Alternatives
TO THE HIGH COST OF LITIGATION
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Arbitration/*Part 1 of 2*

Enhanced Tribunals: Why It's Time To Use Personality Screening to Supplement Selection Criteria

BY PETER L. MICHAELSON

Veteran arbitrators are familiar with the satisfaction of serving on tripartite panels where the three panelists were compatible with each other, and the process proceeded effectively and efficiently to conclusion.

They probably also will be aware of the aggravation of arbitration when the panel was incompatible.

Personality clashes can exist within a panel. When clashes arise, internal strife may occur that causes arbitrator squabbles, often over seemingly innocuous matters.

Where these clashes intensify and repeatedly occur, the panel wastes time and runs a risk of needlessly delaying the proceeding. It may incur significant added costs for the parties.

Should such clashes become sufficiently severe, the result can be similarly extreme: all hell breaks loose, with the arbitrators clawing at each other like a bunch of cats, all the while accomplishing little or nothing. Gridlock can set in.

Often, an arbitrator will be selected to serve on a tripartite panel because of his or her credentials, but without any familiarity with—let alone any experience of serving with—his or her co-panelists. Basically, three people, with little or no working knowledge of each other, are thrown together to function for the next few months—or years—as a fully cohesive unit.

As time marches on and the arbitration proceeds, the arbitrators probably aren't concerned with their personality types. But because clashes with co-panelists can derail the arbitration, they should be.

And so should the parties when the selection is made.

The author, of Michaelson and Associates in Shrewsbury, N.J., is an arbitrator and mediator since 1991, and a practicing attorney since 1979. See www.mandw.com. He is a panel member of the Panel of Distinguished Neutrals of the CPR Institute, which publishes this newsletter. He is a member of panels at the American Arbitration Association and its international division, ICDR; WIPO, and the LCIA, as well as federal and state courts. He also is a Fellow and Chartered Arbitrator of the Chartered Institute of Arbitrators, and a Fellow of the College of Commercial Arbitrators and of ACICA. **The author gratefully acknowledges Dr. Yona Shulman, an organizational psychologist, for her assistance during the preparation of this paper. An earlier version of this paper is published at 76 *Arbitration* 98-112 (February 2010) and can be accessed at via a link under Publications at http://www.mandw.com/mich.html.**

THE 'ARBITRATOR ASSUMPTION'

The quality of an arbitration is directly governed by the quality of the arbitrators. Se, e.g., Arthur Redfern and Martin Hunter, Law and Practice of International Commercial Arbitration, 190 (3rd ed.1999), and Julian D. M. Lew, Loukas A. Mistelis and Stefan M. Kroll, Comparative International Commercial Arbitration 223 (2003).

The ability of a party to select its arbitrator, in light of whatever qualifications it deems essential, is crucial. This is a key advantage that markedly distinguishes arbitration from litigation. As has been wisely noted: "Each side's selection of 'its' arbitrator is perhaps the single most determinative step in the arbitra-

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CPR News

THE AGENDA FOR THE 2011 CPR ANNUAL MEETING

Registration is open for CPR's 2011 Annual Meeting, to be held on Thursday, Jan. 13, and Friday, Jan. 14, in New York at the Intercontinental Barclay Hotel.

To sign up, visit the CPR Annual Meeting website at www.cprmeeting.org, or call (212) 949-6490. The early bird discount registration rate ends on Nov. 15.

The CPR Institute also plans to hold concurrent advanced ADR training in limited classes. See CPR's home page at www.cpradr.org for full details.

Rupert Bondy, group general counsel of BP p.l.c., is the invited opening keynote speaker. He will update the audience on the administration of payments to victims of the Gulf of Mexico oil spill, and will discuss the challenges faced by general counsel who address mass claims issues.

The second-day keynote speaker will be New York University Prof. Bruce Bueno de Mesquita, who is author of "The Predictioneer's Game," a 2009 Random House book that displays the author's use of game theory to understand and influence policy choices. His keynote will focus on what the future holds for the legal profession.

The meeting will feature a special, full-afternoon, plenary workshop, "When Disaster Strikes: The Role of ADR in Resolving Mass Claims."

Other meeting sessions will include: The General Counsel Roundtable—New Tools and Solutions; Overview of ADR Developments in the Courts and in Congress; New Strategies for Resolving Disputes; The Future of Investment Disputes; and Disclosure and Other Ethical Issues in Mediation (providing 1.5 New York State Ethics CLE credit hours, subject to conditions on CPR's website at www.cpradr.org; financial aid may be available).

* * *

The CPR Meeting is nontransitional and is acceptable for newly admitted attorneys. The CPR Institute has been certified by the New York State Continuing Legal Education Board as an Accredited Provider of continuing legal education in the State of New York [July 14, 2007-July 13, 2010; renewal pending at press time]. CPR's financial hardship guidelines appear in full at www.cpradr.org; call (212) 949-6490 for more information.

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Alternatives

CPR

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ADR Tools

JAMS' Expedited Rules: Returning Arbitration to Its Roots

BY KENNETH M. KRAMER

The 1924 passage of the Federal Arbitration Act heralded a new era in commercial dispute resolution. Congress explained that

> It is practically appropriate that the action [passage of the FAA] should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration if agreements for arbitration are made valid and enforceable. H.R. Rep. No. 96, 68th Cong., 1st Sess., at 2 (1924)

Now, nearly 90 years later, there appears to be a growing consensus that the benefits of arbitration have been squandered and that the arbitration of today does not provide the benefits of speed, efficiency and cost control. The agitation against the costliness and delays of litigation is now directed at arbitration.

The charges include long delays reaching a conclusion, discovery abuses that mirror those in civil court litigation, burgeoning costs driven by E-discovery, motion practice, long hearings and frequent appeals. The result is a bloated dispute resolution process that is expensive, slow and frustrating.

The crescendo of complaint often ignores the undisputed advantages that commercial arbitration retains. Post-hearing process time and costs are likely to be substantially less than court litigation since arbitration awards are more easily enforced and provide fewer avenues for challenge.

It also is true that the parties can pick the decision makers, opting for subject matter experts where useful. And of course, confidentiality is much easier to maintain in arbitration proceedings. Notwithstanding these continuing advantages that might be used to tamp down the calls for reform, the community dedicated to efficient alternative dispute resolution has responded to the call for reform.

The author is a JAMS panelist based in the firm's New York Resolution Center. He is a former partner at Shearman & Sterling, where he was litigation department co-chairman.

In 2009, the College of Commercial Arbitrators, a professional group that promotes best practices, convened a summit on business-to-business arbitration. The goal was to identify why commercial arbitration had become inefficient, slow and costly, and explore concrete, practical steps that could be taken now to remedy them.

The CCA recognized that all of the stakeholders in commercial arbitration would have to participate for a successful outcome to the summit. Therefore, in addition to CCA members and staff, representatives from business users, in-house lawyers, outside counsel and the institutions that provide arbitration services were asked to join in the effort [which included JAMS and *Alternatives*' publisher, the CPR Institute]. Task forces were established, research was undertaken and the summit was convened.

Following much discussion, the CCA published its "Protocols for Expeditious, Cost-Effective Commercial Arbitration: Key Action Steps for Business Users, Counsel, Arbitrators & Arbitration Provider Institutions." They are available at www.thecca.net/CCA_Protocols.pdf.

The CCA Protocols provided specific action directives for the four constituencies: business users and in-house counsel, arbitration providers, arbitration advocates and arbitrators.

IMPLEMENTING THE PROTOCOLS

For several years prior to the convening of the CCA summit, JAMS has worked on modifications and enhancements to its Rules and Procedures, which were intended to address the same issues that eventually appeared in the Protocols directed at Arbitration Providers.

As published by the CCA, those Protocols included offering business users clear options to fit their priorities; promoting arbitration in the context of a range of process choices, including "stepped" dispute resolution processes; developing and publishing rules that provide effective ways of limiting discovery to essential information; offering rules that set presumptive deadlines for each phase of the arbitration; training arbitrators in the importance of enforcing stipulated deadlines; publishing and promoting "fast-track" arbitration rules; developing procedures that promote restrained, effective motion practice; and requiring arbitrators to have training in process management skills and a commitment to cost- and time-saving.

Of particular importance was the development of a new set of procedures to expedite arbitrations and eliminate the perceived discovery and motion practice abuses that were blamed for much of the loss of efficiency and explosion in costs.

The JAMS Comprehensive Arbitration Rules and Procedures (available here: www.jamsadr.com/rules-comprehensive-arbitration) have been amended to include two new sections: "Application of Expedited Procedures" and "Where Expedited Procedures are Applicable."

Since arbitration is a creature of consent, the Expedited Procedures cannot be forced on the parties unless they agree. The choice to use the Expedited Procedures can be made in the initial commercial agreement in which the parties agree to submit disputes to arbitration. To do so, the parties must specifically reference the Expedited Procedures in their contract.

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ADR Tools

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If the parties have failed to specify in their initial agreement that the Expedited Procedures are to be used, the claimant when commencing the arbitration can opt in by indicating it wants to use the Expedited Procedures in the demand for arbitration. The respondent is then obligated to indicate whether it agrees to the use of the Expedited Procedures.

A respondent who declines the invitation to use the Expedited Procedures must bring a client or client representative to the first preliminary conference. This allows the arbitrator to discuss the refusal to opt in to the Expedited Procedures, understand the reasons why consent has been refused, and encourage their use if it makes sense to do so.

There will be occasions in which the Expedited Procedures may not give the parties all of the tools they deem necessary to prosecute or defend the claims. But it is important to make sure that the parties have carefully considered the reasons why the Expedited Procedures should not be used, and whether they truly need to incur the expense and delay inherent in full-blown discovery and motion practice.

PROBLEM AREAS ADDRESSED

Once the Expedited Procedures have been agreed to, the procedures themselves go a long way to solving the complaints that arbitration no longer provides a cost efficient and speedy path to resolving disputes.

Initially, prior to the first preliminary conference, each party is obligated to cooperate in good faith to exchange all documents that are relevant to the claim or defense and will be relied upon in support of their positions, including electronically stored documents.

In addition, the parties must exchange lists of witnesses who may be called to testify, as well as identify experts who may be called to testify and provide expert reports. The parties must confirm to the arbitrator in writing that these obligations have been satisfied.

Thus, by the time that the parties first meet with the arbitrator, much of the work necessary to ensure an expeditious proceeding will have been completed. Rules 16.2 and 17 (a).

If further document demands are necessary, they must be limited in time, scope and subject matter to documents that are directly relevant to the disputed matters. Use of demands, which include the usual "directly or indirectly relating to," are banned, as are extensive definitions and instructions. Rule 16 (b).

DEALING WITH E-DISCOVERY

As every litigant knows, discovery is where the litigation costs spiral out of control. E-discovery has spawned its own industry, with hundreds of vendors advertising their qualifications to carry out E-discovery in ways that purport to minimize the millions of dollars spent in any complex litigation.

The Expedited Procedures deal with the costs and abuses of E-discovery head on. Rule 16.2 (c). First, searches are limited to sources used in the ordinary course of business. No documents need to be produced from back-up servers, tapes or other media.

Second, absent a showing of compelling need, production of E-documents need only be made using generally available technology "in a searchable format, which is usable by the requesting party and economic and convenient for the producing party." No need to hire the techie gurus to write new programs.

Third, the Expedited Procedures sharply narrow the custodians whose E-files must be searched. The list of custodians must be narrowly tailored to include "only those individuals whose electronic documents may reasonably be expected to contain evidence that is material to the dispute." Rule 16.2(c)(iii).

Finally, the arbitrator is given substantial discretion to further limit E-discovery or to shift the costs—subject always to reallocation in the final award—if the costs and burdens are disproportionate to the nature of the dispute or the amount in controversy.

TACKLING COSTS

JAMS, through its rules, has long sought to control the deposition discovery costs by limiting each side to one deposition, subject, of course, to the arbitrator's discretion to permit further depositions when appropriate need is shown.

The Expedited Procedures seek to reinforce the one deposition limitation by directing the arbitrator to consider the amount in controversy, the complexity of the issues and, more important, whether "the claims appear, on the basis of the pleadings, to have sufficient merit to justify the time and expense associated" with expanded deposition discovery. Rule 16.2 (d)(i). See also JAMS Recommended Arbitration Discovery Protocols for Domestic, Commercial Cases (Jan. 6, 2010)(available at www.jamsadr.com/arbitration-discovery-protocols).

The Expedited Procedures also tackle the costs of resolving discovery disputes. The parties are encouraged to avoid lengthy briefs and instead submit short letters, meet and confer in good faith and not to seek to delay discovery on all issues because there are disputes as to some. When there is a panel of three arbitrators, the parties are encouraged to agree that one of the arbitrators can resolve discovery disputes acting alone. Rule 16.2(f).

Dispositive motions have long been a controversial aspect of alternative dispute resolution proceedings. The typical lengthy delays occasioned by dispositive motions in court proceedings are antithetical to the spirit of cost-effective and speedy arbitration.

Therefore, the Expedited Procedures default to the expectation that there will not be any dispositive motions. Departure from the default position will only be permitted when the arbitrator decides that such a motion will enhance the arbitration's efficiency. In the usual case, this will mean that the discovery costs will be substantially curtailed.

To justify the filing of a dispositive motion, the party wishing to make the motion must submit a short letter showing that the proposed motion has merit and, if granted, will speed the proceeding and make it more cost effective. Rule 16.2(h); see also JAMS Recommended Discovery Protocols, supra.

Finally, the Expedited Procedures set time parameters designed to ensure a speedy resolution of the dispute. Percipient discovery is to be completed within 75 days of the preliminary conference; expert discovery must be completed within an additional 30 days. The hearing must commence within 60 days after the end of percipient discovery and should continue on consecutive days unless otherwise agreed or ordered by the arbitrator. Rule 16.2(i).

* * *

If the Expedited Procedures are followed with the parties and the arbitrator working together to fulfill their purpose, the charge that arbi-

tration is no better than court litigation will be refuted. But as the College of Commercial Arbitrators recognizes in its protocols, each of the four constituencies—the business users and in-house lawyers, arbitration providers, arbitration advocates and arbitrators—must be serious about the required reforms.

While JAMS has made available procedures that should ensure cost-effective and speedy resolution, ultimately it is the parties working with the arbitrator in good faith that can make the goal a reality.

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Worldly Perspectives

In Latvia, A Capacity for Multiple Mediations Is Waiting for More Use and Acceptance

BY GIUSEPPE DE PALO AND MARY B. TREVOR

Latvia's constitution (called *Satversme*) places judicial power in independent courts and grants everyone free access to a fair trial.

Commercial and other civil disputes under the Civil Procedure Law may be resolved through litigation or arbitration. Mediation is also available, but despite a new and promising infrastructure, mediation is not usually practiced in Latvia. The majority of out-of-court disputes are settled either through mutual negotiations without involvement of a third party, or, to a much lesser extent, arbitration. Although there have been concerted efforts to promote mediation, mediation has yet to become a popular method for settling large commercial disputes.

Latvia does, however, have the capacity to conduct multiple mediations. Presently there are three major private mediation associations: Mediation and ADR, Integrated Mediation in Latvia, and the Latvian Association of Sworn Mediators.

In addition to these private mediation associations, the Latvian Probation Service also provides mediation services in criminal cases. These mediation associations follow the European Code of Ethics of Mediators/European

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De Palo is co-founder and president of ADR Center, a member of JAMS International. He is based in Rome. He also is the first International Professor of ADR Law & Practice at Hamline University School of Law in St. Paul, Minn. Trevor is an associate professor of law and director of the legal research and writing department at Hamline. Flavia Orecchini, of the ADR Center International Projects Unit, is assisting the authors with research. This month's column was prepared in collaboration with Sandis Bertaitis, an attorney at Liepa Skopina Borenius in Riga, Latvia.

The Basics

Latvia, known as "the heart of the Baltics," is bordered by Estonia to the north, Lithuania and Belarus to the south, and Russia to the east. Immediately following the end of the First World War in 1918, Latvia was proclaimed an independent republic. Its independence, however, was short-lived, ceasing with its annexation by the USSR in 1940. It was not until the dissolution of the USSR in 1991 that Latvia would regain its independence.

Latvia's independence from the USSR was marked by the demise of a state-led economy and the growth of a market-based economy. It was within this climate of extensive privatization of state-owned property and social change that Latvia began to develop its own legal system.

The new legal system had two goals. The first was to develop a system that had the capacity to safeguard human rights and handle the commercial disputes that would arise out of the new market-based economy. The second was to develop a legal system that would enable Latvia's accession to NATO and the European Union. In 2004, Latvia succeeded in joining NATO and the European Union.

Today, Latvia has a population of around 2.3 million people. The ethnic groups present in Latvia include Latvian (59.3%), Russian (27.8%), Belarusian (3.6%), Ukrainian (2.5%), Polish (2.4%), and Lithuanian (1.3%). Latvian is the official language and is spoken by the majority of the population, while a substantial minority speaks Russian. The Latvian capital is located in Riga and the country is made up of 109 regions.

Latvia is now a parliamentary democracy composed of executive, legislative, and judicial branches, and it operates under a civil law system. Under the executive branch is the president who functions as the chief of state and the prime minister who functions as the head of government. The current president is Valdis Zalters, and the prime minister is Valdis Dombrovskis. The legislative branch consists of a unicameral parliament, and the judiciary branch is composed of district (city) courts, regional courts, the Supreme Court and the Constitutional Court.

Latvia's popularity as a business destination has grown in recent years. In a 2010 World Bank Group survey of the ease of doing business in various countries, Latvia ranked 27th out of 183 countries. As Latvia's commercial popularity increases, ADR developments will serve an important role in maintaining Latvia's reputation as an attractive commercial destination.

The sources for this information include www.doingbusiness.org/economy-rankings; www.liaa.gov.lv/eng/invest_in_latvia/why_latvia; and https://www.cia.gov/library/publications/the-world-factbook/index.html.

Worldly Perspectives

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Code of Conduct for Mediators regarding the confidentiality of mediation proceedings.

DEVELOPING STANDARDS

To date, there are no Latvian statutes, procedural rules, or case law promoting mediation as a tool for dispute resolution. In other words, there are no means for the courts to mandate mediation. Unfortunately, there is also no regulation motivating parties to mediate.

The only official document related to mediation is the February 2009 "concept" document, "Implementation of mediation in resolution of civil disputes," drafted by the Latvian Cabinet of Ministers. The concept is a political planning document—not binding to third persons—directing the legislature to prepare the necessary draft law in order to promptly achieve its goals.

The concept was drafted for the purpose of implementing Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008, on mediation in civil and commercial matters. It provides for the introduction of four different mediation models: "pure" mediation—that is, mediation conducted voluntarily outside of court proceedings—court-annexed mediation, court-internal mediation, and integrated mediation. Court-annexed mediation is to be introduced into law in 2011-2012, but as of yet, there are no plans to introduce the other forms of mediation into law.

According to the concept, court-annexed mediation—mediation carried out upon the initiative of the judge while the court proceedings are suspended—is to be implemented after the pure mediation model proves itself to be effective, and the numbers of well-qualified mediators are sufficient to satisfy the needs of both pure and court-annexed mediation.

The exact procedure that the courts will use is unclear, but there are three procedural possibilities:

a) Starting the mediation process after the case is initiated;
b) Starting the mediation process after the preparatory hearing; or
c) Starting the mediation process during the hearing.

TRAINING FOR MEDIATORS

Private mediation associations are currently in the process of developing the standards for including mediators on a court-maintained list of approved mediators. The standards include, but are not limited to, educational requirements, professional qualifications, knowledge, and reputation.

Mediation training usually happens in concert with optional ADR courses in general universities—for example, the University of Latvia—as an example of a possible dispute resolution tool. There are also mediation training options outside of the university system. For example, private mediation associations offer 30-hour mediation courses.

HIGHLY EFFECTIVE

According to statistical data provided by the three largest private associations offering mediation services in civil disputes, agreement has been achieved in 65%-75% of their mediations. In criminal cases, agreement has been reached in almost 90% of mediations between the victims of the criminal offense and guilty persons.

There are no reliable statistics available for commercial mediations, but their number is very small because there are no rules mandating mediation for commercial contracts. Furthermore, enforcement of mediation settlement agreements reached in commercial mediations is not compulsory.

* * *

It will take time to encourage individuals and commercial organizations in Latvia to use mediation as a way to resolve disputes. Still, positive steps are being taken by governmental and nongovernmental institutions to promote the idea of mediation and to develop basic standards, beginning with the introduction of court-annexed mediation into law in 2011-2012.

* * *

Next month: Poland.

The Heart of The Baltics

The setting: This month's *Worldly Perspectives* column returns to Eastern Europe, looking at Latvia.

ADR assessed: More mediation growth in the region.

The prognosis: Unclear, because there is an infrastructure, but the law has trailed behind. It's now catch-up time for the court system.

CORRECTION

In the credit line to last month's Romania column, the name of article contributor Constantin-Adi Gavrila, a co-founder and general manager of the Craiova Mediation Center Association, was misspelled. *Alternatives* apologizes for the error.

Arbitration

(continued from front page)
tion. The ability to appoint one of the decision makers is a defining aspect of the arbitral system and provides a powerful instrument when used wisely by a party." Doak Bishop and Lucy Reed, "Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration," 14:4 *Arbitration International—The Journal of the London Court of International Arbitration*, 395 (1998).

Yet, for all its obvious benefits, arbitrator selection carries considerable risk. It can consume excessive time. Of even greater concern is the risk that the wrong people will be chosen.

The former will just delay the process—sometimes significantly. But the latter can seriously jeopardize the entire arbitration.

Generally, arbitrator service, and the accompanying and requisite respect, admiration, and trust of disputants and legal colleagues, occurs only after attaining a high level of experience, expertise, competence, and training. With few exceptions, a good reputation precedes selection.

Often, panelists are chosen by each of two opposing parties, who designate one arbitrator. Then, the two arbitrators choose the tribunal chair. As a default measure, an institution will make the choice.

Variations include situations where the parties give discretion to an institution to choose all three panelists such as instances where: more than two claimants or respondents are involved; an institution permits all claimants or respondents to collectively choose a panelist; and where the parties themselves choose all the panelists.

One recurring arbitration truism, frequently encountered in practice, is that selecting a proper tripartite panel with the requisite experience, expertise, availability and freedom from conflicts—even with institutional assistance—can be difficult, time consuming and problematic.

Perhaps in recognition of this, there frequently is a self-serving, historically rooted and deeply entrenched assumption that appears to be repeatedly and widely invoked by parties, counsel and institutions: once competent arbitrators are selected, no matter who they are and just because they are professionals, it is just assumed they can work together—an assumption I will call the "Arbitrator Assumption."

In practice, when an inquiry is made regarding a candidate-arbitrator's personality or temperament, it is reflexively met with the Arbitrator Assumption being stated. All those concerned with the arbitrator selection task then readily accept the statement.

Doing so, in turn, immediately terminates any further inquiry. In essence, the parties implicitly agree that nothing else needs to be asked on this issue, so nothing more is. To this author's knowledge, there is no actual, underlying causality that links an arbitrator, by virtue of being a "professional," with a demonstrated ability of avoiding interpersonal clashes with others which would otherwise frustrate their collaboration.

Thus, the Arbitrator Assumption seems misguided, even thought it apparently is still widely used and followed. Why?

IGNORING THE RISK?

Perhaps because arbitration counsel inferentially draw from experiential and anecdotal evidence, both theirs and of their colleagues, that the likelihood of an arbitration panel being so dysfunctional, possibly to the point of being stymied, is so low that, for all practical purposes, the attendant risk can be ignored.

Or because accurately assessing the soft qualities of an individual candidate-arbitrator, while obviously useful and desirable, nevertheless is difficult to do. Consequently, whatever soft information can be obtained for a particular candidate arbitrator tends to be anecdotal perceptions from someone who previously appeared before that arbitrator.

In light of a current growing pool of candidate-arbitrators who can hear a given matter as well as counsel having little or no prior arbitration experience in a given substantive or geographic area, there often is little or no personal experience with candidate-arbitrators. Consequently, counsel often solicits, as evidence, the perceptions of another lawyer who has had such experience.

But not only is the resulting evidence subjective, it also becomes progressively more unreliable as the affinity between the two counsels becomes increasingly distant. By eliminating a need for the parties or their attorneys to consider personality and interpersonal compatibility issues, the Arbitrator Assumption simplifies and expedites selecting and constituting the panel so the entire arbitration can then move forward to another phase of the proceeding.

Yet, because arbitrators are humans, can we really work effectively and efficiently with every one of our peers no matter who that person is? Each of us has our own unique set of foibles, personality traits, temperament and character flaws. Some are readily apparent. Others are latent. In sum, they collectively define us as true individuals.

This individuality often can lead to unexpected interpersonal conflict and tension between individuals, possibly to the point of destroying the relationship. Society sees this result virtually across the entire spectrum of multi-person activity. Are arbitrators somehow shielded from this result simply because they are "professionals"? Hardly. We are no more or less human than anyone else, subject to the same psychological characteristics and consequences.

In light of human nature, should the risk of a dysfunctional panel occurring really be ignored? Absolutely not. A derailed process is unacceptable, especially in a complex, high-stakes dispute where any major delay, let alone a restart of an arbitration with a replacement panel, would mean considerable additional time and substantial added expense and disruption for the parties.

But how can parties and counsel ameliorate the risk?

Not through institutional selection rules. They appear to implicitly accept, on face value, that the risk of a dysfunctional panel occurring is negligible. This reinforces and perpetuates the validity and reliability of the Arbitrator Assumption to both counsel and parties alike. And that is where the problem lies.

HOW PROVIDERS SCREEN

In conjunction with use of its "Enhanced Neutral Selection Process for Large, Complex Cases," the American Arbitration Association currently offers the following interview-based service for use in selecting arbitrators:

> The AAA case manager will work with the parties to develop an interview protocol in order for the parties to have an opportunity to present questions to potential arbitrator candidates, either through a telephone conference or in writing. Examples of interview question topics might include: industry expertise, relative experience in similar disputes, the arbitrator's procedural handling practices, and any other questions that the parties would find helpful to the selection process.

Once the parties, in conjunction with the case manager, determine a set of appropriate arbitrator qualifications, an AAA case manager will then select candidates, from pertinent AAA panels, for those matching the set and then pre-screen all of them for conflicts, availability or both. Presumably, the panel

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Arbitration

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ultimately being chosen from those candidates will pass this pre-screening process.

No apparent mention appears of personality types, interpersonal compatibility issues, or, generally, any salient psychological characteristic reflective of whether a particular candidate arbitrator is more likely to be able to effectively and efficiently work with any other candidate arbitrator then under consideration.

Certainly, parties have leeway under the AAA Enhanced Neutral Selection Process to make such inquiries. But since no suggestion along those lines expressly appears, it is unlikely that any party actually will do so. Hence, neither the resulting panel nor ultimately the parties will benefit from any responses that candidate arbitrators would have made to any such inquiry.

While the London-based Chartered Institute of Arbitrators approves of interviewing prospective arbitrators (see "Hot Topics and Etiquette: A Professional Group Makes Its Arbitration Guidelines Public," 27 *Alternatives* 156 (October 2009)), its recently issued guidelines, which contain express references to discussing arbitrator experience and expertise and other permitted topics during an interview, are similarly devoid of using personality-based selection factors. "Practice Guideline 16: The Interviewing of Prospective Arbitrators," Chartered Institute of Arbitrators (2006) (available at www.ciarb.org/information-and-resources/16 The Interviewing of Prospective Arbitrators.pdf).

Irvine, Calif.-based provider JAMS, in Rule 15(b) of its arbitration rules for default arbitrator selection, is more succinct than the AAA: "If the Parties do not agree on an Arbitrator," the rule states, "JAMS shall send the Parties a list of . . . ten (10) Arbitrator candidates in the case of a tripartite panel. JAMS shall also provide each Party with a brief description of the background and experience of each Arbitrator candidate."

Alternatives' publisher, the CPR Institute, is also brief. Rule 6.4(b) of its nonadministered arbitration rules states: "CPR shall submit to the parties a list, from the CPR Panels, . . . of not less than seven candidates if two or three arbitrators are to be selected. Each list shall include a brief statement of each candidate's qualifications."

WIPO, through Article 19(b)(i) of its arbitration rules, uses a list-based selection process similar to JAMS and the CPR Institute. And, similar to the Chartered Institute, WIPO invites parties to specify the candidate qualifications the parties seek. But here, too, no express guidance is provided as to the nature of those qualifications, let alone whether they involve use of any personality-based factor. This article states:

> The Center shall send to each party an identical list of candidates. . . . The list shall include or be accompanied by a brief statement of each candidate's qualifications. If the parties have agreed on any particular qualifications, the list shall contain only the names of candidates that satisfy those qualifications.

Both the LCIA and the International Chamber of Commerce effectively leave the default selection method to the parties' complete discretion, though, where appropriate, party nationality, language, and other salient factors are taken into account. This is evident in LCIA Rule 5.5:

> The LCIA Court will appoint arbitrators with due regard for any particular method or criteria of selection agreed in writing by the parties. In selecting arbitrators consideration will be given to the nature of the transaction, the nature and circumstances of the dispute, the nationality, location and languages of the parties and (if more than two) the number of parties.

The same exists in ICC Rule's Article 9:

> 1. In confirming or appointing arbitrators, the Court shall consider the prospective arbitrator's nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals and the prospective arbitrator's availability and ability to conduct the arbitration in accordance with these Rules. . . .
>
> 2. The Secretary General may confirm as co-arbitrators, sole arbitrators and chairmen of Arbitral Tribunals persons nominated by the parties or pursuant to their particular agreements, provided they have filed a statement of independence without qualification or a qualified statement of independence has not given rise to objections.

So to the extent various institutions specify selection processes, such as the AAA, CPR and WIPO, or guidelines, such as the Chartered Institute, those focus on substantive expertise and arbitration experience; while others, such as the LCIA and ICC, basically delegate the entire process to the parties.

The former approach is deficient because it fails to expressly mention any issue of consideration of interpersonal compatibility of candidate arbitrators, presumably leaving the issue to the parties to raise during discussions with the institution. The latter approach, similarly deficient, leaves the entire process, including this issue, to the parties.

Regardless of the approach followed, even if the issue were to be raised by either one of the parties to a dispute or its counsel, the Arbitrator Assumption is likely to kick in and then the inquiry would be aborted or dropped.

What is missing is consideration of pertinent personality-based characteristics reflective of whether a particular candidate arbitrator is more or less likely to be able to effectively and efficiently work with any other candidate-arbitrator. So: What to do?

PROBLEM RECOGNIZED

This basic selection problem probably has existed for as long as arbitration has been practiced, and surely continues unabated to this day.

Of relatively recent note, in 1994, one commentator tangentially recognized this problem, and identified some characteristic issues:

> All arbitrators of course should be intelligent, experienced in resolving disputes and fair minded. However, there are other important attributes. When selecting a party appointee who will serve with two other arbitrators . . . [t]he appointee should be a person with an ego and temperament compatible with the task of working effectively with other arbitrators.

James H. Carter, "The Selection of Arbitrators," WIPO Worldwide Forum on the Arbitration of Intellectual Property Disputes, World Intellectual Property Organization, Geneva, Switzerland, (March 3-4, 1994)(available at www.wipo.int/amc/en/events/conferences/1994/carter.html).

The author posed one solution by simply excluding from selection those individuals with certain temperaments that he viewed as "dangerous":

- the "Ego-Tripper" likely to treat the office as an opportunity to "flex some muscle" in support of his or her own pet views;
- the "Superbarrister" who may be unable to resist the temptation to take over the advocacy role for one side (or even both);
- the "Superjudge" who was a bully on the bench and has learned to like the taste of it, often causing counsel to jump through unnecessary hoops of the arbitrator's creation;
- the "White Knight" on a quest for justice and truth, whether or not it is to be found within the applicable procedural framework, who may inject issues the parties have intentionally excluded or decide on the basis of matters not discussed with the parties;
- the "Whimp" [sic] who is unwilling or unable to keep a sufficiently firm hand on the proceedings to make them run smoothly; and
- the "Unemployed Timeserver" who may have the ability but lacks the inclination to bring matters to a close; after all, he or she may have nothing else as interesting or remunerative to return to doing.

Having delineated those individuals to exclude from the entire universe of prospective arbitrators, how does counsel then select proper candidates? The commentator says throw them off the list. But that solution isn't complete, because people who have acceptable character traits can still have personality conflicts. Ultimately, the analysis is too superficial in that it advocates nothing more than relying on anecdotal evidence from other practitioners—in other words, what has traditionally occurred in practice for quite some time:

> With these many dangerous types to avoid, how can parties find the right arbitrators? . . . [C]onsult widely and think carefully about what is said by those who know the candidate and have seen him or her in action lately.

Anecdotal evidence can be problematic: It may not exist for a given individual and, when it does, then it may be suspect, depending on its ultimate source.

More contemporaneously, in late 2008, another article acknowledged the general need to include "soft qualities and skills" of candidate-arbitrators and extended this to selecting international mediators:

> Unfortunately for parties, the identification of suitable candidates and agreement on the appointment of mediators (and arbitrators, for that matter) remains firmly embedded in pre-20th century technology: imperfect information transmitted by word of mouth, and what can be gleaned from a curriculum vitae or an initial discussion with the candidate. . . .
>
> As with the appointment of arbitrators, what parties really hope to identify in candidates are the soft qualities and skills that are not readily apparent from a curriculum vitae or public listing of the mediator's name and general qualifications.

Michael McIlwrath, Diane Levin, Giovanni Nicola Giudice, and Jeremy Lack, "Finding an international mediator" (Dec. 9, 2008)(available at http://knol.google.com/k/michael-mcilwrath).

An arbitration analogy, however, has limits. In providing a checklist of what the authors propose as desirable qualities and skills—classified into "The Mediator's credentials," "The Mediator's preferred procedural approaches," and "The Mediator's cultural preferences"—the article omits mention of individual temperament, personality, interpersonal compatibility, and other pertinent psychological characteristics.

Those omissions may well be warranted since, for the most part, mediation is conducted before sole mediators, with co-mediation rarely employed, particularly in an international context. Psychological characteristics, indicative of whether tribunal members can effectively work together and which should influence selection of the arbitrators who will constitute that tribunal, are irrelevant to selection of a sole mediator and thus do not arise in that context. So how can the risk associated with relying on anecdotal evidence of such psychological characteristics of candidate-arbitrators be reduced?

There are two possible solutions: First, change the information source to one that is sufficiently reliable. Second, rely on prior successes. The first can be effectuated through personality-type screening and compatibility matching, and the second through selection of proven panels.

SCREENING AND COMPATIBILITY

Fortunately, a number of psychological screens have been developed over the years for discerning general personality type, and then grouping individuals with compatible types.

Once a sufficient pool of candidate-arbitrators has been determined using traditional arbitrator selection criteria, then, through use of a suitable screen, that pool can be further refined—down to three individuals with seemingly compatible personalities and temperaments.

By so supplementing traditional selection criteria, the parties may significantly reduce the risk attendant to constituting a panel potentially prone to interpersonal conflict and tension—one that could get derailed because of an inability to collaborate.

A rather simplistic, but nevertheless instructive, classification based on three distinct conflict-handling modes—negotiating styles—often is used to describe the behavior of individual negotiators when faced with conflict: a person competes, accommodates, or avoids. Robert H. Mnookin, Scott R. Peppet and Andrew S. Tulumello, Beyond Winning—Negotiating to Create Value in Deals and Disputes 51 (2000).

A degree of interpersonal conflict is required for two individuals to fully engage with each other. By doing so, they can sufficiently advocate their respective positions, and create and capture sufficient value through suitable compromises from whatever is at stake. The conflict aids in satisfying their respective interests. Individual negotiating styles can adversely interfere with this process.

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Arbitration

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To appreciate this, first consider how each of these three modes manifests itself.

Competitors want to experience winning, and enjoy feeling purposeful and in control. Competitive negotiators exude eagerness, enthusiasm and impatience. They typically seek to control an agenda and frame the issues. They stake out an ambitious position and stick to it, and fight back when they are bullied or intimidated in order to get "the biggest slice of the pie."

Accommodators value good relationships and want to feel appreciated. They exude concern, compassion and understanding. Worried that conflict will disrupt relationships, they negotiate, in a smooth fashion, to quickly resolve whatever differences arise. Accommodators listen well, but they may be too quick to give up on their own interests when they fear their relationship may be damaged.

Avoiders believe that conflict is unproductive. They feel uncomfortable with explicit, especially emotional, disagreement. Whenever they are faced with conflict, avoiders do not compete or accommodate. Instead, they disengage.

They tend not to seek control of an agenda or to frame issues. They deflect efforts to focus on solutions, appearing detached, unenthusiastic, or uninterested. Though an avoidance behavior has certain occasional advantages, such as commanding attention of others when an avoider finally speaks up, avoiders often shun opportunities to use conflict to solve problems.

They tend to refrain from asserting and advocating their own interests or forcing out those of another side. Like competitors, avoiders may have problems in sustaining strong interpersonal working relationships with others.

These modes interact—sometimes with disastrous results, as "Beyond Winning" demonstrates.

Two competitors will produce an energetic negotiation—making offers and counteroffers, and arguments and counterarguments. They enjoy bargaining just for its sheer fun. But since both primarily are focused on winning, they are likely to reach a stalemate—or an outright blow-up—because neither is listening to the other. Two competitors need to find ways of framing acceptable compromises.

A far different dynamic occurs when a competitor negotiates with an avoider: They infuriate each other. By refusing to engage, an avoider exploits the competitor's need for control and totally frustrates the competitor. A competitor, when frustrated, may offer an avoider a concession just to get the latter to negotiate at all.

The situation is not any better when a competitor negotiates with an accommodator. Accommodators may make significant concessions if only to preserve a relationship and minimize interpersonal disagreements, tension and strife—thus opening them to significant exploitation by a competitor.

When two accommodators negotiate, each will be precisely attuned to the other's need to protect their relationship. But in doing so, each may fail to sufficiently assert his or her own interests and thus avoid value-creating opportunities that arise out of conflict.

When an accommodator and an avoider negotiate, little, if anything, results. Should the accommodator accommodate the avoider, both will simply avoid the problem before them. A negotiation might still succeed if the accommodator could sufficiently restrain his or her emotions to engage the avoider.

Finally, if two avoiders attempt to negotiate, both will avoid any interpersonal conflict. Thus, nothing will happen.

TYPE APPLIED TO ARBITRATORS

Why are negotiating styles pertinent to tripartite arbitral tribunals? Because a panel of three arbitrators engages in joint problem solving by negotiating with each other in closed-door deliberations to reach a consensus decision on a given procedural or substantive issue.

Parties choose tripartite tribunals and incur the substantial added expense over the cost of a single-person tribunal because, given the finality of arbitration, they understandably want results that survive a process of intellectual distillation: a consensus decision brought about by vigorous internal debate and testing among the panelists as a sufficient safeguard against an aberrant decision that might otherwise be made by a single-arbitrator tribunal.

Even three-arbitrator panels are far from perfect. Still, strength lies in numbers with the need to achieve consensus among three individuals offsetting some of the potential for error that might otherwise arise with just one person. Panelists negotiate to either persuade their fellow panelists of the correctness of their own views and thus bring either or both to their side, or allow themselves to be persuaded by their peers.

These negotiations can get rather heated. They generate considerable interpersonal conflict and tension, depending on how deeply seated an arbitrator's views and those of his or her peer co-panelists are on a given issue.

Ideally, a skilled arbitrator should just focus on the issue at hand, negotiate as strongly as needed, but remain open to persuasion and, once a consensus is reached, immediately let the tension and interpersonal conflict completely dissipate. That is, move on as a united panel, free of residual conflict and tension, to consider the next issue.

But in reality, different negotiating styles of the individual arbitrators can complicate the deliberative process, possibly even frustrate it. If three panelists are unable to negotiate with each other, they cannot achieve consensus.

Consider what may result if a three-person tribunal was composed of a competitor, an accommodator and an avoider. The competitor likely would seek to take command of the panel, force his or her agenda on the others, rapidly analyze the issues at hand, decide them all, and then single-mindedly fight for his or her result.

The avoider would probably wait—in spite of whatever protestations the competitor might raise—and continue to do so hoping that, through the mere passage of time, the issues would disappear and thus he could avoid deciding the issues altogether.

The accommodator, seeking agreement with the competitor and the avoider if only to reduce, if not eliminate, the interpersonal conflict, would be frustrated by the clear split between the competitor and the avoider. By virtue of being forced to take sides with one or the other and at the expense of increasing rather than decreasing conflict, the accommodator probably would elect to side with neither and do nothing. Or alternatively, the accommodator would expend time and energy trying to reconcile the disparate positions—perhaps to the point of jeopardizing a productive outcome in order to salvage the relationship.

The tribunal would not be able to reach consensus and would be stymied. Though this scenario illustrates a rather extreme example, it depicts the potential dysfunction.

Would these clashing negotiating styles be revealed through an arbitrator's CV? No.

Through candidate interviews centering on substantive and arbitral experience and expertise? No.

Through anecdotal assessments of those who have appeared before a candidate arbitrator? No.

Why?

For the most part, these styles would manifest themselves only during panel deliberations. Deliberations are highly confidential without either counsel or the parties having access. Outside of deliberations, an arbitration tribunal takes on a rather stoic and cohesive appearance to present a unified front that intentionally masks all outwardly apparent indicia of internal strife, interpersonal conflict, and tension the panelists may be experiencing. No arbitrator wants to alarm counsel, who is responsible for the neutral's appointment, as to their own apparent failings and the attendant risk to the entire proceeding.

* * *

Next month, author Peter Michaelson describes personality type tests that can be used to screen arbitrators, and concludes with a strong push for inclusion of such screening in commercial arbitration practice.

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THE AMICUS, PART I: ARBITRATION FAIRNESS AT THE SUPREME COURT

BY CHARLES S. HWANG

After years of arbitration cases filled with intricate lawyers' law, the U.S. Supreme Court is now zeroing in on individuals' relationships to ADR.

Returning to the class arbitration battleground just a few months after the Court banned the process unless the parties specifically contracted for it, on Nov. 9 the Court will hear a case that will focus on how individuals fare in arbitration.

Most people could relate to the class arbitration issue in next month's argument in *AT&T Mobility v. Concepcion,* No. 09-0893—at least if they read the contract provisions in their credit cards, insurance policies, and, especially, in their wireless telephone service agreements, which is the type of contract at the heart of the case.

By contrast, last spring's *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.,* 130 S. Ct. 1758 (April 27, 2010) (www.supremecourt.gov/opinions/09pdf/08-1198.pdf) addressed the question of whether imposing class arbitration on commercial parties whose arbitration clauses are silent on that issue is consistent with the Federal Arbitration Act. In a 5-3 opinion, the Court held that courts and arbitrators may not impose their own policies favoring class actions on parties that had not contracted specifically for class-wide arbitration.

In fact, in the last week of the term after *Stolt-Nielsen,* the Court issued an arbitration decision involving an individual's employment contract. But although the employment case, *Rent-A-Center, West Inc. v. Jackson,* 130 S. Ct. 2772 (June 21, 2010), had fairness arguments, the decision was based on contracting principles. The employee lost, with the Court sending the case to ADR for determination on the matter's arbitrability, instead of a court.

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The author is a CPR intern this fall and a student at New York Law School.

Cartoon by John Chase

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AT&T Mobility seems to put the fairness issue more squarely in front of the Court. At a minimum, the argument and decision should provide an understandable entry for consumers into the Court's usually dense arbitration jurisprudence. In the case, Southern California couple Vincent and Liza Concepcion signed agreements with AT&T Mobility for cellular phone service and the purchase of two new cell phones.

The Concepcions were told the phones would be free in exchange for executing a two-year service contract. They were not charged for the phones, but they had to pay the total sales tax on the retail price of each phone. The Concepcions filed suit against AT&T Mobility, alleging that the practice of charging sales tax on a cell phone advertised as "free" was fraudulent.

A Southern California federal district court denied AT&T Mobility's motion to compel the Concepcions to submit to individual arbitration under the parties' arbitration agreement. The court held that under California law, the agreement's class-waiver provision is unconscionable, and that the FAA does not preempt California unconscionability law.

The Ninth Circuit affirmed the U.S. District Court decision.

AT&T Mobility will be argued by attorneys with significant links to the Supreme Court's recent arbitration history. Counsel of record for petitioner AT&T Mobility is Kenneth S. Geller, of Washington, D.C., who is managing partner of Mayer Brown. Geller's firm is a regular participant in top Court arbitration cases. It has filed recent amicus briefs in *Stolt-Nielsen,* on behalf of frequent arbitration case amicus filer CTIA—The Wireless Association, whose *AT&T Mobility* brief is discussed below, and, on behalf of the U.S. Chamber of Commerce, in both *Rent-A-Center* and *Granite Rock Co. v. Int'l Bhd. of Teamsters,* 130 S. Ct 2847 (June 24, 2010).

Geller is a veteran Supreme Court litigator. He has argued 41 cases since his first appearance in 1977. According to Mayer Brown's www.appellate.net website, Geller most recently appeared before the Court in three 2002–2003 term cases: *American Ins. Ass'n v. Garamendi,* 539 U.S. 396 (2003) (invalidating a California statute requiring insurers to disclose Holocaust-era activity because it interfered with the federal government's ability to conduct foreign relations); *Boeing Co. v. United States,* 123 S. Ct. 1099 (2003) (where the Court found that a U.S. Treasury Department rulemaking on accounting for corporate research and development deductions was valid), and *Nat'l Park Hospitality Ass'n v. U.S. Dept. of Interior,* 538 U.S. 803 (2003) (where the Court vacated the judgment of the lower court on ground that the issue, regarding a National Park Service regulation, was not yet ripe for judicial resolution).

It's Time For An Argument

The case: A wireless service contract comes to the nation's top Court.

The arbitration problem, alleged: Every small-dollar dispute must go to ADR. And consumers say they can't get their refunds for overcharges because they can't join together in a class to pursue them.

The issue: Is forcing consumers to waive the right to class arbitration fair?

Deepak Gupta of the Public Citizen Litigation Group, a Washington, D.C., public interest law firm, will argue on the Concepcions' behalf, his first case at the Court. But Public Citizen shows up in nearly every Supreme Court arbitration case, either as amicus or as counsel, advocating against mandatory arbitration.

The case's first amicus filings have lined up behind AT&T Mobility to persuade the Court that the FAA preempts states from conditioning an arbitration agreement's enforcement on the availability of particular procedures—here, class-wide-arbitration—when those procedures are not necessary to ensure that the parties are able to vindicate their claims.

The amicus supporting AT&T Mobility want the Court to uphold the class-arbitration waiver, which is included in many consumer arbitration agreements, and reverse the Ninth Circuit decision holding such waivers unconscionable.

Each petitioner-supporting amicus brief is examined below. The full briefs, along with the Ninth Circuit's decision, can be found at the American Bar Association's briefs site. See www.abanet.org/publiced/preview/briefs/nov2010.shtml#mobility.

The ABA posted 15 respondents' amicus briefs—that is, briefs supporting the Concepcions' view—just as this issue was ready for print. Those briefs will be summarized in a second part in the December *Alternatives*, along with argument highlights. Below are summaries of the petitioner's amicus support that had been filed as of *Alternatives*' November issue deadline.

U.S. Chamber of Commerce: The Chamber states that it filed its amicus brief because many of its member business organizations use arbitration, and rely on the class waivers—which it says is a "key component" of their ADR agreements.

The Chamber argues that class arbitration is not required to deter corporate misconduct, and that the FAA preempts the application of California's unconscionability doctrine.

The Chamber points to the availability of private and public law enforcement remedies. According to the brief, sufficient deterrence is provided by the potential for criminal sanctions; the ability of state attorneys general to pursue and enforce civil penalties; and Federal Trade Commission and Federal Communications Commission regulations.

In fact, the Chamber argues that defendants have no reason to act lawfully because class-actions create an incentive to settle regardless of the merits of the case. Furthermore, it argues that forcing class arbitration on businesses will result in the end of consumer arbitration clauses altogether. The Chamber points to companies such as Comcast Corp., which have removed arbitration provisions in jurisdictions where the courts will not uphold class-action waivers.

Finally, the Chamber insists that the Ninth Circuit's decision is hostile to the FAA because

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it singles out arbitration clauses, and is at odds with the FAA's purpose of providing low-cost, time-efficient alternatives to litigation.

CTIA—The Wireless Association: The CTIA, a Washington, D.C., nonprofit industry group, is a regular amicus party in arbitration cases. Like the Chamber, it argues that the FAA and federal policy favor arbitration and the enforcement of terms entered into by private parties. The Ninth Circuit's decision, according to the brief, puts arbitration's "mutual consent" under attack.

CTIA argues that the merits of bilateral arbitration outweigh any perceived benefits that class arbitration may provide. The Ninth Circuit decision will increase costs, the brief says, as well as create discovery issues and lengthen the arbitration process.

According to the CTIA, these factors will have an adverse effect not only on businesses, but on consumers as well. The increased costs will be passed on to consumers when businesses forgo arbitration provisions; and if local law is allowed to preempt the FAA, differing arbitration agreements from state to state will cause consumer confusion.

DRI—The Voice of the Defense Bar: DRI is a 22,000 member Chicago-based international lawyers' organization that was established to voice the concerns of defense-side civil litigators.

DRI attacks the Ninth Circuit's decision as a policy-driven distortion of the unconscionability doctrine. Instead of looking at the agreement at the time it was entered into, the brief argues that the Ninth Circuit applies a per se unconscionability rule by singling out arbitration provisions, while "ignoring the significant benefits the agreement confers on AT&T's customers."

Among other arguments, a major prong of DRI's brief rails against what it says is a new defense burden to disprove that class actions provide a deterrent effect. DRI states that under the Ninth Circuit's decision, an agreement to arbitrate bilaterally will not be enforced unless the party seeking to enforce it first proves that a class action is unnecessary to deter the alleged misconduct.

The DRI brief suggests that a defendant seeking to enforce an arbitration agreement loses a presumption against class arbitration. It also must "negate an assumption that it has engaged in 'wrongdoing' that requires 'deterrence' before its right to arbitrate the merits of the only basis for that assumption—the plaintiff's allegations—will be enforced."

The Center for Class Action Fairness: The Center for Class Action Fairness, a new Washington-based public-interest law firm that files objections to class settlements where it says consumers got a bad deal, notes that bilateral arbitration offers advantages over class-wide arbitration.

Its brief argues that the cost of navigating "byzantine" procedures, the prolonged time class arbitration takes—it says three years on average—the difficulty that class members have in complete recovery despite a positive outcome, and the notion that there is more financial incentive for attorneys to pursue class actions than for the class members, make class arbitration an inferior alternative to bilateral arbitration.

In contrast, bilateral arbitration is faster, while providing higher success rates for consumers, according to the brief, which notes that the average length of bilateral arbitration is about seven months. Additionally, it says that arbitration provides an easy and complete recovery, citing a 2007 American Arbitration Association study showing that consumers prevailed in 48% of the consumer cases it studied.

These characteristics, the center argues, make the bilateral arbitration process much more appealing to both businesses and consumers.

Pacific Legal Foundation: The PLF is a Sacramento, Calif., nonprofit that files amicus briefs focusing on freedom-to-contact principles.

Like many of its fellow amici, the PLF argues that California's unconscionability doctrine disfavors arbitration and that the application of special criteria, such as the "mutuality test," creates a double standard for arbitration agreements.

According to the PLF brief, the mutuality test focuses on the adhesive nature of the arbitration contract. It says that the test was first outlined in *Stirlen v. Supercuts Inc.*, 51 Cal. App. 4th 1519 (1997), "in which the court held that a contract that requires one party to arbitrate but not the other is so 'one-sided' as to be unconscionable."

Additionally, PLF argues that California courts have ignored the application of the sliding-scale when it comes to unconscionability. They argue that there should be a high level of procedural unconscionability, and a low level of substantive unconscionability, or vice versa, for the doctrine to be properly applied. The brief maintains that California courts only provide lip service to fulfilling the requirements, and ignore the sliding-scale. The PLF states that "even the slightest hint of judicially perceived unfairness will suffice" to deem a contract unconscionable.

The PLF says that "[t]hese features of California jurisprudence, which infect federal courts exercising diversity jurisdiction, as in this case, interfere with the normal and proper functioning of the California marketplace, injuring businesses and consumers alike."

Distinguished Law Professors: This brief, like DRI, argues that California courts ignore the elements of unconscionability and adopt a per se rule—not viewing the contract from the time it was entered into, but looking at the inclusion of a waiver of class arbitration as reason to deem such agreements unconscionable.

Furthermore, the brief attacks the Ninth Circuit and the California courts because it says their opinions have shifted the burden of proof onto the party attempting to enforce the contract to show that the agreement is conscionable, while traditionally the burden to show unconscionability fell on the party seeking to dissolve the agreement.

According to the brief—prepared by attorneys at Washington, D.C.'s Wiley Rein and which includes an appendix listing 13 law professors backing its contents—the California courts have adopted a presumption of harshness wherever an agreement does not contain mutual provisions. The brief argues that the California courts have abandoned a "shock-the-conscience" standard and have decided to apply a mutuality test, despite the fact that mutuality is not required in other contracts.

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American Bankers Association, American Financial Services Association, Consumer Bankers Association, Financial Services Roundtable, and California Bankers Association: The financial industry groups' amicus brief points to the conflict created, by the Ninth Circuit's decision, between FAA §2 and §4.

Among other arguments, the brief claims that FAA §2 preempts states from using public policy as ground for holding a contract unconscionable. Because §2 states that an arbitration agreement must be upheld unless there is an equitable reason why it should be struck down, and §4 states that arbitration agreements should be enforced according to the terms of the agreement, the brief argues that the Ninth Circuit's decision makes it impossible for arbitration agreements to exist within the purpose of the FAA.

The brief also devotes a section to explaining why the California Courts and the Ninth Circuit "have given insufficient weight to the benefits of arbitration and the costs and problems associated with class actions."

DirecTV Inc., Comcast Corp., and Dell Inc.: The companies argue that arbitration agreements have increasingly become consumer friendly as companies have continued to make good-faith efforts to ensure that arbitration is an accessible forum. They note that generally, businesses bear the majority of the costs, as well as hold arbitration proceedings in the consumers' jurisdiction.

In addition to making arbitration cheaper and faster, the brief notes that businesses impose conditions that guarantee consumer fairness, citing the use of rules by arbitration provider JAMS.

Furthermore, the companies note in the brief that the Ninth Circuit decision and the application of the California laws could lead to the end of consumer arbitration agreements. They note that some companies, including Comcast, DirecTV, and Amazon have inserted provisions that nullify the entire arbitration provision if the consumer's state law prohibits the use of class arbitration waivers, or have stricken arbitration entirely.

Equal Employment Advisory Council: The EEAC, a 34-year-old nonprofit employers' association that promotes "sound approaches to the elimination of employment discrimination practices," focuses on the harm that the Ninth Circuit opinion would do to employment policies if it is not reversed.

'The prospect of having to litigate, from state to state, the enforceability of their arbitration agreements creates a chilling effect on employers' efforts to establish binding arbitration programs which benefits not only them but also their employees.'

Noting the conflicts that the Ninth Circuit opinion raises regarding FAA provision interpretations, the Washington-based EEAC also says that the decision will hurt ADR development. With employers facing the risk that ADR programs will not be enforced across the board for all their employees, the council maintains that the potential for increased litigation and the increased costs will cause employers to reconsider arbitration use.

The council's brief notes,

> The California public policy expressed in the decision below, which in effect establishes an across-the-board ban on class arbitration waivers, also undermines most, if not all, of the practical benefits that inure to employers and employees alike by agreeing to arbitrate workplace disputes. Not only does it impose the very cost burdens and procedural complexities that both employers and employees, by agreeing to arbitrate, sought to avoid, but it also undermines uniform application of multistate employers' ADR procedures. The prospect of having to litigate, from state to state, the enforceability of their arbitration agreements creates a chilling effect on employers' efforts to establish binding arbitration programs, which benefits not only them but also their employees. It also significantly undercuts the strong federal policy, as repeatedly endorsed by this Court, favoring private arbitration of employment disputes.

The States of South Carolina and Utah: South Carolina and Utah want to encourage the widespread use of arbitration in the interests of their citizens.

The states argue that class-based approaches don't necessarily help consumers because the returns for individual class members are small. Also, class actions are time consuming and costly; as a result, many claimants do not bother to file claims because of the difficulty of obtaining complete relief.

The states also argue that California's policy against arbitration, and specifically the hostile view toward class arbitration waivers, have the potential to infect the law of other states. The Ninth Circuit, notes the states' brief, held that California law will govern the enforceability of such arbitration provisions "in the contracts of out-of-state customers of California-based businesses, *even when those contracts choose the law of the customer's home state*." (Emphasis in the brief; citation omitted.)

New England Legal Foundation: The organization is a nonprofit, public interest law firm that describes itself as nonpartisan, and interested in "promoting balanced economic growth" and "protecting the free enterprise system."

NELF echoes arguments discussed above. The two major points in NELF's brief are that the FAA should and must preempt any state law, particularly when the law singles out arbitration clauses. Here, it notes, the Ninth Circuit adopts a California Supreme Court rule that "effectively invalidates[,] . . . per se[,]" class arbitration waivers. The brief also states that the Ninth Circuit's decision has the potential to harm consumers, despite its intent to help, because businesses will stop offering arbitration agreements that are helpful to consumers.