
In Theory

Consensus Arbitration: A Negotiation-Based Decision-Making Process for Arbitrators

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In reaching their decisions, arbitrators are currently expected to act like judges by listening fully to both sides and then withdrawing to write the final and complete decision. But because of some key differences between their roles, I argue, arbitrators and judges should exercise completely different styles of decision making. Unlike judges, who make decisive rulings in order to enforce the law, arbitrators are empowered and chosen by the parties themselves to handle specific disputes or govern continuing relationships. Instead of shifting a negotiated process into an authoritative one, arbitrators have the capacity to solicit input from parties as they craft the award. Under a new model of arbitration that I call "consensus arbitration," arbitrators would facilitate negotiation between the parties but retain the power to break impasses with partial, incomplete decisions, behaving more like facilitators than judges.

Key words: alternative dispute resolution, mediation, new processes in dispute resolution, arbitration, consensus arbitration, negotiation-based decision making.

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Introduction

An arbitrator is a neutral person vested by all the parties to a dispute with the power to resolve that dispute (Garner 2001). The arbitrator has the ability to render a decision and has discretion specifically over the decision-making phase of the process (Schmitz 2002). Although they have more flexibility than judges in how they make their decisions, arbitrators behave like judges in that they listen fully to both sides and then withdraw to release a decisive verdict on all issues. Arbitrators, however, have a different relationship with the parties than judges do, and based on this difference, arbitration can and should involve a unique decision-making procedure.

Arbitrators have a special position as decision makers because the parties have both agreed and negotiated, in theory, on the disputes that the arbitrator will handle. Arbitration is therefore said to be a “creature of contract” that stems from and guides the negotiation or relationship between the parties (DiUbaldo 2008: 83). Judges, on the other hand, are imposed on the parties by the legal system. While judges must be decisive because they interpret and apply the laws that govern society, arbitrators govern negotiated agreements and private relationships. So why should a negotiated, relational interaction shift to an authoritative process just because a decision must be made (Nolan and Abrams 1985)? This article describes an entirely new form of arbitration called “consensus arbitration,” which uses negotiated decision making instead of judge-like decisiveness in shaping the award.

The premise underlying this process is that *arbitrators could use their decision-making ability to render incomplete, preliminary decisions as they facilitate the negotiations between the parties*. Instead of delivering an award that conclusively addresses all issues, the arbitrator would set a direction or make a basic decision and then invite the parties to negotiate the details and implementation, making further decisions when the parties reach an impasse. The consensus arbitration process therefore would allow the arbitrator to make decisions and guide the process, while allowing the parties to shape the final award. Thus, instead of writing the award in isolation, the arbitrator would guide and facilitate negotiation between the parties. The following chart and step-by-step description of consensus arbitration will better explain this process (Table One).

The step-by-step description below describes how an arbitrator could both exercise decision-making power and facilitate negotiation between the parties:

1. The parties present their cases and cross-examine each other, as is done in standard arbitration (arguing conflicting interests and perspectives).
2. The arbitrator makes a preliminary decision (an outline, idea, or overall leaning).

Table One
Standard Arbitration versus Consensus Arbitration Processes

	Standard Arbitration	Consensus Arbitration
Investigation phase	Both parties present facts/arguments	Both parties present facts/arguments
Decision-making phase	Arbitrator withdraws to write award	Arbitrator solicits party input to shape the award and uses decision-making power to guide the negotiation

3. The arbitrator presents this incomplete decision to the less favored side and invites input from that party to see if the final ruling can somehow accommodate that party's interests.
4. The arbitrator can then either shuttle back and forth between the parties with amendments or bring both parties together to shape a ruling, facilitating negotiation to shape the award.
5. When the parties reach an impasse, the arbitrator makes a decision or creates a compromise around the interests that the parties express in the negotiation.
6. Steps 3-5 are essentially repeated until a decision or agreement is reached on all issues.

The primary benefit of this new form of arbitration is that it offers the parties a stronger voice in the process and more control over the outcome. Because parties to standard arbitration desire a resolution but fear having little control over how the resolution is crafted, this change should make the process more appealing. And because the arbitrator must be acceptable to both sides in order to be chosen for employment, arbitrators would benefit from using this more consensual approach to decision making, which could make them more attractive in the marketplace (Stempel 1999).

Arbitrator Decision Making: Diverging from the Judicial Model

A focused exploration of the differences between arbitrators and judges reveals that judges must act decisively while arbitrators should exercise a form of negotiated decision making. A historical analysis of prelegal arbitration shows that judicial imitation is unnecessary and unnatural, which justifies a departure from the judicial model. Thus, I argue that key

functional differences supported by historical practices show that the consensus arbitration process, which is proposed in this article, is a better decision-making strategy for arbitrators.

Comparing the Powers and Obligations of Judges and Arbitrators

The arbitrator's main duty is to settle the conflict by rendering a decision (Samsel 2007). Though arbitrators can design their own decision-making procedures, they currently reach their decisions in the same way that judges do, by fully hearing the case for each side and then issuing a complete, decisive, and binding solution on all parties (Edwards 1988; Dolder 2004; Jackson 2006).

By the nature of their power and the structure of their forum, judges have the capacity and obligation to adjudicate decisively. To fulfill their functions in the justice system, judges must be firm and authoritative rather than accommodating (Gardina 2004; Gordon 2006), and because their decisions are legally enforceable rather than matters of private agreement, they are able to render decisive, one-sided rulings rather than negotiated decisions (Yarn 2004). Judges preside over a completely thorough litigation process in which they hear all aspects of each side's case before leaning one way or the other (Crystal 1997). Negotiation with the parties over the outcome would create an inappropriate level of involvement in the dispute.

The trial process itself enables judicial decisiveness because it offers protections that ensure the judge's conclusion will be fair and accurate (Swift 1987). Courtroom formalities ensure due process to the litigants, work to mitigate power imbalances, and promote thorough, accurate fact-finding (Donahey 1995; Wohlmuth 1995; Sharpe 2003); and the appeal process allows for reconsideration of final rulings (Sharpe 2003). Finally, judicial independence ensures that judges are impartial and that they are not unduly influenced by either party (Frankowski 1987).

All these imperatives that compel judges to be decisive adjudicators are inconsistent with the role of the arbitrator. First, the purpose of the arbitrator is vastly different from that of the judge — judges enforce laws upon society whereas arbitrators govern private agreements. The Supreme Court acknowledged that arbitrators are “not a public tribunal imposed upon the parties by superior authority” but rather “a system of self-government created by and confined to the parties” (*United Steelworkers of America vs. Warrior & Gulf Co.* 1960). The goal of arbitration is to resolve private disputes rather than to articulate and disseminate social values; arbitrators facilitate the continuing relationship between the parties rather than a search for justice (Farber 1999; Gross 2004). Furthermore, the powers of the arbitrator are rooted in the agreement between the parties rather than the broader social contract with the state (Zurek 2006). Thus, arbitrators serve as part of the negotiated relationship, resolving

ambiguities and indicating the mutual intent of the parties when a conflict arises (Gold and Furth 1954; Craver 1990).

Unlike judges, who must decisively enforce public law, arbitrators are obligated to govern the interaction between the parties and find optimal solutions to the problems that they face (Craver 1990). Thus, in executing their role as agents of the parties, arbitrators may better operate by consulting with the parties as they draft the award.

In addition, the safeguards and procedures that are essential to judicial trial are absent or deficient in arbitration. Primarily and most importantly, the arbitrator faces considerable pressure to accommodate both sides to the dispute. While judges are independent and appointed to a controversy, arbitrators are often directly selected by both parties to a dispute (Sharpe 2003). In order to be chosen for employment, an arbitrator must therefore be the least unattractive option for both parties: employers and employees, management and labor (Stempel 1999). Arbitrators are therefore pressured to reach mutual accommodation and tend to render compromise decisions rather than one-sided rulings (Monin and Brady 1996). While judges act decisively by ruling for one side under carefully protected independence, when arbitrators act decisively they issue their individual interpretation of a mutually accommodating solution without party input.

In addition, arbitration does not involve the exhaustive protections and balances that allow a trial court to render a unitary determination of the just result. As a more efficient forum, arbitration is not held to full constitutional due process, is not required to follow trial procedures, is not reviewable by higher courts, and allows the fact finder to receive compensation from the parties (Sharpe 2003; Rogers 2005; Cavendish 2006; Ferris and Biddle 2007). Because the protections of formal litigation are traded for efficiency, many consider arbitration to be an imperfect fact finder (Snow 1985). These shortcomings would suggest that because arbitration is not subject to the checks and formalities of a trial court, arbitrators cannot render decisive rulings with the same degree of certainty as a judge. In order to overcome this deficiency, arbitrators may be able to more accurately find the best solution by continuing to solicit party input as they shape the award.

The act of rendering a decisive ruling thus seems contrary to the role that arbitrators should play. Arbitrators govern the negotiation process and the relationship between the parties; however, they use an authoritative rather than negotiation-based approach to decision making. And by unilaterally issuing a decision while under pressure to accommodate both sides, arbitrators end up creating their own idea of an acceptable compromise rather than forming a compromise around party input. I argue that arbitrators are simply imitating judges because they are superficially similar, rather than using a procedure that meets the unique capabilities and pressures inherent to arbitration. One commentator has noted that “when arbitrators

step into judges' shoes, they seem to be wearing them on the wrong feet" (Rogers 2005: 57).

Thus, in some ways arbitrators seem more intent on imitating judges than on resolving disputes in a manner that fits both their powers and the wishes of the parties (Rubino-Sammartano 2003). Because arbitration can be seen as a mechanism to address disagreements in the ongoing, negotiated relationship between the parties, some scholars argue that arbitrators should use their forum to search for positive-gain outcomes for both sides (Craver 1990; Gershenfeld 1998). It seems likely that arbitrators could act like mediators or facilitators, except with the power to render incomplete decisions as the parties negotiate. The question then becomes: why *don't* arbitrators make their decisions in a more negotiated manner, and if they ever did, why did this process disappear?

Historical Development of Arbitration Following the Judicial Model

It is clear from the above comparison that decisiveness fits judges better than arbitrators. To determine whether the arbitrator's inability to replicate the judge's actions indicates a natural handicap for arbitration or a maladaptive imitation of the judicial function, we will now look at the history and development of modern arbitration.

In its original conception, arbitration was a consensual, negotiated process — both parties would take their dispute to a private third party who would facilitate the negotiation and coax them into reconciliation. Forums in which both disputants chose an authority figure to settle their dispute through facilitated negotiations have been identified by legal historians as the early forms of what is now arbitration (Mann 1987; Yarn 2004). Evidence suggests that forms of these private, consensual adjudications occurred in medieval England and that such negotiation-based arbitration practices were carried over to colonial America (Mann 1987; Yarn 2004).

These prelegal, consensus-based arbitrations seem to have been firmly shaped by the communities in which they developed (Mann 1987; Yarn 2004). In these village settings, social relations were highly interdependent and disputants could not avoid future interaction. It was therefore necessary to handle the dispute in a manner that would allow for continuing, amicable relations (Mann 1987). To achieve these means, the parties would take their dispute to a mutually respected member of the community who would negotiate with the parties and use his community standing to pressure them into reaching a resolution (Yarn 2004). While these awards were without strict legal enforcement, and therefore tended to give something to each side, the disputants experienced significant pressure to abide by the award or else face community disapproval and distrust in future disputes (Mann 1987). The original practice of arbitration therefore involved a final determination from a third party, but the process that created this decision

was a facilitated negotiation among the parties and the arbitrator (Yarn 2004).

This organic conception of arbitration, rooted in the community, changed when the community changed. As society expanded and geographic movement increased, communities became less cohesive, and it became more difficult to use community pressure to enforce awards (Mann 1987). When these social changes made arbitrators' decisions less influential and judges began showing hostility to these private adjudicators by not enforcing their awards, litigation gained legitimacy over arbitration as a powerful, credible forum.

To regain enforceability in a less communal society, arbitration increasingly took on legal characteristics and lost its informal, consensual aspects (Mann 1987; Yarn 2004). For example, both parties would submit promissory notes or bonds at the outset of the process so that the arbitrator could have binding and legally enforceable power over both of them (Mann 1987). Because the bond was the sole source of the arbitrator's power, however, the arbitrator would simply choose which bond to enforce rather than shaping a nuanced solution. Through a variety of such mechanisms, arbitration shifted from a multifaceted negotiation over the parties' relationship to adjudication over monetary damages and narrowly defined issues (Mann 1987). Thus, the need for enforcement destroyed the consensual nature of the process and caused arbitration to become a more formal, legal process.

The history of the development of arbitration indicates that it is indeed possible to conduct arbitration as a negotiation among the arbitrator and the parties — in fact, this appears to be the original conception of the process. This history also indicates that decisive decision making, while necessary when arbitration took on legal characteristics to gain enforceability, became outdated once courts began to accept and enforce arbitration awards. With the promulgation of pro-arbitration legislation and jurisprudence in the twentieth century, arbitration decisions became legally enforceable, and the initial agreement to arbitrate became sufficient to bind both parties (Maggio and Bales 2002). As a result, arbitration no longer needs to follow judicial practices and may exercise renewed flexibility in the ways in which the process operates.

Thus, the consensus arbitration process that I propose in this article is well rooted in history and tradition. If arbitrators are able to act as facilitators with the reserve power to render decisions, this will, I believe, allow them to more naturally execute their roles as dispute resolvers whom both parties have agreed to consult.

Responding to Questions and Criticisms

As is often the case with a new idea, the consensus arbitration process that I propose here may raise criticisms, ranging from concerns about

impartiality and judicial imitation, that the potential decision-making power of the arbitrator would hinder his or her function as a facilitator, and that expanding an arbitrator's powers could violate provisions of the Federal Arbitration Act. These concerns can be successfully addressed according to the process that I propose.

Concerns Involving Impartiality and Judicial Imitation

Many mediation theorists and practitioners, probably the majority, consider mediator impartiality to be essential and many reject more evaluative methods of mediation. Consequently, I anticipate that consensus arbitration may generate some skeptical reactions from mediators. Because consensus arbitration is an alternative to arbitration, however, it should therefore be held to the standards of arbitration, not mediation.

By soliciting party input and facilitating negotiation as they determine awards, consensus arbitrators may *seem* to imitate mediators. But consensus arbitration is significantly different from mediation, evaluative mediation, and even mediation-arbitration (med-arb). As third parties who would be brought in by both sides to make a decision, consensus arbitrators would primarily be arbitrators, despite the fact that they would invite party participation in drafting the award. By merely shifting the method by which they would make their decisions, consensus arbitrators would therefore not lose their role as the agreed-to decision maker between the parties.

Skeptics would be incorrect to classify consensus arbitration as evaluative mediation because evaluative mediators only attempt to sway the parties with their own prediction of the court's disposition. Evaluative mediators do not have the arbitrator's decision-making authority and, as a result, cannot exercise the power that would be used in consensus arbitration to break impasses by blending decision making and facilitation. Any criticisms of evaluative mediation or suggestions that consensus arbitrators are mediators who are improperly acting as judges would therefore be misapplied.

Furthermore, concerns about the impartiality of mediators or facilitators also would not accurately apply to consensus arbitration. It is true that after hearing both sides, the consensus arbitrator would present partial decisions that would likely favor one side over the other. But because the parties would have agreed in advance to the arbitrator's decision, it should not matter that the arbitrator would share his or her leanings with the parties while crafting a decision. Thus, so long as the consensus arbitrator hears both sides before entering the facilitated decision-making phase of the process and as long as he or she is unbiased to begin with, this role does not violate any rules concerning mediator impartiality or touch upon the concerns that such standards were designed to address.

Though it might borrow from the practices and positive aspects of mediation, consensus arbitration would primarily be arbitration. So long as

it presents a workable blend of facilitation and decision making within the arbitrator role, consensus arbitration should not be classified as mediation nor criticized according to the standards of mediation.

Problems with Mixing Facilitation and Decision Making

It is possible that when a third-party facilitator has the power to reach binding determinations, parties may not fully disclose their true intentions because they fear the facilitator will become an arbitrator and render a decision (Landry 1996). Mediation is confidential and involves no third-party decision so that parties will openly discuss their positions, allowing for more thorough, informed solutions. If the mediator were to later render a decision, the parties would have continuing incentive to hide and exaggerate their positions, making negotiated agreement less likely. Basically, the possibility of a future decision could impede the present negotiation.

This criticism accurately applies to med-arb, a process in which the third-party neutral attempts to facilitate a negotiated resolution (mediation) but then switches roles and renders a complete decision when the parties reach an impasse (arbitration) (Landry 1996). While both processes involve a mix of facilitation and decision making, some of consensus arbitration's key features would, I believe, help this process avoid the failings of med-arb. The basic reasons are that consensus arbitration would replace arbitration, not mediation, and that med-arb is a purely detached mediation followed by an entirely decisive arbitration award.

First, in med-arb, the parties make their positions known during the initial mediation phase and could distort their entire position to receive more favorable treatment during the decision phase. While this may be a problem in purely negotiation-based processes such as mediation, this level of advocacy is normal in any arbitration process and would be expected in consensus arbitration. Next, med-arb is affected when parties conceal information because the mediation phase is the only opportunity to gather information and the process relies on voluntary disclosure and discussion. Consensus arbitration would not be similarly affected because, like other arbitral forums, it gathers information by the structured presentation and cross-examination of testimony, allowing full presentation and review of information. Finally, the parties in med-arb fear the decision-making aspect because it completely and abruptly takes away control over the decision. In contrast, the decision-making function in consensus arbitration can be limited and allows the parties to continue to shape the final award.

Therefore, consensus arbitration would avoid many of the pitfalls of med-arb because unlike the latter process, it would not involve an abrupt shift in roles from a detached mediator to a completely decisive judge. Instead, consensus arbitration would avoid these med-arb problems by blending facilitation and decision making within the role of arbitrator.

Grounds for Vacating Award in the Federal Arbitration Act

Another potential problem with consensus arbitration is that it could involve “evident partiality” and could cause arbitrators to “exceed their powers” as prohibited in the Federal Arbitration Act (FAA) (Federal Arbitration Act, 9 U.S.C. § 10 2000).

First, by making preliminary decisions favoring one party, the arbitrator would arguably be exhibiting partiality, which could be grounds for vacating the award under the FAA (Federal Arbitration Act, 9 U.S.C. § 10 2000, (a)(2)). This rule seeks to ensure that the arbitration is impartial and free from bias, and is usually applied in situations in which the arbitrator does not disclose a conflict of interest with one of the parties (*Commonwealth Coatings Corp. vs. Continental Co.* 1968; Korland 2003). The reason that consensus arbitration would not violate this rule per se is that the arbitrator would be replacing his *decisive* ruling with a *negotiated* ruling. Under this strategy, the arbitrator would still hear both sides fully, but then instead of rendering a decision, she or he would reveal her or his preferences and solicit continuing input in constructing the award. This decision-making method therefore would not demonstrate the collusion and lack of impartiality that is typically needed to vacate an arbitration award (Blum 1999).

Next, because a consensus arbitrator would employ a different decision-making procedure than the modern, standard approach to arbitration, critics might argue that this process exceeds the arbitrator’s power (Federal Arbitration Act, 9 U.S.C. § 10 2000, (a)(4)). If the parties were to agree to have an arbitrator render a decision, what would give the arbitrator the ability to impose a decision-making process that is not in the contract? Under current arbitration processes, however, arbitrators do have this freedom, because courts allow arbitrators leeway in their decision-making process and will uphold an arbitrator’s award as within his or her powers so long as it bears some rational relationship to the contract (Diamant and Zoller 2004; LeRoy and Feuille 2004).

Furthermore, FAA restrictions cover arbitrators’ substantive powers — which issues they have the power to decide — rather than procedural powers within the decision-making process (Blankley 2006). In fact, the arbitrator should be free to use any fair procedure that is not prohibited in the agreement (Weidemaier 2007). Thus, a simple contract requiring that a dispute be decided by an arbitrator should be amenable to the consensus arbitration approach.

How Consensus Arbitration Would Work

To more fully explore this proposed form of dispute resolution, I will now describe how the process should be applied, the legal classification of consensus arbitration, the more modern historical use of consensual

arbitration, and the broader implications to the field of alternative dispute resolution.

The Consensus Arbitration Process

Consensus arbitration would enable arbitrators to better embrace the consensual aspect of their role and act more like mediators than judges, while wielding the reserve power to make decisions (Prasow and Peters 1967; McConaughay 1999). Under this decision-making strategy, the arbitrator would solicit input from both parties, make preliminary decisions on basic points of contention, and then reinvoke input from the parties on the way to making final decisions. Basically, instead of rendering a decision after hearing both sides, the arbitrator would present his or her leanings or preliminary decisions to the parties for further input and discussion. Two points that merit further focus are the conduct of parties during a consensus arbitration and the strategies available to arbitrators in mixing facilitation and decision making.

The only unique requirement of consensus arbitration is that the parties respect the decisions that the arbitrator makes along the way instead of continuing to debate the areas in which the arbitrator has already made decisions. This is critical because if the parties do not respect the arbitrator's incomplete decisions and instead wish to continue debating the direction of the award, the arbitrator would not be able to guide the negotiation and would be forced to withdraw to render a decisive ruling on all issues. The urge to continue debating the merits of the case during the decision-making phase would, I believe, be outweighed by the fear of losing the ability to affect the subsequent decision. It seems likely that parties would prefer to influence even an unfavorable award rather than stubbornly debating with an arbitrator who has already made a preliminary decision. Consensus arbitrators should therefore frequently remind both parties that they have agreed in advance to accept the arbitral award and that they must show deference to the arbitrator in order to continue having input in the decision-making process.

Implementing the role of consensus arbitrator requires a coherent blend of facilitation and decision making, and this may be accomplished through a variety of strategies. A structured, mechanical approach would require the consensus arbitrator to weigh the merits and then come up with the basis for a decision. He or she would then consult with the parties by presenting the preliminary idea to the side with the weaker case and then shuttle back and forth between the parties for input in fleshing out the award. This approach would allow the arbitrator to maintain a high level of detached impartiality and would probably be favored by those who are only comfortable with standard mediation and adjudication roles.

Consensus arbitration could also involve a more flexible approach, however, in which the third party fluidly shifts between facilitating negotiation and making decisions. Using this method, the consensus arbitrator would openly discuss the shape of the award with the parties, making decisions while guiding the negotiation. This approach would blur the lines between arbitration and mediation but would most resemble the prelegal forms of arbitration described above (Mann 1987; Yarn 2004). Within this spectrum, and potentially in many other ways, consensus arbitrators could pursue a wide range of strategies to fulfill their roles.

Legal Analysis and Classification of Consensus Arbitration

To legally classify consensus arbitration, we must pin down how it would fit into the legal paradigm governing arbitration. I have already discussed the potential objections to consensus arbitration under the FAA and now turn to a broader treatment of consensus arbitration under the law.

On the broadest level, arbitration and other forms of alternative dispute resolution (ADR) are contractual alternatives agreed to by the parties to forego the expense of judicial litigation. This point is important because the flexibility to choose and design a resolution method “is limited only by the imagination of the contracting parties” (Maggio and Bales 2002: 152). Therefore, so long as both parties agree to it, nothing under the law would prevent disputants from exercising the flexibility to choose a new form of dispute resolution such as consensus arbitration.

Going one step further, I argue that consensus arbitration should be treated as a method of reaching a decision that is available to arbitrators. As noted before, consensus arbitration fits into the basic definition of arbitration as a process created and agreed to by the parties in which a neutral party hears both sides and then renders a decision (Garner 2001; Maggio and Bales 2002). The distinction between standard arbitration and consensus arbitration is merely in *how* the arbitrator reaches the decision — either withdrawing to write a complete decision or using partial decisions to facilitate party input in shaping the final award. And because the parties create the arbitration process and “can stipulate to whatever procedures they want to govern the arbitration of their disputes,” this new approach to reaching a decision does not take the process out of the definition and legal treatment of arbitration (LeRoy and Feuille 2004: 861). Consensus arbitration therefore would be arbitration with a slightly different internal method of rendering a decision, which should not change the external treatment of the process within the legal system.

Furthermore, arbitrators are granted judicial deference in how they reach decisions and, as a result, should be free to apply this type of new process under current case law. Using the arbitrator’s decision-making power to guide party input and reach a resolution ultimately fulfills the same function as withdrawing to independently render a decision. As a

result, the facilitation that occurs in consensus arbitration would fall under the decision-making phase of the arbitration process and therefore would be protected by judicial deference. Under the federal policy that limits the ability of the judiciary to review and challenge arbitration decisions, the U. S. Supreme Court has instructed lower courts not to question the arbitrator's specific reasoning, fact-finding, or decision-making methods, absent serious misconduct or excess of authority (Hodges 2000; LeRoy and Feuille 2004). Therefore, if they were to correctly follow the rulings in cases such as *United Steelworkers v. Enterprise Wheel Corp.* (1960) and *United Paperworkers v. Misco, Inc.* (1987), courts would not be able to question or overturn an arbitration award just because it was formed under a consensus arbitration process.

Thus, I would expect the courts to consider consensus arbitration under the same policies as standard arbitration and to treat the facilitated decision-making phase as the arbitrator's reasoning and findings of fact. And considering the leeway that courts provide to arbitrators in how they reach their decisions, consensus arbitration should be applicable at the arbitrator's discretion absent specific limiting instructions by the parties in the agreement to arbitrate or through stipulation.

Consensus-Style Arbitration in Recent History

In the formative days of modern American arbitration in the middle of the twentieth century, an extensive academic debate transpired between two men with opposing views of the arbitrator function (Gershenfeld 1998). George Taylor saw arbitration as an extension of collective bargaining, while Noble Braden viewed arbitration as a quasi-judicial substitution for the courts (Mittenthal 1991). Taylor and his supporters would therefore instruct arbitrators to continually encourage mediated settlements and to view their purpose as improving the parties' relationship by seeking common ground (Nolan and Abrams 1985). In fact, in one of its manifestations, the Taylor-modeled arbitrator was described as a "mediator with a club" — a mediator whose conciliating abilities were reinforced by his or her reserve power to decide parts of the case (Prasow and Peters 1967: 12). Taylor's general vision of the arbitrator's role was dominant for the first half of the twentieth century, with the arbitrator acting as more of a mediator (Nolan and Abrams 1985).

When the labor contracts being arbitrated became more complicated and legalism began to permeate the process, however, the Braden model became dominant, leading arbitrators to act more like judges. But the Taylor model became extinct not because it was flexible and creative in reaching a solution but rather because it was unpredictable (Mittenthal 1991). The fear underlying its demise was that arbitrators with the ability to create a wide-ranging compromise would decisively create an overbroad ruling. Parties were understandably uncomfortable about ceding full

decision-making power to such an uncontrolled arbitrator (Mittenthal 1991).

Taylor's model died not because the theory was flawed but because the theory did not match the procedure. As shown above, an arbitrator who seeks to be a facilitator should not use fully decisive decision making when the parties reach impasse but should continue to solicit party input as the award is shaped. If the parties had continuing input within the negotiation, they might be more comfortable with an arbitrator who aims to facilitate a mutually acceptable solution. Therefore, Taylor's conception of arbitration, while misguided in imitating judicial decisiveness, reveals the roots of a consensus arbitration-style process in American history.

The Potential Impact of Consensus Arbitration

The theoretical implications of this new process are that arbitrators could use their flexibility and decision-making power to facilitate negotiations and break impasses in an effective manner. Functionally, this shift is important because it could create a powerful form of facilitation that may be able to motivate participation and control power imbalances. Consensus arbitrators would facilitate negotiations with the same effectiveness as mediators but, unlike mediators, could make a partial decision and then reinvoke negotiations when parties are at an impasse or when one party is dominating or manipulating the interaction.

Looking at the big picture, I believe that the addition of consensus arbitration to the ADR spectrum could promote the use of arbitration and expand the use of facilitative as opposed to authoritative processes. Though arbitration must be agreed to by both sides before a dispute arises, scholars and policy makers have criticized it for favoring the more powerful, repeat player who compels the other side to sign an arbitration agreement in employment and consumer contexts (Stempel 2004). Consensus arbitration may better address this flaw by making the arbitration process less authoritative and thereby more amenable to the less powerful party.

Also, the overall effect of consensus arbitration may be to promote and spread the use of soft, facilitative dispute resolution methods. By using the same structure and fulfilling the same function, consensus arbitration could replace standard arbitration, and to the extent that it achieves this aim, it would shift the dispute resolution field from authoritative to facilitative processes.

Finally, the use of a process that blurs the lines between mediation and arbitration — and arbitration as it was often actually practiced historically — could have an impact on the way the ADR community views mediation. If it becomes successful and popular, consensus arbitration could rival not only arbitration but mediation as well. The current treatment of mediation avoids the use of power by requiring a level of detached neutrality that minimizes the mediator's relevance in the process (Mayer 2004). As

described earlier in this article, however, early negotiated forms of arbitration somewhat resembled the original “wise elder” forms of mediation in which the facilitator exerted influence over the parties (Prasow and Peters 1967; Mann 1987; Mayer 2004; Yarn 2004). This evolutionary missing link between the two processes also demonstrates that mediation and arbitration may be more similar and closely linked than the ADR community is currently willing to recognize.

Conclusion

Consensus arbitration is a proposed process that could serve the same purpose of standard arbitration except that instead of deciding the case in isolation as a judge would, the arbitrator solicits and facilitates party input while crafting the award. As the decision maker chosen by both parties (whose choice is also presumably indicative of the parties’ intentions for the process), arbitrators, I believe, will find this facilitated approach to be more suitable to their role. Also, parties could be expected to have fewer objections in submitting their dispute to a powerful arbitrator because the decision-making process would continue to accommodate their concerns. This shift in the decision-making phase of arbitration would therefore remove unnecessary judicial imitation, improve the effectiveness of the process, and make arbitration a more popular and less controversial form of dispute resolution.

The major obstacle to putting this consensus arbitration theory into practice is simply that it has not been done before. While the concept of using the arbitrator’s position to facilitate negotiation seems simple, it blurs the lines between mediation and arbitration, as they are now rigidly defined, and sets forth an untested blend of decision making and facilitation. Because established experts are rarely the first people to experiment with new methods, putting consensus arbitration into practice would therefore be the charge of regular practitioners. Fortunately, so long as the individual parties find the above arguments persuasive, any standard arbitrator should be able to apply the consensus arbitration process.

Applying new ideas and approaches in any field requires courage and initiative. Traditional methods offer the safety of routine, and innovations draw initial revulsion by challenging established concepts. However, any unease created by the introduction of consensus arbitration should be outweighed by the pioneering spirit of the ADR field and its continuing desire to improve the methods with which people address their disputes.

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