



California Lawyers Association

presents

Emerging Topics in Alternative Dispute Resolution

1.25 Hours MCLE

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11:30 AM -12:45 PM

Speakers:

David Coher

Jeffery Daar

Bob Gaglione

Kristin Rizzo

Elsa Sardinha

Conference Reference Materials

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Emerging Topics in Alternative Dispute Resolution

- David Coher
- Bob Gaglione
- Elsa Sardinha
- Jeffery Daar
- Kristin Rizzo

About Our Speakers ...

David B. Coher



COHER ADR

Telephone:
(213) 545-6149

Electronic Mail:
david@coheradr.com

Website:
www.coheradr.com

- Mediator, U.S. District Court, Central District of California ADR Panel
- Arbitrator Member of American Arbitration Association panels for Commercial, Energy, and Technology matters
- Former Executive, Southern California Edison
- Chair *Emeritus*, Planning Commission, City of Pasadena
- 20+ of litigation practice in California, New York, and Washington, D.C.

Jeffery Daar



T: +1 818.615.0999

E: jdaar@daarnewman.com

International Litigation and Arbitration track record for more than 25 years

- Principal of Daar & Newman, P.C., Los Angeles
- President, Los Angeles City Ethics Commission
- Chair, Alternative Dispute Resolution Committee, California Lawyers Association
- Fellow, Chartered Institute of Arbitrators
- Past Chair, International Law Section of the State Bar of California
- Past Chair, International Law Section of the Los Angeles County Bar Association

Bob Gaglione



Telephone:
(619) 238-6000

E-mail:
gaglione@pacbell.net

- Arbitrator with American Arbitration Association since 2003.
- Former Deputy Director with the US Department of Labor in Washington DC.
- Business and civil trial lawyer for more than 30 years in California, New York and Washington DC.

Kristin Rizzo



*Results Beyond Dispute*SM

T: (858) 848-5850

Email:

KRizzo@JudicateWest.com

[www.judicatemw.com
/adr/kristin-rizzo](http://www.judicatemw.com/adr/kristin-rizzo)

Mediator at Judicate West

- Specializing in employment matters (including complex multi-party, PAGA, wage and hour class actions) and emotionally charged/high-impact matters
- Plaintiff and Defense Civil Litigator and Workplace Investigator prior to becoming a Full-Time Mediator
- Commissioner and Past Chair, City of San Diego Human Relations Commission
- Past President, San Diego County Bar Association
- Former Mediator with the California Department of Fair Employment and Housing

Elsa Sardinha



+1 778-683-3598

e.sardinha@vaniac.org

Secretary-General & Managing Director, VanIAC; since 1986, not-for-profit Arbitral Institution, administers international arbitrations & mediations, appoints arbitrators, manages finances, provides efficient arbitration services & enforceable arbitration awards to global business community

Independent Arbitrator with extensive international commercial arbitration experience concerning a range of legal systems & industries, under all leading institutional arbitration rules

Singapore International Arbitration Centre (SIAC) Panel of Arbitrators; US-Canada-Mexico Agreement (USCMA, formerly NAFTA) Roster for Chapter 10 Binational Panels for trade remedy disputes; EU list of Arbitrators & Trade and Sustainable Development Experts for investor-State disputes

Former Tribunal Secretary to Arbitrators Henri Alvarez KC, Chris Thomas KC, & Lucy Reed on complex investment treaty & international commercial arbitrations

Former Legal Counsel London Court of International Arbitration (LCIA) & Permanent Court of Arbitration (PCA)

PhD, McGill University; publications in ICSID Review, The Law and Practice of International Courts and Tribunals, Canadian Yearbook of International Law, Routledge's International Economic Law Series, Handbook on International Investment Law and Policy

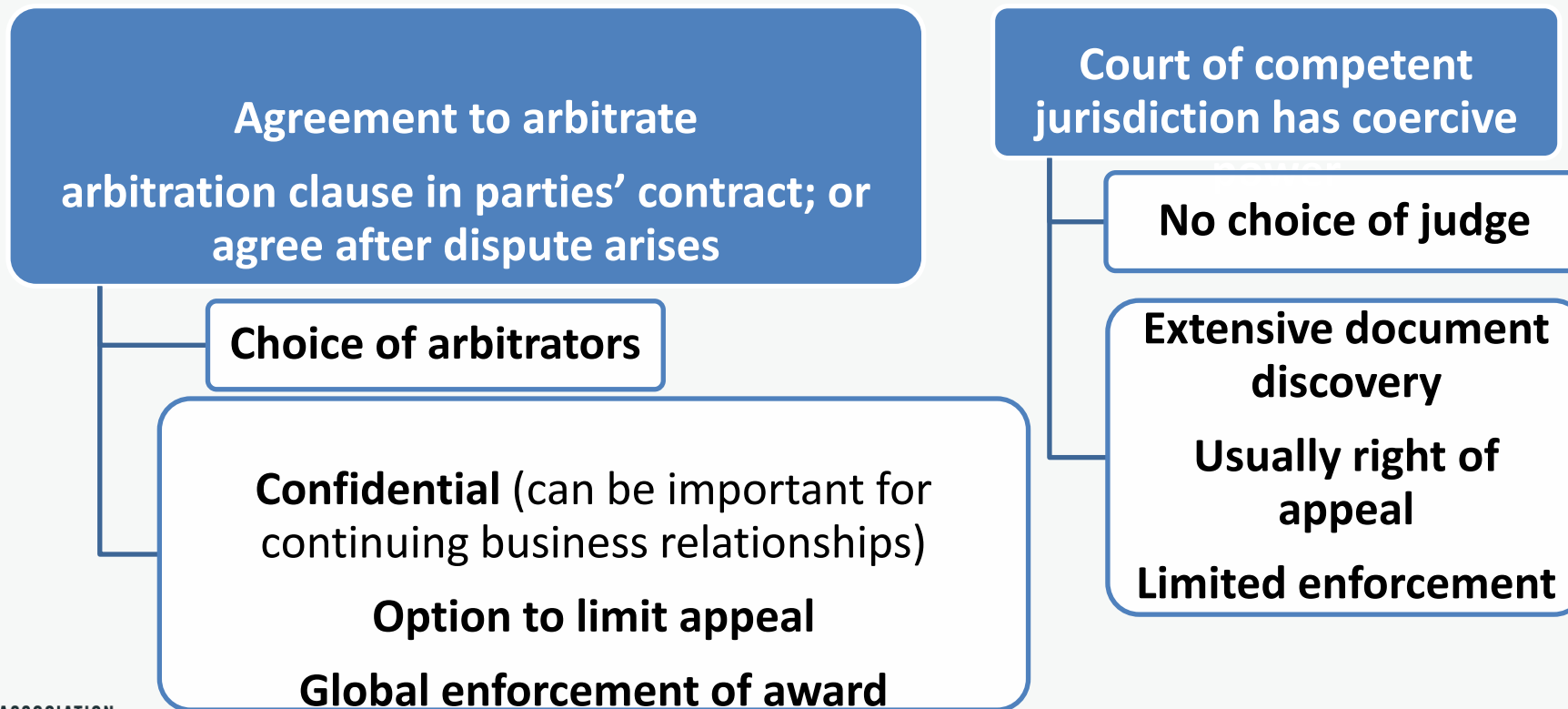
Setting the Stage of ADR

What Is International Arbitration?

- The California Arbitration and Conciliation of International Commercial Disputes Act (Civ. Proc. §§ 1297.11, et seq.) “applies to international commercial arbitration and conciliation, subject to any agreement which is in force between the United States and any other state or states.”
- The Act is based substantially on the United Nations Commission on International Trade Law (“UNCITRAL”) Model Law on International Commercial Arbitration.
- The Act triggered if international commercial agreement and parties agree to arbitrate in accordance with California law (to the exclusion of California’s domestic arbitration law).

Litigation *compared to* Arbitration

Importance of re-setting expectations parties/counsel may have of what arbitration should look like; just proceeding as though it's litigation in another forum won't achieve or maximize efficiency benefits



Arbitration Clause Essentials

Arbitration can be faster and cheaper than litigation

But a poorly drafted arbitration clause can result in arbitration costing more and taking longer than litigation

Having the right arbitration clause in your commercial contract at the outset saves having to seek agreement to this after a dispute arises

Governing
law of the
contract

Arbitration Rules
(VanIAC Arbitration
Rules)

Number of
Arbitrators
(Default 1)

Language of
the arbitration
(default
English)

'Arbitral Seat'
(British
Columbia,
Canada)

Appeal or
No
Appeal?

VanIAC Model Arbitration Clause

All disputes arising out of or in connection with this agreement, or in respect of any legal relationship associated therewith or derived therefrom, shall be referred to and finally **resolved by arbitration administered by** the Vancouver International Arbitration Centre (**VanIAC**) pursuant to its applicable Rules by **one arbitrator [or three arbitrators]** appointed in accordance with the VanIAC Arbitration Rules.

The **place of arbitration** shall be **Vancouver, BC, Canada**.
The **language** of the arbitration shall be **English**.
The **governing law** is the law of **BC**.

Arbitration Clause tips

Be careful not to include provisions that turn out not to suit the dispute

Even if the clause incorporates certain rules, be mindful that parties/counsel may not read them

Arbitrators play an important role in managing parties' expectations and making suggestions at the First Procedural Conference, potentially even in face of an arbitration agreement that hasn't been well thought out

Enforceability

- No international treaty requires foreign courts to give effect to U.S. court judgments. As a result, unpredictable outcomes.
- The New York Convention provides standards for the enforcement of foreign arbitral awards. As a result, more predictable outcomes.
- The New York Convention has approximately 172 member states.

Timing and Contractual Issues

Pre-Litigation & Early Mediation Explored

Benefits of Pre-Filing and Early Mediation:

- **Cost and Time Savings:** Litigation costs and time investments are reduced for both sides
- **Relationships/Privacy:** On-going relationship (family, tenancy, employment); reputational harm; privacy and confidentiality; preserving business focus; financial, emotional, or case concerns (issues with witnesses or disclosure of medical records)
- **Efficient and Effective Opportunity for Reasoned Decision-Making:** The parties gain valuable information to allow for evaluation and decision-making, including each other's factual and legal arguments, what evidence their adversaries are relying on, and the mediator can highlight weaknesses that might not have been contemplated.

Challenges of Pre-Filing and Early Mediation:

- **Lack of Information:** No or little formal discovery (document disclosure and deposition testimony)
- **Perceived Weakness, Potential for De-Valuing the Claim, or Impasse:** Some of the best cases for early mediation can be some of the most difficult to resolve due to the perceived challenges inherent in them and in getting these matters to an early mediation.
- **Timing is Everything:** Pre-litigation mediation requires all involved to quickly evaluate all information. Sometimes it can be too quickly, or a piece of the puzzle might still be missing, and settlement doesn't happen. The silver lining is that the mediation negotiation allows defined parameters and insight into future negotiation potential.

Mandatory Mediation before Arbitration in Contract Clauses?

Potential Benefits of Mediation Before Arbitration

- **Preservation of Relationships:** Adversarial proceedings cause strain in unpredictable ways.
- **Cost and Time Savings:** When fruitful, it's quicker and less expensive than arbitration or litigation.
- **Flexible Solutions:** Parties have more control over the outcome.
- **Confidentiality:** Encourage parties to be more open and candid in their discussions.

Challenges and Concerns

- **Unsuccessful Mediations:** Mediation doesn't always result in a settlement.
- **Power Imbalance:** Some may feel compelled to agree to a settlement for fear of further proceedings.
- **Delay:** It could be a check-the-box exercise if the parties tried to resolve it before and can't.
- **Voluntariness:** A necessary component to a successful mediated resolution of the dispute.

Mass Arbitrations

The question of whether class action arbitration waiver agreements are enforceable was decided by the United States Supreme Court in *EPIC Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018). Justice Gorsuch, writing for the majority, stated that the Court has determined that the Federal Arbitration Act “establishes ‘liberal federal policy favoring arbitration agreements,’...[and] arbitration agreements like those before us must be enforced as written.”

Following this decision, and in the face of arbitration clauses that bar class actions, attorneys representing employees or consumers have responded in some cases by filing dozens, hundreds or even thousands of individual arbitration demands against a single company. These filings have prompted questions about how ADR providers will administer the cases, what fees apply and whether providers will impose specialized procedures or rules that may be contrary to the specific terms of the parties’ contract. Filing fees in mass arbitrations can be very expensive because each claim has to be decided on its own merits. ADR providers are working on best practices to handle mass arbitrations.

Post-Pandemic, Niche ADR Formats, and Technological Developments

Use of ADR in Government & Regulatory Matters

Mediation is now being used more by local, state and federal governments.

For example, the United States Department of Labor has successfully used mediation to resolve civil rights and EEO disputes with federal contractors at the Office of Federal Contract Compliance Programs (OFCCP.) See, OFCCP Directive 2020-03 - Pre-Referral Mediation Program.

Mediation is also used regularly for civil rights cases at the EEOC and California Department of Fair Employment and Housing (DFEH.)

Recent Technological Developments in ADR

Current

- **Videoconferencing:** Has leapt from future to current to the norm due to the pandemic.
- **Online Dispute Resolution (ODR):** For appropriate disputes, it can offer convenience, cost-effectiveness, and speed. Several ODR platforms are available that handle disputes in various areas, including e-commerce, travel, and financial services.

Future

- **Virtual and Augmented Reality:** The next step, beyond Zoom/Teams/Webex. Want to simulate an in-person mediation session? What about doing a site visit to walk-thru or fly-over the site of an accident?
- **Blockchain Technology:** Could be used to track the progress of a dispute, verify the authenticity of documents, or store settlement agreements.

The Best of Both Worlds?

Hybrid Mediation: Today and Beyond

Hybrid Mediation Defined:

- In-Person + Remote Mediation = Hybrid Mediation.
- A "hybrid" format typically is where one side appears in-person and one side appears remotely. Hybrid these days also can mean a mix of in-person and remote attendance within one side or party. A hybrid format offers the benefit of both remote and in-person formats allowing each party to choose whichever or both formats which work best for their team, based on their needs (ex. geography, timing and cost considerations).

Benefits of Remote and In-Person Formats:

- Remote: Cost and time effective especially with parties and participants in different locations, allowing high-level personnel to be present and especially beneficial when non-monetary solutions are discussed.
- In-Person: Particular effective in high-impact matters where specific emotional or intimate connection might be required and/or when a higher form of non-verbal communication might be key.

Hybrid Tips for Using the Hybrid Format Effectively

- 1. Give Specific Notice:** All Parties should be advised of what format(s) each party(ies) will be using at the mediation so everyone is aware, feels comfortable, and has the option to change, if needed.
- 2. Address Communication Expectation:** When using a hybrid mediation model, communication and communication expectations can get complicated. Be prepared to use all forms of communication, from the screen and direct modes of speaking, to the telephone and text messaging for efficiency and/or side communication, to emailing and screen sharing for documents, and a method for executing of the term sheet or settlement agreement. It's also best to address these expectations in advance of the mediation via a pre-mediation teleconference.
- 3. Select Your Format on a Case-By-Case Basis:** When selecting your format for mediation, whether remote, back to in-person, or all formats in one now with a hybrid model, know your client and case needs, how your mediator works, and be prepared for effective communication and document use to ensure the most effective and efficient day.

Top ADR / Negotiation Tips and Tricks



Be a Mediation Advocate with a Resolution Mindset.



Always share you mediation brief and any information which is material to your respective settlement position in advance of the mediation.

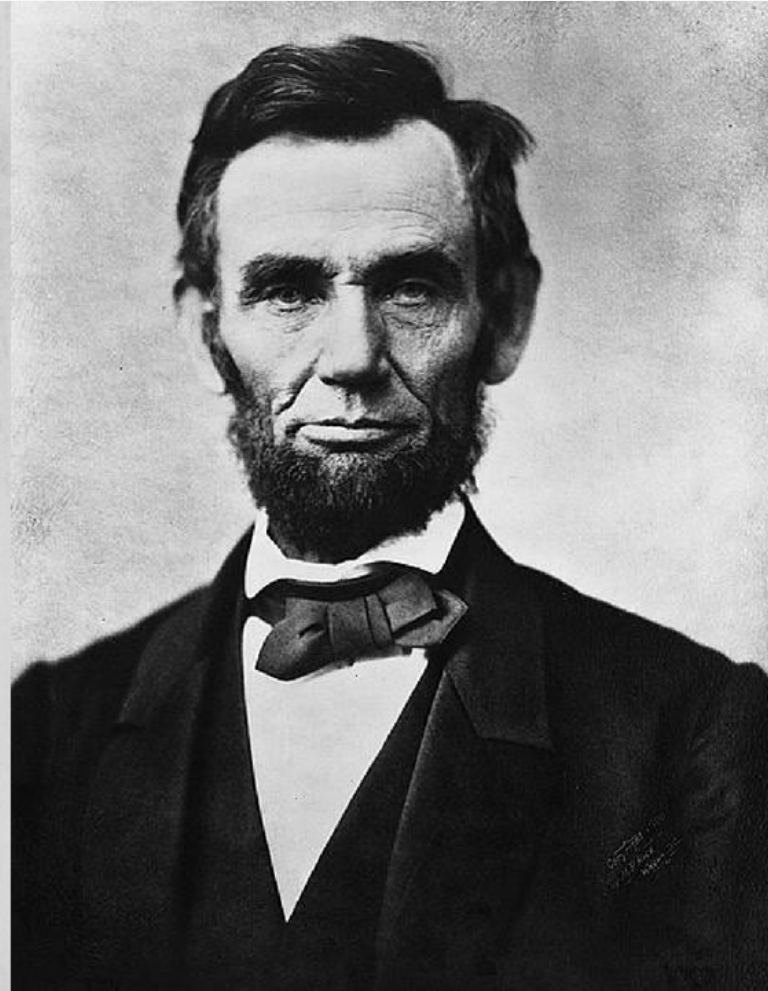
- As the mediator, I am not the decision-maker, so I am not your sole audience for your brief and all of the relevant and significant information.
- Exchanging mediation briefs in advance of the mediation session helps to confirm that the other party and their decision-maker (plaintiff, company head, insurance carrier, etc.) is best educated so they can make reasoned informed decisions at the mediation to reach resolution.
- If the brief contains confidential or more sensitive information, that information can be excluded and shared with the mediator via separate confidential letter/email or during the pre-mediation call.
- Surprise is the death knell of a mediation.

Kristin Rizzo

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Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser -- in fees, expenses and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.

Abraham Lincoln in 1850



Bob Gaglione

“ Tips and Tricks

Mediation:

- Address weaknesses of your case to make them stronger
- Avoid setting unrealistic expectations and boxing in positions
- Cooperate with the Mediator

Arbitration:

- Be very focused on what discovery is essential
- Conduct the case cooperatively
- Focus on efficiency and a just procedure

Jeffery Daar



Tell your story.

Make certain that you are always *telling* and *tying your points back* to your story because *your story is your negotiating power.*

David B. Coher