



THE RESOLVER

TURNING CONFLICT INTO RESOLUTION

Published by the Alternative Dispute Resolution Section of the Federal Bar Association

Message From the Editor

By Hon. Thomas I. Vanaskie (Ret.)

I love the title of the ADR section's publication, *The Resolver*. When I went on the United States Court of Appeals for the Third Circuit, after 16 years as a federal trial judge, I was often asked about what I missed about the district court. My answer invariably was that I missed resolving disputes. I always took great pride in my work bringing the parties to an amicable settlement. And if a settlement was not possible, I did my level best to have the parties feel that their positions were given careful consideration and the case was decided fairly.

The ADR Section of the Federal Bar Association is devoted to those purposes, and its publication is intended to educate and inspire those of us who pursue the noble task of dispute resolution. One undeniably true lesson of the COVID-19 pandemic is that mediation and arbitration can continue to be effective means of dispute resolution through the use of advanced communication technologies, such as Zoom. I, personally, have helped resolve controversies via Zoom, both through mediation and through multi-day arbitration hearings. The Winter 2022 edition of *The Resolver* unsurprisingly includes contributions from practitioners and academics from around the country that discuss the benefits and pitfalls of remote ADR proceedings and provide best

practice recommendations to assist counsel in navigating remote ADR processes.

This issue starts with an exceptional review of both basic and advanced considerations in mediation by Laurel Stevenson, Director of the Mediation and Assessment Program for the United States District Court for the Western District of Missouri, in her article, **Mediation – The Basics and Beyond**. Caryn Siperstein Klein addresses the challenges of virtual mediations and offers helpful suggestions for overcoming those challenges in her article, **Virtual Mediation, Leading the Way?** William J. Caplan, in **Challenges and Solutions in the New World of Virtual ADR**, offers helpful advice on the logistics of not only remote mediation, but also remote arbitration proceedings, giving valuable tips on handling of documents, dealing with difficult witnesses, and addressing confidentiality concerns in trade secret and other cases. Court-mandated mediation should be implemented on a large scale basis is the premise of Gail A. Glick's article, **Bring Back Court Ordered Mediation**, in which she relies upon more than 25 years of experience to argue that court-directed mediation works effectively.

This issue then pivots to some recurring issues in ADR. Norman Feit, in **Mediating Ineffectual Parties**, provides

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An Interview with FBA ADR Section Law Student Scholarship Winner, Goel Damkani

The Federal Bar Association (FBA) Alternative Dispute Resolution (ADR) Section is pleased to announce **Goel Damkani**, a second-year dual J.D. and LL.M student at the University of Miami School of Law, was awarded its inaugural ADR Law Student Scholarship. The \$1,000 Scholarship is awarded to a current law student and member of the FBA ADR Section who has demonstrated a commitment to the field of ADR and who intends to incorporate ADR into their practice post-graduation. In its inaugural year, the FBA ADR Section was pleased to partner with The Strauss Institute for Dispute Resolution at the Pepperdine Caruso School of Law in awarding the Scholarship and will partner with the Benjamin N. Cardozo School of Law in its second year.

Mr. Damkani earned his Bachelor's Degree in International Relations at Reichman University in Herzliya, Israel. He received his LL.B at the College of Law and Business in Ramat Gan, Israel, where he specialized in international commercial law. His strong interest in arbitration is primarily attributed to his two-time participation in the Willem C. Vis International Commercial Arbitration Moot, where he received an honorable mention for best individual oralist. After graduating from the College of

Law and Business, Mr. Damkani volunteered at the Israel Bar Association's Forum for ADR which is tasked with amending, reforming and improving Israel's arbitration and mediation legislation. Mr. Damkani enrolled in his joint J.D. and LL.M program at the University of Miami School of Law in 2020 where he has helped coach its Willem C. Vis International Commercial Moot team for the past two years. Most recently, Mr. Damkani contributed a chapter to Specialized Arbitration: Emerging International Trends and Practices, aimed to increase the range of arbitrator diversity by leveraging the benefits of technology.¹ The following interview was conducted by Hon. (r.) Tom Vanaskie ("TV"), The Resolver editor, and Bryan J. Branon ("BB"), FBA ADR Section Chair, with questions from Mr. Damkani ("GD") to Judge Vanaskie and Mr. Branon, respectively.

Q BB: Congratulations on being the first recipient in the history of the FBA ADR Section Law Student Scholarship. Can you share a little bit about your background and what the scholarship means to you?

GD: *I was born in Israel and raised in North Carolina. I returned to Israel to study my Bachelors, served in the military, and transitioned into law school. I developed a passion for ADR and international arbitration during my studies, and took advantage of several unique opportunities to gain valuable knowledge and expertise in the field. After passing the Israel bar exam, I became involved in Israel's arbitration scene in a number of ways, but the legal job market was very difficult to break into – even as a bilingual and native English speaker. During the pandemic, I thought it was the perfect opportunity to come to Miami to study international arbitration in their prestigious dual LL.M/JD program with top professors and practitioners in the field. My future aspiration is to further my legal career here in the US, with a focus on commercial arbitration and ADR. This scholarship is very valuable, not only as an affirmation of my commitment to the field of ADR, but also as inspiration to continue pursuing opportunities in that area.*

Q TV: The FBA is the pre-eminent voluntary bar association of nearly 18-thousand lawyers and judges dedicated to improving our federal legal system and the administration of justice by serving the federal legal practitioner, both public and private, the federal judiciary and the public they serve. I was a member of the FBA before I was a judge, while I was a judge and after I retired from the Bench. In your scholarship application you had mentioned you had been a member of a voluntary bar association, the Israel Bar Association and its Forum for ADR. There you voluntarily helped draft Israel's federal arbitration legislation. Can you tell us about this experience and what voluntary bar membership has meant to you?

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insightful advice on handling the difficult scenarios that are often encountered in mediation. In his article, **Michigan's Exciting Experiment: Discovery Mediation**, Jay Yelton writes about the evolving use of mediators to facilitate the resolution of nettlesome discovery battles that often impede the resolution of the merits of a controversy. Janice L. Sperow provides an overview of the state of the law on obtaining third party discovery in arbitration in **Do You Know How to Obtain Third Party Discovery in Arbitration?**, explaining that it may not be as facile as one presumes.

This issue concludes with Amy G. Pruet's scholarly article on **ADR in Music Rights Disputes: Creative Solutions for an Industry Driven by Creativity**. Ms. Pruet's article discusses the pros and cons of using ADR to resolve issues typically raised in music rights disputes, such as copyright infringement, streaming royalty disagreements, and others.

In short, this issue offers both valuable practical advice and scholarly analyses of the ever evolving issues of ADR in America in the era of the pandemic. It has been my honor to have served as editor of The Resolver this past year. My predecessor, Alexander Zimmer, did an incredible job in nurturing this valuable platform, and I am privileged to have stood in his shoes this year.

GD: *The Israel Bar Association (IBA) does consist of numerous committees where membership is voluntary, but at the same time it governs the legal profession in Israel. Whenever the Knesset (parliament) considers amending legislation, especially when it is specialized, then the relevant committee in the IBA is influential in that process by making valuable recommendations at all stages. The Forum for ADR is one of those committees, and it is impactful in the trajectory of how the arbitration and mediation legislation develops in Israel. Although my participation in the committee was brief, it was valuable to gain insights as to the considerations and policies that are particularly important to those that influence the development of legislation. Gaining a glimpse into the inner-workings of the committee was informative as to the key changes that need to be implemented, and how the process itself should be improved – especially at the international level.*

Israel has a national arbitration law that primarily governs arbitration matters domestically and some aspects of international arbitration, and there are other bodies of law that speak to certain aspects of the arbitral process such as the Federal Rules of Civil Procedure and laws regulating the family law courts. The Forum consists of several practitioners and retired judges with experience in various aspects of arbitration and mediation, for example in relation to family law and labor law matters. Some of the recurring issues that surfaced included the question as to whether mediators should be able to arbitrate failed mediations, and what right of appeal parties should have against a final arbitral award. My primary goal was to improve Israel's standing internationally in terms of developing the law on ADR. For example, Israel hasn't adopted the UNCITRAL Model Law, which I recommended for a number of reasons. These are all examples of issues discussed within the Forum, some of which are ultimately brought before the legislature as recommendations after an extensive internal drafting and review process takes place.

While being part of that process was insightful, it also opened my eyes to the importance of educating in the area of ADR. Even the most seasoned practitioners and judges had conceptions of arbitration, for instance, that were not much more different than courtroom litigation. That experience opened my eyes, as a younger lawyer, to the importance of preserving the nature of arbitration and ADR as distinctly advantageous methods for dispute resolution outside of the courtroom.

Q BB: *You received the 2016 Willem C. Vis International Commercial Arbitration Moot competition honorable mention for best oralist in Vienna, and have participated in five of these competitions as a coach or oralist in total. Can you speak to the importance of this competition and clinical opportunities to apply classroom teaching to real work settings, generally?*

GD: *I think students can take a class on just about any topic, but the Vis Moot truly exposes students to the inner workings and practical aspects of international arbitration. Though not a real arbitration, it certainly resembles many of the central*

issues that are pertinent in practice. The Vis Moot also offers exposure and networking. While now limited because of the pandemic, the ability to convene in a city like Vienna or Hong Kong and meet so many well respected practitioners and arbitrators with extensive experience in the field is truly invaluable. The experience overall draws many students to international arbitration, and in that respect alone it is valuable as a kind of gateway. In my personal opinion, the fact that there is such broad diversity in the Vis Moot – with teams participating from virtually every country on the planet – is itself invaluable and gives under-represented law schools and students the chance to succeed and become part of the arbitration community.

Q TV: *In your FBA ADR Section Law Student Scholarship application, you identify three areas ADR plays an important role as an alternative to traditional litigation. These included: 1. access to justice; 2. subject matter expertise and 3. accountability in foreign direct investment. Please speak to these three benefits and why they are important.*

GD: *Access to Justice. Traditional litigation reaches a broad market of users, whereas arbitration reaches a market that traditional litigation struggles to reach: access to justice through efficiency and reduced cost such as procedures tailored toward parties' needs and parties who might be underrepresented or have less resources. In traditional litigation, and especially in the United States, there is such extensive motion practice and discovery that larger parties can finance smaller parties out of litigation. This makes it difficult for smaller and less-financed parties to vindicate their rights or pursue certain claims. Arbitration provides more efficient, cost-effective solutions more driven toward equity and achieving a fair outcome. On the international scale mechanisms like third party funding are more common and can provide greater access than the traditional litigation forum as well. Thus, arbitration offers unique solutions with an emphasis on cost reduction and efficiency. Of course, arbitration can still be quite expensive, but if done right then it would certainly be more cost-effective. Costs are not the only obstacle to accessing justice: because international arbitration often represents a more comfortable middle ground between civil and common law systems, and allows a great deal of procedural flexibility to the parties involved, it represents a more practically-accessible method for resolving disputes.*

Subject Matter Expertise. With regards to commercial needs, specialized proceedings are very important. Institutions like AAA/ICDR have procedures tailored towards specific disputes. Parties are able to appoint arbitrators with certain expertise to adjudicate specialized matters, as opposed to judges who may need to appoint their own experts. This goes back to increased cost and access to justice for parties who may not be able to afford the process of litigation.

Foreign Direct Investment. With respect to foreign direct investment, it's difficult to hold state entities accountable. International investment arbitration does achieve this through the reciprocity that is reflected in investment treaties. One can ask why would a foreign jurisdiction enforce an award against

one of its own nationals. Because other jurisdictions would enforce awards against their own nationals. For these reasons states will be willing to expose themselves to legal liability because they know their own investors will be protected when another country violates their own investments. In the arena of investment arbitration, as opposed to traditional litigation, it is much more difficult for state entities to invoke immunity defenses. Numerous private investors have successfully won and enforced arbitral awards against state entities through investment arbitration that would not have been possible through the court system – in fact, investment arbitration is also effective at providing recourse when the violating state has a corrupt court system that fails to protect aggrieved investors. Neutrality is a key consideration. There are areas to improve, but overall investment arbitration is a mechanism whereby states can be held accountable much more effectively than by traditional litigation.

QBB: You have authored a chapter of an upcoming publication which focuses on the increased use of technology providing opportunities for the next generation of more diverse, perhaps younger, ADR practitioners. Can you share more about the publication, your thesis and what this means for ADR, in general?

GD: I had the opportunity to pursue this publication through one of the Chairpersons of the Arbitration and Mediation Committee of the Israel Bar Association. I was allowed to pursue my own topic, conduct the research, and write the chapter with his feedback and guidance. When it comes to diversity, there's a practical need to provide more opportunities to be represented. Practically, the pool of arbitrators is very limited and many parties appoint the same arbitrators, and so there's a need – especially in the long run – to expand the pool. A lot of organizations and practitioners speak about expanding the pool but often it's just platitudes. I was interested in a concrete way where diversity can be increased, even if in small increments, while balancing the need between this objective and the parties' ability to appoint their own arbitrators. The goal is not to increase diversity for diversity's sake, but to tap into a pool of talented practitioners and jurists who may be well-equipped to make valuable contributions but simply not have the exposure. I thought that a practical way to do this would be for low-dollar disputes which could be conducted virtually.

During the pandemic, we saw a rapid increase of a resort to technology almost exclusively for arbitral proceedings. Traditionally, expedited proceedings for low-dollar disputes usually involve a sole arbitrator – often without regard to an expressed choice by the parties to appoint three arbitrators. Combining expedited low-dollar disputes and technology, opportunities can be given to marginalized practitioners. By developing a practical, limited platform which would give younger or marginalized practitioners an opportunity to be visible might encourage a snowball effect that could increase into other areas of international arbitration as well. The

chapter and proposal represents only a rough framework and is more exploratory in nature, but the goal is to find ways to implement these ideas practically.

Mr. Damkani's questions for Judge Vanaskie:

QGD: Since you've become a full-time ADR practitioner, has your approach to, or outlook on, ADR changed compared to your time as a judge? What's one aspect of practice judges are missing that ADR practitioners have?

TV: Number one, I always viewed my role as a district judge as a dispute resolver and I relished that role and if I could, for example, bring the parties together to an amicable resolution, I took great pride in accomplishing that because it brought finality to a dispute. It wasn't always on terms both sides want to agree to but eventually did agree to. I view arbitration and mediation as continuing to fulfill that role as a resolver. I worked for JAMS for a year and now I run the neutral services at a law firm. I've been appointed arbitrator and mediator and I've learned arbitration and mediation can be a lot more efficient than the litigation process because arbitrators can focus on a few cases and not have as a federal judge a caseload that is substantial, diverse, that is not only civil litigation but also criminal. When you're in arbitration you have decisionmakers focused on the matter who give prompt decisions.

One thing I realized from arbitration is the cases don't get bogged down in discovery battles, I've issued decisions very promptly, even after a ten minute recess in matters that might involve millions of dollars. This is not typical in a civil litigation context so the efficiency of ADR has impressed me and the expertise that can be brought to bear is very beneficial. Additionally, mediation has worked exceptionally well through alternative communication technologies like Zoom. It's much more efficient than flying everyone to one location and shuttling from room to room. I've become much more of a proponent of ADR. I don't like the term Alternative, I'd like it to be more mainstream. Let's look at the most effective mechanism to resolve the matter in the most efficient way for our clients. I think we're moving in that direction but I'm always accused of seeing the glass half full.

QGD: Given your firsthand involvement with the ADR process, what is one piece of advice or suggestion you'd give judges dealing with issues surrounding ADR?

TV: One of the things I would like to see would be an increase of cases filed in court referred to arbitration. There are certain cases which have to go through arbitration but I would like to see jurisdictional limits increased to have more cases referred to arbitration. In the Middle District of PA and in federal court there is a big push toward the use of mediation and ADR and many courts have established mediation programs. There is the experiential requirement to be on the federal mediator panel but also periodic annual training to assure we have not only experienced mediators but also competent mediators, I think courts have recognized we're in

the business, especially at the district level, of resolving disputes and let's find a way to do it. I think a push has been made in this direction but more can be done including expanding the jurisdictional dollar value to be referred to arbitrators and to expand the pool of cases amenable to mediation.

I also think mediation can play an effective role in resolving discovery disputes that bog down litigation. The proliferation of electronic information, electronic discovery, is a very expensive part of traditional litigation but there are very smart people who can help sort through the issues that are typically created by that huge expansion of data and I think mediation could be very effective in moving these issues along.

Mr. Damkani's questions for Mr. Branon:

QGD: You were instrumental in developing the Afghanistan Center for Dispute Resolution (ACDR). There is no doubt that the political and security situation there is unstable and unpredictable. Would this have a negative impact on the ACDR, and how should any negative effects be best mitigated?

BB: My heart goes out to Afghanistan. As President Allen, the FBA, the National Association of Women Judges and the International Association of Women Judges have all provided, there is grave concern about the basic human rights of women and those marginalized in Afghanistan.

The ACDR was a project initiated by the Afghan Chamber of Commerce and Industry in an effort to attract foreign investment into that country's economy. The same principles which apply to arbitration and mediation, generally, such as party autonomy and self-determination, applied to the establishment of the ACDR. The Afghanistan government at the time made the decision for themselves to establish the ACDR and enlisted foreign assistance. It is an Afghan born-enterprise that was meant to strengthen the rule of law and attract foreign investment into Afghanistan to allow that country to build economically, create jobs, create opportunity and create hope for the citizens of Afghanistan. It will be up to the new Afghanistan government to decide the future of the ACDR and the use of ADR in Afghanistan, generally.

QGD: More generally, what do you view as effective strategies for implementing robust ADR systems in regions or economies that may not have as strong of an ADR-supporting legal system?

BB: In regard to sustainable ADR centers in the world, it is imperative to have support from the judiciary, legislature, users, practitioners, providers and academia, "the infrastructure." The judiciary and legislature provide critical funding, information and access to the processes which allow users to gain knowledge of the processes and build trust in the system. Practitioners employ arbitration and mediation and ADR providers are critical to ensure quality and competence. Academia can train practitioners creating a sustainable ADR ecosystem. The good news, there are many such projects taking place currently throughout the world.

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Thomas I. Vanaskie joined Stevens & Lee as Of Counsel following a 24+ year career in the federal judiciary that included 7 years as Chief Judge of the Middle District of Pennsylvania, 8 years as a member of the U.S. Court of Appeals for the Third Circuit, and 3 years as chair of the Information Technology Committee

for the Judicial Conference of the United States. He now chairs the Neutral Services and Appellate Practice groups for Stevens & Lee.



Bryan J. Branon is the Chartered Institute of Arbitrators Regional Relationship Manager for the Americas, Immediate Past-Chair of the FBA ADR Section and current Co-Chair of the FBA Diversity Committee's Membership Subcommittee. He can be reached at BBranch@CIArb.org.

Endnotes

¹Goel Damkani and Gideon Fisher, *Virtual Expedited Proceedings: A Proposal to Leverage Technology for Increasing Opportunity and Diversity*, in Yashraj Samant and Chirag Balyan (eds.), *Specialized Arbitration: Emerging International Trends and Practices*, Thomson Reuters (2021), pp. 395-415.

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