THE CASE FOR GREATER FORMALITY IN ADR: DRAWING ON THE LESSONS OF *BENOAM*'S PRIVATE ARBITRATION SYSTEM

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INTRODUCTION

The relationship between formal law and its alternatives has been an important theme in legal writing. While a significant portion of the literature has emphasized the distinctions between courts and Alternative Dispute Resolution (ADR), some of the writing has highlighted similarities and areas of convergence. This Article draws on the case study of *Benoam* to offer a more nuanced approach. Under this approach, we acknowledge the fact that many ADR processes do indeed share common features that are distinct from those of courts. However, we also recognize the existence of ADR schemes that do not fit the ADR "prototype."[1] We analyze the *Benoam* system, which diverges from the common pattern, to uncover a more diverse ADR landscape, the conditions under which unconventional ADR systems emerge, and the potential of such mechanisms to cure some of the ills associated with prevailing ADR practices.

The common view of ADR is explored through a four-pronged prototype that we develop. According to this prototype, ADR processes are premised on the following principal elements: (1) promoting party control and flexibility; (2) addressing individual disputes on an ad hoc basis; (3) dependence on formal law and courts; and (4) the lack of publicity. These features, which have served to make ADR processes attractive to disputants, have also been the target of fierce critiques regarding the need for public airing of disputes for the continued development of law, protection of due process, fortification of individual rights, and equal rights for members of disempowered groups.

We then use the *Benoam* example to better understand what factors influence the emergence of systems different from the ADR prototype and the implications of these uncommon ADR structures. Specifically, in our

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1. *See infra* notes 22–24 and accompanying text.

study, we find that *Benoam* possesses a greater degree of formality, publicity, and independence than those typically associated with ADR, and that *Benoam*, much like a court system, places an emphasis on the promotion of systemic goals beyond the resolution of individual claims. At the same time, we demonstrate that *Benoam* has managed to maintain the advantages of alternative forums by remaining flexible and efficient, principally through ongoing learning and improvement efforts and the introduction of technology. While the features of the *Benoam* system are grounded in the context in which it operates—property damage subrogation claims between insurance companies—we believe that this case study can also offer broader lessons on the ways in which critiques of ADR can be addressed through greater formality and learning.

This Article examines the following main theses: Part I explores the prevailing understanding of the relationship between ADR and courts as divergent by offering the four-pronged prototype of ADR we have developed. In Part II, we use the ADR prototype to analyze the ways in which *Benoam* has departed from typical ADR schemes, and we explore the similarities (as well as some important differences) between the *Benoam* system and courts. Finally, in Part III, we explore the factors that have contributed to the emergence of the *Benoam* system in its present form, while drawing on this particular case study to offer some broader insights and lessons.

I. COURTS AND ADR: DIVERGENCE OR CONVERGENCE?

A. ADR Processes as Informal Alternatives to Courts

Alternatives to courts in the form of mediation, arbitration, and a variety of other processes (med-arb, early neutral evaluation, mini trial, etc.) proliferated in the 1960s and 1970s in the United States.[2] Interest in what has come to be known as "informal justice" was grounded in different ideologies, and the adoption of these mechanisms sought to advance a variety of goals. While some endeavored to empower certain communities

2. *See* DAVID B. LIPSKY ET AL., EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR MANAGERS AND DISPUTE RESOLUTION PROFESSIONALS xiv–xv (2003) (noting that strategies for resolving conflicts evolved during the 20th century, with ADR emerging as a "reaction to growing dissatisfaction with the U.S. court system"); Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165, 170–80 (2003); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1, 6 (1991).

Despite variations in process types and in the rationales for their adoption, these processes have all been grouped together in the literature and practice under the overarching heading of "alternative dispute resolution," or ADR. As Richard Abel aptly states, the ADR processes that emerged were very different from one another, but the common characteristic was the fact that they were informal; they were not courts.[10] Whatever the motivation for adopting informal mechanisms, ADR proponents shared the basic understanding that these processes were distinct from the court option, offering different advantages, including party control, procedural

3. Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1, 11–12 (1989); Menkel-Meadow, *supra* note 2, at 6.

4. *See* Hensler, *supra* note 2, at 185 (explaining that the desire to reduce the caseload of the court system was one source for the development of modern day ADR).

5. ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 100–01 (2000); Hensler, *supra* note 2, at 171.

6. *See* CARRIE MENKEL-MEADOW ET AL., DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL 293–96 (2005) (discussing efforts to resolve a dispute between the city of Glen Cove and Central American immigrants as an example of full community participation in dispute resolution).

7. *See* Menkel-Meadow, *supra* note 2, at 13–17 (discussing the institutionalization and legalization of ADR in public and private settings).

8. This was a consequence of adopting the approach of "fitting the forum to the fuss," the idea that the dispute resolution process chosen should fit the context of the dispute. *See* Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEG. J. 49, 49–50 (1994) (suggesting a procedure to determine the best forum for alternative dispute resolution).

9. Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986).

10. Richard Abel, *Introduction* to 1 THE POLITICS OF INFORMAL JUSTICE 2 (Richard Abel ed. 1982) (stating that "whatever unity the movement may possess is derived more from a sense of common enemy – formalism – than from any clearly shared goal").

In fact, this was also the understanding of the critics of ADR who saw these processes as carrying different traits than courts and promoting different goals from the formal legal system. But while proponents saw these distinctions as important advantages, the critics emphasized the price paid through privatization and viewed the alternatives as inferior to the court option.[12] To them, formal and open court proceedings were significant because they imply uniformity and predictability, essential components of fairness.[13] Critics also believed public airing of disputes was crucial for ensuring norm development,[14] equality,[15] accountability and quality control,[16] and democracy.[17]

Despite their portrayal as alternatives to the courts by both proponents and critics, ADR processes have had strong ties to the formal legal system. Over the years, the nature of these ties has generated a body of research examining the relationship between courts and ADR and, among other aspects, the degree to which these processes present contrasting or similar avenues for addressing conflict. One important contribution emphasized the impact that litigation outcomes have on the outcomes of informal

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11. *See* LIPSKY ET AL., *supra* note 2, at 76–78 (illustrating various justifications for pursuing ADR); Menkel-Meadow, *supra* note 2, at 6–13 (same); Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1872–75 (1997) (same).

12. Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 212 (1995).

13. *See* Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1367–75 (noting aspects of formal court proceedings that reduce bias and prejudice); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1559 (1991) (noting that a "lack of predictability generally harms the party who has the lesser amount of power in the relationship").

14. *See* Fiss, *supra* note 12, at 1089 ("Civil litigation is an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals."); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2642 (1995) (characterizing adjudication as "an essential moment in the law's development, and thus in a community's political life").

15. *See* Delgado, *supra* note 13, at 1368–75 (noting aspects of formal court proceedings that reduce bias and prejudice); Fiss, *supra* note 12, at 1077–78 (asserting that the presence of a neutral judge can lessen the impact of inequalities in a court proceeding).

16. *See* LAURA NADER, NO ACCESS TO LAW: ALTERNATIVES TO THE AMERICAN JUDICIAL SYSTEM 402–04 (1980) (discussing the importance of accountability in a system of dispensing justice); Michael Moffitt, *Suing Mediators*, 83 B.U. L. REV. 147, 148 (2003) (noting that mediation, unlike most professions, "operates with few, if any, formal structures for assuring the quality of mediation services").

17. Judith Resnik, *Bring Back Bentham: "Open Courts," "Terror Trials," and Public Sphere(s)*, Paper presented at the Workshop on Private Power and Human Right, at 27–35 (Dec. 27–29, 2009, Tel Aviv, Israel), *available at* http://www.clb.ac.il/workshops/2010/abstract/resnik.htm.

communications between disputing parties that take place in the "shadow of courts."[18] This important insight has generated a vast body of literature studying this effect across different settings and dispute types.[19] Another important corpus of writing refers to the impact that the institutionalization of ADR in court settings has had on the manner in which these processes, in particular mediation, are practiced. Instead of maintaining their unique characteristics, ADR processes tend to forego some important qualities when delivered in courts. Parties who have already filed court claims in the presence of lawyers and mediators, who themselves come from the legal discipline, sacrifice creativity and opportunity for party control and voice while maintaining other unique traits such as confidentiality and efficiency.[20]

Other research projects have looked at this question from the opposite direction, focusing on the ways in which courts resemble ADR.[21] In his seminal book, *Courts: A Comparative and Political Analysis*, Martin Shapiro examines the gap between the way in which courts are typically described and the manner in which they operate in practice.[22] Shapiro finds that there is a common prototype that includes the following general propositions about how courts operate: they are independent, hold adversary proceedings, and render decisions according to pre-existing rules that result in dichotomous "winner take all" decisions.[23] However, by drawing on the history and evolution of different legal systems, Shapiro

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18. This concept was coined and developed by Mnookin and Kornhauser in their seminal paper Robert N. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979).

19. *See* Catherine R. Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 LAW & SOC'Y REV. 11, 12–14 (2005) (analyzing how law and other social institutions influence workers who negotiate for leave under the Family Medical Leave Act); James J. Alfini & Catherine G. McCabe, *Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law*, 54 ARK. L. REV. 171, 171–73 (2001) (discussing case law addressing "the requirement to mediate in good faith and the enforcement of mediation agreements"); Ethan Katsh et al., *E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of "eBay Law"*, 15 OHIO ST. J. ON DISP. RESOL. 705 (2000) (discussing the fact that on eBay, it was "eBay law" that served as a "shadow" for the electronic marketplace rather than substantive legal arrangements); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2548–49 (2003) (evaluating "the manner in which substantive law does, or doesn't, govern settlements in criminal cases").

20. *See* Menkel-Meadow, *supra* note 2, at 3, 32–33 (noting detrimental aspects of commingling the adversarial legal culture with the consensual approach of ADR); Nancy Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 3–5 (2001) (discussing court-connected ADR and the ways in which its promise for self determination and party empowerment have been eroded).

21. *See* Resnik, *supra* note 17, at 23 (focusing on the changing role of judges and noting that many typical ADR procedures have become "judicial" procedures).

22. MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 1 (1981).

23. *Id.*

We have borrowed Shapiro's notion of a prototype and applied it to ADR, thus offering a prototype of ADR that captures a significant portion of its processes and systems. This prototype can serve as an analytical tool for several purposes. In the first place, the prototype serves to crystallize the essence of ADR. It also underlies both the appeal of ADR and its weaknesses, which account for both its success and concerns raised regarding its fairness, accountability, and effectiveness. We then use the unique case of the *Benoam* arbitration system in order to offer a potential alternative to the current practices dominating the ADR field.

Before we turn to the *Benoam* case study, we elaborate on the prevailing perception of ADR processes. As we demonstrate below, the broad literature that exists on ADR processes gives rise to a prototype based on the following four principal assumptions: (1) ADR is premised on party control and flexibility; (2) it is focused on addressing individual disputes ad hoc; (3) ADR is dependent on formal law; and (4) ADR lacks publicity. Each of these propositions about ADR is explored in the following section.

B. The Prototype of ADR Processes

1. Party Control and Flexibility

The literature on ADR has viewed the flexibility of these processes and the fact that this allows for a high degree (at times, near-absolute) of party control, as a central attribute and as a major source of appeal for disputants. These qualities are typically negated with the nature of the litigation process, where the proceedings are run by the parties' attorneys and the judge, according to a complex set of rules which the parties do not choose, are often unfamiliar with, and leave them very little room for direct participation and voice.[25]

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24. *Id.* at 1–64.

25. *See* Menkel-Meadow, *supra* note 11, at 1872 (arguing that ADR allows for more party participation, control over the proceedings, and better communication among the parties).

Mediation is both voluntary and consensual.[26] Both parties retain control over whether they would like to participate in the process. Furthermore, the agreement to participate in the mediation does not entail an obligation to reach an agreement, and the disputants may withdraw from the process at any stage. Additionally, there are very few procedural guidelines for conducting the mediation, and the ultimate agreement, if one is reached, need not follow legal norms. Procedural and substantive freedom allow for direct party participation. In fact, these features have generated claims that lawyers should not, or at the very least, need not necessarily be present in mediation sessions.[27] The opportunity for parties to tell their "story" in their own voice, and express their needs and interests in plain language instead of morphing their narrative into legal language and categories, has been found to better promote principles of procedural justice than the formal legal system.[28] Research in this area has shown that parties are more satisfied with dispute resolution processes that provide them with freedom to tell their story in their own voice and feel that the outcomes of such processes are more fair.[29]

In arbitration, parties have a lower degree of control over the process and outcome than in mediation because the process is more structured and the third party is a decision-maker, not a mere facilitator like the mediator. Nevertheless, this process still grants parties a substantially higher degree of control and flexibility than the court system, at least in the stages that precede the arbitration when the parties devise the arbitration agreement. Arbitration need not be subject to legal procedures and arrangements and therefore can be structured in a rather loose manner, allowing parties to override procedural and substantive law.

Furthermore, unlike litigation, parties may choose their arbitrator. Through choice of both arbitrator and norms, the parties exert some control over the process, despite ultimately foregoing the power to control the outcome.[30] Control over choice of arbitrator has proven particularly important for disputants where a high degree of subject-matter expertise is

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26. *See* MENKEL-MEADOW ET AL., *supra* note 6, at 100–02 (discussing the principled negotiation approach).

27. *See* Jacqueline M. Nolan-Haley, *Lawyers, Clients and Mediation*, 73 NOTRE DAME L. REV. 1369, 1380 (1998) (stating that because lawyers tend to conduct adversarial negotiations some "argue that lawyer advocacy is inconsistent with mediation").

28. Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got To Do With It?*, 79 WASH. U. L.Q. 787, 826–30, 834–38 (2001).

29. John M. Conley & William M. O'Barr, *Hearing the Hidden Agenda: The Ethnographic Investigation of Procedure*, 51 LAW & CONTEMP. PROBS., Autumn 1988, at 181, 186–87.

30. *See* SHAPIRO, *supra* note 22, at 2 (discussing the idea that parties "consent" to the determination of a third party).

required to understand the specifics of the case, a quality that cannot be assured through random assignment of a judge to a claim as is often the case in the general court system.[31]

It should be noted, however, that while flexibility and control has been one of the chief advantages heralded by ADR proponents, there has been substantial literature demonstrating that the reality of mediation and arbitration can be very different. In the mediation context, this has been particularly true of the court setting.[32] There, mediators tend to be much more directive and lawyers tend to occupy center stage, leaving parties a peripheral role and very little control over the process. In certain courts, mandatory mediation programs remove from parties the choice about whether to participate, at least in the initial stages of the mediation.[33]

Similar to mediation, the reality of arbitration proceedings has been one where parties, at least in certain contexts, enjoy less freedom and choice than we would expect in the ADR context. This has been particularly problematic where arbitration is imposed pre-dispute by strong, repeat-player parties on consumers or employees as part of uniform contracts governing their original transaction or employment agreement.[34]

Despite these developments, it seems fair to say that the ethos of ADR has remained one in which party control and flexibility are heralded. To the extent that they are circumscribed, this is perceived as a problematic development that needs to be dealt with.[35]

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31. A well-known example is that of the diamond industry where subject matter expertise is deemed crucial. *See* Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 149 (1992) (discussing the need for arbitrators who have substantial knowledge of the diamond industry to render prompt and fair decisions).

32. *See* Welsh, *supra* note 20, at 3–5 (arguing that the original ADR vision of self-determination is being replaced with the culture of the court system); Welsh, *supra* note 28, at 836–37 ("As mediation has transmogrified in the court-connected context . . . commentators have begun to observe that courts need to be reminded of their earlier definition of and commitment to quality in mediation."). Some research has established these claims in other settings as well. DR. E. PATRICK MCDERMOTT ET AL., EQUAL EMPLOYMENT OPPORTUNITY COMM'N, THE EEOC MEDIATION PROGRAM: MEDIATORS' PERSPECTIVE ON THE PARTIES, PROCESSES, AND OUTCOMES, ORDER NO. 9/0900/7632/G (Aug. 1, 2001), *available at* http://www.eeoc.gov/eeoc/mediation/studies.cfm (last visited Jan. 1, 2010).

33. MENKEL-MEADOW ET AL., *supra* note 6, at 406–09 (discussing court-ordered mediation and its various effects); Nancy Welsh & Bobbi McAdoo, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399, 407–08 (2004/2005).

34. Lisa Bingham, *Control over Dispute System Design and Mandatory Commercial Arbitration*, 67 LAW & CONTEMP. PROBS. 221, 225 (2004); Carrie Menkel-Meadow, *Do the "Haves" Come out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 38–57 (1999).

35. Lisa Blomgren Bingham et al., *Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace*, 14 HARV. NEGOT. L. REV. 1, 4–11 (2009).

2. Focus on Addressing Individual Disputes on an Ad Hoc Basis

While courts operate as part of legal systems, modern-day ADR processes are typically offered as ad hoc avenues for addressing individual disputes. In fact, the rationale for employing contemporary ADR to begin with seems antithetical to the very idea of a system. Typically, ADR is sought to provide an ad hoc tailored and individualized avenue for addressing a given conflict.[36] The goals are to offer parties a process that would resolve the dispute in a manner that they would perceive as fair and satisfactory.[37]

Naturally, courts also aim to address individual conflicts, but this is commonly understood to be only one of several goals advanced by courts through case law. Other goals include functions that operate on a systemic, rather than on an individual basis, such as addressing the need for coordination,[38] modifying behavior,[39] and performing a "meliorative function" or educational role.[40]

Even where ADR processes are offered as part of a "system," they rarely seek to address systemic goals through dispute resolution. It is difficult to expect consistency because of the other features of ADR systems[41]—where processes are flexible, subject to party control, and tailored to the specifics of a dispute. In addition, as described below, ADR processes are typically confidential and rarely made public. Therefore, it seems adverse to the essence of ADR to send signals through outcomes. In other words, the general understanding is that we cannot expect norm-generation in individualized processes applied ad hoc for the resolution of disputes. Additionally, we cannot expect other users of these processes to know about these outcomes and modify their behavior and expectations where resolutions are kept private.

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36. LIPSKY ET AL., *supra* note 2, at 77–78.

37. Kenneth E. Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937, 937–38 (1975).

38. Steven D. Smith, *Reductionism in Legal Thought*, 91 COLUM. L. REV. 68, 72–73 (1991).

39. *See* Scott, *supra* note 37, at 938–40 (discussing the "Behavior Modification Model," through which courts alter behavior by imposing costs on the injuring party).

40. Smith, *supra* note 38, at 73–75.

41. There are of course contexts in which ADR has functioned as a system that has competed with the formal one, but these are typically arenas in which there are groups that enjoy social cohesion and adhere to a strong set of norms that operate alongside those of the state. JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 119–20 (1983). This is less frequent nowadays, but there are of course many ADR systems that operate in workplaces, organizations, and institutions—where the focus is typically on the resolution of individual complaints and not on systemic goals of behavior modification—because these units rarely see themselves as norm-generating bodies. LIPSKY ET AL., *supra* note 2, at 305; URY ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT 134–68 (1988). For a rare exception see Susan P. Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 2007 J. DISP. RESOL. 1, 3–5, which argues that ADR elaborates public norms by developing "values or remedies through an accountable process of principled and participatory decision making[.]"

3. Dependence on Formal Law

The writing on ADR has tended to portray these processes as "alternatives" to the court option.[42] Certain ADR proponents have objected to this term, viewing these processes as "appropriate" in their own right rather than as an "alternative" to litigation, to be employed where litigation is inappropriate.[43] However, when handling local disputes, ADR is almost never conducted separately from courts, or more accurately, from the legal system.[44]

First and foremost, courts have been a rich source for the steady supply of disputes to ADR avenues. While the ADR community has claimed that disputants prefer informal and flexible processes, these avenues have had difficulty in drawing disputants to use ADR services.[45] It was only when ADR was institutionalized into courts that ADR processes began to flourish. Even voluntary ADR in court settings was slow to draw litigants to their services, a situation that has led to the adoption of mandatory ADR programs in many courts across the United States[46] and elsewhere.[47]

Although ADR processes are not tied to legal norms and can reach outcomes that differ from legal arrangements, research has found that resolutions reached through ADR tend to resemble legally mandated outcomes, as these processes occur "in the Shadow of the Law."[48] This has

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42. This can be evidenced in the perception that ADR should be employed where there is no need for public development of norms. *See* Menkel-Meadow, *supra* note 2, at 12 (noting that litigation may be preferable "when a moral principle must be enunciated, or a legal precedent is necessary") (citation omitted).

43. *See* Menkel-Meadow, *supra* note 11, at 1918–19 (explaining that some states now require lawyers to advise their clients of the advantages ADR processes offer over formal litigation).

44. In the case of non-local disputes that arise online, we find that there are online dispute systems, such as those that exist on eBay and Wikipedia, that are extremely successful in drawing users and which operate independently from formal law. *See, e.g.*, eBay Services: Buying and Selling Tools: Dispute Resolution Overview, http://pages.ebay.com/services/buyandsell/disputeres.html (last visited Jan. 19, 2010), Wikipedia: Dispute Resolution, http://en.wikipedia.org/wiki/Wikipedia:Dispute_resolution (last visited Jan. 4, 2010).

45. Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565, 565 (1997).

46. *See* MENKEL-MEADOW ET AL., *supra* note 6, at 406–09 (discussing the effects of mandatory mediation programs).

47. *See, e.g.*, Nadja Alexander et al., *Mediation in Germany: The Long and Winding Road*, *in* GLOBAL TRENDS IN MEDIATION 223 (Nadja Alexander ed., 2d ed. 2006); David Spencer, *Mandatory Mediation and Neutral Evaluation: A Reality in New South Wales*, 11 AUSTRALASIAN DISP. RESOL. J. 237 (2000) (discussing legislation that mandates mediation in New South Wales); Edna Bekenstein & Ari Syrquin, *Mandatory Mediation – the Israeli Pilot*, http://www.israelbar.org.il/UpLoadFiles/Mandatory_Mediation_the_Israeli_Pilot_Berkenstein_Syrquin.pdf (last visited Feb. 12, 2010).

48. Mnookin & Kornhauser, *supra* note 18, at 950; *see also* Michael Moffitt, *Three Things To Be Against ("Settlement" not Included)*, 78 FORDHAM L. REV. 1203, 1208–09 (2009) (noting that

become even more pronounced in court-based mediation where the style of mediation tends to be evaluative–directive mediation under which lawyers occupy center stage and the mediator tends to steer the parties in the direction of the approximate outcome of the dispute as if it were decided by a court.[49] Similarly, arbitrations tend to be conducted by former judges and lawyers and as such, carry a heavy legal undertone even where freedom from formal legal arrangements is specified in the agreement to arbitrate.

Finally, contemporary ADR processes depend on the formal legal system not only for their supply of disputes but also as an enforcement mechanism in the background, ensuring compliance with the mediated agreement or the arbitration award.[50] Mediation literature indicates that party involvement in the process and in generating the resolution creates a sense of ownership over the result that enhances the chances of voluntary compliance.[51] However, some research has shown, through case statistics, that non-compliance is actually prevalent.[52] This could be a result of the fact that parties occupy a marginal role in most court-based mediation processes (which account for the vast majority of mediations). Prevalent noncompliance nonetheless establishes growing dependence on the court system. In arbitration, there are various legal mechanisms that are aimed at ensuring party compliance and the swift execution of arbitration awards.[53]

In the past, when ADR processes were delivered in closed settings where extra-legal social ties created strong pressures for compliance, the legal system was peripheral and was not an essential player for either supplying disputes or enforcing resolutions.[54] In recent times, however, the picture that emerges is quite different, one in which ADR processes rely on courts for their subsistence and effectiveness. This connection has therefore

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parties' expected court outcomes and belief that such outcomes will be judicially enforced serve as "parameters within which to consider different settlements").

49. Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 938 (1997); Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES TO HIGH COST LITIG. 111, 111–12 (1994).

50. *See* Moffitt, *supra* note 48, at 1209 (asserting that the promise of judicial enforcement supports ADR settlements).

51. Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1377 & 1377 n.167 (1994).

52. James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEG. L. REV. 43, 135 (2006).

53. Anjanette H. Raymond, *Confidentiality in a Forum of Last Resort: Is the Use of Confidential Arbitration A Good Idea for Business and Society?*, 16 AM. REV. INT'L ARB. 479, 486 (2005).

54. *See* AUERBACH, *supra* note 41, at 139 (noting that American history is rife with the rejection of legal formalities, and claiming that settlement alternatives were adopted to "absorb private antagonism" but also that "[e]ven in the most committed utopian ventures . . . the flight from legal formality always has remained problematic for Americans.").

become an integral part of the way we think about ADR in face-to-face settings nowadays.[55]

4. Lack of Publicity

ADR is often hailed as offering a private setting for airing disputes, in contrast with the paradigmatic public nature of court proceedings.[56] While courts typically conduct litigation openly in public buildings, document the proceedings, and publish decisions, ADR processes tend to take place in discreet arenas,[57] are often confidential (under law or contract), and, even where there is no explicit commitment to confidentiality, outcomes are rarely aggregated and published.[58]

In mediation, confidentiality has been viewed as an essential feature, which is crucial for both drawing disputants to participate in the process and for generating an open and free discussion of the areas of disagreement. Thus, confidential mediation allows for a better understanding of the sources of the conflict and consequently, for creative and mutually beneficial solutions to emerge.[59] To that end, parties entering a mediation typically sign an agreement that serves to protect confidentiality by restricting the parties' and the mediator's freedom to discuss the mediation as well as the parties' ability to subpoena the mediator to testify in any future litigation between them.[60] Furthermore, when a case is referred to mediation by the court, there is typically some degree of protection of confidentiality under law[61] (a feature that can be seen as another demonstration of ADR's dependence on courts).

The centrality of confidentiality in mediation is evidenced not only by the formal protection it receives through law and contract but also in the informal practices adopted over the years by mediators and ADR centers providing mediation services. Mediation providers typically refrain from

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55. Jacqueline M. Nolan-Haley, *The Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound*, 6 CARDOZO J. CONFLICT RESOL. 57, 66–67 (2004).

56. This description refers to courts when conducting traditional litigation proceedings, not informal settlement conferences. Resnik, *supra* note 17, at 36–37. However, even when courts operate in a less open manner they still possess a greater degree of publicity than the typical ADR process. *Id.* at 38.

57. Unless this is an ADR program that is conducted at the courthouse, although oftentimes ADR, even when it is being offered to disputants through the courts, is conducted offsite.

58. Orna Rabinovich-Einy, *Technology's Impact: The Quest for a New Paradigm for Accountability in Mediation*, 11 HARV. NEGOT. L. REV. 253, 264 (2006).

59. *Id.* at 265.

60. *Id.* at 263–64.

61. See, for example, the arrangement under the UNIFORM MEDIATION ACT, §§ 4–8, *available at* http://www.mediate.com/pfriendly.cfm?id=904.

keeping any documentation on mediation sessions and keep track of very "thin" types of information on the mediations they handle—type of dispute, number of sessions, outcome and the like.[62]

While confidentiality in arbitration has not enjoyed the same degree of legal protection as it has in mediation proceedings, the parties often agree to keep arbitration outcomes private.[63] Even where there is no formal guarantee of confidentiality, arbitrators and arbitration service providers lack mechanisms for the aggregation and disclosure of outcomes.[64] This is no coincidence of course. Parties often prefer to arbitrate rather than litigate their dispute precisely because they are seeking to conceal the award (at times even the mere existence of the dispute) and/or to use the system to their advantage.[65]

Indeed, for these and other reasons, the confidentiality (or the lack of publicity) of ADR mechanisms has been the source of fierce critique. Critics argue that ADR "erodes the public realm"[66] and is detrimental to members of disempowered groups because they cannot evaluate the fairness of their own resolution due to ignorance about the resolution of other, similar cases. Additionally, the court is deprived of the opportunity to protect their rights and further elaborate norms of equality.[67]

Despite calls to rethink the scope of confidentiality in ADR[68] and, more generally, to ensure due process in ADR,[69] its broad confidentiality continues to be the norm. This confidentiality is generally hailed as a major advantage of ADR and is typically protected by courts to ensure the appeal of ADR.[70]

As we can see, despite broad diversity in the types of processes offered and in their areas of application, there are several significant common features that group together ADR processes and distinguish them from the

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62. Rabinovich-Einy, *supra* note 58, at 264.

63. *See* Raymond, *supra* note 53, at 483–84 (discussing the rules of the American Arbitration Association, which provide for a large amount of confidentiality).

64. *Id.* at 481–86.

65. *Id.* at 496–97.

66. Luban, *supra* note 14.

67. *See supra* notes 12–17 and accompanying text.

68. *See* Rabinovich-Einy, *supra* note 58, at 274–76 (drawing on the SquareTrade online dispute resolution system as one example of a nuanced view of confidentiality that is contrasted with the prevailing understanding of confidentiality in mediation).

69. *See* Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 599–600 (2005) (proposing that courts refuse to sanction certain bargains that violate due process).

70. Peter H. Kaskell, *Is Your Infringement Dispute Suitable for Mediation?*, 20 ALTERNATIVES TO HIGH COSTS LITIG. 45, 60 (2002); Raymond, *supra* note 53; *see* Alternative Dispute Resolution in Alabama, *Mediator Confidentiality Now Alabama Law*, 70 ALA. LAW., Nov. 2009, at 422, *available at* http://www.alabar.org/publications/lawyer.cfm (discussing the passage of the 2008 Mediator Confidentiality Act by the Alabama Legislature and the importance of confidentiality).

court option. These "propositions," to use Shapiro's language, include a higher degree of party control and flexibility than courts, proceedings which are not public and are not driven by a systemic viewpoint but at the same time are also dependent on courts in many important respects.[71]

Benoam provides an enlightening demonstration of an ADR setting that runs counter to traditional perceptions about these processes. In *Benoam*'s case we see a greater degree of formality in the ways in which this system was designed to begin with as well as the manner in which it functions, which proves quite similar to the legal system; in certain domains *Benoam* actually replaces the formal avenue. We, therefore, believe that despite contextual limitations, the *Benoam* story can offer broader insights on the connections between procedure and substance, due process and efficiency, systemic goals and procedural values and arrangements, and the conditions under which dispute resolution systems can generate legitimacy despite their being offered through private bodies under flexible and confidential conditions.

II. REVISITING THE ADR PROTOTYPE: A STUDY OF THE *BENOAM* ARBITRATION SYSTEM

A. General: The Benoam *Arbitration Scheme*[72]

1. The Emergence of the *Benoam* System

Insurance companies active in the auto insurance industry in Israel in 2001 were faced with an acute problem: the need to devote substantial resources to the litigation of a large number of subrogation auto property claims. In past years this was not the case, as these types of claims were addressed contractually through the Knock for Knock (KFK) arrangement. The KFK arrangement consisted of a set of rules applied to all known types of auto property damage claims, enabling the parties to each claim to

71. *See* Shapiro, *supra* notes 22–24 and accompanying text.

72. Some of the information provided in this Article cannot be cited in traditional form as it is based on the personal familiarity with the system and experience and knowledge of one of the authors, Roee Tsur. As mentioned above, Roee Tsur is one of the founders of *Benoam* and an active arbitrator there. For questions and more information on this project or the system and any further developments, please contact Roee Tsur at: roee@mezger.co.il. For the description of the evolution of the *Benoam* system as well as the characteristics of the system itself, *see* Orna Rabinovich-Einy & Roee Tsur, *Unclogging the Collision Course: The Evolution of Benoam, An Online Private Court*, ACRESOLUTION (forthcoming Spring 2010).

predetermine the probable/likely outcome of the claim in terms of liability and damages, and, consequently, to refrain from filing most claims.

The KFK arrangement was based on the understanding, grounded on detailed statistics gathered over the years, that the overall number of winnings in auto property damages subrogation claims was similar to that of losses. The rational choice for insurance companies was therefore to refrain from suing altogether and thus avoid the costs and expenses associated with claim handling. However, as a result of dramatic changes that that took place in the Israeli insurance industry during the late 1990s and in early 2000, the KFK arrangement collapsed. These changes had to do with the emergence of new insurers that offered direct-insurance services. The direct-insurance services required the application of a new method of underwriting, which made the claim handling statistics that had served as a basis for the KFK arrangement inapplicable. The delicate balance that generated the KFK rules was therefore interrupted and the arrangement collapsed.

At the time of the collapse of the KFK agreement, there were 15 insurance companies active in Israel, overseeing a market of several million insured cars. They were involved in thousands of subrogation claims each month over auto property damages. The unavoidable result of the collapse was the clogging of courts with massive numbers of subrogation claims. Courts throughout the country had to reallocate scarce judicial resources in order to handle large amounts of small-scale claims of a mostly uncomplicated nature which generally did not involve important issues of law. This state of affairs harmed the insurance companies' public stature and generated mounting criticism from within the judicial system.

The problem did not go unnoticed by the Israel Insurance Association (the Association). In fact, the Association and mainly its chairman at that time, Mr. Gabriel Last, received informal messages from the Administration of the Courts urging them to find a solution for reducing the number of subrogation claims directed to courts of law.

The solution was conceived by chance at a meeting conducted in 2001 between Yehuda Tunik, a leading Israeli attorney, who was at that time serving as Chairman of the Israeli Bar National Council, and Gabriel Last. Tunik was approached by Last to discuss the possibility of adopting ADR, mainly mediation, to address various insurance claims. The discussion between Tunik and Last turned towards the problem insurance companies and the Association were faced with in the aftermath of the collapse of the KFK. Last challenged Tunik to devise an efficient, decision-based dispute resolution system for auto insurance subrogation claims.

Tunik accepted the challenge and the "*Benoam*" (Hebrew for "in a peaceful manner") project was conceived. Tunik and his team started studying the nature of auto property damages claims in Israel and the problems associated with their handling by the courts. After reviewing the characteristics of the disputes—masses of small scale monetary claims—it became evident that offering mediation as the legal basis for the system would be ineffective and that any private system they develop would have to be based on arbitration to provide the parties with a swift and clear-cut resolution. As the team examined the logistics and costs of physically channeling hundreds of pleadings daily, it soon became clear that an approach based on traditional handling of paper pleadings, motions, and awards would lead to inefficiencies that were similar to those of the court system. The team came to the conclusion that an online system with a strong central database was essential in order to be able to handle masses of claims and evidence.

Another aspect the team had to take into account was the fact that insurance companies tend to be conservative bodies. The new approach of handling masses of subrogation claims through an online private system had to be accompanied by a profound structural change within insurance companies' claim-handling departments. The *Benoam* team was faced with a problem—by offering a solution based on a formal mechanism resembling the judicial system, they would probably be able to convince insurance companies more easily to cooperate and adopt the solution, but that would also mean preserving some of the inefficiencies that characterize the court system. On the other hand, stripping the system from all formal characteristics would serve the purpose of adopting an ADR solution designed to quickly and efficiently handle massive numbers of claims, but that would be a radical departure from familiar patterns, a move for which there was insufficient trust at the time. Consequently, the *Benoam* team took a new approach—developing an online dispute resolution system based on arbitration with an integrated formal mechanism.

Benoam was formally established soon after the Tunik–Last meeting and a prototype of the system was developed and presented to the Association. After reviewing additional options and suggestions, the Association opted for the *Benoam* system. The vast majority of Israeli insurance companies, which controlled more than 95% of the auto insurance market, accepted the solution offered by the *Benoam* system and signed an arbitration agreement under which they were obligated to file all their subrogation "fender bender" claims through *Benoam* (Agreement or Arbitration Agreement). The Agreement included detailed Articles of Arbitration (Articles or Rules). On October 1, 2002, the *Benoam* system

was up and running under the auspices of the Association. Under the Arbitration Agreement, two major organs were recognized: the Association's management, which serves as the executive body; and a steering committee, which serves as a quasi-legislative body with the authority to amend the Rules among other powers. Since its establishment, *Benoam* has successfully handled approximately 100,000 subrogation claims for auto property damages.

2. The *Benoam* Online Arbitration System

The *Benoam* system is an interactive web-based system, with a direct interface to the insurance companies' internal claim-handling systems. All case files are stored digitally and are easily accessible and searchable, eliminating the need for paper files. The claims are resolved purely through online communication, allowing claim handlers for the insurance companies secured remote access to the system. A prominent characteristic of the *Benoam* system is the almost complete absence of in-person hearings. Most of the claims are decided based on written pleadings and evidence submitted and stored digitally, without parties ever meeting face-to-face. This has mainly been made possible due to the generally uncomplicated nature of the claims and the fact that there is a limited set of recurring typical cases.

In terms of data transferring, the *Benoam* system is almost entirely automatic—claims, pleadings with their related evidence (expert reports, photos of the accident scene, police investigation records, etc.), and other submissions are uploaded by drawing directly on insurance companies' internal computerized data. The status and detailed history of cases, in addition to all relevant pleadings, documents, and decisions are available online through the system's database. Any action related to a case is available to authorized users and may be displayed in real time, including the arbitrator's ruling, which is made available almost instantly to the parties. The online system's database makes service of process unnecessary and therefore eliminates lengthy and costly litigation over questions relating to such matters.

The arbitrators assigned to the cases are neutral experts, hired by *Benoam*, and include retired judges, attorneys, appraisers, traffic examiners, and Certified Public Accountants (CPAs). Using the system interface, the arbitrators review the pleadings and evidence as presented online and are able to submit their ruling and awards online as well. The entire process is governed by the Rules, to which the parties agreed when signing the Arbitration Agreement.

Another important feature characterizing the system lies in the appeal mechanism. All awards are subject to appeal before a *Benoam* panel of arbitrators who may amend or vacate the award. The parties are given the choice to appeal before a panel of three arbitrators or a sole arbitrator. Since most claims are addressed exclusively online, appeal arbitrators can conduct an appeal de novo and are not limited to questions of law. The appeal mechanism also enables *Benoam* to address and resolve fundamental questions that arise from time to time.

Finally, one of the most significant features of the system is its enforcement mechanism. The system operates a clearinghouse and is therefore able to effortlessly execute the arbitration awards. The execution stage is conducted automatically, based on the parties' agreement to grant *Benoam* authorization to transfer funds directly to and from each party in accordance with *Benoam* rulings, making any additional action by the parties unnecessary. More specifically, the clearinghouse mechanism runs a monthly scan over the *Benoam* database and sums up all awards and expenses, crediting or debiting each party accordingly.[73] In addition, the system can generate a number of comprehensive reports that allow insurance companies to effectively monitor the transfer of their funds through and by the system.

In the following sections we demonstrate the ways in which the *Benoam* experience undermines some of the most basic assumptions about the nature of ADR processes, particularly when such processes are delivered in the commercial setting in current times. We revisit each of the components of the "prototype" of ADR processes—the emphasis on party control and flexibility, the focus on the resolution of disputes through individually tailored processes, the dependence on courts and formal law (source for disputes and substantive shadow and enforcement mechanism), and the confidential nature of these proceedings. As evidenced from the description below, *Benoam* provides a rich demonstration of an ADR arena whose structure and operation is far removed from the widespread ADR prototype.

B. Offering a Predetermined, Formal Process

From its inception, *Benoam* has been a highly structured setting, with many of the characteristics of a formal environment. For one, *Benoam* is surrounded by formal institutions. It functions under the auspices of the Israel Insurance Association, which is a voluntary, not-for-profit association

73. The calculation is performed by *Benoam* and is technically executed by a subsidiary of the Association that runs a clearinghouse for other purposes relating to insurance companies.

in the insurance industry. In addition, its operation was approved by the Antitrust Authority to ensure that insured parties' interests are protected and that no cartel exists. As mentioned above, under the Arbitration Agreement, several internal formal bodies were identified and granted authority, principally the management of the association and the steering committee.

Second, the *Benoam* arbitration process is based on a set of fixed predetermined and highly elaborate arbitration rules.[74] The parties do not negotiate these rules nor do they provide consent to the rules' application in each claim. Instead, they sign on to the Rules by agreeing to refer all applicable disputes to *Benoam*. Any substantial change to the Rules requires a multi-step process that involves obtaining the consent of the institutions and bodies that govern the industry.[75] Naturally, this has a chilling effect on the ability to amend the Rules, although this has happened on several occasions concerning the rules governing the ability to strike out arbitrators and those governing timelines and extensions, as we describe further below.[76]

In addition, unlike the typical perception of ADR where parties are free to submit *any* dispute to ADR, the *Benoam* system's mandate is limited to a fixed type of dispute—property damage subrogation claims between insurance companies of up to 100,000 NIS (approximately $25,000).[77] In addition, the institutionalization of an appeal process by *Benoam* prolongs the arbitration and makes it more formal. While this feature does exist in some arbitration schemes, it is not an inherent feature of arbitration. In many cases the driving force for adopting the process is the desire for a swift and final resolution of disputes.[78]

Furthermore, because the process is conducted online through digital communication, the software requires that every stage of the arbitration be prescribed, specifying time limits and assigning responsibilities to the parties and arbitrator for moving the process along and performing the ensuing tasks.[79] The introduction of software introduces a certain degree of

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74. Rules are on file with authors.

75. *See Benoam* Arb. Agreement cls. 6, 19 (on file with authors); *Benoam* Arb. R. 59 (on file with authors).

76. Clearly, not every procedural change (such as an extension of timelines) needs the approval of the Head of the Antitrust Authority, but only changes that could impact the rights of the insured (such as changes of the jurisdiction of *Benoam*).

77. *See Benoam* Arb. Agreement cl. 2 (on file with authors).

78. *See* Introduction to CPR Arbitration Appeal Procedure, http://www.cpradr.org/ClausesRules/ArbitrationAppealProcedure/tabid/79/Default.aspx (last visited Jan. 28, 2010) (listing the International Institute for Conflict Prevention & Resolution's ADR appeal rules, which actively seek to prevent appeals of arbitration awards).

79. *See* Orna Rabinovich-Einy, *Beyond Efficiency: The Transformation of Courts Through Technology*, 12 UCLA J.L. & TECH. 1, 26–28 (2008) (demonstrating the ways in which technology, when introduced into the court setting, can enhance accountability for the performance of various tasks

formality by requiring clear verbalization of the rules (such as how many days parties have for filing an appeal or how an arbitrator is assigned) and assigning responsibility for executing certain functions (such as when filing a statement of defense, or requesting an extension, etc.). In other words, when using digital technology, as opposed to face-to-face interaction, there is less tolerance for ambiguity as the rules and conditions need to be specified *ex ante*. Furthermore, once the rules have been programmed, the software automatically executes them without room for selective enforcement. For example, while a party may be able to submit a pleading belatedly to a secretariat and then conduct a debate on whether an extension should be granted or not, in the *Benoam* system, once the approved period has expired, the system will not allow for the pleading to be submitted, since that function is blocked.

Finally, the availability of an internal clearinghouse imbues *Benoam* with a strong aura of formality. The ability to execute arbitration awards swiftly and independently of courts allows *Benoam* to substitute power and authority for consent,[80] thereby limiting party control and strengthening the elements of structure and institutions over flexibility.

As we can see, while ADR typically boasts party control and flexibility, the *Benoam* arbitration process provides a scheme that balances party control and freedom with the need for structure, consistency, and predictability. With respect to some issues, we can even see a clear tendency for increased formalization over time. For example, while initially there were no explicit and clear standards for arbitrators (or a formal process for the selection of arbitrators to the *Benoam* pool), as *Benoam* matured, selection criteria for arbitrator experience, training, and seniority were adopted.

Despite its relatively formal nature, *Benoam* has always left room for flexibility so as to remain an efficient and attractive avenue for its users. However, in some instances where the system refrained from dictating elaborate rules, the need for enhanced structure became apparent over time. While some flexibility was deemed essential so as to avoid stagnation and high costs, pockets of flexibility in the rules also proved to be a dangerous tool that allowed parties to exert control in particular cases at the expense of due process. The evolution of rules regarding two issues demonstrates this

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as well as efficiency).

80. *See* SHAPIRO, *supra* note 22, at 5–8 (discussing society's shift in substituting "law and office"—i.e., the judicial system—for basic consent to a third party).

tension—the rules on users' prerogatives for striking out arbitrators[81] and the arrangements regarding timelines and the availability of extensions.[82]

In terms of arbitrator assignment and striking, the original arrangement was that parties would be assigned an arbitrator by *Benoam*, while the parties would retain an unlimited right to strike out arbitrators. Over time, it became clear that some parties used this right to create a limited cadre of "house arbitrators." *Benoam* was quick to pick up on these dynamics and subsequently put forward the need to amend the rules to allow for one arbitrator strike per party, per case. Consequently, the steering committee instituted this amendment.

Similarly, the original arrangement under the arbitration rules created a highly regulated process with tight time limits on party submissions to ensure an efficient and swift process in which parties have a high level of certainty regarding the proceedings. While the timeframe was rigid and formalized, the rules provided a flexible outlet by leaving the issue of extensions unregulated based on the belief that the parties would refrain from over-extending this right in light of their desire for a quick and efficient process. Over time, parties began over-using the option for extensions, delaying proceedings substantially, much in the way they had handled matters in the courts in the past, thereby threatening the effectiveness of *Benoam*. The solution was to extend the original deadlines, which were understood to be overly stringent and, at the same time, to place restrictions on parties' ability to request extensions.

As we can see, while the system is formal, it is able to remain dynamic and adapt the rules to a changing reality through close monitoring and learning.[83] Such learning and improvement, in turn, are facilitated by the characteristics of digital technology,[84] and the nature of the parties—all strong repeat players who test and challenge the rules from different directions, necessitating ongoing change and intervention by *Benoam*.

Clearly, this environment is far removed from the common view of ADR processes as flexible environments subject to party control. While the literature has focused on the lack of choice by consumers and employees in the design of ADR processes—typically arbitration—included in uniform contracts,[85] the *Benoam* context is entirely different, with all parties being

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81. *See Benoam* Arb. Agreement cl. 17; *Benoam* Arb. R. 58 (on file with authors).

82. *See Benoam* Arb. R. 55–57 (on file with authors).

83. *See* Rabinovich-Einy, *supra* note 58, at 266–67, 278–81 (emphasizing the need for oversight and accountability procedures to cure systematic and recurring deficiencies within a particular dispute resolution system).

84. *Id.*; Rabinovich-Einy, *supra* note 79, at 32–34, 42–43.

85. *See supra* note 1 and accompanying text.

repeat players of similar power.[86] In the case of uniform contracts, one party exerts absolute control while the other enjoys no control at all; in the case of *Benoam*, all users enjoy limited control over the system, resembling the remote sense in which parties consent to the power and authority of courts.[87]

C. Promoting Systemic Goals

The fact that *Benoam* was developed as a mechanism for addressing a single type of dispute that arises between a closed set of repeat players inevitably led to the evolution of a systemic dimension in its operation. Over the years, *Benoam* adopted rules and practices that demonstrate a clear shift from a focus on the resolution of individual disputes to a focus on the system-wide goal of behavior modification.[88] This transformation can be evidenced both on the procedural level (the use of cost-allocation rules to drive user conduct, and the adoption of *res judicata* rules) and in the development of substantive norms (the development of major cases as precedents). These developments have all served to discourage arbitrators from rendering contradictory decisions, thereby engendering certainty for system users. Much like the formal court system, *Benoam* clearly operates under the assumption that if it is to sustain legitimacy, it cannot condone a situation in which similar cases result in opposing decisions. Therefore, *Benoam* singled out "landmark decisions," which resolved areas of stark differences of opinion among arbitrators.

A representative example of a precedent setting decision had to do with the burden of proof in chain accidents.[89] Specifically, the question arose of how to determine which of the drivers in a chain accident bears the burden of proof with respect to the collision between the first and middle cars. The traditional view was that when drivers hit a car from behind, they bore the burden of proof for demonstrating that the impact was not their fault since the assumption of fact in these cases was that the impact occurred as a result of their failure to keep the requisite distance.

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86. We are not claiming that all insurance companies are of equal power. There are obviously power differences—sometimes substantial ones—but they pale in comparison to the insured–insurance company power differences. In terms of the functioning of *Benoam*, it is sufficient that several of the insurance companies possess a similar degree of power and find themselves on both sides of the same types of disputes, to ensure a power equilibrium.

87. *See* SHAPIRO, *supra* note 22, at 5–6 (discussing the idea that parties "consent" to the determination of a judge).

88. *See* Scott, *supra* note 37, at 938–40 (discussing the Behavior Modification model of ADR and its view of the courts and civil process as altering behavior through imposing personal costs).

89. Of course, the burden of proof under the *Benoam* process is not on the drivers themselves, but on their insurance companies, the users of the system, and the parties to the Arbitration Agreement.

Some *Benoam* arbitrators were of the opinion that the traditional view should be expanded. In their view, the driver of the third car bears the burden of proof not only for proving that the impact with the middle car was not his fault, but also that he was not responsible for the crash of the middle car into the first car.

For a while there were two schools of thought among *Benoam* arbitrators on this issue, which proved to be a cardinal matter that kept coming up. Each school supported a different rule that translated into contrasting outcomes, depending on which position the arbitrator subscribed to. The parties therefore acted strategically trying to ensure the allocation of their case to an arbitrator sympathetic to their position. Ultimately, a leading decision was rendered that settled the matter.[90] The ruling adopted the traditional approach, reestablishing the responsibility of each driver over impact to the car in front of him.

Arbitrators, in turn, adopted a practice of treating landmark decisions as binding precedents across the system.[91] Interestingly, the parties also have come to expect arbitrators to follow such "precedents," and occasionally appeal on the grounds that an arbitrator did not rule in accordance with a "leading" decision, even though under *Benoam* rules the arbitration is not subject to formal law, let alone internal prior rulings.[92] In

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90. *Benoam* Arb. Decision No. 06786-04 (decision on file with authors). *See also Benoam* Arb. Decisions No. 10545-03, 04657-04, 03146-06, 01121-06 (decisions on file with authors).

91. The following are select examples in which arbitrators followed precedents in the system. (1) In *Benoam* Arb. Decision No. 06127-05 (decision on file with authors), a *Benoam* arbitration panel upheld a previous ruling regarding the liability distribution between the insurer of a towing vehicle and the insurer of a trailer. (2) In *Benoam* Arb. Decision No. 06851-05 (appeal) (decision on file with authors), a previous landmark ruling regarding the outcome of an insured party unwilling to cooperate with its insurer in defending the claim was upheld after it was challenged by the appellant. (3) In *Benoam* Arb. Decision No. 03907-05 (decision on file with authors), the arbitrator upheld a previous ruling regarding liability in cases of a slippery road due to oil stains. (4) In *Benoam* Arb. Decision No. 04-03349 (decision on file with authors), an arbitrator was willing to vacate his own ruling after he became aware of a contradictory landmark decision of a *Benoam* appeal panel rendered just a few days prior to his own ruling. (5) In *Benoam* Arb. Decision No. 06389-05 (appeal) (decision on file with authors), an appeal arbitrator upheld landmark decisions regarding burden of proof in chain accidents. (6) In *Benoam* Arb. Decision No. 01063-06 (appeal) (decision on file with authors), an appeal panel applied a prior ruling on the terms under which a damaged vehicle may be declared a "total loss."

92. The following present a random selection of examples: *Benoam* Arb. Decisions Nos. 00306-04, 07139-05, 02523-05, 01021-05, 01672-06**,** 04100-1-00394-06, 01063-06**,** 02240-06, 02099-07, 04964-07 (decisions on file with authors). The following quote from a party's appeal on *Benoam* is instructive:

> [T]he appellant claims that the single most important element in a legal system to ensure that the wheels of justice operate is consistency. It is inconceivable that guidelines change constantly in a confusing manner that creates profound uncertainty. The appellant claims that when it engages in writing a pleading and in assessing its chances in winning a claim, one of the principal elements it considers is the guiding principles of this esteemed arbitration institution. This is

addition, the emergence of precedents has impacted parties' choices regarding the types of claims they decided to pursue, with clear-cut claims being resolved in the "shadow" of *Benoam* and the more difficult cases (either with an unclear factual pattern or those that raise new questions) reaching the system.

In addition, arbitrators began treating cases involving the same parties consistently by adopting *res judicata* principles, even though these practices are not dictated by *Benoam* rules.[93] Therefore, when a follow-up dispute arises, arbitrators feel compelled to apply the findings of other arbitrators on certain factual matters that arose in a previous claim involving the same parties, even if they themselves would have ruled differently.

As the description above reveals, despite the typical understanding of ADR as a set of processes that are applied ad hoc to address individual disputes, it is sometimes the case that ADR processes move away from the individual focus adopting a broader, systemic perspective. Under this view, fairness is best advanced through consistency and predictability, even at a certain cost to the goal of uncovering "the truth" in sporadic individual cases. While the literature has uncovered many such instances of "legal pluralism,"[94] these examples have tended to center around close-knit social settings which do not capture the purely commercial nature of relationships among insurance companies.[95]

D. Independence from the Legal System

While many modern-day ADR schemes depend on courts for supply of disputes, content of applicable norms, and enforcement of outcomes reached through ADR, *Benoam* has been a strong pillar of independence. As mentioned above, despite the popular rhetoric on the appeal of ADR and of it being "what people want," disputants have been slow to embrace ADR and have mostly turned to it when referred by a court. Therefore, a significant number of ADR schemes are dependant on courts for a supply of

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> particularly true when the arbitrator sitting on this case is the same arbitrator who established the rule on [burden of proof in chain accidents] in the previous case!!!! The appellant is thus helpless in face of this uncertainty which undermines the very foundation of the most fundamental legal principles.

Benoam Arb. Decision No. 06786-04 (decision on file with authors).

93. Examples include *Benoam* Arb. Decisions Nos. 01676-04, 04657-04 (decisions on file with authors).

94. *See* Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869, 870 (1988) (defining legal pluralism "as a situation in which two or more legal systems coexist in the same social field").

95. Even in the diamond industry, the commercial setting is rooted in a homogenous social context with strong religious and familial ties. *See* Bernstein, *supra* note 31, at 141 (elaborating on the role that Jewish law has played in structuring business relations within the diamond industry).

disputes. *Benoam* is obviously an exception, with its users—all commercial actors in the same industry—agreeing to submit a large number of disputes exclusively to *Benoam* in lieu of the courts.

Interestingly, *Benoam* has fought hard to protect its jurisdiction in the face of attempts to drive certain cases back to the court system. Not surprisingly, questions over jurisdiction have arisen concerning matters involving the insured, who are not parties to the *Benoam* agreement and therefore not subject to the arbitration system and rules.

In two landmark arbitration decisions, *Benoam* preserved its independence from the court system, even when issues regarding the insured arose. In one such case,[96] the question arose as to what constitutes an appropriate forum under requisite law. Specifically, the issue was whether an insured has the right to force her insurer to litigate a case in court. Article 68 of the Israeli Insurance Contract Law states that an insured individual may require his insurance company to litigate a claim, even if the insurer believes that it should pay the claim to a third party.[97] The difficulty had to do with whether this rule requires that the insurance company litigate the case in court or whether it merely implies the need to contest the driver's liability, a requirement that can be met through the arbitration system as well. In a precedential decision, a *Benoam* arbitrator, in his interpretation of Article 68, ruled that the insured can only force the insurer to contest the claim, but cannot dictate a particular forum. This was a crucial juncture in *Benoam*'s assertion of independence and a decision to the contrary would have undoubtedly had a detrimental impact on *Benoam*'s development.

In another case, the question arose as to whether insurance companies could litigate in court those claims that fall under *Benoam*'s jurisdiction when the insured party is unwilling to cooperate with the insurer in defending the claim.[98] While a court can force such cooperation upon an insured party by subpoenaing him to testify or by compelling him to take

96. *Benoam* Arb. Decision No. 02398-04 (decision on file with authors).

97. Insurance Contract Law, 1981, S.H. 1005, 94.

98. *Benoam* Arb. Decision Nos. 01051-02, 2122-03, 2803-03 (decisions on file with authors). Other examples include: (1) Deciding that a claim against an insurer that is also the owner of the insured vehicles falls under the definition of a "subrogation claim," according to the *Benoam* Arbitration Agreement. *Benoam* Arb. Decision No. 04803-09 (decision on file with authors); (2) A decision that under the *Benoam* Arbitration Agreement, *Benoam* is authorized to handle claims in cases of double insurance. *Benoam* Arb. Decision No. 04803-09 (appeal) (decision on file with authors); (3) A decision that *Benoam* proceedings are not to be stayed automatically where criminal proceedings against the insured driver are being held at the same time of the *Benoam* proceedings. *Benoam* Arb. Decision No. 02170-05 (decision on file with authors); (4) A decision that a counter-claim above 100,000 NIS (the cap on *Benoam* claims under the Arbitration Agreement) is a legitimate claim in *Benoam*.

part in the proceedings, *Benoam* cannot.[99] Here as well, *Benoam* arbitrators ruled in a leading decision that such circumstances cannot serve as a ground for change of forum because that would mean externalizing the impact of the conduct of the insured party on the other side who would be required to attend a forum that is outside the scope of their agreement.

But *Benoam*'s independence runs deeper than those landmark decisions protecting the scope of its jurisdiction. The mere existence of precedents in the system underscores the principal role *Benoam*'s own decisions have come to play in the system. One example is the way in which *Benoam* addressed a lacuna in the Israeli Traffic Ordinance (Ordinance) and its regulations.[100] While the arbitration rules of *Benoam* state that the process is not subject to formal law, in practice, arbitrators have tended to abide by formal legal arrangements. Over time, however, the dated arrangements under the Ordinance placed the arbitrators under mounting pressure to deviate from existing legal arrangements. The rules governing which driver is supposed to yield where roads intersect provide a good example.

While the Ordinance regulates the issue of yielding, it does not differentiate between a main and a secondary road when they intersect. This omission became crucial in determining liability for fender-bender claims in areas where there were no clear traffic signs, such as some parking lots outside shopping malls. In those instances, the application of the wording of the Ordinance could have led to absurd results (a person driving on the main road in the parking lot would have had to yield to a person moving in from a side road to her right). Because of the large number of disputes each insurance company processes, these seemingly trivial determinations can have a substantial impact in economic terms. This state of affairs generated a precedential decision according to which the arbitrators are not subject to formal law on this matter.[101]

The above example is a good demonstration of the manner in which the process of norm generation is reinforced over time.[102] As fewer claims

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99. It should be noted that under these circumstances, insurance companies will claim that they should be exempt from liability altogether, not that the case should be referred to court. Such claims are based on rulings by some courts that under these circumstances, because an insurance company is unable to defend the claim, it should be exempt from liability.

100. Traffic Ordinance (New Version), 1961, S.H. 352, 8.

101. *Benoam* Arb. Decision No. 00514-05 (first instance and appeal) (decision on file with authors) (finding that where application of formal law could lead to an absurd result one must rely on "logic and common sense" when rendering a decision); *see also Benoam* Arb. Decision No. 06132-08 (first instance and appeal) (decision on file with authors).

102. *See, e.g.*, *Benoam* Arb. Decision No. 00478-04 (appeal) (regarding yielding rules in a "T" junction); *Benoam* Arb. Decision No. 04353-07 (appeal) (ruling that a driver is expected more frequently to anticipate irregular conduct by other drivers in a parking lot); *Benoam* Arb. Decision No. 07176-08 (appeal) (regarding the validity of an insurance policy after the vehicle was sold); *Benoam*

reach the courts, the courts have a diminished opportunity to develop norms on the subject matters governing the disputes handled by *Benoam*. Thus, *Benoam* arbitrators are forced to fill in lacunae by rendering precedential, landmark cases, internally. In addition, *Benoam* arbitrators are required to interpret the system's own rules and institutions, rendering decisions that are unique to *Benoam* and have no equivalent in the court system.[103] As formal law plays less of a dominant role as a shadow, *Benoam* rulings themselves have come to shape settlements that take place outside the system, with a growing number of claims being resolved through direct negotiation between the disputants.

Finally, while the vast majority of ADR processes (and systems) rely on the formal court system for enforcement of their resolutions, *Benoam* has managed to create a uniquely effective clearinghouse which replaces the need for external enforcement. As described above, funds are transferred between the insurance companies on a monthly basis, on a fixed date, in accordance with the rulings that were given in the month since the previous payment date. Under this mechanism, the parties agreed to give *Benoam* absolute control over the execution of awards and in return for enjoying predictable and efficient implementation with no delays or costly enforcement proceedings.

E. Offering (Partial) Transparency

From the very beginning, *Benoam* adopted a unique stance on the degree to which arbitration awards would remain private. Unlike most arbitration services that offer disputants confidentiality and have no institutionalized mechanism for publishing rulings,[104] *Benoam* instituted a practice of posting landmark decisions, in an anonymous fashion, to all authorized users of the system. Nevertheless, other than these postings, the

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Arb. Decision No. 7673-03 (appeal) (ruling that in regard to a policyholder's participation, the claim amount refers to all damages, including damages that cannot be subrogated); *Benoam* Arb. Decision No. 04632-07 (appeal) (ruling that awarding expenses in *Benoam* proceedings should not serve as a deterring factor for a party considering whether to file an appeal) (decisions on file with authors).

103. *See, e.g.*, *Benoam* Arb. Decision No. 840-02 (decision on file with authors) (making decisions on such matters as the interpretation of Clause 2 of the *Benoam* Arbitration Agreement regarding the scope of *Benoam* claim cause in respect to insured indirect loses); *Benoam* Arb. Decision No. 01865-07 (decision on file with authors) (noting the obligation of a *Benoam* plaintiff to submit all relevant evidence while filing a *Benoam* claims); *Benoam* Arb. Decision No. 06851-05 (appeal) (decision on file with authors) (deciding that the scope of an insurer right to file a claim in court against its insured after the case was tried in *Benoam*); *Benoam* Arb. Decision No. 9291-03 (decision on file with authors) (deciding what meaning should be attributed in *Benoam* to a waiver rendered by an insured).

104. *See supra* notes 57–58 and accompanying text.

understanding was that the users would not be authorized to see one another's decisions for fear of the ability of competitors to collect sensitive data about one another through aggregate data on their cases.

Over time, however, in line with the shift in focus from the resolution of individual disputes to a system-based approach, a trend developed where users would cite their own previous cases and the decisions (whether intermediate or final) rendered in those instances.[105] In some cases, they would attach these decisions. In other cases, where the previous decision was mentioned or cited, but was not attached, *Benoam* adopted a practice of allowing limited access to the prior decision (without revealing the name of the opposing party in that case) to the opposing party in the current case and the arbitrator.

The evolution from references to key rulings to reference to one's own previous cases has led to the expansion of the internal public domain of arbitration rulings within *Benoam*. While this is still far from the degree of publicity we are accustomed to see in courts, this reality is markedly different from the one that typically exists in ADR settings, including most arbitration proceedings. Also, it further strengthens the emphasis on the promotion of the goals of behavior modification and the procedural goals of consistency and predictability, as well as the generation of substantive norms.

As we have seen, the structure and operation of *Benoam* diverges in many important respects from the manner in which we typically think of ADR and conceptualize the role these processes play. In the following part we analyze some of the principal factors that have shaped the *Benoam* process and guided its founders. As will be evident from the description below, some of these factors are highly contextual and may not be applicable to other industries, dispute types, and party characteristics. Other considerations have broader applicability and can generate more general insights and conclusions.

III. ANALYSIS OF THE PRINCIPAL FACTORS IN THE *BENOAM* CASE STUDY

What can account for *Benoam*'s deviation from the prototype of ADR? Naturally, there is no single explanation for these developments. We find that the features of the *Benoam* system are strongly related to the characteristics, goals, and incentives of the players involved with the system—*Benoam* itself, the insurance companies, the Association, and the arbitrators. Below, we explore the motivations of each of these actors and the manner in which they

105. This is evidenced in thousands of *Benoam* pleadings.

have helped shape the form of ADR offered by *Benoam*, as well as the impact the introduction of technology has had on the proceedings.

Benoam is a private for-profit entity whose business is to provide an effective dispute resolution avenue for its users. As such, its goal is to preserve both its legitimacy and its jurisdiction (its share of claims vis-à-vis courts). *Benoam*'s legitimacy arises from the efficiency of its proceedings, which must provide a superior avenue to that of the courts, and fairness. The actual and perceived fairness of the proceedings are a result of the fact that there is trust by the users that the process offered operates in a neutral and unbiased fashion. To establish neutrality, *Benoam* had to demonstrate that the process was applied consistently to different parties resulting in similar outcomes. It is therefore not surprising that *Benoam* has from the very beginning elaborated clear procedures and offered some transparency regarding substantive norms by creating a "public space" for major decisions. The need for consistency has also led to the refinement of procedural arrangements over time as well as expansion of arrangements that lead to consistent outcomes—*res judicata* principles and a growing number of arbitration decisions being disclosed to an internal database. While this database may be smaller than that of public courts, it is applied in a narrow environment with a limited number of dispute types and can therefore be effective in signaling to the insurance companies that their cases are being decided in a consistent and fair manner.

At the same time, the fairness of proceedings is also measured by their efficiency, which may be threatened by increased formalization. The system could not permit the advantages of consistency to substantially detract from the traditional benefits of ADR, which include efficiency and control. In this respect, the introduction of technology has allowed *Benoam* to increase formality, consistency, and documentation, while offering a dramatically more efficient process than that conducted in face-to-face court hearings. From *Benoam*'s perspective, the technological component meant much more than efficiency; it has allowed *Benoam* to preserve the dynamic and efficient nature of ADR. As explained above, technology enhances formalization, and consequently strengthens consistency. But technology also makes it possible to maintain ADR's flexibility through dynamic change and improvement. The automatic documentation that comes with digital communication creates a comprehensive digital database, which for *Benoam*, includes all claims filed on the system. For *Benoam*, the availability of a large digital database that can be searched and analyzed according to different parameters at very little cost, practically instantaneously, has meant that the system, despite its formal

features, has managed to remain dynamic, continuously remedying problems and replicating successes.[106]

In terms of the desire to preserve its "jurisdiction," *Benoam* had to maintain its independence by clearly marking the boundaries between *Benoam* and courts. This was done by generating substantive norms that govern the disputes handled by *Benoam* and by making such norms public so that the parties are aware of them and abide by them, preventing future disputes from arising altogether. One of the most significant features in *Benoam*'s independence from courts lies in its ability to enforce its arbitrators' decisions without having to resort to the courts and state power.

Perhaps the strongest evidence for *Benoam*'s success in both realms—ensuring its legitimacy and independence—is the fact that its contract is renewed annually by the insurance companies. *Benoam* is constantly evaluated by its users, who in the seven years of *Benoam*'s existence have considered it as a superior alternative to the court system, offering them a balanced mix of efficiency and due process. Because the users are all strong, repeat-player parties (granted, there are power differences among insurance companies, but they pale in comparison to the insured–insurance company power asymmetry), this has allowed for strong monitoring over the workings of the arbitrators and the operation of the *Benoam* rules and guidelines, ensuring fair and consistent decision-making by arbitrators.

As for the incentives, characteristics, and goals of the insurance companies, they have placed a high premium on the efficiency of the *Benoam* arrangement out of the desire to reduce the high costs associated with conducting litigation over what are small-scale claims. However, efficiency meant not only that the process itself needed to be low-cost, but also that the arbitration system had to provide these actors with clear-cut and predictable norms that would allow them to resolve most of these claims early on, prior to claim filing, so as to further reduce their expenditures. This goal required elaborate procedures that would govern the process and hopefully lead to similar results. This driving force can also explain the move towards the adoption of quasi-precedents as the system evolved and trust was established. The insurance companies, because they are repeat players and because they find themselves on both sides of the dispute over time, typically share interests with one another. While there are some insurance companies with a unique insurance profile that may give rise to divergent interests (i.e., a company that insures mostly truck drivers), most insurance companies seek a clear rule establishing liability one way or

106. *See supra* notes 81–84 and accompanying text.

the other, and feel less strongly about what that rule should be, as they are likely to find themselves on both sides of the rule over time.

Indeed, trust was a major consideration as the *Benoam* venture involved a new entity that was unfamiliar to the insurance companies and had no past experience in running similar systems. *Benoam*, despite offering a radical new alternative, had to somehow make this change less drastic and more familiar, if it were to be embraced by users within the industry. The combined effect of these factors was that from inception, *Benoam* sought to create a relatively formal setting in which conservative bodies would feel comfortable and which would be acceptable to the external bodies monitoring the field. The risk for the insurance companies was substantial as they were submitting a large number of cases to *Benoam* that would have a significant influence on their finances. In this respect, the elaboration of precise and clear-cut procedures also served to enhance the insurance companies' set of controls. The rules not only served as a control over their own actions, but also curbed the actions of *Benoam* and its arbitrators. Over time, as the system sent a growing number of signals on consistency through norm elaboration and enhanced publicity, both trust and efficiency rose, and a growing number of claims were resolved in *Benoam*'s shadow.

The Association, as a body established by the insurance companies for the advancement of their own mutual interests and goals, was driven primarily by the desire to sustain its own legitimacy. After the collapse of the KFK arrangement, the insurance companies had to undergo lengthy and costly covert proceedings. Consequently, they were critiqued by the court administration for clogging the system with small-scale, simple claims. Therefore, it was crucial for the Association to devise an effective and elegant solution that would satisfy their constituency and demonstrate to the insurance companies that their claims were being addressed in a professional, effective, and fair manner. As a representative of the majority of insurance companies, they had to ensure equality and consistency in the process they embraced. This was translated into the structuring of the process to begin with, and drove the Association to look for ways to actively ensure that these goals were being met continuously over time. That specifically meant that the Association collaborated with *Benoam* in amending the Rules in order to promote such goals as making the process more effective (for example, by improving the arrangement of deadlines and extensions during the proceedings) and fair (for example, amending the Rules on striking an arbitrator and the like). In this respect, we see that the interests of the Association have merged with those of *Benoam*, sustaining

the system as an effective and legitimate channel for addressing the insurance companies' claims.

Finally, *Benoam* arbitrators are motivated by their desire to demonstrate professionalism and to ensure their continued engagement by *Benoam* and the parties. They demonstrate their professionalism through both substantive expertise and neutrality. Therefore, the arbitrators have a strong incentive to write "landmark decisions" that position them as leading arbitrators. In addition, arbitrators feel compelled to follow "precedents" and reach decisions that are consistent with those of other arbitrators so as to avoid being overruled on appeal. Making precedents public serves this need; the arbitrators would like to be precedent setters. Over the years, the position of a *Benoam* arbitrator has become attractive, leading to a growing number of applications to *Benoam* and the elaboration of clear, predefined high standards for applicants. Here also, the automatic documentation of all decisions in proceedings that are primarily based on textual information has allowed for close scrutiny over arbitrator decisions and for enhanced quality control by both *Benoam* and the parties who, as mentioned above, are powerful and sophisticated repeat players.

CONCLUSION

What can we learn from the story of *Benoam*? What does it teach us about the role of ADR systems and the relationship between formal and informal dispute resolution? While much of what has taken place in *Benoam* can be explained by contextual characteristics, such as the nature of the parties, the disputes, the insurance industry, and the arrangement that preceded *Benoam*, we can also view this case study as a demonstration of what can happen when certain assumptions about ADR are relaxed. When we handle repeat disputes, between repeat-player parties in large numbers, by the same ADR provider, the ADR services shift from an individual perspective to a systemic one. The characteristics of these processes will be relatively formal, while maintaining some level of flexibility and control that is higher than that of courts. We find that as flexibility and confidentiality decrease, consistency and predictability become dominant values, and systemic goals outweigh individual preferences.

Interestingly, by adopting a more nuanced approach to the conventional ADR prototype, many of the critiques that have been voiced against ADR can be mitigated. Where there are clearer standards for decision-making and a wider availability of previous resolutions, there can also be a higher degree of accountability by third parties. Also, there is better enforcement of quality control measures by providers of ADR services, as well as

ongoing learning and improvement of the ADR system. We believe that the insight drawn from the *Benoam* case study—that ADR processes can and do perform effectively (at times more effectively) when they deviate from the conventional prototype—can be applied to a wide array of dispute types, parties, and contexts that extend well beyond that of the insurance market. Indeed, we can draw on the lessons of the *Benoam* case in thinking about the "Contract Procedure,"[107] the framework offered by Judith Resnik to guide courts when deciding on whether to support requests to stay formal litigation in favor of ADR.

But the tensions we have explored in the paper—the quest for party control and flexibility vs. formality, individual vs. systemic goals, the voluntary nature of the process vs. the need for state power and intervention, and the private vs. the public nature of proceedings—are not unique to the debate on the divide between ADR and courts. In recent years, we have witnessed such a split within the court system itself, with the emergence of such phenomena as problem-solving courts[108] and other instances in which courts operate in a less formal, often undocumented, manner.[109] These developments have presented a challenge to our traditional way of thinking about the values and goals of the judicial system and may require that, as we search for answers, we look to the ADR field, which has been facing similar questions for several decades now.

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107. *See* Resnik, *supra* note 69, at 626–27 (proposing that courts refuse to sanction certain bargains that violate due process).

108. Michael C. Dorf & Jeffrey A. Fagan, *Problem-Solving Courts: from Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501, 1501–02 (2003); Eric Lane, *Due Process and Problem-Solving Courts*, 30 FORDHAM URB. L.J. 955, 955–56 (2003); Victoria Malkin, *Community Courts and the Process of Accountability: Consensus and Conflict at the Red Hook Community Justice Center*, 40 AM. CRIM. L. REV. 1573, 1573, 1575 (2003).

109. *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378 (1982) (describing the "managerial" role that judges play in shaping civil litigation by negotiating with parties the timing and course of litigation—as well as possible remedies).