Business Courts, Arbitration, and Pre-Suit Mediation: A Modest Proposal for the Strategic Resolution of Business Disputes

By Hon. John C. Foster, Richard L. Hurford & Douglas L. Toering

Introduction

Binding arbitration holds a well-deserved and respected position in the dispute resolution tradition of the United States. No less a historical figure than George Washington embraced the wisdom of arbitration to resolve disputes involving the interpretation of his will. He directed that "all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding…." Those three, "unfettered by Law, or legal constructions," would declare "their sense of the Testators intention," and their decision would be binding.[1]

Our first president has not been alone in embracing the many benefits of arbitration. Indeed, arbitration has often been the default dispute resolution provision in many commercial contracts, especially buy-sell (shareholder) agreements. For a number of reasons, however, the perceived advantages of arbitration—cost savings, efficiency, and fairness—have lost some of their luster over the past 20 years.[2]

For example, the latest edition of the American Institute of Architects (AIA) construction forms, the nation's most widely-used template for building contracts, has eliminated a binding arbitration provision from its standard contract form; arbitration is now solely an option the parties must consciously select.[3] Indeed, the concerns about the cost and delay of arbitration in business disputes have been the subject of numerous articles and studies.[4] This perception led in significant part to the recent passage of the Delaware Rapid Arbitration Act (DRAA).[5]

Under the DRAA, the dispute must be resolved within 120 days of the arbitrator's acceptance of the appointment;[6] all issues of substantive and procedural arbitrability are reserved to the arbitrator; the arbitrator has broad authority in granting interim and final relief, whether legal or equitable; and, any challenge to the arbitrator's decision must be filed within 15 days. To avail themselves of the DRAA, one of the parties to the agreement must be a Delaware-based business or have Delaware as its place of incorporation.[7]

Regardless of any perceived deficiencies, arbitration will (and should) remain in every lawyer's dispute resolution toolbox. Nonetheless, given the track record of Michigan's business courts in efficiently resolving business litigation, arbitration should no longer be the default. Rather, the choice of forum is a strategic decision requiring consideration in each commercial contract. When that occurs, the business courts will often emerge as a strong option in those Michigan counties with business courts.

In any event, drafters of business contracts should seriously consider a progressive dispute resolution process. This requires, among other steps, mediation before a party sues or demands arbitration.[8] A combination of pre-suit mediation and, failing that, litigating in the business courts may prove an attractive option. But if the parties prefer arbitration, mediation followed by arbitration is another option.

This article will briefly review the business court statute, the rationale for the business courts, and whether the data demonstrate the objectives of the business courts are being achieved; compare how arbitration and business courts resolve business disputes; encourage pre-suit mediation when appropriate; and offer a protocol for pre-litigation mediation.

The Objectives of the Business Court Legislation

The purpose of the business courts is to resolve business and commercial disputes efficiently and to "enhance the accuracy, consistency, and predictability" of decisions in business disputes.[9] Generally, every "business or commercial dispute" (as broadly

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defined) is assigned to a specialized docket.[10] To implement this statutory mandate, the business courts are encouraged to adopt "evidence-based practices"[11] that reduce litigation waste and inefficiencies. Those practices can also serve as a model to all trial courts.[12]

Practice, Procedure, and Expertise in the Business Courts

Under Administrative Order 2013-6, those circuits with business courts "shall establish specific case management practices for business court matters. These practices should reflect the specialized pretrial requirements for business court cases, and they will typically include provisions relating to scheduling conferences, alternative dispute resolution (with an emphasis on mediation scheduled early in the proceeding), discovery cutoff dates, case evaluation, and final settlement conferences."[13]

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Also, since January 2014, opinions from the business court judges have been available to the public on an indexed website.[14] Those online opinions (albeit non-binding on anyone but the litigants) will help foster consistency among the business court judges. Likewise, if a particular judge has addressed a similar issue in the past, this will provide guidance to counsel and the parties in their particular case.

Attorneys filing a business court case must verify on the face of the complaint that the case "meets the statutory requirements to be assigned to the business court."[15] Also, all business cases must bear a "CB" case code.[16]

The Michigan Judicial Institute has provided comprehensive training opportunities for business court judges. On October 22-25, 2013, the National Judicial College and the Michigan Judicial Institute held a conference for business court judges.[17] Attended by 31 judges from five Midwestern states, the seminar addressed both procedural and substantive matters including case management techniques, early use of various alternative dispute resolution processes, interpretation of financial statements, and numerous substantive law issues. The last emphasized bankruptcy, dissolution, and receivership; commercial loans; shareholder and operating agreements; and shareholder disputes.

The Michigan State Court Administrative Office ("SCAO") has also been instrumental in exploring evidence-based practices to assist the business courts. For example, in September 2013, SCAO convened an early ADR summit attended by experienced business litigators, ADR experts, and business court judges. The summit recommended, among other things, that the following become standard operating procedures in the business courts:

1. **Early Scheduling Conferences.** Judges should personally meet lawyers, clients, and *pro se* litigants in an early scheduling conference. Early judicial involvement helps identify issues.
2. **Scheduling Orders and Differentiated Case Management.** This recognizes a "number of tracks for various kinds of cases…."
3. **ADR.** Judges, lawyers, and parties should consider using a broader array of ADR procedures, not just the more familiar "standby" options such as case evaluation and mediation.[18]
4. **Discovery.** Judges should be more actively involved in determining the scope and amount of discovery. This can include staged or proportional discovery.
5. **Case Evaluation.** If case evaluation is ordered at all, it should take place *after* mediation. In fact, in many business courts, case evaluation is the exception rather than the rule.[19]
6. **Early Neutral Involvement.** Parties should engage a "knowledgeable neutral third-party" early in the case to help resolve contested issues throughout the litigation.[20]

In fact, much of this is already occurring as reflected by the recently implemented Case Management Protocol in the Oakland County Business Court[21] and the requirements contained in the Notice and Order to Appear issued in all Macomb County Business Court cases. Virtually every evidence-based practice identified during the Early ADR Summit is incorporated into the practices of the Oakland and Macomb County Business Courts.[22] In particular, early and active judicial involvement and early ADR are two of the key factors in the expedited case processing times in the business courts. In the authors' opinion, the majority of business court cases can be effectively mediated after 90-120 days of discovery.[23]

Business Court Processing Times

Although the business court statute was passed in October 2012, Macomb County and Kent County began their specialized business dockets on November 1, 2011 and March 1, 2012, respectively. In June and July 2013, Oakland and Wayne Counties began their business courts under the new business court statute. The results for those four courts have been impressive. Through June 30, 2015, the average time to close a business court case in those counties ranges from about five months (148 days) to seven months (210 days).[24] Moreover, over two-thirds (68 percent) of the respondents to a Macomb County survey preferred the business court process over the ordinary civil case process, and 62 percent reported the process shortened the time to resolution.

To promote efficiency, SCAO has suggested that business court judges consider serving as both dispute resolution advisors and, of course, as traditional trial court judges. SCAO summarized those two roles:[25]

Traditional Trial Judge	Trial Judge and Dispute Resolution Advisor
Short-term and long-term goals: Focuses the parties on a trial date and prepares the parties for a trial (but 98.6% of the civil cases do not go to verdict).	Short-term and long-term goals: Assists the parties in resolving their dispute, if possible (short-term), and prepares for trial as necessary (long-term).
Typically relies on a computer-generated scheduling order.	Conducts an early case conference with counsel to establish a differentiated case management plan and triages cases for effective ADR strategies.
Presides over discovery disputes and motion practice.	Stages proportional discovery and motion practice to support the agreed upon ADR strategies.
Orders case evaluation just prior to the trial date as the first ADR activity in the case (with mediation to follow in some cases.)	Explores multiple and early ADR strategies throughout the life of the case and conducts periodic, moderated settlement conferences to determine the impediments to a voluntary resolution.
Determining legal rights and remedies of the parties is the sole focus.	In addition to determining legal rights and remedies, judges (and neutrals) explore the parties' interests and needs-based solutions.
Result: The vast majority of cases resolve later in the litigation.	**Result:** The vast majority of cases resolve earlier in the litigation.

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Business Courts or Arbitration?

Below is a comparison of some of the perceived advantages of arbitration versus what can be achieved in the business courts.

Arbitration Is Traditionally Viewed As:	*But Business Courts Have Many of the Same Advantages and More*
Quicker	Arbitration has been traditionally viewed as quicker and cheaper than litigation in the courts. In reality, that may not always be the case.[26] Indeed, the average times to close cases in the business courts in Kent, Macomb, Oakland, and Wayne Counties are impressive. Evidence-based practices are a key reason.[27] Another advantage of the business courts (and other courts, as well) is the "black robe effect:" sometimes parties (or counsel, for that matter) will listen to a judge when they will not listen to anyone else. That, in itself, often fosters an earlier resolution. Moreover, a ruling on a threshold issue of law, which arbitrators may be reluctant to decide, can help the parties resolve the case quickly.[28]
Less expensive	The parties must pay the fees of the arbitrator(s). For cases involving an arbitration agency, the fees can also include administrative expenses. By contrast, there is no charge for the business courts (except for nominal filing and motion fees). To the degree that arbitrators limit discovery, and to the degree that an arbitration hearing can be shorter than a trial, arbitration can save legal fees. But the recently adopted pilot project for summary jury trials provides an additional option for a shortened trial.[29] In addition, the proportionate discovery practices in the business courts can rival the discovery cost savings in arbitration. Moreover, some individual business courts are developing their own evidence-based practices.[30] After evaluating the success of those practices, the Michigan Supreme Court or SCAO can take the very best and commend their use in all the business courts.
More informal	The arbitration hearing is more informal than a trial court proceeding. However, business court judges become personally involved in the case, often informally in an early court conference or during telephone conferences. This can help resolve discovery problems and other issues far more quickly than traditional motion practice.
More restricted in discovery	Discovery can be more limited in arbitration. But that can depend on the terms of the arbitration agreement, the practices of the individual arbitrator(s), and any third-party administrative protocols incorporated in the arbitration agreement.[31] With mandatory early disclosures as part of the local administrative orders for some of the business courts, limited discovery may no longer be an advantage to arbitration.[32] Also, one of the typical agenda items for early court conferences in the business courts is tailoring the amount and timing of discovery to the needs of the specific case. That has not generally been a practice of most arbitrators, although they possess that power.[33]
More reliable; fairer	Except for Wayne and Oakland Counties (which have more than one business court judge), the parties know who the judge will be. Depending on the arbitration agreement, the parties may or may not know the designated arbitrators. The indexed decisions of business court judges also provide the parties and counsel with valuable insight into how a particular judge might rule on a specific issue. But what about experience and fairness? Parties in the business courts need not be concerned that the judge will be unschooled in, or indifferent to, business issues. Each business judge has received training sponsored by the Michigan Judicial Institute. The judges also attend ongoing conferences sponsored by MJI and SCAO.[34]
Finality	Arbitration is more "final" than the business courts, in that it is difficult to vacate or modify an arbitration award.[35] That is an advantage if you win, of course, but not if you lose. So should the parties limit their appeal rights in advance by selecting arbitration? Maybe yes, maybe no; it depends on the circumstances. Indeed, many parties see the limited review of arbitration awards as a significant disadvantage. Thus, some parties have (with mixed results) attempted by agreement to expand the bases for the review of arbitration awards.[36] Also, if the parties agree and for an additional fee, certain arbitration providers offer supplemental appellate procedure options.[37]
More efficient, in that it allows the arbitration hearing on a date certain	Business courts may or may not be able to set a date certain for trial, although it is the practice of most business court judges to set a date certain once it appears the case will proceed to a trial. That said, very few business cases (or other civil cases, for that matter) actually go to verdict.[38]

More flexible, in that the parties may craft their own arbitration agreement

This is an advantage to arbitration. For example, the parties may decide to submit only certain disputes to arbitration. The parties can also choose whether to apply the Federal Arbitration Act or the state arbitration procedure.[39] Still, arbitrators might not always explore "off ramps" from the arbitration process through the staged use of ADR. By contrast, a business court judge, when acting in the role of a dispute resolution advisor, can help the parties explore meaningful opportunities for resolution (traditional financial settlement, business solution, ADR) throughout the litigation.

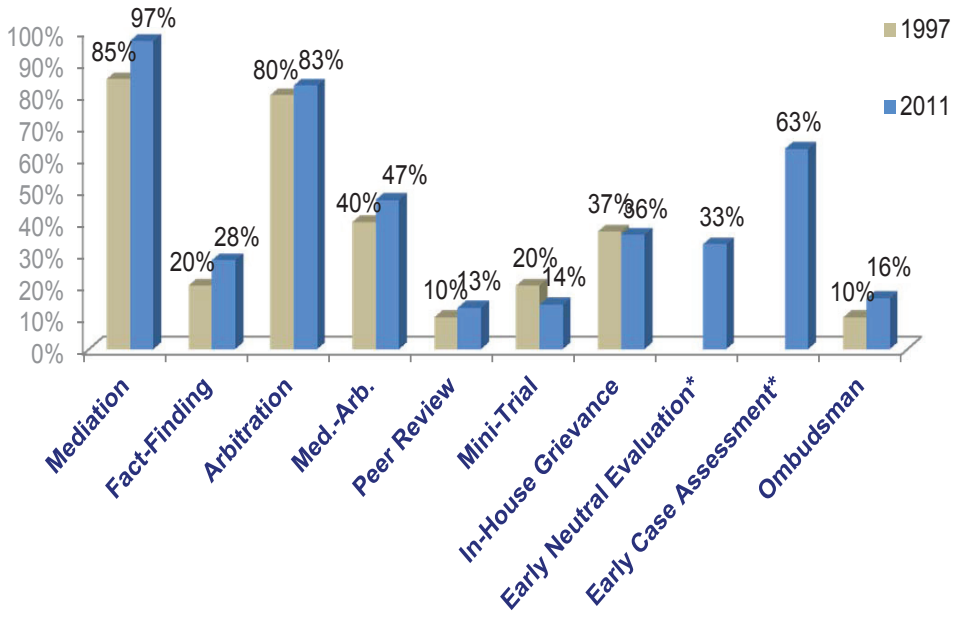
Confidentiality

One major plus of arbitration is confidentiality. This may be an advantage for family-owned business, high-tech companies, or businesses that may lose customers or suppliers simply because their competitors or suppliers become aware of the lawsuit. If a party has to file suit to confirm an arbitration award, then the dispute can become public knowledge anyway (if that has not already happened during the arbitration process).

Pre-Litigation Mediation

Businesses Are Embracing Pre-Litigation ADR

Businesses are increasingly using an array of ADR techniques. A study by Thomas Stipanowich summarized this clear trend by Fortune 1000 companies.[40]



If business clients have already decided to use various forms of ADR, their lawyers would be well advised to adapt.

When one compares the ADR practices of companies between 1997 and 2011 in resolving disputes, it is clear that sophisticated businesses are increasingly using a wide variety of ADR processes. Why? Primarily, to save time and money.[41] If business clients have already decided to use various forms of ADR, their lawyers would be well advised to adapt. Indeed, counsel can recommend whatever ADR strategies are appropriate, including pre-litigation mediation.

Pre-Litigation Mediation: An Option with Either Business Courts or Arbitration

Mediation Generally

Mediation offers many advantages:

1. Mediation is informal, confidential, creative, and non-binding.
2. As the dispute lingers, the parties become entrenched in "positions." Thus, fewer and less creative business solutions (along with less money) may be available to resolve the dispute. Money is fungible, and whatever money the parties spend in litigation is unavailable to settle the case.
3. Mediation is well-suited to address underlying personal or family dynamics that are sometimes at the core of disputes involving small businesses. If the problem is money (e.g., issues involving owner compensation, perks, debt, and the like), the mediator can recommend an outside expert or use competing expert witness vetting techniques to help the parties agree on how to manage their financial affairs.
4. The parties choose the mediator and the process; the process can be designed to meet the needs of the parties in their particular dispute.
5. Mediation (as well as court or arbitration) gives the parties the opportunity "to be heard."
6. Mediation allows a party to acknowledge regret without fear it will be admitted as evidence. How often does a sincere statement of regret—"I'm sorry; I didn't mean to hurt you"—help settle a case in mediation?
7. If the case is filed in the business court, it will eventually go to mediation anyway (probably sooner rather than later).
8. Even if the mediation does not resolve the entire dispute, the parties can use mediation to narrow the dispute and construct an effective litigation plan. That, in turn, can lead to further settlement discussions.

Because the business court judges often encourage (or require) early mediation, some attorneys and judges (the authors included) recommend pre-suit mediation in appropriate cases.

When Is Pre-Litigation Mediation a Realistic Option?

Given that only 1.4 percent of all civil cases in Michigan in 2014 went to verdict, the parties should consider pre-litigation mediation. But is pre-suit or pre-arbitration mediation a realistic alternative?

Yes, if:

a. The parties want to continue to work together or wish to assure that the matter is resolved amicably.
b. The dispute involves a closely held business, particularly a family business.
c. Publicity about the dispute could harm relations with customers (or clients or patients), with vendors, or with employees.
d. The parties are loathe to involve customers and current employees in the resolution of the dispute.
e. Counsel (perhaps with the mediator's assistance) are able to work together.

No, if:

a. The parties cannot trust each other. Yet, a skilled mediator can often help to bridge the trust gap.
b. One party needs a temporary restraining order or preliminary injunction. That said, mediation remains an option after the business court awards or denies such relief.
c. The other party will use mediation solely as a delaying tactic.
d. One party needs discovery, which the other party refuses to provide. Still, a mediator can help the parties resolve the discovery issue so the parties can proceed to a meaningful mediation.
e. A party will not take mediation seriously unless suit or arbitration is filed.
f. The parties cannot agree on satisfactory mediation, tolling, and standstill agreements. See below.

Recommended Protocol for Pre-Litigation Mediation

In General

Because the business court judges often encourage (or require) early mediation, some attorneys and judges (the authors included) recommend pre-suit mediation in appropriate cases. As long as the client's interests are not prejudiced by the delay, why not mediate the dispute before filing suit? To protect the parties, counsel should consider the various agreements described below. In the case of a closely held business, the principals of the company should also be parties to these agreements.

Tolling Agreement

The parties should enter into a tolling agreement.[42] In it, the parties agree that the statutes of limitations, or other defenses based on the passage of time, are tolled for a given period to allow the parties time to mediate the dispute.

Mediation Agreement

The parties should enter into a written mediation agreement. But in pre-suit mediation, there is obviously no judge to enforce the agreement. Thus, the parties should consider additional issues for their mediation agreement. Those include:

1. The right, if any, of the mediator to call additional mediation sessions.
2. Document production (what and from whom). For example, should a party be able to obtain records from the company's accountant, tax advisors, etc.?
3. Confidentiality of proceedings under MRE 408 and MCR 2.412.
4. Confidentiality of documents produced (non-disclosure agreement that may become a stipulated protective order should the matter not resolve).
5. Attendees. This is particularly important in shareholder (business breakup) litigation. Should the company's professional advisors (corporate counsel, corporate accountant, banker, financial and insurance advisor) attend? What about spouses of the business owners? And should adult children, who are already involved in the business, participate?
6. Consequence if a party is not cooperative or has otherwise acted in "bad faith." How will that consequence be enforced? What happens if a party simply fails to show for mediation (or "walks out" early in the mediation) or fails to produce documents?
7. Whether to involve early neutral experts (and who decides, and who pays). For example, if one party believes there are bookkeeping irregularities, it might be helpful to retain an independent auditor to examine the documents and issue a non-binding report.

Standstill (Status Quo) Agreement

In cases involving small businesses (particularly shareholder disputes), the parties should know how the business will be operated during the mediation process. Hence, the need for a standstill (or status quo) agreement. Some of the provisions of a standstill agreement may, depending on the nature of the dispute and on the pre-existing agreements among the parties, include:

1. No changes to:
   a. Compensation for parties
   b. How monies are disbursed or invested
   c. Methods of accounting and bookkeeping
   d. Methods of payment to vendors and payment on other accounts payable
   e. Those approved to sign checks at given amounts
   f. Professional advisors
   g. Location of main and branch offices
   h. Pricing to customers or clients; methods of bidding projects
   i. Line of business
   j. Clients and customers
   k. Suppliers
   l. Vendors
2. No transactions outside the ordinary course of business, including:
   a. Borrowing
   b. Transfers of money or other property between affiliated companies
   c. Purchasing, selling, or mortgaging assets
   d. Hiring or firing (or promotion or demotion) of employees

Regardless of whether the parties opt for arbitration or the business court, they should seriously consider including pre-litigation mediation in the dispute resolution clause.

e. Removal of officers, directors, or managers
f. Future distributions or bonuses
g. Issuance, redemption, or cross-purchase of shares or membership interests

3. Reinstatement of a party to position as officer, director, manager, or employee
4. Management decisions outside the ordinary course of business to be conducted in the presence of all parties
5. Agreed access by shareholders or members to company books and records
6. Agreement on how shareholder or member loans will be repaid
7. Restoring distributions that were not proportionate to equity interests or that were not otherwise permitted by agreement
8. Notice before any party files suit or demands arbitration
9. Retention of all documents (whether hard-copy or electronic) by the company and by the principals themselves
10. Confidentiality. Unless required by existing agreements, the parties will not disclose even existence of the dispute to customers, clients, vendors, lenders, etc.
11. Accounting for disputed transactions
12. Modification. Any of the above may be modified only by unanimous (or agreed supermajority), written consent.

Recommended Pre-Litigation Mediation Clause

Regardless of whether the parties opt for arbitration or the business court, they should seriously consider including pre-litigation mediation in the dispute resolution clause. A brief example follows:

> As a condition precedent to the filing of [a lawsuit/demand for arbitration], except when a party seeks temporary or preliminary equitable relief or when delay will unduly prejudice a party, the parties agree to engage in a confidential [and good faith] mediation with _____ as the mediator. Unless mutually agreed to the contrary, the parties will schedule the mediation to take place within ___ days [of the date the dispute arises / of the written notice of the dispute required by this agreement]. In those instances where temporary or preliminary equitable relief is sought or delay will unduly prejudice a party, the parties will engage in the confidential mediation within 30 days of the filing of the [lawsuit / demand for arbitration]. The parties will comply with all confidentiality and other agreements reasonably required by the mediator. The parties also agree to confer on the voluntary exchange of information, documents, and other data that will assist the confidential mediation process.

Conclusion

Given the success of the business courts so far, and their emphasis on early judicial involvement, it is time to rethink, just as the American Institute of Architects did, the conventional wisdom that binding arbitration should be the default.[43] So what is better, arbitration or business courts?

The answer is: It depends. The choice should be based on the nature of the transaction, the needs and desires of the parties, and the parties themselves. But before filing suit or demanding arbitration, should mediation be required? If so, then the parties should agree at the outset on a forum-selection clause that requires mediation before litigation, except in limited circumstances. But regardless of what the parties decide, they should make a considered decision about how (and when) their dispute will be handled.

NOTES

1. http://www.mountvernon.org/educational-resources/primary-sources-2/article/george-washingtons-1799-will-and-testament/

2. *See, e.g.,* Thomas J. Stipanowich, *Arbitration: The New Litigation*, 1 U Ill Rev (2010).

3. Am. Inst. of Architects, Contract Documents, http://www.aia.org/aiaucmp/groups/aia/documents/pdf/aiab078760.pdf

4. *See* Thomas J. Stipanowich, *Arbitration: The New Litigation*, 1 U Ill L Rev (2010); Robert Gaitskell, Society of Construction Law, *Trends in Construction Dispute Resolution* (2005), http://www.scl.org.uk/files/129-gaitskell.pdf; Editorial, 17 Constr L J 1, 1-2 (2001); Leslie A. Gordon, *Clause for Alarm*, ABA J (Nov. 2006); Sylvia Hsieh, *Arbitration Falling out of Vogue*, Lawyers USA (Mar 10, 2008); *Knocking Heads Together*, Economist (Feb 3, 2000); Harout Jack Samra, *Is Arbitration All It's Cracked Up to Be?*, ABA Section Annual Conference (Apr

2012); http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac_2012/3-1_arbitration.authcheckdam.pdf

5.. Gregory V. Varallo, Blake Rohrbacher, and John D. Hendershot, *The Practitioner's Guide to the Delaware Rapid Arbitration Act*, http://www.rlf.com/Files/11206_DRAA%20Book%20Final.pdf at 9-10.

6. An arbitrator who fails to comply with the time requirements of the DRAA can face financial penalties. *See* Harvard Law School Forum on Corporate Governance and Financial Regulation, *Delaware Enacts New Rapid Arbitration Act* (Apr 15, 2015), http://corpgov.law.harvard.edu/2015/04/14/delaware-enacts-new-rapid-arbitration-act/

7. Under Michigan's Uniform Arbitration Act, as long as the parties comply with the mandatory terms of that Act, they may incorporate many of the DRAA's features in their arbitration agreement.

8. *See, e.g.*, Richard L. Hurford, *SMART Dispute Resolution Processes*, Mich Bar J (June 2010). For example, the parties might consider the use of a meet-and-confer opportunity, supplemented with "real time mediation" if appropriate; the use of a dispute resolution board to resolve issues if the contract is ongoing; and failing those efforts, arbitration or litigation. If the amount in dispute is less than $150,000, the DRAA or summary jury trial process may be viable, cost-effective options. *See generally, A Taxonomy of ADR, A Practical Guide to ADR Practices & Processes for Counsel* (Apr 2015) ,http://hurfordresolution.com/ .

9. MCL 600.8033(3).

10. A fuller summary of Michigan's business court legislation appeared in Toering, *The New Michigan Business Court Legislation: Twelve Years in the Making*, Bus L Today (Jan 2013), http://www.americanbar.org/publications/blt/2013/01/03_toering.html; and in Diane L. Akers, *Michigan's New Business Court Act Presents Opportunities and Challenges*, 33 Mich Bus L J no. 2, 11 (Summer 2013). *See also* the ABA's *Annual Review of Developments in Business and Corporate Litigation* 201-203 (by Douglas L. Toering) (2013).

11. "Evidence-based practices" have become increasingly important to all courts, not just the business courts. In fact, the judicial dashboard developed by SCAO incentivizes the use of "evidence-based practices"**(**http://courts.mi.gov/education/stats/dashboards/Pages/default.aspx). Also, the Michigan Supreme Court has called on all courts to become laboratories in developing such practices that will increase efficiency. In the 2015 budget for the judiciary, Chief Justice Robert P. Young, Jr. stated:

> Every trial court in this state can be a little laboratory of new ideas—a fertile ground for discovering new and better ways of doing things.

(http://courts.mi.gov/News-Events/Newssummary/Documents/ChiefJusticeYoungFY2015BudgetRemarks.pdf).

12. Hon. Christopher P. Yates, *Specialized Business Dockets: An Experiment in Efficiency* https://www.accesskent.com/Courts/17thcc/ pdfs/Experiment_Efficiency.pdf

13. http://courts.mi.gov/courts/michigansupremecourt/rules/documents/administrative%20orders.pdf. The local administrative order of each business court can be accessed at http://courts.mi.gov/administration/admin/op/business-courts/pages/business-courts.aspx

14. http://courts.mi.gov/opinions_orders/businesscourtssearch/Pages/default.aspx

15. MCR 2.112(O). Kent County has a practice of reviewing all filed cases to assure that business and commercial cases are assigned to the business court. Elsewhere, Wayne County may impose a fine of $100 if the appropriate designation assigning a matter to the business court is not used.

16. http://courts.mi.gov/Administration/SCAO/OfficesPrograms/TCS/Documents/TCS%20Memoranda/ TCS-2015-16.pdf#search="Case code Business court"

17. Retired Judge William Dressel, President of the National Judicial Institute, and Dawn McCarty, Director of the Michigan Judicial Institute, coordinated this four-day seminar.

18. An incredibly valuable tool for all trial courts is a publication by the Supreme Court Administrative Office entitled the Caseflow Management Guide. (http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Manuals/cfmg.pdf). The purpose of the Guide is to provide judges with case flow management techniques and suggestions and explores a number of "evidence based practices" that can be employed throughout the life of the litigation. One such practice discussed in the Guide is "proportionate" or "staged" discovery:

> Each of the following approaches is aimed at minimizing the time and expense devoted to discovery while promoting nontrial dispositions at the earliest point in the process…(d) Developing a process where initial discovery focuses on the information needed for settlement with discovery for trial provided only in cases that are likely to be tried.

In sum, it will not be surprising for the Business Courts to ask the parties to identify that discovery essential to engage in a meaningful ADR event and to focus on completing that discovery as soon as possible. An ADR event would then be scheduled before all discovery is completed and in advance of the discovery cut-off date. The parties could then pursue whatever additional discovery that many be necessary to prepare for a trial in the event the ADR event was not successful in resolving the dispute.

19. SCAO commissioned a comprehensive study on the effectiveness of case evaluation and mediation. *The Effectiveness of Case Evaluation and Mediation in Michigan Circuit Courts.* http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Reports/The%20Effectiveness%20of%20Case%20Evaluation%20and%20Mediation%20in%20MI%20Circuit%20Courts.pdf . The study seriously questioned the cost-benefit of case evaluation.

20. http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/odr/ADR%20Summit% 20 Report%20September%204,%202013.pdf.

21. https://www.oakgov.com/courts/businesscourt/Documents/ocbc-pro-case-management.pdf.

22. The reliance on evidence-based practices is certainly not unique to the Macomb and Oakland County Business Courts. *See, e.g.,* Hon. John C. Foster and Richard L. Hurford, *ADR Within ADR: The Business Courts--a Laboratory for Litigation Process Improvement,* Mich Bar J 20 (Jan 2015).

23. http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/odr/ADR%20Summit%20Report%20September%204,%202013.pdf

24. Closed cases include cases that were settled, dismissed, removed, or stayed by bankruptcy.

25. http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/ADR%20Guide%2004092015.pdf. *See also*, *A Taxonomy of ADR: A Guide to ADR Practices & Procedures for Counsel, supra.*

26. For an older study of the cost and length of arbitration in large, complex commercial cases, see American Arbitration Association, By the Numbers, Commercial Bulletin (Issue 7, 2007), https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003921. See also Special Focus: Time & Cost 2012, Dispute Resolution Journal (American Arbitration Association).

27. Hon. John C. Foster and Richard L. Hurford, *ADR Within ADR: The Business Courts—a Laboratory for Litigation Process Improvement*, Mich Bar J 20 (Jan 2015).

28. See Diane L. Akers, *Michigan's New Business Court Act Presents Opportunities and Challenges*, 33 Mich. Bus L J no. 2, 11, 14 (Summer 2013). See also MCL 691.1695(2) (allowing summary disposition proceedings in arbitration).

29. On March 25, 2015, the Michigan Supreme Court approved Administrative Order 2015-1 authorizing summary jury trials. This provides litigants with yet another option for the efficient and fair resolution of disputes. See http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Court%20Rules/2014-24_2015-03-25_formatted%20order_AO%202015-1_Summary%20Jury%20Trial.pdf. This pilot project was the culmination of the efforts of a working committee consisting of judges, representatives of the plaintiffs' and defense bars, and neutrals to evaluate the wisdom of establishing a summary jury trial process in Michigan. See Richard L. Hurford, *The Summary Jury Trial Pilot Has Landed,* ADR Quarterly (June 2015).

30. For example Oakland County has adopted a form model protective order, https://www.oakgov.com/courts/businesscourt/Documents/mod-bc-pro_ord.pdf. In January 2013, Macomb County established "Initial Discovery Protocols" for disputes involving business contracts, business organizations, employment, and non-competes. http://circuitcourt.macombgov.org/CircuitCourt-BusinessDocket

31. See, e.g., MCL 691.1697. Of course, limited discovery can be a double-edged sword: one party may not need the discovery, because that party has better access to relevant information and documents. That poses a disadvantage to the party (a minority shareholder, perhaps) that may not have the same access.

32. See, e.g., local administrative orders for Genesee County (¶5) and Macomb County (¶5).

33. MCL 691.1697(3).

34. Of course, business court juries will not have had that training. Still, most business court actions are not jury cases.

35. MCR 3.602(J), (K); MCL 691.1700, .1702, .1703, .1704.

36. See *Hall St Assocs, LLC v Mattel, Inc*, 552 US 576, 128 S Ct 1396, 1404 (2008). See also, Phillip DeRosier, *Judicial Review of Arbitration Awards Under Federal and Michigan Law*, Michigan B J 34 (February 2013); Brian T. Burns, *Freedom, Finality, and Federal Preemption: Seeking Expanded Judicial Review of Arbitration Awards Under State Law After Hall Street*, 78 Fordham L Rev 1813 (2010).

37. AAA, http://go.adr.org/AppellateRules; JAMS, http://www.jamsadr.com/appeal/

38. In Wayne, Oakland, Macomb, and Kent Counties, the cases where a party demands a jury in the business courts range from 10% to 29%.

39. See, e.g., Federal Arbitration Act, 9 USC 1 *et seq*; Michigan Uniform Arbitration Act, MCL 691.1681 *et seq*. and MCR 3.602.

40. Thomas J. Stipanowich, *Living with ADR: Evolving Perception and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Companies* (2013), http://www.mdcourts.gov/macro/pdfs/reports/cornellstudy2013.pdf.

41. *Id.*

42. A sample agreement for an early mediation is included as Exhibit 7 to the *Taxonomy of ADR, supra.*

43. Akers, 33 Mich Bus L J at 14-15.

Judge John C. Foster retired from the Macomb County Circuit Court bench April 30, 2015. Judge Foster served as the Chief Judge for the Macomb County Circuit Court, Macomb County Probate Court, and the 42nd District Court, Divisions I and II. He was also the appointed business court judge for the Macomb County Circuit Court, which was the first court in Michigan to create a business docket. Judge Foster is currently providing mediation and arbitration services.

Richard L. Hurford specializes in providing various ADR processes to litigants and counsel and is the President of Richard Hurford Dispute Resolution P.C.

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