



PROMOTING LEADERSHIP IN THOUGHT
THAT LEADS TO ACTION

THE WEALTH OF NATIONS REVISITED

CADMUS

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SEED IDEAS

Organization Abolishes Scarcity
Organizing International Food Security
Boundless Frontiers of Untold Wealth
Mediterranean-EU Community for a New Era of Mankind

ARTICLES

The World in 2052
— *Ian Johnson*
Rethinking Growth: The Need for a New Economics
— *Roberto Peccei*
The Evolution of Wealth & Human Security: The Paradox
of Value and Uncertainty
— *Orio Giarini and Garry Jacobs*
Real Economies and the Illusions of Abstraction
— *Hazel Henderson*
The Moral Arc of History
— *Robert W. Fuller*
Mediation of Conflicts by Civil Society
— *Melanie Greenberg, Robert J. Berg and Cora Lacatus*
Rising Expectations, Social Unrest & Development
— *Ashok Natarajan*
Brief History of Alternative Dispute Resolution in the USA
— *Michael McManus and Brianna Silverstein*
Turn Towards Unity: Converting Crises into Opportunities
— *Garry Jacobs*
In Search of Failure's Silver Lining
— *Bengt-Arne Vedin*

BOOKS

Towards Green Growth
Taming Global Governance Idea Chaos: A "Frontier
Frame" for Recent Books
— *Michael Marien*

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The CADMUS Journal

The acronym of the South-East European Division of The World Academy of Art and Science – SEED – prompted us to initiate a journal devoted to seed ideas - to leadership in thought that leads to action. Cadmus (or Kadmos in Greek and Phoenician mythology) was a son of King Agenor and Queen Telephassa of Tyre, and brother of Cilix, Phoenix and Europa. Cadmus is credited with introducing the original alphabet – the Phoenician alphabet, with “the invention” of agriculture, and with founding the city of Thebes. His marriage with Harmonia represents the symbolic coupling of Eastern learning and Western love of beauty. The youngest son of Cadmus and Harmonia is Illyrius. The city of Zagreb, which is the formal seat of SEED, was once a part of Illyria, a region including what is today referred to as the Western Balkans and even more. Cadmus will be a journal for fresh thinking and new perspectives that integrate knowledge from all fields of science, art and humanities to address real-life issues, inform policy and decision-making, and enhance our collective response to the challenges and opportunities facing the world today.

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E-mail:

editor@cadmusjournal.org

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Brief History of Alternative Dispute Resolution in the United States

Michael McManus and Brianna Silverstein
Drinker Biddle & Reath LLP

Editor's note: *This issue of Cadmus focuses on the power of organizational innovation to address social problems and enhance social effectiveness. The development of law marks the evolution of civilization. Survival of the fittest is the law of the jungle based on strength alone. As society developed, rule by the governing principle of physical strength on the battle field was progressively supplanted by the rule of social authority as determined by those in power. Monarchy, dictatorship, plutocracy have gradually given way to principles of justice as rule of law and administered government through legislation and the courts. The settlement of disputes based on rationality and a sense of fairness marks a still higher evolutionary stage in which the authority of the state is progressively replaced by reason and values. The growing prevalence of various mechanisms of alternative dispute resolution denotes different stages of that evolutionary advance.*

Although widely known for its propensity for litigation, the USA has one of the world's most advanced and successful systems for settlement of disputes outside the formal legal system through mechanisms of mediation and arbitration. More extensive use of this system internationally and by other countries can dramatically enhance the speed and quality of social justice globally. Usage within the USA varies widely. About 11 percent of civil cases in Northern California are settled by mediation, compared to around 2 percent in eastern New York and 0.5 percent of civil cases in Europe. About 10 percent of divorce cases in Germany are submitted for mediation.

The growing complexity of modern life has multiplied the burden on the legal justice system, rendering it increasingly inadequate and ineffective. In year 2000 the Italian government was required to pay €600m to litigants claiming damages caused by trial delays. The potential importance of mediation is illustrated by the fact that at the present pace India will not clear its current backlog of cases until 2330. This article is by a very experienced American trial and arbitration attorney and practicing mediator who has extensive experience working with this system.

The wide range of innovative mechanisms commonly employed to settle disputes outside the courtroom is illustrative of the larger potential for organizational innovation in other fields designed to enhance governance nationally and globally. Alternative Dispute Resolution (ADR) in the common law tradition has its origins rooted in English legal development. As early as the Norman Conquest, legal charters and documents indicate that English citizenry instituted actions concerning private wrongs, officiated by highly respected male members

of a community, in informal, quasi-adjudicatory settings. In some instances, the king utilized these local forums as an extension of his own legal authority; rather than adjudicate a suit via the more formal king's court, the king would simply adopt the decision of a local, but highly respected layperson without ever "reaching the merits" of the suit, creating one of the first forms of arbitration. In some sense, then, common law ADR has been around for centuries.

In the United States, commercial arbitration existed in the early Dutch and British colonial periods in New York City. "Pilgrim colonists, convinced that lawyers threatened Christian harmony, scrupulously avoided lawyers and courts, preferring to use their own mediation process to deal with community conflicts." When disagreements occurred, a body of male members of the community would hear claims, determine fault, assess damages, and ensure that the parties reconciled with one another. For much of the colonial period, these informal arbitrations were the norm.

Shortly after independence and the creation of a new government, ADR found its place in a number of applications, albeit sporadically. For instance, in the Patent Act of 1790, Congress provided for an arbitration system of competing patent claims. In such a dispute, the Act authorized the creation of an adjudicative board, consisting of one member appointed by each patent applicant and another by the secretary of state. Decisions by the board were binding and, should an applicant opt out of this arbitration, the other applicant's patent would be summarily approved.

While these early attempts at ADR were essential to its development in the United States, ADR did not receive formal institutionalization until the late-19th Century. For instance, "[i]n 1898 Congress followed initiatives begun a few years earlier in Massachusetts and New York and authorized mediation for collective bargaining disputes." Special mediation agencies, like the Board of Mediation and Conciliation for railway labor and the Federal Mediation and Conciliation Service ("FMCS"), which are still operative today, were formed to carry out negotiations regarding employment. At this stage of ADR's development, it was perceived of less as an alternative to litigation and more as a tool to avoid unrest, strikes, and the resultant economic disruption.

Early in the 20th Century, states began taking a concerted interest in systematic ADR as a litigation alternative. In the 1920s, over a dozen states passed modern arbitration laws and Congress enacted a federal cognate, the Federal Arbitration Act. All of these laws significantly improved the nature of U.S. arbitration by:

- Making agreements to arbitrate future disputes legally valid and enforceable and revocable only as any contract could be revoked;
- Closing the court to parties to an arbitration agreement by requiring them to comply with their agreement;
- Authorizing courts to enforce arbitration awards; and
- Authorizing courts to appoint arbitrators and otherwise expedite arbitration when one party has failed to move forward with the agreement to arbitrate.

While all of these were positive developments, the most innovative was the expressed authorization for courts to enforce ADR remedies.

With the enactment of statutory ADR systems, lawyers and entrepreneurs realized the importance of providing nongovernmental voice to ADR-related policymaking. In 1926, the American Arbitration Association (“AAA”) was formed to provide guidance to arbitrators and parties as to ADR methods and time-tested procedures. Using the collective expertise of individuals in the field, AAA developed and promulgated rules on the proper methods for arbitration. Over the years, AAA has become the premier organization promoting and nurturing business arbitration in the United States.

Throughout the 20th Century, ADR grew in popularity as an alternative to the litigation process. At the governmental level, state and federal governments began utilizing ADR in a number of programs. For instance, during the 1970s, the Department of Health, Education, and Welfare was designated as the administrator of the Age Discrimination Act of 1975, to resolve claims of age discrimination in federal workplaces. To facilitate speedy resolutions of the matters, the Department enlisted the help of FMCS to mediate complaints under the new law, a process that became routine in 1979. At the academic level, the 1980s brought significant interest from legal experts in the uses of ADR in a variety of fields. Universities and law schools began introducing courses and degrees in ADR related topics. By the turn of the 21st Century, an American Bar Association survey showed that the majority of law schools had some form of ADR related program, including extracurricular competitions.

Today, arbitration exists at all levels of the U.S. legal profession. Law firms regularly employ retired judges or AAA certified attorneys with ADR expertise to offer mediation, negotiation, and arbitration services to individuals and businesses. In 1979, retired Judge Warren Knight of California started the Judicial Arbitration and Mediation Service, an organization dedicated to providing law firms, businesses, and individuals with access to judges willing to serve in ADR capacities. And in 1995, database providers, like Martindale-Hubbell, began publishing routinely-updated directories of ADR practitioners, their firms, and areas of practice, affording more individuals access to ADR related services. Thus, ADR as a legal system has become firmly entrenched in the United States.

1. Forms and Types of ADR in the United States

ADR comes in many iterations in the United States, ranging from highly formalized, quasi-judicial proceedings to informal, conference room conversations. In each of its forms, ADR offers U.S. clients and practitioners numerous options to obtaining non-litigation relief. The types of ADR available in the United States can be divided into three general categories: adjudicative, evaluative, and facilitative.

1.1 Adjudicative ADR

In an adjudicative ADR proceeding, a quasi-judicial facilitator, called the “neutral,” serves as the adjudicator or decision maker. This participation by an outside, impartial third-party is often desirable to parties unwilling to negotiate, yet preferring to avoid formal litigation. Additionally, while adjudication through the U.S. judicial system “always results in a binding decision,” adjudicative ADR can provide various results, whether “binding, non-binding, or advisory.”

Arbitration: Arbitration is a form of adjudicative ADR that is generally conducted by a single arbitrator or a panel of three. Typically, arbitration is used in situations where the par-

ties cannot agree on the facts of a dispute or the conflict is purely monetary. Arbitration is also regularly utilized in cases in which a matter is highly technical, requiring an expert decision. Arbitration proceedings are often much more formal than other forms of ADR, mirroring adversarial, court-like proceedings. Often attorneys participate, witnesses are called, evidence is taken, motions are filed, and post-hearing briefs are submitted. Where the parties have previously contracted for arbitration, decisions are binding. Depending on the agreements entered into by the parties before arbitration and the relevant law of the jurisdiction (federal or state), an arbitration decision may be appealable to the court system.* Parties to arbitration must agree on applicable rules of procedure, and the amount of discovery allowable. In situations in which the parties have agreed to a three person panel, most often each party will select its own arbitrator and then agree upon a third neutral.

Neutral Fact-Finding: Another form of adjudicative ADR is neutral fact-finding. In situations in which parties to a dispute cannot agree on the facts or technical expertise is essential to their determination, the parties may employ a third-party to inquire into the underlying particulars of a case. This form of ADR may be employed at the outset of a matter or during litigation; indeed, some trial judges may order the parties to appear before a neutral fact-finder to resolve factual issues. In some jurisdictions, a final decision maker, like a trial court judge, may be bound by the neutral fact-finder's determinations.

1.2 Evaluative ADR

The second category of ADR, evaluative ADR, is a process in which lawyers and litigants present their version of a particular case and receive feedback on the strengths and weaknesses of their claims and arguments. In many of these proceedings, the parties are not yet willing to discuss a settlement and an evaluation serves to provide context as to each party's bargaining power, both to reaffirm particular beliefs and to dispel unreasonable expectations.

Peer Evaluation: In peer evaluation, attorneys for each party appear before a neutral attorney or panel of attorneys experienced in the subject matter of the dispute, and present the case. In many instances, the panel may offer recommendations for argument development, may point the parties to issues not previously considered, and provide recommendations for settlement. Even if a settlement is not reached, the parties' decisions will be informed by these recommendations throughout any future litigation.

Lay Evaluation or Summary Jury Trial: Lay evaluation or summary jury trial ("SJT") is essentially an expedited and abbreviated jury trial. Attorneys for both sides of the dispute present to a pool of possible jurors opening arguments, a summation of the evidence one witness each and closing arguments. On this basis, the "jury" deliberates and returns a verdict, with time for the parties to then poll the panel. This proceeding allows parties to get a sense of how an actual jury may resolve a case.

Judicial Evaluation: Judicial evaluation is similar to an SJT, but in place of a jury it utilizes a retired judge who only provides feedback to the parties on the merits of a dispute.

Specialist or Expert Evaluation: This proceeding is often employed where the conflict raises highly technical issues, requiring opinions from experts in the field, such as in con-

* For a discussion of the intricacies of appellate proceedings for arbitration see Ian Macneil, Richard Speidel and Thomas J. Stipanowich, *Federal Arbitration Law: Agreements, Awards & Remedies Under the Federal Arbitration Act* (1994).

struction, computer design, or biomedical technology matters. The parties may agree beforehand that the expert's determination of the issues is definitive and this may be used as common ground in a settlement discussion or trial. The informality of the proceeding may engender open dialogue between the parties and the experts, without the pressure to "one up" one another.

1.3 Facilitative ADR

In facilitative ADR, the neutral does not render a binding decision nor does he or she actually "reach the merits" of a dispute. Instead, a neutral serves more as a referee or advisor to the parties, to encourage discussion, dialogue, and settlement. The three most common forms of facilitative ADR are mediation, conciliation, and consensus building.

Mediation: Mediation is the least adversarial form of ADR. The mediator helps the parties identify real issues, frame the discussion, and generate options for settlement. The goal of mediation is to provide a "win-win" resolution, enabling both parties to obtain a satisfactory remedy. Mediators come from a number of different backgrounds, but most are practicing attorneys, familiar with the underlying subject matter of a conflict. Mediation can be utilized at all stages of a dispute, whether before or during trial or throughout the appellate process.

Of all the types of ADR, "[m]ediation has emerged as the primary ADR process in the federal district courts."^{*} Most federal jurisdictions offer some form of mediation and many require it. Mandatory mediation either requires parties to engage in mediation in certain cases or creates disincentives for parties to decline it. The cases in which parties are often required to participate in mediation include family law cases such as divorce proceedings, farm mortgages cases, collective bargaining disputes, agricultural producer-distributor bargaining, and medical malpractice cases. In fact, "[m]ediation is most frequently mandated for those disputes . . . which courts despair of handling well and whose continuation is commonly thought to affect those not at the bargaining table." Even when parties are not required to engage in mediation, courts may nonetheless have incentives to encourage mediation, such as imposition of costs or the leveling of sanctions on parties that opt-out. Some courts have even gone so far as to find that failure to engage in mediation deprives the court of subject matter jurisdiction to hear the parties' case.[†]

Conciliation: Conciliation is very similar to mediation, with much less formality. While mediation may entail regular meetings between the parties, conciliation may be as informal as a telephone call. Moreover, conciliation usually assumes that the parties have already achieved some form of reconciliation and that the relationship has been mended, requiring only that the details of the matter be resolved.

Consensus Building: Consensus building may be thought of as mediation on a large scale where a large number of parties are involved and representatives may be charged to appear and obtain decisions on behalf of their constituencies. Consensus building may proceed over an extended period of time. In these situations, because of the sheer number of parties involved, individuals may not attend the actual deliberations, but send a representative.

^{*} Elizabeth Phlapingner & Donna Stienstra, ADR and Settlement in the Federal District Courts 4 (1996).

[†] See *Blackmon-Malloy v. United States Capitol Police Bd.*, 338 F. Supp. 2d 91 (D.D.C. 2004).

2. Conclusion

While ADR as a system has gone through a number of iterations in the United States, the ultimate purpose of the many types of ADR remains similar to that of the early common law equivalents—to provide parties with a satisfactory resolution of a conflict short of formal court proceedings. It is for this purpose that ADR continues to be an important and popular option for individuals and businesses in the United States.

Author Contact Information

Michael McManus - Email : michael.mcmanus@dbr.com

Brianna Silverstein - Email : brianna.silverstein@dbr.com

Notes

1. Valerie A. Sanchez, Towards a History of ADR: The Dispute Processing Continuum in Anglo-Saxon England and Today, 11 Ohio St. J. on Disp. Resol. 1, 16 (1996).
2. Jerome T. Barrett, A History of Alternative Dispute Resolution: The Story of a Political, Cultural, and Social Movement 41 (2004).
3. Cole, McEwen and Rogers, Mediation: Law, Policy, and Practice § 5:1 (3d ed.).
4. Kimberlee K. Kovach, Mediation: Principles and Practice 6 (2d ed. 2000).

Rising expectations release enormous amount of social energy that spills over into social unrest when no suitable positive channels are available to utilize it for social advancement. Harnessing that energy for constructive purposes requires appropriate social organizations and productive skills.

Ashok Natarajan, Rising Expectations, Social Unrest & Development

I would suggest searching for a more appropriate word for failure, one not tainted with negative connotations. Because failure is the high road to innovation, because failure is the inevitable investment in the future, because failure is – the road to success.

Bengt-Arne Vedin, In Search of Failure's Silver Lining

First, we must recognize the crises we face are not black swans, fat tails or perfect storms, but symptoms of our limited perception, fragmentary reductionist mindsets, models, research methods and academic curricula, particularly in economics and business schools. Second, we must move beyond economics to capture all their "externalities" in multi-disciplinary frameworks, systems models, multiple metrics and pluralistic research.

Hazel Henderson, Real Economies and the Illusions of Abstraction

The wide range of innovative mechanisms commonly employed to settle disputes outside the courtroom is illustrative of the larger potential for organizational innovation in other fields designed to enhance governance nationally and globally.

*Michael McManus and Brianna Silverstein,
Brief History of Alternative Dispute Resolution in the United States*

Today humanity has acquired the conscious self-awareness and the organizational capacity for self-expression and coordinated action. Organizing the consciousness of the global power of citizenry is the natural step to transcend the nation state. It needs only the right pioneering leadership with the right ideas and the right values to sound the call.

Garry Jacobs, The Turn Towards Unity: Converting Crises into Opportunities

Global governance is clearly taking shape in complex and chaotic ways, with widespread dissatisfaction of present arrangements and numerous proposals for betterment — all at a time when many national governments are also being questioned, arguably due, at least in part, to deficiencies in global governance and international accords.

*Michael Marien,
Taming Global Governance Idea Chaos: A "Frontier Frame" for Recent Books*

The world needs a paradigm shift in economics similar to the one physics experienced at the dawn of the last century, when quantum mechanics and the special and general theories of relativity were invented to address new phenomena not explainable by Newtonian mechanics or Maxwell's electrodynamics.

Roberto Peccei,

Rethinking Growth: The Need for a New Economics

Society is evolving. Understanding the present in the light of the past, we see only the problems resulting in gloom. Understanding the present in the light of the future compels us to evolve, we see the opportunities it points to.

Ian Johnson, The World in 2052

We have organized production to perfection, but left out the most crucial ingredient – humanity. We have raised the value of GDP phenomenally, but overlooked the value of human security. The process of society's past evolution offers hope and assurance that there is a better way and a better life for all humanity waiting to emerge. Human-centered economic theory and measures of wealth, welfare and human security can help us realize it now.

Orio Giarini & Garry Jacobs,

The Evolution of Wealth & Human Security

Working for peace is part of the heritage WAAS fellows have been given by Academy founders who, after helping develop the theories and technology for nuclear weapons, were amongst the first to recognize that they should be banned. Two of the seven founders of WAAS (Robert Oppenheimer and Bertrand Russell) became global figures in proposing nuclear disarmament.

Melanie Greenberg, Robert J. Berg & Cora Lacatus,

Mediation of Conflicts by Civil Society

The difference between predation and competition is that predation knows no rules. In contrast, competition can be made fair. Making sure that it is—by disallowing rankism in all its guises—a proper function of government.

Robert W. Fuller, Moral Arc of History

Continued . . .