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# BAGGER V. DELISHCO

## ARBITRATION

### Teaching Note

This is a short teaching note for a lengthy simulation. The plot line is derived from that in Bagging Settlement: a contract dispute between a family-owned bag company – Bagger - and a multi-national food company – Delishco. In a nutshell, Bagger had an exclusive bag supply contract with a division of Delishco. When the division was spun off, Delishco terminated the contract because they no longer needed these bags. They interpret the contract language differently: Bagger claims they agreed to a minimum order of 500 million bags over a 5–8-year period (after only 150 million had been supplied); Delishco denies that 500 million was to be a minimum and asserts the right to terminate without buying the balance of the bags. Details can also be found in the Bagging Settlement Mediation Simulation on this site, as well as in the witness statements and the Arbitrators’ Stipulation of Facts here.

This simulation imagines what an arbitration of Bagger v. Delishco might look like. I created the witness statements and exhibits as an arbitration exercise for my ADR course. I confess to having had two agendas. One was to give students the experience of participating in an arbitration, considering how to work with an arbitrator, and to walk through the process.<sup>1</sup> The other was to recreate an arbitration experiment I had originally done (with Prof Tom Stipanowich) at the CPR Institute for Dispute Resolution Spring Meeting in 2000. That experiment (like this one) aimed to learn (1) whether arbitrators sitting in three-member panels or solo affected the likelihood of a liability finding or the damages awarded; and (2) whether arbitrator’s awareness of party-agreed brackets would impact results. (We were interested both in awareness of any bracket and of the bracket \$ amounts.) Spoiler alert: this go-round did not yield conclusive results. It was however a memorable demonstration of the fact that different decision makers considering the same evidence – witness testimony and lawyers’ arguments – will reach different results.

I set up the arbitration presentation by creating and promoting a CLE at a nominal cost - \$25. I would have made it free, but I wanted registrants to show up. I also promoted it and offered free registration to anyone (including those at the law school. ) We scheduled it in a late afternoon time slot. (One option would be to make it a school-wide event, perhaps with endorsement from 1L contracts professors. That would surely be an educational experience for all, but it wouldn’t make the point that even experienced lawyers can see facts differently.).

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<sup>1</sup> We did some in-class exercises regarding preliminary stages. I don’t believe I can access these, and even if I could, I wouldn’t vouch for their design.



During the afternoon CLE, I was admittedly focused on collecting and publishing the results. The arbitration presentation was limited to an hour (though it may have gone a bit over with regard to time). Arbitrators then deliberated, solo or in groups, some with instructions as to brackets. The students collected the arbitrators' decision and award forms and went into a separate room to crunch the numbers. We had invited a panel of lawyers to talk about arbitration issues, to fill time while the students were working on the numbers. At the end of the session, we reported preliminary findings: the % of liability awards and the \$ ranges. Later, I reviewed the results more carefully and sent a memo to all attendees.

Just in case anyone would ever want to re-stage this, the simulation folder includes a promotional email text, the CLE application, our internal "to do" list (including how to set up for entering participants), the program agenda, the various arbitrator award forms, the power points used, the results, and the memo I sent to the participants the following day (with further discussion of the results.). There's no reason anyone else should start from ground zero. These are all in Microsoft Word. Feel free to adapt any of them for your own program.

Note that the experimental design was essentially the same as that in the 2000 CPR Conference, though the *Bio-Con v. Microtex* was the case used there. *Bio-Con v. Microtex* is also included in my simulation set.

I should add that since drafting the *Bagger v. Delishco* case in 2015, I've been serving as an arbitrator with some regularity. I can now say that much more could be done using this case, in an arbitration course or an ADR course with a healthy dose of arbitration. You could set up arbitrator selection, the preliminary hearing, potential motions, questions of Zoom vs. in-person, examination of the dispute resolution, and strategic issues relating to the theory of the case. Contracts or contract drafting professors might use it for discussion in their classes, whether or not they staged the arbitration.

My sincere hope is that this case is arbitrated, again and again and again. It would be even better if professors using it compared results.

A note about the organization of the folders on this simulation site:

As indicated above, I've included several folders relating to the CLE program, just in case you are inspired to run an arbitration experiment with a large audience, either in a CLE or in a law school class.

For the simulation, there's one folder with MS Word versions and one folder with PDFs, as usual. That's to permit users to make changes. However, if you want to have the stipulations-plus-exhibits or just-the-exhibits, in handy packets, that's only in PDF (and it's in both folders). Our witnesses (students in the class) used



what was called “Witness Statement/Deposition Summary” to prepare. We didn’t worry about cross-examination by impeachment with the document as a sworn deposition. (It wasn’t a trial practice class, after all.) The folder shows the separate witness statements as well as a single document containing all of them. If memory serves, all participants in the arbitrator’s role were given an exhibit packet along with a set of Stipulated Facts.