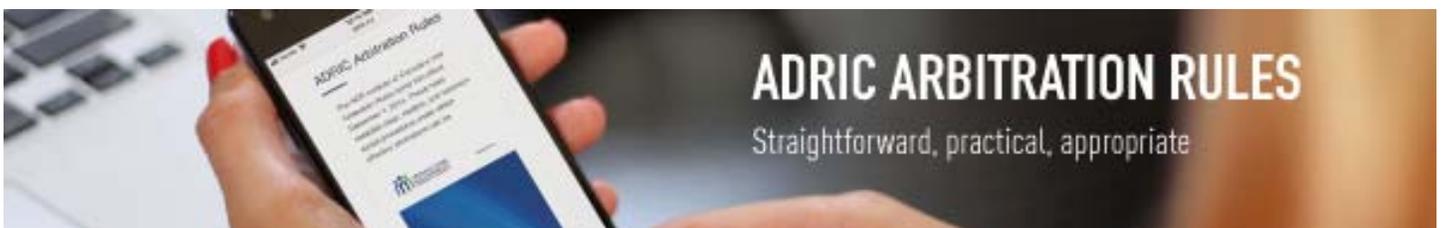
Summary and Application

Psychologists have established that people’s brains are wired to employ certain cognitive biases and analytic

short-cuts. Sometimes those biases and simplified reasoning principles help achieve settlement. But when they impede settlement, mediators and legal advisors have an opportunity to intervene, discreetly or otherwise, to change their influence. Indeed, that is their active responsibility to clients: to recognize and guide the influence of psychological factors that enable, rather than obstruct, the path to settlement.

One final caution is in order. Mediators and legal advisors are also among the group of fallible humans in the room. What they say, do, and express all become part of the context that frames the issues in their clients’ minds. To facilitate a successful outcome, mediators and legal advisors need to stay alert to whether their own role playing, perceptions, and emotional expressions send cues that obstruct the path to settlement. 🏠

- 1 Daniel Kahneman and Amos Tversky (who mentored the author’s Ph.D. research) have been credited with the new-age appreciation of the role of heuristics and biases in people’s thinking. Their research was rewarded with the Nobel Prize in Economics to Dr. Daniel Kahneman, after the death of Tversky, and is documented in his best-selling book *Thinking, Fast and Slow*, 2011.
- 2 A valuable early paper, combining scientific research with practical experience, is found in Russell Korobkin (2006), “Psychological Impediments to Mediation Success: Theory and Practice,” *Ohio State Journal on Dispute Resolution*, 21:2, p.281.
- 3 In addition to footnoted references supra, the following articles add scientific foundation and examples: Elizabeth Bader (2010), *The Psychology of Mediation: Issues of Self and Identity and the IDR Cycle*, 10 Pepp. Disp. Resol. L.J. 183; Dr. Cyril Chern, *The Commercial Mediators Handbook* (London: Informa Law from Routledge, 2014). Hoffman, D. A., y Wolman, R. N. (2013). *The Psychology of Mediation*. *Cardozo Journal of Conflict Resolution*, 14, 759-806.
- 4 Several published articles urge the use of measures that signify progress either towards an ultimate resolution, whether or not achieved at the time of the mediation, or towards improved skills on the part of the mediator. See, for example, Stratemeyer, G. (2017) “Measuring Success in Mediation: An Outline,” published online by *Academia*, at https://www.academia.edu/35440548/Measuring_Success_in_Mediation, last accessed May 15, 2019; Ross, W. H. (2000). Measuring success in mediation. *Mediation Journal*, 1, 1-16.
- 5 Dramatic illustration of how role-playing takes over our thinking and behaviour was provided in the Milgram experiments, in which psychology students asked to play the role of prison guards acted with aggression and even cruelty far beyond the requirements laid out for them. Since those early experiments, psychologists have established more generally that people instinctively adjust their sense of reality and appropriate behaviour to the contexts they find themselves in.
- 6 Overconfidence in turn affects what may be called the “reservation price” with which they come to mediation: the amount of money at which they would be willing to settle. An entertaining account of our innate predisposition to overconfidence was written by Daniel Kahneman for the *New York Times Magazine*, on October 19, 2011, in an article entitled, “Don’t Blink. The Hazards of Confidence,” reproduced at <https://www.nytimes.com/2011/10/23/magazine/dont-blink-the-hazards-of-confidence.html?ref=general&src=me&pagewanted=all>, last accessed May 15, 2019.
- 7 It is sometimes observed that lawyers advising clients at mediation are pulled in two directions: they have enough experience with litigation outcomes to temper their clients’ optimism, yet they themselves have earned their client’s trust by their own displayed confidence in their advocacy skills.
- 8 The operation of an “attribution bias” has been studied by psychologists for at least fifty years. It is only more recently that it has been incorporated into our recognition of cognitive biases as a fundamental quality of human judgment.
- 9 “Facework” is a term coined by some contemporary scholars to describe the efforts people make, conscious or otherwise, to maintain a desired impression with others, and fend off impressions that make them feel devalued. See applications to mediation and other negotiation contexts in, e.g. Ruth Abigail and Dudley Cahn, *Managing Conflict Through Communication*, Boston, MA: Pearson, 2011 and Rosenberg, Sarah. “Face.” *Beyond Intractability*. Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium, University of Colorado, Boulder. Posted: February 2004 <<http://www.beyondintractability.org/essay/face>>.
- 10 Published evidence suggests that humans are pretty bad interpreters of body language in dispute resolution settings. Judges, for example, have done no better than chance at detecting liars in simulated trial settings. See, e.g. Zimmerman, L., “Deception Detection,” in *APA Monitor on Psychology*, March 2016, Vol 47, No. 3, p. 46.
- 11 Ruth M. Corbin, “Context effects on validity of response: lessons from focus groups and complacent frogs,” *Vue Magazine*, November 2006.
- 12 Elaborated in Kahneman, *Thinking, Fast and Slow*, 2011 (*supra*).



Alternative Dispute Resolution in Brazil

Introduction

Brazil is an ADR-friendly country where arbitration and mediation are increasingly used to resolve commercial and state-related disputes. What follows is a brief introduction to this vibrant jurisdiction and how it is embracing ADR.

Brazilian Justice—The Numbers

Brazil is the fifth biggest country in the world by area¹, with just over 208 million people as at 2018². According to the International Monetary Fund³, in 2019 its Gross Domestic Product (GDP) ranked 9th in the world. Brazil is a Democratic Federative Republic composed of twenty-six states, one federal district, and 5,570 counties.

Brazil's judicial system is divided into state and federal courts, each with trial and appellate division. There are four high courts, namely the Superior Justice Court, the Superior Military Court, the Superior Labor Court, and the Superior Electoral Court. The Brazilian Supreme Court, the highest court in the land, is composed of 11 justices appointed by the President, and its jurisdiction is defined in the Federal Constitution of 1988. All the Brazilian high court justices, state judges, and federal judges have life tenure. The cost of maintaining Brazil's 18,168 judges and its judicial system exceeds \$23 billion US per year.

According to the 2018 National Council of Justice Report entitled "Justice in Numbers," Brazil has 80.1 million lawsuits ongoing of which 29.1 million were initiated in 2017. The report states that the average duration of a law suit is more than five years⁴, whereas the average time to reach an arbitration award in complex arbitration procedures is only sixteen months⁵.

Under this perspective, one can easily claim that Brazilian people and companies prefer litigation to other dispute resolution mechanisms and that they trust the courts as the best way to resolve their conflicts. If that is correct then the spread of an ADR culture has come at the right moment. Public administration, lawyers, the judiciary, academia, executives, and all legal professionals are becoming more and more aware that arbitration and mediation are, for some cases, the best choices. The trend towards ADR is demonstrated by the development of recent ADR regulations in Brazil as well as by some numbers from the main arbitration and mediation centres in the country.

Brazilian ADR History

As Brazil was colonized by the Portuguese, it

inherited most of its legislation from the small Iberian country that was, coincidentally, familiar with arbitration and mediation.

The medieval Portuguese legal system recognized arbitration as a dispute resolution option under the ordinances that governed Brazilian commercial law until the Commercial Code was promulgated in 1850⁶. The Commercial Code also allowed the use of arbitration which was mandatory for disputes between partners and the corporation. The arbitration procedure for commercial disputes was regulated by the Decree No. 737 of 1850. In 1866, however, the Commercial Code's mandatory arbitration in Brazilian commercial disputes was revoked, and the process became voluntary. Nevertheless, these legislative changes established that an arbitration agreement is mandatory in every commercial contract.

Mediation shares the same legal roots as arbitration, having been provided for in early Portuguese ordinances and later regulated by the Imperial Brazilian Constitution of 1824 that recognized the conciliatory role of the justice of the peace in legal proceedings.

The 1824 Constitution also expressly authorized arbitration: *Art. 160. In civil suits and in penal causes brought civilly the parties may appoint arbitrating judges. Their decisions shall be executed without appeal if the same parties so agree.*

The next Constitution in 1895 did not say anything about alternative dispute resolution. Arbitration only reappeared in the 1934 Constitution that granted the Union jurisdiction to legislate commercial arbitration. The subsequent Constitutions of 1937, 1946 and 1967 were silent on

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the subject. It was only with our current Constitution from 1988 that ADR came back into the game in the preamble that declares that Brazil is *founded on social harmony and committed, in the internal and international orders, to the peaceful settlement of disputes.*

The Brazilian Civil Procedure Codes recognized arbitration, but mediation was not mentioned until 2015 when it was inserted for civil disputes: *Art. 334. If the complaint fulfils the essential requirements and if there is no preliminary denial of the claim, the judge shall schedule a conciliation or mediation hearing with at least thirty (30) days' notice, and the defendant shall be summoned with at least twenty (20) days' notice.* Although Brazil's State Courts are not making much use of this article, the wording does demonstrate that Brazil is beginning to recognize and take ADR mechanisms seriously. The Civil Procedure Code contains other ADR-friendly provisions: *Art. 3. Neither injury nor threat to a right shall be precluded from judicial examination. § 1 Arbitration is allowed, in accordance with statutory law. § 2 The State must, whenever possible, encourage the parties to reach a consensual settlement of the dispute.* And *Art. 191. By mutual agreement, the judge and the parties can establish a timetable for the performance of procedural acts, when appropriate.*

The Brazilian Arbitration Act (Law 9.307) was enacted in 1996. It is partially based on the 1985 UNCITRAL Model Law on International Commercial Arbitration and the 1988 Spanish Arbitration Act. Significant amendments in 2015 made it possible for unions, states, municipalities, government agencies, government foundations, wholly-owned state companies and state-controlled companies to participate in arbitration: *Article 1. Those who are capable of entering into contracts may make use of arbitration to resolve conflicts regarding freely transferable property rights. § 1. Direct and indirect public administration may use arbitration to resolve conflicts regarding transferable public property rights".*

The Brazilian Arbitration Act is considered to be progressive because it respects party autonomy and allows an arbitration award to be enforced as if it were a judicial decision: *Article 31. The arbitration award shall have the same effect on the parties and their successors as a judgement rendered by the Judicial Authority and, if it includes an obligation for payment, it shall constitute an*

enforceable instrument thereof. Easy enforcement of arbitral awards is also ratified by the Brazilian Civil Procedure Code: *Article. 515. The following are judicially enforceable instruments whose satisfaction shall take place in accordance with the articles provided in this Title: VII – an arbitration award.*

Although the Brazilian Arbitration Act was enacted in 1996, it was not until December 12, 2001, that arbitration started to be taken seriously when the Brazilian Supreme Court declared arbitration to be constitutional in a 7:4 ruling. After that, arbitration quit taking baby steps and advanced fiercely in Brazil. The best proof of this statement is the 2002 adoption of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Brazil has not signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention of 1966 aka Washington Convention) so all arbitrations follow commercial standards even when the state is one of the parties.

Mediation followed arbitration's path. In 2015, the Brazilian Mediation Act was enacted as the Federal Law No. 13.140: *Article 1. This Law provides for mediation as a means to settle disputes between private parties and the self-resolution of disputes in the scope of public administration.* It is believed that Brazil will sign the United Nations Convention on International Settlement Agreements Resulting from Mediation (aka Singapore Convention) following the NY Convention pattern for arbitration.

Although the Mediation Act is also considered progressive, it imposes barriers on hybrid forms of ADR such as med-arb because it expressly forbids the mediator to become the arbitrator in the same proceeding: *Article 7. The mediator may neither act as an arbitrator nor as a witness in legal or arbitration proceedings concerning a dispute in which he/she has acted as a mediator.*

All things considered, there is no denying that Brazil can easily be considered an ADR-friendly jurisdiction.

Recent ADR Initiatives

The Brazilian federal government, states, and counties are constantly regulating the application of arbitration. For instance, in 2017 Law No. 13.467 allows arbitration in labor law for employees that earn more than R\$11.678,90 or \$3051,46 US on a monthly basis, whereas arbitration was



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not previously allowed. And in 2018, Law No. 23172 from the State of Minas Gerais creates the Chamber of Administrative Law for Prevention and Conflict Resolution, establishing conciliation and mediation as a mechanism to solve administrative or judicial conflicts that involve the State of Minas Gerais public administration.

These and other recent initiatives show that Brazilian state entities are becoming more and more aware that the efficiency of ADR is not only for conflicts among private parties but also for conflicts involving public entities such as themselves.

Leading ADR Centres in Brazil

According to the 2018 White & Case International Arbitration Survey⁷ Rio de Janeiro came 14th in the global ranking of seats and 8th in the Latin American subgroup, whereas São Paulo took 4th place in that region and came 8th in the overall ranking.

Brazil is divided in five geographic regions: North, Northeast, Center-West, Southeast and South. The leading arbitration and mediation centres are concentrated in the Southeast and South regions that are considered as the most economically prosperous regions. São Paulo is, no doubt, Brazil's financial-hub, but Rio de Janeiro is recovering after going through years of political corruption that affected its economy tremendously.

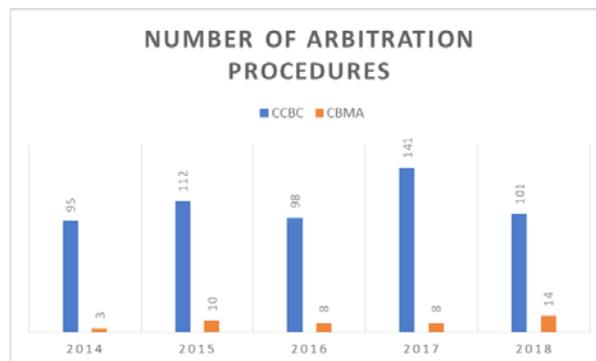
Leaders League ranked⁸ the twelve top arbitration and mediation centres in Brazil, namely:

1. CAM-CCBC (São Paulo - SP);
2. CAMARB (Belo Horizonte - MG) - Câmara de Mediação e Arbitragem empresarial;
3. CMA CIESP/FIESP (São Paulo - SP);
4. International Court of Arbitration of the ICC (São Paulo - SP);
5. AMCHAM Brasil (São Paulo - SP);
6. CAM - Câmara de Arbitragem do Mercado (BM&FBOVESPA) (São Paulo - SP);
7. CBMA – Centro Brasileiro de Mediação e Arbitragem (Rio de Janeiro - RJ);
8. Câmara FGV de Mediação e Arbitragem (Rio de Janeiro - RJ);
9. ARBITAC - Câmara de Mediação e Arbitragem da Associação Comercial do Paraná (Curitiba - PR);
10. CAESP – Conselho Arbitral do Estado de São Paulo (São Paulo - SP);
11. CAMERS - Câmara de Arbitragem, Mediação e Conciliação do CIERGS (Porto Alegre – RS);
12. CAMFIEP - Câmara de Arbitragem e Mediação da FIEP (Curitiba – PR).

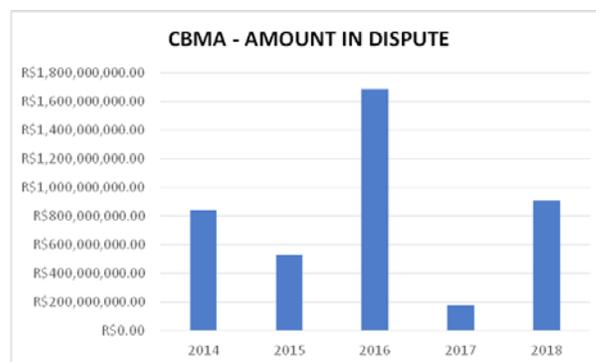
This ranking confirms that ADR centres are concen-

trated in the South and Southeast Brazilian regions, or in seven of the twenty-six Brazilian states. Of the twelve mentioned centres, six are located in the city of São Paulo (Southeast region), two in the city of Rio de Janeiro (Southeast region), one in Minas Gerais (Southeast region), two in the city of Curitiba (South region), and one in Porto Alegre (South region).

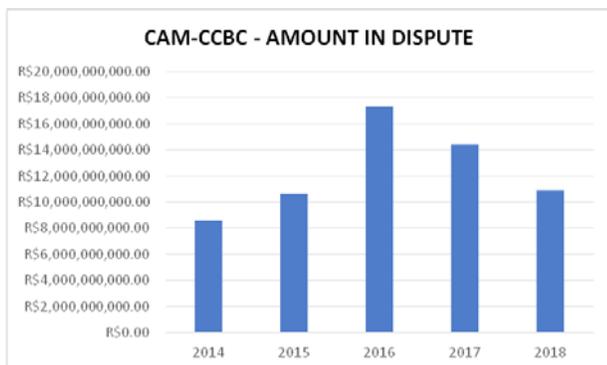
Data from two of the most recognized arbitration and mediation centres—Center of Arbitration and Mediation of the Brazil-Canada Commercial Chamber (CAM-CCBC) and Brazilian Center of Arbitration and Mediation (CBMA) demonstrate ADR's exponential growth in Brazil, especially in the last five years. Most of the arbitration procedures in Brazil involve the following topics: contracts in general, business in civil construction, energy area especially oil and gas, and supply of goods and services. Disputes about international contracts and intellectual property play a minor role in the arbitration procedures. The table below illustrates the number of arbitrations in the last five years for both centres:



CAM-CCBC had the following yearly amount in dispute in Reais (Brazilian Currency) in the last five years, with the average being R\$ 112.000.000,00.



CBMA had the following amount in dispute in Reais (Brazilian Currency) in the last five years, with the average being R\$ 111.996.595,00.



Fewer mediations were conducted at both centres in the last five years as compared to arbitrations, but the amounts involved were considerable. CAM-CCBC had forty mediations in the last five years and has seven ongoing mediations that involves an amount of 13 billion Reais. CBMA had an amount of 117 million Reais in dispute in its mediations in the last four years. Both centres also offer dispute board's service especially for civil construction contracts.

Furthermore, CBMA is involved in sports arbitration in both soccer, our national sport, and basketball. It operates as the appellate arbitration court for disputes that involve solely freely transferable property rights that come from the National Chamber of Dispute Resolution of the Brazilian Soccer Confederation (CNRD - CBF) and the Brazilian Basketball Confederation (CBB).

Disputes Third-party funding is also expanding in Brazil and companies like Leste Litigation Finance⁹ are playing a key role in making the costly arbitration procedure feasible to the parties and also sponsoring ADR events.

After analyzing all this data, there is no denying that ADR is a growing field in Brazil. That being said and even though the ADR concentration makes sense financially, the culture needs to be spread nationwide, thus bursting the ADR river's south and southeast banks.

ADR Teaching and Research

The top Brazilian arbitration and mediation centres are investing in academic initiatives. CBMA and CAM-CCBC, for example, have a yearly International Congress on ADR and offer courses in arbitration and mediation. CBMA recently published the first volume of the *Brazilian Journal of Alternative Dispute Resolution*¹⁰.

The top law schools already have arbitration and mediation moot teams and compete around the world representing Brazil with good results. Moreover, by the end of 2018 the National Council of Education, a Brazilian Ministry of Education branch, after conducting a public hearing and giving voice to all the Brazilian legal community, decided that alternative dispute resolution should be mandatory in law school curricula. In 2018, the Council enacted the new National Curricular Guidelines for the Bachelor of Laws Undergraduate Programs.¹¹

Law school's legal clinics are also obliged to apply arbitration and mediation in the students' daily practice. Legal clinics are mandatory for fourth and fifth year law students in Brazil's 1,500 law schools. Mediation is much more applied in legal clinics, especially in family law cases. Arbitration is usually practised in moot courts.

There are also some graduate programs focused on the subject, meaning master's degrees, doctorate degrees, and LL.Ms.

In a nutshell, academia is also paying attention, researching, publishing, and teaching the law students about ADR.

Conclusion

Brazil still suffers from a rooted litigation culture. This argument is easily ratified by the 80.1 million ongoing lawsuits in Brazilian courts. Nevertheless, our legal history and the recent legislative and academic initiatives show that the country is embracing ADR as few places in the world, not only for private parties but also, and most especially, for public entities.

New and promising ADR centres are arising like the Mediation and Arbitration Chamber (CMAA) from ACIF (Industrial and Commercial Association of Florianopolis) (Capital of the Santa Catarina's State)¹² led by very serious and technical ADR practitioners.

However, ADR culture needs to spread to other regions and for that law schools will play a relevant role by making ADR courses mandatory in their curricula.

Brazil's past was an ADR-agitated river that trusted only in the state's judges for conflict resolution. Our ADR present, though, can be presented as a peaceful river that will flow, not in a distant future, to a dazzling and calm ADR lake. For that and for all the mentioned data, Brazil is today, undoubtedly, an ADR-friendly country. 🏠

1 Brazil's total area is 8.510.820.623 km²

2 Population 208,494,900. Data collected from the Brazilian Institute of Geography and Statistics from 2018. Available at <https://cidades.ibge.gov.br/brasil/panorama>. Accessed June 22, 2019.

3 Available at <http://statisticstimes.com/economy/gdp-indicators-2019.php>. Accessed June 22, 2019.

4 Justiça em Números 2018. Conselho Nacional de Justiça, 2018, p. 197. Available at: <http://www.cnj.jus.br/files/conteudo/arquivo/2018/08/44b7368ec6f888b383f6c3de40c32167.pdf>. Accessed June 23, 2019.

5 See the statistics of Brazilian Arbitration Procedures at CAM-CCBC website: <https://ccbc.org.br/cam-ccbc-centro-arbitragem-mediacao/en/about-the-cam-general-statistics/>. Accessed June 25, 2019.

6 MUNIZ, Joaquim de Paiva. *Curso Básico de Direito Arbitral: Teoria e Prática*.

Curitiba: Juruá Editora, 4^a Ed., p. 29, 2017. Alfonsine Ordinations – book 3, title 118; Manueline Ordinations – title 81; Philippine Ordinations – title 18.

7 See the complete report at <https://www.whitecase.com/law/practices/international-arbitration>. Accessed June 25, 2019.

8 See the ranking at <https://www.leadersleague.com/en/rankings/arbitration-centres-brazil-2019-rankings-1>. Accessed June 25, 2019.

9 See the company at <http://www.leste.com/pt/leste-litigation-finance/>. Accessed July 3, 2019.

10 See the journal at <https://rbadr.emnuvens.com.br/rbadr>.

11 Ministry of Education Resolution No. 5 of December 17, 2018, – article 5, II – which insert the course Consensual ways of Conflict Solution as mandatory in Brazilian Law School's Curricula.

12 See the Chamber at <https://www.cmaa.org.br/>. Accessed July 3, 2019.

The Proactive Arbitrator: Duty Bound!¹

Part I

The use of arbitration to resolve commercial disputes in Canada is growing. The number of properly-trained and experienced arbitrators is increasing, as is the number of lawyers knowledgeable about commercial arbitration. Even so, counsel often fail to take full advantage of arbitration's benefits and attributes, and arbitrators fail to use their persuasive powers to force them to do so. Why?

Typically, arbitrators are former litigation lawyers or retired judges, and arbitration counsel—in Canada, at least—are litigation lawyers. They easily default to their court experiences, forgetting that arbitration is more than “litigation-light.” It is an autonomous, self-contained, self-sufficient process where a neutral selected by the parties resolves their dispute outside of the court system. Bluntly put, too much litigation baggage is brought to arbitration.

Arbitration is driven by parties exercising contractual rights to private dispute resolution, to the exclusion of the courts. They opt for arbitration and they pay for it. Thus, the starting point should always be: *What do the parties want?* This is not difficult to discern from regularly-published surveys² and user panels regularly featured at conferences. Arbitrators and lawyers should attend to what users say. At the risk of over-generalization, users who decide to arbitrate want:

- a non-judicial process, not a duplication of litigation where paid arbitrators replace free judges
- finality in the form of enforceable awards that deal with all of the issues, without the need for appeals or judicial review
- arbitrator expertise in that the decision maker knows the subject matter *and* the practice of arbitration
- time-efficiency so that disputes are determined as quickly as the circumstances permit
- financial-efficiency so they do not pay for seemingly endless, multi-staged process that culminates in a trial-like hearing years hence
- procedural efficiency and *not*
- formalistic court-style pleadings that serve no real purpose
- disproportionate and overbearing production and discovery procedures that assume almost everything is relevant and producible
- oral discovery of unlimited scope and duration
- adherence to the formal rules of evidence that evolved to

suit jury trials; and

- antiquated hearing formats.

How do we promote arbitral processes that give parties what they want? As a former dispute resolution counsel who now serves as an arbitrator, I do this by following the norms of international arbitration and using a “front end” approach to the process. I take the initiative to help the parties adapt the process to deliver a time-efficient and economical resolution by means of a final award that can be recognized and enforced.

A properly conducted arbitration is case managed by the arbitrator, working with counsel from start to finish. Arbitrators should insist and expect that through the delivery of meaningful and relevant information at all stages, they and counsel will be positioned to conduct an efficient hearing. But it is the arbitrator, not counsel, who must take the initiative and lead the process.

My front-end approach, while activist in nature, is completely consistent with party autonomy. When commercial parties contract for arbitration, that contract implies that they will do what is necessary to ensure the proper and expeditious conduct of the process. This is key, for without that underpinning, the unchecked adversarial behaviour of the parties could derail the arbitration, and it is the arbitrator's responsibility to make sure that does not happen.

Canadian arbitration statutes do not explicitly recognize the parties' obligation to participate in good faith, but both English and Australian statutes do, as does the 2016 Uniform Arbitration Act issued by the Uniform Law Conference of Canada³. Arbitration scholar Gary Born links

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the parties' implied obligation to the maxim *pacta sunt servanda* (treaties must be obeyed), and he is of the view that arbitration agreements are not simply promises not to litigate. They are also positive obligations to cooperate in the arbitration process itself.⁴ And, of course, if parties are contractually bound to cooperate in the arbitral process, their counsel are too.

My front-end approach to arbitration is also grounded in the contract between the parties and the arbitrator. In *ad hoc* arbitration, contractual terms are expressed in terms of appointment, and in institutional arbitration they are found in the institution's procedural rules. By virtue of their contract, the arbitrators and parties bind each other to act cooperatively and in good faith to work towards those results. Author Neil Andrews identifies two managerial responsibilities that arbitrators have: timing and planning, and cost containment. "The governing responsibility should be sensible and effective time-management and the pursuit of judgment at proportionate cost," he wrote.⁵

No Canadian arbitration statute speaks to this power on the part of arbitrators, but some institutional rules do. For example, ICDR Canada's rules for domestic arbitration provide that tribunals shall conduct proceedings with a view to expediting the resolution of the dispute and "may take steps necessary to protect the efficiency and

integrity of arbitration." ICC rule 22(1) has provisions to a similar effect. Such institutional rules reflect pro-active and coercive powers that promote arbitral efficiency and prevent adversarial behaviour from overwhelming the arbitration process.

How do these contractual obligations translate into practical measures that ensure the parties get what they bargained for? Firstly, by the arbitrator taking process leadership immediately. In the time between their appointment and the first pre-hearing meeting that culminates in an arbitral direction, arbitrators should act proactively to ensure that the parties adopt suitable procedures.

Over time I have developed practices that promote an efficient arbitration process. They are not invariable, and other arbitrators will have different preferences, but they reflect my experiences as an arbitrator and my conclusions about "best arbitration practice."

1. Very soon after appointment, the arbitrator should have copies of the commercial agreements in issue, the arbitration agreement, the notice of arbitration, and any reply. This lets the arbitrator prepare for the pre-hearing conference and engage in preliminary communications with counsel.
2. The arbitrator (not the parties) should convene the case conference as soon as possible after appointment, and a resisting respondent should not be allowed to unreasonably delay the start of an arbitration. If there are preliminary issues that require determination, convening the first meeting will kick-start that process.
3. The arbitrator should circulate, for comment and approval, the terms of appointment, to be signed by or on behalf of the parties no later than the start of the first meeting. Without this, the arbitrator will lack authority to issue orders or directions.
4. The arbitrator should, in advance, circulate a detailed agenda for the pre-hearing conference and direct counsel to confer on each and every item with a view to coming to some understanding of the process. Alternatively, the arbitrator can circulate a draft procedural order. Whatever the document, everyone must understand that their input will be subject to the comments, suggestions, and directions of the arbitrator who, as "master of the procedure," is not to be pre-empted by the parties or their counsel. For instance, arbitrators should not allow ill-informed parties to adopt rules of civil procedure.
5. The arbitrator should suggest that parties themselves attend the first case conference, if not all meetings. Why? It is their proceeding. There is no principled reason to exclude them. They will benefit from early, unfiltered exposure to the arbitrator and to the process.

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Their presence will enhance the businesslike nature of the process. Finally, party presence ensures that instructions to counsel can be given immediately.

6. The arbitrator should schedule the evidentiary hearing at the front end of the process, even if preliminary or interim issues need to be determined first. Doing this insures against delay and gamesmanship, and promotes diligent and cooperative behaviour. Where the parties raise the possibility of interlocutory steps (e.g., summary judgment, jurisdictional issues, bifurcation, interim relief) that could affect the timing or duration of the hearing, alternative hearing dates should be scheduled.
7. Procedural Order No.1 should immediately follow the pre-hearing meeting, setting out the mandatory procedural rules and timetable. This must be in the form of an order not an agreement so that, in the event of non-compliance, the arbitrator can enforce it.
8. After the first pre-hearing conference and all other case conferences, the arbitrator should circulate a memorandum summarizing any discussions that did not find their way into the procedural order. The arbitrator should invite counsel to promptly correct any points of disagreement.
9. There are a number of suitable checklists that are available in arbitration texts and publications and elsewhere in the public domain.

Checklists are available in arbitration texts and publications and elsewhere in the public domain for matters that should be covered in the first pre-hearing conference and Procedural Order No. 1. That said, the importance and authority of this first order cannot be overstated. For one thing, it deters counsel from treating scheduling as optional. Without advising the arbitrator, they may agree to extend timelines or make changes to procedures, believing that party autonomy entitles them to do so. Allowing counsel to do this can ruin an efficient and timely arbitration.

The arbitrator is responsible to ensure that procedural orders are discharged and that once a timetable is set, it is followed. While timetable changes may at times be required, they must be made under the arbitrator's control and with a view to maintaining the start date of the hearing. Procedural Order No. 1 should provide that the parties are not at liberty to deviate from the timetable without prior notification to the arbitrator, and without the arbitrator's prior approval. This will not always work, and arbitrators will often be presented with after-the-fact change requests. Nevertheless, an explicit prohibition will establish the arbitrator's expectations.

Procedural orders should also provide that whenever material is exchanged between the parties, copies are to be sent to the arbitrator. This allows the arbitrator to monitor the schedule without having to repeatedly ask and gives the arbitrator a sense of how the proceeding are progressing.

Front-end arbitration management also entails the design of the arbitration process itself, a critically important activity that the arbitrator must manage. Through trial and error, I have evolved an arbitration model that, in my experience, balances full and fair disclosure with efficiency. I will describe this model in more detail in the next issue of this journal. 🏠

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- 1 This paper is based upon a presentation made at a November 15, 2018 meeting of the Vancouver Chapter of the Chartered Institute of Arbitrators (Canada Branch)
 - 2 Most notably, the annual International Arbitration Survey conducted by Queen Mary University; see "2018 International Survey: The Evolution of International Arbitration," <https://www.whitecase.com/publications/insight/2018-international-arbitration-survey-evolution-international-arbitration>
 - 3 See, for instance, section 40(1) of the English Arbitration Act of 1996, which provides that: "The parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings."
 - 4 Born, Gary, "International Commercial Arbitration", (2nd edition, 2014, Wolters, Kluwer) at pp. 1257-1283
 - 5 "Improving Arbitration: Responsibilities and Rights", *Arbitration* (2017) Vol 83, 330 at 337



Online Dispute Settlement: Quebec on a Promising Path

Summary

Consumer mediation in Quebec was first developed in the Small Claims Division of the Court of Québec, where a pilot project on mandatory mediation of consumer contracts was completed in May 2018. In November 2016, the Office de la protection du consommateur du Québec launched another pilot project in conjunction with the Laboratoire de cyberjustice de l'Université de Montréal, the Platform to Assist in the Resolution of Litigation Electronically (PARLe). The features of this unique platform are very different from those of the online consumer dispute settlement platform launched by the European Union on February 15, 2016. The technology developed for the PARLe project is promising and already being used elsewhere in the world for online settlement of disputes not involving consumer complaints.



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1. Introduction

In Quebec, as elsewhere, the problems of court congestion and, more generally, access to justice, are not new. It was in this context that the *Regulation respecting the mediation of small claims*¹ (hereinafter "the Regulation") was adopted in 2003. The regulation originally provided for a form of mediation prior to the trial, which was supplemented over the years with on-site mediation on the day of the hearing, and more recently, mandatory mediation of consumer contracts pursuant to the *Regulation to establish a pilot project on mandatory mediation for the recovery of small claims arising out of consumer contracts*².

The Office de la protection du consommateur (OPC) du Québec has long provided consumers with support, which some mistakenly considered a form of mediation. More recently, the OPC launched another pilot project in partnership with the Laboratoire de cyberjustice de l'Université de Montréal, the Platform to Assist in the Resolution of Litigation Electronically (PARLe).

Due to space constraints, the evolution of small claims mediation will not be analyzed. However, this study of consumer mediation in Quebec will review how complaints to the OPC have been processed. We will then examine the PARLe project and compare it to the European Union's online consumer dispute settlement platform, as well as the results obtained to date by each approach. Finally, we will briefly outline

how PARLe technology is used in Ontario and France in areas not involving consumer disputes, and conclude by presenting the options that PARLe provides for online settlement of disputes and litigation in more general terms.

2. How complaints to the Office de la protection du consommateur are processed

2.1 Prior to 2010

The OPC has been in operation since 1971, initially as part of a ministry of the Quebec government and since 1978 as an organization detached from the executive branch.³ Its duties are described in section 292 of the *Consumer Protection Act*⁴ (hereinafter the "Act"). Subsection 292(b) stipulates that it is the duty of the Office "to receive complaints from consumers." The next question was "how would the OPC handle the complaints they received"?

Until 2010, the procedure outlined below was followed. A consumer protection agent (hereinafter "the agent") would receive a telephone call from a consumer who complained about goods or services that he had purchased. The agent then mailed the consumer a complaint form asking him to fill it out, send it back to him, with a copy to the merchant.⁵ Once the agent received the completed complaint form, he called the merchant, informed him of the alleged violation of the relevant sections of the Act and asked him what he was going to

do to resolve the complaint. Some have said, mistakenly in our opinion, that they considered this process described as “consumer support” a form of mediation. Based on the practical effect these calls had on most merchants, it would be in our view more appropriate to describe this process as lobbying on behalf of the consumer. Also, the numerical results of this complaint-processing system were minimal: about 10,000 calls were received each year; about 3,000 resulted in a completed complaint form; and about 500 cases were settled through “mediation.”⁶

The vast majority of disputes between consumers and merchants ended up in the Small Claims Division of the Court of Québec, commonly known as the “Small Claims Court.” This court follows a simplified procedure and, in principle, the parties cannot be represented by counsel (although nothing prevents the parties from consulting counsel before the hearing to be better prepared).⁷ The court hears cases for claims of \$15,000 or less and requests for the cancellation of contracts worth \$15,000 or less, not including interest. Legal persons, partnerships, associations and other groups not endowed with juridical personality may also bring cases to this tribunal if they had no more than 10 employees at any time during the preceding year.⁸

2.2 Since 2010

Following a major strategic planning exercise in the early 2010s, the OPC wanted to give more people access to its services. It therefore ended the consumer support process, which was considered too time-consuming to be effective. This initiative also took increased demand into account. The annual number of calls has steadily increased and is now between 130,000 and 150,000. A formal complaint is filed for about 30,000 of these calls. About half, i.e. approximately 15,000 of these calls, involve a civil dispute between the consumer and the merchant, for example, a problem with services not received or not provided (or partially provided); late delivery of the goods or services; a defective item that has not had a reasonable life or cannot be used for its intended purpose; goods or services that do not comply with the contract, the seller’s statement or an advertisement; or a refusal by the merchant to honour a guarantee.⁹ The other half of the complaints involves violations of the Act and are handled by agents acting as regulatory compliance inspectors.¹⁰

3. The PARLe pilot project

In 2016, the OPC called upon the Laboratoire de cyberjustice de l’Université de Montréal¹¹ to develop the Platform to Assist in the Resolution of Litigation Electronically (PARLe), a pilot project that provides consumers and merchants with a fast and free alternative for settling their disputes. PARLe enables them to negotiate and, if necessary, use the services of an

independent mediator. The platform provides a neutral, confidential and secure online environment for reaching out-of-court settlements, regardless of the value of the goods or services.¹² It is based on an update of the Electronic Consumer Dispute Resolution (ECODIR) technology developed in the early 2000s and funded by the European Commission to implement the European Directive on Electronic Commerce.¹³

3.1 The issue

In principle, mediation involves bringing the parties to a dispute together with a mediator, who can see them separately (in a caucus) or together (in plenary). This is why some have argued that online mediation is not possible, because it is essential, if not indispensable, that the parties be physically present in the same place and at the same time to ensure the success of any dispute resolution process.¹⁴ Without going that far, the OPC was concerned that online mediation, which must take place remotely, “would be a very cold process”, which could impede its adoption. Another problem was where to start. It was necessary to create a suitable number of cases to test the platform without overloading it during the first three to six months of the pilot project.¹⁵

3.2 Chosen solutions

The OPC initially ruled out all cases involving a criminal offence, since there were enough complaints considered “civil” to justify implementing PARLe. Having identified the nature of the disputes that could be submitted to PARLe, the OPC then took steps to resolve the problem of the “coldness” of Online Dispute Resolution (ODR). To this end, the OPC contacted the merchants who had received the largest number of complaints, particularly in the retail, furniture and appliance sales, housing, and automobile sales sectors, and asked them to agree in advance to submit future consumer complaints to PARLe. This was obviously a commitment to participate in the process, not to settle the case.

3.3 Operating procedure

There is no self-service access to the PARLe pilot project. The OPC must therefore be contacted to participate. The agent first ensures that the consumer meets the following three criteria: his problem is exclusively civil in nature (as defined above); he is comfortable with online tools (i.e., he is used to shopping or filling out forms on the Internet); and he has a problem that involves a merchant participating in the pilot project. Once this verification has been completed, the agent emails the consumer the information needed to create an account on PARLe and to use the platform.¹⁶

The PARLe process takes place over a maximum of 35 working days, which the Clerk must enforce. It consists of two phases: 20 days of negotiation, followed by 15 days of

mediation, if necessary. The consumer begins by completing two preprogrammed forms that provide a number of options. He is asked to simply check the box or boxes that describe his situation, which reduces the time it takes to complete the form.¹⁷ The first form describes the problem and the second makes a settlement proposal. The consumer can also upload documents to the platform at this stage. There may be several proposals and counter-proposals.

If no agreement is reached within 20 business days, we move on to the second step. An external mediator accredited by a professional body—the Barreau du Québec or the Chambre des notaires du Québec—is then automatically appointed by PARLe and has access to all the electronic history of the discussions, including the table of proposals. The mediator's services are free for the parties and the mediator is paid by the Government at the rate stipulated in the Regulation.¹⁸

At the end of the mediation, the mediator can propose an outcome that each party is free to accept, reject or amend. If accepted by the parties, the mediator's proposal is formalized via the platform and the case is closed. If the proposal is rejected, the case may, at the consumer's discretion, be referred to the appropriate court (usually the Small Claims Court) and this marks the end of the PARLe process.¹⁹

4. European Union Online Consumer Dispute Resolution Platform (EUODRP)

The European Union Online Consumer Dispute Resolution Platform is a one-stop shop posted online by the European Union (EU) on February 15, 2016 to help European consumers deal with both national and international disputes. Consumers use the platform to submit a complaint to a neutral third party, a "dispute resolution body", regarding goods or services that may or may not have been purchased online. EU merchants doing business online are required to inform consumers of the competent dispute resolution body. This information must be included in the general conditions of the contract or in the sales contract²⁰. A link to the platform (<http://ec.europa.eu/odr>) must also be posted on the merchant's website.²¹

This is a user friendly, multilingual online platform. Translation services are also available to facilitate the resolution of disputes involving parties established in different EU member states.²² It should be noted that in some countries the merchant or professional may also lodge a complaint against a consumer using the platform.

The EUODRP follows a four-step process. As with PARLe, the consumer begins by filing a complaint by completing an online form. Once the form is completed, he has 30 days to choose the dispute resolution body he prefers. Each member country of the EU has a list of organizations, some very specialized, such as the Médiateur du Crédit Agricole de la Touraine et du Poitou in France or the Sveriges

Begravningsbyråers Förbunds Reklamationsnämnd (Swedish Funeral Association Complaints Board) in Sweden. The claim is then sent to the other party.²³

In this second step, the consumer and the merchant have 30 days to agree on the dispute resolution body. If an agreement cannot be reached, the complaint is abandoned. If there is an agreement, the website automatically sends the dispute information to the dispute resolution body that has been chosen. Once it receives the complaint, the dispute resolution body has three weeks to determine whether it is competent to hear the case and inform the parties. If necessary, it may also contact them for more information. Then, within 90 days, the body can suggest a solution to the parties, bring them together to find a solution or impose a solution on them. Once the procedure is completed, the dispute resolution body informs the parties of the outcome of the dispute.²⁴

5. Results

5.1 Results achieved via the EUODRP

The speed at which the platform is being adopted varies between member countries of the Union. For example, since the platform was introduced, Germany is the number one user with 20,550 cases processed, followed by Great Britain with 18,200 cases. The EUODRP seems to be more popular in France than Italy, as shown by the 9,200 and 5,392 cases processed in France and Italy respectively.²⁵ 41.25% of complaints are categorized as national (both parties being nationals of the same Member State) and 52.75% are international.²⁶ The three sectors with the most complaints are airlines with 13% of complaints, clothing and footwear retailers with 10.89% and finally information and communication technology merchants with 6.91%.²⁷

However, there do not appear to be publicly available statistics on the number of cases where a dispute resolution body has been appointed by agreement between the parties, the average processing time, percentage of disputes that resulted in an agreement, general level of consumer and merchant satisfaction, and, for settled cases, the average value of the goods or services involved.

It should also be noted that the EUODRP does not provide a single gateway and a public platform. On the contrary, there are 28 different gateways (for the time being) and a multiplicity of private platforms.

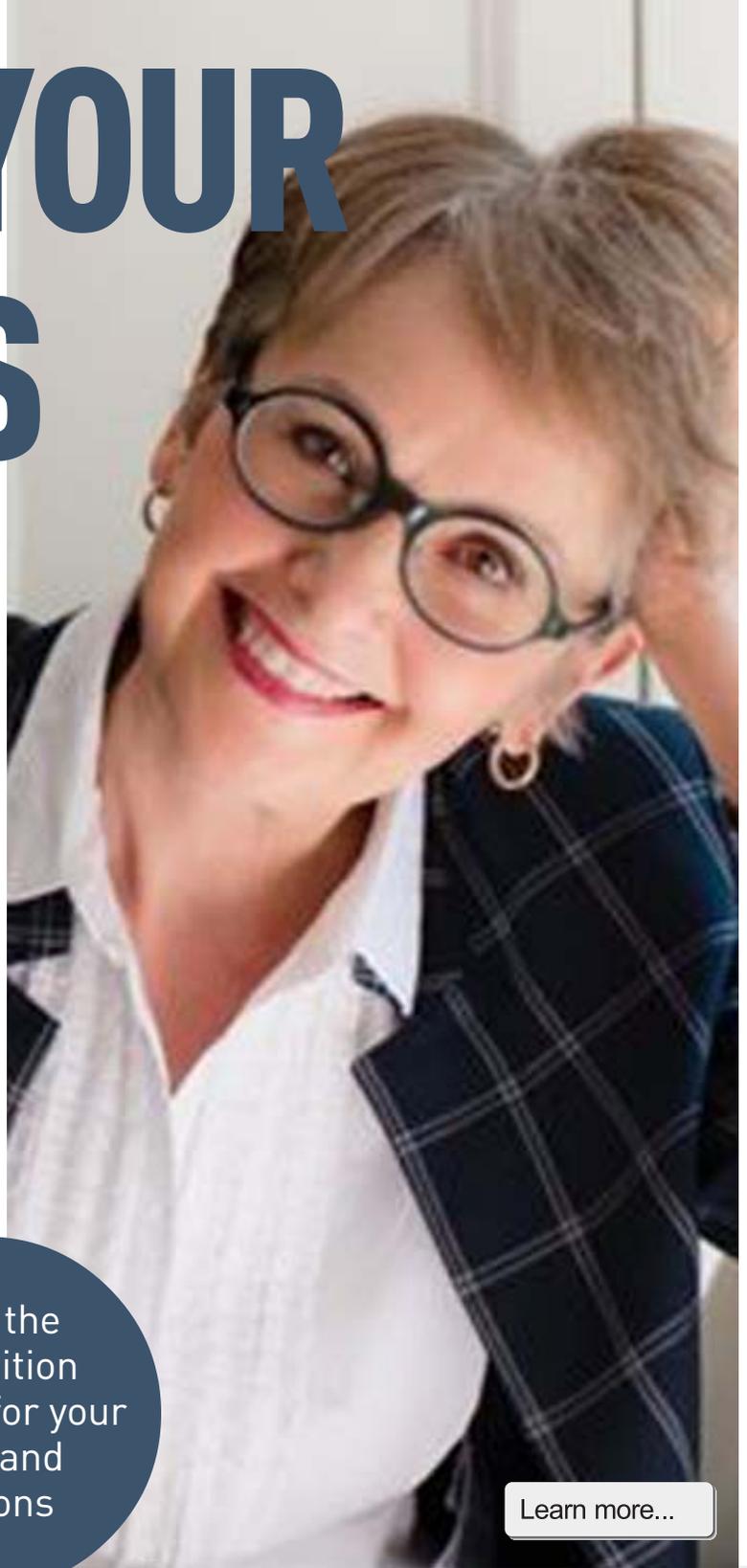
Also, there do not seem to be any statistics on the rate at which merchants accept or reject consumer requests to refer their complaint to a dispute resolution body. As we saw above, if the merchant refuses, the complaint is considered abandoned, although it has not actually been processed. In this regard, there is information circulating, which is obviously difficult to verify, that some of the largest European brands publicly state that they generally want to resolve con-

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sumer disputes through the EUOCDRP. However, unbeknownst to European Union statistics collectors, they in fact routinely reject consumers' proposals to refer their dispute to a specific regulatory body.

The final issue involves what happens after the parties have agreed on a dispute resolution body. There do not appear to be any statistics on the extent to which the dispute resolution body determines it has jurisdiction to hear the case and so informs the parties within three weeks. If the answer is no, the complaint is likely to be considered abandoned, even if it has not in fact been processed. Or, it may be necessary to start over so that one of the parties can propose a new dispute resolution body, which requires mutual agreement between the parties. Also, if applicable, the body must decide whether it has jurisdiction and there is no guarantee that the body will find that it does.

5.2 Results achieved by PARLe

After being in operation for less than two years, the PARLe platform is already being used by a large number of retailers, including big box stores, furniture and appliance retailers, second-hand car dealers and travel retailers.²⁸ Their membership has grown exponentially, from 16 at the launch of the pilot project on November 7, 2016 to 83 merchants at the time of writing. The members include the largest consumer companies in Quebec. Their participation, acquired as a result of a sustained and ongoing recruitment campaign, was facilitated by the fact that when a case is opened at the OPC after a complaint is filed, the case becomes available online, and therefore public.²⁹ As a result, it is in the interest of merchants who are concerned about their reputation to publicly demonstrate corporate social responsibility by showing that they are willing to submit these disputes to PARLe in an attempt to resolve them. Quebec merchants have clearly understood this. In fact, some of them who had not been approached by the OPC have taken the initiative to participate, because they believed that if they did not participate, their competitors would have an advantage over them.³⁰

The results regarding the outcome of the process are also impressive. The average processing time is 27 working days. This compares favourably with the Small Claims Court, and the fastest settlement involved a case that was resolved in 18 minutes.³¹

According to data collected between November 7, 2016 and March 31, 2017, consumers opened 596 cases. In 68% of those cases, the dispute had been settled to the satisfaction of the parties. The overall level of consumer and merchant satisfaction was close to 88%. The average value of the goods or services involved in the cases that were resolved was \$1,253.³²

The success rate (defined as reaching an agreement) is now 70% and the average value of disputes is \$2,000. Since

the pilot project was launched in November 2016, this initiative has potentially saved the Small Claims Court from having to hear approximately 4,000 cases. Merchants refuse to resolve less than 1% of disputes. This is partly attributable to a "custom filtering" system. All the participants—the consumer, the merchant and the mediator—are selected by the OPC.³³ Another important reason is that if a company that has agreed to participate in the platform refuses to try to resolve a particular dispute, it loses its privilege to participate in the future.³⁴

Lastly, we should point out that, unlike the EUOCDRP, PARLe provides Quebec consumers with a single gateway and a public platform run by an organization that, although it operates at arm's length from a department, is nonetheless an emanation of public authority.

6. Applications of PARLe technology outside Quebec

As we have seen, PARLe technology works remarkably well. As a result, it was adopted by the Ontario Condominium Authority Tribunal, created through the amendments to the *Condominium Act, 1998*, adopted in 2015, under which it "may direct the parties to a proceeding to participate in an alternative dispute resolution mechanism for the purposes of resolving the proceeding or an issue arising in the proceeding."³⁵ The technology was also adopted by the *Chambre des huissiers de Paris*, where bailiffs play a role very different from the one they play in Quebec. Based on their university degree in law, the bailiffs can participate in dispute settlement, which they are now doing online.³⁶

7. Conclusion: Outlook for Online Dispute Resolution

Beyond the project's success at the OPC, PARLe technology is being used outside Quebec in areas not involving consumer mediation. This demonstrates its great potential for online settlement of litigation and disputes throughout the world. Although it has so far only been used in Quebec as part of what the new *Code of Civil Procedure*, which came into force on January 1, 2016, refers to as "private dispute prevention and resolution processes",³⁷ we can also hope that it will be used to address the chronic problem of court congestion, here and elsewhere, more effectively than has been the case to date. 🏠

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- 1 Revised Statutes of Quebec (CQLR) c C-25.01, r 0.6.
- 2 CQLR c C-25.01, r 1.
- 3 Telephone interview conducted by the author with André Allard, Director of Legal Affairs of the OPC, on October 4, 2018.
- 4 CQLR c P-40.1.
- 5 The *Consumer Protection Act* does not define this term. Whether someone is a merchant within the meaning of that Act is therefore a question of fact left to the discretion of the court.
- 6 *Op. cit. supra* note 3.
- 7 Édualoi, Introduction to Small Claims Court, <https://www.edualoi.qc.ca/en/capsules/introduction-small-claims-court>, accessed on October 5, 2018.
- 8 *Code of Civil Procedure of Québec*, CQLR c C-25.01, sec. 536.
- 9 Office de la protection du consommateur, Rapport annuel de gestion 2016-2017 [in French only], page 23, https://www.opc.gouv.qc.ca/fileadmin/media/documents/a-propos/publication/OPC_rapport-annuel-2016-2017.pdf, accessed on October 17, 2018.
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- 11 Laboratoire de cyberjustice, <https://www.crdp.umontreal.ca/recherche/groupe/laboratoire-de-cyberjustice/>, accessed on October 16, 2018.
- 12 PARLe: Platform to Assist in the Resolution of Litigation Electronically, <https://www.opc.gouv.qc.ca/en/opc/parle/>, accessed on October 16, 2018.
- 13 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, O.J., L 178/1. See Karim BENYEKHEF on this topic, "La résolution en ligne des différends de consommation : un récit autour (et un exemple) du droit postmoderne", in Pierre-Claude Lafond, dir., *L'accès des consommateurs à la justice*, Cowansville, Yvon Blais, 2010, 89-117.
- 14 For a firm rebuttal of this point of view, see BENYEKHEF, *op. cit. supra* note 13, in the text accompanying note 19.
- 15 *Op. cit. supra* note 3.
- 16 *Op. cit. supra* note 12.
- 17 With respect to these forms, which provide a middle solution between the flexibility of textual discussions and the accessibility of blind bidding, see Nicolas VERMEYS, "Les modes privés de prévention et de règlement des différends en ligne", in Pierre-Claude LAFOND (dir.), *Régler autrement les différends*, Montréal, Lexis Nexis, 2018, p. 421-464.
- 18 *Op. cit. supra* note 3. Section 9 of the Regulation currently provides that the mediator's fees are \$148 per session if the mediation ends the dispute and \$122 per session if the mediation does not end the dispute.
- 19 Pier-Luc BISAILLON LANDRY, « La résolution en ligne des conflits de consommation afin d'encourager la justice participative », individual essay submitted as part of the Séminaire de médiation et de justice participative, Faculty of Law, University of Ottawa, November 27, 2017.
- 20 Resolve your consumer complaint, https://ec.europa.eu/info/live-work-travel-eu/consumers/resolve-your-consumer-complaint_en, accessed on October 17, 2018.
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- 29 Telephone interview conducted by the author with Patrick Lahaie, Government Administrator – Project Lead at the OPC, on September 25, 2018.
- 30 Telephone interview conducted by the author with Professor Nicolas Vermeys, Laboratoire de cyberjustice de l'Université de Montréal, on October 2, 2018.
- 31 *Op. cit. supra* note 29.
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- 34 *Op. cit. supra* note 30.
- 35 LO 1998, chap. 19, section 1.40, subsection 1.
- 36 *Op. cit. supra* note 30. See in this regard "Justice du 21ème siècle : Les Huissiers de Justice au service de la dématérialisation judiciaire", <https://www.huissiersdeparis.com/les-huissiers-de-justice-au-service-de-la-dematerialisation-judiciaire/>, accessed on October 17, 2018.
- 37 *Op. cit. supra* note 8, starting at the Preliminary Provision and in particular in sections 1 to 7.



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Culture and Conflict

Conflict involves a perceived, latent, or manifest incompatibility, and culture influences the outbreak, perception, escalation, and resolution of conflict. By “culture” we mean the characteristics and knowledge of a particular group, encompassing language, religion, cuisine, social habits, music, and arts (Zimmermann, 2017). An individual’s unique upbringing and environment results in a culture that is inherently different from that of another, although one individual may be active in several cultures simultaneously. For example, Bouchra, co-author of this article, has the following cultural identities: mediator, Moroccan, North American resident, Muslim, peace-builder, peacemaker, volunteer, and so on.

The culture in which one is immersed influences one’s perception of conflict and effective conflict resolution. Hence, mediators must be mindful not only of their own dominant culture, but also of the disputants’ dominant culture so as to be able to see the conflict through their eyes.

Culture is an essential part of *conflict* resolution. Bouchra’s cultural identity illustrates this point. The society of Morocco, her birth country, is a high context culture¹. Relationships build slowly and trust-building takes time. In addition, a good reputation within one’s social group and the community grants a Moroccan high social capital. As a young girl growing up in Mohammadia, Bouchra watched trusted members of her small community mediate and resolve grievances. In disputes about a barking dog, a merchant-patron differences, trash, and so on, her elderly neighbours Jelali and Ramya were specifically sought as mediators. The pair recognized that strong relationships in a collectivist society were both social obligations and also fundamental to community safety and harmony. An apology was central to joint problem-solving and peacebuilding. Both excellent listeners, Jelali and Ramya directed each side to have their say before working to find thoughtful and creative mutual solutions. They stressed forgiveness of the offender by the offended and acceptance of the apology by the offender. They would often quip, “Allah esameh wa el mosameh Karim,” or “God forgives and who forgives is generous.” The opportunity to offer an apology and to be forgiven was and still is crucial to repair and reestablish relationships amongst disputants



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and within the community as a whole.

Bouchra’s mentors applied their subtle cultural values and practices to mediate disputes, with great success, and values and practices have influenced Bouchra. Even now, as a professionally trained mediator in North America, she still uses many of the skills she observed in Jelali and Ramya.

Jelali and Ramya were mediators in one small Moroccan community, but the conflict resolution expectations they encountered resembled those in the rest of the country. Although Morocco is a multi-ethnic society where differ-

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ent groups have different cultural practices, the population is ninety-nine per cent Muslim, so there is a strong shared belief in the teachings of the Quran, including the hope of believers for a place in Jannah (paradise).

Unified by faith, different ethnicities in Morocco share the expectation that neighbours will resolve simple communal disputes. In general, people perceive themselves as very tolerant and striving to promote peace. Serving God is an essential part of daily life, and many believers base their perspectives regarding apology on the teachings of the Quran, wherein God asks *if you do not accept an apology and are unable to forgive whomever has done harm to you, how can you expect me to forgive you?* An apology is, therefore, highly valued and understood as the first step in healing for both offender and offended. According to Islamic principles, forgiveness is an obligation, a profound and essential ethical duty. Thus, in Moroccan society it is common to find an offender and a victim apologizing to each other. Apology is both fundamental and crucial for peacemaking, because it is woven into the social and cultural fabric. It is an essential ingredient of conflict resolution that prevents intractable conflicts within the various communities.

Adherence to the mediator(s) decision is also a Moroccan expectation, and violating such an expectation puts the offender at risk for being ostracized, an outcome far worse than any petty crime, simple dispute, or verdict. So, peacemakers like Jelali and Ramya ensure that conflicts can be resolved away from the court system.

Olatunji, the second co-author of this article, grew up in a Methodist and Roman Catholic household in Nigeria. Like Morocco, Nigeria is overall a high context culture. But with over two hundred and fifty ethnicities, marked differences exist between individual cultures. Even so, there is a common expectation among the different ethnicities that neighbours resolve simple communal disputes.

As a young boy in Lagos, Olatunji lived in a building that, like many in the city, housed people of varying ethnicities and faiths—Christianity, Islam, Native Religion, and so on. Barely a decade had passed since the Nigerian Civil War in which many of the neighbours fought on opposite sides or relocated to their specific ethnic areas. Former allies and enemies were now neighbours and, as such, were expected to resolve minor disputes. As a consequence of this expectation, minor disputes between neighbours rarely end in court even though Lagos is Africa's most populated megalopolis.

In contrast to Lagos, minor neighbour-neighbour disputes appear on court dockets in multicultural Canada and the USA, both of which are low-context cultures where relationships begin and end quickly and communication can be matter-of-fact. Disputants may be from high, low, and/or

mixed context cultures, and how they experience power and interpret conflict may differ. When neighbours disagree, such differences can escalate conflict. That is what happened in a dispute mediated by Olatunji between an African-American woman and two Chinese jewelry merchants in California.

The woman purchased a gold necklace two-and-half years earlier and believed it to be two carats more valuable than it was. The merchant recommended regular cleaning to prevent discoloration, and the buyer brought the necklace in for cleaning as scheduled. When the color began to fade, she approached the merchant about the problem. The merchant (North American-born son of Chinese parents) explained that the necklace discoloured because it was two carats less than the buyer believed it to be, and produced the store record as proof. He offered a swap of equal quality, but the buyer refused, accusing the seller of misrepresentation. The merchant in turn accused the buyer of trying to con the store.

The merchant's mother tried to intervene, and things escalated. Harsh words were exchanged, and the buyer—who bought her first piece of jewelry from the older merchant thirty years earlier—was asked to leave the store. Decades of goodwill evaporated.

Nine months after the incident, the parties found themselves in court. The buyer sued for the original pur-



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chase price, court fees, and pain and suffering. Her sister-in-law, a professional jewelry appraiser, came as support. Also in attendance were the junior merchant's wife and eldest son. In this particular court, a party may end mediation by requesting a trial.

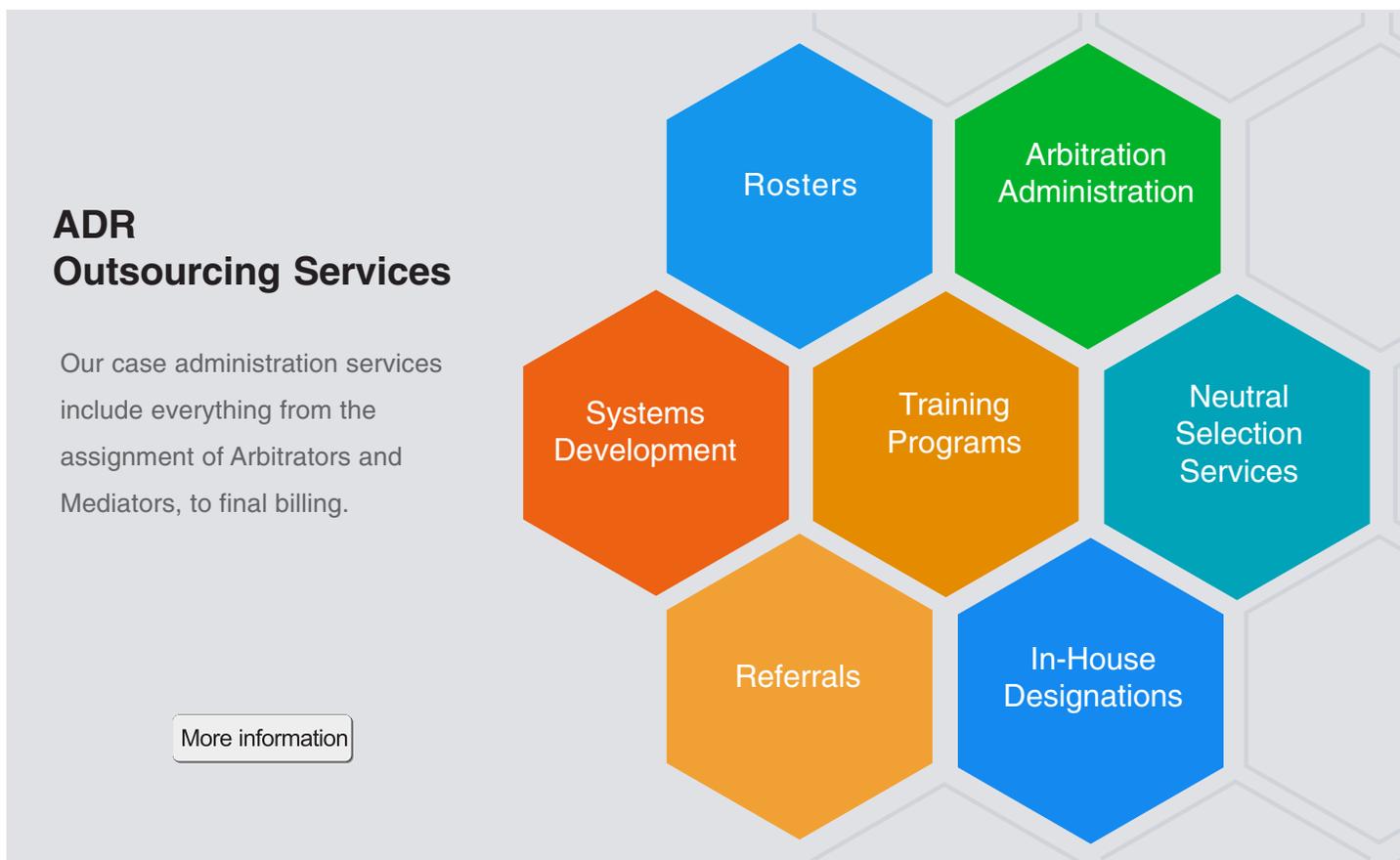
At mediation the buyer spoke first. She justified her claim because she felt duped. Then the merchant's son spoke for his elderly mother, the original storeowner whose English was poor. He pointed out that the buyer wore the necklace for over two years, so her request was unfair. Pure gold is twenty-four carats. The buyer's necklace was fifty percent alloy, and even with two additional carats would still have discoloured. The merchant withdrew the offer of a swap because the buyer took the dispute to court, not to mention the fact that she had told his mother to mind "your f-ing Chinese business" when she tried to intervene. The younger Chinese merchant demanded that the buyer drop the case. His attitude almost ended the mediation, were it not for his mother's intervention, which calmed the nerves of not only her son, but also the African-American buyer and her sister-in-law.

Chinese culture tends to be characterized by "high power," meaning that a higher level of respect is paid to elders. Olatunji's Nigerian culture was also high power. Thus, he surmised that in the eyes of the Chinese mother, the

insult carried more weight than the financial aspects of the dispute. Olatunji hypothesized that unless the buyer apologized to the mother, a mutually satisfactory resolution would be impossible; the mother had been disrespected by someone younger than she, and such a slight would not be easily forgotten. Despite decades of interaction, the two women remained cultural strangers, and the African-American buyer did not appreciate that the older merchant would so take the insult to heart.

With that in mind, Olatunji requested to speak to the parties separately. The merchants were to step out of the room and wait down the hall, but he caught up with them in the hallway and, patting the son on the back, said, "Withdrawing the necklace swap is a power trip." Then he left quickly, before either merchant could respond. His intervention was based on the belief that people in negotiation are embroiled in psychological conflict—a Should I? Or Shouldn't I? (SISI) Dilemma—and that anyone can deem anything important or unimportant (Oniyaomebi, 2018). A bargaining position is thus a constructed reality that can be reversed. Olatunji also hoped that his negative opinion ("power trip") would cause the merchants to reverse their original stance. Even so, he still anticipated that an apology would be the deciding factor. As things transpired, it was.

In a private meeting with the buyer, Olatunji heard



the buyer's sister-in-law acknowledge that hair-coloring products could discolor a gold necklace that wasn't pure gold. He also learned that the original purchase receipt recorded a dollar amount for the necklace but no carat number and that this was the merchant's usual practice. The buyer's sister-in-law agreed that this information moved the Chinese merchants into the driver's seat; in fact, she said, she'd attempted to make the buyer acknowledge that problem multiple times, with no effect.

At this point Olatunji asked the plaintiff whether apologizing to the merchant was a possibility, and she agreed to apologize—now fearing the worst. Even so, Olatunji recognized that the buyer would not have taken the conflict this far without a sense of real injustice.

For their part, the merchants knew that the purchase receipt was in their favor. In a private meeting, the son told Olatunji that in a "he-said, she-said" case, the buyer would likely lose. Appealing to the merchants' sense of fairness, Olatunji asked them to consider paying for the court cost and re-tabling their original offer of a necklace swap as a kind gesture. In return, the case could be dismissed without prejudice and the agreement could require the buyer to bring the jewelry in for regular cleaning. "We prefer to go to trial," the son replied.

Olatunji then politely informed the mother of a saying in his Yoruba language in Nigeria: *Eni t'óba fé télé tûtù, a dó mi si'iwaju, or someone that desires to walk on soft soil waters the ground.* He reminded her that a relationship going back three decades was worth preserving. Hence, he argued, his negotiation request was reasonable. Moreover, direct and indirect reciprocity would go a long way in their neighborhood (the buyer had intimated that many in the community eagerly awaited the court's outcome). "We prefer to see the judge!" the younger merchant cut in. But Olatunji knew that the mother would be the final decision-maker, so continued to appeal to her and mentioned that the buyer was willing to apologize. At this point, the mother interrupted her son and agreed to the terms, but only if the buyer would also promise to speak kindly of her and her son in the community.

A settlement agreement was signed, and the par-

ties engaged in friendly banter, leaving the courthouse together.

This case shows how an individual can be active in several cultures simultaneously. The American-born son of the Chinese merchant functioned under his mother's high power culture. Yet his tone was direct and his comments placed a higher premium on legal advantage, thus demonstrating the influence of Western culture. His Chinese mother, though a long-time resident of North America, expected unspoken words to be understood. Her Chinese culture influence her to value apology and reputation within the neighborhood more than legal advantage. The differing behaviors of the mother and son show that, even within the same family, cultural differences can affect the escalation, perception, and resolution of conflict. Thus, mediators need to be mindful of the cultures within which disputants are most active, particularly if the disputants identify with significantly different cultures.

It is tempting to attribute a minor court dispute between neighbours to a "sue-happy culture," but this particular conflict was interculturally complex. When the buyer first contacted the merchant about the necklace discoloration, their incompatible goals, emotions, and cultural differences meant a lost opportunity to defuse the conflict and prevent it from escalating. The buyer's final acceptance of the merchant's original offer demonstrates how the byproducts of cultural differences—stereotypes, prejudice, misconceptions, fundamental attribution errors², and negative emotion—can create blinders that precipitate and entrench conflict.

Had a trial decided the outcome, the African-American buyer would have likely lost everything, including the jewelry swap and court fees. However, even though victorious in court the Chinese merchants may have suffered the biggest loss if the buyer spread ill will about them in the community. Such a blow could have proved costly for them, a possibility that the mother was more aware of than was the son.

Thankfully, both sides "won" in this case, just as Jelali and Ramya preached in Morocco. 🏠

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1 A high-context culture relies on implicit communication and nonverbal cues, so messages cannot be understood without a great deal of background information. Asian, African, Arab, central European and Latin American cultures are generally considered to be high-context cultures. In contrast, a low-context culture relies on explicit communication so that more information is spelled out

and defined. Cultures with western-European roots, such as Australia, Canada, and the United States are generally considered to be low-context cultures.

2 The tendency to assume that a person's actions depend on what "kind" of person they are rather than on the social and environmental forces that influence them.

Wellman v. TELUS Communications Inc.:

The Supreme Court of Canada Reinforces Arbitral Party Autonomy in the Context of Class Proceedings



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Introduction

Many consumer agreements in Canada contain arbitration clauses that require any dispute arising from the consumer transaction to be determined by way of private arbitration. These clauses often also preclude any form of class dispute resolution. In recent years, most Canadian jurisdictions have enacted legislation that overrides such clauses. Consequently, Canadian consumers—notwithstanding any contractual commitment to the contrary—may resort to the courts in the event of a dispute with a supplier, including by way of class action. However, the same may not be true when the litigation includes non-consumers, even if they are subject to the same contract with the supplier as the consumers, but to whom the consumer protection legislation does not apply.

In *Wellman v. TELUS Communications Inc.*,¹ a majority of the Supreme Court confirmed that a class

proceeding brought on behalf of such non-consumers constitutes an impermissible attempt to negate a mandatory contractual arbitration. In a split 5-4 decision, two diverging perspectives were expressed. On the one hand, the majority upheld the legislature's stated objective of ensuring that parties to a valid arbitration agreement abide by it, confirmed the degree of certainty and predictability associated with arbitration agreements, and reinforced the concept of party autonomy in the commercial setting. On the other hand, the minority expressed concern that arbitration in these circumstances would be corrosive to the goal of greater access to justice owing to the cost of individual arbitrations.

The majority decision in *Wellman* is consistent with the Supreme Court's decision eight years ago in *Seidel v. TELUS*,² which was decided under a different legislative regime in the Province of British Columbia. *Seidel* also

concerned a dispute arising out of a cell phone contract between Telus and one of its customers who sought to bring a class action. The contract also contained a mandatory arbitration clause and Telus applied to stay the class proceeding based on the *Arbitration Act* in B.C.³ Similarly, in a split 5-4 decision, the majority of the Supreme Court held that an arbitration clause will prevail “absent legislative intervention.”⁴ As a result, the non-consumer claims were stayed in favour of arbitration, while the consumer protection claims were allowed to proceed to court by way of class proceeding.

Prior to the Supreme Court’s decision in *Wellman*, the Ontario Court of Appeal had interpreted the Ontario *Arbitration Act, 1991*,⁵ as giving discretion to the court to allow consumer claims to proceed to court (thereby bypassing the mandatory arbitration clause) on the basis that the non-consumers were “inextricably linked” to the consumer protection claims. The Court of Appeal for Ontario first expressed this view in *Griffin v. Dell Canada*⁶ in 2010, and upheld it again in its decision in *Wellman*.⁷

The Supreme Court in both *Seidel* and in overturning the Court of Appeal in *Wellman* confirmed the concept of party autonomy and upheld the policy underlying Canadian arbitration statutes: parties to a valid arbitration agreement should abide by their agreement, even where the mandatory arbitration clause is contained in a standard form contract. Policy considerations will not be permitted to distort the actual words of the statute so as to oust mandatory arbitration where the legislature has allowed for it.

The Legislative Context in Ontario

The starting point for the Court’s analysis is section 7 of the Ontario *Arbitration Act*, whose overriding legislative intent is to promote arbitration.

Stay

7(1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

Exceptions

(2) However, the court may refuse to stay the proceeding in any of the following cases:

1. A party entered into the arbitration agreement while under a legal incapacity.
2. The arbitration agreement is invalid.
3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario

law.

4. The motion was brought with undue delay.
5. The matter is a proper one for default or summary judgment.

Arbitration may continue

(3) An arbitration of the dispute may be commenced and continued while the motion is before the court.

Effect of refusal to stay

- (4) If the court refuses to stay the proceeding,
- (a) no arbitration of the dispute shall be commenced; and
 - (b) an arbitration that has been commenced shall not be continued, and anything done in connection with the arbitration before the court made its decision is without effect.

Agreement covering part of dispute

- (5) The court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that,
- (a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and
 - (b) it is reasonable to separate the matters dealt with in the agreement from the other matters.⁸

No appeal

- (6) There is no appeal from the court’s decision.
[emphasis added]

Lower Courts’ Decisions

Wellman was a proposed class proceeding, which involved claims by consumer and business (i.e. non-consumer) customers against Telus and related entities for allegedly overcharging customers without disclosing the billing practice.⁹ The defendants’ contracts with customers contained standard terms and conditions, including a mandatory arbitration clause. The defendants conceded that by virtue of the statutory protections of the substantive and procedural rights prescribed by Ontario’s *Consumer Protection Act*, the arbitration clause was unenforceable against consumers (representing about 70% of the class).¹⁰ However, relying on s. 7(5) of the *Arbitration Act*, the defendants sought a partial stay of the business customers’ claims (about 30% of the class) on the basis that such claims were not governed by the *CPA*.

Hearing both the motion for a partial stay and the motion for certification together, Justice Conway refused to

grant the partial stay and certified the class. Relying on *Griffin*, she found that it would be unreasonable to separate the business customer claims from the consumer claims, as it could lead to “inefficiency, risk inconsistent results and create a multiplicity of proceedings.”¹¹ Telus appealed that decision on the basis that the motions judge had erroneously relied on *Griffin*, which, Telus argued, had been overtaken by the Supreme Court’s decision in *Seidel*. Telus argued that in light of *Seidel*, s. 7(5) of the *Arbitration Act* cannot be read as conferring jurisdiction over claims the parties have agreed to submit to arbitration and that such claims are subject to the mandatory stay provision in s. 7(1).

The Court of Appeal for Ontario dismissed the appeal. Writing for the majority, Justice van Rensburg held that *Griffin* had not been overtaken or altered by *Seidel* since *Griffin* was “consistent in principle with *Seidel* but was decided in a different legislative context.”¹² *Seidel* was determined in the context of B.C.’s legislative framework regarding arbitration and consumer protection, whereas *Griffin* was decided in the context of Ontario laws. Those different legislative frameworks drove the different outcomes in each case; in particular:

- section 7(5) of the Ontario *CPA* expressly exempts consumer contracts from mandatory arbitration, while the British Columbia equivalent contains no such provision;¹³ and
- the *Arbitration Act* provides broader authority for courts

to intervene in arbitration than B.C.’s equivalent legislation, which provides courts with a very limited right of intervention.¹⁴

In her reasons, Justice van Rensburg emphasized the importance of the legislative context in determining whether a mandatory arbitration clause will be enforced:

Accepting the primacy of arbitration over judicial proceedings where the parties have a contractual agreement to arbitrate does not alter the *Griffin* analysis or the disposition of the present appeal. Rather, both *Seidel* and *Griffin* accept that arbitration agreements will generally be enforced, that any restriction of the parties’ freedom to arbitrate must be found in the legislation of the jurisdiction, and that the ability of the court to interfere with this freedom depends on the legislative context.

...

In Ontario, accordingly, courts have the discretion to refuse to enforce an arbitration clause that covers some claims in an action when other claims are not subject to domestic arbitration. It is this legislative choice that drives the analysis. The bifurcation of proceedings in *Seidel* resulted from B.C.’s statutory scheme and was described as “an outcome ... consistent with the legislative choice made by British Columbia in drawing the boundaries of s. 172 as narrowly as it did”: *Seidel*, at para. 50. One might add that the bifurcation of

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proceedings in *Seidel* also resulted from the absence of a discretion similar to that granted to courts pursuant to s. 7(5) of the *Arbitration Act* in B.C.'s arbitration legislation.¹⁵

In concurring reasons, Justice Blair agreed that *Seidel* had not overtaken *Griffin* because it did not determine the same issues as those raised in *Griffin*. However, he expressed reservations about the correctness of *Griffin* as it relates to a partial stay of the non-consumer claims. He questioned whether litigants ought to be entitled “to sidestep what would otherwise be substantive and statutory impediments to proceeding in court with an arbitral claim by the simple expedient of adding consumer claims (which cannot be stayed by virtue of the Ontario *CPA*) to non-consumer claims (which generally are subject to a mandatory stay) and wrapping all claims in the cloak of a class proceeding.”¹⁶

Majority Reasons of the Supreme Court

Telus was granted leave to appeal to the Supreme Court of Canada. It argued that under s. 7(5) of the *Arbitration Act*, a court has no authority to refuse to stay claims that are subject to an otherwise valid and enforceable arbitration agreement. Rather, the only exceptions to the general stay provision are contained in s. 7(2), and unless one of those exceptions applies, claims that are subject to arbitration *must* be stayed. It argued that since none of the exceptions applied, the business customer claims must be stayed in favour of arbitration.¹⁷ Thus, the sole issue before the Supreme Court was whether, in the context of a proposed consumer/non-consumer class action where only the non-consumer claims are subject to an otherwise valid and binding arbitration agreement, the court has discretion pursuant to s. 7(5) of the *Arbitration Act* to refuse to stay the non-consumer claims.

Writing for the majority, Justice Moldaver's approach to the interpretation of s. 7 was with regard to the purpose of the *Arbitration Act*, consistent with the policy choices made by the legislature in the *Arbitration Act* and in other relevant statutes.¹⁸ In that respect, he held that s. 7(5) of the *Arbitration Act* does not grant the court discretion to refuse to stay claims that are dealt with in an arbitration agreement. Borrowing from the language in *Seidel*, he stated that s. 7(5) “is not a legislative override of the parties' freedom to choose arbitration.”¹⁹ While consumers remain free to pursue their claims in court, the business customers do not. Rather, they remain bound by the arbitration agreements into which they entered, thereby leaving them exposed to a stay under s. 7(1) of the *Arbitration Act*.

Justice Moldaver acknowledged Justice Blair's concern with respect to joining business customers in class proceedings involving consumers:

If non-consumers bound by a valid arbitration agreement could do an end run around s. 7(1) of the *Arbitration Act* simply by joining their claim with that of a consumer and pointing to s. 7(5) of the *Consumer Protection Act*, then this provision could become a vehicle for “piggybacking” non-consumer claims onto consumer claims.²⁰

He then interpreted the two preconditions set out in s. 7(5) of the *Arbitration Act* as follows:

- The first precondition (a) is that the proceeding must involve both (i) at least one matter that *is* dealt with in the arbitration agreement and (ii) at least one matter that *is not*.
- If this precondition is met, then the court must determine whether it would be reasonable to separate the two matters such that the second precondition is also met under s. 7(5)(b).
- If it would be reasonable to separate the matters, then s. 7(5) would permit the court to stay the proceeding in respect of the matter dealt with in the arbitration agreements and allow the proceeding to continue in respect of the matter *not* dealt with in the arbitration agreements.
- Alternatively, if the court were to determine that it would *not* be reasonable to separate the two matters such that the second precondition is *not* met, then the general rule under s. 7(1) would apply and the court must stay the proceeding.²¹

In this case, the majority held that the proposed class proceeding commenced by Mr. Wellman involved a single matter – alleged overbilling – and that matter fell squarely within the arbitration agreements into which both consumers and business customers had entered. Accordingly, the first precondition of s. 7(5) was not met and thus, the analysis stops there. Since s. 7(5) does not apply, the business customers' claims must be stayed pursuant to the general rule under s. 7(1) of the *Arbitration Act*.

The Minority's Reasons

An unusually strong dissent penned by Justices Abella and Karakatsanis, characterized the majority's approach as representing “the return of textualism,” which “creates a dispute-resolution universe that has the effect of forcing litigants to spend thousands of dollars to resolve a dispute worth a fraction of that cost.”²² The minority's position was that the overall purpose of the *Arbitration Act* is to promote access to justice: promoting accessibility by giving parties the choice of resolving disputes outside the court system. The minority preferred the Court of Appeal's interpretation of s. 7(5) in *Griffin* and by Justice van Rensburg in the court below, because it “avoids the unpalatable consequences while invigorating the purposes and effective functioning of

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the relevant legislative schemes.”²³

The minority held that nothing in the text directs a court to read s. 7(5) (or s. 7 as a whole) on a party-by-party basis. Rather, in their view, the focus on the provision is on “matters in respect of which the proceeding was commenced.”²⁴ In this case, it held that Telus’ arbitration agreement deals with only some of the matters in respect of which the proceeding was commenced, namely the claims of business customers; whereby the consumer claims are “other matters” which are not subject to arbitration. Therefore, in the minority’s view, s. 7(5)(b) gave the motions judge discretion to consider whether it was reasonable to separate the matters dealt with in the agreement [the claims of business customers] from the other matters [the consumer claims].²⁵

Conclusion

Ultimately, *Wellman* and *Seidel* do not enable courts in Canada to enforce mandatory arbitration clauses any more forcefully than in the past. Rather, the approach remains that courts should analyze whether a proposed class proceeding may be permitted to override any otherwise applicable arbitration clause. That analysis will largely depend on the legislative context and claims raised by the putative class, and who is in the class or classes.

For example, based on the majority’s interpretation of s. 7(5), while the approach taken in *Griffin* has apparently

been overtaken, the analysis in *Wellman* applied to the facts in *Griffin* does not alter the outcome of that decision. In *Griffin*, not only did the proposed class action include claims that were captured by the arbitration clause, but also claims that fell outside of the arbitration clause (i.e. claims based on a breach of the *Competition Act*). According to the majority’s reasoning, this would be sufficient in order to meet the first precondition in s. 7(5). The court could then use its discretion to refuse the stay and allow all claims to proceed to court in the event that it determines that it would be unreasonable to separate the matters dealt with in the agreement from other matters (which is what the court ultimately found in *Griffin*).

The majority did call on the Ontario legislature to respond to any of the policy concerns outlined in the decision, should it see fit to do so, including:

- Access to justice and the courts;
- Abuse of arbitration clauses in adhesion contracts;
- Shrinking class sizes;
- Multiplicity of proceedings; and
- Difficulty distinguishing between consumers and non-consumers.²⁶

However, if, or until, the legislature decides to amend the *Arbitration Act* on this basis, the majority decision in *Wellman* confirms that where claims are advanced in a proposed class action, which fall within an arbitration clause, the court has discretion to grant a stay under s. 7(5) of the *Arbitration Act*. 

1 2019 SCC 19 [*Wellman*].

2 2011 SCC 15.

3 RSBC 1996, c. 55.

4 *Seidel*, *supra* note 2 at para. 2.

5 S.O. 1991, c. 17 [the “*Arbitration Act*”], s. 7(5).

6 2010 ONCA 29, leave to the SCC refused.

7 2017 ONCA 433 [*Wellman OCA*]. See also our earlier article “Is Canada Ready for Class Arbitration? A Discussion about the Implications of the Ontario Court of Appeal decision in *Wellman v. TELUS Communications Company*,” *Canadian Arbitration and Mediation Journal*, vol. 26, No. 2, Fall/Winter 2017.

8 The jurisdictions of British Columbia, Quebec, Prince Edward Island, Newfoundland and Labrador, Yukon, Northwest Territories, and Nunavut, do not permit a partial stay in its legislation similar to s. 7(5) of the Ontario Arbitration Act.

9 The action centres on the allegation that Telus engaged in an undisclosed practice of “rounding up” calls to the next minute such that customers were overcharged and were not provided the number of minutes to which they were entitled.

10 See s. 7(5) of the *Consumer Protection Act, 2002*, SO 2002, c 30, Sch A [*CPA*], which renders arbitration clauses invalid to the extent that it would otherwise

prevent class members who qualify as “consumers” from commencing or joining a class action of the kind commenced by Mr. Wellman. Indeed, the *CPA* expressly shields consumers from a stay of proceedings under the *Arbitration Act*: see *Wellman*, *supra* note 1 at para. 4.

11 *Wellman*, *OCA*, *supra* note 7 at para. 17.

12 *Ibid.* at para. 59.

13 *Ibid.* at paras. 65-67.

14 *Ibid.* at paras. 68-73.

15 *Ibid.* at para. 63 & 73.

16 *Ibid.* at para. 105.

17 *Wellman*, *supra* note 1 at para. 7.

18 Such as the *CPA*, *supra* note 10 and the *Class Proceedings Act, 1991*, SO 1992, c. 6; *Wellman*, *ibid.* at para. 47.

19 *Wellman*, *ibid.* at para. 8.

20 *Wellman*, *ibid.* at para. 98.

21 *Wellman*, *ibid.* at paras. 100-101.

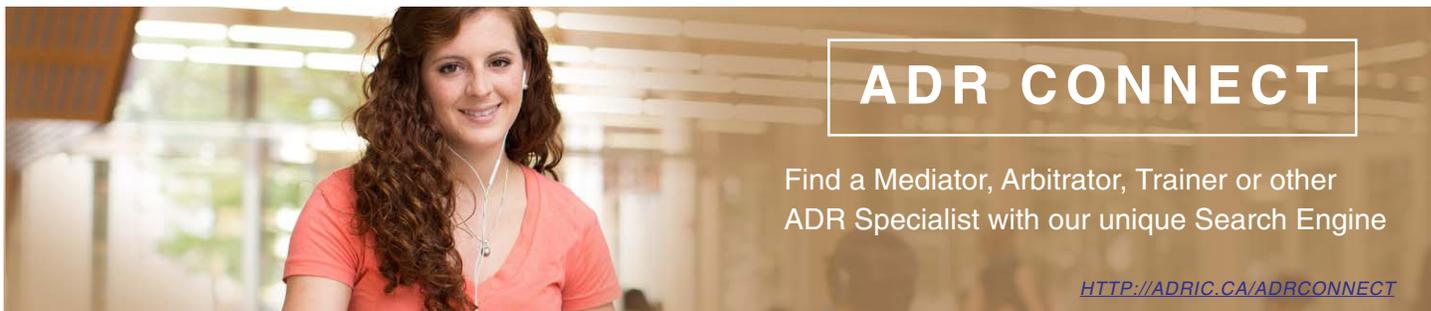
22 *Wellman*, *ibid.* at para. 109.

23 *Wellman*, *ibid.* at para. 110.

24 *Wellman*, *ibid.* at para. 148.

25 *Wellman*, *ibid.* at para. 171.

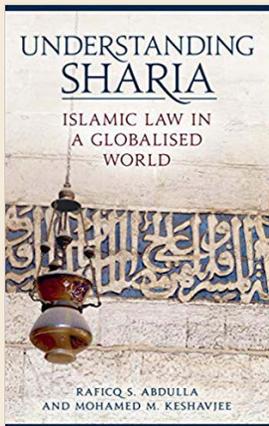
26 *Wellman*, *ibid.* at para. 77.



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Understanding Sharia, Islamic Law in a Globalised World

Rafiq S. Abdulla and
Mohamed M. Keshavjee

London: I.B. Tauris, 2018, 321 pp.,
(hardcover) ISBN 9781788313193

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Reviewed by: Max Blitt, QC, Barrister & Solicitor,
Calgary, Alberta, Canada

Canada, as a country committed to pluralism, today stands as a beacon of hope for all mankind. At the same time, there is much debate on the role of religion in the public sphere, most particularly in the field of private justice where arbitration and mediation are practised. Faith communities have generally shown a preference for ensuring that the ethics and values of their faith are engaged when disputes arise and their resolution is attempted. However, legitimate concerns with regard to human rights are expressed by those in Canadian society who feel that alternative forms of justice can be prejudicial to vulnerable groups such as women, minorities and children or those who are on the wrong side of the power balance. Alternative Dispute Resolution (ADR) has both supporters and detractors in these cases.

Over the years the issue of alternative forms of justice has become contentious with regard to family dispute resolution and the role Sharia, as portrayed in the popular media, plays in its deliberations. Sharia is viewed as a draconian, punitive and pre-modern system that has been defined over the years by a patriarchal interpretation. The deeper ethical values of Sharia are obfuscated and the fact that it has an inbuilt mechanism to

respond both to necessity (*darura*) and to public interest (*maslaha*) and that each day in the Muslim world these mechanisms are used, is often overlooked.

Understanding Sharia, Islamic Law in a Globalised World is a book by two common law lawyers, a Canadian lawyer mediator and an English barrister, which has been written for the educated lay reader and which is both accessible and informative. The authors do not sidestep the controversial issues associated with Sharia but address them with reason, thought, and understanding.

Abdulla and Keshavjee have provided a welcome text setting out the origins of Islam, Sharia and their development from the classical period to modernity within the context of other civilizations and other legal systems. The authors saw a need for a clear and easy to read text. Sharia has been a source of misunderstanding both within and outside the Muslim world.

The authors take the reader from pre-Islamic Arabia to the present. They point out that less than ten percent of the Qur'an is made up of verses of a strictly legal nature. Yet, we find a large body of law evolving over the centuries since the time of the Prophet. From 661-750 a rapid



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expansion occurred into many lands together with the early development of law under the Umayyads. The new demography encompassed a mixture of different cultures, races and creeds and all of these changes took place within 100 years of the Revelation. From the years from 750-1258 brought the consolidation of the Schools of Law under the Abbasids, who came to power claiming descent through al-Abbas, an uncle of the Prophet.

The tenth century saw the rise of the Fatimid empire (909-1171), the first Shia dynasty from the family of the Prophet (ahl al bayt) ruling a maritime empire that stretched from the Atlantic coast of Africa into the southern Mediterranean encompassing also the Arabian Peninsula. This was an empire ruled by the Ismaili Imam Caliphs, ancestors of the Aga Khan, and where Shia law was state law but where legal pluralism was encouraged and practiced.

We are transported in the text to Morocco, where far reaching changes enable a marriage to be dissolved by the

husband or the wife. The authors take us to Tunisia, where similar changes in Family Law have led toward gender equality. Changes in the 1970's led to the emergence of ADR as an alternative to litigation, leading diasporic Muslims, mainly in the UK to establish Sharia councils to deal with family disputes (see Islam, Shari'a and Alternative Dispute Resolution: Mechanisms for legal redress in the Muslim community by Mohamed M. Keshavjee, London: I.B. Tauris, 2013). The authors carefully detail the differences in interpretation of God's law between Sunni and Shi'i using examples of inheritance, divorce and marriage.

In the chapter "The Multiple Manifestations of Sharia" the authors delve into Sharia rulings that are offensive to many Muslims themselves. Examples include apostasy (*riddah*) that remains a capital offence or one punishable by long term imprisonment in many countries of the Islamic world (page 119) and blasphemy, which in the case of Islam, constitutes words or actions that intend to harm or abuse God, His Prophet Muhammad and others, including the good reputation of Aisha, wife of the Prophet (page 125). The authors point out the toxicity that an accusation of blasphemy can bring to bear upon minorities such as Christians, Yezidis, and Shi'i Muslims in Sunni-majority countries. Several well known cases such as that of Asia Bibi and Amina Lawal are reviewed and analyzed in the context of sharia and cultural principles.

In discussing Sharia finance the authors make the point that money should not be a means of making money. It is to be used as an instrument of exchange, not a product in itself. Emerging Sharia-compliant vehicles of finance are explored and explained. In terms of relevance today, the authors point out that ADR as a process fits in well with Sharia provided always that the public laws of the countries where Muslims reside are fully respected both in spirit and in letter. The Qur'an supports ADR which Muslims have

been practicing for centuries (page 173), and believers have been encouraged to enter into negotiated settlement known as *sulh*, rather than legal process. All ADR processes seek justice by enabling the disputants to find a solution that allows both to obtain a level of satisfaction by encouraging compromise, and understanding the interests of the other (page 178).

The reviewer noted with great interest the authors' comments regarding the absence of Muslim countries as signatories to the Hague Convention on the Civil Aspects of International Child Abduction promulgated in October 1980 (Hague Convention). The Canadian government promoted a dialogue between an equal number of Western and Muslim countries. This endeavor, which this reviewer participated in on behalf of Canadian Foreign Affairs, was set up in 2009 following what was known as the Malta 3 Conference. Meetings were held over several years, which resulted in a framework of collaboration between judges in Muslim countries, scholars and other institutions (page 179). Since this process began, Morocco joined the Hague Convention, as have various other Muslim countries. The impact of this endeavor promoted largely through dialogue, mu-

tual respect and a genuine intention to find new solutions to resolve common human problems (*maslaha* in Sharia law) 500 million Muslims today are part of the Hague Convention when formerly there was antipathy towards it.

The authors discuss Sharia and human rights and make the point that Islamic scholars working in Western academic institutions of higher learning are able to critique Western notions while developing a human rights discourse from an Islamic point of view which highlights the higher purpose of Sharia (*maqasid*) at the cost of its rigid time marked *fiqh* (jurisprudential understanding). No doubt, this could be useful as the human rights debate evolves. Finally, the authors argue, that Sharia contains a degree of flexibility, supported by doctrines such as *maslaha* (public interest) *maqasid* (purpose), and *darura* (necessity) but emphasize that ongoing interpretation of texts lies at the heart of all religions as well as laws –secular and religious.

The book is of value to both Muslim and non-Muslim readers providing an insight into a legal system which, in one way or another, affects some 1.8 billion people in 58 countries of the world. An informative and enlightening read. 🏠

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Enforceability of Class Arbitration Waivers in the United States; A Leap in the Dark

Introduction

Should employees or consumers be able to band together and collectively arbitrate disputes that they may have with companies by means of class-wide arbitrations? In the United States this is a controversial issue, and judicial decisions vary. The problem of possible unfairness caused by mandatory arbitration clauses has been exacerbated by a recent trend: the increasing use by many U.S.A. businesses of mandatory provisions that prohibit class-wide proceedings.

Class arbitration waiver

Class arbitration is a type of arbitration that permits parties to bring an arbitration action on behalf of others in similar situations. It is easier than starting a bunch of individual arbitral proceedings on the same dispute because all parties share the costs and the work. This type of arbitration is common in work environments where workers who are aggrieved on similar basis agree to submit the disputes to arbitration collectively.

Having given a definition of class arbitration, what then is class arbitration waiver? A class arbitration waiver is a provision contained in an arbitration agreement stating that the employees agree to resolve employment disputes on individual basis and agree to refrain from pursuing or joining any collective arbitration in conjunction with his or her fellow employees.

Class arbitration waivers began to emerge in the United States in the late 1990s when trade-journal articles first started encouraging corporations to consider including such prohibitions in arbitration agreements. Class arbitration waivers are also encouraged because of how the damages are awarded. Individually, each person may only be able to receive a small portion of the proceeds. When they join together, it suddenly becomes cost effective. All of the plaintiffs share the cost of the case, and the cumulative award can be quite large. However, if the individual damages are small, it will become a bit difficult to start actions individually.

Companies prefer arbitrations brought by individuals to class arbitrations because if they lose class arbitration, then they may have to pay a large sum to the opponents which will be far more expensive than paying just an individual opponent. Being able to take part in class arbitration is important. Sometimes, it is the only way that the individual can get fair compensation for any wrongdoing.

Arbitration agreement

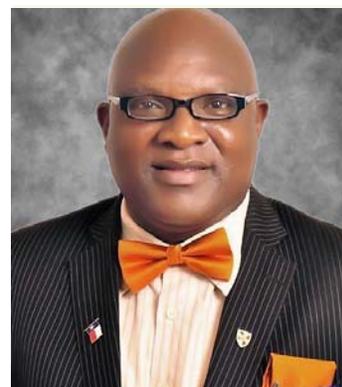
Without the existence of an arbitration agreement, class

arbitration waivers included in an employment contract will not work. This is because without an arbitration agreement there can be no arbitration of disputes. The United States Arbitration Act,¹ commonly referred to as the Federal Arbitration Act of the United States of America provides that

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract².

Furthermore, the United Nations Commission International Trade Law³ also provides that

Arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be



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in the form of an arbitration clause in a contract or in the form of a separate agreement.⁴

An arbitration agreement is a written contract in which two or more parties agree to settle a dispute using arbitration as settlement mechanism. There are three main types of arbitration agreements: arbitration clause, submission agreement, and arbitration agreement incorporated by reference.⁵

- **Arbitration clauses**

This is a clause that regulates the method of resolving any possible future disputes arising from the agreement reached by two parties. This clause is often included in the contract and it provides that any dispute arising from the contract should be referred to arbitration. This is the most common form of arbitration clause. Where a class arbitration waiver exists, there is the greatest possibility that an arbitration clause exists in that contract.

- **Submission agreement**

This is an agreement to arbitrate made after the dispute has arisen and it is less common than an arbitration clause. Submission agreements tend to be much longer and more detailed than arbitration clauses. They will contain details of the dispute and the issues between the parties, and clearly record that it is being referred to arbitration.⁶ This kind of agreement is rarely used in the employment sector and where it is used, if it contains a class arbitration waiver, it will be believed that both parties agreed to it and that may make such provision easily enforceable.

- **Arbitration agreement incorporated by reference**

This type of arbitration agreement is needed if the agreement in dispute does not include an arbitration clause but refers clearly to another document which does contain an arbitration clause. The arbitration clause will be deemed to have been incorporated into the main agreement by the reference made to the agreement

which has arbitration clause in the initial agreement.⁷

Practicability of enforcement of class arbitration waivers in arbitration agreements

The relevance of class arbitration cannot be over-emphasized. It makes possible suits that would otherwise be logistically or economically impossible.⁸ Credit card companies, banks, health care providers, and other corporate defendants usually dislike class arbitrations. Many of these corporations have found ways to avoid class arbitrations through the use of mandatory arbitration agreements⁹ and, more recently, through class arbitration waivers. Companies now frequently use arbitration clauses in their agreements with customers and employers to manage class arbitration risks.

Corporate use of class arbitration waivers is motivated by the view that plaintiffs exploit the class arbitration procedure in order to obtain large and unfair settlements. This view is particularly prominent with respect to defendants involved with mass tort claims, securities fraud claims, and consumer claims, especially under federal laws that provide for statutory and/or treble damages, attorney's fees, and costs.¹⁰ Class arbitration waivers are viewed by these companies as a way to defend themselves from employees and consumers who are "ganging up on" companies through the leverage inherent in the aggregation of large numbers of claims.¹¹ In further support of these waivers, companies argue that the many advantages plaintiffs enjoy in arbitration make up for any disadvantages or inconveniences that they may incur by sacrificing the ability to be part of a class arbitration.

Predictably, both consumer and employee advocates have expressed strong opposition to companies' use of class arbitration waivers. Opponents of class arbitration waivers contend that the ability to aggregate claims is crucial to protect the rights of those individuals-employees, consumers, minorities, medical patients, and the like - who do not have



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the resources to litigate individual claims.¹² Furthermore, many individual claims are *only* viable if brought on a class wide basis.¹³ Indeed, by prohibiting class arbitrations in the context of “negative-value” lawsuits, where the expected recovery is dwarfed by the cost of litigating or arbitrating the claim, individuals are effectively prevented from pursuing their claims. As a result, businesses are able to engage in unchecked market misbehavior that result in small and seemingly insignificant consequences upon individuals, but which leads to sizeable windfalls for the particular corporation in the aggregate.¹⁴

Despite opposition from consumer and employee advocates, class arbitration waivers are increasingly common, as illustrated by a number of recent cases.¹⁵ For example, in *Discover Bank v. Superior Court*,¹⁶ consumers challenged the lawfulness of Discover’s payment schedule. This opposition to class arbitration waiver is especially unsurprising in the context of consumer cases, since no other area of law besides securities cases generates more class arbitrations. According to the schedule, consumers’ payments not credited by 1 p.m. on the bill’s due date were considered late and subjected to a \$29.00 late fee plus finance charges. However, because amendment provisions in the card member agreements both required all claims to be arbitrated and prohibited consumers from proceeding on a class wide basis,¹⁷ Discover customers were all but prevented from bringing their claims; individually, a \$29.00 amount in controversy would not justify the expense of arbitration.

Employers are also increasingly using class arbitration waivers in the context of discrimination and disability claims. Title VII cases have long “typified the sort of civil rights action that courts and commentators describe as uniquely suited to resolution by class arbitration litigation.”¹⁸ Such claims have long been subject to mandatory arbitration agreements.¹⁹ More recently, employers have begun incorporating class arbitration waivers into these arbitration clauses to try to shield themselves from aggregated claims. For example, Circuit City has imposed class arbitration waivers on its employees to minimize its exposure to discrimination and other types of employment-related claims.²⁰

While the potential reach of class arbitration waivers is uncertain, at least one leading scholar predicts that these waivers have the potential to effectively eliminate class arbitrations brought under consumer and employment statutes.²¹ Regardless of whether this prediction proves true, it is not far-fetched to suggest that class arbitration waivers will appear in more and more contracts, in light of a judicial climate largely favorable toward arbitration in general and class arbitration waivers in particular. Indeed, such a result seems especially likely in light of recent articles in trade journals advising companies to include class arbitration waivers in arbitration agreements.²²

Furthermore, even companies that have already

formed contracts with consumers are perfectly able to include modifications to those contracts, including class arbitration waiver provisions, in mail inserts and the like. Thus, in the absence of significant practical restraints, companies predictably will continue to seek to use class arbitration waivers in their contractual relationships with consumers, employees, and other counterparties that they interact with on an aggregate basis.

The majority of courts faced with class action waivers have upheld their validity against claims that they are unconscionable. The U.S. Courts of Appeals for the Third,²³ Fourth,²⁴ Fifth,²⁵ and Seventh²⁶ Circuits all have enforced class action waivers in consumer contracts. Many district courts have also upheld the validity of these class action waivers,²⁷ rejecting plaintiffs’ claims that such provisions are unconscionable or contrary to public policy.

The United States Supreme Court issued a decision, *AT&T Mobility LLC v. Concepcion*,²⁸ that perhaps signaled the availability of a prophylactic measure for employers hoping to proactively avoid exposure to these lawsuits. The Supreme Court held that the Federal Arbitration Act preempted a California ban on class action waivers in consumer arbitration agreements. Based on the Supreme Court’s reasoning, it has been argued that the same reasoning should be given to class action waivers in the employment context as well. Employers should be able to require employees to sign employment agreements requiring, as a condition of employment, that disputes over wages be resolved through binding arbitration rather than courts, and further requiring that they be resolved on an individual basis only, waiving the right to participate in class or collective actions. Since *Concepcion* several courts have upheld arbitration agreements containing class action waivers in the wage and hour context, reasoning that there was no substantive right in the wage and hour laws that prohibited such waivers

Notwithstanding the majority view, however, certain courts—including state courts in California and Illinois, as well as the Ninth Circuit—have refused to enforce class action waivers, finding them unconscionable.²⁹ Noting that under the Fair Credit Billing Act, the statute under which plaintiffs’ cause of action arose that the bank would be liable to pay plaintiffs’ attorney’s fees and costs if plaintiffs prevailed in arbitration, and, thus, plaintiffs and counsel had incentive to proceed on an individual basis despite the small monetary value of individual claim³⁰ thus affirming lower court’s holding that a contractual waiver of the right to pursue a class action is not unconscionable. In *Rosen v. SCIL*,³¹ reversing the trial court’s finding that a class action waiver was unconscionable, the Court reasoned that, even though plaintiffs individual claims were small, the plaintiffs arbitration fee (\$125) was not unreasonable, that there was no limitation on his ability to vindicate substantive statutory rights under the Illinois Consumer Fraud and Deceptive Business Practices Act (including recovery of puni-

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tive damages and attorneys' fees) should he prevail, and that, since the arbitration agreement was added to the credit card agreement through change of terms procedures, "if plaintiff did not wish to agree to the new terms . . . he simply should have stopped using the card".

The Illinois Appellate Court's decision in *Kinkel v. Cingular Wireless*³², LLC88 is one of the most recent to apply the doctrine of unconscionability to a class action waiver and is a good illustration of the reasoning of similar cases. In *Kinkel*, the court declared a class action waiver provision in a wireless telephone arbitration agreement both procedurally and substantively unconscionable. The court based its holding of procedural unconscionability on the grounds that the provision was written in extremely small type, was contained in a contract of adhesion, and was "hidden" in the middle of an extensive "terms and conditions" page. As a matter of substantive unconscionability, the court stated that the cost of filing either in court or before an arbitral body, combined with costs incurred in presenting the claim (including lost wages) would offset a "significant portion" of the plaintiffs maximum recovery (here, a \$150.00 cancellation fee).³³ Significantly, the court in *Kinkel* rejected defendant's argument that a class action proceeding would undermine or eliminate the benefits of streamlined arbitration, noting that it would be more efficient to proceed with a class arbitration than to decide the plaintiffs claim among thousands of other duplicative claims.³⁴ In sum, the court in *Kinkel* refused to enforce the class action waiver on the ground that such waivers (1) would effectively prevent plaintiffs with low-value claims from bringing those claims and (2) would provide defendants with virtual immunity from liability, class wide or otherwise.³⁵

Should class arbitration waivers be enforceable?

Having looked at the meaning of class arbitration waivers, their practicability, it is essential to take a stance as to whether the use of class arbitration waivers should be encouraged or not? Stating that class arbitration waiver should be encouraged would mean that class arbitration should be discouraged. This in turn would have the following effect:

I. Render employee organizations useless

Organizations formed by employees in certain companies are for the main purpose of fighting for the rights of employees who are members of such organizations; one of the ways of fighting for those rights is by bringing a class action. Enforcement of Class arbitration waivers would act as an infringement to the rights of these organizations and in no time render them useless.

II. Cause inefficient determination of disputes

Discouraging the use of class arbitration waivers will

encourage efficient settlement of dispute by means of class arbitration. Commencing an action collectively ensures that the case is before a particular arbitral tribunal and the same award is delivered on the dispute at hand. Thus such dispute is efficiently resolved. On the other hand if individual consumers and employees are allowed to bring individual actions this will necessitate different tribunals, resulting in multiple actions and numerous tribunals, which may in turn overwhelm the employer with too many arbitral proceedings at the same time; in the long run the dispute would not have been efficiently dealt with.

III. Reduce opportunity to fight for small monetary damages

One of the major reasons why class arbitration waivers are included in contracts is to cause a reduction in the amount lost to cases collectively brought by employees or consumers. This includes those with small or plenty monetary damages. However if class arbitration waivers are allowed and enforced, some aggrieved parties with small monetary damages to claim would not bother to bring action; they may be of the opinion that the amount to be spent on arbitral proceedings would be more than the compensation they would get after the proceeding and thereby quit claiming their rights. In the case of class arbitration, even if you have only been somewhat affected, you will still be compensated when you would have otherwise let go.

IV. Increase costs of arbitration

When the costs of arbitration are divided amongst all



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members to the class arbitration, the cost becomes relatively low and thus it becomes easier for aggrieved parties to commence arbitral proceeding. If class arbitration waivers are encouraged some aggrieved parties would be unable to commence arbitral proceedings and get compensated because they may be unable to afford cost of arbitration.

V. Lack of cooperation amongst workers:

When disputes arise on a common cause of action and the aggrieved parties decide to have class arbitration, there will be an agreement amongst them as to the facts and claims to put forward. This will ensure that employees cooperate and understand that their grievances are collective and not individual and this will help them achieve their aims and get proper compensation. If class arbitration waivers are encouraged parties will start having various facts and claims and the facts and claims of another party can be used to jeopardize a party's claims.

With the proper examination of the consequences of enforcing of class arbitration waivers in the employment sphere, it is advisable that such waivers be done away with and parties be allowed to sign contracts including arbitration agreements but ones free of class arbitration waivers.

Conclusion

As commercial relationships become more and more multifaceted, companies are increasingly incorporating class arbitration waivers and mandatory arbitration agreements into their contracts with employees, consumers and others. Given the regularity of these commercial connections, and the bargaining power of companies, these provisions usually are included in contracts. Courts have thus far struggled to develop a suitable doctrinal basis to tackle with the problem caused by these provisions.

The class arbitration waiver removes the individual's right to sue as a group. Some states have laws about this type of waiver because it is inherently unfair. An employee may be told that they have to sign the waiver in order to do their job. Unfortunately, this means that they have limited their options if wrongdoing happens at the job. They may be unable to get just compensation for damages because of the cost of hiring a lawyer or the presence of an arbitration agreement.

Class arbitration waivers should not be enforceable because their disadvantages outweigh their advantages for consumers but especially for employees. Such waivers have the potential to allow employers to get away with wrongs against their employees, thereby giving room for injustice which should not be encouraged in arbitration or in the society at large. 

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