

Dispute Resolution: Comparisons

A discussion of alternative dispute resolution approaches, their values and philosophies

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The discussion surrounding alternative methods of dispute resolution evokes images of the ballyhoo about Cinderella's celebrated slipper: sometimes, there just isn't a good fit. Frequently, myopic attention to the method obscures the central focus, which is to resolve the dispute. Effective dispute resolution requires an honest appraisal of the parties' expectations from the process. For example, is finality really desired? Is cost *really* a factor, if an important principle is at stake?

Two issues can facilitate the choice of method for resolving a dispute. These are: What do the parties want from the dispute resolution process, and when should they decide on a method? The answer to the first question ("how to decide") is determined by several factors:

- *Who* should decide (judge, jury, arbitrator, or the parties).
- *What* should be decided (all or just a part of the issue).
- *Where* should the dispute be resolved (the forum where either the plaintiff or the defendant resides, or some "neutral" area).
- *When* should the matter be resolved (promptly or after some time has elapsed).
- *Why* should the matter be resolved (to reaffirm an important principle or merely to determine the amount of damages).

The second issue ("when to decide") is fairly simple. If the parties can agree *in advance* on (a) the types of problems that might need to be resolved, and (b) what method(s) might resolve them to their mutual satisfaction, then several matters will have been accomplished. A mechanism to *resolve* disputes will have been established, which can be implemented promptly when disputes arise. More importantly, a proclivity to *avoid* disputes will have been created, because the knowledge that disputes will be resolved in a mutually satisfactory manner frees the parties to concentrate on their agreement.

Choice of Method

Leaving the choice of method until *after* the dispute arises can cause additional problems. The parties have the commercial dispute itself to resolve, and then also may

face a dispute over the means of resolution. Having more problems to solve rather than fewer obviously is counterproductive to the process, and the parties need to consolidate their resources, not dissipate them. The advantage to delaying the choice, however, is that the parties can particularize the mechanism to the specific dispute. By choosing a method prior to the dispute, the parties may not be able to tailor the resolution device to the matter which must be resolved.

A comparative approach to the study of dispute resolution alternatives indicates that all legal systems—Western, Eastern, common law or civil code—have many of the same attributes. For example, all share litigation and arbitration and each has a formal method for dispute resolution with essentially the same characteristics:

- State operated or sanctioned.
- Established procedural rules.
- Codified substantive laws.
- Appellate review.
- Enforceable results or awards.

These same systems also have in common less formal, more pragmatic methods of dispute resolution:

- Capitulation, whereby the dispute is resolved by one party's conceding to the other.
- Negotiation, whereby the parties amicably resolve their differences by themselves without reference to a third party.
- Self-help, which is a variant of capitulation, whereby one party resolves the dispute by forcing the other party to concede its position. (This is sometimes referred to as the "Bruno" method, as in "Give me what I want, or I'll send Bruno to break your legs.")

Where these various systems differ is in the value which each places on the participants, the process and the product. For example, *who* can participate may be determined by societal values preferring party control rather than judicial involvement. Some societies may encourage non-judicial resolution of disputes by making the judicial process itself lengthy or cumbersome. Lastly, some systems place greater emphasis on "win-win" results, rather than on "win-lose."

Comparison

Some distinct differences emerge by comparing Eastern and Western systems. In simplified terms, Western systems are comprised of common law and civil code jurisdictions. Elements of the former include party-initiated action and judge-made law, while those of the latter include more judicial involvement and code law. The elements they have in common are certainty of process, finality of result, and societal dualism (God/man, winner/loser, saint/sinner).

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Eastern systems, on the other hand, are comprised of Middle Eastern and Far Eastern societies. The former includes both law courts and religious court-like committees, while the latter includes law courts and nonjudicial mediation commissions. Their common elements, and the ones that mark the significant differences from their Western counterparts, are an emphasis on the *process* of dispute resolution rather than on the *product*, on compromise (as opposed to finality), and on societal harmony (the individual as part of society and the need to reintegrate with society those who transgress societal values or upset the harmony).

By understanding these differences, potential disputants can better understand (a) their own proclivities to certain methods for resolving disputes, (b) their adversary's resistance to those methods and preference for others, and (c) how to decide upon the right method for their particular problem. Discovering the roots of these differences can be especially helpful in facilitating such understanding.

The central concept of Western-style legal systems can be summarized by the phrase: "*Fiat justitia pereat mundus*" (Let justice be done though the world be destroyed). Even the use of Latin to express the thought reinforces the solemnity with which Westerners regard dispute resolution. This idea of "justice" was brought into focus by the Talmudic religion of the Jews (Moses), was given its rationale by the philosophy of the Greeks (Aristotle), and was codified by the laws of the Romans (Justinian). As Aristotle remarked: "If all men were friends, justice would not be necessary." This system presupposes that, without due process of law, in which judgment is rendered by a fair, objective and preferably pitiless evaluation of the facts, justice cannot be done. This system depends on a societal feeling of some transcendent universal rightness, a divine lawgiver and the supremacy of the individual conscience free to choose heaven or hell. This "lawfulness" is merely the modern embodiment of Moses' Ten Commandments ("Thou shall/shall not . . ."), Christ's Sermon on the Mount ("Blessed is he who hungers and thirsts after justice"), and Justinian's Code.

In summary, Western societies, whether based on common law or civil code legal systems, treat dispute resolution as an important feature of their jurisprudence. Elaborate statutory, judicial and administrative procedures have evolved painstakingly over centuries to handle civil, criminal and commercial disputes. In large measure, these procedures are the result of a societal (and inherently religious) preoccupation with guilt and atonement as fundamental principles of human behavior.

Eastern Law

By contrast, Eastern law concepts favor compromise and consultation over confrontation. These societies are based not on the inalienable rights of individuals but on the harmonious relationship *between* individuals, whereby the individuals are incomplete outside their relationship with and to others. This harmony ("*wa*") is the principle that pervades these societies. The process of discussion and consultation is

in itself often more important than the precise kind of decision that may result. As Confucius wrote: "The Master said: ' . . . Govern [the people] by moral force, keep order among them by ritual and they will keep their self-respect and come to you of their own accord.'"

This idea of the inner harmony of the person adjusting to the outer harmony of the world has remained strong in Oriental jurisprudence. Japanese courts, for example, are notoriously slow in moving their cases along, frequently interposing long delays between brief court hearings (at which the court receives written submissions from truth-seeking officers of the court and not oral arguments from impassioned and partisan party-advocates) in order to promote settlement discussions between the parties. The interest of the Japanese courts is in restoring the harmony that has been shattered by a dispute. Thus, the real villain is the party who resists a workable compromise. A brief parable illustrates this point.

Japanese lawyers recount the story of the Three Men Who Lost One Coin Apiece. Briefly told, a man lost a wallet containing three coins. The finder attempted to return the lost wallet to the owner, whose name was on it. The owner refused to accept it because of his shame at having lost the wallet. The finder and the owner argued and eventually the case came to court. The judge took one coin of his own and added it to the other three; then he gave two each to the finder and the owner. He reasoned as follows: "The owner could have had all three coins by accepting the returned wallet; now he loses one. The finder could have had all three coins by taking the money; now he loses one. To restore harmony, I have to contribute one, so I lose that. Each man loses one coin. Case dismissed."

In Japan, the very problem of formal, public dispute resolution is that litigation presupposes and admits the existence of a dispute and leads to a decision which makes clear who is right or wrong in accordance with standards that are independent of the wills of the disputants. An acceptable alternative to discreet, private redress of grievances (which is preferred) is a display of contrition and a request for absolution. For example, in criminal cases, the guilt of the accused is mitigated by the amount of remorse he shows for the crime. Even in Japanese mediation ("*chotei*") both parties present their cases informally to a judge and two lay commissioners, who rule on the matter as much on the basis of personal relationships between the parties as on the law. In this context, then, apology is not necessarily an acceptance of moral fault or an acknowledgment of goodness or badness, but merely an admission that an individual has interfered with harmony.

China Arbitration

Similarly, in China, the law relating to arbitration is provided as a procedure of last resort for the settlement of disputes related to foreign trade. The arbitration clauses in Chinese trade agreements stipulate that disputes are to be settled through friendly "arbitrations." In the event that such friendly arbitrations and negotiations break down, the official arbitration procedure takes place. As a practical matter, in China these discussions and friendly arbitrations form a

continuing process. The two arbitration commissions assist in friendly negotiations, analyze issues and conduct independent investigations of the facts, and explore possible avenues of conciliation. Commercial lawsuits for the settlement of disputes are virtually unknown.

In summary, then, Eastern societies, with their Confucian ideal of harmony and the necessity of the individual to exist in harmony with the group of which the person is a part, treat dispute settlement within the greater context of dispute *avoidance*. Disputes merely manifest the deplorable lack of harmony. These societies provide more opportunities to "save face" and take advantage of negotiation, conciliation, mediation and other private methods of dispute resolution rather than litigation or arbitration.

A survey of nonjudicial methods of dispute resolution necessarily must be rooted in arbitration. The latter is by far the most-recognized form, perhaps because it has been widely described as "just like the courts, only better." Therein lies the central disadvantage, as well as the main benefit, of arbitration as a dispute resolution technique.

Because of its similarity to litigation—adversarial presentation, reliance on procedural and substantive rules, enforceability of awards—most businessmen and the lawyers who counsel them express a preference, particularly in international commercial disputes, for arbitration rather than litigation. The agreement to entrust the determination of a controversy, either present or future, to an impartial third party is based in substantial part on the attitude that one may not always be right or, in the alternative, that one is willing to be a good loser. This is one of the psychological reasons why arbitration aids in the preservation of business relations between commercial parties and thereby avoids the rupture of trade contracts so often associated with proceedings in open court.

And yet, arbitration fails in the same manner, although perhaps not to the same degree, as litigation. Both methods have as their final aim the rendering of exact justice in a matter. Business, however, has as its central concern—the preservation of relations between the parties. Somehow, dispute resolution *per se* means that the

"good deal" has ended and the parties have failed to reconcile their differences through negotiations. In business it is often noted that "time is money"; consequently, "the vexatious delays in litigation, the interruptions to business caused by recurrent consultations and legal hearings, and the mental disruptions accompanying controversies of this sort, are all inimical to the proper formulation of business policies and the efficacious pursuit of business activities." [Carl F. Taeusch, *Extrajudicial Settlement of Controversies, The Businessman's Opinion: Trial at Law v. Nonjudicial Settlement*, 83 *U. Pa. L. Rev.* 147,150 (1934).] Thus, dispute *avoidance* becomes paramount to the businessman.

The exponential increase in litigation and lawyers in the United States, the tremendous expenditure of time and money in pursuit of increasingly unsatisfactory results from litigation, and the growing awareness that arbitration is not a panacea have made business people uneasy, as their profits are eroded by disputes and by dispute resolution. All too frequently the *process* becomes more costly than the *problem*. There is much to recommend, in terms of societal values, allocation of public and private resources, and governmental economy and efficiency, those legal systems that recognize the differences between law as a means to an end and law as an end in itself, to be served like some false idol.

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