The Quiet Revolution in "ADR" has altered the landscape of public and private dispute resolution around the world. Its impact has been felt in the empowerment of individuals to intervene more effectively in conflict of all kinds for the betterment of disputing parties, of institutions, and society at large. It has inspired multitudes of local, regional, national, and international initiatives and fed into diverse realms of discourse, including public engagement, organizational development, restorative justice, and faith-based diplomatic and collaborative law practice. Increasingly, it has been reinvigorated and even transformed by megatrends such as globalization, the revolution in information technology, and studies of brain science and human behavior.

Yet, four decades on, there are also tangible indications that the glass is only half full—that the Quiet Revolution has in some
ways fallen short of the promise of its early days, or developed in unforeseen ways. Factors such as behavioral inertia and behavioral “drift,” the strong “gravitational pull” of the legal profession, and the tremendous diversity of cultures and legal traditions have all affected the speed, shape, and direction of change in our ways of processing disputes. Looking forward, the accelerating technological tsunami is a Pandora’s box likely to eclipse all other influences on human interaction, for good and for ill.

Being given the opportunity to offer this reflection on the first forty years of our modern focus on dispute resolution and conflict management is a special pleasure, because I and others of my generation have had the privilege of living and actively practicing throughout the Quiet Revolution. However, I am also aware that no individual has sufficient knowledge or experience to embrace more than a small fraction of the human activity that comprises the Quiet Revolution. I will therefore limit myself to identifying some salient trends and themes—the “parts of the elephant” that I am able to perceive—and positing some questions for the future.

I. The Revolution in Dispute Resolution and Conflict Management Dramatically Changed the American System of Justice, and Legal Practice

The tellingly-titled 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, better known as The Pound Conference, was the occasion for two presentations that together symbolized a new way of looking that the justice system and the way disputes were being resolved. Chief Justice Warren Burger spoke of the “need for systematic anticipation” in the justice system, encouraging a move away from the strictures and inefficiencies of traditional process models in favor of more efficient and expeditious procedures more appropriately tailored to the real needs of parties in conflict. Burger proposed, for example, consideration of “a tribunal consisting of three representative citizens, or two non-lawyer citizens and one specially

trained lawyer or paralegal, and vest in them final and unreviewable authority to decide certain kinds of minor claims."4

Similar themes were sounded more expansively by Professor Frank Sander in his seminal concept paper Varieties of Dispute Processing,5 which outlined a proposal for making the public justice system more responsive to the different kinds of conflict which make their way to the courthouse. His dynamic vision was premised on a flexible tailoring of the process to the controversy aimed at better resolutions of existing disputes, as well as grievances that were not then being aired for lack of an appropriate mechanism.6 He conceived of a “multi-door courthouse” in which disputes would be allocated to various dispute resolution mechanisms—court adjudication, arbitration, mediation, negotiation, and other processes on the basis of rational criteria, such as the nature of the dispute, the relationship between disputing parties, the amount in dispute, and concerns regarding the speed and cost of dispute resolution.7

In the decades following the Pound Conference, these visions were given material substance by developments on several fronts. Experimental neighborhood justice centers opened the way for a wave of local programs aimed at promoting the use of mediation and other approaches aimed at resolving disputes more informally and effectively while engaging the broader community.8 These initiatives frequently dovetailed with growing hundreds of court-connected programs—the closest evocation of Sander’s multi-door courthouse—focused on mediation, nonbinding arbitration, and early neutral evaluation.9 In time, federal and state agencies fol-
lowed suit with their own diverse programs.\textsuperscript{10} Non-profit organizations, such as the American Arbitration Association\textsuperscript{11} and the new Center for Public Resources (“CPR”), sought to promote more effective approaches to the resolution of private sector and contract-based disputes,\textsuperscript{12} while a variety of new providers, large and small, popped up in the dispute resolution marketplace.\textsuperscript{13} The ABA Section of Dispute Resolution achieved preeminence among a mounting host of related bar groups. Scholars and practitioners began to produce relevant texts and articles; law schools began offering courses on mediation and “alternative dispute resolution.”\textsuperscript{14} The Harvard Program on Negotiation and Pepperdine’s Straus Institute were among the earliest academic programs focused on dispute resolution; both offered a variety of professional skills courses. Broad swaths of these activities were underwritten in whole or in part by the William & Flora Hewlett Foundation.\textsuperscript{15}

Nowhere was change more noticeable than in the construction sector, where I had a front-row seat.\textsuperscript{16} Graduating with a professional degree in architecture as well as a law degree, I started practice as an associate at a well-known “boutique” firm specializing in construction and government contract disputes. I soon found my-

\textsuperscript{10} See Jeffrey M. Senge, Federal Dispute Resolution: Using ADR with the United States Government (2004); Stipanowich, Multi-Door Contract, supra note 6, at 323–24.


\textsuperscript{12} See Stipanowich, International Evolution of Mediation, supra note 1, at 1193–94.


\textsuperscript{14} Carrie Menkel-Meadow, Regulation of Dispute Resolution in the United States of America: From the Formal to the Informal to the ‘Semi-formal’, in Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads 419, 431 (Felix Steffek et al. eds., 2013).


self immersed in two large, complex cases headed to arbitration, both of which took years to conclude. The second arbitration, though hard-fought, produced a complete victory—full compensatory damages, attorney fees, and even punitive damages. While appreciative of our effort, our client was frustrated; he explained that he was not in business to litigate, but to construct buildings, and years of legal process had distracted key personnel at his company from doing and pursuing business. Surely, he mused, there must be a better way.

By the early 1990s, the search for “a better way” was on, and those of us who specialized in the resolution of construction and engineering disputes had good reason to believe that we were experiencing a revolution in the way conflict was managed. It suddenly appeared as though the world might turn upside down, with “advocate-controlled, adversarial, formalized, rights-based, lengthy and costly,” giving way in large measure to “client-controlled, cooperative, relational, informal, interest-based, flexible, early, expeditious and efficient.” Frustration with the costs, delays, risks, and limitations of lawyer-driven adjudication prompted growing attention to informal methods aimed at early resolution of disputes, with those who “owned” the dispute back in the driver’s seat. Contractors, architects and engineers, insurers, agencies, and other owners, and even construction attorneys, were suddenly talking about collaboration, team-building, early settlement, and interest-based bargaining. A smorgasbord of options for preventing, managing, and resolving conflict was suddenly on the table. Processes for binding arbitration, the longstanding traditional alternative to litigation of construction disputes, were being scrutinized and revised. Construction contracts now featured phased or tiered dispute resolution, perhaps starting with early negotiation and, if necessary, negotiation with the assistance of a mediator; mediation promised to be a particularly flexible tool for facilitating reso-

17 See generally CPR Construction Disputes Committee, Preventing and Resolving Construction Disputes (1991) [hereinafter Preventing and Resolving Construction Disputes]. There is an excellent compendium developed under the leadership of Jim Groton and Jim Wilson with assistance from Peter Kaskell. See also Stipanowich, Beyond Arbitration, supra note 16 (discussing results of industry-wide survey on conflict management and dispute resolution processes).


20 Preventing & Resolving Construction Disputes, supra note 17, at 4-1–4-3.
olution of individual disputes and promoting improved communications and relationships on projects.21 There were mechanisms for “real time” dispute resolution on the jobsite by a project neutral, or by group of construction experts sitting as a dispute review board (“DRB”).22 Dispute resolution advisors offered a more refined, project-centric means of managing conflict.23 Finally, there were strategies aimed at the very roots of conflict, including contractual terms aimed at promoting collaboration and reducing the chance of serious conflict,24 and partnering, aimed at establishing a “collaborative ethic and working ‘partnership’” on a construction project.25

The central theme of the Quiet Revolution in the U.S. was the growth of mediation as a regular feature of federal and state court litigation.26 Its expanding use may have been one important factor in the precipitous decline in the incidence of trial on the merits in U.S. courts during the latter years of the 20th century.27 Surveys of corporate counsel in Fortune 1,000 corporations showed that companies used mediation for all kinds of disputes, and respondents overwhelmingly predicted its continued use by their company.28

The job of mediators, Bernard Mayer tells us, “is to help people deal with the most important conflicts in their lives productively, wisely, effectively and ethically.”29 By this measure, mediators regularly achieve extraordinary success. Mediators help couples move through the trauma of divorce and empower them to interact more effectively as parents. They facilitate intergenerational transfer of family businesses and transformed intellectual property disputes into successful licensing arrangements. They give those affected by crime an opportunity to move beyond victimhood, and promoted forgiveness and reconciliation, and facilitate readjustments of debt to stave off foreclosure. They manage

21 Stipanowich, Multi-Door Contract, supra note 6, at 364–78.
22 See generally Preventing & Resolving Construction Disputes, supra note 17, at Chapter 6.
23 Id. at 387–88.
24 Id. at Chapters 2–3.
25 Id. at Chapter 5.
26 Stipanowich, International Evolution of Mediation, supra note 1, at 1194–95.
27 See generally Stipanowich, ADR and “The Vanishing Trial,” supra note 1.
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or ameliorate conflict in the workplace, in neighborhoods, and on construction sites.

In addition to having the privilege of mediating others’ disputes, I was once a party in mediation. That experience helped me to understand what it feels like to sit across from the other party, to recount my expectations and explanations, and to take personal responsibility for resolving my dispute. I felt the extreme awkwardness of the situation and the pain and discomfort of giving ground—more ground than I had planned—in order to reach a deal, and I am sure my counterpart felt the same. In the aftermath of agreement, I also experienced the sense of a heavy burden lifted, and, eventually, the joy of reconciling and reconnecting with the other.

Mediation is an immensely flexible form of intervention that offers a wide array of potential benefits. Recent empirical research suggests that court-based mediation may provide individuals with a greater sense of empowerment, of ability to express themselves, their thoughts and concerns; to assume responsibility for the situation; and to attain a higher level of satisfaction with the judicial system.30

Today, many individuals have garnered vast experience mediating cases in the United States and some other countries. Responding to a 2014 Straus Institute survey, three-quarters of the members of the International Academy of Mediators claimed to have mediated over a thousand cases; about thirty percent had mediated at least 2,500!31 They are worthy of being called dispute resolution professionals; more than seventy percent devote more than seventy percent of their work time to mediating disputes; many also arbitrate.32

Although court-connected dispute resolution programs have generally fallen well short of Frank Sander’s full-blown vision of a courthouse with many doors,33 some court systems have neverthe-

32 Id.
33 Stipanowich, Multi-Door Contract, supra note 6, at 312–18.
less developed programs featuring multiple forms of mediation and settlement facilitation. One notable example is Maryland, which has repeatedly broken new ground under the leadership of the Maryland Mediation and Conflict Resolution Office (“MACRO”) and other entities, including the Maryland Judiciary’s Administrative Office of the Courts, which recently conducted extensive empirical research on court-connected ADR.34

Of course, many other streams of development have also played a part in the Quiet Revolution. These include, by way of example, the realm of facilitated consensus building, of public conversations, civic engagement, and deliberative democracy; the restorative justice movement; and initiatives aimed at faith-based dialogue, or other forms of second or third-track diplomacy. There is also the world of commercial and investment dispute resolution, with heavy emphasis on the use of binding arbitration.

Dispute resolution professionals are experimenting with new ways of using skills, including conflict coaching, early case assessment or early neutral evaluation, and designing conflict resolution procedures. Meanwhile, conflict management skills are important prerequisites for effective twenty-first century practice; law students in our program are being given a range of tools to serve “the whole client” and not simply focus on legal issues. At the same time, conflict management course offerings well beyond basic negotiation skills, are appearing in business school curricula.35

II. THERE IS STILL MUCH WE DO NOT UNDERSTAND ABOUT THE DYNAMICS OF DISPUTE RESOLUTION PRACTICE

In the early days of the Quiet Revolution, one might have thought that experience with mediated negotiation would equip attorneys with the tools to become more effective negotiators and thereby reduce the need for third party intervention. Ironically, however, there are indications that, having become accustomed to negotiate with the help of a mediator, modern lawyers may be even less disposed to engage in unassisted negotiation. They instead

34 Impact of Alternative Dispute Resolution on Responsibility, supra note 30, at 65, 75.
may put off bargaining until the point when law or custom calls for mediation.\footnote{RANDALL KISER, HOW LEADING LAWYERS THINK: EXPERT INSIGHTS INTO JUDGMENT AND ADVOCACY 204–07 (2011).}

This arguably counterintuitive reality is illustrative of our present state. Although many dispute resolution professionals and legal advocates have vast experience—and considerable success—with mediation and other forms of ADR, we still have a great deal to learn, or to re-think. Although increasing attention is being given to garnering and sharing meaningful information from observation of dispute resolution processes, such activities have always proven difficult due to the inherent privacy of these processes and the rather fragmented patchwork of practice.

Meanwhile, the evidence suggests that dispute resolution practitioners vary widely in their approaches. Many successful mediators emphasize that they are not bound to a limited menu of choices, but are prepared to employ whatever tools and techniques are useful in particular circumstances or at particular moments.\footnote{Stipanowich, International Evolution of Mediation, supra note 1, at 1202–09.} Their “default” process choices (that is, the ones they will favor in the absence of contrary agreement or arrangement), however, may vary greatly from those of other mediators. Their different preferences are often, and should be, the subject of ongoing discussion and debate.

Early last year, I presented results from a 2014 survey of International Academy of Mediators (“IAM”) at a national meeting attended by senior attorneys, mediators, and arbitrators. During the discussion of the data showing a wide range of practices respecting the use of caucus, an intense argument broke out between a California-based mediator and mediators from other parts of the country regarding their very different practices and perspectives. That incident caused me to go back and examine the data by region, and what I found was very illuminating. Although wide practice variations were observed within all regions, there were also differences from region to region. For example, among U.S.-based mediators, those practicing in California tended to be more likely to begin mediations in caucus and employ caucus throughout mediation.\footnote{Thomas J. Stipanowich, Insights on Mediator Practices and Perceptions, DISPUTE RESOL. MAG., Winter 2016, at 4, 7–8, available at https://ssrn.com/abstract=2739982 [hereinafter Stipanowich, Insights on Mediator Practices and Perceptions].} On the other hand, non-U.S. mediators were more likely than their U.S. counterparts to emphasize the use of joint sessions. Similar
divergences were observable with regard to mediator evaluations and proposals. California-based mediators were more likely than other U.S. mediators to offer evaluations of parties’ legal and factual arguments, and devise and share proposals for settlement of disputes.39 Responding non-U.S. mediators were as a group less likely than their U.S.-based counterparts to offer evaluations or personal proposals for resolution of disputes.40

Although the IAM survey results are an insufficient basis for drawing solid conclusions regarding regional practices, they do raise interesting questions about the diversity of mediation practice; the factors that underpin different patterns of development; and, most importantly, the impact of different mediation techniques on achieving the needs and goals of parties and other stakeholders, including court systems. It is now appropriate to ask, given the growing body of empirical evidence that is or will eventually be accessible to practitioners, scholars and Policymakers: Can the outcomes of empirical research on our practical experience be channeled into guidance for improved practice? Could we, for example, learn more about the relationship between mediating parties’ perceptions of their experience and mediators’ practices respecting the use of caucus, mediator case evaluations, and mediator proposals? Mediators tend to be the kind of people who welcome insights that advance their understanding, and would therefore take into consideration reliable information of this kind. As it happens, a promising start in this direction has already been made.

Recently, the Maryland Administrative Office of the Courts conducted an extensive study of ADR in the court system.41 One study focused on the District Court Day of Trial ADR Program, which affords participants—the parties to litigation—access to ADR practitioners who conduct either a mediation or settlement conference. A variety of approaches and skills are utilized by ADR practitioners. The survey involved surveys of participants before and after the ADR session, as well as three to six months later; and surveys of ADR practitioners, observations of the ADR processes, and review of court records.42 Efforts were made to de-

39 Id. at 8–9.
40 Id.
42 Id. at 5.
termine the relationship between different techniques used in
ADR and users’ short-term and long-term perceptions of processes
and outcomes.

The final report of the study detailed a variety of findings asso-
ciated with the use of caucus in dispute resolution. The greater the
percentage of time spent in caucus, the study found, the more
likely participants were to say the ADR practitioner controlled the
outcome, pressured them into solutions, and prevented issues from
coming out. More emphasis on caucus also tended to produce
lower levels of satisfaction with the process and the outcome, and
to make people less likely to view the outcome as fair and imple-
mentable.43 Long-term, more time in caucus tended to be associ-
ated with less consideration of the other person, a reduced belief in
one’s ability to talk and make a difference, and lower confidence in
the court’s concerns for resolving conflict.45 There was also a
greater likelihood that participants would return to court in the
twelve months following the ADR session for an enforcement
action.46

Another set of findings related to opinion-giving and the offer-
ing of proposed solutions by ADR practitioners. The study found
that the offering of opinions and or solutions had no significant
impact on short term perceptions, but such activities were nega-
tively associated with long-term perceptions, including participants’
view that the outcome was working, that they were satisfied with
the outcome, that they would recommend ADR, and that they
changed their approach to conflict.47

Where, on the other hand, ADR practitioners elicited from
the parties what solutions they would suggest, summarized those
solutions, and checked in with participants to see how thought
those solutions might work, the reactions were very different. Such
activities enhanced the view of participants that they listened and
understood each other and jointly controlled the outcome, made
participants more likely to report that the other person took re-
ponsibility and apologized, and lowered perceptions that the pro-
cess and outcome were controlled by the ADR practitioner. This
was also the only strategy that enhanced the likelihood that partici-
pants reported reaching agreement.

43 Id. at 6.
44 Id.
45 Id.
46 Id.
47 Id. at 7. What Works in District Court Day of Trial Mediation, supra note 41, at 7.
This is fascinating stuff, in part because it breaks new ground in terms of tying specific process choices to user perceptions. While the resulting data must be treated with caution—it does not, for example, lead to the conclusion that caucus may not be very effectively employed, or that mediators should never offer evaluations or propose solutions—it does set out some new markers for thoughtful practice and raises a question that thoughtful mediators regularly confront: Are our tools and techniques geared to most effectively meet the needs of parties in regard to process and outcome, not to mention the goals of courts and taxpayers? With this in mind, we should hope to see the Maryland study replicated in other court systems and private settings, in specific niches of practice (divorce and domestic practice, construction, intellectual property, employment, etc.), and for cases of different sizes and levels of complexity.

III. LAWYERS HAVE EXERTED CONSIDERABLE “GRAVITATIONAL PULL” ON MEDIATION PRACTICE

While there is no question that mediation has changed the practice of law, it is also clear that lawyers have had a significant impact on the practice of mediation. In the world of litigated cases, a realm dominated by the attorneys for the parties and the attorneys they habitually choose as mediators, their influence has undoubtedly increased as they have acquired considerable experience with mediation processes.

The evolving roles of legal advocates are evident in results from the 2014 IAM survey, in which more than two-thirds of responding mediators (68.3%) indicated that the expectations or behaviors of counsel changed during the course of their mediation practice.48 Lawyers usually come to the table with substantial mediation experience,49 and mediators generally view their increasing familiarity with mediation as a positive development.50 Nine in ten mediators believed lawyers usually or always employ mediation for the purpose of resolving the submitted dispute, although, not sur-

48 Stipanowich, IAM & Straus, supra note 31.
49 Id. (explaining that eighty-two percent of respondents indicated that participating lawyers usually or always have substantial experience with mediation).
50 Id. (explaining that seventy-seven percent of respondents viewed the increasing familiarity of lawyers with mediation as a positive development).
prisingly, the agenda may include manipulation of the process or harm to an opponent.51

For better or worse, the practices of mediators and the processes they manage are bound to reflect the gravitational pull of lawyers they work with on a regular basis. For example, while the IAM survey data showed a variety of reasons why mediators employ caucuses, comments by California mediators suggested that their heavy emphasis on caucus was often the result of pressure from legal advocates.52 While there may be perfectly good reasons why lawyers want to avoid or minimize joint sessions, it is questionable whether avoidance of joint sessions should ever be justifiable as a blanket policy. It is hard to see the latter as anything other than a means of concentrating maximal control in the hands of counsel, which may not be the best thing for clients. As revealed in the recent study from the Maryland court system, there is now evidence to suggest that an over-emphasis on caucus and on the rendering of case evaluations could actually diminish the value clients derive from court-connected mediation.53

Although it is unfair to broadly paint mediation of litigated cases as nothing more than a whistle-stop on the train to the courthouse, it is fair to ask whether lawyers are effectively serving the clients who are the true “owners” of ADR processes. We should collectively ask: Can we achieve a more appropriate balance between the goals and needs of client and counsel in dispute resolution?

IV. WE CONTINUE TO GRAPPLE WITH ISSUES OF RACIAL, ETHNIC, GENDER DIVERSITY, AS WELL AS PROFESSIONAL DIVERSITY

Years ago, I mediated a straightforward construction case involving a claim by a subcontractor, a minority business enterprise, against a general contractor. The mediation proceeded without incident, and the caucus discussions were highly productive. Attorneys for both sides signaled a green light for a final joint session in which the defendant would make a final offer that, it was anticipated, would be accepted by the claimant. There was total surprise

51 Stipanowich, International Evolution of Mediation, supra note 1, at 1210–12.
52 Id. at 1211; see also Stipanowich, Insights on Mediator Practices and Perceptions, supra note 38, at 6–8.
53 What Works in District Court Day of Trial Mediation, supra note 41.
when the claimant turned down the offer; even his lawyer was
dumbfounded. We ended that afternoon without an agreement. It
was only later, a day or two after the mediation, that the claimant’s
attorney called me to explain that as the only African-American in
a room full of Caucasians, his client had had great trouble identi-
fying with and trusting the process, and thereby rejected the out-
come. Although the case eventually settled, the experience left a
lasting impression on me.

There’s been a great deal of emphasis on promoting greater
race, ethnic and gender diversity among adjudicators and
facilitators of settlement. Proponents argue that diversity is es-
sential to ensure that the parties are understood and treated fairly,
that diversity reduces the chance that decisions will emanate from
either conscious or subconscious biases, and that it enhances the
credibility of the process in the eyes of participants. They also
suggest diversity helps reduce the likelihood of “group-think,”
which is prevalent in situations in which members of a panel share
similar traits and similar life experiences.

Such concerns have inspired a diversity and inclusion plan by
the ABA Center for Professional Responsibility; a CPR-spon-
sored commitment, or pledge, recognizing the value of diversity
and inclusion among providers of dispute resolution services and
urging law firms and counterparties to include qualified diverse
neutrals on lists of proposed mediators or arbitrators; and a com-
mitment by members of the international arbitration community to

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54 Mark Smalls, It’s Time to Focus on Diversity in ADR, Recorder (May 30, 2011), https://
www.jamsadr.com/files/Uploads/Documents/Articles/Smalls-Recorder-Time-to-Focus-2011-05-
30.pdf; see also European Commission—Press Release—Commission Proposes New Investment
Court System for TTIP and Other EU Trade and Investment Negotiations, EUR. COMMISSION
.htm.

55 Caley E. Turner, “Old, White, and Male:” Increasing Gender Diversity in Arbitration
Panels (2014) (unpublished final paper, Arbitration Practice & Advocacy, Pepperdine Uni-
versity School of Law, 2014, and Winner of the CPR Award for Best Student Article, 2014) (on file
with author).

56 Sasha A. Carbone & Jeffrey T. Zaino, Increasing Diversity Among Arbitrators: A Guide-
line to What the New Arbitrator Should be Doing to Achieve this Goal, NYBSA J., Jan. 2012, at
33.

57 See Diversity Initiatives, ABA, http://www.americanbar.org/groups/professional_responsi-
bility/cprdiversityplan.html (last visited Nov. 2, 2016).

58 David H. Burt & Laura A. Kaster, Why Bringing Diversity to ADR is a Necessity, ACC
promote greater representation of women in that arena.\textsuperscript{59} There have also been significant efforts by some leading provider organizations.\textsuperscript{60}

Of course, all of these efforts come up against the perception that while such concerns are important, they may be overridden by clients’ other priorities in a given case. For this reason, it is appropriate to ask: \textit{Can we offer compelling empirical support for greater diversity among dispute resolution practitioners, including data relating to specific dispute resolution settings and processes?}

Efforts should be made to conduct and assemble research—either directly from the field of practice or in the form of experimental studies—that provide a strong empirical foundation for diversity in specific scenarios, whether in the appointment of commercial or employment arbitrators or the selection of mediators for divorce and child custody cases.

Some years ago, a study of judges’ races in relation to the outcomes of racial harassment in the workplace demonstrated that the racial or ethnic background of U.S. judges does make a difference in the outcomes in cases of that kind.\textsuperscript{61} The results indicated, “Hispanic judges imposed similar sentences on Hispanic and White offenders but that White judges gave more lenient sentences to White offenders.”\textsuperscript{62} Additionally, “African American judges held for plaintiffs nearly twice as often in sex discrimination cases and over twice as often in race discrimination cases, as compared to White judges.”\textsuperscript{63} The study concluded with statements that “a more diverse judiciary will bring more diverse views on what constitutes racial harassment—ideally reflecting the range of views across all racial groups in society.”\textsuperscript{64}


\textsuperscript{60} Burt & Kaster, \textit{supra} note 58, at 46.

\textsuperscript{61} Pat K. Chew & Robert E. Kelley, \textit{Myth of the Color Blind Judge: An Empirical Analysis of Racial Harassment Cases}, 86 Wash. U. L. Rev. 1117, 1113, 1122, 1135 (2008-09) (explaining that in addition to conducting new research on the role of a judge’s race on the outcome of a racial harassment case, the study also discussed the currently available data regarding the racial diversity among judges. This study and others emphasize that “judges have human inclinations and that judges’ ability to be purely objective about that case may be largely theoretical.”).

\textsuperscript{62} Id. at 1133.

\textsuperscript{63} Id. at 1134.

\textsuperscript{64} Id. at 1162.
We have yet to develop much data respecting the differences race, ethnicity, or gender makes in dispute resolution.\textsuperscript{65} What we do know at this point is that there remains an important disparity between the proportion of women and various ethnic groups in the ranks of dispute resolution professionals and their representation in the general population.\textsuperscript{66} In a recent study of arbitrators’ registrants at a meeting of the International Council for Commercial Arbitration (“ICCA”), Professor Susan Franck found that, although Asians represent about sixty percent of the world’s population, they comprised only ten percent of the registered arbitrators.\textsuperscript{67} On the other hand, although the U.S. and Canada have less than five percent of the world’s population, the study showed that seventy arbitrators, or nearly twenty-eight percent, were from North America; only one of the seventy responding arbitrators was from Mexico.\textsuperscript{68} Overall, the data illustrated the predominance of arbitrators from developed states,\textsuperscript{69} and of males—only 17.6 percent of the international arbitrators were women.\textsuperscript{70} The “median international arbitrator” was a fifty-three year old man who was a national of a developed state and had served in fifteen arbitrations,”\textsuperscript{71} while the “median international counsel was a forty-six year old man who was a national of a developed state and has served in fifteen arbitrations.”\textsuperscript{72}

Drawing on other scholarship, Franck argues that reasonable diversity among adjudicators is a critical factor in establishing the

\textsuperscript{65} Kathleen Claussen, \textit{Keeping Up Appearances: The Diversity Dilemma}, 12 Transnat’l Disp. Mgmt. 1, 6 (July 2015) (concluding that “there is not enough data to determine how women arbitrators fare differently from men.”).


\textsuperscript{67} Franck et al., supra note 66, at 441, 457 (writing that the participants in the study were a group of 1,031 ICCA registrants, and 54.3% responded to the survey). \textit{Id.} at 441, n. 35.

\textsuperscript{68} \textit{Id.} at 458.

\textsuperscript{69} \textit{Id.} at 462.

\textsuperscript{70} \textit{Id.} at 452.

\textsuperscript{71} \textit{Id.} at 466.

\textsuperscript{72} \textit{Id.}
legitimacy of courts, tribunals, and systems. In the words of Nienke Grossman, “where one sex is severely under- or over-represented lack normative legitimacy because they are inherently biased.” Similar concerns underpin the need for diverse national representation.” Franck acknowledges that “given the difficulty . . . in reaching representative levels of gender and race [on panels and tribunals], achieving diversity often requires long-term investments,” but concludes that “taking diversity issues seriously offers an opportunity to strengthen and create infrastructure for international arbitration’s future.”

Recent findings from the Maryland court system reinforce the notion that the racial identity of mediators may make a profound difference to participants in several ways. First, one study illustrated that the matching “the race of the responding participant was positively associated with participants reporting that they listened and understood each other in the ADR session.” And even though the “participants were never asked about their opinion on the role of race or the ADR practitioner’s race,” the study still showed that a racial “match” between mediator and party led participants to report “an increase in a sense of self-efficacy (ability to

73 Franck et al., supra note 66, at 452 (citing Nienke Grossman, Shattering the Glass Ceiling in International Adjudication, 56 VA. J. INT’L L (forthcoming 2016); see also Sally J. Kenney, Breaking the Silence: Gender Mainstreaming and the Composition of the European Court of Justice, 10 FEMINIST LEGAL STUD. 257, 265–66 (2002) (exploring whether the paucity of women on the European Court of Justice’s bench affects its legitimacy and why); Leigh Swigart, The “National Judge”: Some Reflections on Diversity in International Courts and Tribunals, 42 MC-GEORGE L. REV. 223–24 (2010) (“Like their domestic counterparts, international courts and tribunals depend on public faith in their judges to inspire confidence in court decisions and in the judicial system more generally.”).

74 Franck et al., supra note 66, at 467 (citing Nienke Grossman, Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts, 12 CHI. J. INT’L L. 647, 652 (2012)). Additionally, “[e]ven if men and women do not decide cases differently . . . sex representation [on tribunals] matters for sociological legitimacy because relevant constituencies believe they do,” and having different representation is “an important democratic.” Id.


76 Franck et al., supra note 66, at 474.

77 Id. at 495.

78 What Works in District Court Day of Trial Mediation, supra note 41, at 8.

79 Id. at 55.
talk and make a difference) and an increase in the sense that the court cares from before to after the ADR session."

Although the issues are perhaps less broadly compelling, we should also consider the potential need for diversity in the professional backgrounds of arbitrators, a subject I have addressed elsewhere.81 As an arbitrator of complex construction disputes, I have strongly preferred to serve on a well-constituted multi-disciplinary panel as opposed to one comprised solely of attorneys, because complimentary expertise and perspectives are often very helpful in analyzing witness testimony and other evidence on causation and damages. There has been, however, a decided trend toward all-lawyer panels in recent years—another manifestation of the immense gravitational pull of the legal profession on dispute resolution processes.82 Having a panel that is comprised of some non-lawyers can aid the arbitration process by bringing a wide of backgrounds, and therefore a different set of skills and knowledge to the process.83 Even though attorneys are trained to assess legal issues, non-attorneys may be able to assist in the process by providing a different type of factual or technical analysis.84

Finally, on the general subject of the impact of diversity, we must not ignore the pervasive influence of legal representatives. Because attorneys tend to dominate choice-making in dispute resolution, their identity, background, and experience is highly relevant in every aspect of dispute resolution processes. For example, Randy Kiser’s reports of data on decision-making about settlement negotiations by lawyers indicate that teams comprised of male and female members tend to make decisions that are more advantageous for clients.85

80 Id. at 55.
82 Stipanowich & Ulrich, Arbitration in Evolution, supra note 66, at 404–05, 440–45 (stating that only 1.6% of respondents to survey of experienced arbitrators have non-legal backgrounds; experience with multidisciplinary panels including non-lawyers is limited and diminishing).
84 Id.
85 RANDALL KISER, BEYOND RIGHT AND WRONG: THE POWER OF EFFECTIVE DECISION MAKING FOR ATTORNEYS AND CLIENTS 81 (2010) (stating that lower decision error rates are associated with plaintiff and defense teams comprised of male and female attorneys).
As noted above, although a good deal of progress has been made in the direction of Sander's vision of a multi-door courthouse, development has been channeled, and to a great extent constrained, by political, practical, and economic factors. The typical court-connected “alternative dispute resolution” program usually hinges primarily on mediation or case evaluation formats; its size and shape is heavily dependent on state and local funding priorities. A most significant and inherent limitation, of course, is that such processes have to be “retrofitted” into the narrowly tailored schema of public adjudication. However, particularly creative efforts have been made in the context of customized case management by magistrates and special masters. This is not Sander-type ministerial distribution of newly arrived court cases into various appropriate baskets for disposition, but a truly dynamic approach in which sophisticated professionals actively manage the litigation process in order more effectively tailor approaches for the specific case, often producing an early settlement.

Similar things constantly occur in the highly flexible environment of mediation. In order to resolve disputes, mediators are necessarily facilitators of a process geared to produce a settlement. Some process tools—joint session or caucus, sharing party or mediator proposals, engaging in some kind of evaluation—have been mentioned above. In order to help create a more appropriate atmosphere for settlement, moreover, a mediator might encourage that certain information be exchange, or that a particular matter be resolved in advance of the main adjudication on the merits. When mediation fails to produce a settlement, some creative mediators invite parties to explore other dispute resolution options, and even assist in their arrangement. As a mediator attempting to overcome extended impasse in caucus, I’ve sometimes turned the discussion to process options, exploring alternatives such as final offer arbitration (in which the arbitrator’s decision would be limited to choos-

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86 Stipanowich, Multi-Door Contracts, supra note 6, at 311–18.
87 See A Guide to Court-Connected Alternative Dispute Resolution Services, Prepared by the Massachusetts Supreme Judicial Court/Trial Court Standing Committee on Dispute Resolution in cooperation with the SJC Public Information Office, http://www.mass.gov/courts/docs/admin/planning/cadr0601.pdf.
88 Stipanowich, Multi-Door Contracts, supra note 6, at 324–28.
ing one party’s final offer or the other). Although generally this serves merely to keep parties talking, on at least one occasion the parties each expressed interest in final offer arbitration; with my help an abbreviated process was set up, and the resulting award brought an end to a lengthy international litigation. Experiences such as this have caused many dispute resolution practitioners to ask: Can we empower parties to make more effective choices in resolving disputes? One recent initiative aimed at promoting the use of mediation for the purpose of working with parties to promote insights into disputes and tailoring a customized procedural platform for dispute resolution is “Guided Choice.”989 The concept is characterized by a commitment to mediate process as an initial matter; confidential discussions with the facilitator to permit the latter to make a “diagnosis” of the dispute; facilitated process design and option generation based on the diagnosis; and information exchange by agreement. If a facilitated settlement is not achieved, the process envisions an ongoing role of the facilitator, including support in the development or execution of intervention strategies such as nonbinding evaluation or binding arbitration.990

89 Paul M Lurie & Jeremy Lack, Guided Choice Dispute Resolution Processes: Reducing the Time and Expense to Settlement, 8 DISP. RESOL. INT’L (2014) (“Guided Choice is a mediation process in which a mediator is appointed to initially focus on process issues to help the parties identify and address proactively potential impediments to settlement. Mediation confidentiality is a powerful tool to help the parties safely explore ways of setting up a cheaper, faster and better process to explore and address those impediments. Although this person works essentially as a mediator, in Guided Choice the mediator does not focus initially on settling the case. Instead, the mediator works with the parties to first facilitate a discussion on procedural and potential impasse issues, and help them analyse the causes of the dispute and determine their information needs for settlement.”); Paul M Lurie, Using the Guided Choice Process to Reduce the Cost of Resolving Construction Disputes, 9 Constr. L. Int’l 18 (2014), more specifically at page 19 (“The Guided Choice system recognises that not all disputes can be settled without some formal or informal information exchange process. . . . Under Guided Choice, when it is apparent that information is necessary for position change, but not voluntarily available to break impasse, the Guided choice mediator facilitates the customisation of arbitration, litigation or dispute review board processes focused on the impasse issues, which require more information—or even decisions.”).

90 See Paul M Lurie & Jeremy Lack, Guided Choice Dispute Resolution Processes: Reducing the Time and Expense to Settlement, supra note 89.
VI. Binding Arbitration is a Choice-Based Process, but Choice May Sometimes Be Practically Foreclosed or Made by Default

Along with mediation (and related approaches to settlement-oriented facilitation), arbitration is one of the primary conceptual frameworks for third-party intervention in the resolution of disputes.91 Within that framework is a broad spectrum of procedural choice that has given rise to a wide variety of arbitration formats, many of which result in a legally binding award, or decision.92

When people ask you about your perspectives on arbitration, I tell them, always ask, “What kind of arbitration?” For users and their legal counselors and advocates, arbitration is all about opportunities for choosing—both pre-dispute (at the time of contracting) and post-dispute (both before and during the arbitration process).93

We could talk all day about the choices parties might make regarding arbitration, but we will instead pick up on two streams of development in recent decades in which choices are to some degree practically foreclosed, or are often effectively made by default. One stream involves arbitration provisions in contracts—nearly always, standard boilerplate—aimed at consumers or employees. The other stream involves arbitration and dispute resolution agreements in commercial contracts.

Let us first examine arbitration in the context of consumer and employment contracts. In the U.S., unlike many other places, arbitration agreements in individual contracts for employment or for consumer goods or services are broadly enforceable.94 It was not always so. In the early days of the Quiet Revolution, for example, consumer dispute resolution was exemplified by pro-consumer procedures under state lemon laws, which gave consumers a simple, expedited process for getting a remedy for a defective motor vehi-

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91 See generally Jay Folberg et al., Resolving Disputes: Theory, Practice and Law Ch. 17 (3d ed. 2016) (discussing the nature and history of arbitration and various kinds of arbitration).

92 See id. at 557–69.


cle—and the option of going on to court.95 In broad terms, the lemon law framework bears a good deal of resemblance to the small claims tribunal that Chief Justice Burger proposed in his Pound Conference address.96

But, Burger also proposed placing greater emphasis on the use of arbitration, and his court took the first key steps in the direction of heightened enforcement for arbitration agreements, recognizing a substantive law governing the enforceability of arbitration agreements applicable in state as well as federal courts.97 This was the foundation upon which the FAA has since dramatically altered the landscape of arbitration—although it is likely Burger would have been much surprised by the eventual extent of change.

The essential result of what became a Court-driven, supercharged augmentation of the Federal Arbitration Act was to broadly enforce arbitration agreements in individual contracts of adhesion and to preempt state attempts to place meaningful limits on enforcement in order to protect unwitting customers or employees.98 For all practical purposes, the latter individuals’ “assent” was often not informed or knowing, and the choice of process unilateral—by the company.99

In some cases, efforts have been made to overcome the lack of meaningful individual assent and absence of bargaining over arbitration process choices and produce procedures that are fundamentally fair. One good example is regulated arbitration of investor-broker disputes, which is supervised by the Securities and Exchange Commission and characterized by decades of informed and transparent policy-making processes.100 There are also community standards for arbitration provisions such as the Employment Due Process Protocol and Consumer Due Process Protocol that have directly influenced arbitration procedures and administrative processes by organizations like the AAA.101

95 See Folberg et al., supra note 91, at 717–19.
96 Burger, supra note 3, at 454.
97 See Folberg et al., supra note 91, at 657–69, 715–25, 758–79.
98 Id. at 657–69, 715–25.
99 Id. at 725–26.
101 Id. at 1011–12, 1025–26; Folberg et al., supra note 91, at 733–36.
Still, the unilateral crafting of arbitration provisions in consumer and employment contracts gives companies the opportunity to impose claims-suppressing terms. One morning some years ago during my tenure as the CEO of a Manhattan-based dispute resolution think tank,102 I was shocked to see an article on the front page of a national newspaper indicating that a leading provider of cellphone services had included in their consumer contracts an arbitration provision referencing the rules of my organization. I was shocked for the simple reason my organization did not publish arbitration rules designed for consumers, nor did it have the necessary administrative framework to effectively run such a process. Moreover, no one from the company had ever reached out to discuss the matter prior to referencing our rules in the contract. I concluded that the incident was either the product of gross negligence and ignorance or a deliberate, cynical attempt to suppress claims by customers.103 I objected, and the terms were eventually changed. But, this kind of thing can still happen; as recently as last year, Apple’s iTunes Customer Agreement included an arbitration provision calling for arbitration under the rules of the International Chamber of Commerce and for hearings in Egypt!104

Today, the debate over arbitration agreements in standardized contracts focuses on provisions purporting to waive the right to engage in class actions.105 In a series of 5-4 decisions, the Court has resoundingly approved the coupling of such waivers with arbitration agreements, employing pro-arbitration policy to avoid more direct policy considerations of the implications of contractual class action waivers.106

104 Klaus Peter Berger & J. Ole Jensen, It Takes Pressure to Form Diamonds: The Changing Landscape of Dispute Resolution and its Implications for International Arbitration, KLUWER ARB. BLOG (May 23, 2016), http://kluwerarbitrationblog.com/2016/05/23/booked-crina-2/ (“iTunes terms and conditions provid[e] for ICC arbitration seated in Cairo, Egypt, in case Apple’s American customers want to bring a claim against it.”). It appears that the iTunes arbitration provision may recently have been revised to address these concerns. Apple Media Services Terms and Conditions, LEGAL (2017), http://www.apple.com/legal/internet-services/itunes/us/terms.html.
106 Weston, supra note 105, at 769–70.
Whatever Chief Justice Burger might think of these developments, they are arguably a throwback to the kind of 19th century contractual analysis that was decried by Roscoe Pound in 1906. The Court has thrown the U.S. out of step with other advanced countries and made arbitration agreements a focus of criticism. Although the Obama Administration made efforts to address these concerns through regulation and Congress pushed responsive legislation, such initiatives are unlikely to continue, and may be threatened by, changes wrought by the recent election.

In the realm of commercial arbitration, meanwhile, lawyer-driven choices have produced mixed results for business users. At the dawn of the Quiet Revolution, commercial arbitration tended to offer a distinctive alternative to litigation. As construction lawyers, we were accustomed to having multidisciplinary panels comprised of construction experts or design professionals as well as attorneys; although the mix was usually beneficial, lack of a qualified lawyer was sometimes a concern. An advocate might wonder: do we need more effective legal expertise on the tribunal? Prehearing discovery and motion practice were uncommon; although this meant parties could normally anticipate the early advent of hearings, it also meant that document exchange might occur, ad hoc, during the course of hearings and disrupt the orderly flow of the process. Advocates might legitimately ask: would it be more effective and efficient to plan for some prehearing discovery?

Motivated by concerns such as these, lawyers did make affirmative choices that influenced the shape of commercial arbitration today. More lawyer-driven and more legalized, the conceptual starting point under standard rules has become something akin to a private form of litigation. Arbitration tribunals dominated by lawyers. Check. Prehearing discovery, including document discovery, depositions and perhaps even interrogatories and requests for admission. Check. Prehearing motion practice. Check. Judicial rules of evidence. Check (in some cases).

This kind of arbitration may be precisely what business users want, but there is growing evidence that for at least some users and some disputes, the pendulum has swung too far in the direction of

107 Burger, supra note 3, at 450–54.
110 See Stipanowich, Rethinking American Arbitration, supra note 19 (examining data from survey of attorneys regarding arbitration of construction disputes and summarizing previous studies of commercial arbitration).
111 See id. at 443–44.
court-like procedure and away from expedition and cost-effectiveness. It is reasonable for users and their counsel to ask: What are our goals and priorities for arbitration in this transaction and these circumstances, and what process choices may best effectuate these interests?

In the last few decades, commercial arbitration practice has “drifted” in a single direction, both in the United States and internationally, due to the interaction of a number of factors, including the inherent tendencies of advocates and the lack of proper contract planning and drafting.113 Now, however, efforts are at last being made to take stock of user concerns about the value of speed and economy, and consider what steps need to be taken to promote different arbitration models.114 Recently, the ICC joined the ranks for leading provider institutions that have taken tangible steps such as the publication of expedited or streamlined arbitration rules, either as the default procedure for disputes below a certain dollar threshold or as a procedural option.115 It remains to be seen to what extent business users will actively embrace these choices.116

VII. We Have Not Embraced the Opportunities Afforded by the “Multi-Door Contract”

As suggested above, contractual relationships offer a particularly fertile ground for the creation of frameworks for the manage-

113 Id.
116 The 2015 statistics issued by the Arbitration Institute of the Stockholm Chamber of Commerce revealed that 27% of cases were administered under the SCC Rules for Expedited Arbitration. According to the Singapore International Arbitration Centre, between July 1, 2010 and October 1, 2015 there were 216 applications for arbitrations to proceed under the expedited procedures, and 132 of these applications were successful. See Statistics, SINGAPORE INT’L ARB. CTR., http://www.siac.org.sg/2014-11-03-13-33-43/facts-figures/statistics.
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ment of conflict—and opportunities far beyond the scope of any multi-door courthouse.117 Around the time Sander announced his pluralistic vision for the courts, scholars like Ian Macneil were drawing attention to the importance of explicit planning to establish mechanisms to maintain and manage conflict in contractual relationships, including provisions for meeting together to discuss problems, for mediation in the event of a dispute, and for arbitration.118

These kinds of opportunities have been most avidly taken up by companies that perceive important benefits in tackling conflict at its roots. For example, many organizations have developed multi-faceted systems for managing relational conflict in the workplace,119 and some health care organizations have focused resources at the point of patient care.120

There are, however, substantial barriers that may stand in the way moving beyond “boilerplate” solutions and of embracing the opportunities for proactive conflict management afforded by contract.121 First of all, business people are very busy and have other priorities when contracts are planned and negotiated; managing conflict is “lawyer stuff,” and tends to be relegated to the tail end of contract preparation. Moreover, business clients may be averse to perceived risks associated with any kind of untried and untested process for handling disputes.122 In addition, transactional lawyers tend not to have expertise in conflict resolution; their skills are oriented toward framing the deal. Finally, when parties enter into contractual relationships they can only hazard educated guesses about the nature and scope of disputes that might arise, requiring contractual templates to be flexible enough to accommodate whatever might happen.123

117 See Stipanowich, Multi-Door Contracts, supra note 6, at 328–404.
119 Stipanowich, ADR and “The Vanishing Trial,” supra note 1, at 900–03; see also Stipanowich & Lamare, supra note 28.
120 Stipanowich, Reflections on the State and Future of Commercial Arbitration, supra note 13, at 299.
121 Id. at 318; see also Stipanowich, Arbitration and Choice, supra note 93.
122 Stipanowich, Reflections on the State and Future of Commercial Arbitration, supra note 13, at 309–11; see also Stipanowich, Arbitration and Choice, supra note 93, at 406–07.
123 Stipanowich, Reflections on the State and Future of Commercial Arbitration, supra note 13; see also Stipanowich, Arbitration and Choice, supra note 93, at 408–10.
Such factors appear to be at play in the field of construction, an arena that in the 1990s symbolized the dramatic changes in contractual conflict management that might be possible in the Quiet Revolution. But, things did not work out quite the way some might have expected. The primary locus of change was standard form contracts developed by industry groups, which now incorporate opportunities for mediation or other settlement-oriented steps. However, mediation, like arbitration, is nearly always a lawyer-driven process, just as arbitration has tended to become much more like litigation. What is frequently missing, arguably, is a mechanism for management of job-site conflict in real time, such as a standing mediator and/or expert evaluator. More proactive approaches to conflict like project partnering, or innovations like a project-based dispute resolution advisor, never seem to have caught on. These realities beg the question: Are there ways to more actively and effectively manage conflict in real time, during the course of contractual relationships, for the purpose of avoiding escalation of conflict and maintaining relationships?

In this regard, the construction industry will continue to be a laboratory for experimentation. At a recent international conference at our Institute, there was discussion of a new software tool/service, RADAR, which monitors trends and stakeholders’ concerns in order to allow the parties to predict and prevent disputes on infrastructure projects by examining perceptions of risk. It is currently being employed on some infrastructure projects in the U.K. One description of RADAR explains:

Risk on projects is often addressed solely at a technical level, i.e. construction, whereas the areas of projects that most commonly cause dispute are the inter-personal and inter-team dynamics, leaving projects at best sub-optimal, at worst in failure. Combined with an effective traditional risk management process, ResoLex’s RADAR approach improves delivery team engagement and management by giving the programmer/program leadership team an understanding of the differing perceptions of

125 Id. at 14.
126 Id. at 15.
127 Id. at 16–17.
128 Id.
129 Christopher Miers & Patrick Green, Presentation Summary of Proceedings, International Task Force on Mixed Mode Dispute Resolution, Presentation at the Inaugural Summit at Pepperdine University (Sept. 23, 2016), in pp. 38–9. Presenter Christopher Miers, an English construction lawyer, is currently serving one of a panel of experts (along with an experienced project manager and a team psychologist.)
project concern and risk amongst the stakeholder base and enabling a team by team approach to project communication and dispute avoidance.130

VIII. THE VARIEGATED GLOBAL DEVELOPMENT TOUCHED OFF BY THE QUIET REVOLUTION REFLECTS THE DIVERSITY OF LEGAL SYSTEMS’ HISTORY, TRADITION, AND CULTURAL FOUNDATIONS

As the currents and crosscurrents of the Quiet Revolution have spread around the globe, they have splashed up against long-standing traditions and well-established practices in systems underpinned by different cultural norms.131 U.S. practitioners representing clients in cross-border commercial disputes may sometimes be surprised, therefore, by a lack of impetus for professionalized U.S.-style mediation in a foreign court system132 or, conversely, the expectation that judges or arbitrators will engage directly with the parties in settlement discussions.133 Such experiences compel us to inquire: Can we come to a clearer appreciation of variations in international dispute resolution practice by more thoughtful examination of justice systems and their traditional and cultural underpinnings?

In order to come to a more profound understanding of the varying perspectives and practices regarding dispute resolution and the management of commercial conflict, the International Mediation Institute (“IMI”) launched a Global Pound Conference consisting of day-long gatherings at sites around the world at which legal advocates, scholars, and business principals and counsel are surveyed regarding their attitudes and experiences with mediation and other approaches to resolving conflict.134 IMI is also a cosponsor of the International Task Force on Mixed Mode Dispute Resolution,135 an initiative in which more than sixty experienced

131 Stipanowich, International Evolution of Mediation, supra note 1, at 1221, 1241–42.
132 Id. at 1213–21.
133 Id.
professionals, including corporate counsel and advocates, arbitrators, mediators, and scholars are organized into working groups focused on understanding international variations in the handling of complex dispute resolution scenarios involving the interplay between mediation, evaluation and arbitration in order to develop new insights for international and domestic commercial practice.  

Differences between dispute resolution practices in the United States and China afford an excellent illustration of the value of closer study of the traditions and cultural roots of modern activity.  Thanks to the Quiet Revolution, in the U.S., mediation services are provided by thousands of individuals (either directly or through organizations), many of whom regard themselves as dispute resolution professionals. Mediators are not uniform in their approaches, but use a variety of strategies and tactics they regard as appropriate to the circumstances.  Although mediation is frequently undertaken in the course of litigation, there are strong policies in many countries promoting separation of the mediation process from the adjudication and broad protections for the confidentiality of communications made during the course of mediation. Dispute resolution professionals and counsel tend to resist “switching hats” (that is, switching from the role of mediator to that of arbitrator in the course of resolving a dispute, or vice versa). It appears, however, that a sizable minority of mediators and arbitrators switch hats at least occasionally.

In China, on the other hand, mediation has not traditionally been viewed as a discrete professional activity (one of my lawye-
arbitrator friends in Beijing tells me she does not charge parties a fee when she mediates!), but is tied to other roles: government, administrative, judge, and arbitrator—the modern equivalent of the “wise authority figure” of ancient Chinese tradition. Judges and arbitrators regularly offer to “change hats” and working informally with the parties to explore settlement opportunities, and may propose solutions—perhaps with some vigor. There is, effectively, no “wall” separating mediator and adjudicator.

The reasons for these differences quickly come into focus when one “deconstructs” the processes and examines the applicable cultural dimensions and the process goals or values that they support—among the aims of the Mixed Mode Task Force. For example, in the U.S., a “low power distance” culture, high importance is accorded fundamental individual rights and freedom, self-determination and party autonomy, and dispute resolution processes that reflect understood due process norms. A commitment to individualism places the emphasis on independence, self-interest, critical thinking, self-determination, and individual choice-making.

In China, the “high power distance” orientation emphasizes a hierarchical order in which superiors exhibit and make use of their relative status and power. In dispute resolution, the expectation is for an authoritative neutral who is evaluative, directive. In this “collectivist” society, group interests and relationships prevail over those of the individual; the emphasis on social harmony and stability, and the avoidance of direct confrontation and formal adjudication. Dispute resolution processes inculcate these principles, even to the extent of overcoming expectations regarding individual vindication, due process or confidentiality.


143 Stipanowich, International Evolution of Mediation, supra note 1, at 1222–23.

144 Geert Hofstede et al., Cultures and Organizations: Software of the Mind 57–59 (3d ed. 2010).

145 Id.

These and other areas of divergence in international dispute resolution may be better understood by focusing on applicable cultural norms and related legal traditions, and understanding the influence of these reference points on the goals and values that are given priority in dispute resolution processes. These realities, coupled with insights regarding the impact of industry and organizational cultures, may go a long way toward clarifying the dynamics of conflict management in international commerce and promoting more effective practices.

IX. FOR GOOD OR ILL: THE QUIET REVOLUTION IS BEING TRANSFORMED BY MEGATRENDS ASSOCIATED WITH INFORMATION TECHNOLOGY

For a speech on the future of dispute resolution at another symposium, I had some fun making a video (“I-Mediate”) in which I appeared on-screen as a dispute resolution professional of the future. My character was producing an “up-close-and-personal” marketing video for a Chinese audience and was intent on promoting his particular credentials in mediating and arbitrating globally (and often, virtually). Meanwhile, the character’s wife (played by Sky, my own spouse) was frustrating his efforts by interrupting with continuous comments from off-screen. Among other things, she reminded him, much of his vaunted “experience” had been not with real-life disputes, but in computer-based simulations—activities sometimes involving crowdsourcing of thousands of people. Moreover, much to his chagrin, he found himself in competition with an avatar based on his own persona, and the avatar had actually proven much more successful in getting business as a neutral!

Although this depiction is fanciful, none of us need reminding that communication and information technology is transforming every aspect of our lives, and activities associated with conflict management and dispute resolution are no exception. The challenges and the opportunities before us may be framed as a single question: Can we harness communication and information technology to more effectively realize dispute resolution process goals and values?

So far, the indications are mixed. Much change has centered on employing technology in support of traditional mediation or arbitration processes; face-to-face interaction is supplemented and framed by intensive online communications, including increasingly
sophisticated systems of videoconferencing that permit greater long-distance engagement and interchange. These advancements have transformed our ability to communicate so as to transcend limitations of time and geography. However, they have also raised critical and abiding concerns regarding cyber-security and threats to the often-vaunted confidentiality of dispute resolution proceedings, including private communications among arbitrators, or between mediators and individual parties.

There are also systems aimed at improving the way we manage documents and information at all stages of dispute resolution. During international arbitration hearings, arbitrators may have before them a screen with rolling, translated transcription of witness testimony with features permitting highlighting and annotation. There may be a separate monitor for the display of documentary evidence and, of course, a laptop for personal notes. On the other hand, our enhanced ability to electronically parse the vast cloud of meta-data that emanates from the daily transaction of business is, in the framework of disclosure-centric U.S. discovery practice, a potential game-changer in terms of ballooning process costs and even negotiating leverage.

Dispute resolution practice is also supported more broadly by dense networks of online communication. Some years ago Chicago lawyer and neutral Paul Lurie approached me with the idea of creating an analogue of Wikipedia dedicated to dispute resolution. I was busy with other projects at the time, and was then unfamiliar with Wikipedia. Nothing came of that idea, but Paul thereafter established an increasingly popular listserv that is one of a growing number of online sources for wide-ranging national and interna-

147 More than twenty years ago, at a time when videoconferencing technology was in its infancy, I used a video linkup to conduct long-distance mediation session—one of a series relating to an ongoing construction project. The project and parties were in Louisville, Kentucky, and I was far away, facilitating a partnering workshop for a commercial joint venture at Stephen Covey’s corporate headquarters near Provo, Utah. I found it necessary to drive to the nearest Kinko’s—more than sixty miles away in Salt Lake City—in order to conduct the teleconference. Although the technology was primitive in today’s terms, it sufficed for the purpose.


tional dialogue regarding any and all matters that come before dispute resolution professionals and legal counselors. How should a mediator address a particular ethical dilemma? Which of the following candidates would be a suitable arbitrator for an intellectual property dispute? What are the respective strengths and weaknesses of particular dispute resolution institutions? How might one frame a provision to protect the confidentiality of evidence presented and communications made in the course of arbitration? Listserves permit users to avail themselves of a broad aggregation of expert opinions on the double-quick. The responses do not come with a quality guarantee and include a share of low-value kibitzing—part of the price one pays for the democracy of the listserv. They are often, however, a very valuable supplement to more traditional and more labor-intensive methods of researching and obtaining collected wisdom on issues requiring judgment and discretion. They are for many a first, informal experience with crowdsourcing, which harnesses technology for the purpose of surfacing and exploiting “the wisdom of the crowd.”

One of the best-known examples of crowdsourcing is the online “community court” that Colin Rule, who for a number of years directed eBay’s and PayPal’s Online Dispute Resolution system, helped create for buyers and sellers on eBay. After the parties submit their “cases” (including images as well as texts, if they choose) online, a panel of jurors is randomly selected from a pool of eBay members who previously applied and met stringent eligibility criteria. A determination is made in the case by having each member of the community court panel reviews the parties’ submissions and indicates the party whose position they support, if either. This kind of crowd-sourced community tribunal is seemingly the IT revolution’s most direct evocation of the Warren Burger’s 1976 vision of a citizen panel for small claims.

Of course, a much greater volume of relatively low-value consumer disputes have been resolved without direct human interven-

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151 For a general discussion of crowdsourcing, see Jeff Howe, Crowdsourcing—Why the Power of the Crowd is Driving the Future of Business (2009).
152 Id.
153 Rule founded and is currently the C.O.O. of online dispute resolution software provider MODRIA (modular online dispute resolution implementation assistance).
155 Burger, supra note 3, at 454.
tion. As Colin Rule explained, in a system in which parties and products might all be in different parties of the world, it was essential to find a cost-effective online alternative to traditional litigation or arbitration that was not hedged about by geographical and jurisdictional restrictions. The inherent value of online dispute resolution for high volume, low value disputes in e-commerce has also been recognized by the European Commission, which created a web-based, multi-lingual platform for the resolution of contractual disputes relating to online purchases of consumer goods and services in the EU. Meanwhile, Rule’s company, Modria, and others continue to pursue and develop opportunities to expand the application of online dispute resolution.

It is intriguing to think about the possibilities inherent in our advancing technology, which may open new “doors” well beyond Professor Sander’s multi-door vision. Imagine a grand panel of several hundred experienced arbitrators of different racial, ethnic, gender, and professional backgrounds, and with different practice specialties who would be available to participate in online decision-making, evaluation and advise-giving—a concept that well within our current reach. Consider the possibility of experiencing a virtual arbitration hearing in three dimensions, with participants engaging from their home offices over vast distances. Reflect upon the possibilities of data-gathering from electronically supported processes, facilitating greater systemic transparency, and opportunities for feedback. And finally, imagine the opportunities and challenges of a world of dispute resolution professionals and advocates that include computer-generated constructs that build on or augment human personalities and thought processing.

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156 eBay resolves over 60 million disputes annually; nine-tenths of those were resolved through the use of electronic software without direct human intervention. Victor Li, Is Online Dispute Resolution the Wave of the Future?, ABA J. (Mar. 18, 2016), http://www.abajournal.com/news/article/is_online_dispute_resolution_the_wave_of_the_future.

157 Id.


159 See Li, supra note 156.

X. Our Abiding Challenge Involves the Search for Equipoise—The Balancing of Interests such as Party Autonomy and Flexibility with Concerns About Fairness, Transparency, and Protection of Public Interests

A recent article considering the future of mediation practice encouraged mediators to resist being too certain about their practices, and instead to embrace flexibility and adaptability in their approaches to conflict.\textsuperscript{161} This is sound advice for mediators, because many of us view the flexibility and adaptability of our skills and approaches to specific contexts and circumstances as central to our tasks as managers of conflict, just as party autonomy is a key principle of the standards developed around mediation and arbitration.\textsuperscript{162} Moreover, it sounds like wisdom: age and experience often improve our appreciation of the complexity of things, and how little we really know.

Speaking more broadly, the opportunity to creatively explore new ways of more effectively addressing the interests and needs of parties in conflict, or of helping manage conflict in order to sustain or improve relationships, is precisely what intrigues, excites and engages many of us in the field. As suggested in portions of this article, of course, the possibilities of unfettered free choice in conflict resolution in an environment that is largely unregulated bump up against conflicts between one set of interests and others. These realities that raise hard questions about notions of fairness, transparency, and the interests of the public and of specific groups. Here are a few examples:

- Should there be limits on the enforceability of arbitration agreements binding consumers or employees who lack the knowledge, understanding or leverage to avoid them?\textsuperscript{163}
- To what extent should religious minorities have room to exercise their beliefs through bespoke arbitration systems,

\textsuperscript{161} Mayer, supra note 29.

\textsuperscript{162} ACR, ACR ETHICS PRINCIPLES (2010); ABA & AAA, MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard I (2005); See also IMI CODE OF PROCEDURAL CONDUCT § 3.1; Paul M. Lurie & Jeremy Lack, Guided Choice Dispute Resolution Processes: Reducing the Time and Expense to Settlement, 8 DISP. RESOL. INT’L 167, 168 (2014); Paul M. Lurie, Using the Guided Choice Process to Reduce the Cost of Resolving Construction Disputes, 9 CONST. L. INT’L 18, 19 (2014).

\textsuperscript{163} See supra text accompanying notes 98–109.
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and how will this be balanced against legal protection of
the rights of individuals within such groups?164

- Are represented clients playing a meaningful (informed
and empowered) role in decisions affecting their conflict
resolution processes?165

- Is there a need for more public information about or pro-
fessional credentiaing of mediators, arbitrators, and pro-
vider institutions?166

- How are private dispute resolution procedures and out-
comes on interested third parties, including members of
the public,167 and on the operation of systems of legal
justice?168

The range of possible responses to these expressed concerns
runs the gamut from outright legal prohibition to limited enforce-
ment, public regulation, private regulation/credentialing, dispute
resolution procedures, ethics standards, “soft law” and advisory
practice guidelines, and education and training. Having had the
privilege of participating in efforts at virtually all of these levels, I
have come to recognize that while there is sometimes no substitute
for legal action, and even broad-scale legal reform and regulation,
such activity nearly always entails costs as well as benefits and may
produce unforeseeable consequences. Such action should be taken
after due deliberation and consideration of relative costs and bene-
fits, as well as due regard for effective alternatives that are less
sweeping and less stringent. One hopes that such care attended the
recent passage by the Brazilian National Congress of a Mediation
Act169 that strictly regulates many aspects of a process that is still in

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165 See supra text accompanying notes 48–53.


168 Stipanowich, International Evolution of Mediation, supra note 1, at 1238.

the very early stages of evolution in that country. 170 Among other things, the Act establishes very detailed requirements for contractual mediation provisions, including “minimum and maximum period for the completion of the first mediation meeting”, the site of mediation, “criteria for choice of mediator”, and “penalty in the event of non-attendance of the party invited to the first meeting of mediation[;]” 171 appears to raise questions about the ability of mediators to engage in evaluation; 172 and even regulates how information shared in caucus must be protected. 173 While such a framework may prove workable in Brazil, there are many who would view this act as excessively restrictive of party autonomy and of the inherent flexibility of mediation.

As for myself, having reached the stage of “sadder but wiser policy-maker,” I am now content with observing our streams of evolution, surfacing trends, and encouraging deliberation and dialogue among thoughtful practitioners and scholars. I hope that the foregoing will help accomplish that purpose.

170 DIEGO FALECK, BRAZIL: GETTING THE DEAL THROUGH 21 (Renate Dendorfer-Ditges ed. 2013).
171 Article 22, Law Number 13140, of June 26, 2015. Although the parties may, alternatively, make contractual reference to rules of “a reputable institution providing mediation services” there is still a requirement for “clear criteria for the choice of the mediator and the holding of the first mediation meeting.”
172 Article 24, Law Number 13140, of June 26, 2015. By making the distinction, the Brazilian law raises questions about whether mediators may engage in any form of evaluation.
173 Article 31, Law Number 13140, of June 26, 2015. Practices among mediators regarding the communication of information gleaned in caucus vary widely. The approach embraced by the Brazilian law is more limiting of the flexibility of the mediator.