

Chapter One

The Roots of ADR

The Deciding Stone to the European Law Merchant

Two men glare at each other. Long-haired and bearded, their fur garments oily from use, they hold gnarled clubs loosely at their sides. Emotions have been building since the rainy season started and the river overflowed. Who will be forced to brave the swollen river to hunt, and who will hunt near their village? Today it will be decided. With war cries, the disputants raise their clubs and begin to circle. Suddenly an old man appears, shouting: "Behold, the Deciding Stone!" The two men stop in midstride. The old man says, "Ush, the smooth side is yours; Ore, the rough side is yours." The pair hesitate, looking angrily at each other and at the old man, and finally they nod in agreement. With all his might, the old man throws the stone into the air. Their heads turn to the sky as they watch the stone turn over and over.

This imagined story of prehistoric times illustrates that while humans have always had the tendency to solve their differences by fighting, they also have recognized the benefits of settling matters peacefully by flipping a coin or some other way. This search for alternatives to violence gave birth to the precursors of alternative dispute resolution (ADR).

The most basic form of ADR is negotiation: at its core, two people simply talk about a problem and attempt to reach a resolution both can accept. It follows that mediation started when two negotiators, realizing they needed help in this process, accepted the intervention of a third person. If the third party was asked to make a decision or placed the decision in the hands of some arbitrary mechanism, the process was arbitration. Other methods followed:

When the third party undertook an investigation that helped bring the matter to closure, this was fact finding. If the matter is brought before the community and all members had to be satisfied with the outcome, we today call that process consensus building.

ADR is often thought of as a new way of resolving disputes. In fact, its roots run deep in human history, and they have long played a crucial role in cultures across the globe.

ADR in Traditional Societies

To trace the roots of ADR, we can turn to anthropological and sociological studies of traditional societies for a glimpse of some of the ways early humans may have resolved disputes without the use of fists, clubs, or poison arrows. Many of these ways of resolving conflicts are starkly alien to our Western way of looking at the world. Nevertheless, they have much to teach us about the utility of conflict in airing the disagreements of everyday life and how to use them as opportunities to deepen relationships and achieve lasting harmony.

The Bushmen of Kalahari

William Ury and others have written extensively about the Bushmen of the Kalahari, a traditional people whose sophisticated system for resolving disputes in many ways puts modern society to shame. The Bushmen are hunter-gatherers living in a large, arid plain in Namibia and Botswana. Despite the encroachment of agrarian people, the Bushmen have largely stuck to their traditional ways of life, including a way of settling disputes that avoids fighting and the courts.

The Bushmen are far from a passive people. Rivalries over mates, food, and land are common. But when a dispute arises, they are slow to fight and quick to find others who will intercede. When two people have a problem, they bring others around to hear out both sides. If things get testy, some members of the tribe are appointed to hide the hunters' poison arrows—an early form of gun

control. If small-scale intervention fails, the whole group is brought into the process. “When a serious problem comes up,” writes Ury (2002), “everyone sits down—all the men, all the women—and they talk, and they talk and they talk. Each person has a chance to have his or her say. It may take two or three days. This open and inclusive process continues until the dispute is literally talked out” (p. 40). The processes involved here include mediation and consensus building.

Hawaiian Islanders

Hawaiian islanders of Polynesian ancestry use their own traditional system for resolving disputes amicably. The practice, known as *ho‘oponopono*, involves a family’s coming together to discuss interpersonal problems under the guidance of a leader. The common translation of the term is to “set things right” on both a spiritual and interpersonal level. The leader of the session is someone both sides look to with respect. He or she leads the session and acts as mediator. To avoid hard feelings, all discussion is directed toward the leader rather than directly between the disputing parties. The leader opens the session with a prayer, asks questions of the participants, and at times will call for a moment of silence when tempers are running hot or one side is refusing to listen to the other (Boggs and Chun, 1990). After hearing out both sides and attempting to get at the heart of the dispute, the leader works to bring about reconciliation.

The Kpelle of Central Liberia

The Kpelle people of central Liberia have evolved a moot court to resolve family disputes that are too small or intimate for the traditional courts. The sessions, attended by a group of neighbors and family members, are presided over by someone with a kinship tie to the participants and usually political standing in the group. In one typical dispute, a man named Wama Nya had one wife but inherited a second when his brother died. He accused this second wife

of cheating on him, staying out late, and denying him some of the food she brought in from the fields. The assembled group listened to the complaints of the man and the first and second wives, offering their opinions as the principals spoke and in side conferences. The process in some ways was therapeutic: it allowed everyone to be heard and to feel that their complaints were legitimate enough for others to take the time to listen to and consider seriously. In the end, the group decided that the husband was mostly at fault. He was ordered to bring rum, beer, and food for the entire group and thus reintegrate himself and his family into the community (Gibbs, 1963).

The Abkhazian of the Caucasus Mountains

In the Caucasus Mountains of Georgia in the former Soviet Union, the Abkhazian people have long practiced mediation by elders to resolve disputes within their group and among the tribes in the surrounding areas. The mediators are generally respected elders, usually male but sometimes female. The disputing sides tend to call in mediation after a cycle of revenge has allowed each side to feel that it has exacted equal retribution but before any reconciliation has been achieved. In one case, a drunken argument between members of different families had led to violence. The mediators essentially shamed the two sides into a reconciliation, which was followed up by a joint feast. This feast of reconciliation, according to participants, cements family bonds and is considered more sacred than any court document (Garb, 1996).

Interestingly, Abkhazian reconciliation before World War II had often involved either intermarriage between groups or the adoption of a child from one family into the other, thus creating an extended family link. The bond was dramatized by the new mother's taking the adopted child to her breast—either literally or symbolically. At times, an adult male seeking to end a dispute would steal into the home of the rival family and attach himself to the breast of his adversary's wife or mother. Sometimes this method would have the desired effect of ending the dispute. Sometimes (perhaps understandably) it would not.

The Yoruba of Nigeria

In Nigeria, the Yoruba live in modern cities but cling to traditional ways of resolving disputes. When a matter between Yoruba ends up in court, it is generally considered a mark of shame on the disputants: they are viewed as not good people who favor reconciliation. This is not to say that the people do not feel conflict has a place in life. An old Yoruba saying makes this clear: "The tongue and teeth often come in conflict. To quarrel and get reconciled is a mark of responsibility" (Albert, Awe, Herault, and Omitoogun, 1995, p. 9).

Disputes at the family level, such as an argument between co-wives or between parents and a youth who has run away, are generally brought before the *mogaji*, the lineage head, and the *baale*, an elderly head of the district. After the two sides state their case, the elders ask questions and then try to work toward a compromise in which both sides accept some of the blame. The elders have an arsenal of techniques for reaching a settlement: proverbs, persuasion, subtle blackmail, precedent, and even magic. The only real power behind the elders' decisions is cultural: they can threaten social excommunication or use emotional blackmail.

Some disputes transcend the family. One unique venue for resolving such disputes is a television program known as *So Da Bee*, which acts as an informal arbitrator. Land disputes are a common topic. In one case, broadcast in 1995, a blind woman had given a piece of land to a man for farming some twenty years earlier. After the old woman and the farmer died, their heirs, each assuming they held ownership, sold the land to different parties. Through a fact-finding process, the program's arbitrators determined that the agreement between the old woman and the farmer had related only to farming, not full possession of the land. The farmer's heirs were forced to rescind their sale.

The traditional head of the Yoruba, known as the Olubadan, also acts as an arbitrator in many disputes. In a 1983 case, two men each sought the title of *mogaji* of the Sodun family. All internal efforts to resolve the dispute had failed, so the matter was brought

before the Olubadan, who sat in council with his most powerful chiefs. After both sides presented their case and were questioned by the council, the situation still could not be resolved, so the Olubadan ruled that the family would have two *mogaji*.

Mediation in China

China, where the traditional view of dispute resolution has its origin in Confucian ethics, adopted mediation early. Confucius (551–479 B.C.) taught that natural harmony should not be disrupted, and adversarial proceedings were the antithesis of harmony. Since the Western Zhou Dynasty two thousand years ago, the post of mediator has been included in all governmental administrations. Today in China, it is estimated that there are 950,000 mediation committees with 6 million mediators—in fact, there are more mediators per 100 citizens in China than lawyers per 100 people in the United States (Jia, 2002).

Given the emphasis on harmony, Chinese mediators have long played a far-reaching role: “Chinese mediation aims not only to respond to a conflict when it breaks out, but also to prevent it from happening. . . . [It] is a continuous process of being vigilant against any potential threats to harmony, even after the harmony has been built” (Jia, 2002, p. 289). Chinese mediators thus do more than try to settle a dispute and move on: they also instruct the participants in how to have a better relationship for the long term. It would be many, many years before Western practitioners of ADR would catch up to these ideas.

Ancient Greek Roots of Arbitration

In the Western World, the story of ADR can be traced back to the ancient Greeks. One famous story of arbitration comes down through mythology. The goddesses Juno, Athena, and Aphrodite were squabbling over who was the most beautiful and called on Paris, the royal shepherd, to decide. Paris, it seems, was not above

accepting a bribe from Aphrodite, who thus won the contest. But Juno, wife and sister of Jupiter, was not one to forgive and forget. She was so furious at Paris that she unleashed a host of plagues on Aeneas, his fellow Trojan, as the great hero strove to found the new Troy. Thus, one of the classics of Western literature, Virgil's *The Aeneid*, can be read as a long meditation on the evils wrought by an arbitration gone awry.

Arbitration was not simply a matter of mythology to the ancient Greeks. As Athenian courts became crowded, the city-state instituted the position of public arbitrator some time around 400 B.C. (Harrell, 1936). According to Aristotle, all men served this function during their sixtieth year, hearing all manner of civil cases in which the disputants did not feel the need to go before the more formal, and slow, court system. The decision to take a case before an arbitrator was voluntary, but the choice of being an arbitrator was not. Unless he happened to be holding another office or traveling abroad, any eligible man selected to serve as an arbitrator was required to do so; if he refused, he would lose his civil rights (Harrell, 1936).

The procedures set up by the Greeks were surprisingly formal. The arbitrator for a given case was chosen by lottery. His first duty was to attempt to resolve the matter amicably. This failing, he would call witnesses and require the submission of evidence in writing. The parties often engaged in elaborate schemes to postpone rulings or challenge the arbitrator's decision. An appeal would be brought before the College of Arbitrators, which could refer the matter to the traditional courts. In one such appeal process, Demosthenes had alleged that one Midias had used disrespectful language toward Demosthenes and his family. Midias took legal steps to put off the decision by the arbitrator, Straton, including failing to show up on the day the final decision was to be rendered, but Straton ruled against him. Although the official record is incomplete, Midias successfully appealed the decision before the College of Arbitrators, and Straton was expelled from the board. This outcome may seem a setback for arbitration at a very early

stage, but it can also be read as an example of a strong self-policing mechanism. A traditional judge later upheld the board's censure of the arbitrator. The system, it seemed, had worked.

Both Aristotle (384–322 B.C.) and Cicero (106–43 B.C.) commented favorably on arbitration in words that certainly could be used to describe modern arbitration. They made clear that arbitration was an alternative to the courts. Aristotle said arbitration was introduced to “give equity its due weight, making possible a larger assessment of fairness” (Aristotle). Cicero said a trial is “exact, clear-cut, and explicit, whereas arbitration is mild and moderate” (Cicero). He added that a person going to court expects to win or lose; a person going to arbitration expects not to get everything but not to lose everything either.

Other Early Uses of Arbitration

The ancient Greeks were not alone in using arbitration at an early date. Other examples around the world include the following.

- India used a system of arbitration, *Panchayat*, beginning twenty-five hundred years ago. The arbitrator, called a *Panch*, was given such high status that his decisions were irreversible. All types of cases could be subject to arbitration, including criminal matters. This practice of arbitration was so strong that it continued even during the eight hundred years of Muslim rule in India.
- Arbitration was also a feature of the Old Irish Brehon Law system, a body of indigenous law that existed in Ireland from the Celtic settlement before Christ. In early Irish law, a *brithem*, who had trained in law but had not been appointed by the king as the official judge, could work as an arbitrator. The law established the arbitrator's pay at one-twelfth of the sum at issue.
- The Spanish king Alfonso the Wise directed the use of arbitration and allowed lawyers to practice with the publication

of *Siete Partides* in 1263. This arbitration was binding; however, the arbitrators maintained a spirit of conciliation by attempting to make decisions harmonious with cultural norms.

- The early Yi Dynasty in Korea (1392–1910) is remarkable for its longevity and its extensive use of arbitration. Because of its isolation, the regime did not employ arbitration in international disputes, but it was widely practiced in a variety of commercial and civil disputes between citizens.

Religious Roots of ADR

The three main monotheistic strains of Judaism, Christianity, and Islam played significant roles in conflict resolution among their followers. These early religion-sponsored precursors to ADR practices included negotiation, mediation, and arbitration, as well as ecclesiastical courts. The courts, with their strong interest in establishing peaceful relations within the religious group, strongly encouraged disputants to use negotiation, mediation, and arbitration prior to or in place of a court case.

The Wisdom of Solomon

Solomon was king of Israel around 960 B.C. Although he was essentially the law of the land, his improvisational form of jurisprudence in many ways makes him more akin to an arbitrator than a judge. One famous case holds lessons for all who seek to understand the true nature of justice.

Two prostitutes came before the king, according to the story. The first woman said that the second woman had rolled over in the night and crushed her infant, who was only a few days old. This second woman then took the living baby of the first woman and replaced it with her dead child. When it was her turn to speak, the second woman accused the first of having carried out much the

same scheme. Both babies were about the same age, and no one else could tell them apart.

Solomon dramatically called for his sword, saying he would cut the living child in two so that each woman could have her half. One woman agreed. The other said that he should award the baby to her accuser so that the child's life would be spared. Solomon awarded the child to the woman who was willing to give it away.

The case has been endlessly parsed by lawyers and child welfare advocates. Why couldn't Solomon have worked out joint custody? How would he know which mother would be a better one in the long run? In reality, the king's wisdom shone through, and arbitrators got an excellent early role model.

Jewish Bitzua and P'Sharah

Jewish tradition, based on the Torah and Talmud, provided a judicial setting called Beth Din in which disputants argued their case before three rabbinical judges. The disputants first had to agree to be bound by the judges' decision. Prior to appearing before the judges, the disputants were strongly urged to resolve their differences informally in *bitzua* (mediation) or *p'sharah* (arbitration). In Jewish tradition and law, the concept of compromise in dispute resolution was highly valued, a further encouragement of negotiations and mediation.

While the Romans occupied the Holy Land (63 B.C. to 66 A.D.) and Hebrew courts were abolished, the Hebrews created their own informal system resembling arbitration. This continuing Jewish tradition made it possible for Jews to avoid Christian courts during the Middle Ages, when they objected to testifying under an oath identifying Jesus Christ.

Jewish courts were later established wherever the growing Diaspora landed: from cities across the Middle East, throughout Europe, and in Asia. In the United States, the modern Jewish Arbitration Court, originally located on the Lower East Side of New York City, heard a variety of disputes between Jews involving

everything from questions of paternity to proper burials, business disputes to purely family matters. The board offered a formal forum for the airing of disputes large and small, many of which would seem quite out of place in a traditional court.

In one case, a man in the fur trade complained that he had not received his full wages after being promised that he would receive his regular salary even in the slow season. The employer responded by saying that the payment was based on the worker's staying with the firm after the end of the slow times. Instead, the worker had quit. The arbitration board ordered the firm to pay the worker one-third of the full wages (Goldstein, 1981).

In a more touching case, a couple who had been married for fifty years came before the board to ask its permission to separate. In the middle of the wife's complaints about her husband, the arbitration judge asked why, after such a long marriage, the couple wanted to split up now. The wife responded that after raising the children and watching the grandchildren grow up, "I have time to think of my own problems. So I want a separation." After the couple were allowed to air their grievances, the board persuaded them to give their marriage another try.

Christian Peacemaking

The Christian tradition of conflict resolution relies on a number of biblical references, including one on arbitration in 1 Corinthians that suggests very early knowledge of ADR as an alternative to war: "In the obscurity of older time a desire would arise to replace armed combat by arbitration." Matthew 18 speaks of forgiveness and peaceful reconciliation. In numerous other places, the Bible speaks of peacefully working with others to avoid using the court or violence for resolving disputes.

The parish or village priest often served as mediator and arbitrator on an array of issues involving his parishioners. The issues handled by the parish priest went well beyond the realm of the spiritual and involved him in matters appropriate to a state court. In

the fourth century, when the Roman Empire adopted Christianity as its official state religion, the state courts assumed some of the role previously played by the parish priest. However, by then, ecclesiastical courts operating under the jurisdiction of each bishop were well established and were used wherever Catholic majorities prevailed.

The Catholic church used councils, which were gatherings of local or regional bishops, to resolve issues on doctrine and practices. These councils primarily involved negotiation, with the pope's representatives playing a heavy mediation role.

The popes themselves often stepped into negotiations, sometimes on their own behalf and sometimes on behalf of others. In perhaps the most famous case, Pope Leo the Great, in spectacular and mysterious fashion, persuaded Attila the Hun to spare the city of Ravenna, the western capital of the Roman empire, in a meeting on the banks of the Mincio River in the summer of 452.

The incident, which inspired at least one artistic masterpiece, is heavily shrouded in papal image building. The concrete facts are few. Attila had swept across Europe, sacking city after city. He had so thoroughly destroyed Aquileia, on the northern edge of the Adriatic Sea, that it was many hundreds of years before any trace of it could even be found. With Ravenna's fall seemingly assured and thus Attila's path clear for a direct assault on Rome, Pope Leo and two senators, Trigetius, the prefect of Rome, and Gennadius Avienus, a rich and successful politician, set off on a mission to dissuade him.

Attila is said to have received the delegation while reclining in his tent. By the later papal account, the meeting took place on horseback—with the pope's two senatorial companions replaced by St. Peter and St. Paul. This is how Raphael of Urbino depicted the scene in a fresco in the Vatican Palace and is doubtless how it was pictured in the mind's eye of generations of Italians. Some accounts emphasize that Pope Leo impressed Attila with his bearing and his shimmering robes. Others say the apparition of the two saints frightened the fearsome warrior. A substantial payment may also have been involved. Or it may simply have been that it was late in

the year, and Attila was ready to head home to Hungary for the winter. For whatever reason, Attila turned his army back, and the pope's reputation as a powerful peacemaker was born (Howarth, 2001).

Muslim Tahkim

From the earliest days of Islam, Muhammad (570?–632) encouraged and practiced *tahkim*, or arbitration, to resolve a variety of disputes. Muhammad's role as arbitrator is sanctioned by revelation. Once Islam became dominant in a community, local law was amended to include arbitration (Moussalli, 1997).

In one of Muhammad's most significant cases, he helped avert a war over the reconstruction of the Kaaba, the small stone building in the court of the Great Mosque at Mecca. The building houses the sacred black stone that is the goal of Islamic pilgrimage and the point toward which Muslims turn in their daily prayers. After the rebuilding, the leaders of the local clans fought over who would have the honor of replacing the sacred stone. For five days, the clans argued. On the brink of war, Muhammad was called in to arbitrate. He placed the stone on a small cloth, telling the head of each clan to carry a corner to its designated area. Muhammad himself then set it in its final resting place (Moussalli, 1997).

Tahkim has a long tradition in the Arab world. One of the most famous wars of the pre-Islamic period, the war of al-Basus, began with the death of a camel that had been allowed to graze on another man's land. The dispute escalated into a long-running cycle of revenge and counter-revenge and was settled only through the process of *tahkim* and payment of blood money. Another famous and long-lasting quarrel began over which of two horses, Dahis and Ghabra, had won a race. This violent cycle too was eventually resolved through arbitration.

The Islamic tradition and culture focuses more on the group or community than on the individual. Originating in ancient Middle Eastern tribes and villages were the dispute resolution practices of

Sulh (settlement) and *Musalaha* (reconciliation). The two together, often referred to simply as *Sulh*, have been used to control conflict and maintain harmony within and between tightly knit social groups. The ritual practices involve conversations, information sharing, and exchanging promises about the future.

Conflicts of many types, even those involving a criminal act, used *Sulh*. For example, if the person who committed the criminal act was known, *Sulh* would be used to achieve restorative justice and diminish revenge that one group or family might use against another. Thus, the Islamic tradition supported the use of all three original forms of ADR.

From the Middle Ages to the Age of Discovery

A few examples from this extended period of time will illuminate the collective experiences that colonists brought with them to the British colonies in North America.

Medieval Practices

After the fall of the Roman Empire, fighting between nobles to resolve disputes in medieval Europe was the rule rather than the exception. Nevertheless, forms of ADR did exist, though some aspects of them were truly medieval.

Probably the best-documented instances of ADR in the Middle Ages were matters brought for judgment before a king. Pippin the First (who ruled Aquitaine from 819 to 838) heard numerous property disputes. In 861, a group of sixty-one peasants, including women and children, brought a different sort of case before Charles the Bald. The records of the king's court details their claim: "That they ought to be treated as free coloni [citizens] by birth, like the other coloni of St. Denis, and that Deodadus the monk wanted unjustly to bend them down into an inferior service by force, and to afflict them" (Davies and Fouracre, 1986, p. 51). After a preliminary hearing, a review of the documents, and further testimony, the king

ruled in favor of the monk. What is perhaps remarkable is that the serfs felt they had a strong enough case to bring before the king.

ADR is essentially a nonviolent process, but in its early stages, this was a matter of degree. In some ways, the ritualized violence of the duel can be seen as an early form of ADR. To the participants, a duel, or trial by combat, was not viewed as a matter of might makes right; it was a way of divining the judgment of God. A text from Carolingian West Francia dating back to 816 explains how, in a dispute over property rights, the matter can best be resolved: "If a party suspects the witnesses brought against him, he can put forward other, better, witnesses against them. But if the two groups of witnesses cannot agree, let one man be chosen from each group to fight it out with shields and spears. Whoever loses is a perjurer, and must lose his right hand" (p. 47). Of interest here is the notion that the common violence was slowly being channeled into a process. The result was still a fight, but only under certain circumstances and to resolve a specific issue.

In the year 1037, a nobleman named Bernat Orger and the Abby of Saint Cugat had a disagreement over a piece of land on Spain's Mediterranean coast. Unable to resolve the dispute, they took the matter before the court of the count of Barcelona. A distinguished group was assembled to hear the case, including the Countess Ermessende and the bishop of Barcelona. But when it came time for the disputants to place themselves under the law and be sworn in, Bernat refused. Rather than let the panel decide, he asked for trial by water. In this procedure, a child from each side is plunged in cold water. The matter was won according to which child survived the ordeal. If the trial ended in a tie, the land would be split in half. In the end, the results were indeed inconclusive, and the land was divided equally (Salrach, 2001). Other forms of the trial included placing a burning iron in the hands of a disputant. If the wound healed properly after three days, he won. If it became infected, he lost. Another involved reaching into a boiling cauldron and attempting to pull out a tiny ring (Bartlett, 1986). Although these practices sound barbaric by today's standards, they

in fact represented a step up from knocking the other fellow over the head before he knocked you over yours. All of these trials were thought to put the resolution of the matter in God's hands, the most impartial arbitrator of all.

A similarly rough form of justice prevailed in the Languedoc region on the French Riviera about this time. Dueling had been a favored means of settling disputes, though it was falling out of favor by the end of the eleventh century, and war remained popular, but there were some new methods coming to the fore: arbitration by a panel of fellow nobles, or mediation by the nobility or the church. In 1143, after the defeat of Alfonse Jourdain, count of Toulouse, by Vice Count Roger the First, a treaty was reached with the help of Bernard, count of Comminges, Raimond Trencavel, brother of the vice count, and Sicard de Laurac. What is significant here is that none of the mediators imposed their will on the negotiators. They helped them reach a settlement that brought peace (Debax, 2001).

European Law Merchant

During the tenth and eleventh centuries, commercial arbitration became widely used in many European cities under a practice referred to as the law merchant, although no governmental law was involved. This ADR predecessor was voluntarily developed, adjudicated, and enforced by merchants. The legitimacy of the process was founded on an understanding of fairness, mutual benefits, and reciprocity of rights.

In urban centers, markets, and trade fairs, merchants made available these informal judges, drawn from the merchant ranks, to resolve disputes using rules and laws evolved through years of experience. The voluntary and participatory nature of the process contributed to its acceptability to the vast majority of merchants. Those who refused to accept a judge's decision faced ostracism by other merchants. One reason the law merchant was allowed to operate separate from the traditional courts was the specialized nature of the cases. A case from 1278 makes the point. One William

Dunstable of Winchester brought a matter against Robert le Balancer of Winchester. William had bought 103 sacks of good-quality wool from Robert at two prices. He opened four sacks of each lot and accepted them as to quality. But when he went to deliver the wool to another party, 68 of the sacks were found to be “vile and useless.” William claimed the turn of events put his life in danger and cost him 100 pounds sterling. The law merchant affirmed William’s account and the long-standing practice of sales by sample. Robert was ordered to make amends (Hall, 1930).

By the late Middle Ages, state courts had taken over some work of the law merchant. These courts, however, lacked the technical expertise of the merchant judges, who were more akin to arbitrators with their extensive knowledge of travel and commerce.

In 1698, Ireland enacted the first arbitration law, and it remained unchanged for 250 years. It used these words to authorize arbitration:

It may be lawful for all merchants, traders and others desiring to end by arbitration any controversy, sute or quarrels—for which there is no other remedy but by personal action or sute in equity, to agree that their submission of the matter to the award or umpirage of any person or persons should be made a rule of any of his Majesty’s courts of record, which the parties shall chuse (Dublin International Arbitration Centre, 2004).

The law established several important principles that continue in arbitration today: the parties were allowed to choose their own arbitrator, arbitration awards were recorded in a state court, and the court was likely involved in enforcing the awards.

Age of Discovery

By the seventeenth century, the coastal nations of Western Europe were engaged in significant commercial trade and maritime pursuits. That commercial activity and the growth of diplomacy

spawned by a greater sense of nationhood and competition advanced the need for and use of ADR. Although war remained the dispute resolution technique of last resort, a developing middle class, with an interest in peaceful resolution of commercial disputes, and a developing diplomatic class, with an interest in resolving international disputes, fostered negotiation, mediation, and arbitration as alternatives to battle.