University of Missouri

EXPLORATIONS IN DISPUTE RESOLUTION SCHOLARSHIP

Center for the Study of Dispute Resolution
at the School of Law

From the Director: An invitation to join us in our research explorations

It is certainly not uncommon for law professors to share their research projects with others by sending reprints, presenting their work at conferences and more recently through different forms of social media. A shy bunch we are not! And while soliciting input is generally a goal of such sharing, any further engagement between the author and the audience is rarely expected. The essays in this booklet seek to reverse that norm.

Since our founding, scholarship has been always at the core of the mission of the University of Missouri School of Law's Center for the Study of Dispute Resolution. Similarly, the understanding of scholarship as a collaborative effort has been a guiding principle of our work. As we begin our fourth decade of existence, we remain true to that principle. In the pages that follow we describe some of the research projects we are currently conducting with the explicit hope that others will join us as we continue our scholarship journey.

The first three essays describe projects which seek to shed new light on core dispute resolution processes. John Lande describes the origins of his "Rethinking Negotiation Theory" project in which he challenges conventional negotiation frameworks and invites dispute resolution scholars to create new paradigms that more accurately describe the negotiation process. S.I. Strong's essay focuses on her recent incursion into the world of empirical research. By pointing out the significance of such research in the making of international mediation public policy she invites dispute resolution scholars to consider other issues in which empirical research can make such a contribution. In the last of these three initial essays, Carli Conklin describes her work on arbitration history, inviting the reader to explore with her the significance of understanding such history in the development of contemporary arbitration law and practice.

The last three essays identify what we believe are relatively unexplored areas of dispute resolution research. During the last few years, the center has sought to expand the frontiers of dispute resolution scholarship by inviting colleagues who have not traditionally engaged in dispute resolution research to explore possible points of interaction between their areas of expertise and dispute resolution. The essays by Bob Jerry and Dennis Crouch are some of the early fruits of such efforts. In his essay Bob Jerry discusses the convergence between the fields of insurance law and dispute resolution. Dennis Crouch does the same with the field of intellectual property, describing some research ideas which span the dispute resolution field from negotiation to arbitration. In the final essay, and prompted by conversations we had in the development of a project involving the center and the National Academy of Arbitrators, Bob Bailey, Gil Vernon (past president of the Academy) and I discuss what we believe is the novel topic of how arbitration and other dispute resolution processes are portrayed in today's mainstream media.

We very much hope that as you read the various essays, you keep in mind our invitation to engage with us in these and related projects.

Rafael Gely
Director of the Center for the Study of Dispute Resolution
James E. Campbell Missouri Endowed Professor of Law
University of Missouri School of Law

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Advancing Negotiation Theory[1]

John Lande
Isidor Loeb Professor Emeritus of Law
AB with high distinction (1974), University of Michigan
JD (1980), Hastings College of Law (University of California)
MS (1991), PhD (1995), University of Wisconsin-Madison

Everyone knows that there are two models of negotiation, right?

Not exactly.

Most of us who teach negotiation in U.S. law schools do teach that there are two models, which go by various names and reflect no clear consensus about their definitions.

One model is called positional, zero-sum, distributive, competitive, adversarial or hard negotiation. In the extreme version of this model, negotiators exchange offers trying to get the best possible outcome for themselves, assume that one side's gain is necessarily the other side's loss, make legal arguments to gain partisan advantage, act tough, and use hard-bargaining tactics to gain advantage over their adversaries.

The other model is called interest-based, win-win, integrative, cooperative, problem-solving or principled negotiation. In the ideal version of this model, negotiators seek outcomes benefitting both parties, explicitly identify their interests, generate numerous options that might satisfy the parties' interests, consider various factors in negotiation (such as the parties' interests, values and the law) and seek to build cooperative relationships.

Although this two-model system has been helpful, it is woefully incomplete. For one thing, it misses a third model of negotiation, which I have called "ordinary legal negotiation," in which lawyers negotiate around legal norms.

More importantly, it reflects a narrow conception of negotiation, which overlooks much agreement-seeking behavior by lawyers.

And, most fundamentally, the system of models assumes that most negotiation behavior can be meaningfully represented in coherent models. My empirical research about lawyers' actual pretrial negotiation casts serious doubt on this assumption.

Considering these and other possible problems, it is time to develop new negotiation theory that helps us better understand the process and negotiate more effectively.

Confusion about the Concept of Negotiation

An initial problem is the lack of consensus about the definition of negotiation. I reviewed nine texts used in law school negotiation courses and found significant differences. One text makes the following broad statement, "Anytime you deal with someone else, seeking to reach agreement on some matter, you are involved in a negotiation."[2]

By contrast, some texts indicate that negotiation occurs in the context of actual or potential conflict.[3] People often reach agreements when there is no manifest dispute. For example, criminal defendants often accept plea bargains offered by prosecutors without making counteroffers. Presumably, some of these defendants believe that they have good legal claims but accept the deals because of the risk of greater penalties, lack of emotional and financial resources to fight the prosecution, or advice from their attorneys, among other reasons. However, some defendants presumably recognize that they are guilty and accept the deals as the best possible outcome. Many divorcing couples reach agreement with little or no dispute and probably so do people in other types of "disputes." Similarly, some parties in transactional negotiations reach agreement with little or no dispute. Much of lawyers' work involves seeking such agreement and should be considered as negotiation.

Some conceptions of negotiation often involve various elements that do not necessarily occur in the process of reaching agreement. For example, some people think of negotiation as involving (1) an exchange of offers occurring close in time to each other, (2) multiple options for handling an issue, (3) an explicit quid pro quo and/or (4) something different from normal conversation or professional courtesy.

Although it is often helpful to focus on processes that involve explicit disagreements or these other factors,

[1] This essay is adapted from several publications including John Lande, Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money (2d ed. 2015); John Lande, *A Framework for Advancing Negotiation Theory: Implications from a Study of How Lawyers Reach Agreement in Pretrial Litigation*, 16 Cardozo J. Conflict Resol. 1(2014) [hereinafter Lande, *Negotiation Framework*]; John Lande, *Good Pretrial Lawyering: Planning to Get to Yes Sooner, Cheaper, and Better*, 16 Cardozo J. Conflict Resol. 63 (2014); John Lande, *Taking Advantage of Opportunities in "Litigotiation,"* Disp. Resol. Mag., Summer 2015, at 40; John Lande, *What is Negotiation?*, *Indisputably*, Oct. 15, 2014, www.indisputably.org/?p=6009; John Lande, *What is Negotiation?, Part 2*, *Indisputably*, Oct. 29, 2014, www.indisputably.org/?p=6051; John Lande, *Problems with the System of Negotiation Models, Part 1*, *Indisputably*, Jan. 31, 2015, www.indisputably.org/?p=6318; John Lande, *We Need a Better Consensus about Negotiation Theory*, *Indisputably*, Feb. 13, 2015, www.indisputably.org/?p=6394; John Lande, *How Can You Get a Piece of the Action?*, *Indisputably*, Feb. 19, 2015, www.indisputably.org/?p=6465.

[2] Melissa L. Nelken, Negotiation: Theory and Practice 1 (2d ed. 2007)

[3] *See* Lande, *Negotiation Framework*, *supra* note 1, at 15 n.43 (citing definitions in three texts).

ignoring interactions without such elements leads people to overlook much of lawyers' everyday work of seeking agreements. When we use overly narrow definitions, our work is not as helpful for practitioners and students as it should be. So, as a general definition of negotiation, I think that it is appropriate to use the broad, unqualified concept of the process of seeking agreement.

Using this broad conception of negotiation, it is clear that legal matters typically consist of streams of related negotiations. For example, well before a final settlement event in litigation, lawyers may negotiate about acceptance of service of process, extension of time to file papers, conditions during the pendency of the litigation, discovery schedules, resolution of discovery disputes, exhibits to be used at trial or many other things. Similarly, in a transactional negotiation, lawyers may reach agreements about exchange of information and coordination of actions needed before the parties are ready to negotiate the ultimate deal.

Many people do not think of these preliminary interactions as negotiations because the lawyers often work out agreements with little or no difficulty. But these agreements are important events. Lawyers can — and do — argue about all of these things in some cases. If they did not reach these agreements about these preliminary matters, the cases generally would be longer, more expensive and more contentious. And the existence (or absence) of these preliminary agreements can easily affect the ultimate negotiations.

In addition to negotiations with the other side, lawyers negotiate with many other people during a case. For example, lawyers agree with clients about the attorney's fee arrangements, the tasks that they each will perform and how the lawyer will respond to the other side at various points during the litigation. Lawyers reach agreements with people such as co-workers in their firms, process servers, investigators, court reporters, technical experts, financial professionals and mediators. Lawyers regularly reach agreements with judges about case management issues such as discovery plans and schedules, referral to alternative dispute resolution procedures and ultimate issues during judicial settlement conferences.

In litigated cases, we should think of negotiation as what Marc Galanter calls "litigotiation," which he defines as "the strategic pursuit of a settlement through mobilizing the court process." He writes that "negotiation of disputes is not an alternative to litigation. It is only a slight exaggeration to say that it *is* litigation. There are not two distinct processes, negotiation and litigation; there is a single process of disputing in the vicinity of official tribunals."[4]

Along the same lines, one lawyer in my study said, "It is all negotiation from the time suit is filed. You are constantly negotiating or setting up the negotiation. It doesn't just happen. You are negotiating from the outset, setting up where you want to go. You are judging [the other side] and they are judging you." He elaborated, "Negotiations don't occur in a week or a month. They occur in the entire time of the lawsuit. If anyone tells you they aren't negotiating, they really are. Every step in the process is a negotiation. You don't call it negotiation, but in effect, that's what it is."[5]

Viewed from this perspective, most pretrial activity is oriented toward negotiation. For example, we don't normally think of formal discovery as part of negotiation, but it generates information used in the ultimate negotiations and affects the bargaining dynamics. Of course, lawyers regularly reach agreements about discovery. These include initial agreements about what information to exchange as well as resolution of discovery disputes.

Indeed, in practice, negotiation is routinely infused in litigation throughout a case. Although the purported purpose of pretrial litigation is to get ready for trial, this preparation is inextricably intertwined with negotiation because the anticipated trial decision often affects the ultimate negotiation. Of course, some communications in litigation are not oriented to reaching agreement such as arguments in court (and thus are not negotiation), but there are a lot more such communications than most people realize.

Problems with the System of Negotiation Models

H. L. Mencken is frequently quoted as saying, "For every complex problem, there is an answer that is clear, simple, and wrong."[6] I think that this is a good description of the prevailing negotiation theory. This two-model framework is particularly seductive because it embodies a morality play with a supposedly good model and a bad model. It may be adequate for simple, short negotiations involving things such as dividing an orange or buying a car.

But the current structure actually is much less clear and simple than it seems. It turns out that these models are hard to apply to negotiation experience. My study shows that this theoretical structure is seriously deficient in accounting for more complex negotiations, such as in litigation that extends over a substantial period of time and especially when lawyers represent parties.

In my study, I asked lawyers to provide detailed descriptions of the cases they settled most recently and while some cases neatly fit into the models, others did not. The process of trying to fit the cases into the models forced me to try to specify the models precisely and I found that they are incoherent, especially the interest-based model.[7] Although adding a model of ordinary legal

[4] Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. Legal Educ. 268, 268 (1984).

[5] Lande, *Negotiation Framework*, *supra* note 1, at 13.

[6] *See* H.L. Mencken Quotes, *BrainyQuote*, www.brainyquote.com/quotes/quotes/h/hlmencke129796.html.

[7] *See* Lande, *Negotiation Framework*, *supra* note 1, at 16-36.

negotiation helps fill a gap in the two-model system, it does not solve the fundamental problem.

The fundamental problem is that the prevailing theory assumes that negotiation involves coherent models of highly-correlated variables, but often that is not the case. Different negotiators often exhibit different aspects of the models and these may differ for various issues and may change over time. For example, in a divorce case, the process was similar to positional negotiation about child support, interest-based negotiation about disposition of the family home and ordinary legal negotiation about parenting issues.[8]

Developing an Improved Theoretical Approach

Instead of thinking in terms of two (or a small number of) discrete, coherent models, theorists and practitioners would do better to disaggregate the models and analyze key variables separately. The variables generally would be continuous (rather than limited to two extreme values), and most interactions would be located in the middle of the continua rather than at the extreme ends.

Unlike the traditional models, which assume that the variables are all highly correlated, a disaggregated framework makes no such assumption and better reflects the reality of negotiation in many cases. In addition, disaggregating the variables permits more precision by analyzing variables at different times and by different actors in a matter.

I developed the following table identifying important process characteristics derived from the prevailing legal negotiation theory. While these variables seem plausible, one could use other variables and characterize them differently. Thus the key point is the *structure of the framework*, not the particular variables in this version. Indeed, this framework is intended as the beginning of a process of theory development, not the end of that process.

Continua of Negotiation Process Characteristics		
No concern for other party's interests		Great concern for other party's interests
Exclusive use of exchange of demands and offers	includes everyday conversation	Exclusive use of interest-and-option process
Creation of no value		Creation of maximum possible value
Hostile tone		Friendly tone
Extreme use of power		No use of power
Exclusive focus on extrinsic norms		Exclusive focus on intrinsic norms

[8] *Id.* at 42-44.

It would be useful to have shared criteria for a new theoretical structure. For example, it would be important to be sufficiently concrete that academics, practitioners and students would readily interpret theoretical concepts as describing the same behavior.[9] As a practical matter, it would help to use concepts that practitioners and students can easily and consistently understand and use when planning and analyzing their interactions in negotiations.

I think it should be at a moderate level of abstraction — not so simple to be meaningless but not so complex that it is too hard to understand and express easily. Perhaps most important, academics, practitioners and students should find it helpful in solving their problems. There may be other important criteria.

My research to date has focused exclusively on negotiation theory reflected in legal textbooks. While these texts incorporate materials from other disciplines, they do not do so as systematically as possible. My current research project will analyze negotiation theories from multiple disciplines such as business, economics, communication, political science, psychology, sociology and international relations.

For our annual center symposium in 2016, we will focus on rethinking negotiation theory. We are grateful for the collaboration with Marquette Professor Andrea Kupfer Schneider and Convenor Managing Director Chris Honeyman in planning and conducting this symposium.

Conclusion

The University of Missouri Law School Center for the Study of Dispute Resolution has a long history of innovation in scholarship, teaching and service. This project to advance negotiation theory carries on in that tradition.

[9] In research terms, this would be analogous to high inter-rater reliability.

Empirical Studies in International Commercial Dispute Resolution — Providing Support to National and International Bodies

S.I. Strong
Manley O. Hudson Professor of Law
BA cum laude (1986), University of California, Davis
Master of Professional Writing (1990), University of Southern California
JD (1994), Duke University School of Law
PhD (2002), University of Cambridge
DPhil (2003), University of Oxford

For most of my tenure at the University of Missouri, I have calmly and consistently resisted the lure of empirical research, despite the best efforts of several colleagues to bring me into the fold. However, some key changes in the field of international commercial dispute resolution have led me to "drink the Kool-Aid" and undertake not one but multiple empirical studies.

Empirical Work in International Commercial Mediation

My foray into empirical research has its roots in a doctrinal article I wrote several years ago (*Beyond International Commercial Arbitration? The Promise of International Commercial Mediation*, 45 Wash. U. J.L. & Pol'y 11 (2014), which sought to identify why international commercial arbitration is used so much more frequently than international commercial mediation. After conducting a detailed analysis into the legal environments surrounding the two procedures, I concluded that the most likely reason was the absence of an international treaty on international commercial mediation that operated in a manner similar to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

While the article was still in production, I learned that the U.S. State Department's Advisory Committee on Private International Law had called a meeting to discuss possible new projects for the United Nations Commission on International Trade Law (UNCITRAL) Working Group II on Arbitration and Conciliation. I travelled to Washington, D.C., to attend the session at the State Department and suggested the idea of a convention concerning international commercial mediation, based on various recommendations I had made in my article. I was shocked when the State Department decided to pursue my idea further.

My initial recommendation underwent a number of changes as a result of State Department deliberations with various stakeholders, but the core idea was reflected in a formal proposal made by the Government of the United States to UNCITRAL in July 2014. I was fortunate enough to attend the UNCITRAL meeting as a nongovernmental observer and heard the concerns of various states. In particular, a number of delegates specifically asked the UNCITRAL Secretariat if they could be provided with empirical data on issues relating to international commercial mediation and conciliation. Unfortunately, I knew from my prior research that no such data existed.

Given the importance of this issue to the debate about the proposed treaty, I decided to undertake the first ever large-scale international study dedicated to international commercial mediation and conciliation in order to provide the participants in the UNCITRAL process with the empirical data they needed to assess the viability and shape of any future instrument in this area of law. With the assistance of various colleagues at the Center for the Study of Dispute Resolution, I wrote and released a survey instrument in October 2014. The survey was quite long, with 34 different questions on a variety of subjects, but I received a very good number of responses — 221 overall. Although that number may not seem very high, particularly in comparison to some recent surveys involving international commercial arbitration, the world of international commercial mediation and conciliation is much smaller than the world of international commercial arbitration, and the dataset was more than adequate for the intended purposes.

One of the best things about the survey was the breadth of the participants. Rather than being limited to a single sector (such as in-house counsel) or a single country, respondents came from all over the world and included private practitioners, neutrals, in-house counsel, government lawyers, academics and judges with expertise in both domestic and international proceedings. The diversity of responses allowed for a very interesting analysis.

Some people may find it odd that domestic experts were allowed to participate in a survey on international practices. However, that approach seemed both necessary and useful for several reasons. First, in many countries, there are no neutrals or practitioners dedicated solely to international commercial mediation and conciliation. Attempting to limit the survey to those who specialized in international disputes would likely have resulted in an unworkably small sample. Second, domestic specialists can provide critical insight into domestic laws regarding

mediation and conciliation that will both influence and be influenced by any international treaty that may be adopted in this area of law. As a result, it was considered appropriate to permit specialists in domestic forms of dispute resolution to participate in the study, despite the potentially significant differences between domestic and international disputes.

I designed the survey with two goals in mind. First, I hoped to discover and describe current behaviors and attitudes relating to the use and perception of international commercial mediation and conciliation so as to set a benchmark for further analysis in this field. I believed this sort of foundational research was vital because of the absence of any existing large-scale studies dedicated to international commercial mediation and conciliation.

Although I thought this portion of the study would yield relatively predictable data, the responses were in many ways quite surprising and in some cases disprove a number of theoretical assumptions about how mediation and conciliation operate in cross-border business disputes. Specific questions focused on how often mediation and conciliation are currently used in the international commercial context, how mediation and conciliation are initiated in the international commercial context, why parties do or do not use mediation or conciliation in international commercial disputes, how parties might be encouraged to use mediation and conciliation in the international commercial context and which types of international commercial disputes are best suited to mediation and conciliation.

My second goal was to support the UNCITRAL deliberations concerning the proposed treaty. I therefore asked a series of questions relating to issues of interest to the UNCITRAL debate in order to provide participants in the UNCITRAL process with information that would be useful to their next debate, which was scheduled to take place at the Working Group level in February 2015.

The results from this series of questions were particularly noteworthy, both because these types of questions had never been considered before on either an empirical or theoretical basis and because of the content of the answers. Although all of the data in this section proved useful, one of the most intriguing aspects of the study was the degree of interest in a new international convention relating to international commercial mediation and conciliation. Not only were respondents overwhelmingly in favor of a new treaty in this area of law, they were also very clear about the form that instrument should take.

A preliminary report from the survey was made publicly available prior to the Working Group II meeting in New York and was also distributed at the Working Group session itself. Although the discussion on the floor was at times mixed, in the end the Working Group decided to ask the Commission for a broad mandate to develop some sort of instrument in this area of law. The Commission considered that request in July 2015 and agreed to move forward with the project. The next debate on this project is scheduled for September 2015, at the Working Group II meeting in Vienna.

Although the future of the U.S. proposal is not known at the time of writing, it appears likely that UNCITRAL will be considering these issues for some time to come. I was honored to have been able to provide some empirical assistance to the international law-making process and am looking forward to expanding my research, perhaps by distributing the survey in Spanish so as to gain more information about international commercial mediation and conciliation in Latin America.

The full analysis of the study will be published later this year under the title *Use and Perception of International Commercial Mediation and Conciliation: An Empirical Study*, 21 Harv. Negot. L. Rev. __ (forthcoming 2015). Those who are interested in seeing the preliminary report that was made available to UNCITRAL Working Group II can download a copy for free from the Social Sciences Research Network (SSRN). *See* S.I. Strong, *Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report of Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation*, *available on* papers.ssrn.com/sol3/papers.cfm?abstract_id=2526302.

Empirical Work in International Commercial Arbitration

Although I had no conscious intention to undertake any new empirical work once I finished with the mediation research, life has a way of showing us differently. Over the last few months, I have been approached by several colleagues interested in collaborating on empirical projects. These projects appear quite tantalizing, since they focus on international commercial arbitration, which is the field where I have done most of my work.

The first offer came to me from two academics in Australia and is currently in the grant review stage. Given the scope of the work, we will only be able to move forward if the necessary funding comes through, but the process of writing the proposal has created a number of exciting new professional contacts.

The second invitation came from a colleague in England and involves taking a survey that was initially conducted in Europe and reframing it for use in North and South America. This project looks to be quite exciting, since it will allow me to collaborate not only with my friend in England but also with several experts on Latin American arbitration. The study will be trilingual (English-Spanish-Portuguese) and may also allow us to work with a number of international organizations, such as the Organization of American States.

Although I doubt that I will abandon my work in doctrinal research for a full-time career as an

empiricist, I am enjoying my current foray into empirical scholarship. Designing studies that will generate useful results, identifying and contacting the target population, and reading through the raw data allows me to develop an entirely new set of skills and gives me a new perspective on the issues that I am addressing in my other research. I look forward to seeing what the future will hold in terms of empirical studies in the area of international commercial dispute resolution.

Arbitration Practice, Procedure and Policy in Historical Perspective

Carli Conklin
Associate Professor of Law
BS magna cum laude (1997), MAE (1999), Truman State University
JD (2003), MA (2003), PhD (2012), University of Virginia

Hot topics in arbitration are the frequent focus of articles and notes published in top dispute resolution journals. These hot topics include class arbitration, the role of choice in arbitration, pre-dispute arbitration agreements, and debates surrounding the constitutionality and efficacy of newly-created state-based systems of arbitration. Hot topics such as these find frequent mention not only in dispute resolution journals, but also in court cases, professional conferences and the media. While the specific question of each hot topic is distinct, the public discourse surrounding each question reveals some common themes: How ought we to resolve our disputes? Should that process be public or private? Do we have a right to initiate litigation or resolve our disputes by way of a trial? If so, may we waive those rights through contractual agreement? If we may waive those rights, is it harmful or beneficial for democratic decision-making, the development of law or the resolution of a dispute for us to do so? To what extent should arbitration adopt or mirror the procedures of litigation or the administrative functions of the court? Is arbitration, as a dispute resolution procedure, still distinct from litigation? Is arbitration effective, efficient and/or "good"?

At the heart of each of these hot topics and the debates they engender lies a single question: "What is arbitration?" To answer that question fully, and correctly, we must look beyond the Federal Arbitration Act (FAA) and explore the complexity and diversity of arbitration across American history — both before and after the FAA and at the state and federal levels. A recent federal court case on arbitration demonstrates why that exploration matters.

In 2009, the state of Delaware passed a statute that allowed its Chancery Court judges to conduct arbitrations, at the request of the parties, for businesses in conflict, where the disputed amount was in excess of $1 million. The arbitration proceedings were private. The nonprofit organization Delaware Coalition for Open Government (DelCOG) initiated litigation, declaring, among other things, that the arbitration statute was unconstitutional under the First Amendment. Specifically, DelCOG argued that the private nature of the Chancery Court arbitration proceedings violated the public's First Amendment right to open access to proceedings in court.

In the case that ensued, *Delaware Coalition for Open Government v. Strine*, the District Court entered a judgment on the pleadings for DelCOG, holding that the Chancery Court arbitration proceeding "functions essentially as a non-jury trial before a Chancery Court judge. **Because it is a civil trial**, there is a qualified right of access and this proceeding must be open to the public."[1]

The District Court's analysis here is unusual. Instead of utilizing the two-prong "experience and logic" test to determine the question of open access, the District Court simply determined that the arbitration system was comparable to a civil trial and therefore must be open to the public.

The Chancery Court judges, including Strine, appealed the District Court's decision and, in 2013, the Third Circuit affirmed. (*Delaware Coalition for Open Government, v. Strine*, 733 F.3d 510 (2013)). However, the Third Circuit disagreed with the District Court's dismissal of the experience and logic test — and it is here that history comes into play — summarizing the test[2] as follows:

> Under the experience prong…we "consider **whether the 'place and process have historically been open to the press and general public'** because such a 'tradition of accessibility implies the favorable judgment of experience.'"…In order to satisfy the experience test, the tradition of openness must be strong…. Under the logic prong…we examine **whether "access plays a significant positive role** in the functioning of the particular process in question…." [518]

The Third Circuit then applied the experience and logic test to the issues at hand, summarizing its decision as follows:

> This appeal requires us to decide whether the public has a right of access under the First Amendment to Delaware's state-sponsored arbitration program…. **Because there has been a tradition of accessibility** to proceedings like Delaware's government-sponsored arbitration [experience prong], **and because access plays an important role in such proceedings** [logic prong], we find that there is a First Amendment right of access to Delaware's government-sponsored arbitrations."[3]

[1] *Delaware Coalition for Open Government v. Strine*, 894 F.Supp.2d 493, 494 (2012) (emphasis added)

[2] *Delaware Coalition for Open Government v. Strine*, 733 F.3d 510, 515, 518 (2013), citing to *N. Jersey Media Grp*, 308 F.3d at 211 and Press II, 478 U.S. at 8 (emphasis added)

[3] *Delaware Coalition for Open Government v. Strine*, 733 F.3d 510, 512, 521 (2013) (emphasis added)

The Chancery Court judges filed cert, which the U.S. Supreme Court denied in 2014.[4]

The Third Circuit was correct in utilizing the experience and logic test to address the public access question. The Third Circuit was correct, also, in considering the history of arbitration — both "place and process" — in its analysis of the "experience" prong of that test. Where the Third Circuit went astray was in failing to consider the diversity and complexity of arbitration as it has been practiced across American history. A more complete history of arbitration would have provided a very different backdrop for the Court's analysis under the "experience" prong. Since "both experience and logic must counsel in favor of opening the proceeding to the public,"[5] a more complete history of arbitration may have led to a different outcome by the Third Circuit altogether. The discussion below provides three examples of the diversity and complexity of arbitration that were not included the Court's opinion.

Privacy of the Proceedings

First, the Third Circuit held that arbitration traditionally has been open to the public. In contrast to the Court's holding, arbitration in America historically has been a private proceeding. Arbitration has been open to the public only in part (such as through filing of the submission, publication of the award and appeal) and only through the deliberate choice of one or both of the parties (by one or both parties seeking appeal or, in the case of submission and award publication, by the advance decision of both parties to choose a form of arbitration that required filing of the submission and entering the award as a judgment of the court). These procedural realities are mirrored in policy, as the ability to resolve disputes in private traditionally (but not uniformly) has been heralded as one of the most positive benefits of arbitration as a dispute resolution proceeding.

Connections between Arbitration and the Courts

Second, the Third Circuit relied heavily on the connections between Delaware's arbitration system and the Chancery Court, concluding that the connections between the two resulted in a system that looked more like a civil trial than arbitration. Yet, what the Third Circuit failed to articulate was that arbitration traditionally was very well-connected to the courts, often adopting court practices to further arbitration goals. So, for example, in early America, judges were not prohibited from sitting as arbitrators, although a judge was discouraged from sitting as an arbitrator for a dispute that had been referred to arbitration in the midst of a case that the judge had presided over in litigation. Early American state legislatures passed statutes that specifically provided for the payment of costs and fees associated with arbitration, along the same lines as payment for court costs and fees in civil litigation. Additionally, some arbitration awards could be entered as an order of the court, the same as a judgment in litigation, and clerks were paid to file either. Once made an order of the court, the arbitration award was enforceable by the contempt power, just like a judgment in litigation. Finally, arbitrators, like Chancery Court judges, traditionally held a greater freedom to admit evidence and to determine the issues at hand under law or equity. Yet historically, not one of these similarities, nor all of them combined, transformed an arbitration proceeding into civil trial. In contrast to the Third Circuit's analysis, the two dispute resolution systems remained distinct.

The Extrajudicial Nature of Arbitration

Third, history came into play in the terminology utilized by the parties to describe arbitration place and process. "Extrajudicial" is a term broadly meaning "outside of court." DelCOG adopted the term "extrajudicial" to describe the historical practice and procedure of arbitration, but defined that term quite narrowly, arguing that the definition of "extrajudicial" was akin to something more like "outside of the courthouse." Such a narrow definition runs contrary to the diversity of arbitration proceedings across American history. Early America saw three types of arbitration proceedings: Common Law Arbitration, Statutory Arbitration and Reference by Rule of the Court. The distinctions between the three primarily lie in the timing of the submission, the relationship of the submission to litigation and enforcement of the award. When considering the extrajudicial nature of arbitration in early America, these distinctions matter.

For example, Common Law Arbitration — an interesting term adopted by early Americans to describe the custom of English arbitration that was adopted in the colonies and new American states — was extrajudicial in its entirety, and took place without any judicial oversight or involvement. Disputants submitted their dispute to arbitration prior to filing litigation and resolved their dispute without any subsequent filing of litigation or recording of the award in a court of law.

In Reference by Rule of the Court, parties to a litigated dispute chose to "refer" their dispute to arbitration for resolution, sometimes at the recommendation of the judge overseeing the litigation. Historically speaking, the law utilized different terminology (arbitration, arbitrators and award for pre-litigation proceedings; reference, referees and reports for proceedings submitted during litigation) to highlight the differences in the timing of the submission (pre-litigation for arbitration, during litigation for reference). The filing of the report as a judgment of the

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[4] *Strine v. Delaware Coalition for Open Government*, 134 S.Ct. 1551 (2014).

[5] *Delaware Coalition for Open Government v. Strine*, 733 F.3d 510, 514 (2013) (citing N. Jersey Media Grp., 308 F.3d at 213)

court and enforcement of the report occurred under the behest of a judge or clerk of the court.

Statutory Arbitration (sometimes called Reference by Statute) was created to combine the benefits of both Common Law Arbitration and Reference by Rule of the Court. Under Statutory Arbitration, disputants were able to utilize an arbitration procedure that provided the benefits of Reference by Rule of the Court (such as filing an award as a judgment of the court, with the accompanying award enforcement) alongside one of the main benefits of Common Law Arbitration, which was the ability to resort to arbitration without first commencing litigation. Thus, Reference by Rule of the Court and Statutory Arbitration, both of which were prevalent in early America, utilized several of the administrative components of civil trial, but their status as distinct dispute resolution proceedings remained.

A look at late 18th and early 19th century dictionaries, court cases, statutes and newspapers show that the terminology became incredibly mushy over time, with the terms "arbitration" and "reference" being used interchangeably. But even this mushiness indicates that, to early American disputants, lawyers, judges, legislators and policy advocates, it was not the connection to court or even civil litigation that determined whether or not a dispute resolution proceeding fit the definition of arbitration. It was something else, altogether.

Conclusion and Call for Research

The Third Circuit's decision in *Delaware Coalition for Open Government v. Strine* and the U.S. Supreme Court's later denial of cert were met with some surprise in the dispute resolution community. Part of that surprise hinged on what historically has been seen as a key distinction of arbitration, which, in contrast to the Court's understanding, is the privacy of the arbitration proceeding. Part of that surprise hinged on the Court's lack of discussion of the variety and diversity of arbitration proceedings — and their relationship to courts and civil litigation — across American history.

While a closer look at the history of arbitration might not immediately validate any given state's statutory arbitration scheme — and, for both law and policy reasons, we may not want it to — a closer look could at least ensure that the history relied upon in assessing the constitutionality of any such scheme would be accurate. Such accuracy is vital to avoiding not only misconceptions about the nature of arbitration in American history, but also the potential negative ramifications such misconceptions might hold for the future existence and stability of a variety of arbitration models for parties to choose from in resolving their disputes.

While Delaware's program appears to be a modern innovation, it shares many of the characteristics of arbitration as it had been practiced at the state level from the 1700s forward. If we want to fully understand the nature of arbitration across American history — and the experience prong of the open access test requires that we do — we ought to look beyond the more recent form of arbitration that has been practiced since the FAA and gain a more clear understanding of the diversity of arbitration practice and procedure that has existed across American history, both before and after 1925 and at both the state and federal levels.

The Center for the Study of Dispute Resolution's upcoming symposium, "Beyond the FAA: Arbitration Procedure, Practice and Policy in Historical Perspective" seeks to do just that. We invite you to join us in Columbia, Mo., on Nov. 13, 2015, to hear from our keynote speaker, James C. Oldham, St. Thomas More Professor of Law and Legal History at Georgetown University Law Center and past president of the National Academy of Arbitrators, and to join a variety of dispute resolution scholars and historians as we explore the diversity and complexity of arbitration across American history. Their findings will be published in the 2015-2016 symposium issue of the *Journal of Dispute Resolution*. For more information, please see our symposium website at: law.missouri.edu/csdr-symposium.

The symposium will be preceded on Thurs., Nov. 12, by a Works-in-Progress conference. Individuals who write on the history of dispute resolution, including, but not limited to, the history of negotiation, mediation, conciliation and arbitration, should consider submitting an abstract. For more information on the conference or to submit an abstract, please email me at conklinc@missouri.edu.

As we dig more deeply into the history of arbitration, we may be surprised to find that many of the questions underlying our "hot topics" in arbitration — *How ought we to resolve our disputes? Should that process be public or private? Do we, as U.S. citizens, have a right to initiate litigation or resolve our disputes by way of a trial? If so, may we waive those rights through contractual agreement? If we may waive those rights, is it beneficial for democratic decision-making, the development of law or the resolution of a dispute for us to do so? To what extent should arbitration utilize or mirror the procedures of litigation or the administrative functions of the court? Is arbitration, as a dispute resolution procedure, still distinct from litigation? Is arbitration effective, efficient and/or "good"? What is arbitration?* — are not entirely new. While we would not expect or desire even the most careful historical research to prescribe our answers to the very serious law and policy questions that underlie the debates surrounding arbitration's current "hot topics," we may find that a more complete view of arbitration in American history could stimulate, clarify and better inform our analysis as we, today, consider these questions anew.

On the Intersection of Insurance and Dispute Resolution

Robert H. Jerry, II
Isidor Loeb Professor of Law
BS magna cum laude (1974), Indiana State University
JD cum laude (1977), University of Michigan

One of the more prominent trends in higher education in recent years is the increase in interest in interdisciplinary teaching and scholarship. Significant growth in support from the major federal research funding agencies for interdisciplinary research is a pragmatic reason for this increase, but the underlying rationale for interdisciplinary collaboration is powerful. When scholars in two or more disciplines share and blend their knowledge, data, paradigms, perspectives and skills, the possibility of discovering new and deeper understandings and insights emerges, which in turn creates opportunities to solve problems beyond the scope and reach of the individual disciplines. The Center for the Study of Dispute Resolution (CSDR) at the University of Missouri School of Law has pursued interdisciplinary projects for many years, but more recently it decided to expand its interdisciplinary agenda by integrating its mature and robust knowledge base in the law and practice of dispute resolution with the study of another specific, distinct field of substantive law. The decision was made to pursue this agenda by placing an insurance law subspecialty under the umbrella of CSDR.

Other options existed; so why insurance law?

The Business of Insurance: Purpose, Magnitude and Worth

When I wrote the first edition of my treatise *Understanding Insurance Law*[1] over a quarter century ago, I began Chapter 1 with two sentences that summarize the reason insurance is connected, either directly or indirectly, to virtually every aspect of our daily existence: "Life is uncertain. We cannot predict with confidence what the future holds."[2] The reality is that life's events are not completely random, and we can shape the probabilities of occurrences and the course of their outcomes in many situations. But information about the future is insufficiently clear to allow us to say that we are certain whether, when or how future events will unfold. The inherent uncertainty of future events is the essence of *risk*. As explained by Peter Bernstein in his important book *Against the Gods*,[3] the breakthrough that distinguishes modern times from the preceding millennia is the recognition that risk can be managed to the ends of maximizing economic growth, technological advancement and quality of life. Our ability to imagine what might happen in the future and to choose among alternative courses in the context of predictions about the future — in other words, our ability to understand and manage risk — is fundamental to the organization of modern society. How we manage risk not only provides a lens through which the history of humankind can be explained but also ordains how the future will unfold.

The risks that concern us the most in the world are negative risks, meaning those risks that carry with them potential adverse consequences. Individuals and organizations respond to these risks with an array of risk management tools — taking action that limits the probability of loss; taking action that reduces the effects of loss should it occur; diversification strategies that hedge against the consequences of loss; and retention strategies that set aside reserves or deploy other alternative mechanisms to deal with future loss should it occur. When these tools are fully utilized, become too expensive to pursue further or are unavailable for some other reason, we have two remaining choices: to ignore risk and hope for the best, or to transfer risk to others so that the risk is either shared among partners or is distributed by third parties in markets where risk is bought and sold. The transfer and distribution of risk when other risk management strategies are exhausted or fail is the essence of the business of insurance.

Insurance is a monumentally large business, as a brief excursion into some numbers reveals. In 2013, total insurance premiums paid in the United States in the life/health insurance sector (which does not include insurers whose only product is health insurance) and the property/casualty insurance sector totaled $1.26 trillion, which equates to approximately 7.5 percent of U.S. gross domestic product and nearly $4,000 for every person living in the country.[4] Net premiums totaled $1.04 trillion,[5] and on the compensation side of the equation, $879 billion dollars in proceeds and benefits were paid.[6] In addition, of the $2.9 trillion in national health care expenditures

[1] Robert H. Jerry, II, Understanding Insurance Law (Matthew Bender, 1987).

[2] *Id*. at 9.

[3] Peter L. Bernstein, Against the Gods: The Remarkable Story of Risk (1996), at 1-2.

[4] Insurance Information Institute, The Insurance Fact Book (2015) ("Fact Book"), at 1, 2.

[5] *Id*. at 13.

[6] See *id*. at 34, 36.

in 2013,[7] approximately one-third — $962 billion — were funded by private health insurance.[8] If the importance of a jurisprudential field were measured solely by the compensatory impact of the resources that flow through its various rules and procedures, the world of insurance would completely overwhelm the world of tort.[9]

Other metrics put an exclamation point on the observation that the insurance industry is large and important. In 2013, the 6,086 companies that make up the industry[10] directly employed 2.4 million people, or 2.1 percent of the U.S. nonfarm workforce.[11] More than 2.3 million persons hold more than six million licenses to sell insurance or represent buyers in its purchase.[12] The amount of assets held and invested by U.S. insurers make the industry a major participant in domestic and global financial markets. As of the end of 2013, the life/health and property/casualty insurance sectors held $7.3 trillion in total assets, an amount approximately one-half the size of all assets held by all insured depository institutions in the country.[13] These are primarily premiums held in reserve, but $6.8 trillion of this amount is reinvested,[14] and approximately $5 trillion is reinvested directly in the U.S. economy, primarily in the form of corporate, state and local bonds where the industry is among the largest of all purchasers.[15] The $17.4 billion in premium taxes paid at the state level by insurance companies in 2013 accounted for approximately two percent of all taxes collected by the states.[16] Similar observations can be made about the global insurance industry, which has unquestioned importance to the world economy. Total 2013 world insurance premiums of $4.64 trillion represented approximately 6.3 percent of global gross domestic product.[17] Insurance is becoming much more important in developing economies; microinsurance projects have helped millions of low-income individuals in emerging markets set up businesses and purchase homes. By some estimates, more than 500 million people now have microinsurance,[18] and this number is rapidly increasing.

Yet numbers alone do not explain adequately the importance of insurance in our socioeconomic order. Indeed, no hyperbole exists in the statement that without insurance, commerce as we know it would not exist. The transfer and distribution of risk that occurs through insurance mechanisms enables entrepreneurs to convert potential losses that would otherwise deter investment into predictable costs that are manageable within a budget. When losses occur, the proceeds paid through insurance arrangements enable these entrepreneurs to obtain the facilities, goods and services needed to rebuild and restore their business activities. For some industries (the obvious ones are auto repair, auto parts, building supplies and construction), insurance proceeds are indispensable to the balance sheet. For individuals, households and families (and some organizations), insurance enables the management of risks that threaten our most cherished interests and assets. Indeed, it is hard to imagine living in a world where we could not insure the financial consequences of dying, living longer than one's years of earning capacity, suffering an illness or injury (including both the expenses of the health care system and the loss of income when disability prevents one from working), having one's property damaged or destroyed (or losing income due to damage to property upon which one's income depends), incurring liability to a third party (and the expenses of defending against claims of liability) or suffering an injury or loss in circumstances where the financial consequences cannot be shifted to the person or entity who caused it.

Points of Convergence

The business of insurance is, first and foremost, the business of providing financial security against the risk of loss. *But when loss occurs, the business of insurance becomes the business of claims processing and dispute resolution.* Because the insurance business is vast, the number of claims to be managed in resolution processes is immense. The structures of insurance claim processing stress dispute avoidance, and most claims are settled smoothly and without controversy. The sheer volume of claims run through the insurance system is so large, however, that even a small percentage of claims accompanied by friction translates into a massive number of disputed claims. Thus, it is hard to imagine an industry where dispute avoidance is more highly valued, dispute resolution rules and processes matter more or the number of occasions in which dispute resolution procedures are invoked is larger.

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[7] Centers for Medicare & Medicaid Services, Dep't of Health and Human Services, NHE Fact Sheet (2015).

[8] *Id.*

[9] The 2011 Towers Watson study on the costs of the civil tort system in the U.S. calculated total insured and self-insured tort costs in the U.S. in 2010 at $264.6 billion, or about 1.82 percent of gross domestic product. Towers Watson, U.S. Tort Cost Trends: 2011 Update, at 5. This figure included benefits paid (including those funded by liability insurance) or expected to be paid, defense costs and administrative expenses incurred by insurers or self-insured entities in administering tort claims.

[10] Fact Book at 23.

[11] *Id.* at 17.

[12] Federal Insurance Office, U.S. Department of the Treasury, Annual Report on the Insurance Industry ("FIO Report") (2013), at 5.

[13] *Id.*

[14] *Id.*

[15] Fact Book at 31, 50 ($3.5 trillion in life/health; $1.5 trillion in property/casualty).

[16] *Id.* at 24.

[17] *Id.* at 1.

[18] See generally Microinsurance Network, The State of Microinsurance (2015); Insurance Information Institute, Microinsurance and Emerging Markets (July 2015).

With the insurance world being so vast, the points at which insurance and dispute resolution converge are many; I will briefly comment on four of them.

Appraisal and Property Insurance

Appraisal provisions have been common in property insurance policies for more than a century. Today, appraisal provisions are found in many of the standard Insurance Service Organization (ISO) forms (including the personal and business auto policies, the homeowners forms, the businessowners form and the standard building and personal property coverage form, all of which are widely used by insurers in the U.S.), the standard "165 line" fire insurance policy (which is fairly described as the root of all property insurance in the U.S.), and the standard flood insurance policy forms offered under the National Flood Insurance Program.

The appraisal provision in Part D in the ISO's Personal Auto Policy (PAP), which pertains to property damage to the insured's auto, is representative of the appraisal provisions that appear in all of these forms. Under its terms, if the insurer and insured do not agree on the amount of loss, either may demand an appraisal of the loss. Each party selects "a competent and impartial appraiser," and together these two appraisers select an "umpire." The appraisers state separately the actual cash value and amount of loss; if they fail to agree, they submit their differences to the umpire. A decision agreed to by any two of the two appraisers and umpire is binding. Each party pays its chosen appraiser and splits the expenses of the appraisal and the umpire equally.

To say that the appraisal provision and how it operates in practice is important to many people is a stunning understatement. In 2013, 95 percent of the nation's 75 million owner-occupied homes were insured,[19] 4.8 percent of these were the subject of a claim,[20] and thus the appraisal provision became relevant as a process that was invoked or could be invoked on approximately 3.4 million occasions. The other major asset in most household's portfolios is one or more motor vehicles. In 2012, approximately 254 million trucks and automobiles were registered in the U.S.[21] and 192 million of these were insured.[22] Approximately 88 percent of all motorists were insured for liability,[23] and about three-fourths of this group purchased some form of property coverage for their vehicles.[24] A total of 9.9 million vehicles were involved[25] in 5.6 million property damage crashes in 2012 (1.6 million of which involved an injury to one or more persons).[26] From this, one can extrapolate that somewhere in the vicinity of seven to eight million insured vehicles were involved in crashes that produced property damage claims where an appraisal was or could have been invoked. If one were to add the other policies that include appraisal provisions to this analysis, it is fair to say that appraisal, even accounting for the many claims that are processed easily and smoothly, is a relevant consideration in claims resolution more than 10 million times each year, either as a process that is invoked to resolve the claim or as the default process that will be invoked if discussion and negotiation is unable to resolve the claim.

That appraisal provisions are designed to resolve disputes about the amount of loss is uniformly understood. But because it is binding and has the purpose of avoiding litigation, appraisal resembles arbitration, and this has led to inconsistency in how appraisal is understood and treated by courts in different jurisdictions. In some jurisdictions, appraisal has a more limited purpose (e.g., appraisers determine valuation but do not decide coverage) and other differences between appraisal and arbitration are recognized and respected, but elsewhere appraisal provisions are treated as arbitration agreements subject to regulation by state and federal arbitration statutes. Significant jurisdictional variation also exists with regard to the scope of the appraisers' authority and the circumstances in which the right to an appraisal is waived. Beyond these areas of uncertainty in the applicable law, the appraisal process has many points at which the lawyers' skills and exercise of judgment are highly relevant and potentially of great significance to the outcome of the appraisal for either the insurer or insured. These include selecting an appraiser, choosing the order of appraisal and coverage determination, determining how the panel of appraisers and umpire are instructed at the start of the process with regard to scope of authority and issues to be resolved, and deciding what response, if any, to make to a panel's decision. In short, appraisal merits serious interdisciplinary study (and improvement where possible) as a dispute resolution process.

Arbitration, Insurance (and Reinsurance)

Most general liability policies in the commercial and personal lines do not have arbitration clauses, but an arbitration endorsement is available for the standard ISO Commercial General Liability policy form, which is the general liability coverage form relied on by tens of millions of businesses in the United States. There are some indications, however, that arbitration clauses are appearing with greater frequency in commercial liability, directors

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[19] Insurance Information Institute, Homeowners and Renters Insurance (2015), at 5.

[20] *Id.* at 1.

[21] Federal Highway Administration, U.S. Dep't of Transportation, U.S. Vehicle Registrations 1990-2012 (2015).

[22] Fact Book at 76.

[23] Fact Book at 79.

[24] Fact Book at 70 (76 percent purchase comprehensive coverage and 71 percent purchase collision coverage).

[25] National Highway Traffic Safety Administration, U.S. Dep't of Transportation, Traffic Safety Facts 2012, at 79.

[26] *Id.* at 56.

and officers (D&O), employment liability, cyber liability, and errors and omissions (E&O) policies.[27]

Two important exceptions exist to the proposition that arbitration clauses are generally absent in the personal lines, and both of these are found in automobile insurance. The first is the Part B Medical Payments coverage in the ISO PAP. Under the arbitration provision included in Part B, if the insurer and "insured person" (who can be either the named insured or a third party who claims entitlement to medical payments coverage under the policy) disagree whether the claimant is entitled to recover for medical services or whether the medical services result from a covered accident, or disagree about the nature, frequency or cost of the medical services, either the person claiming benefits or the insurer "may demand that the issue be determined by arbitration." The second exception is in Part C of the PAP, which contains the uninsured motorist insurance coverage and sometimes an underinsured endorsement (which otherwise is placed in an endorsement to the policy as a whole). Part C provides that if the insurer and an insured do not agree on whether the insured is legally entitled to recover damages or do not agree as to the amount of damages, "then the matter may be arbitrated," but "disputes concerning coverage under this Part may not be arbitrated." Under the Part C arbitration provision, both parties must agree to arbitration; in that event, the PAP has provisions outlining how the arbitration panel is selected, how the expenses of arbitration are divided, where the arbitration occurs, the rules of procedure and evidence to be applied, and the binding effect of a decision agreed to by at least two of the arbitrators.

The standard crop insurance policy forms offered in the program administered by the Federal Crop Insurance Corporation (FCIC) of the U.S. Department of Agriculture also contain an arbitration provision. The importance of this line of insurance has increased to the point that crop insurance is now the most expensive of the federal government's agricultural commodity programs and has arguably become the most important pillar of U.S. national agriculture policy. In 2013, federal crop insurance policies numbered more than 1.2 million, covered more than $110 billion in crop value on more than 294 million acres and paid $6.0 billion in crop insurance proceeds to agricultural producers (after reaching a peak of $14.1 billion in 2012).[28] If a dispute arises between agricultural producer and insurer about a claim, mediation may be used to settle the dispute. If mediation does not resolve the dispute, it must be submitted to arbitration under the rules of the American Arbitration Association, except that a dispute over a "good farming practice" determination can be resolved in a court proceeding. The arbitration result is not binding; either party may seek judicial review, but failing to complete the arbitration process bars a plaintiff from doing so. Even if a plaintiff completes arbitration and seeks judicial review, before the plaintiff can recover damages or attorneys' fees a determination must be obtained from the FCIC that the private insurer failed to comply with the terms of the policy or FCIC procedures and that the failure resulted in producer receiving less than it was entitled.[29]

Reinsurance is essentially "insurance for an insurer;" it is common for an insurer to "cede" a portion of the risk it assumes to a reinsurer, so that the insurer has protection against the risk of excessive losses in its pool of insureds. Reinsurance is not the only tool available to insurers to diversify their risks, but it is the most important; without the ability to engage in their own patterns of risk management, insurers face the risk of catastrophic losses that could impair or destroy their economic well-being. In addition, reinsurance makes it possible for global insurance markets to digest and manage the largest, most complex risks on the planet, which otherwise would present themselves as impediments to economic growth. In mid-2014, one estimate placed the amount of global reinsurance capital at $570 billion, a sum that serves as a vital backstop for the $4.2 trillion in global insurance capital held around the world.[30]

Reinsurance is frequently described as a "secret" or "mysterious" world, a reputation that derives from essentially two factors. First, 62 percent of reinsurance purchased by U.S. insurance companies is sold by foreign companies and another 30 percent is sold by U.S.-based companies owned by foreign companies;[31] unlike the other parts of the U.S. insurance industry, a significant part of the reinsurance industry operates outside the glare of domestic regulation. Second, for decades arbitration clauses have been standard in reinsurance contracts and the absence of binding arbitration in a reinsurance dispute has been extremely rare. The confidentiality surrounding the resolution of reinsurance disputes through arbitration has contributed to the relative opaqueness of this realm of insurance. Although the near-universal use of arbitration in reinsurance has caused reported cases involving reinsurance to be few relative to other kinds of insurance, from the reported cases that do exist it seems clear that reinsurance arbitration raises many of the same issues that arise in arbitration generally, including ambiguity

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[27] Darren Teshima et al, *Closing the Courthouse Door to Insurance Disputes: Mandatory Arbitration Clauses in Insurance Policies Gain Traction*, Policyholder Insider (May 27, 2015).

[28] See Dennis A. Shields, Federal Crop Insurance: Background, Cong. Res. Service, Report No. R40532 (June 16, 2015), at i, 1, 3.

[29] For discussion of mediation and arbitration in the crop insurance context, see J. Grant Ballard, *A Practitioner's Guide to the Litigation of Federally Reinsured Crop Insurance Claims*, 17 Drake J. of Agri. Law 531 (2013).

[30] Aon Benfield, Reinsurance Market Outlook (July 2015), at 5.

[31] Fact Book at 3.

of the scope of issues subject to arbitration, choice of law, selection and replacement of arbitrators, consolidation of proceedings and judicial confirmation of awards. In recent years, some commentators have urged that major reforms of reinsurance arbitration are needed[32] and have observed that arbitration may be becoming less prevalent when reinsurance is sold in heavily negotiated and intensely documented transactions, as opposed to when the reinsurance is provided under a standard form.[33] All of these areas and questions merit further study.

Outside the specialized world of reinsurance, legislative and judicial reactions to insurance arbitration are not consistent. Some state statutes clearly prohibit arbitration clauses in insurance contracts, and litigation has ensured in a number of states about whether state statutory language has this effect. In jurisdictions where the state statute prohibits arbitration to resolve disputes under insurance agreements, another insurance law question arises with regard to whether the McCarran-Ferguson Act, which as a general proposition protects state insurance regulation from the preemptive effects of many federal laws, shields a state anti-arbitration statute from the preemptive effect of the Federal Arbitration Act. How these statutes interact is an important legal question, but at the core of this dispute is the larger question of whether binding arbitration provisions make good sense as a matter of public policy in insurance arrangements — and whether the answer changes depending on whether the insurance contract in question is a standardized form purchased by an ordinary consumer or a manuscript policy negotiated by sophisticated parties through their lawyers. Moreover, where a contested coverage case turns on an untested, novel question of law, as opposed to a close question of disputed fact, a public policy question exists as to whether the dispute is best resolved in a confidential arbitration proceeding shielded from judicial review, or alternatively, in a public proceeding, which enables a market where policy forms can be sharpened and clarified, and where mistaken legal judgments can be corrected through judicial review.

Dispute Resolution and Mass Disasters

Another convergence of insurance and dispute resolution where the public policy ramifications are enormous involves the increased risks of catastrophic losses through natural disasters. The devastating impacts of hurricanes, earthquakes, volcanic eruptions, floods, tsunamis, tornadoes and other natural disasters are well known, and future catastrophes are certain to occur, even if their timings are uncertain. For some of these risks, the potential for loss has expanded due to the increased concentration of persons and property in locations where these events are most likely to occur. This is particularly true with respect to the hurricane risk, given that population and property are highly concentrated on the U.S. coasts from New York to Texas and that sea levels are expected to rise over time. In Florida, for example, 79 percent of the state's total insured property was located on the coasts in 2013;[34] if the hurricane that made landfall in Miami in 1926, crossed the Gulf and made landfall again on the Alabama coast were to occur today, it would produce losses of approximately $132 billion in 2015 dollars.[35] Hurricane Sandy, which caused losses of $19 billion along the eastern seaboard in 2012, and Hurricane Katrina, which in 2005 caused losses of $49 billion,[36] provide a glimpse into the consequences of future weather events. The economic devastation that accompanies mass disasters creates enormous insurance claims processing and dispute resolution challenges, and at least eight states[37] now have significant experience with mediation programs for property insurance disputes after hurricanes or other natural disasters. Now is the time for thoughtful study and design of dispute resolution systems that will effectively address mass disasters in the future.

Dispute Resolution and Health Insurance

Health care finance and access in the U.S. is a subject of enormous scope and complexity. The massive government presence in health care as both a provider and insurer makes this field of insurance different from any other, and the risks insured differ in many ways from those covered in other lines of insurance (e.g., much health insurance covers nonfortuitous services, such as preventive care, unlike other lines of insurance where an accidental loss of some kind is a predicate for coverage). But, as noted above, private insurance plays a huge role in financing health care services, and private health insurance itself is larger in volume than any other insurance product. In addition, the arrangements among hospitals, physicians, physician groups, insurers, billing companies, laboratories, pharmaceutical companies, medical equipment companies, nursing homes and other residential care facilities, and networks of all or some of the above are exceptionally complex. With historic changes sweeping through the health care world, it should surprise no one that disputes between and among these parties are increasingly

[32] See, e.g., Robert M. Hall, How Reinsurance Arbitrations Can Be Faster, Cheaper and Better (Revisited) (2011); Linda Dakin-Grimm & Mark B. Cloutier, *Coming of age: arbitration — the reinsurance industry's method of settling contract dispute — is no longer effective and needs an update*, Best's Review, Sept. 1, 2003.

[33] See Victor Fornasier, *What the future holds for reinsurance arbitration clauses*, *Hogan Lovells Global Insurance Blog*, reprinted from Global Reinsurance Magazine, Aug. 14, 2014.

[34] Fact Book at 99.

[35] Fact Book at 148 (2011 dollars adjusted to 2015).

[36] Fact Book at 144 (2013 dollars adjusted to 2015).

[37] The states are California, Florida, Hawaii, Louisiana, Mississippi, New Jersey, New York and North Carolina. For more discussion, see Robert H. Jerry, II, "Dispute Resolution, Insurance, and Points of Convergence" (forthcoming)

common. Mediation and arbitration have become the favored dispute resolution mechanisms in the health care industry. With respect to the relationship between the patient and the insurer, disputes can involve a denial of coverage for medical care received, a refusal to authorize a procedure or referral, or an incorrect charge for services received. Inefficient dispute resolution systems, regardless of where in the health care system they operate, add costs to the health care system, and increased costs ultimately compromise access to and quality of health care, or both. Thus, here too is area where the fields of insurance and dispute resolution converge and where the issues are primed for further exploration.

A Concluding Thought

In every area of law, justice promised by substance is meaningless if it cannot be delivered through process. The business of insurance is first and foremost the business of providing financial security against the risk of loss, but when loss occurs, the business of insurance becomes the business of resolving claims. The core of the bargain in an insurance contract is security, but without efficient and effective dispute resolution processes, security is lost and the important functions of insurance fail. Many issues in law and jurisprudence deserve our serious study and attention, but there can be no doubt that the points at which insurance and dispute resolution converge are among them.

The Overlap of Intellectual Property, Entrepreneurship and Dispute Resolution

Dennis Crouch
Co-Director of the Center for Intellectual Property & Entrepreneurship and Associate Professor of Law
BSE cum laude (1997), Princeton University
JD cum laude (2003), University of Chicago

In 2015, the University of Missouri School of Law expanded to include a new Center for Intellectual Property & Entrepreneurship (CIPE) to operate alongside its more well-known sibling — the Center for the Study of Dispute Resolution (CSDR). Professor James Levin and I are co-directors of CIPE and we are also members of the CSDR. A major portion of the new center's focus is on student training and community outreach — including a new Entrepreneurship Legal Clinic led by Professor James Niemann. The new center is also designed to operate as an incubator for academic ideas and research. Toward this end, the University of Missouri School of Law's *Journal of Dispute Resolution* recently hosted a major symposium focusing the resolution of intellectual property disputes. A second general focus is on how regulation and governmental intervention (including government granted intellectual property rights) impact small business and start-up development.

For this short essay, I wanted to write about a few ways that my research in intellectual property law is overlapping with that of dispute resolution. Patent rights are designed as a policy tool to encourage innovative research and development. Unlike monetary grants or tax breaks for innovation, no taxpayer money goes toward paying for the innovations. Rather, the patent incentive operates by offering an exclusive right to the first inventor to file for patent protection. Although patents can be licensed or transferred, the exclusive right is ultimately enforceable through litigation in federal court. Many complain that the patent system is not worth its costs. In a recent essay, *The Economist* argues that it is "time to fix" the "rotten" patent system with the primary culprits being patent trolls gaming the system and large incumbents seeking to lock in their market positions. These anti-patent arguments are not new. In fact, *The Economist* made similar arguments in a parallel 19th century essay on the topic where it called for abolition of the system altogether.

Arbitration of Patent Disputes

The first of my ongoing projects involves the arbitration of patent disputes. Although we know that parties do regularly arbitrate patent disputes, very little has been written about the topic and so it remains somewhat shrouded. The first portion of this project is largely descriptive — uncovering the extent to which patent rights are arbitrated and the reasons why parties choose to (or choose not to) arbitrate their patent rights.

One difficulty with patent dispute arbitration is that some countries (other than the United States) tend to disfavor arbitration of patent rights — finding that the public nature of patent rights should prohibit privatized litigation. This idea of a public right stems from the nature of patent infringement. Infringing a patent really means using an idea that someone else claimed first. Patent infringement is ordinarily a strict liability claim and so a defendant can still be held liable even if she had never even heard of the patent's existence prior to being sued. Likewise, infringement does not involve actually taking any "thing" from the patent owner — in sharp contrast to claims associated with real or personal private property. And, in the background, our culture begins with the notion that ideas should be free for anyone to use — except when limited by the intellectual property system. Taking all of this together helps explain why many countries reject the full privatization and secrecy that can come with arbitration.

The hodgepodge of international rules means that global patent disputes cannot be fully resolved through arbitration. Thus, as with patent infringement actions, patent arbitration proceedings often go country by country rather than fitting within the norms of international commercial arbitration.

The U.S. regime does support arbitration of patent disputes. However, the United States has similar concerns regarding the public nature of patent rights and therefore requires that any arbitration award involving a patent's validity or infringement must be submitted to the U.S. Patent Office. That award becomes a public record tied to the associated patents. As a penalty, the statute provides that the arbitration award is unenforceable until the required notice is submitted to the office.

Oddly, although the provision requiring submission of arbitration awards was added to the statute more than 30 years ago, the patent office has no record of a patent arbitration award ever being submitted. I am working to uncover the reasons arbitration awards are not being received.

Generally, most arbitrations rely upon a predispute arbitration agreement that is invoked during the dispute. Once a dispute arises, at least one party (typically the plaintiff) recognizes that in-court litigation offers strategic advantages over arbitration and thus would refuse to enter an arbitration agreement at that point. In many ways,

patent litigation fits this usual norm — plaintiffs believe that they are more likely to win before a jury and that the jury is more likely to award higher damages than would an arbitrator. My work on this topic explores this bias against arbitration in the patent system and particularly explores some benefits of arbitration for patentees. One example of this private benefit of arbitration is that it reduces the collateral exposure of an invalidity finding by the arbitrator.

Modeling Patent Prosecution as a Negotiation

Several years ago, I advised one of my students, Jaron Brunner, on an interesting project of modeling the patent prosecution process as a negotiation. Brunner's interest-based approach fits well with contemporary negotiation theory. In an ongoing project, I am working toward considering how the reality that Brunner described may be leading toward the systematic issuance of "bad patents." These bad patents are ones that never should have been issued because they fail to meet the legal requirements — being too broad, too indefinite or too limited in their disclosures. A key to understanding this problem is to recognize that the negotiators in the prosecution process are typically only proxies for the underlying stakeholders and that the interests of the proxies often diverge from the stakeholder. This is especially true for patent examiners whose ultimate job (in the negotiation model) is to serve as the chief negotiator on behalf of the American public that will be harmed by the improper issuance of a patent. Interestingly thought, it is illegal for any third party stakeholder to communicate directly with an examiner in an attempt to explain his interest in ensuring that any patent that is issued is properly issued. Rather, patent examiner incentives appear largely driven by quotas and performance reviews that are only loosely tied to patent quality.

The notion of tying the interests of proxy negotiators to those of the underlying stakeholders is well developed in the field. My hope here is that we will be able to apply those theories in the patent system in ways that will have needed positive impacts on the quality of resulting patents.

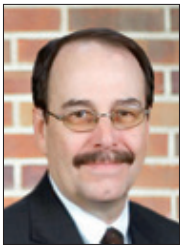
Facilitating a Market for Patent Rights

Good negotiators often look for ways to convert disputes into opportunities. Instead of taking a one-off, dispute-by-dispute frame of reference for this third project, I am researching ways to broadly convert the patent infringement litigation mentality into one focused on a market for patent rights. A market-focused approach has the potential of providing more returns both for patentees and licensees and avoid the undue and excess costs of patent litigation. However, numerous roadblocks exist in this endeavor. Most notable of these is likely the high cost and broad uncertainty associated with patent valuation. While real property valuation estimates may vary a few percentage points, expert patent valuations often differ by 1,000 percent or more. Further, the valuation must incorporate an inherent potential that the patent will be later invalidated either by a court or by the patent office. These difficulties (and others) mean that the market for patents will never be as liquid as the real estate housing market. However, my hope is that small improvements can help us reach a tipping point where negotiations become a standard of the patent law culture at least as much as infringement litigation is today.

It is an exciting time to be working in the areas of dispute resolution, intellectual property and entrepreneurship. For me, the merger of these areas offers challenges but also new frameworks for addressing existing problems. I am especially interested in the tools developed by dispute resolution and how they can apply in the intellectual property and entrepreneurship contexts.

On the Media's Portrayal of Arbitration

Robert G. Bailey
Assistant Dean Emeritus
BA (1968), Marist College
JD (1979), University of Missouri



Gil Vernon
Arbitrator, Past President of the National Academy of Arbitrators
BA (1972), Hope College
MA (1979), University of Chicago

Rafael Gely
Director of the Center for the Study of Dispute Resolution
James E. Campbell Missouri Endowed Professor of Law
BA cum laude (1984), Kansas State University
AM (1987), JD (1987), PhD (1991), University of Illinois

Introduction

In the winter of 2014 the National Academy of Arbitrators (NAA) and the Center for the Study of Dispute Resolution (CSDR) initiated conversations about a possible collaboration involving the development of a neutral, noncommercial and comprehensive website about labor arbitration. The NAA, founded in 1947 as a not-for-profit honorary and professional organization of arbitrators in the United States and Canada, was concerned about the manner in which labor arbitration and the arbitration process were being portrayed in the media. Media reports on labor arbitrators putting back to work "incompetent teachers" or reducing discipline imposed on "corrupt police officers" have appeared in media outlets for years and were concerning enough by themselves. With the expansion of the use of arbitration outside the labor area, particularly in consumer and employment disputes, critical descriptions of the process have reached an alarming level. While some of these criticisms in these other areas may have been justified, the NAA feared that such criticism would spill over and have a delegitimizing effect with regard to labor arbitration.

In response to these concerns, the NAA partnered with the CSDR to develop a website with the purpose of providing information to the public, journalists and professionals about the law and practice of arbitration. While preparing to develop the website, the NAA and the CSDR engaged the services of students from the School of Journalism at the University of Missouri. As part of a capstone project, the students conducted market research to help the project partners better understand how to reach the intended audiences of the website project and what information to provide. The website is currently in the development stage with an expected public availability in January 2016.

A Research Opportunity

The website project generated a number of interesting discussions among the project collaborators regarding the media's reporting of arbitration and other dispute resolution processes. For instance, we became intrigued about the type of statements that we were observing in media reports about arbitration. There seemed to be a fundamental lack of information about the process itself. Arbitrators were described not as neutrals, but more as advocates for labor unions or for employers. Some descriptions suggested that the process itself was less than intellectually rigorous with arbitrations being described as "splitting the difference" without giving much thought to the matter. Little attention was given to the context of the dispute, such as the terms of the agreement that labor arbitrators were being asked to interpret. And seldom was a distinction made between different types of arbitration.

These conversations prompted us to begin exploring whether there were some generalizations we could make about the manner in which labor arbitration was being portrayed in the media. While our interest was primarily with regard to labor arbitration, we soon realized that some of the issues we were raising might be relevant to other forms of arbitration. We began by looking at the literature in the fields of communications and journalism for guidance. Two streams of literature seemed particularly relevant. There exists fairly robust academic literature analyzing the way in which litigation and the judicial process are reported by the media. There is also extensive literature on the reporting of conflict in the media. These two lines of research provide us with the foundations for understanding how the media understands arbitration and other alternative dispute resolution processes. Below we briefly summarize some of the existing literature and suggest a number of research topics that might be relevant to the media covering arbitration.

Alternative Frames

Scholars have recognized the importance of framing in studying media reports. News framing refers to the selection of which aspects of a story are reported and the

decision to make them "more salient in a communicating text, in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation for the item described."[1] Frames "inform the public about what the essence of the issue is, what the controversy is about — in short, they are constructions of the issue."[2]

At least two competing frames have been identified in the reporting of courts and the judicial process. A common frame is the "contest" frame. In the contest frame the focus is on the outcome of the story. In particular, the reporting focuses on who wins and by how much. There is little attempt to explain the "game" itself or provide context for understanding how and why the game is played. The contest frame tends to equate the courts (particularly the United States Supreme Court) with the other "openly political" branches, such as Congress and the president. As such, this frame tends to be more adversarial, with journalists adopting a more challenging, aggressive and critical stand of the judicial process.[3]

An alternative frame can be termed the "due process" frame. This frame is more contextual and gives deference to the judiciary as an institution. When reporting on the United States Supreme Court, for example, such reporters tend to focus on the legal context of the dispute, quote more extensively from the opinions of the justices and provide a more nuanced description of the legal issues involved in the case. Unlike the contest frame, the due process frame usually portrays courts as apolitical and judges as "philosopher kings — apolitical oracles of the Constitution and the law."[4]

Picking a Frame

Existing research identifies several factors which seem to influence the choice news outlets make when reporting on any given story. In the context of the frames described above, four factors have been identified as relevant: the medium, the reporter, the nature of the proceedings, and the nature and saliency of the dispute being reported.

The Medium

Newspaper and broadcast media are obviously very different media, and thus not surprisingly, scholars have found that stories are reported very differently in those two media. Newspapers and magazines have in general the capacity of allocating more space to any given story and are less concerned generally about the entertainment value of the story. In their analysis of media coverage of the U.S. Supreme Court, Spill & Oxley find, for example, that as compared to broadcast media, newspapers covered a larger number of stories about Supreme Court decisions, tended to present more information about the cases and were less likely to report on the political implications of the cases.

Interestingly, the traditional differences between print and broadcast media might be less significant in the context of online delivery of news. Online content combines features from both print and broadcast, making the traditional tradeoff between content and entertainment less significant.

Not only have differences been identified between newspaper and broadcast media, but also among different kinds of newspapers. Clawson, et. al,[5] explore the differences on how the mainstream media and the black press covered an important 1995 decision by the U.S. Supreme Court on the subject of affirmative action (*Adarand Construction*, 515 U.S. 200 (1995)). They found that as compared to the mainstream print media, the black press gave greater coverage to the implication of the decision, was more critical of Justice Clarence Thomas and sought to provide greater voice for a pro-affirmative action perspective.

The Reporter

Not only do the differences across outlets matter in how a story is reported, but as one would expect, the type of reporter does as well. In the context of reporting on courts and on judicial proceedings, differences in reporting have been identified between reporters who are primarily or exclusively assigned to report on the courts (i.e., the legal beat reporters) and non-court reporters. Spill and Oaxley found that court reporters were more likely to focus on the history of the issue and the justification for the court's decision, while non-court reporters were more likely to report on the political implications of the court's decision. Non-court reporters, they noted, were more likely to "fall back on familiar story lines" such as those used in covering political institutions.

Nature of the Proceedings

Frame selection seems to also be influenced by the specific court or type of legal proceeding being covered. While all judicial proceedings are matter of public record, and thus generally available to the public, there is a perception that some proceedings are more public than others. For example, because of the increased availability of trial proceedings through television or internet livestreaming, the public is likely to perceive the trial process as more available and public than the decision-making process

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[1] See Douglas M. McLeod, *News Coverage and Social Protest: How the Media's Protest Paradigm Exacerbates Social Conflict*, 2007 J. of Dispute Resolution 185, 186)

[2] See Rosalee A. Clawson, Harry C. Strine & Erin Walternburg, *Framing Supreme Court Decisions: The Mainstream Versus the Black Press*, 33 J. of Black Studies 784, 785 (2003).

[3] Bryna Bogoch & Yifat Holzman-Gazit, *Mutual Bonds: Media Frames and the Israeli High Court of Justice*, 33 Law & Social Inquiry 53 (2008)

[4] See Rorie I. Spill & Zoe M. Oxley, *Philosopher Kings or Political Actors: How the Media Portray the Supreme Court*, 87 Judicature 23, 25 (2003).

5 Clawson at 768.

of the courts of appeal. In fact, scholars have argued that the perceived secrecy of the inner workings of the U.S. Supreme Court has made it easier for the Court to perpetuate the Court's apolitical image and thus for reporters using the due process frame to tell their stories.

Nature and Saliency of the Dispute

In his discussion of the different coverage given to criminal as compared to civil litigation, Haltom points out that civil litigation tends to receive less coverage than criminal litigation and that the coverage it receives tends to emphasize discussion of inputs (e.g., public filings) and outputs (public statements about the decisions), over almost every other aspect of the litigation. Haltom attributes this to various characteristics inherent to civil litigation: the fact that it involves private matters (as compared to criminal litigation which involves the state against an individual), and the fact that civil cases tend to be about more mundane and technical matters than even the most ordinary criminal case.[6]

Not surprisingly, communication research also indicates that media coverage tends to focus on certain issues more than others. As mentioned earlier, in general criminal cases are more frequently reported than civil matters. This tendency is apparent even at the U.S. Supreme Court level, with coverage overemphasizing civil rights and criminal cases as compare to the composition of other types of cases on the Court's docket.

Importantly, there are exceptions. Haltom notes that while civil litigation tends to receive less coverage than criminal litigation, "the usual indifference of mass media toward civil litigation can be overcome if stereotypes have so suffused the population that news media have news hooks to expand stories that they would normally morselize or ignore."[7] Certain stories, thus, might fit nicely into a broader narrative, which might "force" the media to report on them. There are, however, a couple of implications of this phenomenon. First, because the disputes that break through the default reluctance to cover certain type of stories by definition are exceptional, they are unlikely to provide the public with an accurate picture of the matter under discussion. Second, this in turn makes it easier for the media to overemphasize certain features of the story that tend to reaffirm the particular narrative the media wants to portray.

Framing Arbitration

What does the existing research tell us about the way in which the media might report arbitration proceedings? Will reporters discussing arbitration fall back on existing frames or will they seek to develop new frames? If they were to rely on existing frames, what does the research tell us about which frames are most likely to be adopted?

We first note that we recognize the differences between the judicial context and arbitration. While arbitrators judge by rendering decisions, they are not members of the judiciary. While disputes in arbitration get adjudicated, clear differences exist between arbitration and judicial processes (e.g., less formal application of the rules of evidence). Thus, while the existing literature provides us with a starting point, a number of interesting theoretical and empirical questions need to be asked and answered. Although our initial focus is on labor arbitration, we recognize that major differences exist between different types of arbitration and those differences might affect the way in which media stories about arbitration are framed. With that in mind we offer the following preliminary hypothesis.

Arbitration stories are more likely to be reported in newspapers as opposed to the broadcast media. With regard to the media in which stories about arbitration are reported, our initial expectation is that such stories are much more likely to be reported in newspapers (whether in print or online) as opposed to the broadcast media. We expect that with the exception of perhaps a discussion about international treaty-based arbitration (e.g., the recent reports about investment bilateral treaty arbitration), or perhaps reports of arbitration involving professional sports, most other reports about arbitration are unlikely to reach the national broadcast media. It is possible though that local broadcast media might pick up stories about salient labor disputes, particularly those involving the public sector, or disputes arising out of a major local strike. On balance, however, we expect that the larger proportion of reports will appear in newspapers.

Arbitration stories are more likely to be written by non-labor/non-court reporters, who will adopt frames consistent with their primary areas of expertise. When Steven Greenhouse announced that he was stepping down as the *New York Times* labor reporter, the number of reporters in major U.S. newspapers covering labor on a full-time basis decreased by 50 percent.[8] This decline, which started decades ago, is perhaps not surprising given the decline in the percentage of the labor force that is represented by unions and the financial pressures facing newspapers and news magazines. To the extent that coverage of labor arbitration was part of the labor reporter's bailiwick, one would expect that with the reduction in the number of labor reporters, the reporting on labor arbitration in particular has been passed down to other reporters. Several media outlets have shifted the coverage of labor-related issues to other reporters in the newsroom ranging from reporters covering housing

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[6] William Haltom, Reporting on the Courts: How the Mass Media Cover Judicial Actions, (1998).

[7] *Id*. at 220.

[8] Timothy Noah, *Does the Media Care About Labor Anymore?*, *Politico.com*, Dec. 4, 2014, www.politico.com/magazine/story/2014/12/labor-coverage-decline-113320.html#.VcOwfPlViko.

issues and income inequality issues to those covering business affairs in general.[9]

What do these changes mean for covering arbitration? Like their court reporter counterparts in the context of coverage of the judicial process, one would expect that labor reporters were more likely to adopt something similar to the due process frame when covering labor arbitration disputes. That is, they might be more inclined to focus on the content and context of a dispute, and conveying to the public the nuances associated with the arbitration process. To the extent that coverage is shifting to other reporters the frame is likely to change. As non-court reporters, reporters less familiar with the collective bargaining and arbitration processes might "default" into other frames with which they are more familiar. For instance, business reporters might frame stories from what has been referred to as the "consumer-oriented" approach.[10] This frame places consumers at the center of the story, advocates for leaving the production process in the hands of business, gives preeminence to the role of entrepreneurs in generating economic activity, describes the workplace as a meritocracy and generally describes collective economic action as detrimental. One would expect that under this frame, the arbitration process will be portrayed as part of the vices associated with the collective bargaining process and thus portray the process in a less favorable light. Similarly, reporters focusing on issues like income inequality might focus on the anti-consumer/anti-employee angles of consumer and employment arbitration respectively. This focus could also likely result in negative stories about the nature of arbitration.

With a few exceptions, the private nature of arbitration will likely create a vacuum of information which reporters will likely fill with information consistent with the frames with which they are more familiar. By its very nature, and with very few exceptions, arbitration proceedings are private and confidential. In fact, one of the commonly touted advantages of arbitration compared to litigation is the ability of the parties to keep the proceedings private and confidential. Reporters are in the business of providing information and when first-hand information is not available, they will look for other sources to fill the vacuum. While news frames do not themselves provide the missing information, they certainly influence the sources where reporters look for information and the manner in which that information is reported.

In the context of the U.S. Supreme Court, the "secrecy" surrounding the proceedings has contributed to the narrative of the court as an apolitical institution. What narrative will fill the vacuum of information about the arbitration process? To the extent that the contest frame tends to dominate coverage, one would expect that the focus will be on winners and losers with scant information about context. To the extent that the "labor" frame described by Martin predominates, arbitration might be seen as an instrument of labor unions. To the extent that the inequality frame controls, arbitration might be seen as an instrument of corporations to continue to control vulnerable employees and customers.

As in the case of civil litigation, arbitration stories are generally underreported, except in disputes of high saliency. The private nature of arbitration proceedings is likely to have additional implications. Like civil litigation, most forms of arbitration involve exclusively private matters and often involve breach of contract disputes. These types of disputes tend to be relatively mundane and technical and less likely to be newsworthy and thus likely to be unreported, except of course when the story becomes salient.

In the context of labor arbitration, saliency might be driven by geography. While most readers might care little in general about an arbitrator ordering a school district to reinstate a school teacher accused of some serious misconduct, where the school failed to follow the disciplinary procedure agreed to in the collective bargaining agreement, those readers might feel differently if their children are attending that school district.

Reporters who are put in a position to cover a story that tends in general to be underreported might lack the necessary information to provide a comprehensive analysis of the dispute. Because the event may be an isolated occurrence, they will lack the incentive to educate themselves on the issue and instead will be more likely to use their familiar frames.

There is another implication of the underreporting of arbitration proceedings, except for those which, for some reason, become salient. To the extent that only unusual cases are being covered, those cases will become the norm in the public's mind. In the context of civil litigation, the multi-million dollar McDonald's hot coffee spill case serves as an example.[11] Even though the story is complicated, and the plaintiff's recovery was not in the millions of dollars, the story became the poster child for proponents of tort reform. In the arbitration context, one would expect that stories about what seems like "bad" employees (e.g., the substandard teacher, the abusive police officer) being reinstated, are likely to receive attention and become the story through which arbitration practice is portrayed.

Conclusion

Arbitration has become and will continue to be a permanent feature of the U.S. legal landscape. Nearly 500 million contracts include arbitration clauses and tens of thousands of arbitration proceedings may be conducted

[9] David Uberti, *The Labor Beat is Dead; Long Live the Labor Beat*, Columbia Journalism Review, March 12, 2015, www.cjr.org/analysis/when_longtime_labor_reporter_steven.php.

[10] Christopher R. Martin, Framed! Labor and the Corporate Media, (2004).

[11] Haltom at 223.

every single year. The ubiquity of arbitration provisions makes it important for those involved in arbitration — neutrals, service providers and advocates — to pay some attention to how the process is understood by the public. The media clearly plays a crucial role in the process of informing the public about arbitration and in developing the narrative about the value of arbitration. The NAA and the CSDR seek to contribute to this conversation through the development of an educational website with information about arbitration. Our understanding of the relationship between the media and the arbitration process is in its fairly early stages. As we continue our collaboration, we also seek to contribute to the development of research exploring the way the media talks about arbitration. We encourage other scholars to join us in this effort.

Faculty
of the Center for the Study of Dispute Resolution at the University of Missouri School of Law

Robert G. Bailey
Assistant Dean Emeritus
BA (1968), Marist College
JD (1979), University of Missouri

Carli N. Conklin
Associate Professor of Law
BS magna cum laude (1997), MAE (1999), Truman State University
JD (2003), MA (2003), PhD (2012), University of Virginia

Dennis D. Crouch
Co-Director of the Center for Intellectual Property & Entrepreneurship and Associate Professor of Law
BSE cum laude (1997), Princeton University
JD cum laude (2003), University of Chicago

Brad M. Desnoyer
Associate Professor of Legal Research and Writing
BJ with distinction (2006), JD with distinction (2009), University of Missouri

Angela K. Drake
Director of the Veterans Clinic and Instructor
BA (1982), College of St. Thomas
JD (1985), University of Minnesota

Rafael Gely
Director of the Center for the Study of Dispute Resolution and James E. Campbell Missouri Endowed Professor of Law
BA cum laude (1984), Kansas State University
AM (1987), JD (1987), PhD (1991), University of Illinois

Chuck Henson
Associate Dean for Academic Affairs and Trial Practice Professor of Law
BA (1987), Yale University
JD (1990), Georgetown University

Robert H. Jerry, II
Isidor Loeb Professor of Law
BS magna cum laude (1974), Indiana State University
JD cum laude (1977), University of Michigan

Paul Ladehoff
Director of the LLM in Dispute Resolution Program and Director of the MU Campus Mediation Service
BS with distinction (1986), University of Nebraska
MA (1988), University of Michigan
JD with distinction (1994), University of Nebraska

John Lande
Isidor Loeb Professor Emeritus of Law
AB with high distinction (1974), University of Michigan
JD (1980), Hastings College of Law (University of California)
MS (1991), PhD (1995), University of Wisconsin-Madison

Ilhyung Lee
Edward W. Hinton Professor of Law
BA (1983), University of Maryland
MA (1985), Washington College
JD (1988), Boston College

James Levin
Co-Director of the Center for Intellectual Property & Entrepreneurship, Associate Director of the Center for the Study of Dispute Resolution and Director of the Mediation Clinic
BA summa cum laude (1980), Macalester College
JD (1986), Northeastern University

Carol D. Newman
Associate Professor of Law
AB (1971), Sweet Briar College
PhD (1981), University of North Carolina at Chapel Hill
JD (1985), Duke University

Richard C. Reuben
James Lewis Parks Professor of Law
BA magna cum laude (1979), University of Georgia
BA (1982), JD (1986), Georgia State University
JSM (1996), JSD (1996), Stanford University

S.I. Strong
Manley O. Hudson Professor of Law
BA cum laude (1986), University of California, Davis
Master of Professional Writing (1990), University of Southern California
JD (1994), Duke University
PhD (2002), University of Cambridge
DPhil (2003), University of Oxford

Rodney J. Uphoff
Elwood L. Thomas Missouri Endowed Professor Emeritus of Law and Director of the University of Missouri South Africa Educational Program
BA summa cum laude (1972), University of Wisconsin-Madison
MS (1973), London School of Economics
JD (1976), University of Wisconsin-Madison

Christina E. Wells
Enoch H. Crowder Professor of Law
BA cum laude (1985), University of Kansas
JD with honors (1988), University of Chicago

School of Law

University of Missouri