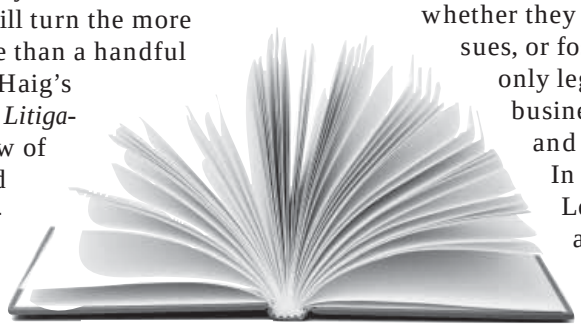
Book Reviews

Commercial Litigation in New York State Courts (Third Edition)—A Handy Resource for the Commercial ADR Neutral and Professional

Reviewed by Simeon H. Baum

> Books! tis a dull and endless strife:
> Come, hear the woodland linnet,
> How sweet his music! on my life,
> There's more of wisdom in it."
> (*The Tables Turned*, William Wordsworth)

While Wordsworth (aptly named) might have a point, even in the age of the Internet we lawyers, and even spontaneous ADR resolutionaries, still turn the more than occasional page. There are more than a handful of pages (8,400 to be precise) in Bob Haig's multi-volume treatise on *Commercial Litigation in New York State Courts*. A review of this rich resource with an eye toward its utility for ADR professionals raises another opportunity to revisit the common theme of the place of knowledge and expertise in the ADR field.



First, let us take a quick look at the *Commercial Litigation* compendium. It presents a scholarly, readable and practical compilation of chapters by 144 experts in the field. Indeed, just the task of gathering and organizing so many experts is a feat for which the compendium's editor, former New York County Bar President and founding Chair of the Commercial and Federal Litigation Section of the New York State Bar Association, Bob Haig, commands awe. Beyond this, the treatise is organized into a rational and intuitively usable order.

The first volume—led off by Chief Judge Jonathan Lippman's accessible and scholarly piece presenting an historical overview of commercial litigation in New York, culminating in the birth of the Commercial Division, considering its state today, and contemplating its future—begins at the beginning, with preliminary considerations and actions. It ranges from jurisdiction and venue, through case investigation and evaluation, to pleadings, third party actions, removal, specific performance, and rescission. The volume continues with a useful and novel comparison of commercial litigation in federal and state courts. It considers choice of law clauses, joinder, consolidation and severance, and the handling and coordination of multi-district litigation. It finishes with issue and claim preclusion and inter-jurisdictional considerations and nonjudicial determinations. Within this first volume ADR aficionados can find Brad Karp and Roberta Kaplan's piece on *Investigation of the Case* helpful. Some of the approaches they suggest can be useful even for a mediator in helping parties and counsel to develop key information and think about a matter. Moreover, their insights into the value of—and approaches to—reducing the time and cost of formal discovery are worth sharing.

Alan Raylesberg's chapter on *Case Evaluation* merits special attention, both because it is tremendously helpful, and further because it provides us with an occasion to reflect on the role today of evaluation in commercial mediation. Twenty years ago, there was great debate in the mediation field over the question of whether it was proper for mediators to engage in evaluation. Much of this discussion was prompted and defined by Professor Len Riskin's landmark article,[1] which included a chart—that came to be known as Riskin's grid—in which Riskin plotted out mediator orientations according to whether they were facilitative or also evaluative and directive, and whether they were narrowly focused on legal issues, or fostered broader consideration of not only legal issues, but also party interests, business considerations, relationships, and even societal values and principles. In reaction to Riskin's grid, Professors Lela Love and Kim Kovach wrote an article in which they called "evaluative mediation" an oxymoron.[2] Their chart, the great divide, posited that the mediator's role is fundamentally that of a facilitator. They urged that it should be the parties' and not the mediator's judgments and evaluations that matter, and the parties' choices, not the mediator's direction, which steer the negotiation process and resolution. A couple of years after Riskin's *Grid for the Perplexed* was published, Professor Josh Stulberg published a piece questioning the entire framework. He noted that reorienting parties' understanding of, and relationship to, one another in order to promote resolution of a dispute requires the fostering of dialogue, reflection, and analysis that is aided by the mediator's being informed about the nature and context of the dispute.[3]

Understanding of the mediator's purpose and role has continued to develop and be refined over the last fifteen years.[4] Certainly, there are a good number of times when the focus of a commercial mediation is less on defining the "shadow of the law"[5] and more on fleshing out party interests and creatively exploring the contours of a potential business deal. There is little doubt, however, that case evaluation—whether it is an activity of the parties facilitated by the mediator or also involves direct feedback from the mediator—has assumed a meaningful place in commercial mediation. Sometimes developing a sense of case strengths and weaknesses happens only in advance of the mediation. Parties, with the help of counsel, might look to assess their case as part of their preparation for bargaining. This gives them a preliminary view of their litigation BATNA (the best alternative to a negoti-

ated agreement)—the "shadow of the law." The mediator might similarly prepare by getting pre-mediation statements and through pre-mediation communications with counsel in joint conference calls or private telephonic caucuses. Even if the mediator never plans on giving a direct evaluation, this prepares the mediator to conduct an effective discussion—with appropriately focused and informed areas of inquiry—when the parties and counsel get together for a mediation session. It is possible that, having been prepared by an understanding of the case, parties might recognize that the greatest value to be had in mediation is in focusing on the deal, not the case. But the case assessment got them to that point in the first place. Quite often, of course, case evaluation processes occur during the mediation session. These can be a side consideration at any stage of the mediation—early, middle or later in the process. An ancillary risk analysis can serve as a good prod at any stage to shift parties away from the case to creative deal making. Additionally, a good number of times, the evaluative process becomes the main event. For these processes, opening sessions might involve initial case summaries. Later sessions can involve further development of information and probing of strengths and weaknesses. Further on in the process, there might be a risk and transaction cost analysis informed by what has been gathered throughout the process. These assessments—by parties and counsel, or with mediator input—can frame and form the iterative content of the final bargaining that closes the deal.

Understanding that case evaluation can play a significant role in preparing for or conducting a mediation, ADR readers—whether in the role of representatives or neutrals—will certainly appreciate the contribution of Alan Raylesberg's Chapter by that name. He has a wealth of practical tips that mirror what happens in the mediation process. Mr. Raylesberg considers evaluations not only of trial outcome but at all stages of a case. He reminds us of the critical role insurance can play. He considers ways of setting goals and considerations relating not only to the case but also to cost and delay. He takes a careful look at how information developed from discovery, including deposition testimony, can affect assessment of a case's settlement value. We can laud Mr. Raylesberg for specifically advising the reader to consider ADR options and to use alternative procedures not only to resolve a case but even for their benefit in evaluating a case. His chapter ends with some checklists on case evaluation and a sample written case evaluation that can be helpful for both representatives and mediators.

A final Chapter worth highlighting in the first volume of this treatise is T. Barry Kingham's *Enforcement of Forum Selection and Arbitration Clauses*, which is plainly of interest to those involved in arbitration.

Was Wordsworth right? Having culled just a handful of pieces from the wealth of material in the first volume, we are stunned to have five more volumes to go. Yet, though nearly endless, they are anything but dull, and are well worth the effort. For the reader's sake here, we will highlight just a few of the various chapters that are of value to representatives and neutrals in ADR processes.

In the second volume, there are three Chapters that stand out for ADR professionals. The Chapter on Disclosure, by James M. Ringer and Thomas F. Fleming can be very useful to arbitrators in commercial matters, particularly given the degree to which arbitration has begun to parallel litigation. In 2008, NYSBA's Dispute Resolution Section was charged by NYSBA's then-President Bernice Leber with developing a discovery protocol for commercial arbitration.[6] Given the differences between domestic and international commercial arbitration practices, our Section developed two protocols, each of which was approved by NYSBA: (a) one for Domestic Commercial Arbitration and (b) one issued the following year for International arbitration.[7] Complementing the advice that can be gleaned from these protocols, Messrs. Ringer and Fleming's Discovery Chapter offers representatives and neutrals good insights into factors to consider when developing a discovery plan and for handling the ever growing area of e-discovery. There are particularly useful thoughts for preliminary conferences (22:25) and supervised discovery (22:26). Insights into discovery can also be very useful for mediators when fleshing out details for a Commercial Division based transaction cost analysis.

Additional insights for ADR neutrals are provided in William F. Kuntz's Chapter on Referees and Special Masters. Dispute Resolution Section members who serve in this capacity will have particular appreciation for this piece. Bill Kuntz provides an excellent synopsis of those processes, including guidance on the scope, power and function of referees and special masters.

The ADR capstone of Bob Haig's second volume is its Chapter on Settlements by current NYSBA President David Schraver. Having seen Dave Schraver in action at the House of Delegates over the years, and more recently in his new role as State Bar President, this reviewer has an empirical basis for stating that Mr. Schraver has profound expertise and insight into the art and wisdom of arriving at negotiated resolutions. This Chapter is a case negotiation primer, loaded with tips for the negotiator. Dave urges "litig-negotiators" to think resolution from the start. He highlights the vital importance of preparation; recognizing the perspective of one's counterparty; and developing flexible goals. He reminds negotiators of the importance of complying with ethical guidelines, and the benefit of adopting a constructive, joint, mutual gains problem solving approach that steers a middle path between competition and accommodation.[8] Dave also recommends that negotiators develop skills in active listening and develop an holistic understanding of the problems and people involved in a given dispute and its context. For this he draws on a central ADR resource, Fisher and Ury's classic, *Getting to Yes*.[9] Mr. Schraver offers tips

on how to handle a negotiating counterparty who prefers an obstructionist approach.[10] He closes with excellent tips for settlement agreements and admirably encourages negotiators to consider some form of alternative dispute resolution [34:22].

One chapter in the next volume is of obvious interest to members of this Section: John Hartje's Chapter on Alternative Dispute Resolution. Mr. Hartje provides an excellent overview of ADR, with a focus on mediation, and its place in the New York State Court system. The piece has a nice summary of the benefits and nature of mediation. It provides reference to some classic reading in negotiation theory pertinent to mediation as "structured negotiation" and some mediation resources. The Chapter offers tips on mediator selection; recommended terms for a mediation agreement; and an accessible description of the mediation process. It goes on to provide a brief description of privilege and confidentiality in mediation. Of institutional significance to NYSBA and to its Dispute Resolution Section is Mr. Hartje's support for the Uniform Mediation Act (UMA). Commencing in 2008, the Dispute Resolution Section urged the State Bar to press for New York State's adoption of the UMA, and the Bar responded by placing this at the top of its list for legislative lobbying. Our lobbying efforts have continued over the past several years, but, unfortunately, the UMA has not yet been adopted by New York's legislature. Greater clarity and widespread implementation of a mediation privilege, and of confidentiality in general, are needed to reinforce the reasonable expectation that mediation communications are confidential. This is essential to the character of mediation as a forum where parties in conflict can experiment with trust and efforts at reconciliation, without concern that their tentative expressions for peacemaking will come back to bite them in a courtroom, in the news, or at the office water cooler. Beyond the protections that could be afforded outside the Commercial Division by the UMA, Mr. Hartje informs us of the protections that are fortunately in place within the Commercial Division—detailing its rules on confidentiality, privilege and mediator immunity, and mediation ethics. He also provides a more abbreviated look at other dispute resolution processes, including neutral fact-finding, ENE, med/arb, mini-trials, summary jury trials. He reviews the Commercial Division's mediation training requirements and introduces the reader to the current ADR administrator, Simone Abrams. Finally, the Chapter contains an informative section on Arbitration, including a listing of key providers, and ends with some useful checklists and forms of mediation agreements.

The remaining volumes in the treatise are expansions of this last mentioned volume.[11] They contain a number of pieces that are useful for refining one's analysis and approach to dispute resolution as neutral or advocate. These include Mitchell J. Auslander's chapter on *Litigation Avoidance and Prevention*, promoting the "upstreaming" of dispute resolution. Also along these lines is Barry R. Ostrager and Mary Kay Vyskocil's chapter on *Crisis Management*, with useful tips for all dispute resolvers. Similarly, the next three chapters give transferable advice on streamlining and managing litigation: *Techniques for Streamlining and Expediting Litigation*, by Steven Wolowitz; *Litigation Management by Corporations*, by the late Joseph T. McLaughlin and by Nader H. Salehi; and *Litigation Management by Law Firms*, by Robert E. Crotty.

These are followed by instructive pieces on ethics and civility, reflective of the sensibility of ADR practitioners. Stewart D. Aaron presents a chapter on *Ethical Issues in Commercial Litigation*, followed by an excellent piece on *Civility* by Hon. Ann T. Pfau, then-Chief Administrative Judge of the State of New York, together with Jeremy Feinberg and Laura Smith from the Office of Court Administration.

Embedded in these remaining volumes are chapters that will be of particular interest to neutrals and practitioners concentrating in a particular substantive area or addressing particular substantive issues. For example, Stephen L. Ratner, David A. Picon, and Bruce E. Fader's chapter on *Broker-Dealer Litigation and Arbitration* will certainly be of interest to practitioners in that field. Beyond this, practitioners, including mediators and arbitrators, who could use a quick step into a substantive arena can find guidance in these pages. For example, when I was struggling as a neutral with a knotty question of damages relating to loss causation in a hedge fund tax, accounting malpractice action, I found a very helpful discussion that took me to the heart of the matter in Richard Swanson's chapter on *Professional Liability Litigation*. Similarly, Margaret Dale's chapter on *Admissibility Issues in Commercial Cases* can be helpful not only for practitioners, but also for arbitrators looking to consider how to rule, or at least to assess the worth of evidence they heard, when they promised to "take it for what it is worth." It can also be helpful for mediators engaging the parties and counsel in a risk analysis. Along similar lines, the Dispute Resolution Section's longstanding liaison, Claire Gutekunst, offers valuable insights in her chapter on *Jury Conduct, Instructions and Verdicts*.

In sum, while many a tree has been lost in the service of Bob Haig's treatise, much meaning has been gathered in this wealth of collective wisdom. I commend it to the ADR Bar.

Endnotes

1. Leonard L. Riskin, *Understanding Mediator Orientations, Strategies, And Techniques: A Grid For The Perplexed*, 1 Harv. Neg. L. Rev. 7, 8-13, 17-38 (1996).
2. Kimberlee K. Kovach & Lela P. Love, *"Evaluative" Mediation Is an Oxymoron*, 14 Alternatives To High Cost Litig. 31 (1996).
3. Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing The "Grid" Lock*, 24 FSU L. Rev. 985.
4. This has had practical consequences in New York. In the early 1990s, Chief Judge Judith Kaye commissioned Margaret Shaw,

Ken Feinberg and Fern Schair to hold public hearings and issue a report on the state of ADR in New York State. The Kaye Task Force report recommended 24 hours of training for mediators. As a consequence, the Commercial Mediation training that Steve Hochman and I have presented for Commercial Division mediators began as a three-day course. Because of its commercial focus, it integrated facilitative skills and theory with approaches to evaluation in the commercial mediation context. Various Advisory Groups were formed as a consequence of the Kaye Task Force, including groups on standards and qualifications for mediators, led by Lela Love, on which this reviewer served. That group sought to integrate the insight that mediation is primarily the facilitation of the parties' own dealmaking and dispute resolution with the observation that in commercial matters participating parties and counsel often will engage in a facilitated evaluative process, and might even turn to the mediator for some evaluative feedback or "reality testing." The group recommended that the 24 hour training requirement be expanded to 40 hours, 16 of which would address both skills of neutral evaluation and application of mediation to the substantive area involved. That led to the issuance of Part 146 of the Rules of the Chief Administrator, and more recently the promulgation of standards and guidelines under Part 146, developed by Unified Court System's Office of ADR. The ADR Office now approves training programs under Part 146. In approving the Commercial Mediation training that Mr. Hochman and I have delivered for the Court for the last 17 years, the ADR Office struggled with defining what should be in the first three days and what should be in the last, since we had integrated all elements into the first three from the start. This struggle mirrors the points captured and questioned in Josh Stulberg's article, n. 3, *supra*.

5. This phrase was made popular by Robert H. Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950 (1979).

6. President Leber presented me, as then-Dispute Resolution Section's Chair, with a Goldilocks and the Three Bears issue—in lieu of too little discovery for a fair process and outcome or too much discovery, mirroring the cost, delay and inefficiency of litigation, how does one create guidelines for discovery in arbitration with a balance that is just right? I quickly passed this hot potato to Section members Carroll Neesemann, John Wilkinson, and Sherman Kahn in view of their expertise in arbitration. Now, five years later, John Wilkinson is Chair and Sherman Kahn is Chair-Elect of the Dispute Resolution Section.

7. A brochure containing both sets of protocols—Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic Commercial Arbitrations and Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of International Arbitrations—can be found online at: http://www.nysba.org/Content/NavigationMenu/Publications/GuidelinesforArbitration/DR_guidelines_booklet_proof_10-24-11.pdf. The Domestic Commercial Arbitration Guidelines were approved by the Executive Committee of NYSBA in April 2009, and the International Guidelines were approved in November 2010.

8. One useful resource that could have been mentioned in this Chapter is the Thomas-Kilman Conflict Mode Instrument, which places negotiators on a scale of five preferred responses to conflict: competing, avoiding, accommodating, compromising and collaborating. More information can be found at: http://www.kilmanndiagnostics.com/overview-thomas-kilmann-conflict-mode-instrument-tki. One observation that emerges from study of the TKMCI is recognition that at different times, in different circumstances, and for different purposes, a different one of the five modes of handling conflict might be the optimal mode. This creates a dynamic and variegated approach to negotiation and conflict resolution.

9. Mr. Schraver's excellent recommendation to spend time developing client goals could have gone further by elaborating Fisher and Ury's advice of identifying interests and using them as the basis for generating options to achieve mutual gains.

10. The Chapter could have added a citation to Ury's highly readable sequel, *Getting Past No.* Also of interest might be this reviewer's piece, "*Tips on How to Negotiate and Acquire Negotiation Skills,*" drawn from a NYSBA Dispute Resolution Section joint meeting with NYSBA's Labor and Employment Law Section: http://www.nadn.org/articles/BAUM-HowToNegotiateAndAcquireNegotiationSkills.pdf.

11. Mr. Hartje's piece on ADR is found in Volume 4. The remaining volumes are Volumes 4A, 4B, 4C, and 4D.

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Outsourcing Justice: The Rise of Modern Arbitration Laws in America

By Imre Szalai

Reviewed by Stefan B. Kalina

This history of "the rise" of arbitration law arrives as public discussion of arbitration reaches new heights. Arbitration may be found in an ever increasing array of contracts in use today. Arbitration is thus having a wider and deeper impact on businesses and individuals alike. Indeed, the Supreme Court's recent decision in the commercial case of *American Express Company v. Italian Colors Restaurant* received an editorial response by *The New York Times*. Professor Szalai's timely volume provides needed context to understand how arbitration reached this position and to analyze the propriety of its spread from purely commercial contracts into such areas as consumer and employment contracts.

To begin, Professor Szalai traces the history of the reform movement in the early 1900s that led to the enactment of New York's arbitration statute, the Federal Arbitration Act and many other state arbitration laws. Although pre-existing laws were favorable to arbitration, they did not assure the enforceability of arbitration agreements. Such agreements were revocable, and courts refused to enforce many of them. Business disputes thus remained the province of the courts.