The Three Pursuits of Dispute Settlement

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role of dispute resolution | arbitration | mediation | negotiation | settlement | rule of law | justice | satisfaction of the parties | Owen Fiss

Abstract *| What is dispute settlement? What should we expect or ask from a dispute resolution mechanism? To what extent and with what consequences can we buy dispute resolution, privatise it and remove it from society's purview? Should arbitration be seen as a mechanism that merely does away with disputes, or rather as an instrument of governance? These are some of the principal questions on which this essay seeks to provide some basic structuring reflections. To this effect, the essay envisions three functions that dispute settlement may pursue: the individualised and isolated maximisation of the parties' satisfaction; the sustainment of the rule of law and of predictability; and the enforcement of substantive societal values.*

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13.01. My aim with this short essay is to outline a triptych on the pursuits of dispute settlement. This triptych is out of necessity a sketch, and its objective is primarily to highlight areas where further work may be useful. But in drawing this sketch, I hope to tackle some structuring ideas for dispute settlement which would allow us to understand arbitration and its confines in a distinctive way.

13.02. This essay's discussion of the pursuits of dispute settlement will draw fairly heavily on Owen Fiss's cardinal exposition of the subject matter 25 years ago, although it will depart from his binomial elaboration at a number of significant junctures[1]. The first pursuit of dispute settlement sketched in this essay is to maximise the satisfaction of the parties to the instant case. It is, then, conducive to immediate peace. The second pursuit envisioned here is the furthering of the rule of law. In this incarnation, the function of a dispute settlement mechanism is to promote formal systemic justice, and hence to sustain some of the basic values of the liberal-democratic tradition. It is, hence, conducive to predictability in the longer term and to treating potential future parties at large as proper responsible moral choosers. The pursuit sketched in the third part of the triptych imagined here is the implementation of substantive societal values inscribed in legal rules. A dispute resolution mechanism would thus be expected to promote the values that society has collectively agreed to embody in authoritative legal texts, which is a pursuit that in the final analysis aims at bringing reality closer to democratically chosen ideals.

13.03. Surely, none of these three pursuits of dispute settlement correctly captures the whole truth of the variegated roles and purposes of any actual dispute settlement system. No actual system can presumably be accurately reduced to any one or even several of these paradigmatic representations. Nevertheless, the purpose of my triptych is simply to offer the simplest possible account of the roles of dispute resolution in a manner that is as bold and contentful as possible, while retaining a reasonable degree of truthlikeness.

13.04. The essay moves in two parts. Reviewing and elucidating Fiss's analysis is the aim of the first part. While Fiss's treatment of this matter is a permanently valuable contribution to the general theory of dispute resolution – one that is too often forgotten or mistakenly thought to be relevant only in the judicial-political context of the 1980s in the United States – his explication of the tension between resolving disputes and justice occasionally lacks analytic purchase. The second part of the essay then delineates further distinctions that lead to the threefold representation already adumbrated.

[1] Owen Fiss, *Against Settlement*, 93 Yale L.J. 1073 (1984).

I. Fiss's Distinction

13.05. My story starts in 1984. That year, Owen Fiss published a remarkable article in the *Yale Law Journal*, entitled 'Against Settlement'[2]. In this article, which has acquired legendary status in contrarian circles, Fiss dared to go against the grain and raised a forceful voice in the midst of the wind of change that was starting to blow over the court system in the United States. With limited respect for political correctness (a likely valuable source of inspiration for every academic), he cracked open the idea, which was starting to turn into a dogma, that settlement heralds a fairy-tale world of peace and efficiency. For Fiss, the cure that settlement, in the context of mediation or negotiation, might bring to society litigious character would come only at the expense of some of our most sacred values. Brutally simplified, an over-development of settlement as a means of dispute settlement would be reminiscent of a family where the parents systematically negotiate for peace with their children, instead of facing the more draining tasks of parenthood, giving force to the values forming their educational ideals. So Fiss contends, 'ADR is the judicial counterpart to the deregulation movement'[3].

13.06. Fiss's paper 'Against Settlement' was initially presented, provocatively, at a meeting of the American Association of Law Schools intended to celebrate the formation of its new Alternative Dispute Resolution section. Fiss was concerned about the fact that a call was being issued to train students 'for the gentler arts of reconciliation and accommodation', a development advocated by Derek Bok, then President of Harvard University[4]. As David Luban later summarised it, Fiss's point was simply that 'settlements are no cause for celebration'[5]. They are merely, as Fiss puts it, 'a capitulation to the conditions of mass society [which] should be neither encouraged nor praised'[6]. When the parties express a preference for settlement, that preference may very well be a 'function of the deplorable character of the options available to them'[7]. Put differently still and to toy with Churchill's famous words, settlements may in many situations of modern, complex society be the worst solution, except for the others that have been tried. Marc Galanter and Mia Cahill present the situation like this:

> *Demand for adjudication-backed remedies is increasing faster than the supply of facilities for full-blown adjudication. … As society gets richer, the stakes in dispute become higher, and more organizations and individuals can make greater investments in litigation. Expenditures on one side produce costs on the other. … As the law becomes more*

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2 *Ibid.*

3 Owen Fiss, *Second-Hand Justice?*, Conn. L. Trib. 11 (17 March 1986).

4 Derek Bok, *A Flawed System*, Harv. Mag. 38 (May-June 1983).

5 David Luban, *Settlements and the Erosion of the Public Realm*, 83 Geo. L.J. 2619 (1995).

6 Owen Fiss, *supra* note 1, at 1075.

7 Owen Fiss, *The History of an Idea*, 78 Fordham L. Rev. 1273, 1277 (2009).

> *voluminous, more complex, and more uncertain, costs increase. Virtually every "improvement" in adjudication increases the need and opportunity for greater expenditures. Refinements of due process require more submissions, hearings, and findings; elaborations of the law require research, investigation, and evidence. … There is more of a "settlement range" in which both parties are better off than if they had run through the full course of adjudication*[8].

These words seem to echo in the field of international arbitration: mediation and settlement are increasingly considered as ways out of the procedural overheating and cost avalanches in arbitration[9].

13.07. Yet the moral quandary remains at the heart of the promotion of settlement as a method to deal with disputes: while often necessary, settlements represent a step away from law, if we accept the idea of legal philosophers as prominent as Lon Fuller and Matthew Kramer that law has a central guiding role, which it fulfils by setting cognitively reliable guideposts[10]. Embracing the development of settlements without reservations means being happy with the sentiment Fiss calls 'moving a case along' regardless of whether justice has been done or not, instead of confronting the vicissitudes associated with the task of applying the law correctly[11]. So we have come, at some stage, to celebrate the betrayal of the values of the rule of law – perhaps the world's least controversial political ideal – by the eschewal of adjudication, one of the most fundamental mechanisms giving force to the ideal of predictability for guidance. The cause of this, Fiss suggests in essence, lies in the conflation of two roles that dispute resolution may pursue and fulfil. And so he argues that 'In [the] story [told by the ADR movement], settlement appears to achieve exactly the same purpose as judgment'[12]. To mark this division will then be our next task.

13.08. (Fiss, it should be pointed out, uses the concept of 'dispute resolution' in a different way than the generic, overarching meaning that it usually receives, at least in the international context. The latter, more common, meaning of dispute resolution covers the whole variety of procedures leading to the solution of a case, be they judicial or extra-judicial. This is the meaning used for the current chapter. For Fiss, 'dispute resolution' is a synonym to 'Alternative Dispute Resolution' in the sense used primarily in the United States, that is, out of court dispute settlement by arbitration,

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8 Marc Galanter & Mia Cahill, *'Most Cases Settle': Judicial Promotion and Regulation of Settlements*, 46 Stan. L. Rev. 1339, 1387 (1994).

9 Gabrielle Kaufmann-Kohler, *When Arbitrators Facilitate Settlement*, 25 (2) Arbitration International 187 (2009).

10 Lon L. Fuller, The Morality of Law, New Haven: Yale University Press 229 (1969); Matthew H. Kramer, Objectivity and the Rule of Law, Cambridge: Cambridge University Press 118 (2007). See also Thomas Schultz, *Some Critical Comments on the Juridicity of the Lex Mercatoria*, 10 Y.B. Pr. Int'l L. 667 (2008).

11 Owen Fiss, *supra* note 1, at 1073, 1086.

12 Owen Fiss, *supra* note 3, at 10; Owen Fiss, *supra* note 1, at 1073, 1085.

mediation or negotiation. He opposes it to adjudication, that is, court litigation.)

I.1. Resolving Disputes

13.09. For Fiss, the first role of dispute resolution, in its incarnation as settlement, is merely that: resolving disputes *stricto sensu*. 'What matters' from this perspective, Fiss writes in 1986, 'is not so much the terms of the resolution, but only that the dispute is resolved'[13]. Neutrals in a dispute resolution process espousing this view are 'brokers of deals'[14], their job is to 'maximize the ends of private parties' and to 'secure the peace'[15]. Put more crudely, and with somewhat less enthusiasm, the role of dispute resolution in this incarnation is more simply to move cases along[16]. In an article written on the occasion of a symposium at Fordham Law School marking the 25th anniversary of 'Against Settlement', Fiss insists that the peace achieved by settlements, which he had tentatively admitted 25 years earlier, was in reality 'often a very fragile and temporary peace'[17]. In other words, Fiss considers that settlement, as a method of dispute resolution, ideologically based as it is on 'the supposition of a natural harmony'[18], does not promote wide-scale social peace, but a very specific and individualistic peace: the parties should merely stop 'quarrelling'[19]. The reason why this sort of case-related peace is not conducive to a more general state of social tranquillity is linked to some of law's most basic purposes: the enforcement of our collectively chosen ideals and, more fundamentally, justice[20].

13.10. Fiss further challenges what is probably the most important argument in favour of the desirability of settlement: the fact that it is directly a product of party consent. After all, if a settlement is by definition only possible if the parties agree with the terms of the settlement, and not merely with the terms of the procedure as it would be the case in arbitration for instance, what is there to object to? Leaving aside the empirical question of the conditions under which consent is really given (the problems known as freedom of consent and access to information), two of Fiss's arguments are worth mentioning here.

13.11. First, settlement is not justice. There is simply no reason to conclude, Fiss argues, that the parties believe their settlement to be 'an instantiation of justice or will, as a general matter, lead to justice'[21]. If a bargained-for

13 Owen Fiss, *supra* note 3, at 10.
14 Owen Fiss, *supra* note 7, at 1280.
15 Owen Fiss, *supra* note 1, at 1085.
16 *Ibid.,* 1086.
17 Owen Fiss, *supra* note 7, at 1277.
18 *Ibid.,* 1275.
19 *Ibid.*
20 H. Lee Sarokin, *Justice Rushed is Justice Ruined,* 38 Rutgers L. Rev. 431 (1986).
21 Owen Fiss, *supra* note 7, at 1277.

settlement happens to correspond to a rationally established instantiation of justice, then this overlap is merely a matter of luck. Hence, Fiss considers that recourse to settlement is often a 'function of the deplorable character of the options available to them':[22] building on the postulate that the parties to a dispute rarely have a reason not to want justice, a settlement is made *faute de mieux.* The parties simply 'make the best of an imperfect world and the unfortunate situation in which they find themselves'[23]. Settlement is often merely a 'capitulation'[24] before the practical problems faced by the adjudicative system that would, ideally, have instantiated justice.

13.12. Taking the argument further, if parties settle *en masse* in certain domains, or if the settlement rate in given contexts rises significantly, we should perhaps be less than euphoric. It may not be a signal for merriment, but merely a sign that the adjudicative system of *justice* is broken. If there is an increase of settlements within arbitrations, if parties increasingly expect arbitrators to display settlement skills, then we should perhaps not rejoice too quickly, and not marvel at the fact that arbitration becomes more sophisticated, multifaceted and closer to the needs of business. Instead, we should realise that the parties move away from a relatively slow and expensive system of *justice* to a quicker and cheaper system that simply does away with disputes. In the words of William Park, witty as usual, 'An agreement to end hostilities may cost less than arbitration, just as a train trip from London to Paris is cheaper and quicker than a flight from London to Hong Kong'[25]. The parties' consent to settlement may well be the sort of consent one finds in a surrender: if the result is to be praised, it is only because it is economically the best alternative to justice[26].

13.13. Fiss's second argument against the panacea effects of consent builds on these considerations about justice: 'when the parties settle, society gets less than what appears, and for a price it does not know it is paying'[27]. He maintains that, even if the avoidance of adjudication were the parties' true ideal and their desire of settlement not a matter of contingency, then the following problem would still remain: 'Justice is a public good, objectively conceived, and not reducible to the maximization of the satisfaction of the preferences of the contestants'[28].

13.14. To a certain extent, it is hard not to concur in this opinion. Indeed, the parties' quest for efficiency through settlement, in other words their efforts towards their own wealth maximisation, is realised not only at the expense of other forms of their own well-being (such as justice or

22 *Ibid.*

23 *Ibid.*

24 Owen Fiss, *supra* note 1, at 1075.

25 William W. Park, *Arbitrators and Accuracy*, 1 J. Int'l Disp. Settl. 25, 34 (2010).

26 On the different values pursued in dispute resolution, see for instance Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement*, 76 Texas L.R. 77 (1997).

27 Owen Fiss, *supra* note 1, at 1085.

28 Owen Fiss, *supra* note 7, at 1277.

fairness)[29]. It also creates negative externalities for society if it becomes overwhelmingly important in a given context. Adjudication is not only necessary for justice to be done in a specific case, but also for justice to be seen to be done – it provides an opportunity for general rules to be applied to specific and individual situations, thus reaffirming and reinforcing law's 'dependable guideposts for self-directed action'[30]. If a dispute settles, it escapes from much of the normative framework and machinery to rule society and to make life in community possible – that is, law. Where settlement starts, law survives only as a shadowy figure lurking in the background, as Bob Mnookin and Lewis Kornhauser put it so eloquently[31]. One should, of course, readily acknowledge that a shadow is better than utter absence. Unconditional supporters of the ADR movement often call for rejoicing and merriment because of law's survival as a shadow in settlement. But I know of no reason why we should not remain hungry for law's full promises. Provided it codes power in a benevolent, not wicked regime[32], law is a common good of moral value[33] as it allows to 'predict and plan'[34], which in turn elevates law's addressees to the dignity of 'responsible moral choosers', to use Matthew Kramer's words[35]. If it is applied competently and impartially, law 'promotes the morally worthy end of upholding the citizens' reasonable beliefs concerning the

[29] See Louis Kaplow & Steven Shavell, Fairness versus Welfare, Massachusetts: Harvard University Press (2002).

[30] Lon L. Fuller, *supra* note 10, at 229.

[31] Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law*, 88 Yale L.J. 950 (1979).

[32] Indeed, as Matthew H. Kramer has shown, '[law] is indispensably serviceable for the pursuit of benevolent ends on a large scale over a sustained period, but it is also indispensably serviceable for the pursuit of wicked ends on such a scale over such a period': Matthew H. Kramer, Objectivity and the Rule of Law, Cambridge: Cambridge University Press 143 (2007). See further Matthew H. Kramer, In Defense of Legal Positivism, Oxford: Oxford University Press (1999); Matthew H. Kramer, Where Law and Morality Meet, Oxford: Oxford University Press 143-222 (2004); Matthew H. Kramer, *The Big Bad Wolf: Legal Positivism and Its Detractors*, 49 (1) American Journal of Jurisprudence (2004). On law coding power, see Michel Foucault, The Will to Knowledge, London: Penguin Books Ltd. 82, 87, 89 (1978).

[33] Edward P. Thompson, Whigs and Hunters, New York: Pantheon Books 265-266 (1975): law is an 'unqualified human good'; Neil McCormick, Rhetoric and the Rule of Law, Oxford: Oxford University Press 12 (2005): law is 'a signal virtue of civilized societies'.

[34] Brian Z. Tamanaha, On The Rule of Law, Cambridge: Cambridge University Press 96 (2004): law 'enhances [its addressees'] dignity … by allowing them to predict and plan, no doubt a moral positive'.

[35] Matthew H. Kramer, Objectivity and the Rule of Law, Cambridge: Cambridge University Press 175 (2007). See similarly Jan Paulsson, *The Power of States to Make Meaningful Promises to Foreigners*, 1 J. Int'l Disp. Settl. (2010) forthcoming, where he argues, in substance, that adjudication in which a state is dealt with as a normal contractor elevates states to the 'adulthood' of 'making meaningful promises'.

legal consequences of their actions'[36]. Settlement allows us to go back to business, but these lofty ideals are lost.

13.15. Simplified with the utmost terseness, law has public value. Adjudicative dispute resolution mechanisms, as one of the cogwheels of law application, thus also have public value. Settlements, by allowing instant cases to be removed from the ambit of law application, undermine the operations of the rule of law; they decrease the public value of law as an instrument of predictability. For Fiss more specifically, settlements prevent the operations of law application as enforcement of the societal values according to which we agreed to live, which are instantiated as legal rules. This leads to Fiss's second view of the role of dispute resolution.

I.2. Justice

13.16. The second role of dispute resolution according to Fiss, in its incarnation as adjudication, is 'Justice rather than peace'[37]. He puts it thus: the job of legal decision-makers in the adjudicative process 'is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle'[38]. Put differently, the decision-maker in this role is an actor of the state's performance of the social contract: we give up sovereignty to a government, we accept legal limitations on our conduct in return for the assurance that we will be governed according to a defined and agreed set of rules. These rules, Fiss would say, instantiate certain defined and agreed societal values by which we have decided to live. Of course, not all rules carry societal values; many legal rules merely have a coordinating purpose (such as the rule defining when precisely the risk passes from the seller to the buyer). But even in these cases, we should remember that if we are not, as a matter of principle, held accountable for our actions according to initially agreed rules, then we become powerless to make 'meaningful promises', as Jan Paulsson puts it[39]. As he reminds us, in his Holmesian habit to point to simple things that we tend to overlook, if we are not as a matter of principle 'held to a bad bargain', we would 'be stuck in the poverty of a primitive economic system where every transaction is instant – cash and carry'[40].

13.17. Now, what should we think of a dispute resolution mechanism whose only possible successful outcome is that a new promise replaces the failed promise? Perhaps that we should not, for the sake of the socially valuable

[36] Matthew H. Kramer, Objectivity and the Rule of Law, Cambridge: Cambridge University Press 175 (2007).
[37] Owen Fiss, *supra* note 1, at 1075.
[38] *Ibid.*, 1085.
[39] Jan Paulsson, *supra* note 35.
[40] *Ibid.*

system that makes promises meaningful, be too easily permitted to talk ourselves out of a failed promise by dint of a settlement. Perhaps that if the only recourse we have in a given context is negotiation or mediation, then in this context we simply face, as Jeremy Bentham put it, a 'denial of justice'[41]. Or one can go further: it is the social contract that would founder in such a situation. This is what led to Simon Roberts's understated note that 'consensual agreement has seldom been accorded what one might call "ideological parity" with judgement by legal theorists'[42] and to his somewhat more forceful mention of the 'deep distrust of negotiation and compromise on the part of some who now comment upon them'[43].

13.18. And so Fiss argues that one of the two great roles of dispute resolution, the one played by legal decision-makers in an adjudicative dispute resolution mechanism, is to act as a 'coordinate branch of government'[44]. Dispute resolution is to 'give concrete meaning and expression to the public values embodied in the law and to protect those values'[45], to 'apply and protect the norms of the community'[46], to 'perform a distinctive function within the system of government that is endorsed by the people'[47]. In sum, it is called upon to 'enforce a public morality'[48].

II. Further Distinctions: A Triptych

13.19. When Fiss is understood in the way expounded in the preceding pages, we can perceive the relevance of drawing two analytical dividing lines: the first marks the division between dispute resolution as an instrument to deal with each case in isolation, and dispute resolution as an instrument for induction ('the inferring of future regularities from past regularities'[49]). Within the second category, a distinction may be made between the promotion by induction of procedural justice and of substantive justice. On this basis, I wish to sketch the three main pursuits of dispute settlement as follows:

(a) The promotion of the satisfaction of the parties to the instant case.
(b) The promotion of the rule of law.
(c) The promotion of substantive societal values.

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41 Jeremy Bentham, *Scotch Reform*, *in* 5 The Works of Jeremy Bentham (Scotch Reform, real Property, Codification Petitions), Edinburgh: William Tait 1, 35 (J. Bowring ed., 1843).

42 Simon Roberts, *After Government? On Representing Law Without the State*, 68 (1) Modern L. Rev. 23 (2005).

43 *Ibid.*

44 Owen Fiss, *supra* note 7, at 1275.

45 Owen Fiss, *supra* note 3, at 11.

46 *Ibid.*

47 Owen Fiss, *supra* note 7, at 1275.

48 Owen Fiss, *supra* note 3, at 11.

49 Matthew H. Kramer, *supra* note 36, at 23.

II.1. Seeking the Satisfaction of the Parties

13.20. In order to think more fruitfully about dispute resolution as an instrument for party satisfaction, a further division may be advisable: the distinction, present in public international dispute settlement but often ignored in other circles, between a conflict and a dispute. (It is of course not the semantics and terminology that matter here but the distinction itself.) A conflict is a 'general state of hostility between the parties', whereas a dispute is 'a specific disagreement relating to a question of rights or interests in which the parties proceed by way of claims, counter-claims, denials and so on'[50]. At the interstate level, one of the primary aims (historically at least) of dispute settlement mechanisms is precisely to identify and isolate the legal disputes that underlie conflicts – especially armed, or potentially armed, conflicts – and then submitting them to pacific resolution. This transpires for instance in Chapter VI of the UN Charter on the 'Pacific Settlement of Disputes'. If this distinction is perhaps most obvious at the interstate level, because of the extent of the tragedy often involved, it is obviously also applicable to relationships between private individuals, between companies, between a company and a state, and all other variants of business and non-business relationships.

13.21. Accordingly, one may discriminate between dispute resolution mechanisms that, within the context of seeking the satisfaction of the parties to the case, aim at achieving, on the one hand, peace as absence-of-conflict and, on the other hand, peace as absence-of-dispute.

13.22. The existence and inexistence of disputes and conflicts entertain intertwined causal relations. First, disputes can be both the cause and the consequence of conflicts. This much should be obvious. Second, the resolution of a dispute can lead – should hopefully lead – to the disappearance or lessening of the conflict, but it can also have the opposite effect: there are unfortunately many examples in public international dispute settlement where the resolution, by means of adjudication but also mediation and negotiation, of a boundary dispute between two states has led to an increase of the hostilities on the ground. On another level, a divorce by settlement may remove a dispute, or several disputes, but the state of hostility may easily remain or even grow. Or a settlement between two companies, where one company for instance infringed the intellectual property rights of the other, may put an end to that specific dispute, but at the same time fuel the conflict between the companies if one of the parties is left with the impression that it had to throw in the towel, for instance. A bad settlement resolves a dispute, but may have the reverse effect on the conflict. Third, a conflict may in certain situations be resolved while the dispute survives but is simply ignored. The dispute may (the parties still disagree over a specific legal question, but no longer care),

[50] John Collier & Vaughan Lowe, The Settlement of Disputes in International Law, Oxford: Oxford University Press 1 (2000).

whereas the conflict is resolved (the parties are no longer hostile). The differentiation of peace as an absence-of-dispute and peace as an absence-of-conflict leads to a distinction between dispute resolution (*stricto sensu*) and conflict resolution. Both ways of promoting these sorts of peace between the parties, however, seek nothing more than the satisfaction of the parties to the instant case, and may well remain oblivious to the reflected consequences of the resolution of the dispute or the conflict on other addressees of the same normative system.

13.23. A further ramification of party satisfaction as the objective of dispute resolution may be explored: satisfaction cannot be a function of the resolution of the dispute, but of the procedure itself. Indeed, while the resolution of a dispute in and of itself is an objective attainable by dint of a role of the dice or the consultation of an oracle, the search for truth and the provision of a fair hearing are a different matter altogether[51]. To a certain extent, the latter in fact stand in the way of the former: when only the resolution of the dispute matters, then the sole values that should rationally govern the resolution process are finality and efficiency.

13.24. 'Justice delayed is justice denied', says the adage, with all the imperfections and distortions that are normally attached to adages[52]. But in a number of situations (which may of course be extreme situations, but are therefore also particularly useful for purposes of analytical clarity), it may be more important for the parties to participate in a process seeking to establish the truth, to be given a real possibility to express their points of view and to be listened to, than to actually resolve their dispute. To echo a preceding paragraph, one may think of family matters where both parents no longer care to resolve a conflict between them and the many disputes it has spawned, but want to be given a formal and unimpeded possibility to say why they believe they were good parents. Or we may think more gravely of Hannah Arendt when she said (in a perhaps uncharacteristically bold statement), while witnessing the Eichmann trial, that 'everyone, everyone should have his day in court': it may have been more important to let the story of the Holocaust be told than to determine Eichmann's precise liabilities[53]. Such situations may be a partial response to Hamlet's question during his famous soliloquy 'who would bear the whips and scorns of time, … the law's delay, the insolence of office, … when he himself might his quietus make with a bare bodkin?'

13.25. William Park, a Shakespeare in his own right in the field of arbitration, describes thus the need for a 'day in court' in the context of arbitration,

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[51] See generally William W. Park, *Arbitrators and Accuracy*, 1 J. Int'l Disp. Settl. 25 (2010).

[52] This adage is in fact a rhetorical figure that was used most prominently by British Prime Minister William Gladstone in 1868 in a political speech about the Irish question – a quite different context than the one in which it usually is called upon.

[53] Hannah Arendt, Eichmann in Jerusalem, New York: Penguin Books USA Inc. 229 (1994, orig. 1963).

where the tension between finality and economy, on the one side, and truth and fairness, on the other, is a recurring theme:

> *An arbitrator who makes the effort to listen before deciding will enhance both the prospect of accuracy and satisfaction of the litigants' taste for fairness. … If arbitration loses its moorings as a truth-seeking process, nostalgia for a cheerful golden age of quick results will yield to calls for reinvention of an adjudicatory process aimed at actually getting the facts and the law. … Much of the criticism of arbitration's cost and delay thus tells only half the story, often with subtexts portending a cure worse than the disease*[54]*. If simple peace-making were to become the norm, arbitration as a truth-seeking process would need to be reinvented*[55]*.*

13.26. Party satisfaction derived from the procedure itself, as opposed to the resolution it seeks to lead to, may be manifold. A sense that 'justice is being done' is perhaps the most lofty form of satisfaction, but other components often come into the mix. Business parties may for instance oppose a quick and easy settlement, which would have fulfilled their putative aspirations to resolve the dispute, and proceed with a lengthy and costly arbitration because it allows them one of the following: not to show weakness; or to shift the responsibility for the case from business executives to their legal counsel; or to designate the arbitrators as scapegoats for a defeat on the basis of their alleged incompetence and the erroneous arbitral award that ensued; or to fulfil the requirements of an insurance policy that in effect excludes damages incurred by way of settlement; or to satisfy stakeholder demands. If we break up the concept of a party into the actual user of a dispute resolution mechanism (such as a company) and its legal counsel, the interests of the legal profession in a long and costly procedure also becomes apparent. In many of these cases, to varying degrees, the dispute resolution procedure may start following an immanent logic of development and become alienated from its origin as well as from its purpose: peace as absence-of-dispute.

II.2. Sustaining the Rule of Law

13.27. The promotion of the rule of law, I contend, is the second possible pursuit of a dispute settlement system. Even more fundamentally and in terms of political philosophy, a dispute resolution system in this guise aims at the implementation or sustainment or furtherance of some of the core moral-political values of the liberal-democratic philosophical tradition. As Matthew Kramer summarises:

> *[T]he liberal-democratic tradition comprehends thinkers such as John Locke, John Stuart Mill, Immanuel Kant, Friedrich Hayek, John Rawls, and Robert Nozick … Central to the liberal-democratic tradition*

54 William W. Park, *supra* note 51, at 27.

55 *Ibid.*, 53.

> *has been an emphasis on the liberty and autonomy and dignity of the individual, on the fundamental legal and political equality of persons, on equality of opportunity, … on the importance of reasoned deliberation and justification in the domain of public power*[56].

13.28. These values are crucial for any morally estimable form of governance for variegated reasons, but one only is of particular interest to us here: as has already been briefly mentioned, these values make the addressees of the relevant form of governance responsible moral choosers by allowing them to rationally predict the consequences of their actions. Distortedly simplified, the promotion of these values is intimately tied to the promotion of predictability.

13.29. Matthew Kramer further explains that 'These values come to fruition in the Rule of Law. They are the values whose formal dimensions are enshrined in Fuller's principles'[57]. Simply put, a dispute resolution system that conforms to Fuller's principles sustains the rule of law, which in turn furthers predictability, which brings to fruition the moral-political values of the liberal-democratic tradition. Admittedly, this may benefit from some explanatory comment.

13.30. At the most basic level, we should note that one of the principal differences between (a) dispute resolution seeking the promotion of the rule of law and (b) dispute resolution merely seeking the satisfaction of the parties to a specific case is, as we see, that the former's function is tied to the moral estimableness of the resolution of any given case for all potential parties – the effects of the resolution of one case on other, actual and potential, cases. Such moral estimableness is considered here specifically as the provision of predictability, through induction of general rules, or their precise meanings, from a collection of individually resolved cases: to echo the words used above, the regularities of future case resolutions should be inferable from the regularities of past case resolutions.

13.31. Jan Paulsson captures and illustrates the idea in a plainer way. He explains that in the field of international investments, arbitration is not simply the plaything of the parties – a label typically attached to arbitration – and it should not merely aim at maximising the ends of the parties to each dispute taken individually. As he puts it, 'in the field of international investments, arbitral tribunals are instruments of the rule of law. Their purpose is … to enable states to make reliable promises. … International tribunals tend to irritate respondent states [and claimant investors] in individual cases; yet their decisions should be respected in order to achieve the long-term benefits of the rule of law'[58]. What matters here is not the satisfaction of the parties in any individual case, but the overall promotion of the rule of law. Indeed, in the long run the rule of law is infinitely more important for international investments as it removes the

[56] Matthew H. Kramer, *supra* note 36, at 144.
[57] *Ibid.*
[58] Jan Paulsson, *supra* note 35.

'cash and carry'[59], 'quick buck'[60] nature of economic transactions in an unreliable environment, that is an insufficiently predictably environment: a 'spectacular rate of return – after which both the investment and the profits vanish'[61].

13.32. So what is the rule of law? In two words: dependable guideposts. In more words, looking to Lon Fuller, clarified by Matthew Kramer, the rule of law (in its meaning as 'formal legality' favoured here[62]) has eight constitutive elements. These, using Matthew Kramer's terminology[63], are (1) governance by general norms, that is the generality of expression and application of the rules that are part of the system; (2) public ascertainability, or the public promulgation of the rules of the system; (3) prospectivity, meaning non-retroactivity of the rules of the systems; (4) perspicuity, that is the formulation of the mandates provided by the legal system in lucid language; (5) non-contradictoriness and non-conflictingness, in other words the normative coherence of legal system; (6) compliability, that is the near absence of unsatisfiable behests; (7) steadiness over time, which calls for 'limits in the pace and scale of the transformations of the sundry norms in a legal system';[64] (8) congruence between formulation and implementation, in other words that the publicly promulgated rules are actually applied and are applied impartially. All these requirements seek to jointly fulfil law's essential function, which is to 'subject […] people's conduct to the guidance of general rules by which they may themselves orient their behaviour'[65].

13.33. This chapter is scarcely the place for an exhaustive analytical discussion of the different requirements that the rule of law, in its acception favoured here, sets for a dispute resolution system[66]. But one requirement of four of these principles may be outlined here: governance by general norms, public ascertainability, prospectivity and steadiness over time all are principles that are not straightforwardly fulfilled by a dispute resolution method interested only in the parties to the dispute in question. If dispute resolution outcomes are to collectively satisfy these principles, one element in the procedural setup of the system becomes crucial: the precedential force of prior outcomes.

13.34. As an example, the question of whether prior awards in the field of investment arbitration should be given precedential weight has been the

59 *Ibid.*
60 *Ibid.*
61 *Ibid.*
62 For other meanings of the rule of law, see Brian Z. Tamanaha, *supra* note 34.
63 Matthew H. Kramer, *supra* note 36, at 103-186.
64 *Ibid.*, 132.
65 Lon L. Fuller, *A Reply to Professors Cohen and Dworkin*, 10 Villanova L.R. 655, 657 (1965).
66 For such a survey, see Thomas Schultz, *Arbitration and the Rule of Law*, forthcoming.

subject of heated discussion during the last five years[67]. When investment arbitration is understood in the way favoured here, it seems difficult to eschew the conclusion that a rule of precedent should be practised in the field of investment arbitration. Put boldly, those who oppose the precedential value of arbitral awards in this field further the rule of law's opposite: the rule of men[68].

13.35. Beyond the requirement of the precedential force of prior outcomes, it may simply be adumbrated here, with analytical discussion following elsewhere[69], that other requirements of the eight principles of the rule of law are for instance the following, applicable *mutatis mutandis* to different forms of dispute resolution: public ascertainability requires a wide publication of the outcomes; perspicuity demands detailed reasoned outcomes; non-contradictoriness and non-conflictingness call for *res judicata*, *lis pendens*, derived jurisdiction and, to a certain extent, an appeals mechanism; congruence between formulation and implementation require that adjudication remains overwhelming for any given set of legal situations and thus puts limits to the realm of settlement.

II.3. Promoting Substantive Societal Values

13.36. The promotion of substantive societal values as a third possible role for a dispute resolution system barely requires here any further explanatory comment, as we can embrace Fiss's conception of this role, which I have expounded above[70], with little reservation. It may simply be pointed out that his use of the concept of justice, as a simple opposition to ad hoc peace, may have been given greater analytical purchase if divided into procedural justice, which for instance takes the form of predictability as we have seen in the preceding section, and substantive justice, which is in question here.

13.37. It may also be important to note that justice is here neither *Gerechtigkeit als Rechtsmässigkeit* nor *suum cuique tribuere*, which are two of the great classical conceptions of justice, but a combination of the two.

13.38. The former is based on the tenet that justice (*Gerechtigkeit*) can only be found in conformity to law (*Rechtsmässigkeit*); it conceives of justice *qua* justice according to law, where law stands for the utterances of the sovereign – the law of the state[71]. It is the dominant form of justice for lawyers, who are occupied primarily with the achievement of practical

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67 See for instance Gabrielle Kaufmann-Kohler, *Arbitral Precedent:Dream, Necessity or Excuse?*, 23 (3) Arbitration International 357 (2007).

68 Brian Z. Tamanaha, *supra* note 34, at 126. On arbitral awards' precedential value, Thomas Schultz, *Some Critical Comments on the Juridicity of the Lex Mercatoria*, 10 Y.B. Pr. Int'l L. 667 (2008).

69 Thomas Schultz, *Arbitration and the Rule of Law*, forthcoming.

70 See section 'Justice' above.

71 John Bell, *Justice and the Law*, *in* Justice: An interdisciplinary Perspective, Cambridge: Cambridge University Press 114, 117 (K. R. Scherer ed., 1992).

justice, by focusing on the way in which legal decisions are rendered[72]. Lawyers typically may safely remain agnostic to the values according to which legal rules are created: in the somewhat elliptical words of Pound, 'lawyers are not required to conduct a sit-down strike until philosophers agree' in order to achieve practical justice[73].

13.39. The latter, *suum cuique tribuere*, the most widely shared understanding of justice throughout history, is a 'concern for how resources are allocated'[74], 'how the law ought to allocate entitlements in the first place'[75]. It raises the problem that Kelsen put thus: 'The problem of values is in the first place the problem of conflicts of values, and this problem cannot be solved by means of rational cognition. The answer to these questions is a judgment of value, determined by emotional factors, and, therefore, subjective in character – valid only for the judging subject, and therefore relative only'[76].

13.40. Hence, dispute resolution as a promoter of substantive societal values is meant here essentially as a means to implement the fundamental agreed allocation of entitlements underlying in the legal system of a given society at a given time, which may not yet have translated into positive legal rules.

13.41. This role of dispute resolution puts a limitation on the common idea that as the parties pay for an arbitration, or another dispute resolution mechanism, it is their plaything alone. This limitation is instantiated most obviously through the mechanics of the concept of (substantive) public policy, for instance in arbitration. The question then is whether dispute resolvers should look beyond the narrow requirements of this concept and should take into consideration the social effects of, for example, the outcome of a sports arbitration in a doping case, or the reduction of the differences between social classes by an increased protection of imprudent consumers. Indeed, not all legal questions posed by business disputes relate to rules of coordination. In other words, the role of international dispute resolution as a promoter of substantive societal values in business is a question relating to the ethics of transnational business law. This, however, will be the story for another day.

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72 See generally Niklas Luhmann, *Gerechtigkeit in den Rechtssystemen der modernen Gesellschaft*, 4 Rechtstheorie 131 (1973).

73 Roscoe Pound, Justice According to the Law, New Haven: Yale University Press 129 (1951).

74 John Bell, *supra* note 71, at 115.

75 *Ibid.*

76 Hans Kelsen, *What is Justice?*, *in* What Is Justice?, London: University of California 4 (H. Kelsen ed., 1957).

Summaries

FRA [***Les trois fonctions du reglement des differends***]
Qu'est-ce que le règlement des différends ? Que pouvons-nous attendre ou exiger d'un système de règlement des différends ? Dans quelle mesure et à quels risques peut-on acquérir la résolution d'un litige, la privatiser et la soustraire à l'intérêt de la société ? L'arbitrage doit-il être compris comme un mécanisme qui met simplement fin à un litige ou plutôt comme un instrument de gouvernance ? Cet article propose une réflexion structurante dont on espère qu'elle pourra contribuer à l'examen de ces questions fondamentales. A cette fin, il brosse les grands traits d'un tableau en trois parties représentant les fonctions qui peuvent être attribuées à un mécanisme de règlement des différends : la optimisation de la satisfaction des parties, la promotion de la 'rule of law' (l'état de droit, avec une minuscule) et de la prévisibilité et, enfin, la mise en œuvre de valeurs sociétales substantielles.

CZE [***Tři snahy o urovnávání sporů***]
Co je urovnávání sporů? Co bychom měli očekávat nebo požadovat od mechanismu urovnávání sporů? V jakém rozsahu a s jakými důsledky můžeme urovnání sporu odkoupit, privatizovat a odstranit ho ze zorného pole společnosti? Mělo by být rozhodčí řízení považováno za mechanismus určený pouze pro řešení sporů, nebo spíše jako nástroj pro rozhodování? To jsou některé z hlavních otázek, ke kterým se tento materiál snaží poskytnout některé základní strukturní úvahy. V této souvislosti materiál předkládá tři základní funkce, které může urovnávání sporů mít: individuální a izolovanou maximalizaci spokojenosti stran; podporu platnosti právních norem a predikovatelnosti; a prosazování hlavních společenských hodnot.

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POL [***Potrójna funkcja rozstrzygania sporów***]
Niniejszy esej wskazuje trzy funkcje, które można przypisać każdemu mechanizmowi rozstrzygania sporów: zindywidualizowaną i odizolowaną maksymalizację satysfakcji stron; utrzymanie rządów prawa i przewidywalności; oraz egzekwowanie podstawowych wartości społecznych. Specyficzna, dominująca funkcja, którą posiada każdy dowolny mechanizm, implicite czy explicite, pociąga za sobą szereg ważnych konsekwencji: na przykład określa idealną rolę, ku której powinien skłaniać się podmiot rozstrzygający w sporze, formę sprawiedliwości i porozumienia, które można osiągnąć, oraz wpisuje systemy rozstrzygania sporów i strony sporu w ramy społeczne.

DEU [***Drei Ziele der Streitbeilegung***]
Der Artikel schlägt drei Funktionen vor, die jeder Streitbeilegungsmechanismus erzielen sollte: Individualisierte und isolierte Maximierung der Befriedigung von Parteien, Beitrag zur Rechtssicherheit und Vorhersehbarkeit sowie Durchsetzung grundlegender gesamtgesellschaftlicher Werte. Dabei zeitigt die vom jeweiligen Mechanismus implizit oder explizit verfolgte spezifische bzw. dominante Funktion eine Reihe bedeutsamer Folgen: So wird z. B. die ideale

Rolle vorgegeben, nach der sich das Verhalten der Schlichter richten sollte, die Form von Gerechtigkeit und Rechtsfrieden, die erzielt werden kann, und die Verortung beider Systeme zur Streitbeilegung sowie der Streitparteien innerhalb der Gesellschaft.

RUS [***Три дела по урегулированию споров***]
В данном очерке рассматриваются три действия, которые могут быть предприняты в механизме разрешения любых споров: максимальное удовлетворение каждой из сторон в отдельности и в частном порядке; соблюдение нормы права и предсказуемости; а также требование соблюдения главных общественных ценностей. Конкретный и преобладающий подход в любом отдельном взятом механизме, будь он неявно или явно выраженным, становится причиной важных последствий: к примеру, на его основе определяется идеальная роль, которой должен придерживаться тот, кто разрешает спор, рамки «корректности» и мирного урегулирования, а также место, отведенное в обществе системам разрешения споров и участникам спора.

ES [***Las tres pretensiones del acuerdo de disputa***]
Este ensayo sugiere tres funciones en las que cualquier mecanismo de resolución de disputas debe centrarse: la maximización aislada e individualizada de la satisfacción de las partes, el mantenimiento del Estado de Derecho y la previsibilidad y la aplicación de los valores fundamentales de la sociedad. La función dominante o específica en la que se debe centrar cualquier mecanismo, sea de forma implícita o explícita, conlleva diversas consecuencias significativas: por ejemplo, determina el papel ideal al que debería tender el comportamiento del resolutor de disputas, la forma de justicia y de paz que se pueden alcanzar y el lugar de ambos sistemas de resolución de disputas y de los disputantes en la sociedad.