Behind the Neutral: The Critical Role of Provider Institutions

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by Thomas J. Stipanowich*

In the last generation the “quiet revolution” in conflict resolution has spawned a vast array of organizations sponsoring or promoting the services of arbitrators and mediators. These “provider institutions” are often in a position, directly or indirectly, to exert significant influence on the lives and fortunes of individuals in all sectors of society. For this reason they have become increasingly visible, the focus of growing scrutiny and, in some cases, regulation.

Why Providers Matter—and Why the Choice of Provider is Important

Since the days when the American Arbitration Association (AAA) enjoyed virtual hegemony as an institutional provider of conflict resolution services, much has changed. The contemporary landscape of ADR services ranges from large, complex, multi-faceted organizations to ad hoc arrangements among individuals. Somewhere in between are entities marketing particular procedures (such as adherence to rules of law and evidence, and written arbitration awards), “celebrity” panelists or emeritus judges; groups that have evolved to serve the special needs of a community, industry, or business sector; and mom-and-pop mediation services.

Some “provider organizations,” such as JAMS, exist to make a profit, while others (like AAA) claim public interest priorities; all compete in the burgeoning and increasingly saturated marketplace of private dispute resolution, usually with minimal regulatory oversight. Some span continents, while others serve regional or local markets and needs. Some only compile and publish lists of arbitrators and mediators (“neutrals”), some train or purport to “certify”; others act as appointing authorities—helping parties to select arbitrators or mediators for particular cases; still others offer a broader spectrum of administrative support for parties in conflict.

“Setting the Playing Field.” Providers play a primary role in determining the quality of the user’s ADR experience. They are usually responsible for designing and fine-tuning the ADR procedures that govern private processes. The published procedural rules of prominent dispute resolution institutions are the primary template for business clients and counsel, most of whom have little or no time, expertise or inclination to prepare their own rules of procedure for resolving disputes.1 (As we will see, over-reliance on standard “one-size-fits-all” commercial arbitration templates, which normally leave considerable discretion to arbitrators and counsel regarding discovery and motion practice, has contributed to the increasing similarity between arbitration and court litigation.2) In administered arbitration, a provider’s case administrators or case managers may do more

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than provide information to the parties. Case managers may possess discretion concerning the scheduling of some procedures, such as the timing of preliminary discussions among the parties or the scheduling and location of initial hearings. They may also advise the parties on procedural options and “troubleshoot” problems which the neutrals cannot or will not address, including payment issues.

**Neutral Screening, Endorsement.** Of all of the ways in which provider organizations may affect the user’s experience, none is as likely to be as critical as their role in screening and facilitating the selection of neutrals. Establishing and maintaining a pool of neutrals who meet its requirements for listing is usually a core competency of providers—and the need which is first and foremost in the minds of those seeking dispute resolution services.

Providers often assist in the neutral selection process by identifying prospective neutrals based on criteria provided by the parties and, in some cases, making the appointment. Moreover, providers may be empowered to consider and rule upon challenges to an appointee. At the conclusion of the proceeding, some providers furnish a mechanism for evaluation of the neutral and the process.

Today, increasing attention is focused on arbitration and mediation in the U.S. and internationally. Many individuals (seemingly a whole generation of judges and litigators!) are claiming qualifications as arbitrators or mediators, and user-counsel are becoming more sophisticated, more demanding and more specific in their requirements. In response to these developments various institutions are trying to promote themselves as the best source of information—or the arbiter of standards—regarding neutrals.

**Supporting the Process of Dispute Resolution.** The provider’s “administrative” role varies greatly among institutions. In arbitrations involving investor/broker disputes, FINRA case managers routinely sit in on hearings. At the AAA and JAMS, case administrators or managers help initiate dispute resolution proceedings, handle the collection of neutral fees and provide clerical support and monitoring in the publication of arbitration awards. The International Institute for Conflict Prevention & Resolution (CPR), on the other hand publishes lists of neutrals and dispute resolution procedures but limits its administrative role to appointing arbitrators—if and when it is called upon to do so. In the name of efficiency and economy the CPR approach cuts out what some view as an unnecessary “middle man”; others are more comfortable with a greater degree of administrative support, and willing to pay what is often a nominal difference (as compared to arbitrator and lawyer fees) for the latter. It should be observed that some provider organizations require an administrative fee to be charged any time “their” neutrals are employed in an arbitration or mediation, even if the process itself is “non-administered”; this is troubling, and users should be on the lookout for such add-ons.

**Provider Immunity—and Accountability**

Like the arbitrators who act under their imprimatur, providers are cloaked with quasi-judicial immunity to preserve the integrity of the arbitration process. The principle of arbitral immunity is well established in the courts, along with a “penumbra” of immunity

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3 See Butz v. Economou, 438 U.S. 478, 511-12 (1978) (extension of quasi-judicial immunity to non-judicial officials is properly based on the “functional comparability” of the individual’s acts and judgments to the acts and judgments of judges); Corey v. New York Stock Exch., 691 F.2d 1205, 1209 (6th Cir. 1982).

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A decade ago, the revision of the Uniform Arbitration Act re-ignited a debate over the scope of arbitral immunity, including institutional immunity. The existence of provider immunity raises the question of alternative ways to ensure accountability. Some providers, to be sure, are making efforts to self-regulate. In 2002, a national Ethics Commission co-sponsored by CPR and Georgetown University produced a wide-ranging set of Principles for ADR Organizations. The “Provider Principles” set out a series of guidelines for entities providing dispute resolution services under the following rubrics: (1) quality and competence of services, (2) information regarding services and operations, (3) fairness and impartiality, (4) accessibility of services, (5) disclosure of organizational conflicts of interest, (6) complaint and grievance mechanisms, (7) ethical guidelines for neutrals and the organization, (8) false or misleading communications, and (9) protection of confidentiality. The Principles were a groundbreaking contribution to public discussions about the roles and responsibilities of provider organizations and, while not explicitly adopted, undoubtedly had an important influence. Subsequently, the AAA published its own Statement of Ethical Principles and new internal ethics policy for its staff.

Meanwhile, the widespread use of arbitration agreements in mass-produced consumer and employment contracts has become the acid test for provider independence, even-handedness and accountability. Fairness concerns have stimulated a variety of private as well as public responses.

Providers, Mass Contracts and the General Public

The establishment of ADR programs within, or on behalf of, particular companies, tied to provisions in standardized employment or consumer contracts which require employees or customers to arbitrate, raised special concerns about the independence and impartiality of those rendering dispute resolution services and the fairness of dispute resolution processes and outcomes. Such programs blossomed in the wake of a string of U.S. Supreme Court decisions broadly enforcing contractual arbitration agreements and requiring parties to arbitrate virtually the entire spectrum of civil claims, including statute-based actions.

Concerns are sharpest in the context of a private adjudicative system set up and administered by companies. In one notable case, the California Supreme Court denied

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4 See, e.g., Corey, supra. See also New England Cleaning Serv., Inc. v. American Arbitration Ass'n, 199 F.3d 542 (1st Cir. 1999); Honn v. National Ass'n of Sec. Dealers, Inc., 182 F.3d 1014 (8th Cir. 1999); Hawkins v. National Ass'n of Sec. Dealers, Inc., 149 F.3d 330 (5th Cir. 1998); Olson v. National Ass'n of Sec. Dealers, Inc., 85 F.3d 381 (8th Cir. 1996); Aerojet-General Corp. v. American Arbitration Ass'n, 478 F.2d 248 (9th Cir. 1973).


6 See Weston, supra.

7 CPR-GEORGETOWN COMMISSION ON ETHICS AND STANDARDS OF PRACTICE IN ADR, PRINCIPLES FOR PROVIDER ORGANIZATIONS (2002).


10 Id., 695-708.

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enforcement to an arbitration agreement in the consumer contract of the nation’s largest HMO on the basis of false representations to the public about the speed of its internally-administered claims arbitration process; the HMO subsequently junked its in-house program and established an “outside” process. In another much-publicized decision, the Fourth Circuit Court of Appeals struck down an employment arbitration program run by, and heavily skewed toward, an employer (Hooters). Not surprisingly, the broad-based national groups that developed due process protocols for consumer and health care disputes each separately concluded that contractually mandated private conflict resolution should be independently administered.

Even with outside providers, of course, the presence of an ongoing service relationship with a corporate entity raises red flags when the other parties are not themselves “repeat players.” Providers should recognize that an ongoing, close connection between a provider and company may be a source of concern to the incidental user—the employee or customer who is drawn into an ADR process by a pre-dispute ADR clause in a contract of the company’s devising. For example, reasonable persons should deem it inappropriate for a provider to pass along to a corporate “client” summaries of a particular arbitrator’s determinations or of mediator settlement rates without making them available to the other party. (Such practices were not unknown in the past.) But there are a variety of other ways in which unreflective interactions creates impressions of lack of independence or of institutional bias, such as a provider “going along” with essentially one-sided substantive terms in a company’s standardized arbitration agreement, or creating a list of potential arbitrators with input from only one “side.”

As concerns about privatized justice under adhesion contracts began boiling up in court cases, and in proposals for legislation limiting the enforceability of predispute arbitration agreements in employment and consumer contracts, discerning individuals understood that much depended upon the care and discretion with which providers approach their role in the facilitation of out-of-court conflict resolution. They recognized that any entity holding itself out as the handmaiden of justice must, like Caesar’s wife, be above reproach. In the mid-1990s these realities led the AAA to spearhead, in cooperation with other groups, the creation of minimum standards for the management of employment, consumer and health care disputes. The Employment Due Process Protocol and the more expansive Consumer Due Process Protocol were the first significant efforts to create a common floor of expectations for a fundamentally fair dispute resolution process. They served as templates for the AAA’s employment and consumer arbitration procedures and heavily influenced other providers’ initiatives. The Health Care Due Process Protocol took the particularly significant step of acknowledging

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15 See note 13 supra.
that “in disputes involving patients, binding forms of dispute resolution should be used only where the parties agree to do so after a dispute arises.”

The Protocols reflect the good that can come of cooperative efforts by providers and stakeholder groups. They appear to have produced tangible positive results when effectively put into practice, as reflected in empirical studies of employment disputes conducted under AAA auspices. A recent independent investigation of AAA-administered consumer credit cases by a task force of Northwestern University’s Searle Civil Justice Institute supports the conclusion that consumer debtors prevailed more often in debt collection actions in AAA-administered debt collection arbitration than in court, and creditor recover rates tended to be lower than, or comparable to, recovery rates in court.

However, the due process protocols have been criticized as an inadequate response to the problem of consumer and employment arbitration under private auspices, in part because their efficacy depends in part on the voluntary continuing commitment of private providers. Such criticisms were lent weight by recent scandals, exemplified by the settlement in 2009 of a lawsuit by the Minnesota attorney general against the National Arbitration Forum (NAF) alleging fraud and deceptive practices; NAF ceased administering consumer credit arbitration disputes as a part of the settlement. There are also troubling scenarios that appear to reflect the negligent or cynical acts of companies in drafting dispute resolution agreements: Sprint’s Residential Wireless contract includes a dispute resolution provision that for a time called for arbitration under the rules of CPR—an organization which does not even publish appropriate consumer arbitration rules; Sprint’s current published terms require arbitration, but do not specify any procedures.

A more pervasive concern with the Employment and Consumer Protocols is that they do not address what has become the central issue in the debate over binding arbitration provisions in standardized contracts of adhesion—provisions purporting to waive an individual’s ability to participate in a class action. In addition to a steady drumbeat of litigation over the enforceability of arbitration agreements, there have been efforts to legislate procedural protections, from the Revised Uniform Arbitration Act to the California Ethics Standards (requiring provider organizations as well as arbitrators to make disclosures relating to possible conflicts of interest). Currently, Congress is considering different versions of a proposed Arbitration Fairness Act that would

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16 HEALTH CARE DUE PROCESS PROTOCOL, supra note 13, Principle 3.
19 NAF Rubber-Stamps Creditors’ Awards, Another Suit Says, 16 No. 9 ANCALR 6 (Oct. 22, 2009).
effectively outlaw predispute arbitration agreements in consumer, employment and franchise agreements—even including arbitration provisions in brokerage agreements that are already subject to oversight and regulation by the Securities & Exchange Commission.22

**B2B Disputes: The Need for User-Friendly Templates Promoting Real Choice**

In the increasingly competitive ADR marketplace, many providers use an assortment of media outlets to advertise their services (including their procedures and the quality of their neutrals) to the general public or to a targeted audience. As noted above, many business persons and counsel rely heavily on the provider, who they have prospectively embraced in contractual dispute resolution provisions referencing the provider’s procedures and administrative services, to provide effective neutrals, procedures and administrative support.

In light of the vast differences in the scope and type of services available from different providers, potential users of ADR services need objective help to make a meaningful choice of providers. For commercial users, some guidance may be obtained from industry, trade or professional groups, which may work with a particular provider to develop standard ADR procedures for their constituency. **COMMERCIAL ARBITRATION AT ITS BEST**, the final report of the CPR Commission on the Future of Arbitration sets out a checklist of questions for users to ask regarding prospective ADR providers.23

Besides ensuring the quality of neutrals, the most pressing issues currently confronting providers of B2B arbitration services in the U.S. are user concerns regarding the cost and length of arbitration proceedings. Central to the latter is the management of discovery, including e-discovery. Acknowledging the need for reliable, straightforward new templates that go beyond standard rules that afford parties and arbitrators great “wiggle room,” several leading providers have begun to offer alternative procedures (including expedited or streamlined procedures) or supplemental rules or guidelines for discovery.24 The AAA, JAMS, CPR and the Chartered Institute of Arbitrators co-sponsored a National Summit on Business-to-Business Arbitration for consideration of relevant guidelines for providers, business users and counsel, outside counsel and arbitrators.25

**Providers and Evolving International Standards—Examples from China**

In the international arena, leading provider institutions have collectively contributed to the development of recognized procedural standards. With the emergence of China as a major player in international trade, that nation’s officially recognized provider organizations—including China International Economic Trade Arbitration Commission

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22 See generally Stipanowich, supra note 2, 40-49 (discussing these initiatives and their “spillover” into the realm of commercial (B2B) arbitration).


24 See generally Stipanowich, supra note 1 (offering guidance for counselors and drafters seeking efficiency and economy in arbitration, and discussing current or recent initiatives by provider institutions).

25 HOW TO DRASTICALLY REDUCE COST AND DELAY IN COMMERCIAL ARBITRATION, DRAFT REPORT OF THE COLLEGE OF COMMERCIAL ARBITRATORS FOR DISCUSSION AT THE NATIONAL SUMMIT ON BUSINESS-TO-BUSINESS ARBITRATION (Thomas J. Stipanowich et al, eds. 2009).

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(CIETAC) and the Beijing Arbitration Commission (BAC)—have taken discrete steps to address concerns about the independence of arbitrators, the transparency of the arbitration process, and the impartiality of the forum,26 and to bring their procedures and operations in line with international standards.27

Now that mediation is achieving some prominence as an alternative to arbitration of international business disputes, some of the more intriguing initiatives of recent years are focused on these developments. One “emblematic” initiative is the International Mediation Institute, a Netherlands-based provider organization that purports to credential mediators worldwide. In China, the salient development of recent years is the effort of BAC to develop a freestanding program for mediation of international commercial disputes—the first ever developed by an official commission. With the assistance of Pepperdine School of Law’s Straus Institute for Dispute Resolution and other advisors, BAC has published mediation rules; sponsored U.S.-style mediation training for dozens of experienced Chinese arbitrators, lawyers and judges; established a multi-national panel of commercial mediators; and consulted with government ministers and representatives of the Supreme People’s Court on possible changes to the legal framework to encourage mediation as a true alternative to arbitration and litigation. The initiative has underlined the vast cultural, philosophical, legal and political differences that make implementing mediation on an American model more problematic in China (where forms of conciliation by judges, arbitrators and authority figures have a history that extends back many centuries). The ultimate success of the present BAC initiative requires addressing these realities on the ground, and in demonstrating the utility of mediation to Chinese parties in discrete commercial disputes.28

Contributing to the Evolution of the Field and the Public Good

As the foregoing discussion makes clear, provider institutions are in a position to do great good—or, it must be said, ill—in developing and maintaining mechanisms for the resolution of conflict. On the positive side, moreover, many large and small providers have contributed time, energy and support to a spectrum of activities that look beyond the ordinary course of business to the future of the conflict resolution field or the needs of others. These including, among other things, participation in volunteer mediation facilities aiding disaster victims, peer mediation programs in schools, empirical research on arbitration and dispute resolution in varied settings, “think tank” initiatives promoting new tools, and scholarships for international scholars and practitioners wishing to study dispute resolution at leading universities or to shadow experienced neutrals.

At no time in history have so many organizations provided services aimed at the management and resolution of conflict. Never have they had a greater impact on the universe of dispute resolution, or greater opportunities to direct its future courses.