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Realizing the Potential of Arbitration in Federal Agency Dispute Resolution

By Marshall J. Breger

Passage of the Administrative Dispute Resolution Act of 1990 has given direct authorization to all federal government agencies to voluntarily agree to use alternative dispute resolution (specifically arbitration) in any type of dispute—whether disputes between the government and private parties, interagency matters or labor-management disputes within one agency. This law will be overseen by the Administrative Conference, which coordinates and advises agencies on the act’s implementation. The Administrative Conference is a permanent federal agency established in 1964. Its purpose is to “improve the procedures of federal agencies so that they may fairly and expeditiously carry out their responsibilities.”

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The act requires agencies, in consultation with the Administrative Conference of the United States and the Federal Mediation and Conciliation Service, to review systematically all “administrative programs” for ADR potential and adopt policies addressing the use of ADR in typical agency disputes. Additionally, an agency must designate a senior official as its dispute resolution specialist, provide ADR training for selected personnel and review grants and contracts for possible inclusion of clauses encouraging ADR use.

The act amends the Administrative Procedure Act to include a new subchapter entitled, “Alternative Means of Dispute Resolution in the Administrative Process.” New Section 582 provides explicit statutory authority for voluntary use of ADR in federal agencies. It also indicates those situations where such techniques, particularly arbitration, would be inap-
propriate. The act states that an agency “shall consider not using” ADR if:

(1) a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;
(2) the matter involves or may bear upon precedent;
(3) the matter is required for precedential value, and such a matter is required for precedential value.

Besides educating agency personnel regarding ADR and implementing ADR policies, the act takes various steps to make it easier for agencies to utilize current ADR expertise. The act authorizes interagency agreements for the use of “neutrals” whose names appear on a roster of neutrals maintained by the Administrative Conference. Over the past two years, the Administrative Conference has developed a roster of over 700 neutrals: individuals and organizations whose experience and activities include mediation, facilitation, arbitration or other ADR services. Moreover, the act authorizes the Administrative Conference, in consultation with the Federal Mediation and Conciliation Service, to develop standards for the selection of neutrals including experience, training, affiliations, and actual or potential conflicts of interest.

At the center of the debate regarding the act’s adoption was the use of arbitration to resolve public sector disputes. New Section 585 authorizes arbitration under the following conditions:

(a)(1) Arbitration may be used as an alternative of dispute resolution whenever all parties consent. Consent may be obtained either before or after an issue in controversy has arisen. A party may agree to—

(A) submit only certain issues in controversy to arbitration; or
(B) arbitration on the condition that the award must be within a range of possible outcomes.

(2) Any arbitration agreement that sets forth the subject matter submitted to the arbitrator shall be in writing.

(3) An agency may not require any person to consent to arbitration as a condition of entering into a contract or obtaining a benefit.

(b) An officer or employee of an agency may offer to use arbitration for the resolution of issues in controversy, if such officer or employee—

(1) has authority to enter into a settlement concerning the matter; or
(2) is otherwise specifically authorized by the agency to consent to the use of arbitration.

The act only authorizes voluntary arbitration and specifies that consent must be in writing. Enforcement of arbitration agreements is provided for in Section 586. Section 587 states that the parties to the arbitration are entitled to select the arbitrator. Sections 586 and 589 provide a structure for the conduct of the proceedings and the authority of the arbitrator over the proceedings. Section 590 discusses arbitration awards.

Section 590(b) also establishes the right of agency heads to vacate or “opt out” of an arbitral award within a 30-day waiting period before it becomes final. This unusual provision is grounded in a compromise that was crucial to the act’s passage. The Office of Legal Counsel of the Department of Justice raised numerous constitutional concerns with respect to the use of arbitration (consensual or otherwise) by the federal government. The department suggested that arbitrators making decisions involving the government would be taking actions as officers of the U.S., but would not have been appointed in the manner required by the appointments clause. A related worry of the department was that, if the arbitrators were not deemed to be officers of the U.S., their service in binding arbitra-
tion of governmental disputes might constitute an impermissible delegation of either the executive branch’s Article II policy-making responsibility or the Judiciary’s Article III adjudicative responsibility to private individuals.

Given its concern for the protection of executive prerogatives, the department’s position is understandable. Nonetheless, although the clauses (and even some of the cases) cited by the department can be construed broadly to require that all government decision-making activity remain in the hands of federal officers, they need not be read so sweepingly. Since accountable agency officials will retain the ultimate right to send (or not to send) disputes to arbitration, they will be making the critical policy determination—namely, whether a matter presents sufficiently important issues to warrant the use of more formal proceedings. Empowering government officials to decide when to send an issue to arbitration establishes an acceptable level of control in the executive branch—thus satisfying any appointments clause concerns or concerns about delegation of policymaking responsibilities. A variety of federal statutes already provide specifically for agreements to resolve disputes with the government by use of private arbitrators, including cases involving government liability or implicating future government action.

The Article III argument raised by the Justice Department concerning the transferring of judicial power to private hands is similarly overly formalistic. This position draws on such early cases as United States v. Ames in which the Circuit Court found that the secretary of war (now called the secretary of defense) exceeded his authority when he authorized a U.S. attorney to agree to arbitrate a dispute concerning damage to government land. The court held that the use of arbitration improperly vested judicial power in an entity that was not an inferior court created by Congress. Today, administrative agencies routinely decide a wide range of cases that were, at one time or another, the province of the courts, and the Ames position has been abandoned in the contemporary “administrative state.”

In 1985, the Supreme Court in the 30-day period before finality will require the agency to pay the private party’s expenses and the fees of the arbitration proceedings.

For this arrangement to make sense, we must assume that the government will rarely use its “opt out” power. In its testimony before the House Judiciary Subcommittee on Administrative Law and Governmental Relations, the department stated: “For the court majority, observed that ‘to hold otherwise would be to erect a rigid and formalistic restraint on the ability of Congress to adopt innovative measures such as negotiation and arbitration with respect to rights created by a regulatory scheme.”

In rejecting Article III-based objections to the requirement, Supreme Court Justice Sandra Day O’Connor, writing for the court majority, observed that “We expect that an agency head would seldom vacate an award.” In indicating his support for the compromise, Assistant Attorney General William Barr expressed the expectation that agency heads would exercise this authority to vacate an arbitral award only in “unusual” cases.

Should this indeed be the case, arbitration may yet become a valuable ADR device for government agencies. I would venture to say that any agency whose head vacates a significant number of awards will find exceedingly few takers for its subsequent offers to arbitrate. Thus the “30-day” delayed finality process raises a number of issues, only some of which are answered by the statute. The success of the arbitral mechanism, therefore, depends in very large measure on government “good faith.”

The act’s provision for attorney

fees in arbitral cases applies only in cases where the agency head vacates an arbitral award to which the agency was a party. Limited attorney fees covering expenses incurred only during the arbitral phase would be paid if an award is made by an arbitrator and then vacated by the agency head. Since the act’s “opt-out” authority is unilateral (i.e., only the government has it), the attorney fee provision was viewed by several members of Congress as crucial to ensure compensatory balance in the implementation of the law.

The act specifies a largely automatic fee award process that is simple and straightforward. It takes advantage of existing agency processes for handling applications under the Equal Access to Justice Act (EAJA), while avoiding the contentious EAJA question of whether the government’s position had “substantial justification.”

It would compensate all private parties—not just “small” entities as provided under EAJA—except in those rare cases where special circumstances make an award of expenses unjust.” Parties will be compensated for all reasonable expenses (as defined by EAJA) that would not have been incurred but for the arbitral proceeding. In this regard the Senate report on its ADR bill (S. 971) noted:

The section provides that, in the event an agency vacates an award or terminates an arbitration, any party to the arbitration other than the United States may petition for attorney fees and expenses pursuant to the Equal Access to Justice Act (EAJA). This petition may be filed with a court or administrative law judge using the standards for recovery articulated in the EAJA. The section references the EAJA in order to make use of the complex body of law already developed under that statute and to ensure that persons using ADR procedures have the same rights as persons who engage in litigation.

The section also provides that, if ordered by a court or administrative law judge, payment for such attorney fees and expenses must be taken from the funds of the agency that vacated the arbitration award or terminated the arbitration proceeding. The purpose of this provision is twofold: (1) to reimburse parties who engaged in the arbitration process for out-of-pocket expenses, and (2) to provide an incentive for agencies to abide by arbitration by making them otherwise liable for the other parties’ costs.

Currently under section 504(b) (1)(A)(ii) (agency adjudication) of EAJA and 28 U.S.C. 2412 (d)(1)(C)(2) (court cases), attorney fee awards are limited to $75 an hour plus a higher amount if the agency by regulation or the court determines that special factors are present, such as cost of living increases or a shortage of qualified attorneys. Additionally, courts may authorize higher rates on a case-by-case basis. If an agency believes that it is necessary to pay higher maximum rates, the agency must adopt those rates by rulemaking or administrative proceedings. To date, no agencies have done so. The expenses that may be awarded include expert witness fees and the cost of studies or tests necessary for case preparation.

The Administrative Conference has noted that “most knowledgeable government officials, contractors and attorneys agree that government contract appeals have become too onerous, too expensive and too time-consuming.” The new ADR Act provides a basis to reverse this trend. The act amends the Contract Disputes Act to encourage agency contracting officers and boards of contract appeals to use consensual methods to settle acquisition disputes. It specifically authorizes use of ADR, including arbitration, on contract disputes, and calls for related changes that will greatly enhance parties’ flexibility to resolve claims via minitrials and other informal means in an area where litigation has increased almost exponentially in recent years.

Under the new act, arbitration and other forms of ADR can be used either at the contracting officer level or after a case has been appealed to an agency board of contract appeals. The act requires that the Federal Acquisition Regulation—the body of rules that govern federal agency acquisition of goods and services—be amended to permit agencies to make greater use of ADR, including arbitration. Additionally, Section 3(d)(1) of the act requires that every agency with grant or contract administrative program functions review its standard contracts or assistance agreements to determine whether to amend them to include language that would authorize and encourage ADR use. The Administrative Conference is presently developing a recommended model ADR clause (including arbitration) for government contracts.

The new act also serves to encourage settlement by the federal government by amending the Federal Tort Claims Act to authorize explicitly the use of ADR. The act permits the attor-
The act was supported by the Comptroller General. For example, 5 Comp. Gen. 417 (1925); 8 Comp. Gen. 96 (1938). The Comptroller General had contained a ceiling set decades ago of $25,000, which required Justice Department approval of many proposed settlement agreements in small cases that raise no legal or policy issues. Since agencies often could not negotiate effectively with private attorneys when they could not “clinch” a settlement that was over $25,000 without recourse to Justice Department review, the present level served to chill settlement discussions. A similar change in the Federal Claims Collection Act permits a raise in agency authority to settle those cases from the current $20,000 to $100,000.

The new act means that ADR is likely to be a significant part of agencies’ futures, ready or not. As Court of Appeals Judge Harry Edwards—one of the early skeptics about ADR in public disputes—said when he chaired a panel discussion at last summer’s Judicial Conference, “ADR is here. How can we make it work?” These methods will be an increasingly important phenomenon in the years to come. The act represents a mandate, and an opportunity, for agency personnel to become educated in these processes and begin to implement them. Should they do so, both they and the public they serve will benefit immensely.

ENDNOTES


2 Id. at § 2.


One of the dark chapters in legal history concerns the validity, interpretation and enforceability of arbitration agreements. From the standpoint of businessmen generally and of those immediately affected by such agreements they were beneficial and salutary in every way. But to the courts and to the judges they were anathema. “Suffice it to say for a consideration time claims at once that the Arbitration Act in 1925 the Congress had come to the conclusion that an effort should be made to legislate on the subject of arbitration in such fashion as to remove the hostility they have received and make the benefits of arbitration generally available to the business world.” id. at 406–7. For a discussion of common law and statutory arbitration of private rights, see generally M. Domke, Commercial Arbitration (Dearfield, Ill: Callaghan & Co., revised ed. 1984).

4 For example, 5 Comp. Gen. 417 (1925); 8 Comp. Gen. 96 (1938). The General Accounting Office based its position on (1) an expansive reading of 31 U.S.C. § 1346 (1988) (formerly §§ 672, 673) which prohibits the use of federal funds to pay “(A) the pay or expenses of a commissioner, counsel, board, or other member of that group; or (B) expenses related to the work or results of work or action of that group” unless authorized by a specific statute; and (2) 31 U.S.C. § 3702 (1988) which states that “the Comptroller General has jurisdiction over settlement of federal accounts.” See also 31 U.S.C. § 3526 (1988) (Comptroller General’s jurisdiction over settlement of federal accounts).


5 I have found only one example of an agency effort to arbitrate contract disputes without explicit statutory authorization. An appeals board later found that the Department of Interior had arbitrated without statutory authority. Dames and Moore, Inc., IBCA No. 1306–10–79, 81–2 BCA 76 (Oct. 27, 1981). The Administrative Conference of the United States, see 1 C.F.R. § 305–6–3, (1990) reprinted in Sourcebook, supra note 4 at 113, and many others have recommended a more expansive use of arbitration by administrative agencies. See Hardy & Cargill, supra note 4, at 351, 353; Berg, supra note 4 (argues that G.A.O.’s objections are without legal foundation).


11 Pub. L. No. 101–552, § 27 states: “Federal agencies may not only receive the benefit of techniques that were developed in the private sector, but may also take the lead in the further development and refinement of such techniques.”

12 Pub. L. No. 101–552, § 3(a), 104 Stat. 2736–37 (codified at 5 U.S.C. § 581). An administrative program: “includes a Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rule making, adjudication, licensing, or investigation, as those forms are used in subchapter II of this chapter.” Id. at 4(b), § 581 (Definitions), 104 Stat. at 2738.

13 Pub. L. No. 101–552, § 3(b), (c) and (d), 104 Stat. at 2737.


(b) The United States district court for the district wherein an award was made that was issued pursuant to section 590 of title 5 may make an order vacating the
award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 582 of title 5.

The standard to be utilized by the court to determine that arbitration or the award is "clearly inconsistent with the factors" is very vague. However, since Section 582 does not prohibit use of ADR in the presence of any of the factors, but only provides for agency consideration of factors militating against using ADR, creating a third party right of review might result in greater agency caution when choosing arbitration to resolve disputes.


17 Pub. L. No. 101-552, § 4(b), 104 Stat at 2739 (codified at 5 U.S.C. § 582(c)2) ("Alternative means of dispute resolution authorized under this subchapter are voluntary procedures which supplement rather than limit other available agency dispute resolution techniques.").


20 5 U.S.C. at § 583(c)(1). Regarding conflicts of interest, § 583(a) states: "A neutral shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve."

21 Pub. L. No. 101-552, § 4(b) and § 5, 104 Stat at 2742-45 (codified at 5 U.S.C. §§ 585-590 and 9 U.S.C. § 10). Unlike other ADR techniques mentioned in the Act, arbitration is discussed in considerable detail. In part, this is to emphasize the concurrent authority of the Federal Arbitration Act over any public sector arbitration. See S. Rep. No. 543, supra note 16 at 394-96. (Instead of being used as a bar to arbitration by the Government today, it would more properly be viewed as an example of the general nineteenth century judicial attitude disfavoring arbitration, even by private parties.)

22 Ames, 24 F. Cas. at 789.


24 In United States v. Farris, 89 U.S. 22 (Wall.), 406 (1874), the Court upheld arbitration where the law court agreed to refer a pending suit to arbitrators whose decision would become the judgment of the Court.


28 See 9 U.S.C. §§ 1-13 (1988); Thomas, 473 U.S. at 601. In his concurring opinion, Justice Brennan noted that judicial review under FIFIA encompasses the authority of courts to invalidate an arbitrator’s decision when it exceeds the arbitrator’s authority or exhibits manifest disregard for governing law.

29 Thomas, 473 U.S. at 593-594. Although the constitutional propriety of using private arbitrators in the judicial branch was not discussed in the opinion, the Court was fully briefed on this issue by the parties.

30 Besides the Article II and Article III concerns, an additional claim was that binding arbitration would violate the requirements of due process. However, in Schweiker v. McClure, 456 U.S. 188 (1982), the Supreme Court has upheld the use of outside decision-makers for part of the Medicare program (in which private insurance carriers resolve and decide claims for reimbursement under the Medicare program that are ultimately borne by the Federal Government), in face of a direct due process challenge. Apart from the potential due process problems presented, the Court showed no concern over the conferral of arbitral authority on private parties even though that was one of the bases upon which the lower court struck down the Medicare scheme. McClure v. Harris, 503 F. Supp. 409, 414-15 (N.D. Cal. 1980), rev’d sub nom. 456 U.S. 188 (1982).

31 Pub. L. No. 101-552, § 590(b), 104 Stat at 2743. The compromise, codified at 5 U.S.C. § 590(b), provides:

(b) The award in an arbitration proceeding shall become final 30 days after it is served on all parties. Any agency that is a party to the proceeding may extend this 30-day period for an additional 30-day period by serving a notice of such extension on all other parties before the end of the first 30-day period.

32 Pub. L. No. 101-552, § 590(g), 104 Stat at 2744 (codified at 5 U.S.C. § 590(g)).

33 See testimony, supra note 27, at 47.

34 See testimony, supra note 27, at 48.


36 Id. § 504(a)(1).

37 Pub. L. No. 101-552, § 4(b), 104 Stat at 2744 (codified at 5 U.S.C. § 590(g)).


42 Pub. L. No. 101-552, § 3(d), 104 Stat at 2745 (codified at 51 U.S.C. § 415(a)).


44 The value was recently raised to $500,000. 56 Fed. Reg. 8523, 8924 (March 4, 1991), implemented by 56 Fed. Reg. 12666 (March 27, 1991).


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