NYSBA FALL 2011 | VOL. 4 | NO. 3

New York Dispute Resolution Lawyer

A publication of the Dispute Resolution Section
of the New York State Bar Association

Message from the Chair

Charles J. Moxley, Jr.

I am delighted to write my first Message from the Chair. Edna Sussman, Jonathan Honig and Simeon Baum are a tough act to follow. I look forward to working with all of you this year to continue the broad range of activities of our Section. I believe our Section is in fine shape to continue to make a major contribution to the dispute resolution field in New York and beyond.

Those of us who work in the dispute resolution field come face-to-face daily with the reality that humans, as a species, are hard-wired for conflict, even, at times, in the face of our own self-interest. The disputatiousness inherent in survival of the fittest is part of our genetic make-up. Competition for things, position, and all the rest, with the discord that inevitably ensues, is central to our economic, political, social, legal, and other realms.

Dispute is so pervasive in human society and its effects so pervasive that we can be confident that our work in the field of dispute resolution, whether on the advocacy or the neutral side, has the potential to make a significant contribution to making people's lives better and our society more cohesive. All of the wide range of disputes that arise from our inherent disputatiousness need to be resolved. Knowing how to effect such resolutions is very much a matter of the specialized knowledge and skills that we spend our lives honing and applying.

Time of Need and Opportunity

I think those of us active in the field have a sense that this particular point in time, on many levels, cries out for more effective and satisfying dispute resolution processes and techniques. Whether at the national political level or in the realm of the litigation of cases through the court system or arbitration, we are keenly aware of the need for substantial improvement. This need for more effective dispute resolution approaches obviously presents opportunities for us as dispute resolution professionals.

Let's talk about commercial arbitration and mediation.

Commercial Arbitration

I think it can fairly be said that commercial arbitration, particularly on the domestic side, is at a crucial point in its history, certainly in contemporary times. For a number of years, there has been a background chorus of disenchantment with arbitration, disenchantment broadly flowing from the sense of many users and commentators that the process no longer works reliably in delivering dis-

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Message from the Co-Editors

Edna Sussman

The Dispute Resolution Section moves from strength to strength in this fourth year as a Section, with Charlie Moxley taking the helm. Charlie's focus will be on promoting New York as a venue for international arbitration and increasing the use of mediation, in particular mediation as a viable and practical solution for reducing the burden on courts under financial pressure. Our leaders continue to be major contributors as they move from chairmanship and continue to participate in our trainings, programs, and publications. Edna never reduced her commitment as co-editor of this journal and is even now thinking of the next issue as she continues her work as one of the leaders of the I Love NY Group, an informal association of representatives from all of the bar associations working on expanding the use of N.Y. for arbitration. Our white papers issue, which represents the work of a large circle of our members, is out and will continue to be useful for practitioners who want to describe the advantages of ADR to their clients and to understand arenas new to them in which they can use ADR modalities and resources. *New York Dispute Resolution Lawyer* has been recognized as an important source of ADR information and we will continue to bring you thoughtful articles, book reviews and case reviews about a wide variety of issues in arbitration, mediation and collaborative law, as well as information about our Section itself, some of which is revealed in the Survey of the Section by Leona Beane, which we publish in this issue under "Report."

ADR News

The Section has had a busy year with important new trainings in arbitration, mediation, and litigation funding, and its continuing work of the task force on New York law in international matters. We also report on the first training and certification in N.Y. of the UK's Center for Effective Dispute Resolution (CEDR).

Ethics

This issue's Ethical Compass opinion column by Elayne Greenberg provides the second article in her series addressing multicultural knowledge as an ethical issue. Here, Elayne addresses the impact of culture and legal background, including the common law/civil law divide on ethical perception and practice.

Laura A. Kaster

Arbitration

We start with what has now become our traditional Supreme Court review by Sherman Kahn. He has supplemented his review of the Court's single, but significant, word on preemption and class action arbitration, with a follow-up in New York's Second Circuit take on *Stolt-Nielsen.* From this legal analysis we move to the practical problem faced by advocates and arbitrators trying to find their way through the thicket when seeking materials from third-parties in arbitrated matter in Kathleen Roberts article "Restrictions on Obtaining Testimony and Documents from Non-Parties Under the Federal Arbitration Act." Michael Oberman takes on the state court diversity in dealing with the opening left in *Hall Street* for parties to fashion more searching review of arbitral award. Edna Sussman provides us with a road map for the decision makers who are charged with evaluating the pros and cons of consumer arbitration: "The Dodd-Frank Act: Seeking Fairness and the Public Interest in Consumer Arbitration." Finally, William Brown provides an argument for uniform construction of federal and New York arbitration laws.

International Arbitration

In the international realm, we have focused on an outpouring of changes around the world with articles on the new rules of the ICC by Victoria Shannon and Suzanne Ulicny, on the French Rules by Catherine Kessedjian, the new Hong Kong law by Chiann Bao, and the new Irish Arbitration Law by Klaus Reichert SC.

Mediation

We continue our interest in brain science. Although Pauline Tesler has entitled her article as one for collaborative lawyers and others, it is for all of us. It points out that neuroliteracy is required if we are to develop a system that lives up to the promise of party autonomy, because a failure to understand the impact of our process can deprive parties of the cognition needed to make truly independent and sound decisions. Pauline points to ways to study and integrate the new learning into our practice. Peter Scarpato brings eastern martial arts concepts to us in his Counterintuitive Mediator. While Robert Badgley, who represents mediator insurance carriers, points out

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pute resolution that is not only fair, but also faster and less expensive than litigation. Across the business spectrum, users, including large institutional users of arbitration, have vocally expressed the lament in prominent public forums that commercial arbitration is being pulled down by many of the worst aspects of litigation, particularly excessive and often disproportionate discovery, protracted and wasteful motion practice, and inefficient hearings.

Specifically, many arbitration users and commentators believe that litigation-type depositions and e-discovery have become so pervasive in arbitration as to undermine arbitration's putative advantage as faster and less expensive than litigation. The lament has been that arbitrators have been unable or unwilling to limit depositions and e-discovery and also to put reasonable limits on the scope of testimony and documents accepted at hearings.

The significance of this point as to disenchantment with excessive discovery can be seen from the reality that, based on credible estimates, the major portion (some estimate as high as 90%) of the overall expenses in highly contested litigations and, presumably, arbitrations results from e-discovery, far outdistancing the time spent on such matters as client counseling and efforts at resolution.

Similarly, it is lamented that pre-hearing dispositive motions, particularly motions to dismiss, have become so pervasive in large commercial arbitrations as to impose costs approaching, if not comparable, to those of motion practice in courts. Indeed, the lament as to motion practice in arbitration is broader. There is a perception among many users and commentators that arbitrators are not only permitting substantive motions to be made too frequently, but are also then compounding the injury by overwhelmingly denying even highly meritorious motions that would routinely have been granted in court.

These perceptions that commercial arbitration fails to deliver on the putative arbitration objectives of speed and economy with fairness are so broadly felt that it almost doesn't matter whether they are accurate or not. Nonetheless, it is worth noting that these laments, to a considerable extent, are certainly much more a matter of perception than of reality. In fact, it is readily demonstrable that commercial arbitration is appreciably faster and less expensive than litigation. Based upon available information from the court systems and major arbitration providers, the reality is evident that the typical commercial arbitration is generally conducted well within a year while the typical court case takes years.

At the same time, it seems evident that the perception of many arbitration users and commentators that arbitration is morphing into litigation is true in significant respects. Depositions are now permitted in many commercial arbitrations and electronic discovery, with all its problems, has become a hugely expensive reality in arbitration. Too many motions are entertained and perhaps too many are denied in arbitration. Too many arbitrators are prone to permit the parties essentially to put on as much testimony, as many witnesses, as they want, without effectively limiting the irrelevant, the immaterial, the cumulative, and the simply unnecessary.

These developments would appear to emerge because: (1) Litigators in arbitrations typically have more experience in court proceedings than in arbitrations and hence are prone to bring their court-related expectations and experience into their arbitrations, (2) Complex commercial cases, involving substantial millions of dollars, are now routinely submitted to arbitration, resulting in situations where the stakes involved can justify high legal expenses, and (3) The bulk of documents that are relevant to a given commercial dispute in today's world are necessarily of an electronic nature, resulting in the huge volume of materials to be reviewed for production that this process can entail.

Some years ago, those of us spending most of our time practicing as commercial arbitrators felt that we were doing a good job if we managed substantially to limit depositions in commercial cases. Now, while limiting depositions to what is reasonably necessary in a case remains a laudable objective and something we try to do, it has become painfully evident that e-discovery has become the primary area of threat to the efficiency and even the viability of arbitration as a process offering advantages over litigation.

So these are the problems. What then is the solution?

Fortunately, here one can say with considerable confidence and satisfaction *that the solution is at hand*. Those of us who are commercial arbitrators and counsel in arbitrations need only recognize the powerful tools that have become available to us within the past several years to achieve the arbitration objectives of speed and economy without compromising fairness.

Specifically, numerous leading arbitration provider organizations and others have come forward with studies and protocols that have led to recognized and emerging Best Practices that offer the way out, the solution to the above-referenced and other laments as to the perceived contemporary failing of commercial arbitration to offer substantial benefits over the litigation alternative.

Our own Dispute Resolution Section has been at the forefront of developing these Best Practices. Specifically, our Section in the past several years has issued its Report on Arbitration Discovery in Domestic Commercial

Cases (the "Precepts") and its follow-up Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of International Arbitrations (the "Guidelines"). The College of Commercial Arbitrators, following an exhaustive process that included input from all of the main arbitration players—parties, in-house counsel, outside counsel, arbitrators and provider institutions—recently issued its Protocols for Expeditious, Cost Effective Commercial Arbitration.

Our Precepts and Guidelines and the CCA Protocols, together with notable protocols and procedures promulgated by the American Arbitration Association, the International Centre for Dispute Resolution, JAMS, CPR, the ICC, and other arbitration thought-leaders, set forth numerous approaches and Best Practices to enable arbitrators to be what the American Arbitration Association, drawing on the CCA Protocols, has referred to as the "Muscular Arbitrator."

These comprehensive Best Practices are game changers: Through using arbitrators committed to the administration of their cases consistently with such Best Practices, counsel are empowered to obtain for their clients the type of arbitrations they need and want. Applying these Best Practices, arbitrators are able to deliver on the promise of arbitration. The recent arbitration training program conducted by our Section explored these Best Practices in detail over the course of three days, advancing, I think, the understanding of all participants as to the huge possibilities here.

Mediation

The contemporary state of mediation presents a different set of challenges and opportunities. The overriding reality, well known to those of us who serve as mediators and as counsel in mediations, is that mediation is extraordinarily effective. Quite simply, it is possible, often at an early phase of a dispute, to resolve cases through mediation in a way that is extraordinarily less expensive and often considerably more satisfying than through litigating the matter through the court or arbitral processes.

Those of us who have spent much of our professional lives litigating large commercial, insurance, securities and other disputes understand full well the reality that such litigations involve extremely extensive discovery and motion practice expanding over many years. Even small and medium-size cases in court involve substantial discovery and motion practice and typically take years. Yet many of these cases, even the biggest of them, can be resolved by mediation with incredibly less time, effort, and expense.

The paradox then is that, notwithstanding its extraordinary potential, mediation remains substantially underutilized. Anecdotally, it would seem that across the broad spectrum of disputes in our court system and in arbitration in New York only a small percentage, probably less than 10%, are mediated.

Why is this? The reasons, no doubt, are legion and to some extent speculative. Some suggest the cynical interpretation that the litigators don't want to give up the opportunity to litigate the cases. While there may be some abuses in this regard, my sense is that the reasons are fundamentally more complex and nuanced. Specifically, it seems to me that for most of us who grew up in the litigation system, the belief is innate, essentially part of our litigative DNA, that extensive discovery and motion practice are necessary to best represent our clients. There is a basic sense that this is the standard of care.

There is also a sense still held (I think) by perhaps most litigators that, while the idea of mediation is nice, they're perfectly able to settle their cases, as they have always done, without the aid of some third-party. The subtext is that the usual settlement techniques used from time immemorial in litigation by litigators and judges work just fine—and, inferentially, that mediation does not really add much to the mix.

If these observations are well-founded, it would seem that increasing the use of mediation in New York would in large measure require substantial consciousness-raising whereby parties, in-house counsel and litigators become more aware of such realities as the following: (1) Mediation, effectively conducted, can often unearth the key facts early on that are essential for the parties and their counsel to be able to evaluate a particular dispute; (2) The practice of mediation offers many techniques that are not part of the standard lawyers' and judges' bag of tricks for old-fashioned settlement efforts; and (3) Mediation is able to settle cases at all points in the process, including in the very early phases of the individual dispute. Most significantly, as awareness increases among clients and in-house counsel as to the potential of mediation, it will become—indeed, is in the process of becoming—the standard of care for litigators to try to resolve cases by mediation early on. Clients and their in-house counsel will flock to litigators who actively engage the mediation process.

Conclusion

There is a great need for the more effective administration of commercial arbitrations and for the use of mediation in more disputes. These needs represent a significant opportunity for members of this Section and others involved in the dispute resolution area, whether as counsel or neutrals. This is an area of high public need and service, which our Section is committed to address.

Charles J. Moxley, Jr.

the perils and exposures that mediators face. And in mediation too we investigate international impacts on the practice of mediation with Randall Kiser and Nicole Ginder's examination of the difference in mediator standards between the U.S. and Europe. We close this section with Solomon Ebere's article suitably entitled, "Attorneys' Inability to Predict Case Outcomes: Mediation to the Rescue."

Book Reviews

There is no dearth of new books for the ADR bookshelf and we have a large number of reviews in this issue, including, *A Guide to the ICDR International Arbitration Rules*; *The Evolving International Investment Regime: Expectations, Realities, Options; Lawyering with Planned Early Negotiation; Mediation Ethics*; and *ADR in Business: Practice and Issues Across Countries and Cultures.*

Case Notes

In this issue, Barbara Mentz examines a New York district court case overruling the imposition of sanctions for bad faith mediation and Laura Kaster discusses a holding that negotiation expertise was sufficient to allow Robert Mnookin to act as an expert on damages in patent litigation.

Enjoy this issue.

Edna Sussman and Laura A. Kaster

Dispute Resolution Section News

Commercial Arbitration Training Program

On June 28-30, 2011, the Section conducted a three-day intensive commercial arbitration training program, designed for both new arbitrators and experienced arbitrators wishing to enhance their skills. The program, headed by Charlie Moxley and Edna Sussman with the participation of many members of the Section and arbitration experts from outside the Section, drew an active and engaged audience.

The program was designed to address the concern of many that commercial arbitration has lost its ability to deliver on the arbitration objections of providing a fair process that is faster and less expensive than litigation. The goal of the program was to impart contemporary Best Practices that, if used, can enable arbitrators, with the assistance of counsel, to conduct fast and efficient arbitrations without sacrificing fairness.

The first two days of the program focused on contemporary Best Practices, drawing upon work of the Arbitration Committee, including the Committee's Report on Arbitration Discovery in Domestic Commercial Cases and the Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of International Arbitrations, and also upon the Protocols for Expeditious, Cost-Effective Commercial Arbitration recently released by the College of Commercial Arbitrators.

The remaining portions of the program were devoted to individual areas of importance, including arbitration law, e-discovery, ethics in arbitration, award writing, and practice development. A good time was had by all. We are hoping that this program, which was co-sponsored by the Benjamin N. Cardozo School of Law, will become an annual event.

—Charles J. Moxley, Jr.

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Second Annual Commercial Mediation Training Generates a Fresh Crop of Commercial Mediators

On March 15-17, 2011, the Dispute Resolution Section presented its second annual Commercial Mediation Training, held at Fordham Law School. Once again, past Section President Simeon H. Baum and Steven Hochman conducted the same training that they have given for over a decade for mediators in the Commercial Divisions of the New York Supreme Court. The program received Part 146 certification from the Office of Court Administration and satisfies 24 hours of the 40 hour training requirement for Court Commercial Division panels.

The course, as always, offered a highly interactive format, replete with role plays, exercises and opportunities for experimentation and exploration of mediator skills and the dynamics of mediation. In addition, Messrs. Baum and Hochman presented a PowerPoint-supported lecture and fostered lively discussion on the nature of mediation and its place in the dispute resolution spectrum, negotiation theory and skills, various stages of the mediation process, use of joint session or caucus, generating movement, impasse breaking, mediation ethics, and even tips on building a mediation practice.

The program, which drew 50 participants, received rave reviews. The 1st Department's Administrative Judge for Civil Matters, Hon. Sherry Klein Heitler, kicked off the first day with a strong expression of her support of ADR in the Courts, and appreciation to the participants for their anticipated service. Dan Weitz, Deputy Director, Division of Court Operations and Coordinator, Office of ADR and Court Improvement Programs, and Kevin Egan, Chief Clerk for the Commercial Division, appeared at later sessions to elaborate on the workings of the Commercial Division ADR Panel. Dan also contributed greatly to the Ethics section. The event's success depended on the efforts of Program co-Chairs Evan Spelfogel and Lisa Brogan, and Jennifer Peterson of Resolve Mediation Services, Inc. In addition, 18 experienced mediators contributed mightily to the training by facilitating the role plays and sharing their insights with the full assembly.

—Jennifer Peterson

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Third Party Funding Program

Following up on the article on this hot new subject in our Spring 2011 issue, on June 15, 2011 the Dispute Resolution Section sponsored a conference, cosponsored by the Fordham Law School ADR and Conflict Resolution Program, entitled *Third Party Funding of International Arbitration Claims: The Newest "New New Thing."* The program, the first to address the unique issues that arise for this kind of funding in this context, was a tremendous success with over 100 participants representing a broad cross section of the legal and business community. The session was headed by Edna Sussman with invaluable support in organizing it from Selvyn Seidel and Stephanie Reckler of Fulbrook Management LLC.

Third party funding, already firmly established in Australia and the UK, has become more common in recent years in the U.S. Commercial claims are increasingly being viewed as a commercial asset, with value and use like other assets. Around this new asset class an emerging industry is growing: third party capital investments to buy an interest in merit-based assets, with the capital to be used to prosecute the claim in return for some form of interest in the asset. If successful, the investor gets investment returns related to the recovery. If unsuccessful, the investor takes the loss. Top tier law firms, major multi-national corporations and sovereign states are among those starting to turn

to third party funders to support commercial arbitration claims.

The presentations by many prominent experts in the field, including providers, users, academics and the media, explored how the industry and the law are developing, what funders look for in making their investment decisions, what commercial, professional, and ethical considerations need to be reviewed, why international arbitration may be ripe for expanded use of such investments, and what empirical research reveals and predicts for the future. It is a subject about which we are sure to hear more in the coming years.

—Edna Sussman

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Task Force on New York Law in International Matters

As reported in the introduction to our last issue, arbitration venues around the world from Stockholm, Paris and Vienna to Singapore and Hong Kong are now aggressively marketing themselves as the ideal choice for arbitrations. In the U.S. other cities including Miami and Atlanta are also taking concrete steps to promote themselves as seats of arbitration. In response to this increasing competition, a NYSBA Task Force on New York Law in International Matters was formed in the fall of 2011 by then-NYSBA President Steven Younger and co-chaired by Joe McLaughlin and James Hurlock. Judge Judith Kaye and our chair Edna Sussman served as advisors. The Task Force undertook and issued a comprehensive study that identified the benefits of N.Y. and suggested ways to improve and promote N.Y. The report, adopted by the NYSBA House of Delegates, is available on the NYSBA website at www.nysba.org/InternationalReport.

Our NYSBA president, Vincent Doyle, issued a press release on June 28, 2011 (available on the NYSBA website President's Page under News Releases) calling for the establishment of a permanent center for international arbitration as recommended in the report. Vince also highlighted a few other recommendations drawn from the report:

- Establishing a council of New York international law firms to promote and advance New York law;
- Creating a degree of judicial specialization, such as a designation of specialized courts to deal with international arbitration matters;
- Creating a "rocket docket" in the court system's Commercial Division to expedite international arbitration-related cases;
- Using "judicial referee" decisions by New York judges on issues presented to them by foreign courts, rather than by litigants, that require interpretation of New York law;
- Promoting domestic and overseas continuing legal education programs on drafting international arbitration agreements primarily for transactional lawyers and in-house counsel; and
- Coordinating efforts among groups and individuals who are currently working to advance New York in international matters.

Our DR Section brochure entitled *Choose New York for International Arbitration* explaining the many benefits of selecting New York as the seat of arbitration, which has drawn rave reviews, is included in the report as an appendix. It is available on line at www.nysba.org/DRIntlbrochure.

Our committees look forward to working cooperatively with other NYSBA sections and New York bar associations to implement these and other Task Force recommendations.

—Edna Sussman

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International Mediation Accreditation Comes to New York

For four days in June, 2011, the London-based not-for-profit CEDR (Centre for Effective Dispute Resolution), a leading European ADR service and mediation training organization, came to New York City for its first four-day advanced mediation training and its first training in the U.S. CEDR's CEO, Dr. Karl Mackie, and three leading trainer-mediators ran a course at JAMS New York office for a small group of experienced mediators from New York, New Jersey and Illinois. Indeed, for the eleven participants, there were four faculty, reflecting CEDR's emphasis on role play and individual feedback and evaluation. Each participant had one individual coaching session and two full hours of evaluated mediation, using actors and other participants in the role plays. A total of forty-five minutes of one-on-one feedback was provided over the course. For the CEDR team and participants, the experience was demanding and stimulating, giving real opportunities to learn about both differences and parallels in techniques expected in international mediation, and to be coached by seasoned international mediators who deal with demanding commercial disputes. Those achieving CEDR accreditation (measured against CEDR's competency standards delivered through their training courses conducted in the UK and Europe; in Egypt, Nigeria and South Africa; and in Pakistan, India, Qatar and Hong Kong) have found it an aid in developing international recognition as mediators. The training may also help to provide a model for intensive advanced courses for established mediators.

The highly interactive course was developed over CEDR's 20-year life, enabling participants to analyze the techniques they were already using, develop their intuitive skills, and to measure them against CEDR's competency-based assessment program. CEDR intends to learn from this course and will be back, so track CEDR's programs on www.cedr.com.

—Laura A. Kaster

The Ethical Compass
The Globalized Practice of Law: Part Two
It's a Small World After All: Cultural Competence with Your International Brethren

By Elayne E. Greenberg

Globalization is a "force majeure" that is growing and shaping the practice of law.[1] As increasing numbers of New York lawyers represent clients in transnational and cross-border matters, many New York attorneys are welcoming the enriching perspectives that their international brethren bring to deal making and dispute resolution. However, culturally competent lawyers are also cognizant of how the different and sometimes disparate ethical obligations and values held by their colleagues from civil law countries are influencing and, at times, complicating their dispute resolution efforts. In the previous column, I discussed how our perceptions, communications and preferential modes for resolving conflict are culturally laden choices.

Continuing the discussion, in this column, I discuss how lawyers from civil and common law countries are inculcated with different culturally based ethical values that influence their participation in dispute resolution. First, I highlight how the different sources of law and the prescribed educational qualifications in the common and civil law systems have different cultural underpinnings that are the genesis of variant ethical behavior. Then, I explain how although the ethical codes of civil and common law countries both identify the core ethical concepts of professional independence, confidentiality and conflicts-of-interest, each code interprets these terms with divergent and culturally infused meanings.[2] References to two ethical codes, the ABA Model Code[3] and the Council of Bars and Law Society of Europe Code of Conduct (hereinafter the CCBE Code)[4] frame this comparison. Next, I hypothesize about how these different legal systems might influence an attorney's receptivity and preferences for certain dispute resolution processes. Finally, I conclude with recommendations about how, given these inherent value differences, you as an attorney might achieve cultural symmetry with your international colleagues and create more effective and responsive dispute resolution options.

Allowing a meta perspective on the cultural underpinnings of ethical behavior, note that a lawyer's ethical behavior is, in part, influenced by the source of law in a lawyer's legal system of origin. Civil and common law regimes have fundamentally different sources of law, and each legal regime relies on these sources of law in very different ways. Civil law is codified, with the source of law coming from statutes, administrative law, and custom.[5] In contrast, our common law system is considered an uncodified legal system in which our sources of law emanate from a mix of judicial decisions, customs, and statutes.[6] In the common law system, sources of law are often regarded as flexible tenets that are often interpreted broadly. Following a different perspective, the civil law system reveres and preserves its code by requiring close interpretation to the code's original intent while shunning the concept of judicial precedent. Therefore, whether lawyers regard the law as either malleable and responsive or static and part of a long-held tradition depends on whether their legal system of origin was the common law or civil law.

Another explanation for the cultural divergence is that lawyers from civil and common law regimes receive different legal education, legal training, and legal skill sets that shape lawyers' values and perceptions about ethical behavior and effective advocacy. As lawyers from common law systems, we earn the right to be called a "lawyer" only after completing a graduate-level legal education and passing the bar. We then become part of a "unitary" profession that allows us to practice in a variety of legal areas and roles, including service as a judge.[7]

In direct contrast to our familiar common law approach, lawyers in civil law systems receive their legal education as part of their undergraduate education. Their legal education focuses on the theory of law and does not teach advocacy skills. Instead, aspiring lawyers learn lawyering skills by serving as apprentices after completing their undergraduate training. As part of their undergraduate education, aspiring lawyers decide which career track they will pursue: public prosecutor, government lawyer, judge, advocate, or notary.[8] Once an aspiring lawyer elects a track, it is difficult to change.[9] Again, how different this is from our U.S. legal education, where we are taught the theory and skills necessary to advocate as a lawyer in a diverse spectrum of practice areas. So we see, to the surprise of some, that even the label "lawyer" has different meanings, different statuses, different educational requirements, and different career trajectories depending on whether you are a lawyer from a civil or common law system.

Looking at another difference that shapes ethical behavior, judges from civil law and common law legal regimes have different career trajectories and roles that influence attorneys' advocacy and create different expec-

tations about fairness and justice. In our common law system, service as a "judge" is a high honor awarded to lawyers who have advanced in their legal careers and won the respect of their brethren. As we know all too well, judges who practice in common law regimes have "broad interpretive powers,"[10] and in fact, distinguish themselves by using these broad interpretive powers to re-interpret precedent and create new case law. However, judges in the civil law system are civil servants and do not have the stature accorded to judges in the common law system.[11] Rather, civil law judges are considered to be "expert clerks" taking evidence and rendering decisions based on the existing statutes, void of interpretation or discretion.[12] There is no stare decisis and judges may arrive at different interpretations of the same source of law. The priority is honoring the code. In fact, judges practicing in civil law regimes role seek *verita processuale* or "procedural truth."[13] Of course, lawyers advocate differently in these two distinct legal systems. Unlike their common law counterparts, civil lawyers defer to judges, providing them upfront with all the evidence they need to make a decision without discovery or flamboyant advocacy.

If we consider a legal system's ethical code as a memorialization of the legal culture, the ABA Model Rules and the CCBE are representative ethical codes of the common and civil law regimes, embodying culturally prescribed behaviors for lawyers practicing in each respective legal culture. The idiosyncratic preferences of each legal regime are reflected in the very way the codes are drafted. While the ABA Model Rules speak in terms of rules, the civil law ethic codes[14] refer to more general articulated standards and norms. Although both ethic codes appear to articulate similar core values such as professional independence, confidentiality, and conflict–free representation, the actual interpretation of these words and the order in which they are prioritized are different and require a more nuanced understanding of the legal system and broader culture in which they live.[15]

Professional independence is one ethical value that has divergent meanings in each system. In the U.S., the professional independence of lawyers signifies that the profession is self-regulating instead of regulated by the government.[16] However, professional independence in civil law systems refers to the lawyer's "independence and autonomy from the client."[17] The CCBE Code reinforces that a lawyer's professional independence is central to her role as a member of the legal profession and a free society.[18]

Given these different meanings attached to the concept of professional independence, there is also a different ethical value about how the two legal systems address attorney-client conflicts. In the U.S, the lawyer is considered the client's agent.[19] Thus, it is the client, upon the lawyer's disclosure of the conflict, who has the option to elect to waive the conflict or not.[20] Although the CCBE Code of Conduct cautions against allowing a lawyer to take on a representation when there is a conflict, the client has no ability to waive the conflict.[21] In the civil law system, which values the lawyer's sense of professional independence, the decision rests solely with the lawyer.[22]

Confidentiality is another term that has different meanings depending on whether you are from a civil or common legal system. Both in civil and common law jurisdictions, the ethical rules about confidentiality between attorney and client are similar with narrowly defined exceptions.[23] In the common law ethics regime, confidentiality exists between attorney-client communications.[24] In contrast, in civil law ethics, the concept of "professional secret" is the umbrella term for confidentiality, attorney-client privilege and work product. This concept of professional secret is another example that highlights the importance of professional independence in civil law countries. The professional secret is deemed to be owned by society and cannot be waived by the client. [25]

Confidentiality has a broader reach in civil law countries. According to civil law ethics, confidentiality is extended beyond communications between attorneys and clients, but also attaches to communication between attorney and attorney.[26] In part, this rationale for extending confidentiality to attorney/attorney communications is a continuation of the concept that the lawyer remains professionally independent from influence by his client and others.[27] Interestingly, the CCBE Code requires that in order for attorney/attorney communications to be confidential, the sender must designate the communication as such.[28]

Some ethics scholars and commentators have said that these differences are theoretical and have called for the formulation of a global theory of ethics.[29]

The International Bar Association Code of Ethics is one such attempt to harmonize the divergent ethical codes.[30] However, other ethics commentators, including this author, believe that a true global theory of ethics is aspirational and not readily achievable in any meaningful way. As we have discussed, there remain fundamental ethical differences that will not be eradicated with an international code of ethics.

A more realistic and prudent approach is for attorneys to learn to address these differences by trying to create culturally aligned dispute resolution forums that are respectful of all participants' goals and values.[31] As seasoned practitioners know all too well, negotiation, mediation, and arbitration each present their own cultural challenges. Fortunately, many international arbitrations are administered, and the ADR provider mediates the ongoing culturally driven differences that are inherent in structuring an international arbitration.[32] However, negotiation and mediation are more fluid dispute resolution processes that lack formalistic procedures and structure. Such informality often magnifies the ideological cultural values and distinctions of each lawyer's respective legal

system, as each attorney prefers her way. If you do not have a case manager or administrator, you should initiate a conversation with your international colleague about issues of confidentiality, conflicts and good lawyering. As we have discussed, it is prudent to avoid assumptions about commonality of legal practice.

Even the preference for selection of a dispute resolution forum might be a culturally determined choice. In the U.S., our confusion about why some of our civil law counterparts have not been as receptive to using mediation for resolving international commercial disputes may have a cultural basis. In one glaring example, the terms facilitated settlement, mediation, conciliation, and arbitration are often used interchangeably with different cultures using the same word to refer to totally different processes. However, this confusion actually reflects the cultural preferences for facilitated or directed dispute resolution processes. In another example, one commentator has suggested that the inherent cultural differences between legal systems explain the differences in receptivity to mediation.[33] In common law systems, state-authority and government interventions are viewed as encroachments on civil liberties. However, civil law countries are more likely to respect state and government interventions as a requisite duty to its people to preserve social values and services.[34] Civil law systems are organized by adhering to existing concepts of law, sometimes at the expense of changing to the evolving need of the people it serves. Thus, it is no surprise that the U.S. is more receptive to mediation than civil law countries.

Conclusion

Although we are finding that our world gets smaller and smaller, our globalized legal practice requires us to be more culturally attuned to our international brethren if we are to effectively engage in dispute resolution. Legal ethics are the embodiment of the cultural values of a legal system and its broader society. To fully appreciate the meaning of the ethical differences between us and our colleagues from civil law countries, we have to get beyond the actual written word and understand the context. The limited allocated space of this column forced me to distill a complex and nuanced topic in a few short pages. Yes, there remain many unanswered questions. Optimistically, I believe that awareness of the complexity of this topic, as with any cultural learning, makes for a good beginning.

Endnotes

1. Mary C. Daly, *The Ethical Implication of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-First Century*, 21 Fordham Int'l L.J. 1239, 1240 (1997).
2. *See generally* Geoffrey C. Hazard, Jr. & Angelo Dondi, Legal Ethics: A Comparative Study, Stanford Univ. Press (2004); Maya Goldstein Bolocan, *Professional Legal Ethics: A Comparative Perspective* 9 (American Bar Ass'n, CEELI Concept Paper, 2002).
3. Model Code of Prof'l Responsibility (2002).
4. Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers (Council of Bars and Law Societies of Europe 2010). The CCBE Code of Conduct offers global harmonization of the ethics rules of states of the European Union and European Economic Area. The purpose is to facilitate transnational legal practice when state ethical rules compete.
5. *See* John Henry Merryman & Rogelio Pérez-Perdomo, The Civil Law Tradition 24 (3d ed. 2007).
6. *See id.* at 26.
7. *See id.* at 102.
8. *See id.*; *see* also Maya Goldstein Bolocan, *Professional Legal Ethics: A Comparative Perspective* 4 (American Bar Ass'n, CEELI Concept Paper, 2002).
9. *See also* Bolocan, *supra* note 8, at 4.
10. *Id.* at 34.
11. *See id.* at 35.
12. *Id.* at 36.
13. Hazard & Dondi, *supra* note 2, at 76.
14. *See* Bolocan, *supra* note 8, at 9.
15. *See id*.
16. *See id.* at 10.
17. *See id.* at 11.
18. *See* Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers Principle (a) (Council of Bars and Law Societies of Europe 2010), the independence of the lawyer, and the freedom of the lawyer to pursue the client's case.
19. *See* Model Code of Prof'l Responsibility R. 1.2 (2002).
20. *See id.* R. 1.7-1.9.
21. Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers 3.2 (Council of Bars and Law Societies of Europe 2010).
22. *See* Bolocan, *supra* note 8, at 43.
23. *See id.* at 35.
24. ABA Model Code Rule 1.6.
25. Mullerat, Ramon, *For A Global Code of Ethics*, Chicago Daily Law Bulletin, July 7, 2010 (Volume 156, No. 131).
26. Hazard & Dondi, *supra* note 2, at 211.
27. *See* Bolocan, *supra* note 8, at 36.
28. *See id.* at 36.
29. *See* Andrew Boon & John Flood, *Globalization of Professional Ethics? The Significance of Lawyers' International Codes of Conduct*, 2 Legal Ethics 29 (1999); Daly, *supra* note 1; Mullerat, *supra* note 25.
30. *See* International Code of Ethics (Int'l Bar Ass'n 1988).
31. Julia Ann Gold, *ADR Through a Cultural Lens: How Cultural Values Shape Our Disputing Processes*, 2005 J. Disp. Resol. 289 (2005).
32. *See, e.g.*, the International Chamber of Commerce in Paris.
33. See Nadja Alexander, *What's Law Got to Do With It? Mapping Modern Mediation Movements in Civil and Common Law Jurisdiction*, 13 Bond L. Rev. 335, 345 (2002).
34. *See id.* at 355.

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Developments in Supreme Court Jurisprudence: The Court's *AT&T* Decision and the Second Circuit's Treatment of *Stolt-Nielsen*

By Sherman Kahn

After deciding four arbitration cases during the previous term, the United States Supreme Court decided only one case regarding arbitration during its 2010 term (commencing in October 2010 and extending until June 2011)—but it is a case with major implications for both arbitration and litigation practice. In addition, the Second Circuit has decided a case that takes a perhaps unexpected approach to the Supreme Court's decision last year in *Stolt-Nielsen S.A. v. Animalfeeds International Corp.*[1] ("*Stolt-Nielsen*"). Both decisions are discussed below.

A. *AT&T v. Concepcion*

The Supreme Court's sole arbitration decision this year was rendered in *AT&T v. Concepcion*,[2] which reversed on Federal Arbitration Act preemption grounds a Ninth Circuit decision upholding California's rule that class action waivers in certain consumer adhesion contracts were invalid as applied to contracts containing arbitration clauses.[3] *AT&T* builds on the Supreme Court's decision the previous term in *Stolt-Nielsen* holding that an arbitration agreement that was silent on class arbitration could not be interpreted to authorize class arbitration to create an environment in which consumer class actions may be very difficult to bring in arbitration.[4]

In *AT&T*, the named plaintiffs Vincent and Liza Concepcion had entered a mobile phone agreement with AT&T Mobility LLC ("AT&T").[5] The Concepcions' agreement with AT&T ("the Agreement") included an arbitration provision which provided for arbitration of all disputes between the parties, but required that all claims in arbitration be brought in the parties' individual capacity and not "as a plaintiff or class member in any purported class or representative proceeding."[6]

The Agreement provided that AT&T was authorized to make unilateral amendments and AT&T amended the agreement, including the arbitration provision, on several occasions.[7] As finally revised, the arbitration provision in the agreement had been amended to include a pre-arbitration demand procedure and a variety of procedural protections for the consumer party to the agreement including provisions requiring that AT&T pay all costs for non-frivolous claims; that the arbitration must take place in the county in which the customer is billed; that for claims of $10,000 or less the customer may choose whether the arbitration is conducted in person, by telephone or only by submissions; that either party may bring a claim in small claims court in lieu of arbitration; and that the arbitrator may award any form of individual relief.[8] The agreement also provided that AT&T would not be entitled to seek reimbursement of attorney's fees and that if the customer received an arbitration award greater than AT&T's last written settlement offer, AT&T would pay a $7,500 minimum recovery and twice the claimant's attorney's fees.[9]

Notwithstanding the arbitration provision, the Concepcions filed a complaint against AT&T in U.S. District Court alleging that AT&T had promised the Concepcions free phones but in fact had charged them sales tax based on the phones' retail value.[10] The Concepcions' complaint was later consolidated with a putative class action claiming that AT&T's advertising regarding free phones was deceptive.[11]

AT&T moved to compel arbitration. The Concepcions opposed the motion on the ground that the class action waiver in the Agreement was unconscionable and unlawfully exculpatory under California Law. The district court ruled in favor of the Concepcions, finding that, although the procedural protections that AT&T had put into place were helpful, the class action waiver remained unconscionable under California Law.[12] The district court relied on a rule articulated in the California Supreme Court's decision in *Discover Bank v. Superior Court*[13] ("the *Discover Bank* rule").[14]

The Ninth Circuit affirmed the district court ruling on the ground that the class action waiver provision was unconscionable under the *Discover Bank* rule.[15] The Ninth Circuit also rejected an argument by AT&T that California's *Discover Bank* rule was preempted by the Federal Arbitration Act ("FAA"), holding that the rule announced in *Discover Bank* was a refinement of the unconscionability analysis applicable to contracts generally in California.[16] The Ninth Circuit found no preemption in light of FAA § 2's provision that arbitration clauses "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[17] Because California's unconscionability analysis applied to all contracts and not just contracts to arbitrate, the Ninth Circuit reasoned that the FAA did not preempt the *Discover Bank* rule.

The Ninth Circuit also examined whether the FAA impliedly preempted California unconscionability law by interfering with the accomplishment and execution of the full purposes and objectives of Congress in enacting the FAA.[18] The Ninth Circuit identified the purposes of the FAA as reversing judicial hostility to arbitration

agreements by putting arbitration agreements on an equal footing with other contracts and promoting the efficient and expeditious resolution of claims.[19] The Ninth Circuit held that the *Discover Bank* rule did not interfere with arbitration because it "placed arbitration agreement class action waivers on the *exact same footing* as ordinary contracts."[20] The Ninth Circuit also rejected AT&T's arguments that allowing class arbitration would interfere with the promotion of efficient and expeditious resolution of claims in arbitration.[21]

"The AT&T majority's focus on efficiency as not just one goal of the FAA but as the 'overarching goal' of the FAA may signal a new approach at the Supreme Court to arbitration."

The Supreme Court reversed the Ninth Circuit's decision and remanded, holding that the FAA preempts California's unconscionability law as applied to class action waivers.[22] *AT&T* was a five/four decision in which the justices were divided along ideological lines.[23] The majority opinion by Justice Scalia acknowledges that arbitration agreements can be invalidated by generally applicable contract defenses, such as fraud, duress or unconscionability.[24] However, the majority opinion frames the question before the Court as whether California's *Discover Bank* rule, even if founded in generally applicable principles of California unconscionability law, applied those principles in a fashion that disfavored arbitration.[25]

In answering this question in the affirmative, the majority opinion emphasizes the efficiency goals of the FAA as the primary goal of the statute:

> The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.[26]

After explaining that parties are generally free to determine the scope of arbitrations and applicable procedures, the opinion goes on to state "[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute."[27]

The Court went on to conclude that California's *Discover Bank* rule interferes with arbitration because it effectively bans class action waivers in arbitration.[28] The majority opinion also found considerable fault with class arbitration, finding that class arbitration as the result of an unconscionability rule would be inconsistent with the FAA;[29] that class arbitration would be less efficient than multiple individual arbitrations and would require undue procedural formality;[30] that arbitrators are not well suited to make class certification decisions;[31] and that class arbitration "greatly increases risk to defendants."[32]

The *AT& T* Court's holding was that California's ban on class action waivers in certain consumer adhesion contract arbitration clauses was invalid. However, perhaps the most interesting aspect of the opinion was the majority's new focus on efficiency as the "overarching goal" of the FAA. The *AT&T* majority's focus on efficiency as not just one goal of the FAA but as the "overarching goal" of the FAA may signal a new approach at the Supreme Court to arbitration. For example, perhaps there is an argument to be made that AT&T's focus on efficiency gives arbitrators more "muscle" in resisting attempts by the parties to impose excessive discovery. Likewise, AT&T might be invoked to support resolution of more arbitration issues by dispositive motion.

Justice Breyer's dissent, joined by three justices, argues against the interpretation that efficiency is at the heart of the FAA:

> And this Court has acknowledged that parties may enter into arbitration agreements in order to expedite the resolution of disputes.… But we have also cautioned against thinking that Congress' primary objective was to guarantee these particular procedural advantages.[33]

Particularly in light of the political elements of the issues in *AT&T*, it is not entirely clear whether the majority's focus on efficiency will mark a lasting change in the Supreme Court's approach to arbitration issues. Nonetheless, the majority's emphasis on efficiency may lead to interesting results unrelated to *AT&T*'s specific holding regarding class arbitration going forward.

The Supreme Court vacated and remanded four cases for further consideration in light of its ruling in *AT&T*.[34] It is possible that the lower courts' resolution of the issues raised by one or more of these cases might provide additional insight into the continuing effect of the Supreme Court's decision in *AT&T*.[35]

B. Developments at the Second Circuit after *Stolt-Nielsen*

When the Supreme Court decided *Stolt-Nielsen*, many thought that the decision eliminated class arbitration except where the arbitration clause specifically authorizes the procedure. However, in a decision released in July 2011, the Second Circuit has analyzed the *Stolt-Nielsen* decision much more narrowly. The case, *Jock v. Sterling Jewelers Inc.*,[36] overturned a decision of the Southern District of

New York that had vacated an arbitration award on the ground that the arbitrator had exceeded her authority in light of *Stolt-Nielsen* by finding that the arbitration agreement did not preclude class arbitration.[37]

Jock arose out of an employment discrimination claim.[38] The employees were parties to an employment contract that required a three-step alternative dispute resolution process culminating in arbitration.[39] After receiving a favorable decision from the EEOC, the claimants in *Jock* filed a class action in the Southern District of New York alleging claims under Title VII and other statutes and also filed a class arbitration complaint with the American Arbitration Association making the same allegations.[40] The district court granted a motion by the plaintiffs, over the employer's objection, to refer the matter to arbitration and to stay the litigation, after which the parties submitted to the arbitrator the question of whether their agreement permitted class arbitration.[41]

The arbitrator found in favor of the plaintiffs and held that the arbitration agreement "cannot be construed to prohibit class arbitration."[42] The arbitration clause included, after listing a set of civil rights and employment statutes that would be subject to arbitration, the following language:

> The arbitrator shall have the power to award any types of legal or equitable relief that would be available in a court of competent jurisdiction including, but not limited to, the costs of arbitration, attorney fees and punitive damages for causes of action when such damages are available under law.[43]

The arbitrator determined, based on Ohio law, that because the contract had no express prohibition on class claims and "indeed, there is no mention of class claims" she would not read into the agreement an intent to prohibit class claims.[44] The arbitrator also noted that the employer had not changed the language of the contract to prohibit class arbitration in light of several previous court decisions permitting class claims absent an express prohibition and noted the language quoted above giving the arbitrator the right to award any type of relief available in court.[45]

The employer moved to vacate the arbitration award.[46] The district court initially denied the motion to vacate the award and the employer appealed.[47] However, after the Supreme Court's decision in *Stolt-Nielsen*, the employer moved for reconsideration under Rule 60(b) of the Federal Rules of Civil Procedure; the appeal was stayed and the district court decided that, if jurisdiction was restored to it, it would reconsider its order and vacate the arbitrator's award in light of *Stolt-Nielsen.*[48] The Second Circuit remanded the appeal and the district court reversed its decision, after which the plaintiffs appealed.[49]

On its face *Jock* might seem like it is on all fours with *Stolt-Nielsen.* The arbitrator found that the arbitration provision did not prohibit class arbitration but did not specifically allow it either and that "there is no mention of class claims." The arbitrator arguably found that the agreement was "silent" as to class arbitration and ruled in favor of class arbitration anyway. The Second Circuit did not see it that way. The Second Circuit analyzed "silence," as discussed in *Stolt-Nielsen*, significantly more narrowly.[50]

In *Jock,* the Second Circuit read *Stolt-Nielsen* to hold that the agreement at issue was silent as to class arbitration in the sense that the parties there agreed that they had not reached *any agreement* as to class arbitration.[51] In other words the parties in *Stolt-Nielsen* had agreed that there was neither express nor implicit agreement to submit to class arbitration.[52] The reason the arbitrators in *Stolt-Nielsen* had exceeded their powers, according to the Second Circuit's interpretation, was not because they had imposed class arbitration where the agreement was silent but because they had done so on public policy grounds.[53] According to the Second Circuit:

> *Stolt-Nielsen*, on which the district court relied, did not create a bright-line rule requiring that arbitration agreements can only be construed to permit class arbitration where they contain express provisions permitting class arbitration.[54]

After setting forth this analysis of *Stolt-Nielsen,* the Second Circuit examined the district court's decision to vacate the arbitration award in *Jock* under FAA Section 10(a)(4) on the ground that the arbitrator had exceeded her powers.[55] The Second Circuit concluded that the district court had erred in setting aside the award by focusing on whether the arbitrator had correctly interpreted the arbitration agreement rather than whether the arbitrator exceeded her authority.[56]

The Second Circuit's decision rested on the well-established rule that FAA Section 10(a)(4) allows only a very narrow inquiry into whether the arbitrator was authorized to adjudicate the challenged issue—*i.e.* "it is not for the district court to decide whether the arbitrator 'got it right' when the question has been properly submitted to the arbitrator and neither the law nor the agreement categorically bar her from deciding that issue."[57] Because, unlike the parties in *Stolt-Nielsen,* the parties in *Jock disagreed* about whether class arbitration was authorized or not and submitted that issue to the arbitrator, it was in the scope of the arbitrator's authority to decide that issue.[58]

According to the Second Circuit, where the arbitration agreement contains what is argued to be an implicit agreement to submit to class arbitration, the arbitrator must look to state law principles of contract interpretation to decide whether the parties had the intent to submit to class arbitration.[59] As the arbitrator had based her award on the terms of the agreement and Ohio law, the Second

Circuit found her to be within her authority to find that class arbitration was authorized by the agreement.[60]

The interpretation announced in *Jock* renders *Stolt-Nielsen* very narrow indeed. It is unlikely that there will be many more occasions when the parties agree that a contract does not, either expressly or impliedly, authorize class arbitration, but submit the issue to the arbitrator anyway.[61] The situation found in *Jock*, where the parties disagree about the interpretation of the contract is likely to be significantly more prevalent. The future will tell whether the Second Circuit's approach to *Stolt-Nielsen* holds up or is adopted by other courts.

"The interpretation announced in Jock *renders* Stolt-Nielsen *very narrow indeed."*

C. The Coming Supreme Court Term

It appears that in the coming term, the Supreme Court will continue its current focus on consumer arbitration. The Supreme Court granted certiorari in *Greenwood v. Compucredit Corp*.[62] In *Greenwood*, the Ninth Circuit had held that an arbitration clause in a credit card agreement was invalid under the Credit Repair Organizations Act[63] ("CROA") on the ground that the CROA voids any waiver of a consumer's right to sue in court for violations of the CROA. The Supreme Court granted certiorari on the question "[w]hether claims arising under the [CROA], are subject to arbitration pursuant to a valid arbitration agreement." It will be interesting to see how the Supreme Court approaches this issue.[64]

Endnotes

1. 130 S. Ct. 1758 (2010).
2. 131 S. Ct. 1740 (2011).
3. *AT&T,* 131 S. Ct. at 1753.
4. *See*, however, Section B *infra*, discussing the Second Circuit's very narrow interpretation of *Stolt-Nielsen.*
5. *AT&T,* 131 S. Ct. at 1744.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *AT&T,* 131 S. Ct. at 1744-45.
13. 36 Cal. 4th 148 (Cal. 2005).
14. *AT&T,* 131 S. Ct. at 1745.
15. *Laster v. AT&T Mobility LLC,* 584 F.3d 849, 852 (9th Cir. 2009), *rev'd and remanded by AT&T v. Concepcion,* 131 S. Ct. 1740 (2011).
16. *Laster,* 584 F.3d at 857.
17. *Id.*
18. *Laster,* 584 F.3d at 857-58.
19. *Laster,* 584 F.3d at 857.
20. *Id. (Emphasis in original.)*
21. *Laster,* 584 F.3d at 858. The Ninth Circuit did not specifically articulate its response to AT&T's efficiency arguments, instead relying on a prior Ninth Circuit decision, *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976 (9th Cir. 2007). In *Shroyer,* the Ninth Circuit held that, rather than reducing the efficiency of arbitration, class arbitration would increase efficiency by lessening the number of individual claims needing to be arbitrated. 498 F.3d, at 991-92 ("There is no reason to believe that the principal consideration of judicial economy that underlies the class action mechanism in Rule 23 would not operate similarly in the context of class arbitration.")
22. *AT&T,* 131 S. Ct. at 1753.
23. Justice Scalia delivered the opinion of the Court, joined by Chief Justice Roberts, Justice Alito, Justice Thomas and Justice Kennedy. Justice Thomas filed a concurring opinion. Justices Breyer, Ginsburg, Sotomayor and Kagan dissented.
24. *AT&T,* 131 S. Ct. at 1746. Justice Thomas' concurrence suggests instead that FAA §2 only allows attack on *formation* of the arbitration agreement such as by proving fraud or duress and that generally applicable contract principles not going to formation should not be used to invalidate arbitration clauses. *AT&T*, 131 S. Ct. at 1753 (Thomas J. *concurring*).
25. *AT&T,* 131 S. Ct. at 1746-47.
26. *AT&T,* 131 S. Ct. at 1748.
27. *AT&T,* 131 S. Ct. at 1749.
28. *AT&T,* 131 S. Ct. at 1750. The Court reasoned that all consumer contracts these days are adhesive; that even several thousand dollars of damages are small enough to preclude individual actions; and that the *Discover Bank* requirement that the consumer allege fraud is toothless because it requires only an allegation. *Id.*
29. *AT&T,* 131 S. Ct. at 1750-51. The Court commented based on *Stolt-Nielsen* that class-arbitration would not be appropriate based upon an invalid class action waiver as such a class action would be non-consensual. *Id.*
30. *AT&T,* 131 S. Ct. at 1751.
31. *AT&T,* 131 S. Ct. at 1750-51.
32. *AT&T,* 131 S. Ct. at 1752. The majority opinion stated that class arbitration may magnify risks of error leading to "in terrorem" settlements. *Id.* It is not entirely clear why, to the extent this problem exists, it is a feature of class arbitration and not of class actions generally.
33. *AT&T,* 131 S. Ct. at 1758 (Breyer J. *dissenting*). The dissent argues that the *Discover Bank* rule is, consistent with the Ninth Circuit's holding reversed by the majority opinion, an application of a general provision of California law without specific reference to arbitration and that therefore the ban on class action waivers should be upheld. *AT&T,* 131 S. Ct. at 1760-62.
34. *Fensterstock v. Education Finance Partners,* 611 F.3d 124 (2d Cir. 2010), *vacated and remanded by Affiliated Computer Services v. Fensterstock,* No. 10-987, 2011 U.S. LEXIS 4434 (2011) (invalidating class action waiver in arbitration clause under California law based on *Discover Bank* rule); *Herron v. Century BMW,* 693 S.E.2d 394 (S.C. 2010), *vacated and remanded by Sonic Auto, Inc. v. Watts,* No. 10-315, 2011 U.S. LEXIS (2011) (holding class action waiver in arbitration clause invalid based on South Carolina public policy in light of South Carolina statute making class actions non-waivable against auto-dealers); *Litman v. Cellco Partnership,* 381 Fed. Appx. 140 (3d Cir. 2010), *vacated and remanded by* No. 10-551, 2011 U.S. LEXIS 3411 (holding class arbitration waiver invalid under New Jersey law); *Brewer v. Missouri Title Loans, Inc.*, 323 S.W.3d 18 (Mo. 2010), *vacated and remanded by* No. 10-1027, 2011 US LEXIS 3378 (2011) (referring case to class action in court on finding that class action waiver was unconscionable and class arbitration impermissible due to *Stolt-Nielsen*).

35. While the current Congress may act on the issue, it is likely that the *AT&T* decision will lead to renewed efforts in Congress to enact a version of the Arbitration Fairness Act or other legislation restricting arbitration in consumer adhesion contracts. Indeed, Senators Franken (Minnesota), Blumenthal (Connecticut) and Representative Hank Johnson (Georgia) reintroduced the Arbitration Fairness Act legislation on May 17, 2011 (H.R. 1873, S. 987) and issued a press release stating that the reintroduction of the legislation was in direct response to the *AT&T* decision.
36. 2011 U.S. App. LEXIS 13633 (2d Cir. 2011).
37. *Jock*, 2011 U.S. App. LEXIS at *2-*3.
38. *Jock*, 2011 U.S. App. LEXIS at *3-*4.
39. *Jock*, 2011 U.S. App. LEXIS at *4-*5.
40. *Id.*
41. *Jock*, 2011 U.S. App. LEXIS at *5-*6.
42. *Jock*, 2011 U.S. App. LEXIS at *6.
43. *Jock*, 2011 U.S. App. LEXIS at *7.
44. *Jock*, 2011 U.S. App. LEXIS at *7-*8.
45. *Jock*, 2011 U.S. App. LEXIS at *8-*9.
46. *Jock*, 2011 U.S. App. LEXIS at *9.
47. *Jock*, 2011 U.S. App. LEXIS at *10.
48. *Jock*, 2011 U.S. App. LEXIS at *11-*12.
49. *Jock*, 2011 U.S. App. LEXIS at *12.
50. *Jock,* 2011 U.S. App. LEXIS at *14-*20.
51. *Jock,* 2011 U.S. App. LEXIS at *15.
52. *Jock,* 2011 U.S. App. LEXIS at *17.
53. *Jock,* 2011 U.S. App. LEXIS at *14-*15.
54. *Jock,* 2011 U.S. App. LEXIS at *30.
55. *Jock,* 2011 U.S. App. LEXIS at *20-*33.
56. *Jock,* 2011 U.S. App. LEXIS at *27-*28.
57. *Jock,* 2011 U.S. App. LEXIS at *29.
58. *Jock,* 2011 U.S. App. LEXIS at *29-*30.
59. *Jock,* 2011 U.S. App. LEXIS at *36.
60. *Jock,* 2011 U.S. App. LEXIS at *36-37. The Second Circuit dismissed the employer's arguments that the arbitrator got it backwards by finding that the agreement did not prohibit class arbitration rather than that it authorized it, finding the relevant question to be a determination under state law and contract interpretation of the parties' intent. *Jock,* 2011 U.S. App. LEXIS at *33-*35.
61. The Supreme Court does not answer in *Stolt-Nielsen* the question of why the parties' agreement to submit the class arbitration issue to the arbitrators did not itself act as a separate agreement providing the arbitrators with the authority to decide the class arbitration question.
62. 615 F.3d 1204 (9th Cir. 2010), *cert. granted*, 2011 U.S. LEXIS 3404 (2011). Morrison & Foerster, with which the author is Of Counsel, was co-counsel on the petition for certiorari and represents one of the petitioners in the case.
63. 15 U.S.C. §§ 1679 *et seq*.
64. The Supreme Court had also granted certiorari in an additional arbitration case, *Citibank v. Stok & Assoc.*, 387 Fed. Appx. 921 (11th Cir. 2010), *cert. granted,* 131 S. Ct. 1556 (2011), *cert dismissed,* 2011 U.S. LEXIS 4179 (2011). This case, which raised the issue of whether a party who chooses litigation waives the right to demand arbitration, or whether the party still retains that right absent prejudice to the other party, was dismissed after the parties settled the matter.

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Restrictions on Obtaining Testimony and Documents from Non-Parties Under the Federal Arbitration Act

By Kathleen A. Roberts

Recent interpretations of the Federal Arbitration Act (FAA) impose significant restrictions on the ability of litigants to obtain testimony and documents from non-parties in arbitrations governed by the FAA. These include restrictions on the ability to obtain documents and testimony prior to the arbitration hearing, and territorial limitations on the reach of arbitral subpoenas for pre-hearing testimony and/or documents and for appearance at the arbitration hearing itself. Differing interpretations of the FAA among a number of circuits, and the absence of case law in many circuits, create a virtual minefield for parties and arbitrators and for non-parties responding to arbitral subpoenas. This article summarizes the existing case law and discusses the practical issues posed by current interpretations of the FAA.

Limitations on Discovery

Section 7 of the FAA provides in relevant part that "the arbitrators * * * or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case."[1] The FAA is silent, however, regarding the arbitrator's power to compel testimony or production of documents prior to an arbitration hearing.

A number of recent federal court decisions have addressed this issue, resulting in the application of different rules and much uncertainty, depending on the federal circuit in which the arbitration takes place or in which the non-party is located.

The approach to non-party discovery taken by the Second and Third Circuits is the most restrictive. In *Hay Group, Inc. v. E.B.S. Acquisition Corp.*,[2] the Third Circuit held that the FAA does not grant an arbitrator the authority to order non-parties to appear at depositions, or the authority to demand that non-parties provide the litigating parties with documents in pre-hearing discovery. The court found that "[b]y its own terms, the FAA's subpoena authority is defined as the power of the arbitration panel to compel non-parties to appear 'before them;' that is, to compel testimony by non-parties at the arbitration hearing."[3]

Noting that a "hallmark" of arbitration is a limited discovery process, the court observed that "[t]he requirement that document production be made at an actual hearing may, in the long run, discourage the issuance of large-scale subpoenas upon non-parties. This is so because parties that consider obtaining such a subpoena will be forced to consider whether the documents are important enough to justify the time, money, and effort that the subpoenaing parties will be required to expend if an actual appearance before an arbitrator is needed. Under a system of pre-hearing document production, by contrast, there is less incentive to limit the scope of discovery and more incentive to engage in fishing expeditions that undermine some of the advantages of the supposedly shorter and cheaper system of arbitration."[4]

In a concurring opinion, Judge Chertoff observed that arbitrators are not "powerless to require advance production of documents when necessary to allow fair and efficient proceedings," because Section 7 permits the arbitrators to compel a third party witness to appear with documents before a single arbitrator, who can then adjourn the proceedings. Judge Chertoff noted that "[i]n many instances, of course, the inconvenience of making such a personal appearance may well prompt the witness to deliver the documents and waive presence."[5]

Judge Chertoff further observed:

> To be sure, this procedure requires the arbitrators to decide that they are prepared to suffer some inconvenience of their own in order to mandate what is, in reality, an advance production of documents. But that is not necessarily a bad thing, since it will induce the arbitrators and parties to weigh whether advance production is really needed. And the availability of this procedure within the existing statutory language should satisfy the desire that there be some mechanism "to compel pre-arbitration discovery upon a showing of special need or hardship." *Comsat Corp. v. Nat'l. Sci. Found.*, 190 F.3d 269, 276 (4th Cir. 1999).[6]

The Second Circuit adopted the *Hay* approach and its reasoning in *Life Receivables Trust v. Syndicate 102*,[7] holding that Section 7 "does not enable arbitrators to issue pre-hearing document subpoenas to entities not parties to the arbitration proceeding." In accordance with its prior decision in *Stolt-Nielsen Transp. Group, Inc. v. Celanese AG*,[8] the Second Circuit approved the procedure described by Judge Chertoff in *Hay*. The *Stolt-Nielsen* court held that Section 7 "unambiguously authorizes arbitrators to summon non-party witnesses to give testimony and provide material evidence before an arbitration panel," and that "'[n]othing in the language of the FAA limits the point in time in the arbitration process when [the subpoena] power can be invoked or says that the arbitrators may only invoke this power under section 7 at the time of the trial-like final hearing'."[9] The *Stolt-Nielsen* court further noted that Sec-

tion 7's reference to hearings "before [the arbitrators] *or any of them*" suggests that the provision authorizes the use of subpoenas at preliminary proceedings even in front of a single arbitrator, before the full panel "hears the more central issues."[10]

The Fourth Circuit has adopted an interpretation of the FAA similar to that of the Second and Third Circuits, but has held that an arbitrator may compel a non-party to provide pre-hearing discovery "under unusual circumstances" and upon "a showing of special need or hardship."[11]

In contrast to the Second, Third and Fourth Circuits, a number of courts in other circuits have found that the FAA permits pre-hearing document discovery, and may permit depositions of non-parties.

The analysis supporting pre-hearing document discovery is typified by the Eighth Circuit's decision in *Security. Life Ins. Co. of Am. v. Duncanson & Holt*, in which the court concluded that "[a]lthough the efficient resolution of disputes through arbitration necessarily entails a limited discovery process, we believe this interest in efficiency is furthered by permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing."[12] The Eighth Circuit and other courts adopting this approach have found that although the statute by its terms permits arbitrators to compel non-parties only to "attend before them," the power to compel production of documents at a hearing implies the lesser power to require the documents to be produced in advance of the hearing. Other courts have also pointed out that an arbitrator's power to compel documents places little additional burden on the non-party, because the FAA explicitly grants the arbitrator authority to demand documents at the hearing, and the documents need be produced only once.[13]

A number of courts that permit pre-hearing document discovery draw a sharp distinction between pre-hearing document discovery and depositions, noting that "the power to require pre-hearing appearances by witnesses in effect would increase the burden on non-parties, by creating the potential to require them to appear *twice,* both for discovery depositions and then for testimony at the hearing itself."[14] Accordingly, the "power to compel a deposition cannot be seen as simply an implied power to control the timing, in the interests of efficiency, of a production the arbitrators concededly have the power to order, but constitutes an additional power not granted by the statute."[15]

There is no circuit court authority on these issues outside the Second, Third, Fourth, Sixth and Eighth Circuits.

Territorial Limitations

Even where the hurdles of statutory authority for pre-hearing discovery can be overcome, counsel may face significant territorial limitations on the subpoena power of the arbitration tribunal that do not exist in federal litigation.

FAA Section 7 states that an arbitrator's summons "shall be served in the same manner as subpoenas to appear and testify before the court." Section 7 also provides that the district court in the district in which the arbitrators are sitting may enforce such a summons by compelling attendance or punishing a non-attendee for contempt "in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States."

Service of subpoenas to appear before the federal courts and enforcement of those subpoenas is governed by Federal Rule of Civil Procedure 45. Rule 45(b)(2) provides, with limited exceptions not applicable here, that a subpoena may be

> served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, or inspection specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, or inspection specified in the subpoena.[16]

Accordingly, a non-party cannot be subpoenaed for trial outside the applicable territorial limit.[17] However, the federal rules do provide a procedure for obtaining the testimony and documents of non-parties outside the territorial limits. Under the familiar provisions of Federal Rule 45(a)(3)(B), an attorney authorized to practice in the court in which a trial is being held may issue and sign a subpoena on behalf of a court for a district in which a deposition or production is to take place. The subpoena has the case name and number of the case pending before the court where the trial is to take place, but is enforced by the district court for the district in which the deposition is to take place.

A recent decision of the Second Circuit has effectively held that Rule 45(a)(3)(B) procedures for obtaining evidence from non-parties located outside the territorial limits of subpoena power are unavailable in arbitration. In *Dynegy Midstream Servs. v. Trammochem*,[18] the Court of Appeals held that the district court in New York lacked jurisdiction to enforce a subpoena issued by a New York arbitration panel requiring production of documents in Texas. The court held that the Federal Rules governing subpoenas to which Section 7 of the FAA refers "do not contemplate nationwide service of process or enforcement."[19] In addition, because Section 7 "explicitly confers the authority to issue subpoenas only upon the arbitrators," neither the parties to an arbitration nor their counsel may employ this provision to subpoena documents or witnesses.[20] Most importantly, the court expressly *rejected* the reasoning of *Amgen Inc. v. Kidney Center of Del. County, Ltd.*,[21] where the district court

enforced an arbitration subpoena against a distant non-party by permitting an attorney for a party to the arbitration to issue a subpoena that would be enforced by the district court in the district where the non-party resided, as provided in Fed. R. Civ. P. 45(a)(3)(B).[22]

In contrast to the Second Circuit, the Eighth Circuit held in *Security Life Ins. Co. of Am. v. Duncanson & Holt* that an arbitrator's subpoena for the production of documents by a non-party does not require compliance with Rule 45(b)(2)'s territorial limit because "the burden of producing documents need not increase appreciably with an increase in the distance those documents must travel."[23]

Faced with decisions imposing territorial limitations on the ability to obtain testimony and documents from non-parties, some practitioners and arbitrators have adopted the practice of convening a pre-merits hearing before the arbitral panel or a member of the panel where the non-party is located. This practice is arguably supported by the language of Section 7 that permits arbitrators to summon a person to appear "before them or any of them," without expressly limiting the appearance to the arbitral forum, and by the pre-merits hearing procedure authorized by the Second and Third Circuits in *Hay* and *Stolt Nielsen*.

At least one court has upheld a subpoena requiring a non-party to appear and testify before a relocated tribunal. In *In re National Financial Partners Corp. and William Corry*,[24] a district judge in the Eastern District of Pennsylvania, relying on *Hay*, denied a motion to quash a subpoena issued in connection with a Pennsylvania arbitration, calling for a non-party to appear before the arbitrator for a pre-merits hearing in Florida.[25] However, in a recent case from the Northern District of Illinois, the judge refused to enforce subpoenas issued by an arbitration panel in connection with an arbitration being conducted in Chicago that called for oral testimony and the production of records before a member of the arbitration panel at a hearing in San Francisco, California.[26] The court based its decision on the provisions of Fed. R. Civ. P. 45(a)(2)A) and (b)(2), and agreed with the holding of the Second Circuit in *Dynegy*.[27] In another case addressing a variant of this practice, an Indiana appellate court refused to enforce a subpoena issued by the arbitral panel for an arbitration to be conducted in New York City that required a non-party to appear at a preliminary hearing in Indiana before one of the panel members and to produce certain business records.[28] The non-party refused to comply and the party seeking the documents asked an Indiana trial court to enforce the subpoena based upon an Indiana law permitting a court to order testimony or production of documents to assist tribunals and litigants outside the state. The trial court ordered the non-party to comply, but the Indiana Court of Appeal reversed, holding that the state law was preempted by the FAA, and that the subpoena was improper based upon the court's reading of the decisions in *Hay*, *Life Receivables* and *Dynegy*.

State Court Alternatives?

In contrast to the FAA, some state statutes expressly permit non-party discovery in arbitration, including those states, such as New Jersey, that have adopted the Revised Uniform Arbitration Act.[29] In New York, an arbitrator or attorney of record to an arbitration is authorized to issue subpoenas to non-parties, whether *ad testificandum* or *duces tecum*,[30] although it is unclear whether this subpoena power extends to pre-hearing discovery.[31] A court may order disclosure "to aid in arbitration" pursuant to N.Y. CPLR 3102(c), although court-ordered discovery is not available in arbitration proceedings "except under extraordinary circumstances."[32] With respect to territorial limitations, some states have procedures that permit a litigant to obtain a court order requesting the assistance of another state in obtaining documents and/or testimony.[33]

In *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*,[34] the Supreme Court held that in arbitrations otherwise subject to the FAA, parties may agree to the application of state arbitration procedures as long as they do not "undermine the goals and policies of the FAA."[35]

Several recent cases demonstrate that it is at best uncertain whether and to what extent limitations on non-party discovery and/or territorial limitations under the FAA can be overcome by adopting or using the provisions of state law.

In New York, the First Department has adopted an interpretation of the FAA that is more liberal than that adopted by the Second and Third Circuits. In *ImClone Systems Incorporated v. Waksal*,[36] a case decided prior to *Life Receivables*, the First Department upheld a New York Supreme Court order directing depositions of non-parties pursuant to a state statute in aid of an arbitration expressly governed by the FAA. The court held that "[w]hile it is an open question in the Second Circuit whether prehearing nonparty depositions are authorized under the FAA, and there is substantial federal authority that they are not, in the absence of a decision of the United States Supreme Court or unanimity among the lower federal courts, we are not precluded from exercising our own judgment in this matter."[37] Citing the Fourth Circuit's decision in *COMSAT*,[38] the court held that "[w]e subscribe to the view that depositions of nonparties may be directed in FAA arbitration where there is a showing of 'special need or hardship,' such as where the information sought is otherwise unavailable." The court found that "special need or hardship" had been demonstrated in that case "since the crucial issue in plaintiff's attempt to vitiate the agreement is its claim that it was induced by fraud, and the nonparties defendant seeks to depose are the officers and directors who took part in its drafting and negotiation."[39]

However, in *ConnecU, Inc., et al. v. Quinn Emanuel*,[40] an unpublished New York Supreme Court decision decided after *Life Receivables*, the court declined to enforce *subpoenas*

duces tecum issued to non-parties located out of state by a New York arbitration panel in an arbitration governed by the FAA. The court held that "even under the more liberal standards enunciated by the First Department," the petitioners had not met their burden of establishing special need or hardship necessary to justify granting their motion to compel.[41] Moreover, citing *Dynegy*, the court also held that it lacked the power to compel a non-party located out of state to testify at an arbitration in New York.[42] Interestingly, the court suggests that discovery from out-of-state non-parties could be obtained pursuant to N.Y. CPLR 3108, which authorizes New York courts to seek the assistance of a sister state court to compel discovery by issuing a commission or letter rogatory, but does not address the question of whether use of this procedure would be preempted by the FAA.[43]

Under the *Volt* pre-emption analysis, it seems unlikely that the FAA would pre-empt state court procedures that permit pre-hearing discovery, or that facilitate obtaining evidence outside the territorial reach of an arbitral subpoena. A different result, however, may be mandated by the Supreme Court's recent decision in *AT&T Mobility LLC v. Concepcion*,[44] which dramatically transformed the landscape of FAA pre-emption. In *Concepcion*, the Court emphasized the FAA's "overarching purpose to ensure the enforcement of arbitration agreements according to their terms *so as to facilitate streamlined proceedings*" to strike down a California decision finding an arbitration provision unconscionable because it disallowed classwide proceedings.[45] The Court held that requiring the availability of classwide arbitration "interferes with fundamental attributes of arbitration" by sacrificing arbitration's informality and making the process slower and more costly.[46] Notably, this same emphasis on informality and streamlined proceedings informs the decisions in *Hay*, *Life Receivables*, and *Dynegy*.

There is little doubt that the use of state court procedures to overcome limitations on non-party discovery and/or territorial limitations under the FAA will be met with challenges based on FAA pre-emption. As set forth above, at least one court has rejected, on grounds of pre-emption, an attempt to enforce an arbitral subpoena using a state law provision permitting a court to order testimony or production of documents to assist tribunals and litigants outside the state.[47]

Conclusion

In sum, in the absence of definitive guidance from the Supreme Court, arbitrators and litigants in arbitrations governed by the FAA will be forced to grapple with a daunting array of procedural challenges. In order to succeed in this dynamic environment, practitioners cannot rely on the availability of procedures that may have become familiar prior to the uncertainties created by recent interpretations of the FAA. Both arbitrators and litigants must have a comprehensive understanding of newly imposed limitations on the ability to obtain evidence from non-parties in arbitrations governed by the FAA, as well as the procedural approaches that may be proposed to overcome those limitations.

Endnotes

1. 9 U.S.C. Section 7.
2. 360 F.3d 404 (3d Cir. 2004).
3. *Id.*, at 410.
4. *Id.*, at 409.
5. *Id.*, at 413-414 (citation omitted).
6. *Id.*, at 414.
7. 549 F.3d 210 (2d Cir. 2008).
8. 430 F.3d 567 (2d Cir. 2005).
9. 430 F.3d at 580 (quoting lower court decision, *Odfjell ASA v. Celanese AG*, 348 F.Supp.2d 283, 287 (S.D.N.Y. 2004)).
10. *Id.*; *Guyden v. Aetna Inc.*, 2006 U.S. Dist. LEXIS 73353 (D. Conn. September 25, 2006), *aff'd*, 2008 U.S.App. LEXIS 20783 (2d Cir. Oct. 2, 2008) (although a party may be precluded from taking depositions of non-party witnesses, she may obtain necessary information through a pre-merits hearing before the arbitrator). The reasoning of *Hay* and *Life Receivables* has been adopted by federal district courts outside the Second and Third Circuits. S*ee*, *e.g.*, *Ware v. C. D. Peacock, Inc.*, 2010 U.S. Dist. LEXIS 44737 (N.D. Ill.); *Empire Financial Group, Inc. v. Penson Financial Services, Inc.*, 2010 U.S. Dist. LEXIS 18782 (N.D. Tex.); *Matria Healthcare v. Duthie*, 584 F.Supp.2d 1078 (N.D. Ill. 2008).
11. *COMSAT Corp. v. NSF*, 190 F.3d 269, 276 (4th Cir. 1999). The *COMSAT* court did not address what circumstances or showing would be sufficient to invoke this exception, but held that "'special need'" means that, "at a minimum, a party must demonstrate that the information it seeks is otherwise unavailable." *Id.; see Gresham v. Norris*, 304 F. Supp. 2d 795 (E.D. Va. 2004) (no special need where non-party could be subpoenaed to testify at the arbitration hearing); *see also ImClone Systems Incorporated v. Waksal*, 802 N.Y.S.2d 653, 654 (1st Dep't 2005) (depositions of non-parties may be directed in FAA arbitration where there is a showing of "special need or hardship," such as where the information sought is otherwise unavailable).
12. 228 F.3d 865, 870-71 (8th Cir. 2000); *see also American Fed'n of TV & Radio Artists v. WJBK-TV*, 164 F.3d 1004 (6th Cir. 1999) (arbitration panel may issue subpoena to non-party for production of documents); *Festus & Helen Stacy Found., Inc. v. Merrill Lynch*, 2006 U.S. Dist. LEXIS 32402 (N.D. Ga.); S*chlumbergerSema, Inc. v. Xcel Energy, Inc.*, 2004 U.S. Dist. LEXIS 389 (D. Minn.); *In The Matter Of Meridian Bulk Carriers, Ltd. And Louis Dreyfus Corporation*, 2003 U.S. Dist. LEXIS 24203 (E.D. La. 2003); *Meadows Indem. Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42, 45 (M.D. Tenn. 1993); *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F.Supp. 1241 (S.D. Fla. 1988). Prior to the Second Circuit decision in *Life Receivables Trust*, a number of district courts in that circuit had taken a less restrictive approach. See *Atmel Corp v. LM Ericsson Telefon, AB*, 371 F.Supp.2d 402 (S.D.N.Y 2005); *Nat'l Union Fire Ins. Co. v. Marsh USA, Inc.*, 2004 U.S. Dist. LEXIS 12716 (S.D.N.Y); *P&G v. Allianz Ins. Co.*, 2003 U.S. Dist. LEXIS 26025 (S.D.N.Y); *In re Arbitration between Brazell v. American Color Graphics*, 2000 U.S. Dist. LEXIS 4482 (S.D.N.Y.); *Integrity Ins. Co. v. American Centennial Ins. Co.*, 885 F. Supp. 69, 71-73 (S.D.N.Y 1995); *but see*, *Guyden v. Aetna Inc.*, 2006 WL 2772695 (D. Conn.); *Odfjell ASA v. Celanese AG*, 328 F.Supp.2d 505, 506 (S.D.N.Y 2004) (adopting the *Hay* approach).
13. *See*, *e.g.*, *Integrity Ins. Co. v. American Centennial Ins. Co.*, 885 F.Supp. 69, 72-73 (S.D.N.Y 1995).
14. *See, e.g., Atmel Corp. v. LM Ericsson Telefon, AB*, 371 F.Supp.2d 402, 403 (S.D.N.Y. 2005).

15. *Id.* Only a few courts have found that an arbitrator has the power to compel non-party depositions, none of which addresses the analysis of the many cases to the contrary. The leading cases are *Amgen Inc. v. Kidney Center*, 879 F.Supp. 878 (N.D. Ill. 1995) and the district court decision in *Security Life Ins. Co. of Am. v. Duncanson & Holt Inc.*, 1999 U.S. Dist. LEXIS 23385 (D. Minn.). *Amgen* was eventually dismissed for lack of subject matter jurisdiction, *Amgen, Inc. v. Kidney Ctr.*, No. 95-1988, 1996 U.S. App. LEXIS 28250 (7th Cir. Oct. 28, 1996), and when *Security Life* was appealed, the Eighth Circuit never addressed the issue of an arbitrator's power to compel depositions of non-parties, because the issue was moot. *Security Life*, 228 F.3d at 870; *see SchlumbergerSema, Inc. v. Xcel Energy, Inc.*, 2004 U.S. Dist. LEXIS 389 (D. Minn.) (arbitration panel's authority to compel production of non-party witnesses for deposition testimony is unsettled). In *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F.Supp. 1241 (S.D. Fla. 1988), the court held, without analysis, that "[p]laintiffs' contention that § 7 of the Arbitration Act only permits the arbitrators to compel witnesses at the hearing, and prohibits pre-hearing appearances, is unfounded."

16. Fed. R. Civ. P. 45(b)(2).

17. The majority of courts to consider the issue have held that a court may compel the trial testimony of parties (and, where the party is a corporation or entity, the party's high-level employees or officers) even when the person to be compelled resides beyond the Rule 45 territorial limit. *See* Fed. R. Civ. P. 45(c)(3)(A)(ii)); *AFGE, Local 922 v. Ashcroft*, 354 F.Supp.2d 909 (E.D. Ark. 2003) (collecting cases).

18. 451 F.3d 89 (2d Cir. 2006).

19. *Id.*, at 95.

20. *Id.*, at 96.

21. 879 F.Supp. 878, 882-83 (N.D. Ill. 1995).

22. In an unpublished opinion, the Third Circuit has held that the District Court for the Eastern District of Pennsylvania does not have the power to enforce an arbitration subpoena issued in Philadelphia calling for a non-party to appear for deposition and produce documents in Florida. *Legion Insurance Company v. John Hancock Mutual Life Insurance Company*, 33 Fed. Appx. 26; 2002 U.S. App. LEXIS 6797 (3d Cir.). The court did not discuss the *Amgen* decision or Rule 45(a)(3)(B).

23. 228 F.3d 865, 872 (8th Cir. 2000) (reserving for "another day" the "thorny" issue of whether an arbitrator's subpoena power is limited by the 100-mile limitation contained in Fed. R. Civ. P. 45(b)(2)); *see also Festus & Helen Stacy Found., Inc. v. Merrill Lynch*, 2006 U.S. Dist. LEXIS 32402 (N.D. Ga.) (compelling compliance with arbitral document subpoena served outside the Rule 45 territorial limits); *SchlumbergerSema, Inc. v. Xcel Energy, Inc.*, 2004 U.S. Dist. LEXIS 389 (D. Minn.) (same, but also holding that the court does not have the power to enforce an arbitration panel's subpoena for deposition of a non-party).

24. 2009 U.S. Dist. LEXIS 34440 (April 21, 2009).

25. It is unclear whether the motion to quash was properly brought in the Eastern District of Pennsylvania. The basis on which this practice arguably overcomes the restrictive interpretation of Section 7 is that the subpoena is issued by an arbitrator "sitting" in Florida, in which case a challenge to enforcement of the subpoena would seemingly more properly be sought in a Florida court.

26. *Alliance Healthcare Services, Inc. v. Argonaut Private Equity, LLC and Medical Outsourcing Services, Inc.*, Case No. 11 C 3275, slip op. (Northern District of Illinois, Eastern Division, August 9, 2011).

27. The court expressly rejected the reasoning of an earlier case from the same district, in which the judge enforced a subpoena issued in connection with an arbitration being conducted in the Northern District of Illinois that required a non-party to produce documents and testify at a deposition in the Eastern District of Pennsylvania, where the non-party was located. *See Amgen Inc. v. Kidney Center*, 879 F.Supp. 878 (N.D. Ill. 1995), *dismissed for lack of subject matter jurisdiction*, 1996 U.S. App. LEXIS 28250 (7th Cir. Oct. 28, 1996). Arguably, enforcement of the subpoena could be sought in the Northern District of California, on the theory that the arbitral panel is "sitting" there for the pre-merits hearing.

28. *In re the Subpoena Issued to Beck's Superior Hybrids, Inc.*, 940 N.E.2d 352 (Ind. App. 2011).

29. N.J. Stat. § 2A:23B-17.

30. N.Y. CPLR 2302(a); 7505; *Reuters Limited v. Dow Jones Telerate, Inc.*, 662 N.Y.S.2d 450, 453 (1st Dep't 1997); *Minerals & Chemicals Philipp Corp. v. Panamerican Commodities*, 224 N.Y.S.2d 763, 773 (1st Dep't 1962), *appeal dismissed*, 11 N.Y.2d 1109.

31. *DeSapio v. Kohlmeyer*, 35 N.Y.2d 402, 406 (1974) (under the CPLR, arbitrators do not have the power to direct the parties to engage in disclosure proceedings).

32. *Id.*

33. *See, e.g.*, N.Y. CPLR 3108 (authorizing New York courts to seek the assistance of a sister state court to compel disclosure from out-of-state individuals by issuance of a commission or letter rogatory).

34. 489 U.S. 468 (1989).

35. *Id.*, at 478. In *Volt*, the Court addressed a provision of California law that permits a court to stay arbitration pending resolution of related litigation between a party to the arbitration agreement and third parties not bound by it, where "there is a possibility of conflicting rulings on a common issue of law or fact." The Court found that although the application of the California rule resulted in a stay of the arbitration, the provision did not conflict with the FAA's "principal purpose of ensuring that private arbitration agreements are enforced according to their terms." *Id.*

36. 802 N.Y.S.2d 653 (1st Dep't 2005).

37. *Id.*, at 654 (other internal citations omitted).

38. *COMSAT Corp. v. NSF*, 190 F.3d 269, 276-277 (4th Cir. 1999).

39. *Imclone*, 802 N.Y.S.2d at 654.

40. Slip op., Supreme Court, N.Y. County, Index No. 602082/2008, January 6, 2010.

41. *Id.*, at 13.

42. *Id.*, at 21-22.

43. *Id.*, at 22.

44. 131 S.Ct. 1740 (2011).

45. *Id.*, at 1743.

46. *Id.*

47. *In re the Subpoena Issued to Beck's Superior Hybrids, Inc.*, 940 N.E.2d 352 (Ind. App. 2011).

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The *Hall Street* Parade: State Courts Step Out and Consider Expanded Review of Arbitration Awards

By Michael S. Oberman

In *Hall Street Assocs., L.L.C. v. Mattel, Inc.*,[1] the Supreme Court in 2008 resolved a then-surging conflict among the federal courts of appeals and unambiguously held that the parties to an arbitration agreement cannot by contract expand the scope of judicial review of an arbitration award under the Federal Arbitration Act. In particular, the parties cannot cause a court to review an award for errors of law. Instead, the Court held that the narrow statutory categories set out in Sections 10 and 11 of the FAA are the exclusive grounds for vacating or modifying an award under the FAA.

But the Court left open the possibility of expanded review outside of the FAA. The Court stated: "[W]e do not purport to say that [Sections 10 and 11] exclude more searching review based on authority outside the statute.… [Parties] may contemplate enforcement under state statutory or common law,…where judicial review of different scope is arguable"; the Court "decid[ed] nothing about other possible avenues for judicial enforcement of arbitration awards."[2] With the Supreme Court "deciding nothing" about those state law avenues, state courts have picked up where *Hall Street* left off. This article discusses a cluster of post-*Hall Street* decisions by the highest courts of six states addressing the enforceability of an agreement to expand the scope of judicial review (as well as a decision of the New York Court of Appeals applying *Hall Street* on a motion to stay arbitration). The picture that emerges from this cluster of cases pretty much matches the Supreme Court's description: "judicial review of different scope is arguable." Looking at these decisions one-by-one, each state court is providing clear guidance on whether expanded review is permitted by the arbitration law of its state.

Texas

The most recent case comes from the Supreme Court of Texas. In *Nafta Traders, Inc. v. Quinn*,[3] the court held that the Texas Arbitration Act permits parties to expand the scope of judicial review by agreement and that the FAA does not preempt enforcement of such an agreement. The court found its holding to "'flow inexorably from the fact that arbitration is simply a matter of contract between the parties.'"[4] The parties' contract specified that the "arbitrator does not have authority (i) to render a decision which contains a reversible error of state or federal law, or (ii) to apply a cause of action or remedy not expressly provided for under existing state or federal law."[5] Nafta—the party seeking vacatur of the award in a sex discrimination case—argued that there were reversible errors of law and remedies not permitted by law.

The court applied the Texas Arbitration Act, noting that the parties had not disputed the applicability of the TAA and that the "TAA and the FAA may both be applicable to an agreement, absent the parties' choice of one or the other."[6] The TAA, like the FAA, includes as a ground for vacatur "where the arbitrators exceeded their powers."[7] The court viewed the contractual provision limiting the arbitrator's authority as the "flip-side" of an agreement to expand the scope of judicial review.[8] Yet because the agreement in question was structured as a limitation on the arbitrator's power, the court homed in on the "exceeded their powers" ground for vacatur, pointedly observing that the Supreme Court in *Hall Street* did not discuss whether this ground might permit judicial review for error. The Texas court found that the statutory language—"where the arbitrators exceeded their powers"—can lead to vacatur when an award is shown to exceed the contractual authority given to the arbitrator. The court ultimately held "that the TAA presents no impediment to an agreement that limits the authority of an arbitrator in deciding a matter and thus allows for judicial review of an arbitration award for reversible error."[9]

Having held that expanded review is permitted under the TAA but noting that the case was covered by both the TAA and the FAA, the court proceeded to consider whether the FAA preempted Texas law permitting expanded review. The court found there was no preemption, because preemption occurs only where "state law... refuse[s] to enforce an arbitration agreement that the FAA would enforce."[10] "Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA."[11] The court cited Justice Breyer's dissent in *Hall Street*, which "emphasized that the Court was in agreement that its decision would not have preclusive effect."[12] The court was also "mindful of the TAA's mandate that it 'be construed to...make uniform the construction of other states' law applicable to an arbitration.'"[13] The court reported that three states had found their arbitration statutes to permit expanded review while five states found that their arbitration statutes did not permit expanded review (including, in this tabulation, three pre-*Hall Street* cases).[14]

Maine

Moving slightly back in time, the Supreme Judicial Court of Maine held in *HL 1, LLC v. Riverwalk, LLC*[15] that an arbitration agreement providing a right to appeal any questions of law was invalid under the Maine Uniform Arbitration Act. The court applied Maine law because the parties' agreement stated that "the Agreement, and the interpretation hereof, shall be governed exclusively by its terms and the laws of the State of Maine."[16] Finding that the Maine statute and the FAA had similar provisions, the court followed *Hall Street's* textual analysis and interpreted the state statute consistent with *Hall Street's* reading of the FAA. The court also pointed to the following language in the Maine statute as limiting judicial review: "But the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award."[17] The court held that the Maine statute reflected only one policy: "when parties have agreed to arbitration that results in an award, the role of the court is to promptly confirm the award subject to narrow review upon application of a party."[18] The court therefore upheld the lower court decision that confirmed the award after severing the expanded review clause from the arbitration agreement pursuant to the agreement's severability clause.

Georgia

The Supreme Court of Georgia applied reasoning similar to the Maine court in *Brookfield Country Club, Inc. v. St. James-Brookfield, LLC,*[19] rejecting expanded review. There, the parties' agreement provided that an award could be reviewed for error of law as an additional ground for vacatur under the Georgia arbitration statute. The court found *Hall Street* to be persuasive authority and held: "We…reiterate that arbitration in this state is no longer governed by common law, but is wholly a creature of statute, and thus it is the role of the legislature, not this Court, to augment any fundamental changes in the nature of the proceeding.… Although we acknowledge the fundamental principle that parties have the right to freely contract, courts may not enforce a contractual provision which contravenes the statutory law of this state."[20]

Tennessee

The Supreme Court of Tennessee followed *Hall Street* as persuasive authority in applying Tennessee's arbitration statute in *Pugh's Lawn Landscape Co. v. Jaycon Development Corp.*,[21] but also emphasized that the Tennessee statute expressly disallows vacation of an award on the ground that "the relief was such that it could not or would not be granted by a court of law or equity."[22] The court applied a game-changing remedy. It held that the provision in the parties' agreement providing for expanded judicial review constituted a mutual mistake requiring recission of the parties' arbitration agreement and a vacatur of the award.

Alabama

The Supreme Court of Alabama displayed a different approach in *Raymond James Fin. Servs, Inc. v. Honea*.[23] The court recounted that it had previously applied Section 10 of the FAA to motions for vacatur, without having to decide whether it was obliged to do so. The court, in view of *Hall Street*, confronted the issue and decided that it need not apply the FAA to state court proceedings to vacate an award. The court held that "[u]nder the Alabama common law, courts must rigorously enforce contracts, including arbitration agreements, according to their terms in order to give effect to the contractual rights and expectations of the parties.… Applying that principle in this case requires us to give effect to the provision in the arbitration agreement authorizing a court having jurisdiction to conduct a de novo review of the [transcript and exhibits of the arbitration hearing]…pursuant to that same agreement."[24]

California

In this parade of state cases, the Supreme Court of California led the way, responding to *Hall Street* within months of its issuance. In *Cable Connections, Inc. v. DIRECTV, Inc.*,[25] the court held that Section 10 of the FAA did not preempt California law governing review of arbitration awards, that California law permitted parties to alter the usual scope of judicial review by an express agreement, and that enforcement of such agreements was consistent with the FAA's policy of enforcing private contractual arrangements.

New York

The New York Court of Appeals has recognized the holding of *Hall Street* but enforced it in a different context from the cases discussed above. In *Life Receivables Trust v. Goshawk Syndicate 102 at Lloyd's*,[26] the court reviewed a motion to stay or enjoin an arbitration where the arbitration clause provided for judicial review for errors of law and where the issue presented was whether a court or an arbitrator should decide the enforceability of the arbitration agreement that contained an unenforceable clause (that is, the expanded review clause rendered unenforceable by *Hall Street*). In a memorandum decision, the court held: "Although *Hall Street*...prohibits parties from expanding, by their own agreement, the scope of judicial review beyond that authorized by the Federal Arbitration Act, clear and unmistakable evidence exists in this case that the parties agreed to arbitrate questions of arbitrability, including whether the parties' arbitration agreement is invalid under *Hall St. Assoc.* or whether the apparently offending provision could be severed from the remainder of the agreement."[27] It appears from the dissent in the

Appellate Division-First Department decision (where the majority held the issue of enforceability was for the arbitrator) that the "parties agree that their agreement is subject to the Federal Arbitration Act."[28]

Practice Point

If an award is reviewed pursuant to Section 10 of the FAA, an agreement for expanded judicial review will not be enforced. This article shows an emerging split among state courts on the enforceability of agreements for expanded judicial review. To the extent parties seek expanded judicial review, consideration must be given in drafting the arbitration agreement to the law that will govern the review of the award (looking particularly at the few states that permit expanded review).

Endnotes

1. 552 U.S. 576 (2008).
2. *Id*. at 590.
3. 339 S.W.3d 84 (Tex. 2011).
4. *Id*. at 87 (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)).
5. *Id*. at 88 (citation and internal quotation marks omitted).
6. *Id*. at 97 n.64.
7. *Id*. at 92 (citing § 10(a)(4) of the FAA and § 171.088(a)(3)(A) of the TAA).
8. *Id*.
9. *Id*. at 97.
10. *Id*. at 98.
11. *Id*. at 99.
12. *Id*. at 100-01 (citing 552 U.S. at 596).
13. *Id*. at 97 (citing Tex. Civ. Prac. & Rem. Code § 171.003).
14. *Id*. (citing as states permitting review *Raymond James Fin. Servs., Inc. v. Honea*, 55 So.3d 1161, 1170 (Ala. 2010); *Cable Connection, Inc. v. DIRECTV, Inc.*, 44 Cal. 4th 1334, 82 Cal. Rptr. 3d 229, 190 P.3d 586, 606 (2008); and *Tretina Printing, Inc. v. Fitzpatrick & Assocs., Inc.*, 135 N.J. 349, 640 A.2d 788, 793 (1994)); and citing as states not permitting expanded review *Brookfield Country Club, Inc. v. St. James–Brookfield*, LLC, 287 Ga. 408, 696 S.E.2d 663, 667 (2010); *HL 1, LLC v. Riverwalk, LLC*, 15 A.3d 725, 736 (Me. 2011); *John T. Jones Constr. Co. v. City of Grand Forks*, 665 N.W.2d 698, 704 (N.D. 2003); *Pugh's Lawn Landscape Co. v. Jaycon Dev. Corp.*, 320 S.W.3d 252, 261 (Tenn. 2010); and *Barnett v. Hicks*, 119 Wash. 2d 151, 829 P.2d 1087, 1095 (1992).
15. 15 A.3d 725 (Me. 2011).
16. *Id*. at 730.
17. *Id*. at 734 (citing M.R.S. § 5938(1) (2010).
18. *Id*. at 736.
19. 696 S.E. 2d 663 (Ga. 2010).
20. *Id*. at 666-67.
21. 320 S.W.3d 252 (Tenn. 2010).
22. *Id*. at 260 (citing Tenn. Code Ann. § 29-5-313(a)(5)).
23. 55 So. 3d 1161 (Ala. 2010).
24. *Id* at 1169.
25. 190 P.3d 586, 597-99 (Cal. 2008).
26. 927 N.E. 2d 553 (N.Y. 2010).
27. *Id*.
28. 888 N.Y.S.2d 458, 459-60 (1st Dep't 2009).

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Editor's Note: *In July of 2011 the NYSBA Dispute Resolution Section submitted Comments to the Consumer Financial Protection Bureau in Connection with its Review of Arbitration for Consumer Financial Products or Services. The comments were submitted to provide background and highlight issues the Bureau may wish to consider in fulfilling its charge under the Dodd-Frank Act to review consumer arbitration in the financial sector. The report takes no position as to the appropriate treatment of consumer disputes, but supports a thorough examination of dispute resolution processes to ensure that they are in the public interest and fair to consumers. This article summarizes some of the issues highlighted for the Bureau's attention. The reader is invited to review the full text of the comments which cover these and other issues. The comments can be found at www.nysba.org/doddfrank.*

The Dodd-Frank Act: Seeking Fairness and the Public Interest in Consumer Arbitration

By Edna Sussman

The April 2011 Supreme Court decision in *AT&T v. Concepcion*, 131 S. Ct. 1740 (2011), intensified earlier concerns about the fairness of pre-dispute arbitration agreements in consumer contracts. In the *AT&T* case the court held that California state contract law, which deems class-action waivers in arbitration and other agreements unenforceable when certain criteria are met, is preempted by the Federal Arbitration Act as applied to arbitration clauses. Thus, California must enforce arbitration agreements even if the agreement requires that consumer complaints be arbitrated individually instead of on a class-action basis.

"[T]he Consumer Financial Protection Bureau…was directed to conduct a study…on the use of agreements providing for arbitration of future disputes between covered persons and consumers in connection with consumer financial products or services."

How *AT&T v. Concepcion* will be interpreted by the courts remains to be seen, but it has already motivated action to afford consumers more protection. The Arbitration Fairness Act which would invalidate pre-dispute arbitration agreements for consumers and employees was reintroduced in Congress on the heels of the decision. Senator Franken said when he reintroduced the bill: "This ruling is another example of the Supreme Court favoring corporations over consumers. The Arbitration Fairness Act would help rectify the Court's most recent wrong by restoring consumer rights." The Arbitration Fairness Act is not likely to progress in Congress this year but Congress has already enacted legislation with respect to arbitration which may ultimately be a game-changer for consumer arbitration. The Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. § 1028 (2009), commonly known as the "Dodd-Frank Act, has attracted considerable press coverage with respect to various required changes in practices by financial institutions, but the Act's provisions requiring a review of arbitration have drawn little attention.

The examination of arbitration for consumers in the financial sector called for in the Dodd-Frank Act was first recommended in the Obama Administration's white paper on financial reform. Adopting the recommendation, the Consumer Financial Protection Bureau (the "Bureau") established by Congress was directed to conduct a study and provide a report on the use of agreements providing for arbitration of future disputes between covered persons and consumers in connection with consumer financial products or services. The Act further authorized the Director of the Bureau to prohibit or impose conditions or limitations on such arbitration agreements by regulation if it would be in the public interest, for the protection of consumers, and consistent with the study performed.[1]

The Bureau's task will not be an easy one. There have undoubtedly been abuses of arbitration for consumers. Indeed, the courts have struck many unfair provisions in arbitration agreements as unconscionable, including unfair arbitrator selection, discovery limitations, distant forums, limitations of remedies, shortening time to file from applicable statutes of limitations, and burdensome costs. On the other hand arbitration is viewed by many as affording a more user-friendly, cheaper and faster forum and as offering many advantages over litigation. Accordingly, there are a host of considerations that should be analyzed and reviewed by the Bureau in the development of the mandated study.

The Bureau's final study and conclusions are likely to have great influence on subsequent legislation and regulation of consumer arbitration not only for the financial services sector that are the subject of the Dodd-Frank Act but also for other sectors of the economy. This article does not urge any specific outcome but discusses some of the issues and highlights some of the impacts which the Bureau should consider before making its final determination.

I. Prior Studies of Arbitration for Consumers

There have been a great many studies of consumer arbitration addressing various questions including win rates, and cost and time factors.[2] However, none of them appear to address the question of when mandatory arbitration is or is not "in the public interest," a finding that the Bureau must make as part of its analysis of consumer arbitration.

The Federal Trade Commission ("FTC") conducted a comprehensive study of consumer debt collection,[3] to date the market segment that has garnered the most intensive study, undoubtedly due to the very large number of such cases and the perceived inequities in dispute resolution processes of such claims. In its study the FTC recognized that consumer credit is a critical component of today's economy and that debt collection is essential to keep credit available and its cost as low as possible.[4] The FTC, following comprehensive hearings and a review of the literature, concluded "that neither litigation nor arbitration currently provides adequate protection for consumers. The system for resolving disputes about consumer debts is broken."[5] To fix the system, the FTC found that a variety of significant reforms were necessary in both litigation and arbitration to make the system both efficient and fair.

Any assessment of consumer arbitration must examine the litigation alternative to arbitration since without arbitration disputes will have to be resolved in court. Arbitration results alone without such a comparison signify nothing and cannot be the basis for evaluating the process as the challenges in certain contexts may be endemic to the nature of the disputes in question, creating problems in the context of both arbitration and litigation as the FTC already found. Illustrating this point, one study found that in California, over a 4-year period, in more than 19,000 credit card cases heard by arbitrators, the credit card company prevailed 94 percent of the time, suggesting a bias in favor of the claimants.[6] A subsequent study reported that in court programs, creditors won relief in 98-100 percent of the debt collection cases that went to judgment. Meanwhile, in the American Arbitration Association debt collection cases, the rates were 97.1 percent for the debt collection program run by the AAA and 86.2 percent in the individual AAA debt collection cases. In a significant portion of the cases, both in court and in arbitration, the consumer defaulted.[7] It is this kind of comparison with respect to all relevant factors that is required to arrive at the optimal solution.

II. Access to the Courts

Court congestion and the recent cutbacks in judicial budgets are also relevant to the analysis as they affect access to the courts for the resolution of disputes. Data for 2009 regarding disposition of civil cases show a median of 23.4 months through trial in the federal courts, with the median in various districts ranging from 14.9 to 57.3 months. The median through appeal was 32.1 months.[8] The Bureau of Justice Statistics reports that for state court contract cases in the 75 largest U.S. counties, the average length of time from case filing to trial in jury cases was 25.3 months and for bench trials was 18.4 months.[9] Delays for appeals similar or lengthier than in federal court are likely to be found for state court appeals, a statistic that is not reported. These statistics are likely to deteriorate with the current budget crises.

Empirical research has also been conducted on the length of time required to complete a dispute in arbitration. One study found that the average time from the filing of the demand to the final award was 6.9 months.[10] As discussed below, delays in resolution of disputes not only has a negative impact on people's lives as they await resolution but also has real economic, dollars and cents, consequences. Justice delayed is indeed justice denied. Consideration may also be given to whether parties feel pressured to settle and accept terms not wholly acceptable in order to avoid long delays.

Recent cutbacks in funding of the judiciary in light of today's hard pressed state and local governments are leading to further delays in court. State after state reports cutbacks in funding for the judicial branch with 65 percent of states reporting reductions for fiscal year 2010 and 57 percent of states reporting reductions for fiscal year 2011,[11] with consequent reductions in access to justice. For example, the Los Angeles Superior Court, the nation's largest trial court system, predicts anticipated layoffs of roughly one-third of its personnel, and the closure of 139 courtrooms used as civil courtrooms out of its total courtroom count of 605 for all cases. Civil caseload clearance capacity is expected to fall by no less than 35 percent by 2013.[12] Florida reports a rapidly growing caseload coupled with funding which peaked in 2004-2005, forcing courts to slow or suspend the processing of civil cases.[13] Iowa reports a 9.3 percent reduction in staffing, ten days of court closure, and a delay in processing, *inter alia*, small claims cases.[14] Many consumer cases are low-dollar value cases which, with the more limited resources of the courts, may suffer disproportionately long delays and lack of attention as courts focus on their criminal and larger stakes civil matters.

III. The Economic Impacts of Elimination of Consumer Arbitration

The analysis of the "public interest" should include an examination of the financial implications of any action taken with respect to arbitration. The Supreme Court has recognized that the contractual selection of the dispute resolution forum can be a factor in pricing.[15] Thus whether the elimination of arbitration will lead to increased costs for the consumer must be explored.

Furthermore, delayed recoveries have a real monetary cost to the recovering party. As discussed above, there is considerable support for the proposition that resolution is approximately three times faster in arbitration as compared to court. The economic impact of a delay in resolution on an individual recovery for the consumer or the opposing party can be meaningful. To illustrate: assuming a successful claim for $10,000 and a delay of twelve months until resolution, a discount rate, a tool typically used to account for the time value of money, can be applied. Applying a 10 percent discount rate with respect to the $10,000 claim on which recovery is delayed by twelve months yields a loss in the real value of the recovery of about $900, or almost 10 percent of the recovery. In other words, the present value of the recovery received twelve months later on a claim of $10,000 is $9,090, thus reducing the value of the recovery by almost 10 percent.[16] The longer the wait the less the value to the party.

The impact on the broader economy of including all consumer cases in the court caseload cannot be overlooked either. The delays in the judicial system caused by the influx of the hundreds of thousands of consumer cases could be significant and could cause enormous economic losses for the broader society.[17] The County of Los Angeles conducted an analysis to predict the economic impact of the increased duration of litigation due to lost operating capacity driven by the budget constraints. It projected a $30 billion drop in economic output, translating to more than 150,000 jobs and $1.6 billion in tax revenue.[18] Findings from a similar study conducted in Florida showed that the total adverse economic impact of the projected increased civil court case delays on the Florida economy would be almost $17.4 billion annually and lead to an adverse impact on 120,000 jobs.[19]

IV. Pro Se Appearances

In late 2009, the American Bar Association Coalition for Justice undertook a study of judges throughout the United States to determine the effect of the economic downturn. The judges reported that self-representation had increased significantly. Sixty two (62) percent of all judges said that outcomes were consequently worse. When asked how parties were negatively impacted, ninety-four (94) percent of those responding stated that the failure to present necessary evidence was the most common problem. Eighty-nine (89) percent said that parties were impacted by procedural errors. Ineffective witness examination (85 percent) and failure to properly object to evidence (81 percent) were both cited as issues by more than four-fifths of the judges. Seventy-seven (77) percent of the judges cited ineffective arguments. Several judges noted that even when parties won at hearing, they were not able to proffer an order or judgment in a form that could be enforced to the court.[20]

Consideration should be given to whether in arbitration, with its more informal setting and expectations, these obstacles would have a less detrimental impact on a *pro se* representation. For example, are procedural errors less likely as arbitration procedures are less rigid and can be set out in simple, short arbitration rules? Is the arbitration process more easily accessible and easier to explain to the *pro se* litigant when the arbitrator and the case managers are involved? Is failure to object to evidence properly and the proper introduction of evidence less of a concern in arbitration as the rules of evidence are not strictly adhered to in arbitration and arbitrators are likely to consider the weight to be given to evidence based on its trustworthiness, whether or not a formal objection is lodged? Are issues concerning the provision of an enforceable order or judgment alleviated because parties generally need not present an order or judgment to the arbitrator since the arbitrators draft the award? It would seem that inquiry along these lines as to the ability of individuals to represent themselves effectively in court versus arbitration should be considered.

V. Online Dispute Resolution—Domestic and International

Many scholars have suggested that arbitration in the form of an online dispute resolution ("ODR") process could be most useful for consumers. E-commerce between business and consumers is growing rapidly. ODR involves the use of the Internet, e-mail, and other information technologies in lieu of the traditional face-to-face dispute resolution model. It offers efficiency, cost savings, and convenience for the disputing parties, while relieving the courts of an additional caseload. For smaller claims in particular, not having to take days off from work, or find coverage at home in order to attend to a dispute, can be of enormous benefit to consumers. Thus, use of such ODR arbitration processes may be a benefit for consumers.

The Congressional mandate under the Dodd- Frank Act does not distinguish between international and domestic transactions, and does not direct the Bureau to conduct a separate analysis of arbitration in these two different settings. ODR can be of special benefit to the consumer in the international context. Efforts on several fronts have been pursued to develop ODR for cross-border disputes involving consumers. One such effort by the United Nations Commission on International Trade Law (UNCITRAL) is progressing.[21] The Department of State, Office of Legal Adviser, Office of Private International Law, is actively engaged with UNCITRAL in its ODR initiatives.[22] Special attention should be given to cross border consumer disputes in this increasingly global economy.

VI. Standards for Consumer Arbitration

Regulation that would impose consumer protection standards in arbitration is a solution that must be examined. The private sector community that offers arbitral services has devoted considerable attention to the concerns about consumer arbitration. For example, in 1998, the American Arbitration Association issued a Consumer Due Process Protocol[23] that has guided the conduct of consumer arbitration at the AAA. It requires such measures as qualified, independent, and impartial neutrals chosen by an equal voice of the parties, an independent administration, reasonable cost which may require the business rather than the consumer to pay, a reasonably convenient location, reasonable time limits, a right to representation, encouragement of mediation, clear notice of the arbitration provisions and their consequences, access to information to ensure a fair hearing, a fair hearing, availability of all remedies that would be available in court, application by the arbitrator of pertinent contract terms, statutes and legal precedents and, on request, the provision of an explanation of the basis for the award. In addition, it provides that consumers retain the ability to take matters to small claims court that fall within small claims court jurisdiction.

An AAA-led Task Force released additional standards for consideration in a Consumer Debt Collection Due Process Protocol Statement of Principles which supplement the Consumer Due Process Protocols.[24] These additional Protocols include requirements that the commencement of the arbitration be in a manner that provides substantial certainty that the debtor will receive notice, that all communication be drafted in a manner easy to understand, including communicating in the consumer's primary language where known, that claims be accompanied by sufficient documentation to establish a prima facie case, that a procedure be established to identify time-barred claims, that the answer to the demand for arbitration be simplified, that the appointment of the arbitrator be done in a manner that enhances the perception of neutrality, and that participants take advantage where appropriate of technology such as e-mail, telephonic, or videotaped hearings and proceedings to save time and expense.

There has to date been no resolution of the debate as to class action waivers in the development of consumer arbitration fairness protocols because no consensus has been reached by the groups that have studied the issue. In the wake of the *AT&T v. Concepcion* decision, class action waivers will be an important issue for the Bureau to review. However, the Bureau's conclusion as to such waivers should not drive its broader conclusion as to arbitration. Regulation as to the validity of a class action waiver can simply be part of the development of a regulatory scheme that would ensure fairness in arbitration for consumers.

Conclusion

The Bureau has before it an important and difficult task in responding to the Congressional mandate under the Dodd-Frank Act. The conclusions reached in its study may influence future discussions of arbitration for consumers not only in the financial sector covered by the Dodd-Frank Act but also influence future consideration of consumer arbitration in legislation for a host of economic sectors. A thorough analysis of all of the pros and cons of arbitration for consumers and of the impact of any decision reached on the broader public interest should lead to a thoughtful and informed conclusion.

Endnotes

1. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1028, 124 Stat. 1376, (2010) (definitions for "covered person" and "consumer financial products or services" are provided in § 1002). The Dodd-Frank Act also authorizes the Securities and Exchange Commission to engage in rulemaking with respect to arbitration agreements.
2. For a listing of prior studies, *see* Comments to the Consumer Financial Protection Bureau in Connection with its Review of Arbitration for Consumer Financial Products or Services, adopted by the Dispute Resolution Section of the New York State Bar Association, Appendix A, April 2011, *available at* www.nysba.org/doddfrank.
3. Federal Trade Commission, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* 37–71 (Jul. 2010), *available at* http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf [hereinafter *Repairing a Broken System*].
4. Federal Trade Commission, *Collecting Consumer Debts: The Challenges of Change—A Workshop Report* iii (2009), *available at* http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf [hereinafter *Collecting Consumer Debts*].
5. *Repairing a Broken System*, *supra* note 3, at I.
6. *See* Public Citizen, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers* (Sept. 2007), *available at* http://www.citizen.org/documents/ArbitrationTrap.pdf.
7. *See* Searle Center on Law, Regulation and Economic Growth, *An Empirical Study of AAA Consumer Arbitrations* (Mar. 2009) (hereinafter *Searle Consumer Arbitrations*); Searle Center on Law, Regulation and Economic Growth, *Creditor Claims in Arbitration and in Court, Interim Report No. 1*, 27 (Nov. 2009).
8. *See Judicial Business of the United States Courts, 2009 Annual Report of the Director*, *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2009/JudicialBusinespdfversion.pdf.
9. Bureau of Justice Statistics, *Civil Justice Survey of State Courts (CJSSC), Bureau of Justice Statistics 2005*, *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=dcdetail&iid=242 (this is the most recent compilation of data by this source).
10. *Searle Consumer Arbitrations*, *supra* note 7, at 2.
11. National Center for State Courts, *Budget Shortfalls by State*, *available at* http://www.ncsc.org/information-and-resources/budget-resource-center/states-activities-map.aspx.
12. *See* B. Roy Weinstein & Stevan Porter, *Economic Impact on the County of Los Angeles and the State of California of Funding Cutbacks Affecting the Los Angeles Superior Court* (Dec. 2009), *available at* http://www.micronomics.com/articles/LA_Courts_Economics_Impact.pdf.
13. *See* The Washington Economics Group, Inc., *The Economic Impacts of Delays in Civil Trials in Florida's State Courts Due to Under-*

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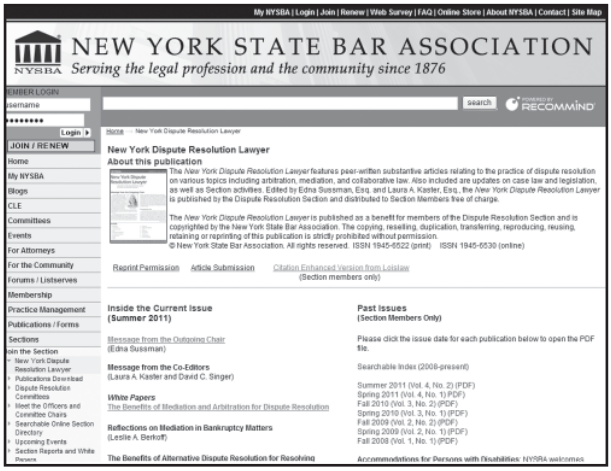

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Funding (Feb. 2009), *available at* http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/1C1C563F8CAFFC2C8525753E005573FF/$FILE/WashingtonGroup.pdf?OpenElement.

14. *See Justice in the Balance: The Impact of Budget Cuts on Justice, Iowa Judicial Branch* (Jan. 13, 2010), *available at* http://www.iowacourts.gov/wfData/files/StateofJudiciary/JusticeInTheBalanceJan2010.pdf.
15. *See, e.g., Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).
16. The award of pre-judgment interest, permissible in some cases, may compensate for all or part of this impact depending on the interest rate allowed and the appropriate discount rate to use.
17. The number of cases involved in consumer disputes is not *de minimis*. In 2006, approximately 320,000 consumer debt collection cases were filed in New York City alone. This number is comparable to the total number of civil and criminal cases filed in the federal trial courts nationwide that year. *See* THE URBAN JUSTICE CENTER, *Debt Weight: The Consumer Credit Crisis in New York City and its Impact on the Working Poor* 3 (Oct. 2007), *available at* www.urbanjustice.org/pdf/publications/CDP_Debt_Weight.pdf. Sixty percent of the 120,000 small claims cases filed in Massachusetts in 2005 were filed by debt collectors. In Cook County Circuit Court in Chicago, 119,000 cases against debtors were pending as of June 2008. *See Collecting Consumer Debts, supra,* note 4 *at* iii.
18. *See* Weinstein & Porter, *supra* note 12, at 1.
19. *See* The Washington Economics Group, *supra* note 13, at 12–17.
20. *See* AMERICAN BAR ASSOCIATION COALITION FOR JUSTICE, *Report on the Survey of Judges on the Impact of the Economic Downturn on Representation in the Courts* (Preliminary) (Jul. 12, 2010), *available at* http://new.abanet.org/JusticeCenter/PublicDocuments/CoalitionforJusticeSurveyReport.pdf.
21. UNCITRAL, Working Group III (Online Dispute Resolution) 22nd Session, 13-17 December 2010, Vienna, *available at* http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html.
22. U.S. Department of State Advisory Committee on Private International Law (ACPIL): Online Dispute Resolution (ODR) Study Group, 75 Fed. Reg. 66420 (Oct. 28, 2010), *available at* http://edocket.access.gpo.gov/2010/pdf/2010-27297.pdf.
23. *See* AMERICAN ARBITRATION ASSOCIATION, *Consumer Due Process Protocol*, *available at* http://www.adr.org/sp.asp?id=22019.
24. *See* AMERICAN ARBITRATION ASSOCIATION, National Task Force on the Arbitration of Consumer Debt Collection Disputes, *Consumer Debt Collection Due Process Protocol Statement of Principles* (Oct. 2010), *available at* http://www.adr.org/si.asp?id=6248.

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This article is adapted from an article published in the American Bar Association's *Dispute Resolution Magazine*, fall 2011.

Reaffirming Basic Powers of the New York Arbitrator: A Plea for Harmony in State and Federal Arbitration Law

By William J.T. Brown

Arbitrators acting in New York State derive their powers from the parties' agreement to submit their dispute to arbitration and from the law that validates and implements that agreement: the New York State arbitration statute ("CPLR Article 75") and, if the dispute involves interstate or international commerce, the Federal Arbitration Act ("FAA"). These two statutes are quite similar in text and vintage. New York in 1920 was the first of the states to enact an arbitration statute and thus to reject the traditional view of arbitration as a competitive threat to the judiciary. The 1920 New York enactment was the model and inspiration when Congress in turn enacted the FAA in 1925. Despite their similarities, the New York statute has historically been interpreted by New York State judges as withholding from the arbitrator certain powers that the FAA does grant to arbitrators. To cite three examples: the power to decide whether the claim in arbitration is barred by the statute of limitations,[1] whether punitive damages should be awarded,[2] and whether an award of attorneys' fees should be granted (permitted under New York arbitration law only if the parties have agreed to confer such a power).[3] A further difference that may now be at issue in New York's appellate courts concerns the authority of the arbitrator to impose a monetary sanction for party obstruction causing injury or prejudice to the other party. However, the strong policy in favor of arbitration, shared in common by New York state and federal law, calls for a commitment to harmonious interpretation and avoidance of conflict between the two systems, permitting arbitration to go forward to final and enforceable results without unnecessary impediment.

The Authority of the New York Arbitrator to Impose Sanctions

The federal courts, applying the FAA, generally hold that the arbitrator may defend the orderly procedure of arbitration through imposition of sanctions in much the same way as a judge might defend the procedures of litigation. Thus in *Reliastar Life Ins. Co. of New York v. EMC Life Co*. the Second Circuit has held that in matters governed by the FAA, "[w]here an arbitration clause is broad, arbitrators have the discretion to order such remedies as they deem appropriate.… Consistent with this principle we here clarify that a broad arbitration clause… confers inherent authority to sanction a party that participates in the arbitration in bad faith."[4] In contrast, a recent case in New York State Supreme Court, *Grynberg v. BP Exploration Operating Co. Limited*, involving an equally broad arbitration clause, held that since the parties had agreed that "the arbitration shall be regulated by the procedures of the New York Arbitration Act (CPLR Article 75)" the arbitrator lacked authority to defend the arbitral process through imposition of sanctions. This was the holding even though arbitral proceedings had languished for some ten years due to obstruction by the sanctioned party.[5]

The New York State Court's Analysis

Justice Solomon relied on the fact that judicial authority to impose sanctions is established by court rule, 22 NYCRR 130, holding that the rule confers no authority upon arbitrators. However, the First Department case on which the court relied[6] emphasized that the parties had agreed to arbitration rules which precluded any award of costs and fees, thus depriving the arbitrator of the authority to sanction.[7] But *Reliastar* held that if the parties have agreed to give the arbitrator broad powers of decision, in effect the power to decide as a judge would decide, that agreement may be deemed to encompass authority to impose sanctions. However, despite the international origin of the *Grynberg* arbitration, dealing with the development of oil fields near the Caspian Sea and thus clearly within the scope of FAA chapter 2, Justice Solomon relied on the fact that the parties' agreement referred to procedures of New York arbitration law and not the FAA, unlike *Reliastar*, where the parties had agreed that arbitration would be under "the laws of the State of New York and to the extent applicable the Federal Arbitration Act."[8] Justice Solomon also distinguished *Reliastar*'s award of attorneys' fees from the sanction in *Grynberg,* which was untethered to specific expenditure of attorneys' fees. Justice Solomon viewed the *Grynberg* sanctions as more akin to punitive damages, unavailable under New York state arbitration law.[9] Justice Solomon also rejected the contention that the AAA Commercial Rules, under which the parties had agreed to arbitrate, Rule R-45 gave the arbitrator authority to sanction by providing authority "to grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties," because Rule R-45's general grant of authority did not contain a specific reference to sanctions.

A Critique of the *Grynberg* Decision

We respectfully question Justice Solomon's conclusion that the FAA did not apply to this arbitration due to the parties' omission of any reference to the FAA in the arbitration clause. Where an agreement to arbitrate is concluded in the context of interstate or international commerce, it appears that section 2 of the FAA operates of its own force to make that agreement valid and require its enforcement.[10] Certainly the arbitration clause defines

the scope of the issues that are subject to the arbitrator's decision and must be interpreted under the state contract law that the parties have chosen,[11] but the U.S. Supreme Court has held repeatedly that such a clause must also be interpreted under substantive federal law requiring that any ambiguity as to the scope of matters in arbitration be resolved in favor of subjecting the matter to arbitration.[12] The Second Circuit's recent decision in *Bechtel do Brasil Construcoes* would suggest that when parties empower the arbitrator to decide issues but adopt rules that curtail the arbitrator's authority the ambiguity must be resolved in favor of arbitrability.[13]

Justice Solomon was certainly correct that under the Supreme Court's decision in *Volt* parties may agree to employ state law procedures.[14] But she made no mention of the subsequent Supreme Court cases that have distinguished *Volt*, which have emphasized that the state rules applied there affected only the timing of the arbitrator's decision, without denying him the ultimate authority to decide the matters at issue.[15] Thus, the question remains, for purposes of the *Grynberg* analysis, does the parties' agreement to arbitrate under procedures of New York state law deprive the arbitrator of powers that the FAA and the parties' choice of AAA Commercial Rules would give him, or is there ambiguity on this point, ambiguity that must be resolved in favor of arbitration and arbitral authority?

Adoption of arcane and unnecessary differences between New York and Federal law that started out together in pursuit of a common policy invites protracted litigation, undermining arbitration's basic goal of efficiency and speed, as recognized by the Supreme Court in *AT&T Mobility v. Concepcion*.[16] While all would agree that a need to impose sanctions in arbitration can arise only rarely, it is also undeniable that, in the context of obdurate disputation, such a need can indeed arise. Once arbitration is in progress, the arbitrator, rather than a court, is best qualified to assure that the process moves forward to conclusion. To be sure, the role of state contract law in defining the agreement of the parties cannot be denied;[17] and if, in applying state contract law, the court finds that the parties have expressed an unambiguous intent to limit the powers of the arbitrator and to withhold any sanctions power, the contract must be respected. But new limitations on the power of the arbitrator, at variance with developing federal law, should not be created or extended.

State and Federal Arbitration Statutes as Concurrent Grants of Authority

Past history shows that New York courts have sought to move state and federal arbitration law toward a goal of greater harmony. After the U.S. Supreme Court held in *Prima Paint* that the arbitration clause should be deemed an agreement separable from the commercial contract and the arbitrator allowed to decide issues of fraud in the inducement to enter into the commercial contract[18] the New York Court of Appeals in a unanimous opinion by Judge Wachtler overruled its prior decisions, finding that it was unduly "bothersome" for the state courts to be enforcing a different rule than that which prevailed in federal court and thus changed New York arbitration law to achieve uniformity on the issue of separability.[19] There is no public policy need to accentuate or cultivate differences in the state and federal law.

State and federal arbitration law should be considered as largely concurrent. While the New York arbitration statute may not give the arbitrator power to decide certain matters, it does not stand in the way of the arbitrator's exercise of those powers if he obtains them from concurrent grant of authority by the FAA (or party agreement validated and enforced by § 2 of the FAA).

The concept of concurrent grant of arbitral authority should not be limited to the notion that the FAA may supplement the limitations of the New York arbitration statute. The FAA too has its awkward limitations, most notably the troublesome rule of 9 U.S.C. § 9 that judgment is to be entered under the FAA on an arbitration award only if the parties have specified in their arbitration clause that judgment is to be entered.[20] New York arbitration law imposes no such formulaic requirement.[21] If arbitration has taken place under concurrent authority of New York and federal law and the verbal formula required by § 9 of the FAA is missing, there is no reason why judgment on the award cannot be entered by the state or federal court under New York state arbitration law.[22] Similarly, if an arbitrator is deemed to lack authority under New York state law to impose a sanction, surely he may do so under a concurrent grant of authority under federal law in a matter involving interstate commerce.

Of course the parties may preclude imposition of sanctions in arbitration if they wish to do so. Under the authority of *Volt*[23] and *Hall Street*[24] they may also preclude application of all or at least most of the provisions of the FAA if they indeed wish to arbitrate under a different body of law, such as New York State law. But why should it be presumed that parties who have agreed to arbitrate under New York state arbitration law wish to preclude the application of the FAA where its terms may supplement but are not in conflict with the chosen state law procedures? The Second Circuit considered such an issue in the recent *Bechtel do Brasil* case.[25] There, as in *Grynberg* and *Reliastar*, the parties had adopted a "broad" arbitration clause and had also agreed, as in both of the cited cases, that arbitration was to be under arbitration procedures of New York state law. Since the *Bechtel* case arose in the context of interstate commerce, the court held that the FAA was applicable except to the extent displaced by the parties' decision to arbitrate under procedures of New York state arbitration law. Admittedly, under those procedures a court, not the arbitrator, would have been called on to decide statute of limitations issues. But the parties

had also agreed in their broad arbitration clause that the arbitrator should decide all issues in dispute. Thus the court found it ambiguous whether, in choosing New York arbitration law, the parties had intended to deny the arbitrator the authority to decide the statute of limitations issue. And in the face of such ambiguity, the court held that under Supreme Court precedent doubt had to be resolved in favor of submitting the issue to arbitration.

The analysis in *Bechtel do Brasil* suggests that the Second Circuit might have decided *Grynberg* so as to affirm the arbitrator's imposition of a sanction under authority of the FAA. In *Grynberg*, as in *Bechtel*, the parties had adopted a broad arbitration clause submitting all issues to the arbitrator, but had then agreed that arbitration was to be under procedures of New York state law, which, in Justice Solomon's view, did not authorize imposition of a sanction. But the FAA would have had continuing effect in this international arbitration, and it would have been ambiguous whether, in subjecting the arbitration to procedures of New York state law, the parties wished to countermand their agreement that the arbitrator was to decide all issues, including the question whether a sanction was appropriate under the FAA or under AAA Commercial Rules.

Conclusion: The Ongoing Need for Greater Harmony in State and Federal Arbitration Law

The strong policy in favor of arbitration, shared in common by New York state and federal law, calls for a commitment to harmonious interpretation. This need is especially clear in New York, which serves as a center for international commercial arbitration that should offer consistent, predictable and welcoming procedures for international arbitration. The *Bechtel* case seems to be soundly based in Supreme Court precedent of the *First Options* and *Moses Cone* cases.[26] Practitioners in the arbitration area, ever in search of harmony and reason, may hope that state and federal courts will find their respective decisions mutually persuasive.

Endnotes

1. See In Re Smith Barney, Harris Upham & Co. v. Luckie, 85 N.Y. 193 (1995).
2. See Garrity v. Lyle Stuart, Inc., 40 N.Y. 2d 354 (1976).
3. See CPLR 7513.
4. 564 F.3d 81, 86 (2d Cir. 2009). The "broad" arbitration clause in that case gave the arbitrators authority to decide "any disputes or differences arising hereafter between the parties with reference to any transaction under or relating in any way to this Agreement…." Id., 564 F.3d at 84.
5. Grynberg v. BP Exploration Operating Co., Ltd., 2010 N.Y. Misc. Lexis 5985 (N.Y. County 2010). The arbitration clause extended to "a dispute or differences arising out of, in relation to or in any way connected with this Agreement…." Id. at 4.
6. *Citing* Emery Roth v. M&B Oxford 41, Inc., 298 AD 2d 320, 321 (1st Dep't 2002).
7. Applicable rules denied recovery of witness fees and also denied recovery of attorneys' fees where the parties had not requested them. Id.
8. Grynberg, supra, 2010 N.Y. Misc. LEXIS 5985 at 8.
9. Garrity v. Lyle Stuart, Inc., 40 N.Y. 2d 354 (1976).
10. Indeed, as Grynberg involved an international arbitration, the New York Convention and FAA Chapter 2, section 207, would have applied to bring FAA section 2 into operation.
11. See Credit Suisse First Boston Corp. v. Pitofsky, 4 N.Y. 3d 149, 154 n.2 (2005), citing federal precedents.
12. E.g., First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944-45 (1995); Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).
13. Bechtel do Brasil Construcoes v. AUG Araucaria Ltda., 638 F.3d 150 (2d Cir. 2011), discussed below.
14. Volt Info. Sciences v. Board of Trustees, 489 U.S. 468 (1989).
15. See, *e.g.*, Preston v. Ferrer, 552 U.S. 346, 361 (2008); Doctor's Associates v. Casarotto, 517 U.S. 681, 688 (1996).
16. 131 S. Ct. 1740, 1743 (2011).
17. See Credit Suisse First Boston Corp. v. Pitofsky, 4 N.Y. 3d 149, 154 n.2 (2005), citing federal precedents.
18. Prima Paint v. Flood, 388 U.S. 395, holding that the arbitration clause should be considered as a contract separate from the commercial agreement and that the arbitrator did indeed have authority to decide the issue of fraud in the inducement to enter the commercial agreement (so long as it was not claimed that there was fraud in inducing the agreement to arbitrate itself).
19. See In Re Weinrott v. Carp, 32 N.Y. 2d 190, 199 (1973).
20. See Varley v. Tarrytown Assocs., Inc., 477 F.2d 208 (2d Cir. 1973).
21. See CPLR 7510.
22. See The Home Ins. Co. v. RHA/Pennsylvania Nursing Homes, Inc., 113 F.Supp. 633 (S.D.N.Y. 2000). But see Franklin Hamilton LLC v. Creative Insurance Underwriters, Inc., 2008 U.S. Dist. LEXIS 92980 (S.D.N.Y.2008).
23. Supra, note 14.
24. Hall Street Associates, LLC v. Mattel, Inc., 552 U.S. 1035 (2007).
25. Bechtel do Brasil Construcoes v. AUG Araucaria Ltda., 638 F.3d 150 (2d Cir. 2011).
26. Cited supra, note 11.

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The New ICC Rules of Arbitration

By Victoria Shannon and Suzanne Ulicny

Created in 1923, the International Court of Arbitration® (the "Court") of the International Chamber of Commerce (the "ICC") is currently the world's leading institution for resolving international commercial and business disputes, and effectively pioneering international commercial arbitration as it is known today. The Court is not a "court" in the traditional sense, but rather a body that administers the arbitration process under the ICC Rules of Arbitration (the "ICC Rules"). The Court has administered more than 17,000 cases in its 88-year history, including 797 cases filed in 2010 alone.

"The new ICC Rules address concerns raised about the time and cost efficiency of arbitration as a means of resolving disputes…"

The Court is assisted by a Secretariat, headed by the Secretary General, which is headquartered in Paris and staffed full-time by over 80 persons, including more than 30 lawyers spanning 26 nationalities and 22 different languages. Each case is monitored by one of eight case management teams, located in Paris and Hong Kong, that are each led by a Counsel using computerized case management and information retrieval systems that function in four different languages. In addition to case management, the Secretariat provides educational and documentary support services to promote and facilitate the use of arbitration.

Through ICC Dispute Resolution Services, the ICC also administers other forms of dispute resolution, including ADR, Expertise proceedings including DOCDEX (Documentary Credit Dispute Resolution Expertise), and Dispute Boards. In addition, as part of its global outreach, the Court has five Regional Directors who represent the Court and serve as liaisons to users of ICC dispute resolution services around the globe.

Finally, in 2008, the ICC opened a state-of-the-art hearing center in the heart of Paris serving users worldwide of both ICC and non-ICC dispute resolution services.

A Brief History of the ICC Rules of Arbitration

In 1955, the Court released its first set of modern arbitration rules. The ICC Rules were revised twenty years later in 1975 and again in 1988. The current version of the ICC Rules came into effect a decade later in 1998.

The 1998 ICC Rules of Arbitration have stood the test of time and functioned very well over the past thirteen years. They are well drafted, have a universal appeal and are flexible. They have also allowed the Court and its Secretariat to adapt to developments in international arbitration. It is necessary, however, to undertake a revision of the ICC Rules periodically in order to adapt to the changing demands of arbitration users. Recent concerns include the increasing time and costs of arbitration, the need for greater speed in the arbitrator appointment process, the increased complexity of disputes and parties, the need for greater transparency, advances in communication technologies and the rapid rise in the number of investment disputes involving states and state entities.

In January 2008, the ICC invited all of the its National Committees, located in over 90 countries around the world, to comment on whether they considered changes to the ICC Rules to be useful or necessary. In April 2008, the ICC held a conference to seek input from the wider arbitration community. More than 120 people attended and participated in working groups focused on various issues identified in the Rules. In October 2008, the ICC Commission on Arbitration formed the Task Force on the Revision of the ICC Rules of Arbitration.

The Goals of the Task Force on the Revision of the ICC Rules of Arbitration

The Task Force on the Revision of the ICC Rules of Arbitration (the "Task Force") was composed of roughly 175 members nominated by the ICC's National Committees. The Task Force's mandate was as follows:

- To study all suggestions received from National Committees, members of the ICC, users of the ICC rules of arbitration, Court members and members of the Secretariat;
- To determine if amendments to the ICC rules of arbitration are useful or necessary; and
- To make any recommendations for the amendment of the ICC rules of arbitration that the Task Force deems to be useful or necessary.

The overarching objective of the Task Force was to devise a modern set of arbitration rules, designed to serve the needs of the business community and states engaged in international commerce over the course of the next decade or so.

In reviewing the Rules, the Task Force only made changes that are genuinely useful or necessary. The Task Force sought to retain, to the greatest extent possible, the key and distinguishing features of ICC arbitration through clear drafting and avoidance of overly prescriptive language. This approach preserved the universal and

flexible appeal of ICC arbitration while still modernizing the ICC Rules.

The new ICC Rules address concerns raised about the time and cost efficiency of arbitration as a means of resolving disputes and introduce provisions aimed at reducing the time and cost of arbitration proceedings. New provisions in the Rules take into account the latest technological advances, memorialize existing practices of the Court concerning multi-party issues and other new developments in arbitration, and remedy any lacunae in the Rules, such as the absence of provisions governing the withdrawal of cases or claims.

"New provisions in the rules take into account…technological advances,… existing practices…concerning multi-party issues and other new developments in arbitration, and remedy…lacunae…."

In addition, given the growing number of investment disputes handled under the ICC Rules, the ICC Commission created the Task Force on Arbitration Involving States or State Entities (the "Task Force on States") in March 2009. The Task Force on States is composed of over 150 members from 36 different countries, and its mandate is as follows:

- To study and identify the essential and distinctive features of arbitrations involving states or state entities and determine whether there are special procedural considerations that should apply to such proceedings, including investment disputes pursuant to bi-lateral and multilateral treaties or state investment laws;
- To look at ICC arbitration procedures and the Court's practices in relation thereto and determine whether there should be any specific requirements for ICC arbitrations involving states or state entities. Specifically, to determine whether and how the presence of a state or state entity may or should affect the conduct of the arbitration and the role of the institution administering the proceeding; and
- To make any proposals for enhancing the role of the ICC International Court of Arbitration in the settlement of disputes involving states or state entities, including investment disputes pursuant to bi-lateral and multilateral treaties or state investment laws.

The Task Force on States recommended specific changes to the ICC Rules in order to accommodate the concerns of state parties, and the new rules include many of those suggestions.

Improvements to the ICC Rules of Arbitration

The ICC Commission on Arbitration approved several significant improvements to the ICC Rules, including the following:

- **The new ICC Rules streamline the process for rendering a prima facie decision under Article 6(2) regarding whether a valid arbitration agreement exists under the ICC Rules.** The Secretariat will become the gatekeeper, so to speak, which in effect means that not every case will go through a full Court session. The Secretariat will decide routine cases and will refer the more complicated cases to the Court for a decision. This will allow prima facie decisions to be made more quickly, improve efficiency and speed up the arbitrator appointment process.
- **The new ICC Rules memorialize the existing practices of the Court and Secretariat for handling multi-party and multi-contract cases.** The new provisions outline the process for handling joinder of additional parties, claims among multiple parties, consolidation of multiple proceedings involving multiple contracts, and modified cost allocations for cases involving multiple parties or multiple contracts.
- **In an effort to shorten the length of time it takes to put in place a tribunal, the Court has slightly modified the arbitrator appointment and confirmation process.** The process for confirming party-appointed arbitrators remains largely unchanged. In cases when the Court will appoint an arbitrator, it will still consult the National Committees for nominations, but there will be some slight changes to allow the court to put arbitrators in place more quickly. In addition, the court will have the ability to appoint directly in special circumstances, such as in cases involving a state or parastatal entity as a party.
- **The new ICC Rules will require all potential arbitrators, including party-appointed arbitrators, to sign a Statement of Acceptance, Availability, Impartiality and Independence before being appointed or confirmed.** This form makes explicit reference to impartiality as a requirement for serving as an ICC arbitrator, and replaces the previous Statement of Acceptance, Availability and Independence.
- **The new ICC Rules provide additional authority to tribunals to manage costs, taking into account the complexity of the issues and the amounts in dispute.** There is a new appendix outlining case management techniques that the arbitral tribunal and the parties can use to control time and cost. The

recommendations found in the 2007 ICC Publication entitled "Techniques for Controlling Time and Costs in Arbitration" served as the basis for this new appendix.

- **The new ICC Rules include several modifications to make the rules more attractive to state parties.** For example, in arbitrations involving state parties, the Court can appoint arbitrators directly, rather than through the National Committee nomination process.
- **The new ICC rules feature gender-neutral language and modern terminology.** For example, the head of the arbitral tribunal is now called the "President" instead of the "Chairman."
- **The ICC is modernizing its delivery methods and case filing through new technology.** The ICC is upgrading its IT systems in order to support provisions in the new ICC Rules that allow for electronic case filing and document management. The new system is called eCase, and it will replace the former NetCase system.
- **An emergency arbitrator procedure is included as a new appendix to the new Rules of Arbitration.** Under the old rules, the parties had to incorporate the Rules for a Pre-Arbitral Referee Procedure into their contract in advance in order to make use of the ICC's emergency arbitrator procedures. Incorporating an emergency arbitrator procedure into the Rules of Arbitration makes this valuable resource available to all parties who choose ICC Arbitration.

This brief sampling gives the reader a general idea of the complexity of the issues involved and thoroughness with which the ICC conducted its rules revision process.

The ICC is in the process of hosting launch conferences in various cities around the world to introduce users to the changes in the new rules. In the United States, the next ICC Rules Launch Conference will take place in Miami on November 6.

The new ICC Rules of Arbitration are available on the website of the International Court of Arbitration, located at http://www.iccwbo.org/court.

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Editors' Note: *Over the last two years new arbitration laws have been passed in countries around the world including Spain, Scotland, Kuala Lumpur, Ghana, Vietnam, Costa Rica and the Bahamas. Most, but not all, of these new acts draw heavily on the UNCITRAL model law. We offer our readers an analysis of the new arbitration laws in France, Ireland and Hong Kong.*

European Developments—French Rules on Arbitration and European Commission Proposal

By Catherine Kessedjian

On May 1, 2011 the new French Rules[1] on Arbitration entered into force[2] updating the French provisions in effect since the early 1980s. The new Rules are largely a consolidation and codification of previous case law developed both by the Cour de cassation and the Paris Court of Appeals. At the time of this writing there is no official English translation available on the Legifrance website.[3] We provide a translation prepared with Maxi Scherer on the NYSBA website.[4] All references in this brief comment are to that translation.

At about the same time as the new French Rules were released, the European Commission proposed rules to recast the Brussels I Regulation, a regulation which deals only (at least for time being) with court jurisdiction and foreign judgments.[5] These changes could have a significant impact on arbitration in the EU.

This article provides a brief overview of the most salient provisions of the new French Rules, explains the proposed European revisions and discusses the conflict between the European proposal and the French reform.

The New French Rules

The new Rules retain the prior French law's two-pillar structure which separates domestic arbitration from international arbitration. Article 1506 precisely spells out all domestic arbitration provisions which apply by default to international arbitration, unless the parties have agreed otherwise. Among all those provisions, there is at least one which may not be advisable for an opt out. It is Article 1464 para. 3 whereby "the parties and the arbitrators shall act expeditiously and faithfully (avec loyauté) in the conduct of the proceedings." Indeed, it is difficult to understand why parties would want to waive such a common sense requirement for the conduct of the arbitration.

If only one aspect of the French Rules may be noteworthy it is the strong emphasis on party autonomy. Almost all Rules are optional for international arbitration, including the vacatur procedure against the award when it has been rendered in France (see below). Parties who want to consider choosing France as their place of arbitration will need to examine the different options possible and craft their arbitration agreement accordingly. Options must be expressly formulated by the parties. Consequently, if the parties have remained silent on a specific issue, the default rule will apply. For example, under the new Rules, international arbitration is not protected by confidentiality.[6] If the parties want to be protected, they must say so and organise their own rules on confidentiality. They may do so in two stages, so that the arbitration agreement is not overburdened: in that agreement they may provide for confidentiality of the arbitration proceedings—in addition to any other confidentiality they may have provided already in other parts of the contract—leaving for the terms of reference more specific rules on confidentiality and perhaps including also the consequences of a failure to comply.[7]

The vacatur procedure against an international award rendered in France is available as a default rule (Article 1518). It is filed with the Court of Appeals of the judicial district in which the award was rendered (Article 1519 para.1). It must be filed within one month of the date when the award was served (Article 1519 para. 2). If the parties want to waive their right to set aside the award, they must expressly say so (Article 1522). There is no limit to this waiver. It is open to any party, whether French or not, whether resident in France or not. While some have hailed this change as a real innovation it must be noted that even if there is a waiver, the appeal against the exequatur order is always available (Article 1522 para. 2). Consequently, the change may be more formal than a real revolution. Indeed, the reasons for vacatur and the appeal against the exequatur order are exactly the same and provided in Article 1520.[8]

Another noteworthy innovation is the codification of the "juge d'appui," i.e., the judge who acts in support of the arbitration proceedings. The parties are allowed to choose the judge who will act as juge d'appui (Article 1505). If they do not do so, the President of the Paris tribunal de grande instance will act as juge d'appui. The French judge is available to act in support of arbitration if the arbitration takes place in France,[9] or the parties have agreed that French procedural law is applicable to the arbitral proceedings, or the parties have expressly chosen French courts to settle disputes which may arise from the arbitral proceedings or if one of the parties risks facing a denial of justice.[10]

Finally, the new Rules codify the competence-competence principle, both in its positive and negative effects. It applies to international arbitration as a default rule, so that parties can opt out. The positive effect appears in Article 1465[11] and the negative effect in Article 1448.[12] Article 1448 goes further than Article 2.3 of the New York Convention

of 1958. The judge must send the case to the arbitral tribunal as soon as the tribunal is constituted, because the judge lacks jurisdiction (note the words used) when there is a prima facie arbitration agreement. The incompatibility of the French Rules with the proposed new European rules lies in the principle of competence-competence.

The Proposed European Rules

The origin of the European Commission's interest in regulating arbitration lies in the belief by some in Europe that the present situation is not tenable, with each country (mainly the United Kingdom and France) having developed its own practice for dealing with the potential powers of the judge confronted with an arbitration agreement.[13] Article 2.3 of the New York Convention leaves room for action by a judge, but it does not set out a jurisdictional rule (which judge has jurisdiction to decide) and there is no universal, uniform, understanding of what Article 2.3 means by an agreement which is "null and void, inoperative or incapable of being performed."

An academic study, conducted by Professors Hess, Pfeiffer and Schlosser and commissioned by the European Commission, had concluded, against the large majority of the national reporters, that a rule should be included in Regulation 44/2001 granting exclusive jurisdiction to the judge of the "seat" of the arbitration to decide on the validity of the arbitration agreement. That decision would have had preclusive effect in all Member States. And although the study did not say anything about the preclusive effect of that decision in an arbitration proceeding, it was clear that the authors were hoping that this would be the "natural" consequence of the proposed rule. That proposal was met with strong criticism. The thrust of the criticism was essentially twofold: 1) including a rule on arbitration in an instrument having nothing to do with arbitration, having been conceived only for courts, is bad legislative policy; 2) granting exclusive jurisdiction to the court of the "seat" is bad law, not only because it grants too much power to that single court, but also because there are a number of cases where the place of arbitration is not known at the time when the validity of the arbitration agreement is at stake.

Notwithstanding these criticisms, the Commission decided to propose a rule consistent with that study's recommendations. Instead of framing that rule as a jurisdictional rule, it did so as a "lis pendens,"[14] a rule that relies on timing, and ignoring the fact that there cannot be lis pendens between an arbitration proceeding and a court proceeding, both being of a different nature, and calling for different powers.[15] In addition, in order to make that rule operational, the Commission decided to add a rule as to when an arbitral tribunal is deemed to be seized (Article 33.3).[16] Any person with arbitration experience will note that the rule proposed is not in accord with established practice and expectations. In light of the importance of when an arbitral tribunal is seized (particularly in terms of whether the award has been rendered within the specified time limit), it is bad law to provide for a rule on the seizure of the arbitral tribunal which is different from that which has been adopted by previous practice.

As of this writing, the negotiations with respect to the European proposal are still ongoing at the European and Member States level. It is unclear whether this proposal will survive at all, or as now proposed, or with amendments, in the final draft.

Inconsistency Between French Rules and the European Proposal

If the final draft of the Brussels I Regulation recast contains a provision similar to the one now proposed, it is clear that the new French Rules are inconsistent and will have to be amended. First, French law does not use the concept of "seat," which has a strong legal implication, but the more neutral, factual, geographical concept of "place of arbitration."[17] Second, at the heart of French theory on arbitration is the concept that as soon as there is an arbitration agreement, courts entirely lack jurisdiction. Therefore, the concept of "declining jurisdiction," as phrased in the European proposal, which suggests that a court has jurisdiction but prefers not to exercise it, is foreign to French arbitration theory. Third, there is no possible lis pendens between an arbitration proceeding and a court proceeding. Hence, a rule disguised under a lis pendens is at best an awkward way of expression, a lesson that could easily have been learned from the experience of one of the EU's closest neighbours. The same issue had indeed arisen in Switzerland where the Tribunal Federal, in the *Fomento* case,[18] applied the lis pendens rule of the Swiss Private International Law to deal with the same issue. The Swiss legislature intervened shortly thereafter to make clear that the lis pendens rule was not to be used and, instead, introduced the competence-competence principle into Swiss law. Fourth, Article 1456 of the new French rules provides for a different rule than the European one concerning the time as of when the arbitral tribunal is seized.[19]

Finally, the combination of Articles 1448 and 1465 of the new French Rules, as explained above, clearly show that the arbitral tribunal has complete primacy over courts (even that of the place of arbitration) to decide on the validity and effect of an arbitration agreement. The European proposal is, thus, squarely contrary.

Conclusion

The new French rules are a welcome codification of the case law and interpretations by the French courts that have developed over the last three decades. The rules preserve the long-standing French approach to arbitration with broad autonomy for the parties and a strong deference to the arbitral tribunal over the courts. The European proposal to recast the Brussels I Regulation and rule on the interplay between the courts and arbitration proceedings within

the EU includes various provisions that are in conflict with the new French Rules and inconsistent with and detrimental to established arbitration practice. Vigorous discussions about the European proposal are continuing and a discussion of its ultimate import will have to await the release of the final version by the European Commission.

Endnotes

1. It is not possible to speak of a «Law» because the Rules have been adopted via a «*décret*» therefore curtailing the legislative process.
2. The triggering date of May 1, 2011 is pertinent as follows: Articles 1442 to 1445, 1489 and 1505 2° and 3° only apply to arbitration agreements entered into after May 1, 2011. Articles 1456 to 1458, 1486, 1502, 1513 and 1522 apply to arbitral tribunals constituted after May 1, 2011. Article 1526 applies to awards rendered after May 1, 2011.
3. *See,* http://195.83.177.9/code/index.phtml?lang=uk which provides the English version of the French Code of Civil Procedure.
4. The translation is available on the NYSBA Dispute Resolution Section web site at www.nysba.org/FrenchLawonArbitration.
5. Com (2010) 748 final, 14 December 2010, Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0748:FIN:EN:PDF A fuller analysis of the arbitration rules proposed in the recast will be published in the Proceedings of the 2011 Sixth Annual Fordham Law School Conference on International Arbitration and Mediation.
6. Article 1464 para.4, on confidentiality set forth for domestic arbitration is not applicable to international arbitration.
7. The only secrecy which remains as a default rule is the secrecy of the deliberations of the arbitral tribunal (Article 1479). However, this can be opted out equally.
8. Article 1520 provides:

   > The award may be set aside only if:
   >
   > 1. The arbitral tribunal wrongly decided it had or lacked jurisdiction; or
   >
   > 2. The arbitral tribunal was not properly constituted; or
   >
   > 3. The arbitral tribunal ruled without complying with the mandate conferred upon it; or
   >
   > 4. The right to be heard (*principe du contradictoire*) was violated; or
   >
   > 5. The recognition or enforcement of the award is contrary to international public policy (*ordre public*).

   This is very close if not identical to former Article 1502 of the NCCP.
9. The Rules avoid carefully speaking about the "seat of arbitration" but use the more neutral, factual, expression of "place of the arbitration." The only time when the Rules use the expression "seat" is in Article 1459 applicable only to domestic arbitration.
10. The latter provision is a codification of the famous NIOC case (1st February 2005, case # 01-13742 and 02-15237) where the Cour de cassation agreed that French courts had jurisdiction to assist in getting the arbitration started by appointing a missing arbitrator, because otherwise, there would have been no courts available and the arbitration could not proceed.
11. Article 1465 provides: "The arbitral tribunal shall have exclusive jurisdiction to decide on challenges to its jurisdictional power."
12. Article 1448 provides: "If a dispute subject to an arbitration agreement is submitted to a domestic court, that court lacks jurisdiction, unless the arbitral tribunal has not yet been seized and the arbitration agreement is manifestly null or manifestly inapplicable." It further provides: "The national court may not decide on its own motion that it lacks jurisdiction."
13. The Commission was also influenced by the criticism triggered by the Allianz v. West Tankers decision of the European Court of Justice (10 February 2009, C-185/07). For a discussion of the West Tankers case *see*, Timothy G. Nelson and Colm P. McInerney, A Farewell to Arms? *West Tankers* and the Demise of the Anti-Suit Injunction in Europe, NY Dispute Resolution Lawyer, Vol. 2 No. 2, Fall 2009. See also our own comments in English at http://conflictoflaws.net/2009/kessedjian-on-west-tankers/ and in French in Dalloz, 2009, pp. 981-985.
14. Article 29.4 of the proposed Recast of Regulation 44/2001, provides:

   > Where the agreed or designated seat of an arbitration is in a Member State, the courts of another Member State whose jurisdiction is contested on the basis of an arbitration agreement shall stay proceedings once the courts of the Member State where the seat of the arbitration is located or the arbitral tribunal have been seised of the proceedings to determine, as their main object or as an incidental question, the existence, validity or effects of that arbitration agreement.
   >
   > This paragraph does not prevent the court whose jurisdiction is contested from declining jurisdiction in the situation referred to above if its national law so prescribes.
   >
   > Where the existence, validity or effects of the arbitration agreement are established, the court seised shall decline jurisdiction.
   >
   > This paragraph does not apply in disputes concerning matters referred to in Sections 3, 4 and 5 of Chapter II.
15. For a more thorough analysis of the proposal, see the paper to be published in the Proceedings of the 2011 Sixth Annual Fordham Law School Conference on International Arbitration and Mediation.
16. Article 33.3 of the proposed Recast of Regulation 44/2001 provides: "For the purposes of this Section, an arbitral tribunal is deemed to be seised when a party has nominated an arbitrator or when a party has requested the support of an institution authority or a court for the tribunal's constitution."
17. The only time when the French rules use the term "seat" deal with domestic arbitration, in a provision which is not applicable to international arbitration.
18. *Fomento de Construcciones y Contratas S.A. (Spain) v Colon Container Terminal S.A*, ATF 127 III 279, 14 May 2001, available at http://www.bger.ch/. In the *Fomento* case, the Swiss court held that the *lis pendens* provision of Article 9 PIL Act applied to international arbitration and an arbitral tribunal in Switzerland had to stay the arbitration proceeding during the pendency of an action filed earlier in a foreign court.
19. Rule 1456 provides: "The arbitral tribunal is constituted when the sole arbitrator or the arbitrators have accepted the mandate with which they have been entrusted. The arbitral tribunal is seized of the dispute as of that date."

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New Hong Kong Arbitration Law Comes Into Force

By Chiann Bao

Introduction

On 1 June 2011, Hong Kong welcomed the enactment of its much-anticipated Arbitration Ordinance (Cap 609) (the "Ordinance"). Of key significance is the abolition of the dual regime for domestic and international arbitrations under the old Arbitration Ordinance (Cap 341) and the adoption of a unitary regime based on the UNCITRAL Model Law ("UML"). Mirroring the structure of the UML and incorporating the vast majority of the UML provisions into the Ordinance, the new Arbitration Ordinance is a piece of legislation which is not only easily navigable for both local and foreign users but also reflects international best practice. It represents the efforts of the international arbitration community in Hong Kong to make its arbitration legal framework more user-friendly and marks an important milestone for Hong Kong as a leading centre for arbitration.

"Of key significance is the abolition of the dual regime for domestic and international arbitrations…and the adoption of a unitary regime based on the UNCITRAL Model Law."

Background

In January 1992, the Attorney-General tasked the Hong Kong International Arbitration Centre's Arbitration Law Committee to investigate the implications of the 1991 draft Arbitration Act of England on the then-existing Arbitration Ordinance in Hong Kong. In its report published in 1996, the HKIAC Arbitration Law Committee concluded that several urgent amendments were required. These amendments were swiftly enacted in the Arbitration (Amendment) Ordinance (no. 75 of 1996). A series of longer-term recommendations were also made. Notably, the Committee was of the view that the Ordinance should be restructured to subject all arbitrations, not simply international arbitrations, to the UML. The Hong Kong Institute of Arbitrators, in cooperation with the HKIAC, then set up another committee in 1998 to further develop the recommendations made by the HKIAC Arbitration Law Committee. This committee incorporated the suggested restructuring recommendation made by the HKIAC Arbitration Law Committee and concluded that Hong Kong should amplify its status as a Model Law jurisdiction. Specifically, it recommended that (1) the Arbitration Ordinance should be a unified regime which applies the UML to domestic and international arbitrations alike; and (2) the original text of the UML should appear in the main schedule of the legislation which should make express mention that the Model Law should have the force of law in Hong Kong in all cases.[1]

A Working Group, established in 2005 by the Hong Kong Department of Justice, published a Consultation Paper and a draft Arbitration Bill in 2007 reflecting these recommendations. A consultation period followed during which many interested parties contributed their views. The Ordinance was approved by the Hong Kong Legislative Council, gazetted in November 2010, and came into force on 1 June 2011. The result of these efforts is a state-of-the-art arbitration regime founded upon the familiar UML.

Restructuring of the Ordinance

Perhaps the most consequential change is the unification of old Arbitration Ordinance's regimes for domestic and international arbitrations. Rather than applying the UML to international arbitrations only, the Ordinance abolishes the domestic and international distinction and applies the UML to all arbitrations in Hong Kong.

The framework of the Ordinance largely follows that of the UML which is structured by the chronological stages of the arbitral process. The original text of the UML is incorporated into the Ordinance and any modifications are clearly highlighted to alert users to any deviations to the UML.

However, the users of the domestic regime, most of whom are from the construction industry, lobbied successfully to retain certain aspects of the domestic regime. For example, parties may choose to be subjected to the following: (1) for disputes to be heard by a sole arbitrator only;[2] (2) the courts to consolidate arbitrations;[3] (3) the courts to decide preliminary questions of law;[4] (4) the courts to deal with challenges to an award for serious irregularity;[5] and (5) the courts to deal with appeals against an arbitral award on a question of law.[6] These features have been appended as opt-in provisions under Schedule 2 of the Ordinance which apply automatically to (1) arbitration agreements entered into before the commencement of the Ordinance, which provides for "domestic arbitrations,"[7] or (2) agreements entered into within six years after commencement of the Ordinance which provides for "domestic arbitrations."[8]

Key Features of the Ordinance

Preliminarily, it is worth noting that several of the modifications to the UML existed in the old Arbitration Ordinance and have been retained, and, in some cases, enhanced, in the Ordinance. For example, whereas the UML

provides that the default number of arbitrators shall be three, the Ordinance provides that the HKIAC is empowered to determine whether the arbitration shall be heard by one or three arbitrators.[9]

Also, the arbitration-mediation ("arb-med") provision, which existed as the "conciliation-arbitration" provision in the old Ordinance, is retained.[10] Despite its infrequent use in Hong Kong, this arb-med provision is in line with the Hong Kong government's efforts to promote mediation. Under this provision, the arbitrator has the power to, with the parties' agreement, stay arbitral proceedings,[11] attempt to resolve the dispute through mediation, and, if the mediation fails, resume the arbitral proceedings. Important to mention is that, upon the resumption of the arbitral proceedings, the arbitrator must disclose any confidential information "material to the arbitral proceedings" to all parties.[12]

"Hong Kong has taken a bold stance by legislating the express duty of confidentiality."

Provisions dealing with enforcement have also been carried over from the old Ordinance. In addition to addressing awards rendered in New York Convention jurisdictions,[13] specific provisions are incorporated to handle issues relevant to Hong Kong's unique status as a special administrative region (such as provisions dealing with awards rendered on the Mainland[14] and in Taiwan[15]). The Ordinance enhances the previous enforcement provisions by requiring leave of the court for any appeal from the court's decision to grant or refuse leave to enforce an award.[16]

The Ordinance contains several new provisions which supplement the UML provisions. These features exemplify the underlying objectives of the Ordinance—(1) a fair and speedy resolution of disputes by arbitration without unnecessary expenses, (2) enhanced party autonomy[17] and (3) reduced court intervention.[18] Provisions addressing confidentiality and interim measures are perhaps the most salient.

Confidentiality

Hong Kong has taken a bold stance by legislating the express duty of confidentiality. While the old Arbitration Ordinance and the UML are silent as to the duty of confidentiality, Section 18 of the Ordinance is a new provision specifically intended to safeguard confidentiality in arbitration. Under Section 18 of the Ordinance, save as for an enumerated set of exceptions, "unless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to arbitral proceedings or an arbitral award."[19] Further, the Ordinance provides that court proceedings related to arbitration are not to be held in open court unless a party applies to the court and the court determines otherwise.[20]

Interim Measures

In an effort to minimize court intervention, the Ordinance adopts the UML provisions addressing interim measures and allows arbitral tribunals to grant interim measures upon the request of a party. The scope of this power is specifically defined in Section 35(2) of the Ordinance and empowers an arbitral tribunal to order such temporary measures as preserving assets or evidence and maintaining or restoring status quo. The Ordinance further elaborates on the power of a tribunal to order interim measures and allows the tribunal to make an award to the same effect as the interim measure it has granted.[21]

As evidence of further enhancing Hong Kong's pro-enforcement stance, the Ordinance adds a new provision which vests Hong Kong courts with the power to order interim measures in aid of arbitrations in and outside of Hong Kong (unless the courts find that it is more appropriate for the arbitral tribunal to grant the requested interim relief).[22] The caveat is that courts may only grant such interim measures where the award would be enforceable in Hong Kong and the interim measure is of a description that may be granted by the Court in Hong Kong.[23]

"[The] drafters determined that… providing parties with a 'reasonable' [rather than 'full'] opportunity to present their cases would achieve the goal of encouraging a fair, speedy yet cost-effective means to resolve their dispute."

Other Notable Provisions

To facilitate a fair and speedy resolution of disputes without unnecessary expenses, drafters of the Ordinance chose not to adopt Article 18 of the UML which would allow parties to have a "full" opportunity to present their cases before a tribunal. Instead, drafters determined that, on balance, providing parties with a "reasonable" opportunity to present their cases[24] would achieve the goal of encouraging a fair, speedy yet cost-effective means to resolve their dispute.

Other indications of emphasizing cost and time efficient practices include more extensive provisions dealing with costs, including taxation of costs[25] and the ability for arbitrators to limit the amount of recoverable costs.[26] For example, unlike the previous Ordinance where the default was for the courts to assess costs of the arbitral proceedings, pursuant to Section 74 of the Ordinance, arbitral tribunals may award directions with respect to costs of arbitral proceedings unless parties agree to have such costs assessed by the courts.

Conclusion

With a sound legal system founded on the rule of law and an independent judiciary already in place, the passage of this arbitration legislation is a move towards an even more user-friendly arbitration environment. The Ordinance reaffirms Hong Kong's position as a leading arbitration centre not only in the Asia-Pacific region but also internationally.

Endnotes

1. Choong and Weeramantry (n2) [Ch2.29] referring to the Committee Report 2003, p.25, para 6.3.
2. *See* Arbitration Ordinance, Cap 609, Schedule 2, section 1.
3. *See* Arbitration Ordinance, Cap 609, Schedule 2, section 2.
4. *See* Arbitration Ordinance, Cap 609, Schedule 2, section 3.
5. *See* Arbitration Ordinance, Cap 609, Schedule 2, section 4.
6. *See* Arbitration Ordinance, Cap 609, Schedule 2, section 5
7. *See* Arbitration Ordinance, Cap 609, s. 100(a).
8. *See* Arbitration Ordinance, Cap 609, s. 100(b).
9. *See* Arbitration Ordinance, Cap 609, Section 23(3).
10. *See* Arbitration Ordinance, Cap 609, Section 33(1).
11. *See* Arbitration Ordinance, Cap 609, Section 33(2).
12. *See* Arbitration Ordinance, Cap 609, Section 33(4).
13. *See* Arbitration Ordinance, Cap 609, Sections 87-91.
14. *See* Arbitration Ordinance, Cap 609, Sections 92-98.
15. *See* Arbitration Ordinance, Cap 609, Sections 84-86.
16. *See* Arbitration Ordinance, Cap 609, Section 84.
17. *See* Arbitration Ordinance, Cap 609, Section 3(2)(a).
18. *See* Arbitration Ordinance, Cap 609, Section 3(2)(b).
19. *See* Arbitration Ordinance, Cap 609, Section 18(1).
20. *See* Arbitration Ordinance, Cap 609, Section 16.
21. *See* Arbitration Ordinance, Cap 609, s. 35(3).
22. *See* Arbitration Ordinance, Cap 609, s. 45.
23. *See* Arbitration Ordinance, Cap 609, s. 45(5).
24. *See* Arbitration Ordinance, Cap 609, Section 46(3)(b).
25. *See* Arbitration Ordinance, Cap 609, Section 75.
26. *See* Arbitration Ordinance, Cap 609, Section 57.

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Ireland's Thoroughly Modern Arbitration Law[1]

By Klaus Reichert SC

As and from 8 June 2010 Ireland's arbitration law took a new and decisive path away from its past, which had its origins in a replication of the English Arbitration Act 1950,[2] with the coming into force of the Arbitration Act 2010[3] ("the Act"). This short article will give a panorama of the Act and its contents.

First, the main operative provisions: all previous arbitration laws are repealed[4] and the UNCITRAL Model Law on International Commercial Arbitration (2006 version[5]) ("the Model Law") is prescribed,[6] virtually without any changes, for all arbitration taking place in Ireland with no distinction between domestic or international cases. In short, if one knows the Model Law one knows Ireland's arbitration law.

"…Ireland's arbitration law took a new and decisive path away from its past…"

Secondly, there some minor changes to the Model Law:

1. The default number of arbitrators is set at one rather than three.[7]
2. The reference in Article 27 of the Model Law (court assistance with the taking of evidence) is extended to include arbitrations with seats outside of Ireland.[8] Thus, those who might wish to seek evidence located in Ireland in aid of an overseas arbitration can apply to the High Court for such assistance.
3. All decisions of the High Court under the provisions of the Model Law are made subject to no appeal to the Supreme Court.[9] This approach was particularly inspired by Switzerland's system for court challenges going directly to the Federal Tribunal.
4. The time limit for the making of an application to set aside an award based upon a public policy argument per Article 34(3) of the Model Law shall be made within 56 days from the date on which the circumstances giving rise to the application became known or ought reasonably to have become known to the party concerned.[10]
5. Articles 35 and 36 of the Model Law do not apply in respect of an award rendered in Ireland.[11] Enforcement by the High Court of an award made in Ireland is pursuant to section 23(1) of the Act by means of a simple application which does not permit the raising of the various grounds in Article 36 by a defendant. This means that the potential for two bites at the cherry[12] by a recalcitrant defendant has been completely removed.

Thirdly, certain additions are made to the Model Law:

1. The Arbitral Tribunal is empowered,[13] unless otherwise agreed by the parties, to administer an oath to a witness—but this is not a mandatory provision.
2. Consolidation of arbitrations is permitted but only upon the consent of the parties.[14]
3. The parties can agree the powers of the Arbitral Tribunal to award interest, or in default of such agreement there is a power to award simple or compound interest from the dates, at the rates and with the rests which are considered fair and reasonable.[15]
4. The Arbitral Tribunal can (unless otherwise agreed by the parties) order a party to provide security for costs.[16]
5. The Arbitral Tribunal has (unless otherwise agreed by the parties) the power to make an award requiring specific performance of a contract (other than a contract for the sale of land).[17]
6. The parties are free to make such agreement as to the costs of the arbitration as they see fit whether before or after a dispute breaks out. This is an important provision for U.S. practitioners to note as this is different to the provisions of section 60 of the English Arbitration Act 1996 which nullifies the effect of clauses which provide that costs shall be borne by each side regardless of the outcome (save where such an agreement is entered into after the dispute breaks out). In default of agreement on costs or in the absence of an agreed procedural power to award/withhold costs, the Arbitral Tribunal can determine by award those costs as it sees fit.[18]
7. There is a full and unqualified protection[19] from liability in respect of arbitrators[20] and arbitral institutions[21] for anything done or omitted in the discharge or purported discharge of their functions.
8. An arbitration agreement or the authority of an arbitral tribunal is not discharged by the death of any party.[22]

9. In the event of the bankruptcy of a party there is a prescribed mechanism in order to allow the arbitration to move forward.[23]

10. The Act applies to an arbitration agreement under which a State authority is a party.[24]

Fourthly, there are certain specific provisions which also merit attention:

1. The Act carries on the pre-existing force of law in Ireland of the New York[25] and Washington[26] Conventions and the Geneva Protocol.[27]

2. When considering any application under the Model Law the High Court shall take judicial notice of the UNCITRAL *travaux préparatoires* and its working group relating to the preparation of the Model Law.[28]

3. The Act appoints[29] the President[30] of the High Court (or such judge of the High Court as may be appointed by the President) to deal with all applications[31] under the Model Law, save for stay applications.

4. The Act specifically prohibits[32] the High Court from ordering the discovery of documentation or security for costs when exercising its powers under Article 9 or 27 of the Model Law.

5. The Act does not apply to an arbitration under an agreement providing for the resolution of any question relating to the terms or conditions of employment or the remuneration of any employees.[33]

6. In relation to consumers, such parties shall not be bound by an arbitration agreement (except if they agree after the dispute has arisen) where the agreement between the parties contains such a term which has not been individually negotiated and the dispute involves a claim not exceeding £5,000.00.[34]

7. The High Court and Circuit Court[35] can of their own motion adjourn proceedings to enable the parties to consider whether any or all of the matters in dispute might be determined by arbitration.[36]

There is a provision in another statute which is also relevant to a complete understanding of the Act. Section 17 of the Defamation Act 2009 gives absolute privilege to a statement made in the course of proceedings before an arbitral tribunal where the statement is connected with those proceedings.[37]

Finally, the initial experience of the High Court's discharge of its functions under the Act has been marked by a commendable efficiency. A recent application to the High Court in a high-profile matter under the Act illustrates this point rather neatly. The application was for a measure in aid of a pending arbitration and demonstrated that the robust nature of the timetable prescribed by the Rules of the Superior Courts[38] works well in practice. An application was made to appoint an arbitrator in the matter of *Munster Football Club Ltd -v- Football Association of Ireland*[39] and the relevant papers to commence the arbitration application to the High Court were filed on 18 January 2011. The application was given a date (31 January 2011) for oral argument before the High Court. On that date an order was made appointing an arbitrator.

"[O]n the first anniversary of the Act's coming into force, one can certainly look back with some satisfaction at the initial experience of practitioners with how it has worked…"

While there is nothing particularly earth-shattering about such an application, what is noteworthy is that thirteen days after the papers were filed the actual oral argument was presented to the High Court and the order was made. The rapidity of the process is the important point.

In conclusion, on the first anniversary of the Act's coming into force, one can certainly look back with some satisfaction at the initial experience of practitioners with how it has worked, how the High Court has dealt with its functions and how the Act has been received by the international community.

Endnotes

1. An assessment of Ireland's Arbitration Act 2010 made in the editorial of the first part of the 2011 edition of *Les Cahier de l'Arbitrage*, a leading international journal on arbitration based in Paris.
2. It should be noted that from 1998 there was a distinction drawn between domestic and international arbitration with the latter being governed by the Arbitration (International Commercial) Act 1998 based upon the UNCITRAL Model Law.
3. The Act can be found at www.arbitrationireland.com and came into force on 8 June 2010, two years to the day from when it was announced at the Opening Ceremony of ICCA 2008 in Dublin. There has been much favourable comment on the Act from the international community. The efforts of *Arbitration Ireland*, the Irish Arbitration Association, in undertaking road shows in Paris, New York, Washington DC, London and Geneva in the first few months of the Act's existence has particularly assisted with widening the interest in Ireland as a venue. Immediately prior to the completion of this short paper it became known that the ICC International Court of Arbitration had designated Dublin as the seat of an arbitration in a matter where the parties had left that choice to that institution. This was the first time, to this author's knowledge, that the ICC had designated Dublin as a seat for one of its cases since the coming into force of the Arbitration Act 2010.
4. Section 4 of the Act.
5. Option 1 of Article 7 is chosen for the form of arbitration agreements and the interim measures provisions added in 2006 are adopted in full.

6. Reproduced in full in Schedule 1 of the Act.
7. Section 13 of the Act.
8. Section 15 of the Act.
9. Section 11 of the Act.
10. Section 12 of the Act.
11. Section 23(4) of the Act.
12. First bite: a set aside application under Article 34; second bite, resisting enforcement under the same grounds again in Article 36. If a losing party sits on its hands and does not challenge an award under Article 34 it will be shut out from complaint when confronted with a High Court enforcement application.
13. Section 14 of the Act.
14. Section 16 of the Act.
15. Section 18 of the Act.
16. Section 19 of the Act.
17. Section 20 of the Act.
18. Section 21 of the Act. The form of an Arbitral Tribunal's determination is prescribed in section 21(5) and requires specification of the grounds, the items of recoverable costs, fees or expenses, the amount referable to each and by and to whom they shall be paid.
19. Section 22 of the Act.
20. This includes an employee, agent, advisor or tribunal-appointed expert.
21. Section 22(3) of the Act.
22. Section 26 of the Act.
23. Section 27 of the Act:

> (1) Where an arbitration agreement forms part of a contract to which a bankrupt is a party, the agreement shall, if the assignee or trustee in bankruptcy does not disclaim the contract, be enforceable by or against him or her insofar as it relates to any dispute arising out of, or in connection with, such a contract.
>
> (2) Where—(*a*) a person who has been adjudicated bankrupt had, before the commencement of the bankruptcy, become a party to an arbitration agreement, and (*b*) any matter to which the agreement applies requires to be determined in connection with or for the purposes of the bankruptcy proceedings, and (*c*) the case is one to which *subsection (1)* does not apply, then, any other party to the agreement or the assignee or, with the consent of the committee of inspection, the trustee in bankruptcy, may apply to the court having jurisdiction in the bankruptcy proceedings for an order directing that the matter in question shall be referred to arbitration in accordance with the agreement and that court may, if it is of the opinion that having regard to all the circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly.
>
> (3) In this section "assignee" means the Official Assignee in Bankruptcy.

24. Section 28 of the Act.
25. Reproduced in full in Schedule 2 of the Act.
26. Reproduced in full in Schedule 3 of the Act.
27. Reproduced in full in Schedule 4 of the Act.
28. Section 8 of the Act.
29. Section 9(2) of the Act.
30. The most senior judge of the Irish High Court and second only to the Chief Justice in the judicial hierarchy.
31. All applications are to be made in a summary fashion (section 9(3) of the Act) which means that evidence in support of the relief sought is tendered by way of affidavit and not by live testimony. The procedural rules of the High Court under the Act (Order 56 of the Rules of the Superior Courts) set out a clear and robust timetable for the filing of affidavits and the speedy disposition of applications.
32. Section 10 of the Act.
33. Section 30 of the Act.
34. Section 31 of the Act. Also, there is a provision in section 31 which specifically excludes the protection afforded to consumers from amateur sportspersons who are parties to arbitration agreements involving their sporting bodies. This is particularly aimed at supporting the arbitration system under the auspices of the Gaelic Athletic Association which is the major amateur sporting body in Ireland with a very large number of participants.
35. The Circuit Court deals with smaller civil claims and sits in most towns of any size in Ireland. The High Court sits, almost exclusively, in Dublin.
36. Section 32 of the Act.
37. The concern noted at *Arbitration* (CIARB) 2010 Volume 76, No. 4, page 585, is answered by section 17 of the Defamation Act.
38. *Supra* fn 31.
39. The underlying dispute between the Applicant, the corporate name of Limerick City FC, a soccer club in that city and the governing body of that game in Ireland, the Respondent, was widely reported in the Irish media at the time and involved a proposed friendly match between the Applicant and FC Barcelona, one of the World's most famous clubs.

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Neuro-Literacy for Collaborative (and Other) Lawyers

By Pauline H. Tesler

1. What Is Neuro-Literacy and Why Should You Care About It?

A flood of neuroscience research studies (including imaging technologies as well as animal and human studies) is yielding remarkable discoveries about the workings of the human brain, discoveries that challenge core beliefs about human consciousness and rationality imbedded in our legal institutions and jurisprudence. This growing body of evidence carries potentially revolutionary implications for our day-to-day work as lawyers, depicting a brain that is driven not by reason, but by emotion—a brain that has changed little in 20,000 years. This article aims to introduce the practical value of this burgeoning knowledge, and the importance for lawyers of developing basic "neuro-literacy."[1]

"[Neuroscience] carries potentially revolutionary implications for our day-to-day work as lawyers, depicting a brain that is driven not by reason, but by emotion—a brain that has changed little in 20,000 years."

The sheer volume of game-changing discoveries about the workings of the human brain means there is no orderly body of knowledge for lawyers to absorb and reduce to proven practical applications. But there is plenty of evidence to suggest that the impact of these new understandings will be transformative for dispute resolution practice. Even without definitive proof, we can put these new findings to good use if they pass our personal "smell test": if they appear plausible and potentially helpful, and if we see no likelihood of harm. The questions we need to ask before incorporating practical neuroscience applications into our daily work are straightforward and simple:

- Does this research finding sound plausible in terms of what I know about human behavior during conflict, negotiations, and decision making?
- Can I devise a practical way to apply this finding?
- Do I think the application might be helpful?
- Would trying out my idea be unethical, dishonest, improperly manipulative, or otherwise inconsistent with highest standards of practice?

2. Practical Neuro-Literacy Replaces "Naïve Realism" with "Neuro-Realism"

Emerging understandings about the workings of the human brain can (1) enrich the lawyer-client relationship, (2) enhance interactions with clients and colleagues during negotiations, and (3) facilitate achieving clients' goals during negotiations through techniques we can weave into every stage of representation. This vast terrain of potential applications cannot be explored in any depth in an introductory article. It *is* possible, however, to give readers a glimpse of what we have learned about some harmful effects flowing from unexamined assumptions that rational thought should be the primary way to attain clear understanding of external realty and arrive at truth. Those assumptions go to the heart of our professional identity as lawyers, and we now know that biologically speaking, they are simply wrong. We also can look briefly at how a more scientifically sound understanding of the role of emotions in our work with clients might play out in two of those three potential areas of application: the lawyer-client relationship, and interactions during negotiations.[2]

Re-tooling for neuro-literacy begins with facing the implications of "naïve realism," a seductively simplistic habit of mind found in abundance among lawyers. Naïve realism, simply put, holds that:

- I see reality as it actually is. My actions and beliefs are based on a sound rational interpretation of reality.
- Other people would share my view and actions and opinions if they had access to the same information that I have and if they have processed that information in a reasonable way, as I do.
- If others don't share my views, it's because:
  - they have insufficient or incorrect information; if they will pay attention to my information we can reach an agreement;
  - they are lazy or stupid—i.e., not making rational decisions based on the right information;
  - they are biased by ideology, self-interest, or some other distorting influence.[3]

In reality, research confirms that our sensory perceptions and the thinking we base on those perceptions are inherently limited and fallible. Our brains select only a very small sliver of incoming sensory data and make meaning by attempting to match the limited data to similar prior experiences. The brain approximates reality; it tells a story about the incoming data that fits with what we have encountered before. Thus, the human brain is not like a camera, but more like a film editor, making a coherent movie out of unrelated bits and pieces according to a pre-existing script. What our senses do *not* register is vastly greater than what they do register; before any thoughts

or perceptions even hit our conscious awareness, they have been edited to cohere to the most likely similar pattern our brain has stored, minus everything that is unnecessary for the pattern to match up. In a sense, then, we perceive what we expect to perceive, and we notice as new only that which confounds our expectations in a way that triggers an emotional response. We notice the slavering dog racing toward us down the beach; we notice our own name spoken in passing in a nearby conversation that until then was meaningless buzz. We do not notice the man in the gorilla suit strolling slowly across the basketball court, because he's not part of the game where our attention is fixed. Thus, our mantra as we embark on becoming neuro-literate might be the words of Nobel prizewinning physicist Richard Feynman: "The first principle is that you must not fool yourself and you are the easiest person to fool." We have a lot to learn, and even more to unlearn, if we are to move into 21st Century lawyering based on an accurate understanding of how we, our clients, and our colleagues apprehend reality and make decisions.

Our interaction with our clients is deeply influenced by the jurisprudence in which we work. In turn, jurisprudence is founded on a theory of how people think and act—and thus, on a theory of the mind. Our legal culture is infused with a belief that the human mind is, or should be, entirely rational when it is functioning properly, and that each client is a bounded rational individual who owns a bundle of rights and entitlements that sometimes conflict with the bundle belonging to someone else. Reasoning is how the law resolves those conflicts, based on orderly presentation of sensory facts whose meaning ultimately is decided by a third party authority. Therefore, our jurisprudence is deductive, rules- and norms-based, and hierarchical.

Our professional identity and habits are honed to function well within that system; we work every day with assumptions about informed consent, choice, and decision making grounded in beliefs about the primacy of reason and cognition so pervasive as to be virtually invisible. This is called "thinking like a lawyer," and when we do it, our clients and even we ourselves take on an archetypal quality in which complex individuality is subordinated. The welter of confused impressions, hopes, fears, and desires that constitute the client's narrative and our own sensory experience of that incoming narrative are abstracted by the thinking layer of our brains into legally framed arguments based on individual rights and entitlements.

Our focus on individual rights, our reliance on argumentation, and our conviction that considerations in the emotional and relational realm have no place in our work arise from an 18th Century rationalist jurisprudence that is tone deaf to the spectrum of non-justiciable concerns that our clients care mightily about. Equating strong advocacy with strong assertion of positional arguments about rights and entitlements makes good sense in a rules-based third party decision-making model, but makes far less sense in client-centered, interest-based out-of-court modalities like collaborative law because collaborative law (like some modes of mediation[4]) aims exclusively at finding acceptable solutions based on client interests and values, entirely outside the courts, without any involvement of third party decision makers. We are by definition working in the realm of human (as distinct from purely legal) conflict.

It turns out Adam Smith was just plain wrong about rational self interest as the driving force for human decision making. Contrary to the assumptions of thinkers since Plato, functional MRI studies confirm that complex rational thought does not drive our behavior. Rather, every choice we make arises not from our uniquely human cerebral cortex, but from the limbic brain, the seat of emotions and a brain structure we share to a degree with all other mammals.[5] Even the choice of Cheerios or Corn Flakes for breakfast is driven by and cannot be made without emotion, the moving force and sine qua non for thought. Thus, to the extent that we rely upon 18th Century enlightenment bargaining techniques based on a naïve realist model of decision making as our frame for negotiations in a client-centered interest-based model, we are using a hacksaw to do brain surgery.

"We have a lot to learn, and even more to unlearn, if we are to move into 21st Century lawyering based on an accurate understanding of how we, our clients, and our colleagues apprehend reality and make decisions."

3. Practical Neuro-Literacy Enriches How We Relate to Our Clients

No client, asked when the divorce began and when it ended, will ever answer by naming pieces of paper (petitions, complaints, settlement agreements, judgments). Every divorce lawyer knows that our clients experience divorce as an extended human transition of operatic dimensions, with emotionally exhausting peaks and valleys involving betrayals, bad faith, and narcissistic wounds that call into question identity, core values, and even the will to survive. At the forefront of attention for most clients are concerns fraught with emotional content (grief, loss, disappointment, anger, fear, mistrust, and the like). But for lawyers locked in an 18th Century naïve realist model for legal dispute resolution, the sole focus of negotiation is abstract legal "containers" stripped of the emotional context in which clients experience divorce-related conflict. The containers are labeled alimony, child custody, child support, and property division. For the client, an exchange of quantifiable positions about the issues under

these legal rubrics leaves unnamed, unventilated, and unresolved the underlying emotional forces that drive the conflict. Our clients frequently leave such settlement processes with little or no sense of the closure or "ownership" that are the hallmarks of deep conflict resolution.

Our brains organize memory in neural pathways that include sensory data saturated with intense emotions; these patterns shape incoming sensory data to fit the pre-existing template. Every time our client recalls the bad experiences surrounding separation and divorce, a pattern in her implicit memory system is reactivated, strengthened, and altered, so that today's painful experience merges contextually with every other similarly painful relationship experience extending back into childhood, gathering force and in a sense rewriting the story of the marriage—not only now but as it was lived previously—through the lens of pain, disappointment and betrayal. Each reactivation of this increasingly emotion-saturated narrative trope triggers involuntary physiological events throughout the body as it prepares to defend against attack. Blood pressure rises, heartbeat speeds up, cortisol floods the bloodstream. As a direct result the newer cognitive centers of the brain—located in the neocortex, which engages in cause and effect thinking and in imagining new solutions to old problems—go offline for as long as several hours after a triggering memory while the "fight, flight, or play dead" response plays out in body and mind. Some studies have suggested a substantial temporary drop in I.Q. of 30 points or more when a spouse experiences rejection by the former partner. Our divorcing clients are required (perhaps for the first time in their lives) to make complex and far-reaching decisions about finances and parenting at a time of unprecedented and sustained stress, and for many of them, deep and wounding rejection is the context in which this decision-making must take place. We are, in other words, representing clients who may for much of the time we work with them be experiencing transient states of diminished capacity.

We cannot erase their pain, and we cannot rewrite their history; but I believe we do have a professional responsibility to understand how unrealistic, unhelpful, and biologically incorrect a rationalist decision-making model really is for distressed clients. What might change for the better if we brought practical neuroliteracy into the picture? Quite a lot. For instance, if we appreciated the reality that for the emotional brain there is little or no difference between experiencing something, imagining it, remembering it, and recounting it, and if we also appreciated the inescapable neurobiological reality that in the presence of strong emotion, the rational thinking brain will be switched "offline" for perhaps hours at a time, we would understand the importance of ensuring that no client is encouraged to make "rational" decisions soon after re-experiencing the intense emotional states invoked by recounting or recalling intense divorce-related narratives. The artistry of when and how we attend to our clients' pain-saturated stories, and how we encourage clients to envision the goals of their divorce separate and apart from the pain of the marital breakup, can be greatly enriched by a grounding in practical neuroscience.

We can also be clear about the difference between empathy and destructive alignment or identification as we fulfill our responsibilities as effective advocates. We can reconsider how we respond when a client retells the painful history of the divorce or the most recent spat with the "ex." If, like a litigator constructing a winning theory of the case, we align with and magnify the unhappy story, we are in a literal sense altering our client's brain for the worse, diminishing the ability to remember anything positive, foreclosing the capacity for clear thought, and reducing the ability to entertain constructive options for the future. Instead, as neuro-literate advocates, we can learn new skills for reframing the emerging narrative into one more congruent with the client's best hopes for the future.

When we consider new neuroscience understandings about how pain-saturated stories diminish our clients' capacity to plan effectively for their own future and the future of their children, it is difficult to escape the conclusion that neuro-literacy is no longer optional. We do not need to be psychotherapists to learn better and more effective empathic skills that allow us to form alliances that help rather than harm angry or distraught clients; we do not need to be neuroscientists to learn how to work constructively with pain-saturated narratives to help clients return more quickly to higher-functioning cognitive states. Skills like these should constitute vital parts of the core professional education of divorce lawyers—especially those of us who choose to work in consensual out-of-court models that depend on full client engagement, and that promise a deeper and fuller kind of resolution than is available from a court

4. Practical Neuro-Literacy Enhances Interactions with Clients and Colleagues During Negotiations

In the 1990s Marco Iacoboni, an Italian researcher, accidentally discovered a previously unknown neuronal function in the brains of macaque monkeys, and subsequently in human brains, called "mirror neurons," which most evolutionary neuroscientists now believe are the key to our capacities for empathy, language, and self-awareness. Subsequently, a Stanford psychologist named Paul Ekman took Iacoboni's work to the next level by demonstrating that human beings across all languages, cultures, and levels of sophistication express and understand emotions through mirroring and reading facial expressions that are universal. Thought to be a key evolutionary advantage, mirror neurons enable all of us to "know" without engagement of any of the higher cognitive brain centers whether a person is friend or foe, happy or sad,

flirtatious or disgusted, truth-teller or liar. We know what others feel by assuming the same expression and thereby simulating or mirroring in our own bodies the sensory output. We feel one another's pain and joy in the most literal way, as an evolved biological mechanism for rearing infants and for forming and sustaining relationships and communities built on trust and cooperation—the evolutionary advantage that has allowed us to develop complex cultures. Moreover, we don't merely read the emotional language of others; the emotional states of each of us are contagious to everyone in proximity to us, without us usually being conscious of the phenomenon.

It follows that every communication between and among the lawyers and the parties in a case necessarily carries a biologically wired emotional substratum. Lawyers unsophisticated in the workings of mirror neurons may make the well-intentioned error of allowing distressed clients to unload on one another at settlement meetings, believing there is something constructive in what they call "catharsis." Not so, neuroscience tells us. Each client, and everyone else in the room, will simulate via their own mirror neurons the intense emotions being expressed, and will experience in their own bodies and brains the "fight or flight or play dead" evolutionary defense program that strong emotion triggers. The possibility of creative problem solving disappears, neurally speaking, for quite some time following such a "catharsis." For clients, another round of the same old fight also reinforces the implicit memory attractor patterns that register every shred of evidence confirming the other's unworthiness of trust and respect, while diminishing the brain's ability to notice disconfirming evidence of good faith that does not match the increasingly charged negative pattern.

If catharsis is counterproductive, should we instead instruct clients to "suck it up," or adopt that strategy ourselves when frustrated or angry at someone else in the negotiating room? It turns out that won't work well, either. Our facial muscles, body language and the timbre of our voices speak louder than words, communicating our actual feelings and contaminating the environment at the table. If the feelings are there, they will be read by every brain in the room and can silently undermine trust and cooperation.

How might practical neuro-literacy help us address more effectively the eruption of negative emotion during case-related communications?

- We can learn "self scanning," a technique for becoming aware of how various emotions express themselves uniquely in our own bodies. This can become an early warning system, alerting us that we are becoming anxious or irritated before the emotion reaches a volume that shuts down higher level cognitive processes like planning, creative imagination, and cause-and-effect analysis.
- With a more nuanced awareness of our emotions as they play through body and mind, we can invoke self-soothing techniques that operate at the neural level to abort emotional "hijacking" of higher brain functions. Functional brain imaging studies show that meditation and similar awareness practices can modulate the effects that otherwise accompany negative emotional states.
- We can teach clients simple techniques to soothe and avert emotional meltdowns, many of them involving sensory inputs associated with implicit memory patterns of relaxation, trust, and other desired states. Some of those associations may be uniquely personal, such as listening to a particular piece of music or experiencing a scent associated with a particular positive memory or looking at a photograph of a beloved child, while others may be shared by most of us—the positive effects of deep breathing, soothing touch, or of endorphins generated by taking a break for a short brisk walk.

Collaborative lawyers have employed these and similar techniques for nearly two decades. Now, hard science confirms that far from being touchy-feely ideas, these techniques work because of how our brain works. Strong emotions should neither be allowed to contaminate the safe space of the negotiating room, nor be excluded from the negotiation process. Learning how to manage them constructively is part of becoming neuro-literate.[6]

5. Conclusion

At this point, you may wonder, "what on earth does this stuff have to do with lawyering?" The answer is, quite a lot. Chief Justice Warren Burger famously observed, "The entire legal profession—lawyers, judges, law teachers—has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers—healers of conflicts. Doctors, in spite of astronomical medical costs, still retain a high degree of public confidence because they are perceived as healers. Should lawyers not be healers? Healers, not warriors? Healers, not procurers? Healers, not hired guns?"[7] In the same vein, Robert Benham, the first African American to serve as Chief Justice of the Georgia Supreme Court, has spoken of three fundamental professions found in all civilized societies—medicine, which heals the body; the clergy, which heals the soul; and law, which properly understood heals breaches in the social fabric.[8] Justice Benham went on to describe the law codified in statutes and reflected in appellate decisions as the "floor" for acceptable behavior in a society: go below it and you encounter trouble with the law. He lauded the collaborative practice movement for encouraging our clients to explore the space between the floor—their legal rights and entitlements—and their own highest values. The emerging neurosciences offer us a rich harvest of understandings and tools to support the work these distin-

guished jurists have encouraged us to embrace as healers of breaches in the social fabric.

No act of will can force us, or our clients, to cease operating according to the deeply wired biological programs that are our evolutionary legacy, and there is no simple checklist of "ten easy ways to help your client stop being emotional at inconvenient times." Becoming neuro-literate in conflict resolution work means embarking on a long and very personal process of recognizing when we are in the throes of unhelpful naïve realism, and gradually developing nuanced new skills to replace positional argumentation based on deductive logic. This is a tall order. Such retooling cannot be done alone.[9] In this regard, collaborative law, which is inherently collegial and which is built on protocols and roadmaps for sophisticated professional teamwork, represents one of the cutting edge methods for reshaping our understanding of what it means to be effective advocates in the 21st century.

"Becoming neuro-literate in conflict resolution work means embarking on a long and very personal process…"

Endnotes

1. Collaborative lawyers work outside the court system in interdisciplinary teams that transform how the lawyers participating in them deliver services to clients. See, Pauline H. Tesler, "Informed Choice and Emergent Systems at the Growth Edge of Collaborative Practice," Family Court Review, Volume 49, Issue 2, pages 239–248, April 2011, available online at http://onlinelibrary.wiley.com/doi/10.1111/fcre.2011.49.issue-2/issuetoc. See, also, Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 Ariz. L. Rev. 289 (2008).
2. An overview of the third area, facilitating achievement of clients' goals, will have to wait for another article.
3. From Lee Ross and Andrew Ward, "Naive Realism: Implications for Social Conflict and Misunderstanding," Working Paper No. 48, Stanford Center on Conflict and Negotiation (May 1995), accessible at https://www.law.stanford.edu/program/centers/scicn/papers/naive_realism.pdf, last consulted May 25, 2011.
4. Many points in this article also apply to the facilitative and transformative ends of the mediation spectrum. The focus here is on how lawyers can provide new styles of advocacy and counsel to clients. Others may want to explore these ideas in the context of practice as a neutral.
5. Thomas Lewis, Fari Amini, and Richard Lannon, A General Theory of Love (2000).
6. Interdisciplinary collaborative team practice provides an elegant, skillful solution to the challenge of working with strong emotions, providing licensed mental health professionals in a coaching role who prepare each client for negotiating difficult issues in an emotionally intelligent manner. See, Pauline Tesler and Peggy Thompson, Collaborative Divorce: The Revolutionary New Way to Restructure Your Family, Resolve Legal Issues, and Move On with Your Life (2006). The team model also provides a context in which unexamined habits of naïve realism in dispute resolution work can be highlighted and altered.
7. Warren Burger, *The State of Justice*, A.B.A. J., Apr. 1984, at 62, 66.
8. Unpublished keynote address at International Academy of Collaborative Professionals annual Forum, Atlanta, Georgia, 2005.
9. If you are interested in embarking on that retooling process, the place to start is in an extended experiential workshop.

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The Counterintuitive Mediator

By Peter A. Scarpato

Introduction

Mediation is a process. You start somewhere and end somewhere else, hopefully with smiling parties shaking hands, penning a settlement. The initial task is often formidable: non-communicative, unhappy parties represented by aggressive lawyers…and you, wondering as you sense the palpable tension in the room, "how did I get myself into this?" The issues are often complex, with layers of interested parties, non-party insurers, experts and relatives, all wondering (as you no doubt have) "how will the mediator help us solve all these problems?"

Faced with these circumstances, your intuitive reaction is to be proactive, to set a course of action, calling upon all of your analytical skills, negotiation technique and keen persuasiveness to move parties out of the darkness. To give them your views on each issue and the dollar range of a possible settlement. But is that really what works in mediation? Or should you be counterintuitive?

Doing Less Accomplishes More

Defined as the art or science of "softness," the ancient Japanese martial art Jujitsu began as a method for feudal Japanese samurai to overtake an armed opponent in circumstances where the use of weapons was impractical or forbidden. It applies the *principle of manipulating an attacker's energy against them, not directly opposing it*. Essentially, Jujitsu masters derive and use the power from the attacker's weight and strength defensively.

The parallel to mediation is striking: stripped of the typical "weapon" of traditional dispute resolution—the power to issue formal decisions—the samurai mediator must "disarm" parties, who "weaponize" their lawyers' legal analyses and their own myopic view of the facts. Instead of confronting and challenging the parties'/lawyers' arguments head on, counterintuitive mediators "join the resistance," drawing out the parties' arguments, facts and underlying interests they serve in a subtle, measured way to ensure that ***the parties*** realistically examine and evaluate them. Ultimately, these self-evaluations become the engine mediators help the parties use to drive towards a settlement.

But what are some critical elements of counterintuitive mediation?

Relinquishing Control Affords More Control

The more parties *themselves* dictate the direction, form and substance of the mediation process, the more it becomes *their* process, decreasing the likelihood that they will walk away. From the very first introductory/scheduling conference call, the mediator should—carefully—encourage parties to work together to design key steps in the process. For example, if possible, parties—not the mediator—should agree on: The need to exchange key documents informally; the details and timing of this exchange; the need to prepare and exchange mediation statements; staging the mediation to ensure all key documents are produced, depositions are taken, motions are decided; the need for people with authority to be at the mediation table.

The more parties discuss, debate and work out these steps—make this their process—the more they begin to create an atmosphere of agreement, planting seeds for more difficult negotiations later.

"Instead of confronting and challenging the parties'/lawyers' arguments head on, counterintuitive mediators 'join the resistance,' drawing out the parties' arguments, facts and underlying interests they serve in a subtle, measured way to ensure that the parties *realistically examine and evaluate them."*

Instead of Critically Talking, Mediators Must Actively Listen

The oft quoted 80/20 rule must apply in every mediation: in the beginning, during joint sessions and initial caucuses, mediators must talk 20% of the time and listen 80% of the time. Why? For several reasons:

First, it's about unpeeling the onion, developing facts relevant to each side's positions for use later in the "bartering" stage and maybe, just maybe, unearthing those elusive interests of which Harvard's Fisher and Ury are so fond.

Next, it's about releasing the immeasurable, potent power of engagement. Think about how many mediations you've had where parties seems content to remain unengaged while their lawyer runs the show. Parties unengaged are not reacting to the other side—they are mostly listening to their lawyer, occasionally whispering some "silver bullet" sound bite into his/her ear. If parties are permitted to speak, maybe even to each other, they are better positioned to carefully listen and react to the other party—they are engaged in the actual process that fuels potential settlements. In this position, a careful mediator can steer their factual, often cathartic dialogue towards the issues.

Third, it's about permitting parties, in joint session, to connect with each other and in private caucus, to become comfortable with and trustful of the mediator. If engagement is powerful, one party's genuine expression of acknowledgment and understanding of the other party's positions (not complete agreement with them) is earth-changing, the first plank in the process of building a bridge between them. The same holds true for building the bridge of trust between party and mediator. In caucus, mediators should ask broad questions and listen attentively, looking parties in the eye, expressing empathy and optimism about prospects of settlement, and occasionally even touching their arm or patting them on the back, the quintessential human expression of "I feel you, I hear you, I understand your problem."

Lastly, it's about observing the physical reactions and substantive interactions from party-to-party, lawyer-to-lawyer, party-to-opposing lawyer and party-to-hired lawyer. All of these episodes give the mediator powerful insights into the centers of power, influence and information. They allow parties to react to and judge the strengths and weakness of their own and their opponent's positions—it's one thing to hear it from your lawyer, in a safe environment and atmosphere critical to the other side, it's quite another thing to be sitting 5 feet from your opponent as s/he lays out his/her case against you logically, legally, and passionately.

All of these steps require relative silence from the mediator. Once they set it up and get the parties going, mediators should selectively use the balance of their 20% to keep the mediation on track. As the mediation moves into caucus and more detailed bargaining, the mediator of necessity becomes more active, talking 80% of the time.

Ask Broad, General Questions to Get Precise, Detailed Answers

In the quest for detailed, useful information, there is no better tool than asking a party (not his/her lawyer) an open question. "How did you and the other party meet and ultimately decide to enter into your agreement? What happened on the day of the claimed breach of contract?"

Though certainly not a negative attribute, lawyers are trained to package their recitation of the facts logically and selectively, highlighting information that supports their client's causes of action and downplaying the rest. Generally, parties are more willing to tell the whole story, possibly revealing background information that unearths their true interests—an important element of the process.

Slower Is Better (and Sometimes "Faster")

Remember the TV ads for Paul Masson wine, in which a portly, stately Orson Wells proclaimed "We will sell no wine before its time"? In mediation, parties will settle no case until they're ready, "ready" being the elusive, operative word.

Slower is better because typically mediators have much to do to get everyone in the "settlement zone." A colleague of mine calls it "turning the aircraft carrier." Many factors (ship speed, surrounding objects, wave heights and wind speed) must be assessed and found just right before executing the turn. Similarly in mediation, many factors (parties' trust in the mediator and their opponent, their merits' assessment and desire to settle, their feeling of being heard and appreciated, etc.) must be aligned to create the optimum possibility for settlement. And getting them there often takes time. An untimely request to "cut to the chase and start talking numbers" is often the death knell of your mediation.

Slower is sometimes "faster" if you define "faster" as getting the case settled before you're "at the courthouse steps." Since most mediators believe—and the literature supports the idea—that no mediation is ever a waste of time, a properly executed, unrushed mediation plants the seeds for future, meaningful settlement talks between the parties, well before the more coerced, pretrial version.

When You Hit Impasse, You Are Making Real Progress

Yes, you read it correctly.

For all participants, mediation is a search: for information, arguments, concessions, common ground—and ultimately, for the hard issues standing in the way of settlement. If a mediation collapses because parties rushed to positional "numbers" bargaining prematurely, or a lawyer's aggressive style caused participants to "clam up," the parties missed an opportunity for the mediator to help them uncover and deal with the real issues, the impasse roadblocks fueling their dispute.

Thus, if a mediator gets parties to the point of impasse and clearly identifies the most fundamental reason(s) why they can't agree, s/he had made true progress. At that point, everyone knows the problems to be solved, and the mediator can intelligently chart a course to help the parties solve them.

Since You Are the ADR Specialist, Ask the Parties for Help

Its 6:30PM. You, the parties and their counsel have been at it since 9AM. You have tried unsuccessfully to use all the tools in your belt to move the parties past a key issue. People are beginning to grouse about missing dinner, but no one wants to leave, a sign that they want to settle.

What do you do?

Especially, but not exclusively, if the lawyers have experience in mediation, there is nothing wrong with asking them for suggestions. Like you, they have been "noodling" this problem all day; they and their clients most likely know the facts and their bottom lines better

than you, and ultimately will suggest something they would accept.

If You Hit an Irreconcilable Impasse, Use the Power of Silence

As humans, we are hardwired to fill in the gaps of uncomfortable silence. Even people who meet for the first time on an elevator, knowing they will depart and never see each other again in a matter of seconds, feel compelled to chat about the weather.

Faced with a problematic impasse and flush out of ideas, you can reassemble the parties in joint session to deal with the issue, sit in the corner and say nothing. Let the seconds pass in silence. Inevitably, someone in the room will suggest something new, or a new twist on an old offer or demand, something to break the silence. And even if the idea is not accepted, it often leads to further brainstorming and other suggestions for settlement.

Even Though They Have Nothing to Do with the Substantive Issues, Steer Into, Not Around, Emotional Issues

We are, after all, human beings with hopes, dreams, fears, and yes emotions. Even corporate employees and counsel in complex civil disputes get angry, vengeful, and upset, especially if their theory or position is sharply challenged or internal politics subject them to undue pressures.

Don't assume as a mediator that avoiding emotional issues removes them from a party's decision-making process. In caucus, you should get them on the table, acknowledge their importance, and help develop strategies for accommodating them in the mediation.

Instead of Being in Charge, Disappear

Some say that mediation is a lonely business because, when the parties begin to agree on points and accelerate towards settlement, they often negotiate the final few points without the mediator. But that is the true mark of a successful mediation. The sooner you become invisible, the better. Don't fight to stay directly involved but be on call if they need you to move past any final issues.

Conclusion

Like the Jujitsu master, we as mediators must understand the power of "less is more." Often the most effective strategies are counterintuitive, contravening our gut reactions but successfully applying "manipulative nonresistance." In the final analysis, this dispute belongs to the parties—what better way to serve them than to help them resolve their issues and disappear?

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Mediator Liability: A Survey of Recent Developments

By Robert A. Badgley

As ADR, and mediation in particular, has become more prevalent, claims and lawsuits against mediators have become more frequent. In most cases, the claims are baseless. However, because one of the parties to the mediation may be dissatisfied with the result or the process, a claim may well follow.

When confronted with the specter of a potential claim, many in the mediation community invoke quasi-judicial immunity—the kind of near-absolute immunity enjoyed by arbitrators—as a basis to avoid liability. However, not all jurisdictions recognize immunity for mediators, and most states that do restrict such immunity to court-annexed mediation. Moreover, the protection is typically not absolute even where immunity is available. The mediator may still be vulnerable to suit predicated upon a wide variety of causes of action that fall outside the scope of the immunity, such as gross negligence, breach of contract, and breach of confidentiality. In addition, other forms of redress that are not barred by immunity, such as state disciplinary or grievance procedures, may be pursued by a disgruntled party. Finally, it is critical to note that, even if mediator defendants ultimately escape liability, they can nevertheless incur significant defense bills.

In addition to potential exposure to civil liability, mediators also face exposure to disciplinary proceedings which address potential misconduct. Although an adverse outcome will not result in payment of money damages, the imposition of disciplinary measures can be costly in other ways, such as the mediator's reputation. And, of course, it costs money to respond to the disciplinary allegations.

The following survey of fairly recent claims makes clear that mediators will continue to face challenges to their conduct, even where the mediator did nothing wrong.

Family Law

One area where the use of mediation continues to proliferate is family law. Couples seeking a divorce can do so more quickly and inexpensively through mediation than via the traditional court process. When mediators do commit errors in the mediation process, they become vulnerable to attack. Moreover, the emotionally-charged context of a divorce produces situations in which, even where a mediator has seemingly done everything right and taken necessary precautions to protect both parties, he or she is still open to claims.

- ***Post-Mediation Advice.*** In April 2011, a mediator was sued in Tennessee state court for allegedly giving legal advice to the divorcing husband a few days after a mediation session. In an e-mail, the husband made comments to the mediator about the wife's allegedly threatening conduct, and the mediator allegedly responded by e-mail that the husband should ask his attorney about pursuing a restraining order or order of protection. The mediator is also alleged to have advised the husband to take measures that could shame the wife into ceasing her conduct and to save e-mails to preserve an evidentiary record. Subsequently, the husband secured an order of protection against the wife.

  The wife is now suing the mediator for $15 million, under theories of malpractice, breach of contract, and intentional infliction of emotional distress. The wife claims that she lost her job as a result of the actions set in motion by the mediator. She also claims to have been arrested in January 2011 as a result of the order of protection set in motion by the mediator.

  Prior to filing the lawsuit, the wife had filed a grievance with the Tennessee Supreme Court Alternative Dispute Resolution Commission. The Commission gave the mediator a private reprimand. The mediator has filed a motion to strike from the civil complaint references to the ADR Commission proceedings. The civil lawsuit is otherwise in its early stages. (2011)

- ***Post-Mediation Murder.*** In California, a family mediator was sued for the death of a wife stabbed by her husband in the building in which the mediation session occurred. The divorcing couple had met a week earlier at the mediator's office for an initial mediation session, which ended without incident. After the second meeting, held a week later and in the evening, the husband left the mediator's office. The wife remained for 20 minutes and spoke with the mediator. The wife then left and, on the first floor of the building, was fatally stabbed by her husband, who had gone to his car and returned to the building with a pair of scissors.

  The court dismissed the complaint in 2008 on the grounds that there was no evidence of prior violence by the murderer or safety concerns at the premises. The same day as the case was dismissed, the parties settled in order to avoid an appeal. The combined settlement amount and defense costs exceeded $100,000. It also bears noting that many professional liability policies do not afford indemnity for bodily injury or death. (2006)

- ***Faulty Settlement Agreement.*** A California mediator participated in the drafting of a Marital Separation Agreement several years ago. The agreement confirms that the mediator was not rendering legal services or giving legal or tax advice. The ex-husband was recently audited by the IRS, and faces possible tax liability in connection with the deductibility of certain support payments made under the agreement. The ex-husband has threatened suit against the mediator. (2010)

Commercial Law and Other Contexts

Lawsuits against mediators arising from commercial law matters and other various types of disputes have proven to be just as dangerous as those which arise out of family law, employment law and personal injury.

- ***Misstated Tax Implications of Settlement.*** In Florida, a plastic surgeon sued a local broadcaster for defamation and false light. The lawsuit was mediated, and a settlement agreement was achieved. In March 2010, the surgeon moved to rescind the settlement agreement, alleging that the mediator had coerced him into settling and had inaccurately represented that the settlement proceeds would be tax exempt. The surgeon gave a deposition in the underlying case in connection with his motion to rescind the settlement agreement. At deposition, he admitted that the mediator never physically or mentally prevented him from leaving the mediation, and did not prevent him from consulting with his lawyers, family, or longstanding accountant regarding the settlement or its tax implications. The proceedings to set aside the settlement agreement in the underlying case are still pending; to date no lawsuit has been filed against the mediator. (2010)
- ***Conspiracy and Bias.*** A commercial law mediation involved a dispute among the plaintiff company, another company that asserted cross-claims against the plaintiff, and the plaintiff's insurer. The court appointed a mediator, who presided over a mediation. The plaintiff left the mediation before it was concluded, after which the insurer and the other company reached a settlement of part of the dispute. The plaintiff then filed suit against the mediator, alleging that he improperly continued with the mediation and conspired with the other parties to prejudice the plaintiff's rights. The trial court granted the mediator's motion for summary judgment, holding that the court-appointed mediator enjoys quasi-judicial (i.e., absolute) immunity. That ruling was affirmed on appeal, but the plaintiff filed a second lawsuit. That suit was also dismissed and has now been appealed. Despite the existence of immunity in California for court-annexed mediators, this claim has gone on for years and has been very costly to defend (more than $400,000). (2005)
- ***Nondisclosure and Bias.*** A commercial law mediation involved a dispute over the creation of a popular television show. The plaintiff claimed the production company owed him compensation for his contribution to the creation of the show. The parties agreed to mediate. Unbeknownst to the plaintiff, the mediator had previously mediated a dispute between the production company and another party which involved the same attorneys. The instant case settled at mediation for $200,000. The plaintiff later discovered the mediator's prior history with the other side and claimed that the mediator was biased against him. He further alleged that if the mediator had properly disclosed this information before the mediation, he would not have agreed to the selection of the mediator. The plaintiff filed a lawsuit, which alleged that the mediator's failure to disclose the prior mediation which involved the production company resulted in a settlement that was significantly lower than it should have been. The complaint alleged causes of action for conspiracy, fraud, breach of fiduciary duty and negligence. Although the lawsuit was eventually dismissed based on quasi-judicial immunity, the mediator incurred significant defense costs. (2002)

Conclusion

As the foregoing relatively recent cases demonstrate, mediators are often exposed to situations with the potential to spark a variety of expensive claims. Although the defendant mediators may avoid liability in many cases, defense costs can be significant. The magnitude of the problem may not be widely known because many of the cases involve confidential settlements entered into prior to trial. Given the current trend of increased use of ADR, these examples demonstrate that mediators cannot afford to be unprotected. In many jurisdictions, mediators cannot rely on strong immunity defenses, and thus must look to other safeguards to protect their business assets. Liability insurance is an obvious first step.

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Differences Between U.S. and European Mediator Standards

By Randall Kiser and Nicole Ginder

The Court of Justice of the European Union's recent decision in Akzo Nobel Chemicals Ltd. v. European Commission, Case C-550/07 P, confirming that the attorney-client privilege does not apply to in-house counsel in European Commission antitrust investigations, is a reminder that fundamental differences continue to exist between EU and U.S. legal systems. Although U.S. attorneys understand that these differences in substantive and procedural law may affect how their clients conduct business in Europe, they may be unaware that these differences extend to mediation principles and methods as well.

"The European Code of Conduct for Mediators…places greater emphasis on the mediator's role and responsibilities."

EU and U.S. standards of conduct for mediators reflect some divergent policies, priorities, practices and philosophies. Six important differences between the standards are discussed in this article: party self-determination; mediator competence, training and evaluation; confidentiality; conflicts of interest; party consent and understanding; and preparation of the settlement agreement.

Party Self-Determination. The Model Standards of Conduct for Mediators ("Model Standards"), adopted by the American Bar Association, American Arbitration Association and Association for Conflict Resolution, emphasize "party self-determination." That term is defined as "the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome."

The European Code of Conduct for Mediators ("European Code"), prepared under the auspices of the European Commission and applicable to civil and commercial matters, places greater emphasis on the mediator's role and responsibilities. It expressly imposes a duty to consider "the circumstances of the case, including possible imbalances of power and any wishes the parties may express, the rule of law and the need for a prompt settlement of the dispute." The mediator, moreover, "must inform the parties, and may terminate the mediation, if a settlement is being reached that for the mediator appears unenforceable or illegal, having regard to the circumstances of the case and the competence of the mediator for making such an assessment." The inclusion of "the rule of law" and "power imbalances" in the European Code may counter the domestic criticism, as summarized by law professor Richard Reuben, that "ADR serves not only to frustrate the rule of law by denying its application, but, worse yet, it ultimately uses law to reinforce the very class and power disparities that so often give rise to conflict in the first place."[1]

Competence. Under the Model Standards, a U.S. mediator must have "the necessary competence to satisfy the reasonable expectations of the parties." Any person may serve as a mediator provided "the parties are satisfied with the mediator's competence and qualifications." If the mediator determines during a mediation that he "cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps to address the situation." The issue of whether "competence" includes subject matter competence as well as procedural competence is not addressed in the Model Standards and remains a source of continuing dispute among mediators and clients. Although this dispute is not squarely addressed in the European Code, the requirement of subject matter competence may be inferred from two independent requirements: (1) mediators "must be competent and knowledgeable in the process of mediation;" and (2) mediators "must verify that they have the appropriate background and competence to conduct mediation in a given case before accepting the appointment."

Closely related to mediator competence requirements are continuing education and quality assessment requirements. Under the Model Standards, a mediator "should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation." A mediator also should advance the practice of mediation by, inter alia, "participating in research when given the opportunity, including obtaining participant feedback when appropriate." The continuing education and participant feedback provisions are permissive, as the Model Standards expressly state that the term "should" connotes "careful use of judgment and discretion."

Stricter requirements for continuing education and stronger steps to promote quality assessment appear to be imposed by the European Code, when read in conjunction with the European Directive on Mediation.[2] In determining whether mediators have satisfied the requirement of competence and knowledge in "the process of mediation," one relevant factor is "continuous updating of their education and practice in mediation skills." Under the Directive, moreover, European Union Member States are encouraged to develop "effective quality control mechanisms concerning the provision of mediation services" to ensure that mediations are conducted "in an effective, impartial and competent way."

Confidentiality. The scope of confidentiality is broader under the European Code. Although confidentiality protections under the Model Standards apply to "all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law," the European Code extends the protections further. To comply with the European Code, the mediator "must keep confidential all information arising out of or in connection with the mediation, including the fact that the mediation is to take place or has taken place, unless compelled by law or grounds of public policy to disclose it." To avoid inadvertent disclosure by the parties participating in mediation, the mediator "must in particular ensure that prior to commencement of the mediation the parties have understood and expressly agreed to the terms and conditions of the mediation agreement including any applicable provisions relating to obligations of confidentiality on the mediator and on the parties."

U.S. practitioners should be aware that, under certain circumstances, EU mediation practices may afford a lower degree of confidentiality than they would expect from a literal reading of the European Code. In awarding costs sanctions, for example, some jurisdictions may permit the court to consider the reasonableness of a party's refusal to participate in mediation or its position at mediation. If the parties have consented to a mediator's proposal, moreover, a party's rejection of that proposal and its subsequent failure to achieve a better result at trial may be a factor in determining an award of attorneys' fees and costs. Mediation confidentiality also may be waived by the parties. Under Article 7 of the Directive, "unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process.…"

Conflicts of Interest. The Model Standards adopt a "reasonableness" standard in defining and disclosing conflicts of interest, but the European Code imposes a strict disclosure standard. A conflict of interest, under the Model Standards, "can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality." A mediator is required to "make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator." The actions necessary to accomplish a "reasonable inquiry," moreover, "may vary based on practice context." After completing this reasonable inquiry, the mediator must disclose "all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality."

The European Code does not include a "reasonableness" standard but rather requires strict disclosure and seems to adopt an appearance of conflict standard: "If there are any circumstances that may, or may be seen to, affect a mediator's independence or give rise to a conflict of interests, the mediator must disclose those circumstances to the parties before acting or continuing to act." In circumstances that may or may be seen to give rise to a conflict of interest, "the mediator may only agree to act or continue to act if he is certain of being able to carry out the mediation in full independence in order to ensure complete impartiality and the parties explicitly consent."

Parties' Consent and Understanding. The Model Standards do not impose an affirmative duty upon mediators to ascertain whether parties consent knowingly and freely to the terms of their mediated settlement. "A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions," the Model Standards declare. The Model Standards also do not impose an affirmative duty to ascertain whether the parties understand their settlement agreement. If a party "appears to have difficulty comprehending the process, issues or settlement options, or difficulty participating in a mediation," however, the mediator "should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination." The process of "exploring" a comprehension problem is triggered after a party manifests some difficulty, and the term "should" indicates the practice is "highly desirable but not required." This protective measure appears to be relatively weak when contrasted with the European Code counterpart: "The mediator must take all appropriate measures to ensure that any agreement is reached by all parties through knowing and informed consent, and that all parties understand the terms of the agreement."

Preparation of Agreement. Many U.S. mediators refuse to draft or participate in the drafting of the parties' settlement agreement. Reasons for this refusal include a concern that drafting documents constitutes the practice of law, increases the risk of being called as a witness, violates ethical constraints against conflicts of interest or simply is an inappropriate role for a mediator. The ABA Section of Dispute Resolution Committee on Mediator Ethical Guidance issued an opinion on June 24, 2010, stating that "mediation," as defined by the Model Standards, "does not expressly include the drafting or preparation of mediated settlement agreements or MOUs [Memorandum of Understanding]." The ABA opinion further cautions that, if a mediator "provides legal advice or performs other tasks typically done by legal counsel, the mediator runs a serious risk of inappropriately mixing the roles of legal counsel and mediator, thereby raising ethical issues under the Model Standards."

The European Code takes a markedly different approach to advising the parties: "The mediator must, upon request of the parties and within the limits of his competence, inform the parties as to how they may formalize the agreement and the possibilities for making the agreement enforceable." This duty is consistent with the strong, explicit support of mediation expressed in the European Directive on Mediation: "Mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the good will of the parties. Member States should therefore ensure that the parties to a written agreement resulting from mediation can have the content of their agreement made enforceable." The EU's emphasis on enforcement is emphatic: "Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability."

"[T]he European Code…imposes stricter standards regarding confidentiality, conflicts of interest, consent, and understanding of the settlement agreement and requires consideration of 'the rule of law,' 'possible imbalances of power,' and the legality and enforceability of the settlement."

The Model Standards reflect a firm belief in party self-determination, while the European Code adopts an arguably more protective model of mediation. The Model Standards encourage the consensual, creative solutions that, mediation proponents believe, frequently yield better outcomes than could be achieved through formal judicial adjudication. Although the European Code also promotes consensual, creative solutions, it imposes stricter standards regarding confidentiality, conflicts of interest, consent, and understanding of the settlement agreement and requires consideration of "the rule of law," "possible imbalances of power," and the legality and enforceability of the settlement.

As a practical matter, many U.S. mediators may routinely take the precautions and consider the factors embodied in the European Code. They may question whether explicit requirements are preferable to the parties' reliance on the mediator's judgment, experience, discretion and integrity. Ironically, this type of conflict between explicit rule making and individual judgment occurs in another critical ADR context—the duty to advise clients of ADR alternatives. Once again, our European counterparts address the duty explicitly in the Code of Conduct for Lawyers in the European Union: "The lawyer should at all times strive to achieve the most cost effective resolution of the client's dispute and should advise the client at appropriate stages as to the desirability of attempting a settlement and/or a reference to alternative dispute resolution." Although diligent U.S. attorneys may regard ADR counseling as obligatory, the Model Rules of Professional Conduct provide no explicit direction on this issue. Whether explicit requirements protect parties and reduce misunderstandings about mediator and attorney responsibilities or, alternatively, decrease personal responsibility and diminish the importance of professional judgment and discretion, is a philosophical issue still unresolved by vigorous debate on both continents.

Endnotes

1. Richard C. Reuben, *ADR and the Rule of Law*, 16 Dispute Resolution Magazine, Summer 2010, at 6.
2. Directive 2008/52/EC on Certain Aspects of Mediation in Civil and Commercial Matters, as adopted by the European Parliament and the Council of the European Union on 21 May 2008.

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The authors thank Alfred Haug, a mediator and Director, Swiss Reinsurance Company, Ltd. in Zurich, Switzerland for his comments on an earlier version of this article.

Attorneys' Inability to Predict Case Outcomes: Mediation to the Rescue

By Solomon Ebere

According to two recent publications, attorneys are confident yet inaccurate predictors of case outcomes. As a result of overconfidence in their predictions, attorneys tend to advise parties to proceed to trial when in fact parties are generally better off accepting pre-trial settlement offers than going to trial. Mediation offers the parties and their attorneys the best chance to improve the accuracy of case predictions.

"[A]ttorneys are confident yet inaccurate predictors of case outcomes."

In a recent book entitled *Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients*, Randall Kiser relates an extensive study undertaken a few years ago comparing attorneys' predictions with case outcomes.[1] According to this study, a staggering percentage of attorneys erroneously forecasted their client's prospects at trial, advising their clients to proceed to trial when they would have been better off settling the dispute on the terms offered. Previously, in a study related in an article entitled *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*, Professor Elizabeth F. Loftus and her colleagues reached a similar conclusion: attorneys tend to be confident but poor forecasters of case outcomes.[2]

Both studies highlight that ineffective decision-making harms both parties and counsel. Most plaintiffs who decided to pass up a settlement offer to proceed to trial got less money than if they had taken that offer. And while defendants who proceeded to trial were more likely to have made the right decision, those who would have been better off accepting a pre-trial settlement offer paid a steep price for their decision error. With respect to attorneys, ineffective decision-making exposes them to malpractice liability.

One way to mitigate attorneys' proclivity to make wrong predictions about case outcomes may be to resort to mediation. First and foremost, a very significant number of parties who use mediation settle the dispute. Second, mediation may help parties and counsel overcome the various psychological, financial and other impediments to a sound assessment of the merits of the case. Third, mediation brings a third-party neutral to the process, who may provide parties and counsel with a more realistic evaluation of the case and its likely outcome.

This article summarizes some of the studies' most noteworthy findings and potential explanations for them. This article then considers why mediation may help parties and attorneys make decisions as to how to proceed with a case.

Findings

Evidence That Attorneys from All Walks of Life Are Confident Yet Inaccurate Forecasters of Case Outcomes

In an analysis of 2,054 civil cases litigated in California that went to trial from 2002 to 2005, what will be referred to as the Kiser study found that in 61% of the cases, plaintiffs made the wrong decision to go to trial, and should have accepted the settlement agreement offered pre-trial.[3] On average, this decision error costs plaintiffs $43,000 or more in their recovery.[4] By contrast, defendants were less often wrong to proceed to trial—only 24% ended up paying more than what they offered plaintiffs to settle the dispute.[5] However, the cost they suffered for this decision error was much greater: on average, $1.1 million.[6]

In *Insightful or Wishful*, the authors found that out of 481 civil and criminal litigations in which attorneys participated in the survey, about half of them demonstrated overconfidence about the case outcome: only 32% of them met their goals, while 44% were less successful than they predicted and only 24% exceeded their goals.[7]

Additionally, both studies looked at a number of variables predictive of attorneys' ability to accurately predict case outcomes.[8] For instance, both studies looked at gender as a correlate, but found contradictory evidence. In *Insightful or Wishful*, the authors found that "female lawyers were slightly better calibrated than their male counterparts and showed evidence of less overconfidence."[9] By contrast, the Kiser study found that "in general, higher decision error rates and lower win rates for plaintiffs are correlated with female solo attorneys, while higher decision error rates for defendants are correlated with male attorneys practicing by themselves or with another male attorney."[10]

The Kiser study also found that effective decision-making does not improve with experience or the quality of legal education. "[L]awyers with more experience are not better calibrated than less experienced lawyers." On the contrary, it seems that the more experienced an attorney is, the more prone he becomes to overconfidence.[11] Moreover, "[s]lightly higher decision error rates and lower win rates are correlated with plaintiff attorneys

who graduated from one of the 20 highest academically ranked law schools, as listed by US News and World Report."[12]

In contrast with the "actor" variables above-mentioned, both studies also found that "context" variables have a stronger effect on decision errors.[13] For instance, the Kiser study looked at the fora in which the cases were tried and compared decision error rates in bench trial with jury trial and arbitration. It found that the total amount of decision error in arbitration, especially for plaintiffs, is much lower than either bench trials or jury trials.[14] Moreover, "plaintiff decision error was considerably higher in jury trials relative to bench trials (62% v. 45%)."[15] These disparities may be attributable to the increased predictability of outcomes in arbitration because the adjudicators are selected by the parties, often for their expertise and capabilities, and to the greater predictability of a judge's decision over that of a jury.

Potential Causes for Attorneys' Inability to Accurately Forecast Case Outcomes

The two studies point to law firm compensation practices as one of the causes for attorneys' propensity to go to trial rather than encourage pre-trial settlement.[16] Attorneys' compensation is determined primarily by billable hours. Proceeding to trial enables them to bill for the additional hours required to prepare for and go to trial, which would not be needed should the parties settle. Similarly, attorneys hired on a contingency fee basis have an incentive to encourage their clients to go to trial because contingency fee arrangements often provide for the contingency percentage to increase if the case is tried, as opposed to settling at mediation. As Professor Elizabeth Loftus observes, mistakes were made more often in cases in which trial contingency fees were involved.[17]

The two studies also draw attention to a number of psychological hindrances to effective decision-making. Attorneys have, for instance, a tendency to display overconfidence as a means to attract and retain clients because it is thought that such behavior conveys to clients the idea that their interests will be well served.[18] Another important factor is that lawyers tend to ignore contextual factors (e.g., unpredictable judges or juries) that are outside the attorneys' control and which may ultimately prevail.[19] Furthermore, counsel tend to adopt their clients' biases regarding the character and motivations of their adversaries, the causes of the dispute, and the weight of the evidence.[20] These biases include selective perception, selective memory, self-serving biases, etc. Still another aspect of this decision-making dynamic is that attorneys and parties appear to be less inclined to take risks when they anticipate gaining something than when they do not, which ultimately affects their decisions to settle or try a case.[21] In addition, attorneys are less able to recover from setbacks and therefore are more inclined to engage in wishful thinking and cast aside doubts about case outcomes.[22]

Finally, both studies indicate that law schools do not train law students to become good predictors of case outcomes.[23] The prevalent teaching method, the case-method, does not incorporate the set of skills necessary to effectively undertake one of an attorney's most basic and common tasks, making sound predictions and decisions. It is urged that better informed lawyers will not only be better at predicting but will be more likely to seek third-party feedback to avoid subjective overconfidence.

Consequences of Poor Decision Making

As noted above, in a large majority of cases, clients go to trial based on counsel's advice when in fact they would be better off accepting pre-trial settlement offers. These decision errors do have great repercussions upon attorneys because they constitute actionable claims for malpractice and/or breach of professional ethics. According to the American Bar Association's "Profile of Legal Malpractice Claims,"[24] "nearly half of all malpractice claims allege errors relating to professional skills required in pre-trial evaluations, negotiations and settlements."[25]

Does Mediation Have a Role to Play in Improving Decision Making?

Mediation Facilitates Settlement

Both studies found that settling is generally better than going to trial. The logical policy implication is that pre-trial settlement ought to be encouraged, which is precisely the goal and generally the result of the mediation process—mediation is a highly successful method of dispute resolution, and a high number of mediated cases settle. It has been demonstrated that mediated cases have a higher rate of settlement than cases that did not undergo mediation.[26] Thus, mediation is well worth the effort because it will in all likelihood render the decision-making process for parties and attorneys more effective.

Mediation Neutralizes the Psychological Biases Affecting Attorneys' Assessment of Case Outcomes

Mediation also provides parties with a forum conducive to sound decision-making, notably because it allows the parties to take a more active role in the decision-making process and work together towards settlement. If attorneys do their best to explain the other side's case to their clients, they may not be best equipped to do so. They generally suffer from similar self-serving biases as their clients,[27] or project overconfidence in order to attract and/or retain clients.[28] Mediation provides an opportunity for clients to "hear and understand, first hand, what the other side's position will be at trial if the case does not settle. Thus the client's ability to make good choices—whether to settle or not—is greatly enhanced." Moreover, while mediation is a collaborative process, it nevertheless enables the parties to have their "day in court" and voice their grievances, which is thought to be critical to satisfaction.

The Mediator May Act as an Objective Forecaster of the Trial Outcome and a Settlement Facilitator

Both studies point out that attorneys are too ingrained in the case to make a realistic assessment of the case and its likely outcome.[29] Mediation addresses this concern because parties and counsel appear before a third party neutral, the mediator, who evaluates the case and, on request, gives parties a disinterested assessment of the merits of the case. Parties and counsel may find this "outside view" from someone they presumably respect very helpful in making a decision as to how to proceed with a case. In addition to this evaluative role, mediators may also adopt the role of settlement facilitator, assisting the parties in finding a common ground.

"[M]ediation offers a method of dispute resolution that encourages, educates, and assists parties and counsel to make more accurate predictions and become better decision makers…"

Conclusion

While attorneys' inability to accurately predict case outcomes is well-documented, few studies explore the role mediation could play to mitigate the detrimental consequences of this reality. As discussed, mediation offers a method of dispute resolution that encourages, educates, and assists parties and counsel to make more accurate predictions and become better decision makers as to the best course to pursue with the case.

Endnotes

1. See Randall Kiser, *Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients* (Springer, 2010) [hereinafter *Beyond Right and Wrong*], see also Randall L. Kiser, Martin A. Asher, and Blakeley B. McShane, *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*, 5:3 Journal of Empirical Legal Studies, 551-91 (Sept. 2008) [hereinafter *Let's Not Make a Deal*] (in which the study was originally published).
2. *See* Jane Goodman-Delahunty, Pars Anders Granhag, Maria Hartwig, Elizabeth F. Loftus, *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*, 16/2 Psychology, Public Policy & Law, 133 (2010) [hereinafter *Insightful or Wishful*].
3. *See Let's Not Make a Deal*, *supra* note 1, at 567.
4. Id.
5. Id.
6. Id.
7. *See Insightful or Wishful*, *supra* note 2, at 140-41.
8. For an enumeration of explanatory variables and explanations, *see supra* note 1, *Beyond Right and Wrong*, at 52-85.
9. *Insightful or Wishful*, *supra note* 2, at 133.
10. *Beyond Right and Wrong*, *supra* note 1, at 81.
11. Id. at 78.
12. Id. at 84.
13. *See Let's Not Make a Deal*, *supra* note 1, at 551; *see also Beyond Right and Wrong*, *supra* note 1, at 52-85.
14. *See Beyond Right and Wrong*, *supra* note 1, at 63-65.
15. Id. at 63.
16. *See Beyond Right and Wrong*, *supra* note 1, at 164-82.
17. *See* Jane Goodman-Delahunty, Pars Anders Granhag, & Elizabeth F. Loftus, *How Well Can Lawyers Predict Their Chances of Success?*, unpublished manuscript. University of Washington, Cited in Derek J. Koehler, Lyle Brenner & Dale Griffin (2002).
18. *See Insightful or Wishful*, *supra* note 2, at 136.
19. Id.
20. *See Beyond Right and Wrong*, *supra note* 1, at 89-108.
21. Id. at 108-20.
22. Id. at 120-39.
23. *See Beyond Right and Wrong*, *supra* note 1, at 141-56; *see also Insightful or Wishful*, *supra* note 3, at 153.
24. American Bar Association Standing Committee on Lawyers Professional Liability, *Profile of Legal Malpractice Claims 2004-2007* (American Bar Association, 2008), *available at* http://www.americanbar.org/groups/lawyers_professional_liability.html.
25. *Beyond Right and Wrong*, *supra* note 1, at 200-01.
26. *See* Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 Ohio St. J. on Disp. Resol. 641, 694 (2002).
27. *Beyond Right and Wrong*, *supra* note 1, at 104 (quoting Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, *Inside the Judicial Mind*, 86(4) Cornell. L. Rev. 812, 813.)
28. *See Insightful or Wishful*, *supra* note 2, at 136.
29. *See Insightful or Wishful*, *supra* note 2, at 152, *see also Beyond Right and Wrong*, *supra* note 1, at 350.

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2010 Dispute Resolution Section Survey

By Leona Beane

A survey was conducted among members of the Dispute Resolution Section in December 2010 to find out more about the members of the Section and their interests in ADR.

Following is a Summary of the results to the questions:

"What type of Dispute Resolution work do you handle now or are interested in pursuing?" (you may select more than one)

The largest percentages indicated the following:

Mediation	84.5%
Arbitration	79.7%
Negotiation	38.5%
Collaborative Law	12.3%

"What percentage of your practice is devoted to dispute resolution other than litigation?"

The responses were:

Response	Percent
0%	9.2%
1-20%	24.3%
21-40%	17.3%
41-60%	10.3%
61-80%	8.6%
81-100%	30.3%

"In what role do you serve in ADR?" (you may select more than one)

The main responses were:

Response	Percent
Neutral	68.4%
Counsel	47.1%
Academic	7.0%
Non-Profit	7.0%
Government	6.4%
Court Administration	5.9%
Other (please specify)	9.1%

The category "other" which comprised 9.1% included numerous different responses such as: In house Counsel; full time teacher; consultant; not currently active.

"Which of the following Dispute Resolution Section Meetings have you attended?"

The highest numbers were the
January 28, 2010 Annual Meeting at NY Hilton—26.7%
January 29, 2009 Annual Meeting at NY Marriott Marquis—25.1%

"If you have seldom or never attended any of the section meetings, please tell us why."

The comments having the highest responses were:

Timing (dates) of the event(s)	33.2%
Location not convenient	18.2%
Cost of traveling & lodging	17.1%
Cost of registration	12.8%

"For short CLE programs (e.g., 2 hours), what time of day do you prefer?"

Response	Percent
Morning	44.4%
Early evening	27.3%
Lunch time	19.8%
Late afternoon	18.2%

"What kinds of activities that the Dispute Resolution Section does or could offer would be of interest to you?" (please check all that apply)

The ones with the highest percentages are:

ADR training sessions	51.3%
Live CLE programs	51.3%
Networking & social events/ activities	41.7%
Publications— N.Y. Dispute Resolution Journal	40.6%
Programs and activities on ADR in my specific area of law	39.6%
Website info on ADR developments	35.3%
Commenting on legislation that impacts the Dispute Resolution field	31.6%

"What else should the section do?"

This open ended question elicited a long list of responses including, but not limited to: continue to host programs jointly with other sections as a way to educate members of the latter about the benefits of ADR; one-day training programs at upstate locations, not a resort—too expensive and I prefer a one-day commitment; formal mentoring program; advise/assistance on how to build an ADR practice and practice management; more emphasis on collaborative law and mediation; develop & fund community/public education (mass media, speakers, etc.) on understanding ADR and its alternative processes and benefits; provide balanced presentation of issues; bring in leaders in the field instead of having the same people present; more training, set up a roster of approved neutrals, set up minimum criteria for inclusion on roster,

and, more networking opportunities; more outreach to attorneys outside the NYC area, such as webinars, seminars, meetings, etc.; assist neutrals in finding appointments; organize CLE programs outside of NYC to increase relevance statewide; have a roster of members with bios, etc., who are available as neutrals; more CLE, training to become a mediator; promote ADR principles to other NYSBA Sections; broader focus, not so weighted on commercial and international.

"Please indicate which county your main office is located in."

The counties with the highest percentages are:

New York County	42.2%
Westchester	8.1%
Albany	7.0%
Nassau	7.0%
Erie	3.2%
Kings	3.2%
Monroe	2.2%

All other counties had less than 2%.

"Other" had 10.3% which included out of state and out of the country members, also students.

The Executive Committee, CLE Committee, and all other Committee Chairs will be referring to the survey results so as to provide more benefits to the members of the Section.

Leona Beane, LBMediateADR@aol.com, handles wills, probate, trusts, estate and guardianship matters. She is an Arbitrator and Mediator for several different forums. She has written many articles on mediation related-topics and is the author of Chapter 26, Mediation in the *New York Lawyers Deskbook* (NYS Bar Assoc. 2008). She is the Chair of the NYSBA Dispute Resolution Section website committee.

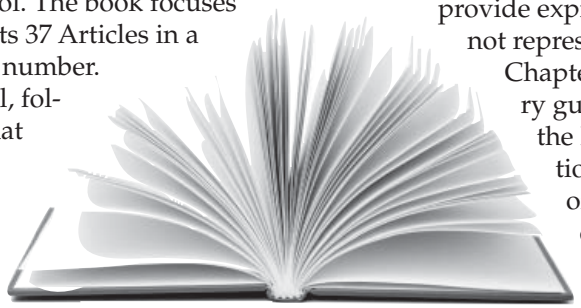
Book Reviews

A Guide to the ICDR International Arbitration Rules

By Martin F. Gusy, James M. Hosking and Franz T. Schwarz (Oxford University Press 2011)

Reviewed by Stefan B. Kalina

To date, the *ICDR Rules of Arbitration* have not enjoyed "stand-alone treatment." Thus, this rules guide merits attention as a welcome and needed tool. The book focuses on the *ICDR Rules*, treating each of its 37 Articles in a dedicated chapter of corresponding number. Each chapter states the Article in full, followed by introductory comments that explain the scope of the Article and illuminate issues and trends arising thereunder. This introduction is followed by textual comments that examine each rule of each Article in detail.



The textual analysis deconstructs the constituent sentences and phrases of particular rules to extract their meaning and application. At both the introductory and textual levels, the authors provide historical context, comparison with other arbitral rules on the same subject, and citations to judicial or other interpretative sources. The *ICDR Rules* themselves are presented in the Appendix along with additional guidelines and supplementary procedures as well as other comparable and oft-cited UNCITRAL and AAA Rules for ease of reference.

The extensive annotations elevate the analysis from technical treatment to a substantive reference work without being overbearing. The authors carefully keep pace with arbitration itself by citing the major treatises and specialized articles in lieu of lengthy discussions on any particular rule. At the same time, readability is maintained by footnotes that do not obscure the text. Consequently, the authors enable readers, like parties to arbitration itself, to flexibly pursue topics of interest as they deem necessary.

The authors' analysis guides readers through issues that commonly arise under the rules. No issue is too basic for consideration. For example, the very first chapter addresses the "cornerstone" topic of the parties' written agreement to arbitrate. The authors immediately red flag that the "*ICDR Rules* themselves do not contain any written definition of what constitutes an agreement 'in writing.'" Nor even, is the term "international" easily defined. To help solve these threshold issues, the authors provide scenarios in which the ICDR would have jurisdiction, including several examples of what constitutes a genuine or intrinsic international dispute.

This useful approach is replicated in varying degrees throughout the entire volume with regard to increasingly complex issues. The authors smartly use chronology as their guide and present issues as they would arise in the course of an actual ICDR proceeding. For example, the authors tackle Article 7's requirement of arbitrator impartiality and independence despite the fact "none of the institutional or non-administered rules define 'impartiality' or 'independence.'" Likewise, they seek to clarify a party's right to representation although "Article 12 does not provide express guidance as to who may or may not represent a party in arbitration." Again, in Chapter 19, the authors provide evidentiary guidance under the *ICDR Rules* despite the lack of uniformly accepted definitions "on the subject of the standard of proof." Furthermore, the authors discuss the panel's broad discretion to decide procedural issues under Article 26 (subject to the parties' agreement under Article 16 discussed below) and raise the "open debate" over what precisely "constitutes 'questions of procedure.'" In this regard, the authors offer commentary by leading authorities under "the analogous 1976 UNCITRAL Rules" for guidance, citing those issues that might fall within the panel's authority, such as "time limits and scheduling," and those issues that might fall outside its authority because of the impact on "the substance of the dispute" or "the rights of the parties," such as "disclosure or admissibility of material evidence." By using examples or by turning to other rules systems for interpretative guidance, the authors provide useful examples and citations to help fashion a solutions to these recurring issues under the *ICDR Rules*.

This book does more than remedy an "omission" in the arbitration literature by providing a needed rules guide for the ICDR. Along the way, the authors also offer "constructive ideas and profitable discussion" points about arbitration generally. One theme echoing throughout their commentary is that absent a rules-based system, arbitration would become the closed province of practitioners conversant in its arcane language and practices. This would be especially true under the ICDR whose rules have rapidly developed in less than a twenty year period. For this reason, the book contends, an exposition on the application of the *ICDR Rules* is necessary to avoid this outcome. It posits that a rules-based system, open and applicable to everyone, is a key element to preserving arbitration as "great agency for *human* happiness and public welfare" (emphasis added).

Against this backdrop, the authors' practice pointers take on greater significance. For example, while they point

out that the ICDR does not impose any strict pleading requirements, they also explain that the rules "encourage" narrative claim presentation. The authors' tellingly suggest that this opening permits narration to address:

> the equities of the case: the *human sense* of fairness or unfairness or unfairness when examining the parties' acts or omissions; the wrongs that were committed by one party against another; and the injury that was suffered by one or more parties as a result (emphasis added).

The authors' commentary also sounds the theme that although "[p]arty control is the guiding principle of international arbitration," it is "not without limits." In so doing, the authors tackle the inherent conflict between rules-based arbitration and arbitration's promise of flexibility and informality. To resolve this tension, the authors examine the rules' existence as positive agents for achieving these goals rather than rigid ends in and of themselves.

In line with this theme, the authors present the binding aspects of the *ICDR Rules* as "guideposts for the process" that, nonetheless: (1) can be subject to variants by the parties to tailor the process to their needs and (2) leave significant discretion to arbitrators to manage the process "economically" and "efficiently." This idea is amplified at several points throughout the book, resulting in a set of commentaries that specifically reveal how and when the parties can exercise control and engage the arbitrators to craft a tailored process.

For example, the authors look at how Article 4 "affords the parties relatively wide latitude to modify claims…as long as the arbitral tribunal considers it appropriate." The arbitral tribunal is vested with the discretion to consider the appropriateness of proposed "amendments or supplements" based "on the individual circumstances of the case" while treating "the parties with equality." This approach avoids an "unduly static or formalistic rule that would require parties to recommence every time the adversarial evolution of argument and evidence suggests the need for a different legal articulation of the claims." That said, the arbitral tribunal may discharge its "mandate" to "carefully structure procedural directions and it is not for the parties to treat…[that] direction with an unwelcome disregard on its own motion."

Similarly, the authors examine how Article 16 grants "the tribunal more discretion" in the conduct of the arbitration itself "than the majority of other institutional rules." "Still," the authors' note, "in practice, the parties have significant influence over the process" because "[d]espite the strong focus on arbitral discretion under the ICDR rule as written, arbitrators…will virtually always seek agreement by the parties on procedural issues and will only in the rarest of cases overrule such agreement." Accordingly, the "several limitations to the discretion of the arbitral tribunal in conducting proceedings" are enumerated for the benefit of procedural guidance.

Importantly, the Appendix provides the *ICDR Guidelines for Arbitrators Concerning Exchanges of Information* which specifically addresses the arbitrators' authority to conduct proceedings insofar as discovery is concerned. Unless otherwise agreed by the parties, these guidelines took effect in all ICDR arbitrations commenced after May 31, 2008 and may be adopted at the panel's discretion in pending cases. The guidelines are expected to be reflected as amendments in the next revision of the *ICDR Rules*. Sensitive to the differences between litigation and arbitration, the ICDR cautions arbitrators "to prevent the importation of procedural measures and devices," such as American style discovery, that may be inappropriate to international arbitration. Accordingly, the *ICDR Guidelines* "make it clear to arbitrators" that they have a responsibility, if not the duty in certain jurisdictions, to provide, through management, "a simpler, less expensive, and more expeditious form of dispute resolution than resort to national courts." Including these *ICDR Guidelines* (and eventual amendments) in the book is timely and important because of the growing concern in the international arbitration community about how discovery affects selecting an arbitral forum as well as the arbitration proceeding itself.

The author's blend of theory and practice also opens the text to those looking for strategic guidance on how to apply seemingly static rules to the dynamics of their particular matter. The authors cite to the optional aspects of Article 2 which vest claimants with discretion to "include proposals as to the means of designating and the number of arbitrators, the place of arbitration, and the language(s) of the arbitrators." Interestingly, the authors suggest that:

> [e]ven in cases in which the parties have already agreed upon these items in the arbitration agreement, the circumstances *may merit* an attempt to change the agreements reached in light of possibly difference economic interests and factual scenarios at the time the dispute arose as compared to when the business relationship was initiated (emphasis added).

The authors also identify that the process for appointing arbitrators under Article 6 "supplies the parties with a *strategic opportunity to tailor* the composition of the tribunal to their individual and substantive needs" (emphasis added). To aid the discussion, the authors consistently depict scenarios to illustrate the "restrictions" as well as the opportunities for exercising party autonomy on the process.

In the end, this very stately hard-cover edition may be deceiving. On one hand, it certainly merits a place on

"shelves [already] laden with books on arbitration" because it does "stimulate constructive ideas and profitable discussion" while preparing for, or studying, arbitration. Yet, on the other hand, the intuitive features inside its covers make this work as useful as a soft-bound rules pamphlet that may be kept at the ready during proceedings for quick clarification and prompt references to key authorities. Therefore, it should be useful to many across the arbitral spectrum, from neophyte to expert, including those who may be revisiting ICDR arbitration or international arbitration generally after some hiatus.

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The Evolving International Investment Regime: Expectations, Realities, Options

By José E. Alvarez and Karl P. Sauvant, with Kamil Gérard Ahmed and Gabriela P. Vizcaíno (eds.)

Reviewed by Edward G. Kehoe

Introduction

Investment disputes that are resolved through international arbitration have experienced dramatic and unprecedented growth over the past two decades, and the market segment is experiencing growing pains. Through a compendium of chapters that comprise the fine publication entitled *The Evolving International Investment Regime*, the editors, José Alvarez and Karl Sauvant—noted experts in the field of international policy and law—bring together a diverse group of established figures in this field who provide varying perspectives, ideas and potential paths forward for resolving international investment disputes. In broad terms, the book analyzes the recent proliferation of international arbitration disputes between foreign investors and the host states where these investments are made under "international investment agreements" or "bilateral investment treaties," and it explores whether the current dispute resolution system is adequate.

By way of a brief background, international investment agreements and bilateral investment treaties between sovereign states provide, among other things, protections for "investments" that are made by nationals of each country in the jurisdiction of the other country to the treaty. For example, the United States of America and the Republic of Honduras signed a bilateral investment treaty on July 1, 1995 that entered into force on July 11, 2001. If a U.S. company were to build a pencil factory in the Republic Honduras, that activity would be considered an investment, and if the Republic of Honduras were to, for example, expropriate the investment without paying adequate compensation or treat the investment unfairly or inequitably through improper regulation, the treaty allows the investor to assert a claim directly against the Republic of Honduras, and the dispute would be resolved through international arbitration. Today there are more than 2,800 investment treaties between countries across the world. Trade transactions are not considered investments that are protected by investment treaties or international investment agreements. So, if a U.S company were to manufacture pencils at its headquarters in the United States and ship them to Honduras under a contract of sale, that transaction would not fall within the investment regime and would not be protected by the treaty.

As the authors of the book eloquently describe and debate, the challenge of today's international investment treaty regime—both in the drafting of investment treaties and in the resolution of disputes arising under them—is to strike the appropriate, albeit delicate, balance of the interests of the various stakeholders, which include not only protection of the investment but also promotion of foreign investments, the balance of interests of developed and developing countries, the fair administration of justice, and the confidence of the "users" in the system.

James Crawford provides a characteristically insightful Foreword for the book, stating: "Since the first modern investment treaty claim was referred to arbitration just two decades ago, the ad hoc tribunals deciding these claims have produced at times conflicting decisions, sometimes with little regard for the regulatory interests of the host states." He goes on to say, however, that these "problems are not unique to the investment treaty regime," and that "in fresh contrast to a mass of literature on the so-called 'crisis' of international investment law," this book approaches the question thoughtfully and deliberately by considering the interests and expectations of each relevant stakeholder, including the state and the investor."

The Preface by Louis T. Wells begins by identifying the main players' fundamental concerns regarding foreign investments: "To make investments, business must have some conviction that governments will not unreasonably take property and that contracts generally will be enforced. In turn, governments expect taxes from businesses but also impose regulations and accountability standards to direct business activities toward the public interest." Wells sees a "backlash from developing countries" to perceptions of inconsistent decisions under the international arbitration regime, and concludes that the backlash itself is sufficient justification to reexamine the system because "perception matters."

In their Introduction, editors Sauvant and Alvarez set the stage for the ensuing chapters, noting that the international investment regime is far more complex than it once was "when developed countries and their goals could be seen as its linchpin." They predict that the tensions inherent in such an evolving system "will eventually settle into a new balance of rights and responsibilities of the various stakeholders in the regime." In that same vein, Jeffrey Sachs focuses on the importance of foreign direct investment and articulates his belief that there is a shift in power from developed to developing countries that will help drive change.

The book is then divided into three parts. Part 1 addresses Stakeholder Expectations in the International Investment Regime. Part 2 tackles the issue of Reforming the FDI Regime: Avenues to Consider. And Part 3 is the Report of the Rapporteur. This review will examine each of the three parts in turn.

Part I: Stakeholder Expectations in the International Investment Regime

Part I of the book contains four chapters that examine the international investment landscape from the perspective of the various participants, authored by Roberto Echandi (1.1), Howard Mann (1.2), Peter Muchlinski (1.3), and Stanimir Alexandrov (1.4).

For Echandi, the increasing number of international investment disputes that are being resolved through international arbitration is having the positive effect of making international investment regimes "rule oriented" rather than "power oriented." Despite some perceived flaws in the arbitral system, Echandi sees many more benefits to a dispute resolution system that has its foundation in the rules and procedures of a neutral forum, than one built on "raw power and gun-boat diplomacy" where the stronger country was more likely to intervene successfully on behalf of its unhappy citizen who invested in a foreign country and felt mistreated there.

As the editors of the book observe, however, the issues here are complex. On the heels of Echandi's praise of a shift from a "power" system to one based on "rules," Howard Mann argues that the entire investment regime is fundamentally broken, and that it needs to either be rejected and abandoned, or revamped in its purpose and direction. If it is to be revamped, Mann argues that the international arbitration process should allow appeals, improve conflict of interest rules, and allow public access to the process.

Muchlinski takes a different approach. He traces the development of international investment agreements "from a historical and futurological standpoint," and concludes that many of the perceived problems with the current system can be solved in the treaty drafting process. Muchlinski also helpfully offers provisions that new generations of treaty drafters may consider.

Alexandrov's chapter completes Part I of the book, with a defense of the international arbitration system for resolving investor-state disputes. Alexandrov observes that the main criticism against the system "has been the charge of inconsistency," and he argues powerfully that "this claim is overwrought" because those who launch it often overlook the difference in facts of the various cases and the differing language of the treaties upon which the differing arbitral awards are based.

Part II: Reforming the FDI Regime: Avenues to Consider

Part II of the book contains 8 chapters, each with a uniquely refreshing perspective. Some of the authors advocate for a change to the current system; others propose natural evolution and development of the current system over time. The authors are Susan D. Franck (2.1), Petros C. Mavroidis (2.2), John Cobau (2.3), Nassib G. Ziadé (2.4), John H. Dunning and Sarianna M. Lundan (2.5), Rainer Geiger (2.6), Brigitte Stern (2.7), and James Zhan, Jorg Weber and Joachim Karl (2.8).

Franck approaches the issues in a manner that is compelling in its simplicity. She tackles the tough issues with empirical and statistical data. According to Franck, her research used "existing archival data and statistical models" to analyze whether arbitration inappropriately favored investors from developed countries over developing country respondents. Franks analyzes various "data points" using different statistical methodologies, including a Chi Square test, and finds that "none of the analyses demonstrated a statistically significant difference between development status and arbitration outcomes," either with respect to liability or damages.

Mavroidis injects trade disputes into the discussion, as compared to investment disputes (see my pencil factory example at the top of this review) by pressing the importance of considering the two together: "The discussion on trade and investment will not take off unless we first put together all the pieces of the jigsaw puzzle." Mavroidis offers a number of practical tips for consideration on how this might be done. Other authors pick up on this theme in later chapters of the book.

Cobau focuses on the policies of the United States towards foreign direct investment policy (inbound and outbound), with an emphasis on issues surrounding national security, and notes the significant changes in review process that were implemented during the period 2006-2008.

The International Centre for Settlement of Investment Disputes ("ICSID") is a public international organization established in 1966 that provides a forum for resolution of investor-state disputes through international arbitration. Ziadé's chapter focuses on some of the challenges to ICSID's independence for its ties to the World Bank Group, as well as the relatively sudden increase in ICSID's case-

load and related case law. In a nutshell, Ziade calls the challenges to ICSID's independence "unfounded" and he describes the inner-workings of ICSID which certainly seem to help prove his case. He also explains that the "dramatic growth in its caseload since 1997" has caused ICSID to restructure itself internally to handle the increased work.

Three of the four final chapters recommend insightful variations on a multilateral approach to international investment law, to bring some type of global uniformity to a system that currently exists in the form of thousands of individual investment agreements and bilateral investment treaties. A multilateral system exists to an extent in the international trade regime, with, for example, the World Trade Organization that entered into force in 1995. But as each of the authors detail, extensive efforts to bring multilateral organization to international investments have failed. Dunning and Lundan, who focus on the importance of the human element in the international investment regime, remark that "[t]his is primarily because Foreign Direct Investment, unlike trade, implies the actual presence in one country of a firm that is owned and controlled by nationals residing in another country."

Geiger's "modest approach" to establishing a multilateral system recommends "codification of international law; establishment of a permanent facility for adjudication of investment disputes; creation of a facility to provide advice for treaty negotiators, and support for the prevention and/or management of investment disputes."

Zhan, Weber and Karl recommend the "very bold" approach of renewing efforts towards drafting a single multilateral investment instrument. Fully recognizing that some will call this goal "unrealistic," they nevertheless make a passionate plea on the basis that "a lot of common ground has already been built during the last decades…[and] a multilateral undertaking can gradually be built on this common ground."

The venerable Brigitte Stern refreshingly grounds the reader by describing the "so called crisis of international investment law and policy system" as a "*crise de croissance*—a teenager's crisis." And in her estimation: "Investment arbitration has created a very successful arbitration system." But she also calls for a keen focus on a balanced approach in the international arbitration system that takes into account not only protection of the investment, but also the state's capacity to regulate in the general interest.

Part III: Report of the Rapporteur

The Vale Columbia Center on Sustainable International Investment held the Second Columbia International Investment Conference on October 30-31, 2007. The core of the book consists of original contributions that the authors prepared and presented at the Conference, which they subsequently finalized in light of the open discussions at the event. Andrea Bjorklund acted as the Rapporteur for the Conference, and in Part III of the book she provides an excellent summary of the open dialogue between the speakers/authors, also adding her own perspective. She notes the friendly banter and sometimes lively disagreements between the esteemed participants, as well as the areas of general consensus. The narrative of Part III is a fitting conclusion to the book, which I recommend to anyone who is interested in the basic underpinnings of this rapidly emerging area of the law.

Ed Kehoe, EKehoe@KSLAW.com, is the head of King & Spalding's New York Business Litigation Group and co-head of the firm's International Arbitration Practice. He has served as counsel and arbitrator in numerous significant international arbitrations and serves on the arbitration panel of the ICDR.

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Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money

By John Lande (ABA Publishing 2011)

Reviewed by Margaret M. Huff

Professor John Lande wants to liberate litigators from unplanned late negotiations. In *Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money* ("*Lawyering with PEN*"), Lande shows us how. Not limited by an "ivory tower" approach to the subject, Lande includes suggestions from practicing attorneys interviewed for the book. He supplies detailed forms to anchor key negotiation theory points in a "real world" context. At the same time, he outlines a general client-centered approach to practicing law that seeks to meet client interests.

Planned Early Negotiation (PEN)

Clients typically do not benefit from acrimonious relationships among the parties, combative lawyers, or protracted discovery followed by settlement on the courthouse steps. To address these and other issues related to costly litigation, many corporations and their law firms have pledged to use ADR.[1] But actual practice does not always meet aspirational goals.[2]

Applying his expertise in dispute systems design, Professor Lande shows how lawyers can improve the way they handle disputes for their clients. He proposes satisfying clients' interests (the *Getting to Yes* mantra) through a system he calls Planned Early Negotiation (PEN). He believes PEN should lead to more of what lawyers

want—client referrals, repeat business, income (through mutually profitable fee arrangements as well as increased fee collection), and job satisfaction. His goal is to provide practical forms and techniques to use PEN skillfully and systematically during the entire life of a case.

Following an introductory chapter on PEN's benefits, Lande covers several stages where negotiation comes into play in a case: 1) developing productive relationships with clients, 2) billing systems such as contingency fees with triggers and premiums for early settlement, 3) developing good relationships with the other side in a dispute, 4) planning and conducting negotiation effectively, 5) dealing with impasse, 6) engaging other professionals, including cost-effective joint retention of neutral experts, and 7) improving the quality of negotiations through further education, client surveys, self-assessment, and revising case management and negotiation procedures within a firm and in court programs. He concludes with a short discussion of PEN-related ethics issues.

Lande's main focus is on three PEN processes—settlement counsel, cooperative negotiation, and collaborative negotiation.[3] Traditional litigation counsel can adapt several of the techniques and forms related to these processes, in order to improve their law practice. For example, regardless of whether a client hires separate settlement counsel or not, a litigator may adopt a practice philosophy that routinely includes approaching opposing counsel at the front end to negotiate their relationship in the case. That relationship will later foster effective negotiations to set up a discovery plan tailored first to access key, settlement-relevant information in the case, followed by early case evaluation with the client and reasoned settlement negotiations.

Lande supplements his concise ten chapters (about 160 pages) with an extensive bibliography and a treasure-trove of forms—more than 100 pages of checklists, client questionnaires, contracts, and other forms duplicated on a CD included with the book, with most forms in Word format for easy adaptation. For example, Lande provides retainer agreement addenda, a conflict analysis form for clients, a chart of factors that affect appropriateness of mediation, collaborative law and cooperative law procedures, a letter to the other party inviting negotiation, and a checklist to prepare clients for the first negotiation session.

The book's concluding chapter on selected ethics issues briefly addresses diligence and loyalty, client informed consent, discussing ADR options with clients, screening cases for appropriate use of collaborative law processes, conflicts, confidentiality, truthfulness to others, conflicts with collaborative practice norms, advertising and membership in a negotiation practice organization, and withdrawal from representation. The discussion should inspire lawyers to learn more on the ethical dilemmas and malpractice risk management issues that arise in connection with PEN processes.

Assessment

Clients are demanding more cost-effective ways to resolve disputes. Traditional litigation systems were not designed to achieve a satisfactory negotiated result, even though settlement is the most typical outcome.

In *Lawyering with Planned Early Negotiation*, Lande posits that lawyers are imprisoned by the fear of negotiation, such as the fear of appearing weak, the fear of leaving too much on the table, and the fear of malpractice risk if settlement occurs before full discovery. He suggests overcoming these fears by planning systematic incorporation of negotiation at each stage of a case, if appropriate, and with client informed consent.

Planned Early Negotiation should increase the likelihood of client satisfaction: rather than engage in ad hoc negotiations, attorneys can implement a plan to integrate negotiation in the representation of the client, using the forms, strategies and practical suggestions in *Lawyering with PEN*. Law professors might consider using *Lawyering with PEN* for lawyering, negotiation, or ADR courses. Sophisticated clients interested in managing their lawyers to control costs will draw insights from the book.

In a chapter on handling problems in negotiation (so-called "impasse" issues), *Lawyering with PEN* does offer general tips, plus ideas for dealing with clients, the other side, and relationships with difficult lawyers. That chapter would have benefited from more information on the psychology of negotiation as it relates to impasse, with endnotes directing the reader to the key literature on the subject.

The "make money" part of the book's two-part subtitle, "How You Can Get Good Results for Clients and Make Money," may suggest more than it intends to deliver. Indeed, Professor Lande has noted elsewhere that early case handling (ECH) "could be problematic for some lawyers, especially those paid on an hourly basis, because using ECH could cause them to 'lose' substantial revenue when cases are not handled as litigation-as-usual."[4] *Lawyering with PEN* suggests various fee arrangements that might be mutually beneficial for clients and lawyers interested in implementing Planned Early Negotiation, and reasonably suggests that satisfied clients are more likely to pay their fees and refer business. We need more empirical research and debate on ADR practice development and management.

Conclusion

Lawyering with PEN is a "how to" book—an organized, helpful blueprint for attorneys who wish to add settlement counsel, collaborative law, or cooperative law negotiation to their law practices. Advocates in litigation, clients, and law professors will welcome this well-written, practical book on effective planned early negotiation.

Endnotes

1. *E.g.,* more than 1,500 law firms have signed a CPR ADR pledge:

> We recognize that for many disputes there may be methods more effective for resolution than traditional litigation. Alternative dispute resolution (ADR) procedures—used in conjunction with litigation or independently—can significantly reduce the costs and burdens of litigation and result in solutions not available in court.
>
> In recognition of the foregoing, we subscribe to the following statements of policy on behalf of our firm. First, appropriate lawyers in our firm will be knowledgeable about ADR. Second, where appropriate, the responsible attorney will discuss with the client the availability of ADR procedures so the client can make an informed choice concerning resolution of the dispute.

CPR Law Firm Policy Statement on Alternatives to Litigation, International Institute for Conflict Prevention and Resolution (CPR) Pledges to use ADR at http://cpradr.org/About/ADRPledge/LawFirmPledgeSigners.aspx (last visited May 31, 2011).

2. John Lande, "The Movement Toward Early Case Handling in Courts and Private Dispute Resolution," 24 Ohio St. J. on Disp, Res. 83, 109 n. 157 (2008) (citing studies that found "no connection between corporate ADR policy and actual ADR usage").
3. In the Settlement counsel process, the client retains a lawyer to negotiate, while typically also hiring separate litigation counsel. Cooperative negotiation is a process where all parties explicitly agree to use a planned negotiation process, with the lawyers able to also represent their clients if the matter goes to litigation. Collaborative negotiation is a process where all parties explicitly agree to use a planned negotiation process, with the added feature that the collaborative lawyers are disqualified from representing their clients if the matter goes to litigation.
4. *Supra* n. 2, 24 Ohio St. J. on Disp, Res. at 87. In the same article, Lande cites a study of a law firm using a process with early exchanges of information and structured negotiations. The first 40 cases "typically were completed in 1-3 months and…fees averaged $16,760 per case compared with 3-9 months in traditional litigation and average fees of $63,323." *Id.* at 125.

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* * *

Mediation Ethics

Ellen Waldman, Editor

Reviewed by Kathleen M. Scanlon

Mediation Ethics makes a unique contribution to the field of ADR ethics. The editor, Professor Ellen Waldman of Thomas Jefferson School of Law, offers a text that combines both theory and practice in an engaging and thoughtful manner.

Professor Waldman has gathered together some of the leading mediators in the field to write, together with them, 12 chapters on specific ethical issues that mediators can expect to face at some point in their careers—e.g., power imbalances, unrepresented party, confidentiality dilemmas, conflicts of interest, diminished capacity of participant, role of ADR provider organizations. Also included at the beginning of the text is an extensive overview chapter by the editor on mediation ethics. This chapter addresses a range of topics that influence how mediators approach ethics. It also generally identifies relevant model standards of conduct for mediators.

The most dynamic parts of the text are the hypotheticals contained in each of the chapters focusing on a specific ethical issue. The text contains over 24 hypotheticals, all of which have an authentic quality about them. Each hypothetical is followed by a thoughtful analysis either by the editor alone, or two guest commentators followed by an editor's summary. The guest commentators include leading mediators from backgrounds in the academic, public and private sectors. This format, which is followed in each of the 12 topic-specific chapters, infuses the text with life. Because of the high quality of the contributors, and the careful analysis of issues by them, the commentaries provide powerful guidance.

The other portions of the text pale in comparison to the hypotheticals-commentaries sections. However, this is not meant as a criticism but rather a testimony to the outstanding use of scenarios and commentaries throughout the book. Besides these sections, each chapter begins with an overview of select issues that the hypotheticals will highlight. These portions provide the reader with a broad summary of relevant theory and authorities. These overview sections help prepare the reader for the hypotheticals and commentaries to follow. For example, the chapter on confidentiality provides an overview of confidentiality protections through the lens of mediation codes and legislation. This portion also addresses aspects of theory underlying confidentiality in mediation.

While reading the text, I did find myself wishing that a different footnote layout was used. The footnotes are tucked away at the end of the text and I found myself doing a fair amount of hunting to find them, which interrupted my reading and ability to learn. I also found myself wishing that there was an appendix that listed all of the numerous codes referenced throughout the text. For example, an appendix fleshing out the references provided in footnote 1 in Chapter Eleven (Conflicts of Interest) or a reproduction of Appendix A referred in footnote 17 of that chapter.

I suggest the audiences that will most benefit from this text are mediators as opposed to counsel participating as advocates in mediation. It is a book that seasoned mediators will find very helpful. For mediators with less experience, it provides the framework to walk them

through ethical quagmires with accompanying mentoring from the commentaries. I think the text could be an excellent teaching tool in mediator training courses.

The fine work that has been done in this book should be applauded. It is a difficult subject matter to tackle and Professor Waldman has done so in a manner that will greatly enhance the field.

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* * *

ADR in Business: Practice and Issues Across Countries and Cultures

Volume II, Wolters Kluwer, Arnold Ingen-Housz, ed.

Reviewed by Jennifer L. Gorskie and Matthew E. Draper

The authors of this review are relatively young practitioners, both of whom have gained the lion's share of their experience by acting as counsel to clients in commercial dispute resolution, principally international arbitration. We enter the fray when a dispute has already arisen; we strategize how we can *win*, which typically means an *award* with a capital A. We might suggest that our client seek relief from a court instead of from an arbitral tribunal, depending on the circumstances, or recommend settlement. But it can be quite easy—for young practitioners and seasoned veterans alike—to overlook the various guided dispute resolution options available as an alternative to litigation or arbitration. *ADR in Business: Practice and Issues Across Countries and Cultures* may well be the antidote to that problem.

ADR in Business, Volume II (the first edition was published in 2006) is divided into five parts, each of which offers new and unique contributions to the alternative dispute resolution ("ADR") field. It is not a treatise or a textbook; its chapters are directed at the seasoned practitioner, and do not purport to provide a primer on alternative dispute resolution techniques. Yet at the same time, *ADR in Business* is more than just a collection of scholarly articles on topics of interest only to those already well versed in the field of ADR. Instead, it offers a deep, nuanced look at the structural, economic, and other advantages of various ADR techniques. The focus in this book's construct of ADR is on alternatives to litigation other than a standard arbitration process. It introduces some ADR options that may be less familiar but nonetheless appealing to litigation counsel, and it provides an in-depth study of some recent developments in ADR and how they can be best put to use. In short, *ADR in Business* has a little bit of something for everyone, whether the seasoned ADR practitioner, the novice litigation/arbitration counsel, the businessman seeking litigation alternatives, or anyone in between.

Part I of *ADR in Business* focuses largely on the "Why?" of ADR. This goes well beyond the basics. In a stellar introductory chapter by Pierre Tercier, the reader gets a concise and on-target explanation of the structural underpinnings of ADR as contrasted with arbitration and other forms of dispute resolution. In just a handful of pages, Tercier captures the various "modes" of dispute resolution and provides an overview of how ADR can both complement and diverge from judicial and arbitral modes. Jean Francois Guillemin then offers in chapter 2 a practical overview of the reasons one might choose alternative dispute resolution. More normative in approach than Tercier's piece, Guillemin offers a view on the goals of ADR, which is best viewed as a way to assist parties in reaching a mutually acceptable compromise. According to Guillemin, "Its aim is often to *restore or preserve the dynamics of the contract*, though sometimes its function is simply to encourage resumption of dialogue between the parties." We recommend Part II of *ADR in Business* to anyone not yet convinced that ADR is a viable option; it is guaranteed to provide, at the very least, food for thought.

It would be disingenuous to suggest that *ADR in Business* does not have some pro-ADR bent; its authors are mostly practitioners in the field, and chapters such as "Making Mediation Mainstream," which is devoted largely to promoting the mission of the International Mediation Institute, argue for the institutionalization of the field as a profession and area of expertise. Yet many of the book's contributors acknowledge the failures of ADR and the problems inherent in current models of deal-facilitation and mediation, which often do little to engender the trust or confidence of future ADR-users. In response, they offer realistic and workable ideas for regulating and harmonizing the field of mediation, including institutionalized training of mediators, uniform standards and procedures utilized across jurisdictions, and a review system through which parties can provide feedback on mediator performance. One comes to understand early in reading *ADR in Business* that ADR has real advantages; it is difficult then to take issue with proposals to regulate, institutionalize, and train lawyers in the field.

What's more, *ADR in Business* supports its conclusions in favor of ADR with hard facts and convincing logic. In Chapter 5, for example, Manon Schonewille

and Kenneth Fox engage in a detailed, example-driven analysis of how an experienced "deal-facilitator" might move parties much further in their negotiations than they could ever accomplish themselves, and use his/her skills to guarantee a long-term and sustained outcome that likely could not be reached by lawyers or businessmen focused solely on the dispute-at-hand. Take one basic technique: the use of an "anchor number," a monetary starting point off which a party's perceptions of movement up or down are largely influenced. An experienced and trained deal facilitator might engage in "caucusing" with the parties, approaching each separately to learn their anchor number, or offer a suggested anchor number of his own. He can then effectively use this information in the negotiation setting in order to manage the parties' expectations of reasonableness and move them closer to a deal. Such information sharing simply could not exist in a bilateral, interested party negotiation setting.

Part II of *ADR in Business* sets out some of the many frameworks available for pursuing ADR. Expert practitioners describe court-ordered mediation, online ADR, and ADR pursuant to formal institutional rules, such as those of the International Chamber of Commerce ("ICC"), among others. For example, Thomas Schultz informs us of the astonishing fact that the eBay Community Court resolves roughly 60 million disputes every year through a combination of computer-assisted negotiation and online mediation. Mr. Shultz worries, however, about the growth of an autonomous "legal" system where the parties apply "eBay law."

A number of contributors consider the ICC's ADR Rules in detail, and some of the thorny legal issues they and ADR in general raise. Professor Charles Jarrosson identifies a number of these issues. For example, following a successful ADR proceeding, what can be done when a party fails to perform the resulting settlement agreement? The agreement is simply a contract, which itself may contain an ADR or arbitration clause in case of disputes. One of the limitations of ADR is that settlement agreements are not accorded the same level of worldwide enforcement as arbitral awards or court decisions. Peter Wolrich, who chaired the ICC working party that drafted the ICC ADR Rules, provides some suggested solutions to the problem raised by Professor Jarrosson. Mr. Wolrich rightly points out that the parties to an ADR-brokered settlement agreement are free to structure it in a way that makes the need for enforcement unlikely, for example by requiring a bank guarantee for future payments. Alternatively, if the settlement occurs during the pendency of arbitral proceedings, he suggests that the parties request the arbitral tribunal to render an award by consent. This is just some of the sound advice Mr. Wolrich provides in his article-by-article commentary to the ICC ADR Rules, which is essential reading for any user (or prospective user) of those Rules. Similarly, Hannah Tümpel and Calliope Sudborough of ICC Dispute Resolution Services provide a very practical chapter describing how ICC ADR rules are administered and the procedures they follow. Perhaps most useful is their inclusion of examples from actual cases administered by the ICC, describing how the ICC's ADR Secretariat has handled a variety of situations.

This in-depth consideration of the ICC's ADR Rules is invaluable to practitioners. A future edition of *ADR in Business* would benefit from providing similar treatment to other popular ADR rules, such as the American Arbitration Association's Commercial Mediation Procedures.

In Part III, *ADR in Business* devotes a number of chapters to practical advice for ADR practitioners and lawyers. One chapter by Denis Brock and Rebecca Pither provides advice on how lawyers of international law firms should talk to their clients about ADR, both before and after a dispute arises. Michael Schneider, a well-regarded arbitration practitioner who successfully led the recent revision of the UNCITRAL international arbitration rules, discusses how arbitrators might better use ADR techniques. Mr. Schneider argues that "[t]he principal, if not the only, function of the arbitrator is to settle the dispute that the parties have submitted to him." To that end, he sets forth a number of examples of how ADR methods have been successfully employed by arbitrators. All of the chapters in this Part provide practical, real-world ways for employing ADR, or elements of ADR, to help to solve disputes.

ADR in Business makes the lingo of ADR seem familiar and the psychological and cognitive underpinnings of negotiation and conciliation theories accessible even to the novice reader. In Part IV, which focuses on hybrid theories of dispute resolution, an opening chapter by Jeremy Lack aptly titled "Appropriate Dispute Resolution" discusses theories such as conflict escalation and the development of holistic approaches to conflict prevention and resolution. While such concepts may be familiar to a seasoned psychologist or a negotiation specialist, they are typically not studied by the average litigator—and after reading Lack's chapter, one wonders why not. Lack encourages both litigation counsel and litigants themselves to think as "consumers" by questioning the dispute resolution process and how it might be tailored to best suit the peculiarities of a dispute. He examines the benefits and drawbacks of "directive vs. facilitative" dispute resolution processes and "evaluative vs. non-evaluative" approaches, and suggests how various forms of each might be combined in a hybrid approach that will have the best chance at reaching party consensus. Lack's chapter is followed by a probing discussion by Edna Sussman about the lack of and need for an enforcement mechanism for mediated settlements so the parties are not left with just another contract to enforce. Sussman discusses the differences among jurisdictions as to whether an arbitration award can be issued to reflect a mediated settlement agreement by a mediator who had not been appointed

as the arbitrator before the settlement. Sussman reviews the pros and cons of eliminating contract law defenses to mediated settlements and urges that mediated settlement agreements be turned into arbitral awards and that the New York Convention be construed to require enforcement of such awards.

ADR in Business truly lives up to its name, demonstrating its sweeping international scope, in Part V, whose essays delve into the nuances of ADR across borders and regions. We learn of the unique challenges to ADR across Latin America, where the practice is not effectively supported by the court system. There are chapters on ADR in Australia, the Arab world, and even Sub-Saharan Africa, where entrenched norms regarding amicable and peaceful problem solving lend themselves rather neatly to an ADR approach. A final chapter discusses the European Mediation Directive for mediation in cross-border disputes, approved in 2008, which has faced many challenges in implementation by Member States.

ADR in Business is an important and unique contribution to the ADR field. It manages to present on virtually all of the fundamental issues underlying the ADR field without sacrificing nuance, scholarship, or depth. It should convince even the most skeptical counselor to consider closely the added value an ADR approach can bring to the right cases, while at the same time providing a respect-worthy guide to the ADR community for ADR's increased implementation and use.

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District Court Reverses, as an Abuse of Discretion, a Bankruptcy Court Order of Sanctions and Contempt for Failure to Participate in Good Faith in a Court-Ordered Mediation

By Barbara Mentz

In *In re A. T. Reynolds & Sons, Inc.*,[1] Judge William H. Pauley III of the United States District Court of the Southern District of New York reversed, as an abuse of discretion, an Order of Judge Cecelia G. Morris of the United States Bankruptcy Court, Southern District of New York sanctioning a participant and its attorney for failure to comply with a court-ordered mediation ("Mediation Order") and holding them in contempt of the Mediation Order for failure to participate in good faith in the mediation process. ("Sanctions and Contempt Order").[2]

The Bankruptcy Court's Sanctions and Contempt Order resulted from a report by the mediator to a court-ordered mediation that a participant failed to participate in the mediation process in good faith. The court's decision is based, *inter alia*, on its determination that good faith participation requires that parties actively participate in the process by listening to each other's views and engaging in discussion and risk analysis.[3] While the court recognized that a participant in court-ordered mediation is free to adopt a "no-pay" position, the court found that a participant's mere attendance, without participating beyond parroting that it would not pay, does not satisfy the good faith requirement for participation. The court stated that "[i]f mere attendance were all that were required for good-faith participation, then the federal statutes that encourage mediation would be rendered meaningless."[4]

The court emphasized that its conclusion that the participant had failed to participate in good faith in the mediation process was based upon a comprehensive review of the participant's conduct after a full hearing and that the proof of failure to comply was clear and convincing. The court found that the participant's conduct demonstrated dilatory and obstructive behavior between entry of the Mediation Order and the mediation session and its insistence on asserting its legal argument to the exclusion of other discussion at the mediation session. The court concluded that, "[a]t the hearing…[the participant] insisted that its legal position was foolproof; however, [the participant] was directed to participate in mediation, not to sit as its own judge and jury in an off-the-record proceeding."[5]

The District Court disagreed with the Bankruptcy Court's interpretation of the good faith standard, the appropriate scope of a court's inquiry into parties' good faith participation and the Bankruptcy Court's evaluation of the evidence. The District Court decision focused on protecting a party's right to take a "no-pay" position and the confidentiality of the mediation process. The District Court expressed concern that inquiry into a participant's conduct, backed by a threat of sanctions, may exact a coercive influence on the participants to settle.[6]

With these considerations in mind, the District Court held that a court is precluded from inquiring into the level of a party's participation in mandatory court-ordered mediations, i.e., the extent to which a party discusses issues, listens to opposing viewpoints and analyzes its liability. The court found that its holding was consistent with the general pattern of interpretation by courts that have narrowly interpreted good faith to require compliance with orders to attend mediation and, if required, to provide pre-mediation memoranda and the attendance of a party representative with sufficient settlement authority. The court also disagreed, among other things, with the Bankruptcy Court's interpretation that good faith required discussion and risk analysis among the participants and the mediator either in joint session or in caucus. The court noted that although participants must listen courteously to opposing arguments and respond in kind, ultimately the benefits of enforcing such participation by threat of sanctions are dwarfed by the significant potential for harm. Based upon its analysis of the good faith standard, the appropriate scope of inquiry and its assessment of the evidence, the District Court reversed, as an abuse of discretion, the Bankruptcy Court's Sanctions and Contempt Order.[7]

Because of the potential ramifications of the District Court's decision on court-ordered mediations, both courts' analyses have been set forth below in some detail.

Background

In December 2008, A.T. Reynolds & Sons, Inc. ("Debtor") filed a petition for relief under Chapter 11. Wells Fargo Bank, N.A. ("Wells Fargo"), a secured creditor, controlled and disbursed Debtor's cash collateral through an account. At an auction and sale hearing, Boreal Water Collection, Inc. ("Boreal") purchased Debtor's assets and assumed the Debtor's loan obligation to Wells Fargo. Also at the hearing, a utility company sought payment of a utility bill. After negotiation, Wells Fargo agreed to make the utility payment and Boreal agreed to give Wells Fargo a small increase in the interest rate on the Debtor's loan obligation payments that Boreal had assumed. Boreal subsequently moved the court, among other things, for repayment of

the wage payments it had made that it claimed were the Debtor's responsibility. The Debtor asserted that the wage payments dispute was really between Boreal and Wells Fargo. In making the utility payments, Wells Fargo had used funds that were then available in the cash collateral account. This resulted in insufficient funds to pay the employees' wages. Boreal contended that its agreement to pay Wells Fargo the increase in the interest rate on the Debtor's loan obligation was tied to Wells Fargo's agreement to pay the utility bill. Boreal asserted that the utility bill should have been paid from Wells Fargo's own funds.[8] Although Wells Fargo was not a party to the motion, it was served with all of the motion papers which referred to Wells Fargo throughout the papers.[9]

The Bankruptcy Court ordered the Debtor, Wells Fargo, Boreal, and other parties to mediation to attempt to resolve the disputes relative to the sale. The Mediation Order provided, among other things, that the parties participate in the mediation to be conducted in accordance with General Order M-211 of the Bankruptcy Court, Southern District of New York, which was then in effect. Shortly before the Sanctions and Contempt Order was entered, General Order M-211 was amended and restated without change by General Order M-390. Both General Orders were referred to interchangeably in the courts' respective decisions.[10]

During the mediation process, the mediator advised the Bankruptcy Court, pursuant to General Order M-211, that Wells Fargo and its outside counsel, Ruskin Moscou Faltischek, P.C. ("Ruskin"), had failed to participate in good faith in the mediation. The mediator submitted a report describing his reasons for making this determination ("Mediator's Report").[11]

The Mediator's Report

The Mediator's Report included the following conduct by Wells Fargo and its counsel as evidence of their failure to participate in good faith in the mediation process.

With respect to its conduct between the Mediation Order and the mediation session, the mediator reported that Wells Fargo desired that a mediation statement be filed with the court identifying the issues to be discussed at the mediation, claiming to be at a loss to fully understand the issues at hand. In response, Debtor's counsel identified five specific issues and stated, and "[a]ny other issues anyone wants to discuss, of course." Wells Fargo objected to the "any other language" statement. Wells Fargo also demanded to know the identities of individuals from the other parties who would attend. Wells Fargo expressed concern that if its demands were not complied with the mediation would be a "free for all" which would be a "waste of everybody's time."[12] The Bankruptcy Court also noted in its decision that when the mediator did not agree that the mediation would be limited to the five issues, Wells Fargo told the mediator that it could only be prepared to discuss the five issues and would address any other issues only if it felt it could without review of documents or other preparation. Wells Fargo also told the mediator that it would not attend unless a business person from Boreal attended as nothing could be accomplished without such a person attending. The mediator responded that he understood that all parties would have a party representative present. Ultimately, Wells Fargo submitted a mediation statement and attended the mediation.[13]

Shortly after the mediation began during Boreal's presentation of its position, counsel for Wells Fargo interrupted to express disagreement with Boreal's position. Although the mediator requested that Wells Fargo's counsel allow Boreal's counsel to finish before interjecting disagreement with Boreal's view, Wells Fargo's counsel continued to press his point. The mediator then spoke in caucus session with Wells Fargo's representative and its counsel for over an hour. During the caucus session, Wells Fargo did not go through any risk analysis and deflected the mediator's attempts to see if there was any credibility to the concept of a linkage between two substantive issues involving Wells Fargo. Instead of engaging in a discussion with the mediator, Wells Fargo repeated its pre-conceived mantra that it had stated at the outset of the mediation that it was not open to any compromise that would involve "taking a single dollar out of their pocket."[14]

When the mediator informed Wells Fargo that he must report to the court that Wells Fargo and its counsel were not participating in good faith, Wells Fargo's counsel advised the mediator in private that there were two of them and just one mediator; and that the mediator "could be assured that Wells Fargo would never agree" to his acting as a mediator in the future in a matter in which Wells Fargo might be a party.[15]

After the caucus, the mediator notified the Bankruptcy Court at a hearing that one of the parties was not participating in good faith. The Bankruptcy Court informed the Wells Fargo representative and its attorney that a failure to mediate in good faith could result in sanctions. At this point, the mediation reconvened and Wells Fargo's representative and its attorney had an extended phone call with an unidentified person without the mediator being present. After the call Wells Fargo made a settlement offer that was unacceptable to the other parties.[16]

Based on the Mediator's Report, the Bankruptcy Court issued an Order to Show Cause, *sua sponte*, ordering Wells Fargo and its counsel separately to show cause why they should not each be sanctioned for contempt of the Mediation Order and General Order M-390. After submissions and an evidentiary hearing, the Bankruptcy Court issued the Sanctions and Contempt Order, pursuant to its inherent authority to enforce its orders and under Fed. R. Civ. P. 16(f). The Sanctions and Contempt Order was based on the court's findings that Wells Fargo had failed to mediate in good faith because Wells Fargo and its attorney: (a) refused

to engage in discussion and risk analysis, and obstructed the mediation; (b) attempted to wrest control from the mediator of the procedural aspects of the mediation process; and (c) did not send a representative with full settlement authority.[17]

Wells Fargo and its counsel appealed the Sanctions and Contempt Order to the United States District Court for the Southern District of New York.

As a preliminary matter, the District Court found that the Bankruptcy Court had the power to issue the Sanctions and Contempt Order which could be set aside only for an abuse of discretion. Further, there was no question on appeal that, pursuant to General Order M-211, the mediator was required to report to the Bankruptcy Court a willful failure of a party to participate in good faith in the mediation process or conference and that such failure could result in the imposition of sanctions. The District Court reversed the Bankruptcy Court's Sanctions and Contempt Order based on its determination that the Bankruptcy Court's findings were clearly erroneous under the Second Circuit standard.[18]

Standard for Determining Participation in Good Faith During the Mediation Session

The Bankruptcy Court based its decision on good faith participation in the entire mediation process. The court's primary focus, however, was on the level of participation necessary to constitute good faith participation in the mediation session.

In response to the Show Cause Order, Wells Fargo and its counsel presented four arguments. First, they argued that good faith is an intangible and abstract quality with no technical meaning or statutory definition. As such, an individual's personal good faith is a concept in a person's own mind and inner spirit and could not be conclusively determined by its outward conduct. At the hearing, the Wells Fargo representative testified that he had come to the mediation with an open mind, intending to listen, see what the relevant facts were and make a decision one way or the other. Second, Wells Fargo's counsel denied that he had interrupted Boreal's counsel or obstructed the mediation. He also testified that he did not consider the mediator to be neutral, but that he did not threaten the mediator. Third, Wells Fargo's representative testified that Wells Fargo had made an internal risk analysis and had assessed the case against Wells Fargo as zero. Fourth, Wells Fargo argued that under Second Circuit authority in *Negron v. Woodhull Hosp.*, a party may adopt a no-pay position at mediation and that a court cannot compel a party to settle, a proposition with which the Bankruptcy Court did not take issue.[19]

After the court engaged in a detailed review of the principles and benefits of mediation and the Bankruptcy Court's Alternative Dispute Resolution Mediation Program, the court found that in order to meet the good faith standard, mediation requires parties to listen to each other's points of view, participate in discussions, and engage in risk analysis and discussions of proposed resolutions.[20]

With respect to Wells Fargo's arguments, the court first determined that even though good faith is an intangible concept, some outward conduct can evidence that a party has failed to participate in good faith. Second, the court found that even if Wells Fargo attended the mediation intending to listen, intent is not sufficient to satisfy the good faith standard. Based on the testimony of the mediator and two of the mediation participants, the court found that the testimony of Wells Fargo's counsel that he did not interrupt opposing counsel or obstruct the mediation was not credible. The court also found that the testimony of Wells Fargo's counsel that he did not threaten the mediator was not credible. Third, the court found that even if Wells Fargo had undertaken an internal risk analysis that was insufficient because discussion and risk analysis were fundamental elements of the mediation process. Fourth, the court noted that in *Negron* the Second Circuit did in fact uphold sanctions for costs based on its finding that a party failed to bring a principal to the mediation as ordered and "impaired the usefulness of the mediation conference." The court concluded that *Negron* could not be stretched to mean that a party's mere attendance without participation, except to repeat that it would not pay, is sufficient participation to satisfy the good faith requirement.[21]

The court also addressed the issue of the confidentiality of mediation. The court referred to Section 5.1 of General Order M-390. Section 5.1 specifically provides that, while the substance of the mediation is confidential, "[n]othing in this section, however, precludes the mediator from… complying with the obligation set forth in 3.2 to report failures to attend or participate in good faith." The court concluded that mediators are relieved from the rules of confidentiality to the extent necessary to report a failure to participate in good faith in mediation. The court's inquiry had focused on the mediation process, e.g., did the parties engage in discussion and risk analysis? The court continually informed the parties that it did not want to know the substance of the discussions, e.g. the parties' positions or settlement numbers.[22]

The court held that Wells Fargo and its attorneys failed to participate in the mediation in good faith because Wells Fargo insisted on adherence to a predetermined resolution and on being dissuaded of the supremacy of its legal obligations, without participating in discussion and risk analysis.

The District Court disagreed with the Bankruptcy Court's interpretation of the good faith standard for participation, the appropriate scope of the inquiry and its interpretation of the evidence.

The District Court viewed the competing considerations as the need to require adversary parties who do not want to mediate as weighed against concerns of litigant

autonomy and the need for confidentiality. However, relying on *Negron*, the District Court held that, contrary to the Bankruptcy Court's determination, Wells Fargo was within its rights to enter the mediation with the position that it would not make a settlement offer, to decide that it was not liable, and to insist on being dissuaded with regard to its legal position. The court noted that dissuasion is the core of the mediation process, particularly in mandatory mediation where the parties are only participating because of a court order and it should be presumed that each party enters the mediation confident in the strength of its legal position.

Judge Pauley also disagreed with the Bankruptcy Court's holding that the good faith standard requires parties to engage in risk analysis during the mediation. The court noted that risk analysis was often an internal process that, at best, makes it difficult to determine whether the party had analyzed the risk as zero or had failed to analyze the risk at all. The court determined that approaching the mediation with an open mind, intending to listen, internally analyzing the risks and adhering to its pre-mediation no-pay position as Wells Fargo had testified it did, was consistent with a rational analysis of risk.[23]

Wells Fargo's counsel testified in contradiction to other witnesses that he did not interrupt opposing counsel.[24]

The District Court refused to examine the underlying "truth" of these assertions, stating:

> Although parties to mediation must listen courteously to opposing arguments and respond in kind, ultimately the benefits of enforcing such participation by threat of sanctions are dwarfed by the significant potential for harm. Where parties do not want to settle, inquiry into a minimum level of participation (beyond objective criteria such as attendance, exchange of pre-mediation memoranda, and settlement authority) backed by threat of sanctions forces unwilling parties to engage each other civilly to satisfy a court order. But ultimately, mediation will only succeed if the parties themselves want it to, and a court's order to mediate—even in good faith—will not change the mind of a party who believes that settlement is not in their best interest. Certain disputes are simply not amenable to mediation... Such a case exists where, as here, there exists a strongly contested threshold factual issue…that may be fully determinative of a party's liability.[25]

The court held that limiting the examination of behavior during mediation was necessary because: "the confidentiality considerations preclude a court from inquiring into the level of a party's participation in mandatory court-ordered mediation, i.e. the extent to which a party discusses the issues, listens to opposing viewpoints and analyzes its liability."[26]

Settlement Authority of a Party Representative

The Bankruptcy Court found that Wells Fargo was in violation of the Mediation Order and General Order M-390 because its representative did not have authority to settle. In particular, the court found that the representative: (i) only had authority to settle for a predetermined amount even though there was a "very real possibility" that the amount in controversy might be in excess of that amount; (ii) was only prepared to discuss predetermined issues; and (iii) did not appear to have authority to enter into creative solutions that might have been brokered by the mediator. The court also found that a pivotal decision was made by an absent person.

The District Court found that the Bankruptcy Court applied an unworkable and overly stringent standard for determining "settlement authority." The court held that the Bankruptcy Court was clearly erroneous in its findings that Wells Fargo had to have settlement authority for any amount, including an amount that was greater than the amount in controversy; that the representative must be prepared to discuss any theory of legal liability; and enter into undefined "creative solutions."

The District Court found that a party satisfies an order to send a representative with authority to settle if that representative has authority to settle for the anticipated amount in controversy and is prepared to negotiate all issues that can be reasonably be expected to arise. The District Court also found that the Bankruptcy Court's finding that a pivotal decision was made by an absent person was speculative and clearly erroneous based upon the record. The court found the record to be unambiguous that the Wells Fargo representative had full authority to settle the matter up to the amount in controversy.[27]

Control by the Mediator of the Procedural Aspects of the Mediation

The Bankruptcy Court found that Wells Fargo sought to control the procedural aspects of the mediation by resisting filing a mediation statement, claiming not to understand what the issues were, stating that it would only address the five specific issues raised, expressing concerns that if its demands were not met the mediation would be a waste of time and demanding to know the identities of the other party representatives. The court rejected Wells Fargo's arguments that any control it had wrested from the mediator was as a result of its ignorance of the issues and inability to properly prepare were frivolous. The court pointed out that Wells Fargo had received all of the motion papers and that it was mentioned throughout the papers. The court also found that Wells Fargo's insistence that it had analyzed the risks and that its legal liability was zero

was inconsistent with its assertion that it did not understand what the issues were.[28]

The District Court found that the Bankruptcy Court's findings were clearly erroneous in as much as Wells Fargo ultimately submitted a mediation statement and attended the mediation as required by the Mediation Order. The court found that the issues raised by Wells Fargo in the pre-mediation exchanges with the Mediator were valid points and that there was nothing in the Mediation Order that prevented any party from raising such valid concerns.[29]

Based upon the District Court's holding with respect to the order of sanctions and the Second Circuit decisional law with respect to the standard necessary for a court to hold a party in civil contempt, the District Court also reversed the Bankruptcy Court's order that Wells Fargo and its attorney were in civil contempt of the Mediation Order.[30]

Conclusion

The Bankruptcy Court's decision appears to grow out of a belief that there are real benefits to be attained in mediation but only if the parties actually participate in discussion and risk analysis. The Bankruptcy Court was also motivated by the need to give meaning to federal statutes encouraging mediation and to the Bankruptcy Court's Court Annexed Alternative Dispute Resolution Program. The District Court's decision appears to be focused on the coercive nature of court-ordered mediation and the need to preserve party autonomy and choice and the confidentiality of the process.

The concerns of both courts are of interest. To increase the likelihood of successful mediation, how can we best balance the purpose of the good faith participation requirement in court-ordered mediation with the need to preserve the non-coercive nature of the mediation process. Simply going through the motions with a fixed position will normally not be in the best interest of the process or the parties. In addition, it may not satisfy the requirement of good faith participation in the mediation process. Defining good faith participation, however, to include, in some instances, certain narrowly drawn parameters may arguably appear to the participants to be coercive in nature.

Endnotes

1. *In re A.T. Reynolds & Sons, Inc.*, No. CIV. A.10-2917, 2011 WL 1044566, *1 (S.D.N.Y. Mar. 18, 2011).
2. *In re A.T. Reynolds & Sons, Inc.*, 424 B.R. 76, 78 (Bankr. S.D.N.Y. 2010). The Bankruptcy Court ordered Wells Fargo and its counsel to pay the costs of the mediation, including the costs of the mediator and the other parties to the mediation to attend. The court made no findings with respect to the merits of the dispute that was the subject of the mediation.
3. *Id*. at 78.
4. *Id.* at 88.
5. *Id.* at 95.
6. *In re A.T. Reynolds*, 2011 WL 1044566, at *6-7.
7. *Id.* at *6-8.
8. *Id*. at *1.
9. *In re A.T. Reynolds*, 424 B.R. at 79, 92.
10. *Id*. at 78; *In re A.T. Reynolds*, 2011 WL 1044566, at *1. *See, In re Adoption of Procedures Governing Mediation*, General Order M-211 and General Order M- 143 which were amended and restated by General Order by M-390 (Bankr. S.D.N.Y. Dec. 1, 2009). General Order M-390 is part of a Court Annexed Alternative Dispute Resolution Program. Section 3.2 of General Order M- 390 provides in relevant part that: (a) a representative of each party shall attend the mediation conference, and must have complete authority to negotiate all disputed amounts and issues; (b) the mediator shall control all procedural aspects of the mediation; and (c) the mediator shall have the discretion to require that the party representative or a non-attorney principal of the party with settlement authority be present at any conference. It also provides that the mediator "shall" report any willful failure to participate in good faith in the mediation process or conference and puts the parties on notice that a failure to do so may result in the imposition of sanctions by the court. *Id*. at n.1; *In re A.T. Reynolds*, 2011 WL 1044566, at *1.
11. *In re A.T. Reynolds*, 2011 WL 1044566, at *3.
12. *Id.* at *2-4.
13. *Id*. at *2, *9.
14. *Id.* at *3-4.
15. *In re A.T. Reynolds*, 424 B.R. at 80.
16. *In re A.T. Reynolds*, 2011 WL 1044566, at *3-4.
17. *Id.* at *4-5.
18. *Id*. at *5, *9.
19. *In re A.T. Reynolds*, 424 B.R. at 88-90.
20. *Id.* at 84-88. Among others, the court cited Stephen P. Younger for the proposition that mediation is not about whether you are going to lose or how much you are going to win, but about identifying critical risks up front. *Id.* at 84.
21. *Id.* at 84-95.
22. *Id*. at 86-87. It is of note that Section 5.1 speaks in the disjunctive in terms of reporting failures to "attend or participate in good faith."; *In re A.T. Reynolds*, 2011 WL 1044566, at *8.
23. *In re A.T. Reynolds*, 2011 WL 1044566, at *5-7.
24. *Id*. at *3.
25. *Id*. at *7.
26. *Id*. at *8. The court expressed concern that necessary exclusion of confidential information had the unintended—but unavoidable—effect of excluding relevant facts. *Id.* The court did note that if a party demonstrated conduct such as dishonesty, intent to defraud or the like, that the benefits of inquiry outweigh considerations of coercion and confidentiality. *Id.* at n.4.
27. *Id* at *8-9.
28. *In re A.T. Reynolds*, 424 B.R. at 91-95.
29. *In re A.T. Reynolds*, 2011 WL 1044566, at *9.
30. *Id.*

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Robert Mnookin, Harvard Negotiation and Mediation Guru, Crosses Over to Patent Damages Expert

By Laura A. Kaster

In a recent decision, on remand for a damages trial in a hotly contested patent case, a California federal court has ruled that Professor Robert Mnookin, a leading negotiation theorist and Harvard professor, may testify as an expert on patent damages. In permitting negotiation theory to serve as the basis for establishing reasonable royalties in a patent case, the court has given this mediation guru an entirely new role, and has held that negotiation theory is one acceptable basis for assessing reasonable royalties in a patent case. The court has created a new use for mediation knowledge and a new opportunity for mediation and negotiation theorists. The ruling grew out of a challenge to Professor Mnookin's qualifications to testify under *Daubert,* the case that requires federal trial courts to act as the gatekeeper for expert testimony and to determine whether the qualifications and basis for the proposed expert testimony meet generally accepted scientific principles. In *Lucent Technologies, Inc. v. Microsoft Corporation*, No 07 CV 2000 (SD Cal. June 16, 2011), the court held that negotiation theory is sufficiently well-established and accepted in the scientific community to withstand a *Daubert* challenge. Lucent contended that Professor Mnookin's real-world negotiation analysis would conflict with the hypothetical approach typical in patent damages analysis because:

> Under this [negotiation] theory, two parties come to a negotiation with their "best alternative to a negotiated Agreement" ("BATNA") and a reservation price.… The two parties will only come to an agreement if there is an overlap between their "zone of potential agreement" ("ZOPA"). (Id.) Lucent argues that this theory ignores that the hypothetical negotiation between two parties should (1) assume the patent is valid and infringed, (2) allow parties to walk away, and (3) ignores information about the "Book of Wisdom."

(Slip Op. at 8.)

The court rejected the contention that the royalty calculation had to be based exclusively on the hypothetical negotiation that would have taken place before the infringement. According to the court, the hypothetical negotiation was not the only approach:

> [T]here is no single correct approach at calculating reasonable royalties.… Both Lucent and Microsoft agree that Professor Mnookin is well versed and qualified in the area of negotiation theory.… Professor Mnookin's negotiation that he applies to the facts of this case is widely accepted in the scientific community and has been published in many journals.… The Court concludes that Professor Mnookin's negotiation theory is based on reliable principles and methods [internal citations omitted].

(Slip Op. at 9.)

However, the court seems to ignore the fact that although Professor Mnookin may understand how negotiations work, his only understanding of what either Lucent or Microsoft would be willing to offer must come from evidence equally available to the judge and jury—is the negotiation theory information sufficient to pinpoint the reasonable royalty?

It is no small irony that negotiation theory that depends on assumptions about the risk assessed value of litigation for its analysis of the best alternative to a negotiated agreement (BATNA) is now going to serve as the foundation for establishing that value. It is of interest to note that Lucent ultimately prevailed on its patent claim with a result closer to its damages analysis. http://www.infoworld.com/d/the-industry-standard/alcatel-lucent-gets-70-million-in-microsoft-patent-case-168525. Nevertheless, mediators and negotiation experts may have a new role to play. Professor Mnookin has crossed over. Will negotiation specialists appear as experts in other damages cases? It will be interesting to see how things develop.

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ISSN 1945-6522 (print) ISSN 1945-6530 (online)

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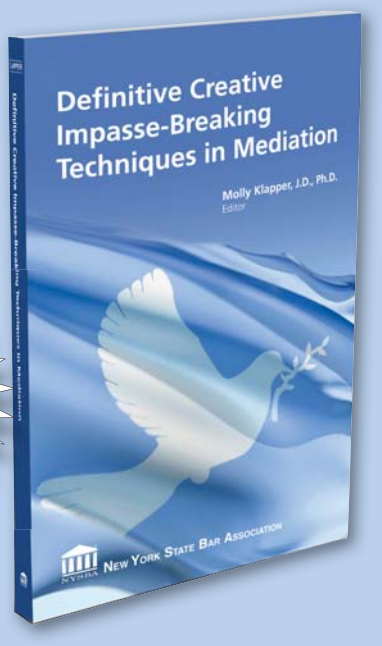

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