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The Right Mix

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Searching for the balance between simplicity and fairness in arbitration

By Richard C. Reuben

With the growing popularity of mediation and other consensual processes, it might be easy to overlook the continuing importance of arbitration as a vehicle of dispute resolution. It would be an unfortunate oversight, however.

From the Editor

To be sure, arbitration has been the most controversial, and heavily litigated, of ADR processes since emerging from the relatively obscure meeting rooms of labor and commercial arbitrations to the forefront of general dispute resolution during the past two decades. This ascent seemed only natural. Arbitration was familiar to lawyers as a process governed by a third-party decision maker, yet one that allowed for disputes to be resolved without unyielding allegiance to the rules of law and procedure that can make more formal trials so expensive and time consuming. It was, in short, a simpler process.

Questions raised

But just when it seemed that arbitration had come of age, serious questions began to be raised about the process in courts and other public policy circles. While its informality and simplicity made arbitration a viable alternative to litigation, it came at the cost of several aspects of litigation that had come to be associated with fundamental principles of fairness, such as one's voluntary participation in the process, the ability to discover information that may not be readily disclosed by an adversary, and appellate review to ensure the legal accuracy of the final decision.

Factor in voiced concerns over the actual neutrality of arbitrators, and dispute resolution professionals began looking to other types of processes, such as mediation, for the resolution of disputes. The trade-off between simplicity and fairness too often seemed precarious.

For much of this decade, arbitration reform – whether by litigator or legislator – has had to grapple with the tension between simplicity and fairness. After all, the simplification of an adjudicatory process often begins with streamlining or eliminating ingredients that are intended to assure fairness. On the other hand, building fairness into a dispute resolution process can often force the sacrifice of elements of simplicity that make the process attractive. Finding the right mix has been and remains a crucial challenge.

Exploring the problem

This edition of *Dispute Resolution Magazine* explores several aspects of the problem. It begins with a debate between Jean Sternlight and Theodore O. Rogers over the propriety of mandatory predispute arbitration processes in the consumer and employment contexts, followed by a proposal by Terry Trantina for a "constructive compromise" regarding the general validity of arbitration agreements in contracts of adhesion.

This trio of essays is followed by articles on two major arbitration reform efforts. The first, by Thomas J. Stipanowich and J. Clark Kelso, discusses the rise of protocols and other industry standards intended to bring fairness to the arbitration process, and focuses in particular on the American Arbitration Association's recently released Consumer Due Process Protocol, which is reprinted in full. Dean Timothy J. Heinsz also provides an update on the revision of the 50-year-old Uniform Arbitration Act. Both efforts call for greater assurances of fairness in the arbitration process, despite sacrifices in simplicity.

The Consumer Due Process Protocols and the Revised Uniform Arbitration Act are arguably more institutional efforts to address issues of fairness in arbitration. Carroll Neesemann and Stanley McDermott proceed to explore the degree to which parties may build procedural protections into their private contractual arbitration agreements by including provisions for judicial review of arbitration awards, debating the merits of what appears to be an emerging trend in both the federal and state courts.

Finally, Deborah Masucci reminds us that in the end, the fairness of arbitration is as much a responsibility of the parties, and their lawyers, as it is of the arbitrators and of the system itself.

A positive direction

As a whole, the collection of articles is remarkable in its breadth, depth and currency. For this, the Editorial Board extends its special appreciation to Professor Thomas J. Stipanowich of the University of Kentucky College of Law for his early insights and efforts in helping to shape the magazine, as well as the contributors who gave their time and talent to help assemble such a rich resource of thinking on these challenging issues. While we may not resolve all of the questions presented by modern arbitration, their thoughtful airing certainly keeps the search for the right mix of simplicity and fairness moving in a positive direction.

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