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## TAKING NOTICE OF ARBITRATION

Senior legal counsel in major corporations are taking notice of arbitration and, in the context of current practice rather than theory, recognizing its strengths and its weaknesses. A recent *ABA Journal* article notes that these lawyers find the arbitration process, including judicial enforcement of arbitration clauses, is not as fast and inexpensive as touted. Further, they now realize that arbitration's transparency leaves a lot to be desired; these lawyers described the system as lacking the "checks and balances" that Americans have come to expect from their judicial system.<sup>1</sup>

### Escalating Costs, Absence of "Checks and Balances"

Arbitration is not likely to disappear, at least not any time soon; but the face of alternative dispute resolution (ADR) is changing. In-house counsel, who have long been proponents of binding, pre-dispute arbitration, are now embracing other options. What specific issues have focused their attention on alternatives to binding arbitration?

#### *Boilerplate*

The contract drafter often includes the "boilerplate" clause of their favorite ADR administrator, and they rarely inquire further. There are three major ADR administrators – the American Arbitration Association (AAA), Judicial Arbitration and Mediation Services (JAMS) and the National Arbitration Forum (NAF) –, and each has its own recommended contract language, its own rules of procedure and its own ADR philosophy. But, the *implementation* of these is really the key. One *must* become familiar with an ADR administrator's philosophy and

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<sup>1</sup> Leslie A. Gordon, *Clause for Alarm*, ABA JOURNAL 19 (Nov. 2006) available at [http://www.abajournal.com/magazine/clause\\_for\\_alarm/](http://www.abajournal.com/magazine/clause_for_alarm/); see also *Keeping the Peace*, CARPENTER LAW OFFICE CLIENT NEWSLETTER (Robert H. Carpenter, Jr., Plano, Tex.), Mar. 2005, [http://www.carpenterlaw.net/images/Keeping\\_the\\_Peace\\_Mar.2005\\_2007.pdf](http://www.carpenterlaw.net/images/Keeping_the_Peace_Mar.2005_2007.pdf).

how its rules and practice can actually affect dispute resolution.

The unavailability of the checks and balances that litigation provides underlies the worries of critics of binding arbitration. For instance, there is no appeal in which errors may be addressed. Discovery rights may be severely limited by arbitrators, or they may allow burdensome discovery rights. And, a party may be forced to endure the entire arbitration before having an effective opportunity to challenge an arbitrator for bias.

### *Summary Judgment*

The lack of summary judgment in the arbitration process is a principal concern for many potential litigants. In the summary judgment process, a court may terminate a case, without lengthy discovery and trial, if the facts are not in dispute and the matter is a question of law that the judge alone can decide. Many cases present this posture, and judges sometimes engage in semantics and gymnastics to position cases for summary judgment.

Summary judgment provides an expedited way to resolve disputes within the transparency of the U.S. judicial system. In fact, civil case litigants in U.S. District Courts increased the use of summary judgment motions from 12% of cases in 1975 to over 20% in 2000. Further, summary judgment motions in 2000 terminated twice the number of cases they terminated in 1975.<sup>2</sup>

★  
*Season's Greetings*



★  
The rules of all three leading arbitration administrators contemplate a hearing, either on the basis of written submissions or involving participation by the parties; and in either case a party may present not only argument, but also evidence, even if the facts are essentially undisputed. Only the JAMS rules even mention anything like the disposition available via summary judgment: ★

#### Rule 18. Summary Disposition of a Claim or Issue

(a) The Arbitrator shall decide a Motion for Summary Disposition of a particular claim or issue, either by agreement of all interested Parties or at the request of one Party, provided other interested Parties have reasonable notice to respond to the request.

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<sup>2</sup> Joe S. Cecil et al., *Trends in Summary Judgment Practice: A Preliminary Analysis* (Div. of Res., Fed. Jud. Center, Washington, D.C.), Nov. 2001, [http://www.fjc.gov/public/pdf.nsf/lookup/summjudg.pdf/\\$file/summjudg.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/summjudg.pdf/$file/summjudg.pdf).

(b) JAMS shall facilitate the Parties' agreement on a briefing schedule and record for the Motion. If no agreement is reached, the Arbitrator shall set the briefing and Hearing schedule and contents of the record.<sup>3</sup>

But even JAMS offers no instruction on what Rule 18 means or how it might be used. Summary Disposition is not even charted in JAMS's "ADR Spectrum Illustration" – a graphic presentation of the full range of dispute resolution processes between direct negotiation and litigation that JAMS offers.<sup>4</sup>

Even if a summary disposition were available to terminate arbitration, an arbitrator would most likely not produce a record or an opinion to inform the parties, and the summary disposition would not be appealable. Thus, transparency and checks and balances are still not available.

These fundamental flaws in binding, pre-dispute arbitration are driving the search for better alternatives to litigation that preserve cultural bias toward the courtroom. Two novel ADR mechanisms are "experiments" in this effort.

## **Novelties**

Much touted today in family law practice, collaborative law practice has been around for more than 15 years. But, its efficacy in commercial disputes is not yet clear.

### *Collaborative Law*

Collaborative law practice holds:

. . . At the outset of a case, the parties put their goals and interests into writing. The parties and attorneys also agree to abide by written protocols that promote a free exchange of information and ideas with the goal of achieving the best possible settlement for all the parties without resorting to the courts.

Everything that occurs as part of the collaborative process is kept confidential, so information revealed in negotiations cannot be used against a party if the matter ends up in court. Most striking – and controversial – is the requirement that attorneys withdraw from the case if settlement talks fail and the clients decide to litigate.<sup>5</sup>

This looks similar to a good mediation process that strongly encourages the parties to resolve their dispute. The biggest loss here is in the event of failure; the parties lose the expertise of their collaborative lawyers. The biggest gain is that those lawyers are spending their time in search of a settlement rather than keeping an eye toward the courtroom.

The jury is still out on the collaborative law process. Statistical support for its success

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<sup>3</sup> JUD. ARB. & MEDIATION SERV., INC., COMPREHENSIVE ARBITRATION RULES AND PROCEDURES rule 18 (2007) <http://www.jamsadr.com/rules/comprehensive.asp#Rule%2018>.

<sup>4</sup> See Jud. Arb. & Mediation Serv., Inc., ADR Spectrum <http://www.jamsadr.com/adrtips/spectrum.asp#JAMS/Endispute%20ADR%20Spectrum%20Illustration> (last visited Sep. 27, 2007).

<sup>5</sup> Jill Schachner Chanen, *Collaborative Counselors*, ABA JOURNAL 52, 54 (Jun. 2006).

across a broader spectrum of disputes than those involving domestic relations matters is required to prove its worth in all but the most exceptional circumstances.



## THE ULTIMATE PIRATE PARTY

Open source fights to free software for public use, promoting the interchange of ideas and, thus, furthering development. The new frontier for IP “freedom” advocates is data – those who own data should have unrestricted use of it. Apple has been a prime target, especially in Europe, for such advocates who argue that Apple should offer music purchased from the iTunes Music Store® in a format compatible with rival music players.

Politics has always made strange bedfellows, and many causes have captivated political activists. The Pirate Party is one of the newest of these IP freedom advocates. The Pirate Party of the United States, whose website is located on the Internet at <http://www.pirate-party.us/>, lists these objectives:

The basic idea of the Pirate Party is simple - the government should encourage, rather than smother, creativity and freedom.

Copyrights are now stretching into the hundreds of years, and fair use is under constant attack by attorneys who exploit the vagueness of the law. . . .

. . . Patents are suppressing innovation in the digital age by making it possible to monopolize methods and practices. . . .

Lastly, the routinization of privacy violations in the digital age must be halted. . . .

There are also Pirate Parties in Europe (they actually started in Sweden), South America, Africa and Australia and New Zealand. Time will tell whether such politics will materially influence IP practices.

## Private Judges

Since 1987 Texas has authorized former and retired (special) judges to try non-jury cases by agreement of the parties.<sup>6</sup> Established court rules of procedure and evidence apply, and there is a right of appeal based upon a required transcript and judge’s verdict. It is a fast-tracked process, a judicial process as surely as that of any Texas court, and it preserves the transparency, fairness and equity of the U.S. judicial system.

There are fewer mouths to feed than in binding arbitration. Only the special judge is paid, not a case administrator and perhaps multiple arbitrators. Summary judgment is available.

This special or private trial process is not unique, but it is a novelty. Other jurisdictions have adopted statutes that enable a similar fast-tracked process.<sup>7</sup> These present models may satisfy perceived shortcomings of more common ADR mechanisms.

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<sup>6</sup> TEX. CIV. PRAC. & REM. CODE §§ 151.001 *et seq.* (Vernon 2007) available at <http://tlo2.tlc.state.tx.us/statutes/docs/CP/content/word/cp.007.00.000151.00.doc>.

<sup>7</sup> See, e.g., IND. CODE §§ 38-10-1 *et seq.* (2007) available at <http://www.in.gov/legislative/ic/code/title33/ar38/ch10.html>) and CAL. CODE OF CIV. PROC. § 638 *et seq.* (2006) available at <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=cpc&group=00001-01000&file=638-645.2>.