

# ADR & the Law

TWENTIETH EDITION

Developments in the Law: 2003



American Arbitration Association

*Dispute Resolution Services Worldwide*



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## PREFACE TO THE 20TH EDITION

The 2003 edition of *ADR & the Law* is a joint venture of the American Arbitration Association, the *Fordham International Law Journal*, and the *Fordham Urban Law Journal*. (Information about these journals is available in the Appendix at the end of this volume.) The AAA and the Fordham journals have been publishing the series in partnership since 1999 (the 16th edition). For the first time, Juris Publishing, a well-known legal publisher, is participating in the series as co-publisher of the 2003 edition.

This volume contains summaries of significant court decisions about alternative dispute resolution issued in 2003 by federal and state courts in the United States. The cases are mainly commercial in nature, or involve labor and employment, reinsurance, healthcare and construction. The cases are organized into chapters by subject matter. However, they may address procedural and substantive issues that would appeal to readers interested in other subjects.

This book also contains commentary by practitioners and scholars concerning ADR law and practice in the United States and abroad. The domestic portion of this volume includes an empirical study of employment awards, an update on important employment arbitration decisions, a paper on discovery in arbitration, negotiation and mediation, and Jewish law and ADR. The international part of the book contains timely articles on arbitration under bilateral investment treaties, the role of precedent in international arbitration, an analysis of the latest developments in domain-name arbitration, the new Austrian mediation law, discovery problems in international arbitration, using step-ADR clauses in Finland, and an introduction to the new Spanish Arbitration Act. In addition, it summarizes recently enacted U.S. and state ADR legislation, and presents unofficial translations of new international legislation from Japan, Spain and Vietnam.

For the first time, the 2003 edition includes a CD ROM that contains the latest version of the American Arbitration Association's ADR rules and procedures, the recently revised American Arbitration Association/American Bar Association Code of Ethics for Arbitrators in Commercial Disputes, a directory of AAA offices, and other useful materials.

*William M. Treanor, Dean of the Fordham University School of Law*  
*William K. Slate II, President/CEO of the American Arbitration Association*



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## INTRODUCTION TO THE 20TH EDITION

The 2003 edition of *ADR & the Law* is the 20th edition of this popular series. Originally published by the Office of the General Counsel of the American Arbitration Association under the title *Arbitration & the Law*, the series was re-titled *ADR & the Law* in 1994 to reflect the growing importance of ADR processes other than arbitration, including mediation, and dispute avoidance techniques.

There is no doubt that ADR is now an established field. The Federal Arbitration Act (FAA) is 80 years old and the 1955 Uniform Arbitration Act, which was enacted in numerous states, is 50 years old. Five years ago, the National Commissioners on Uniform State Laws crafted a revised uniform arbitration statute known as the Uniform Arbitration Act 2000, and in 2001, the Commissioners produced a brand new uniform act on the mediation process. As of this writing, the 1955 Uniform Arbitration Act remains in effect in a majority of states. The Uniform Arbitration Act 2000 is in effect in these 11 states: Alaska, Colorado, Hawaii, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Utah and Washington. In addition, the Uniform Mediation Act has become law in six states (Illinois, Iowa, Nebraska, New Jersey, Ohio and Washington). It is expected that these new uniform laws will continue to be introduced in state legislatures throughout the country.

In addition to ADR legislation, there is a growing body of case law that delineates important aspects of ADR law and practice. Over the last two decades, there have been major pronouncements by the U.S. Supreme Court upholding the enforceability of arbitration agreements and otherwise supporting the practice of arbitration. The Court has addressed issues relating to federal preemption of state arbitration laws, interpreted the Federal Arbitration Act, and ruled on various arbitrability issues. State courts have also issued decisions on these and related subjects, many of which have concerned the due process requirements for arbitration proceedings involving consumers and employees. To protect consumers and employees subject to mandatory arbitration programs, the American Arbitration Association initiated collective efforts with other interested

groups to develop due process protocols in the areas of employment, consumer transactions and healthcare. These protocols can be found in the AAA Web site ([www.adr.org](http://www.adr.org)) and in the CD-ROM included with this volume.

Through enactment of the Administrative Dispute Resolution Act of 1996 and the Alternative Dispute Resolution Act of 1998, the federal government has promoted the use of ADR by government agencies and courts, respectively. As a result, since the mid-1990s, Court mandated ADR programs can be found in federal courts throughout the country at all levels. State court systems have also followed suit.

In the 80 years since the Federal Arbitration Act was enacted, judicial attitudes toward arbitration have made a 180-degree turn. Once considered a disreputable process (or at least one that took business away from judges who were paid by the number of cases they heard), arbitration has become a favored process, one that helps reduce court congestion while providing a quicker and less costly resolution. Mediation is increasingly popular since it puts the resolution in the hands of the parties themselves and, therefore, tends to come up with a settlement acceptable to both sides while preserving the business relationship. Surveys of corporate counsel indicate that it is a favored process in the business sector.

Today law students and all practicing lawyers should be learning about ADR. In some jurisdictions lawyers have no choice because local ethics rules or rules of professional responsibility require them to discuss ADR options with their clients. In order to do this, lawyers need to understand the processes, know the advantages and disadvantages of each and when it would be most productive to employ them. Certainly, lawyers must learn about the particular processes required by the jurisdictions in which they practice law. They also must become familiar with the rules relating to the multi-jurisdictional practice of ADR if they practice ADR in more than one state.

Arbitration is particularly associated with international commercial transactions since it is a practical way of avoiding litigation in a foreign nation's court. Since the late 1990's arbitration has also become associated with certain multilateral treaties (for example, the North American Free Trade Agreement known as NAFTA) and bilateral investment treaties entered into between two States to encourage investment by foreign investors. Such treaties usually provide foreign investors with protection from local courts by calling for arbitration to resolve disputes arising from treaty violations (although some may require the "exhaustion of local

remedies” first). Lawyers whose clients enter into international transactions have the added responsibility of learning the laws in the affected countries (including their arbitration law, if any), and becoming familiar with treaties that apply.

ADR has made inroads on the latest frontier—the Internet. For example, online mediation is available for buyer-seller disputes arising out of e-Bay sales. An arbitration process exists for disputes over ownership of Internet domain-names through the World Intellectual Property Association and other providers. The American Arbitration Association is a provider of ADR services for trademark disputes involving the .US domain name. As business increases online, entrepreneurs and ADR providers can be expected to find ways to adapt ADR to the circumstances.

The Internet provides a gold mine of information about ADR. One can find the rules of most established ADR institutions (including that of the American Arbitration Association), the arbitration laws of most states, translations of many international arbitration statutes, and international treaties providing for recognition and enforcement of international arbitration awards. There one can also find documents prepared by the United Nations Commission on International Trade Law (UNCITRAL), including the Model Law on International Commercial Arbitration, the UNCITRAL Arbitration Rules, and the recently developed UNCITRAL Model Law on International Commercial Conciliation. While ADR between commercial parties is largely a private matter between the parties alone, the same cannot be said of State-to-State and investor-State arbitrations conducted under international treaties (whether multilateral or bilateral), and many awards in these cases can be found on the Internet as well.

One must look to professional journals and law reviews for serious research and commentary in the field of ADR. Through such work, scholars and practitioners reveal how ADR is practiced and the strengths and weaknesses of each process. The Association maintains the only library in the country that is solely devoted to the subject of ADR. Since its dedication on March 23, 1954, the American Arbitration Association Library and Information Center, located in New York City, has amassed a vast collection of books, periodicals, pamphlets, microforms, and articles dealing with all types of arbitration, mediation, negotiation and other forms of AD. The Association is committed to educating the public about ADR through its flagship publication, the *Dispute Resolution Journal*, and *ADR & the Law*.

