NYSBA SPRING 2012 | VOL. 5 | NO. 1

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.

As we approach our fifth year as a Section, it is a good time to take stock of what we have accomplished and what lies ahead. By all accounts, our Section is a leader in the identification, formulation, and promulgation of best practices in arbitration and mediation, not only from the perspective of neutrals but also of attorneys representing clients in ADR. Our reports, CLE programs and trainings are highly recognized in New York and beyond. Our programs and meetings not only create a community of neutrals and advocates but are also great fun.

Much remains to be done to implement and refine Best Practices in arbitration: for example, expediting the time to preliminary hearing; improving proactive handling of electronic discovery; continuing to foster speed, economy, and fairness by imposing appropriate limits on discovery and motion practice; developing and articulating practices for expediting hearings and post-hearing argument and written submissions; and the rendering of prompt awards. There is much more we can do to get out the message to prospective parties and counsel all over the world that New York City is a most attractive site for international arbitrations. There is also more opportunity to work with the courts to foster more expeditious resolution of arbitration issues before them. There may also be a place for more extensive voluntary arbitration within the courts themselves for cases below some threshold amount when a lessened scope of discovery, motion practice and overall process may be of interest to litigants who prefer the cost-effective resolution of their disputes.

The overriding challenges with respect to mediation relate to increasing its utilization, which remains far too low despite the wide recognition that it is incredibly effective. We need to continue to work to promote mediation both inside and outside of the court system. The relative newcomer, collaborative law, has proved to be very appealing and growing in the family law arena, but has great potential in other areas where the parties' continued relationships and ability to work with one another are important.

In fact, a detailed listing of our Section's energetic accomplishments is cause for great optimism as to what lies ahead.

Arbitration

As I discussed in my Message from the Chair in the Fall 2011 issue of the *New York Dispute Resolution Lawyer*, commercial arbitration has in recent years been subject to criticism from some users and commentators for having become nearly as expensive and time-consuming as litigation. While this is more a matter of perception—I should say misperception—than reality, it must be addressed. Two reports issued by our Section address this concern. The

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Message from the Co-Editors


Edna Sussman

The *New York Dispute Resolution Lawyer* supports our Section's extensive efforts to expand public knowledge and use of ADR and to provide professional resources for neutrals and advocates in New York, the U.S., and international ADR. To that end, we continue to provide insights into ethical issues, case developments, new books in the field, and new issues relating to professionalism and certification as well as practice tips.

In this issue, we also join other ADR organizations, including the ABA Dispute Resolution Section, the American Arbitration Association and CPR in addressing one of the serious issues in ADR, the lack of diversity in neutral selection. In this combined effort, which involves articles in all of the journals of these organizations, the focus is on the indisputable fact that women, like other historically disadvantaged groups, are not selected as arbitrators or mediators in proportion to their numbers and established accomplishments in the profession. Our hope is that we can help to sensitize administrative organizations, advocates and neutrals who recommend and select neutrals, and corporate users of neutral services, who have long been committed to diversity in selecting law firms and other providers, that this is an area on which they must focus. Both male and female neutrals and attorneys have a key role to play as mentors, sponsors and supporters of the effort. The service provider organizations have had this on their radar for some time, but the solutions from the supply side alone are not going to work and the pace of change has been glacial.

ADR is often a substitute for the court system where there has long been public pressure to diversify the bench. A credible dispute resolution system must have decision makers reflective of the diversity of society. As former Chief Judge of the New York Court of Appeals Judith Kaye notes in her article here, much has changed since the 1960s and 70s when there were almost no women in major law firms or on the bench. Now one-third of the Chief Justices of the state courts are women and we now have three women on the U.S. Supreme Court. She was surprised by "déjà vu all over again" when she commenced work as an arbitrator that the statistics on women's participation as arbitrators were more akin to those of the judiciary and the legal practice fifty years ago. The same conscientious effort made with the judiciary is needed here to make sure that private dispute resolution does not mean a return to a small controlled guild. Prominent neutrals, recommending attorneys, and corporate clients need to turn their attention and their commitment to this issue. World class corporations have long ago found that diversity actually improves results.


Laura A. Kaster

Women in ADR

In this issue we have four articles relating on this topic: "Déjà Vu: A Personal Reflection on Women in International Arbitration" by Judith S. Kaye, Anne Weisberg's article, "Taking the Bias Out of the Neutral," Louise Barrington's "Then and Now: A Quarter Century of Women in Arbitration," and Barbara Mentz's "Women in Law and Arbitration: Running in Place or Sliding Backward."

Section News

Our committees have been active and productive and have reports on their ongoing work—you can participate.

Ethics

Elayne Greenberg's Ethical Compass column invites a communal discussion about the ethics of creative billing alternatives intended to capture the "value added" that lawyers bring by early settlement. She proposes several alternatives to begin the dialogue.

Arbitration

One of the selling points of arbitration is the privacy of the practice and the confidentiality that may be preserved. We explore the distinction between the two and the practice issues that should be considered in attempting to maximize confidentiality in Laura Kaster's article on confidentiality in U.S. arbitrations. Sherman Kahn shares his insights on e-discovery in arbitration. Michael Oberman reviews new important precedents from both the Second Circuit and the N.Y. Court of Appeals clarifying the standard to be employed in assessing challenges to awards based on claims of an arbitrator's "evident partiality." James H. Boykin and Jan K. Dunin-Wasowicz address some very recent New York cases, both in federal and state court, that address problems in analyzing enforcement issues against foreign sovereigns under the New York Convention and the FAA.

MED-ARB

This issue provides real life examples of the use of Med-Arb and Arb-Med and discusses an important de-

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2009 Report on Arbitration Discovery in Domestic Commercial Cases set forth Best Practices for administering discovery in commercial cases to achieve the objectives of a fair, speedy, and economical process. The 2010 Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of International Arbitrations ("International Guidelines") set forth Best Practices for arbitrators' administration of the pre-hearing phrases of international arbitrations.

These reports were geared to arbitrators who now have to integrate these Best Practices into our day-to-day work. But these reports also provide potent tools for both inside and outside counsel in commercial arbitrations, who can assert that these Best Practices are bedrock expectations that counsel in arbitrations may expect and demand. The competition among numerous major world cities for selection as the site of international arbitrations seems to be intensifying. Our International Guidelines provide assurance to prospective parties in international arbitrations that arbitrators in New York can avoid the pitfalls of U.S.-style litigation discovery and motion practice. In addition, our Section's brochure, "Choose New York for International Arbitration," describes in detail the many demonstrable advantages of New York for international arbitration, including neutral courts experienced in international commercial disputes, leading arbitrators, lawyers and arbitral institutions, and the infrastructure for any type of case. We need to get this word out.

Our Section participated in the work last year of NYSBA's Task Force on New York Law in International Matters, and is presently engaged, with numerous other Sections, Bar Associations and other entities, including the "I Love New York" coalition, in numerous follow-up efforts to implement the Final Report of that Task Force, including efforts to investigate the establishment of a permanent Center for International Arbitration in New York, and, possibly, an interim "virtual" international center. Our Section is pursuing projects relating to the establishment of a dedicated reporter for decisions of New York courts relating to international business disputes and matters of significance to international arbitration, as well as the study of numerous legal issues and initiatives identified by the Task Force as needing additional work to enable New York to put its best foot forward as an attractive center for international arbitration.

Our Section, with other interested groups, is also interfacing with the state and federal judiciary in New York, with respect to possible initiatives to facilitate the more expeditious and expert resolution of arbitration-related disputes that end up in the courts, all with the overall objectives of fostering the expeditious, economical and fair administration of arbitration and arbitration-related litigation in New York. If arbitrations end up in prolonged collateral litigation, that also undermines the general appeal of arbitration.

Mediation

The paradox is that mediation is so underutilized in New York, despite its demonstrable effectiveness. As I discussed in my Message from the Chair in the Fall 2011 issue of the *New York Dispute Resolution Lawyer*, those of us who engage in mediation in New York, whether as mediators or counsel, uniformly experience a high percentage of cases settling, but the general use of mediation lags behind this reality. Our Section is engaged in discussions with representatives of the state and federal judiciary about expanding the use of mediation in New York.

Given the effectiveness of mediation and the substantial overload that our courts face, this time of budget constrictions may be a good opportunity to raise the broader question: Why do we not, as a matter of sound public policy, require mediation in New York in all cases, subject to whatever exceptions to such a general requirement might seem appropriate? Why don't we put in place statutes and/or court rules mandating the use of mediation in substantially all cases?

There could be political challenges with this, as some portions of the Bar have in the past been unenthusiastic about expansion of mediation. However, the approach of broad mandatory mediation has reportedly been taken by numerous other jurisdictions with considerable success; it is time for us to explore it now. For those favoring more extensive court-mandated mediation, the question becomes which approach is potentially more effective.

Perhaps we should explore the duties of litigators to assure that, as a matter of public policy, they seek the most expeditious resolution of their clients' disputes, whether that be through litigation, negotiation, arbitration, mediation, collaborative law, or some other approach. It is a truism that a very high percentage of cases in our courts settle. It also seems evident that the parties to these disputes would in many instances benefit substantially from earlier settlement, something eminently achievable through the broader use of mediation.

Our Section has also produced a 2010 Final Report on Mediator Quality and has just launched a Mediator Registry to make available to the public information as to the training and experience of members of our Section who are practicing as mediators in New York State.

Collaborative Law

Those of us who have grown up in our adversary system tend to very comfortable with it (no doubt it is part of our litigative DNA), notwithstanding our recognition that it may lead to excesses. One alternative paradigm is collaborative law. The essence of collaborative practice appears to be basic meditative training and the agreement that the collaborative lawyers will voluntarily exchange relevant

information and attempt to resolve the dispute without litigation. The commitment to collaborate is bolstered by the requirement that the collaborative attorneys step aside without participating in the subsequent litigation of the dispute if the collaborative process fails to lead to settlement. This process, which often includes neutral advisors on child welfare and custody and on finances, has had growing appeal in the family law context. But the potential usefulness of the collaborative process does not stop with family law. There are obviously other areas of dispute where the parties need to be able to continue to work together on a cooperative basis, or where opportunities for synergy going forward will be fostered by a collaborative process and possibly undermined by litigation.

Ethics

Arbitration and mediation quintessentially involve private individuals performing roles of high public trust. It is extraordinary when one thinks about how societally important and sensitive are the roles played by arbitrators and mediators. To foster greater use of arbitration and mediation, the parties and counsel must believe that the neutrals consistently act with the highest of ethical standards.

Our Section regularly addresses this need through our CLE and training programs which incorporate ethics considerations into their presentations, and our regular ethics column in our preeminent journal, *New York Dispute Resolution Lawyer*. Most recently, we have focused on the ethical disclosure obligations raised by the participation by arbitrators and mediators in social media, such as Facebook, Linked In, and the like. Our Section's efforts in this area have heightened the awareness of these issues by many arbitrators, mediators and counsel in New York. We will continue to study this area and, eventually, will suggest Best Practices.

Legislation Concerning ADR

Our Section monitors state and federal legislation relating to arbitration, mediation and collaborative law and has submitted numerous reports to legislatures on pending bills or legislation that has been enacted, including a 2011 Report on the Dodd-Frank Act, a 2009 Report on the Arbitration Fairness Act, and reports on numerous bills proposed in the New York legislature.

Website

Our Section has developed what is an increasingly inclusive and useful website for activities of the Section and matters of interest to ADR practitioners. The website contains many of our reports and studies. See http://www.nysba.org/DRS.

Speakers' Bureau

Our Section is in the process of developing a Speakers' Bureau, whereby members of the Section who are experienced in arbitration, mediation, and collaborative law will speak to professional, civic and other groups in New York and beyond with respect to ADR-related subjects. This will likely be a project of great interest to our members for the opportunities it will give them to reach out to parties and attorneys potentially interested in neutral services and will also potentially give counsel opportunities to take the stock of neutrals, as well as serving the societally useful purpose of educating the public as to the potential advantages of arbitration, mediation and collaborative law in appropriate cases.

Diversity

The NYSBA, under the leadership of President Vincent Doyle, has implemented an ambitious diversity plan to increase diversity within the NYSBA.

Our Section has been interested in the diversity area from its inception, when it established a Diversity Committee. In late 2011 we submitted our first formal Diversity Plan with the NYSBA, as our part of the NYSBA's overall diversity effort.

The point is as elusive as it is important that diversity is our objective not only because it is the right thing to do, but also because of the benefits that diversity brings to the conducting of individual arbitrations and mediations. Specifically, the inclusion of a diverse range of advocates, neutrals and others in arbitrations and mediations will inevitably result in broader perspectives being brought to those matters, leading inevitably to smarter and better outcomes. To take, for instance, what should be an obvious example—the inclusion of women—who appear to be underrepresented on arbitration panels and in commercial mediation. The results is loss of understanding and perspective when we have arbitration and mediation panels made up primarily of men. It seems obvious that all diverse groups will bring added perspectives to arbitrations and mediations that can greatly enhance the experience and outcome of the process.

Upstate

A further effort of our Section has been to become a truly statewide entity. This effort is ongoing—and there is much further we need to do in this regard, to include this element of "geographical diversity." This will be an area of increased effort by our Section.

Arbitration and Mediation Training Programs

It is unquestionably of the utmost importance that arbitrators and mediators in New York be educated and trained to perform these roles with distinction. Our Section addresses this need by conducting a three-day Commercial Arbitration Training Program and also a three-day Mediation Training Program each year in New York City. These programs attract faculties of well-credentialed and experienced arbitrators, mediators, counsel, client representatives, academicians, and representatives of the

leading arbitration and mediation provider organizations in the world, as well as interested and often quite experienced and insightful participants—and have been very well received by persons wanting basic or advanced training in arbitration and mediation.

New York Dispute Resolution Lawyer

Last but not least, this journal has become a go-to place for up-to-date articles on the emerging practices and developing law in arbitration, mediation and other ADR-related areas. We have been told that receipt of this journal is a major benefit of membership.

GET INVOLVED

The accomplishments of our Section result solely from the wisdom, commitment and energy of our members, facilitated by the staff of the NYSBA. As our areas of activity expand, we will inevitably need new members and new leaders. Please get involved through contacting me at cmoxley@kaplanfox.com or Beth Gould of the NYSBA at bgould@nysba.org and joining in the activities of our Committees in arbitration, mediation, collaborative law and other areas.

Charles J. Moxley, Jr.

Message from the Co-Editors *(continued from page 2)*

cision on the subject from the Hong Kong court which highlights some of the cross border differences in practice and the attendant risks. This is an area of development and considerable discussion in the world of ADR and of interest to neutrals and advocates in New York and around the world.

Mediation

Whether to require a higher level of training and certification for mediators was the topic of a Section white paper. That effort recommended that no certification be undertaken. We provide three articles that revisit this issue and views from the international arena. From the perspective of CEDR (Centre for Effective Dispute Resolution), IMI (International Mediation Institute) and MII (the Mediators Institute of Ireland), the success of mediation in the international arena depends on high initial training requirements and reliable certification. One U.S. multinational corporation notes that transparent qualifications are required to get more litigants to the table.

We previously discussed the spectrum of ADR and here we discuss the differences between traditional mediation and online mediation with an exploration of the pros and cons of ODR. We also analyze the reasons for the disparity between the U.S. and the UK in the frequency of use of mediation in personal injury disputes and the impact of the allocation of costs and fees and litigation funding in that area of practice.

International

The development of international dispute resolution processes both for private and investor-state disputes, changes in international progress in various institutions around the world, and financing for dispute resolution provide for rich explorations in this issue. Our growing interest in this arena coincides with the Section's and the Bar's growing focus on promoting New York as a hub for international arbitration and mediation.

Book Reviews

There are a number of new books that are contributions to the ADR field that we review in this issue. We review our own NYSBA's *Definitive Creative Impasse-Breaking Techniques in Mediation.* This book has had an excellent reception and is in its second printing, a printing that will be dedicated to Molly Klapper, the beloved editor of this compendium who passed away shortly after its publication. We also review Randall Kiser's new book *How Leading Lawyers Think,* a book which takes a group of lawyers who escape the typical mistakes in predicting case outcomes that Kiser explored in prior works and extracts the practices that make them better case analysts.

Case Notes

Our student editors report on a number of important cases dealing with attorney disqualification, piecemeal litigation and arbitration, and pre-arbitration security.

Fall and Annual Meetings

Last but not least, we have reports on our Fall and Annual Meeting programs written by our invaluable student members who demonstrate, as do all the contributions to this issue, the wide interests and talents of our Section and its members.

Enjoy this issue.

Edna Sussman and Laura A. Kaster

DRS Committee Reports

The Arbitration Committee

The Arbitration Committee, Co-Chaired by John Wilkinson and Abigail Pessen, has continued its bi-monthly meetings. Two extremely well-attended meetings related to the ICC's new arbitration rules and to third party funding of arbitrations.

The Committee also recently finalized and had 5,000 copies printed of its *Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic and International Commercial Arbitrations*. These Guidelines have been adopted by the NYSBA's House of Delegates, and the Arbitration Committee is now working to achieve their widest possible distribution.

In addition, the Committee is active in the project to determine whether New York should adopt the NCITRAL Model Arbitration Act, as well as various other projects to make New York. a more desirable site for international arbitration.

Finally, the Committee has been active in opposing a proposed amendment to the NY CPLR which would contain an additional, confusing and unneeded ground for vacating arbitration awards.

The Mediation Committee

The Mediation Committee, Co-Chaired Irene C. Warshauer and David Singer, held regular meetings to explore areas of interest. At the first meeting our speaker, Deborah Mendes, Senior Conflict Resolution Officer/ Mediation with the United Nations Secretariat spoke on dispute resolution at the UN and particularly on the mediation process and the ombuds process. The UN has approximately 60 mediations per year. Ms. Mendes noted that conflicts at the UN may arise from the diversity of the people who work there including culture, language, country of origin, race, religion, sex, etc. Mediations are often between staff persons and their supervisors who may be in different countries and are often conducted by phone.

At the second meeting Peter Scarpato made a presentation and led a discussion on "The Counterintuitive Mediator," a discussion reflected in his article previously published in this publication. Peter suggested trying the following techniques, among others: (1) as an ADR specialist, ask parties for help; (2) if talking stops, use the power of silence; (3) steer into, not around, subjective emotional issues irrelevant to objective, probative issues; and (4) instead of being in charge, disappear.

The third meeting was held jointly with the Negotiation Committee and in conjunction with the DR Section's Annual Meeting. Various topics of interest were discussed including: (1) what, if anything, can you do with/for a party who is receiving what you are certain is bad advice about what could be expected at trial?; (2) how to handle unrepresented parties where one seems compromised and less competent than the other; (3) how to prepare for a mediation when you know in advance that one of the parties will offer virtually no money in settlement because it basically doesn't have it; and (4) issues relating to ethics in the negotiation process extracted from a St. John's Law School course taught by Peter Bernbaum.

Negotiation Committee

The recently founded Negotiation Committee, chaired by Jason Aylesworth and Norman Solovay, held its first meeting and explored some interesting hypothetical exercises created by Jason which framed the discussion of key negotiation issues. With the help of its member Peter Bernbaum, who teaches the Negotiation Course at St. John's Law School, the second meeting took the committee further along in discussing the various ethical questions arising in negotiations that had fascinated his students. At the third meeting, further hypotheticals were posed for exploration issues and there was clear interest in pursuing the subject further and involving students and members of our Section in doing so.

In addition, Simeon Baum, a member of the Committee and the force behind its creation, suggested that the committee pursue, perhaps in conjunction with the Mediation Committee, the creation of one or more exercises and perhaps the creation of a full program dealing with the growth of mediation/negotiation skills. The Committee is also exploring possible exercises and a program suggested by Steve Hochman as to why mediation works when party-conducted negotiations don't. The Committee expects to pursue these ideas further.

The Ethical Compass
Show Me the Money: Part One

By Elayne E. Greenberg

Introduction

Until now, the discussion of how to ethically monetize "the value added" that settlement savvy attorneys bring to the client has been one of the few remaining taboos that is rarely, candidly discussed among lawyers. *How should settlement-proficient lawyers calculate the value of efficient, quality outcomes? How does a lawyer who bills by the hour ethically deal with the inherent conflict of interest between his desire to make as much money as he can and the economic disincentive to be settlement-proficient? What are some creative billing incentives to more closely align the clients' desire for contained legal costs with a lawyer's desire to be fairly compensated for the value he adds for efficient, quality settlements?* Especially during these constricted economic times, when consumers of legal services are scrutinizing more than ever the value of legal services, this conversation invites a timely re-consideration of different, more creative billing paradigms beyond the "hourly billing."

This column takes "lawyer billing" for settlement-proficient attorneys out of the closet, and invites a public discussion about the ethics of creative billing alternatives. First, I will introduce three alternative billing regimes that capture the "value added" that lawyers bring by early settlement. Continuing, I will review the existing ethical and legal contours that shape the parameters to be followed when considering any fee incentive structure. Then, applying this ethical guidance, I will offer how settlement-savvy practitioners should implement these innovative billing regimes. Finally, this column concludes by offering the next steps practitioners might want to contemplate when exploring creative billing incentives.

Innovative Billing Ideas

In his new book *Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money*, Professor John Lande, a respected leader in the development of ethical dispute resolution, tackles the problem of monetizing the "value added" for early settlement by proposing innovative billing incentives that help capture the "value added" in efficient quality outcomes.[1] According to Professor Lande, those lawyers who are facile in effectuating early settlements might also consider offering clients billing alternatives that allow clients and lawyers to share in both the risks and savings of settlement.[2] Professor Lande suggests several innovative billing models, three of which will be discussed here: combined hourly and contingent fees, value billing, and premiums for early settlement.

The combined hourly and contingent fees arrangement, as the name implies, incorporates the benefits of contingency billing with the certainty of hourly billing.[3] According to this billing method, the lawyer lowers her hourly rate but adds a contingency fee for a portion of the settlement.[4] By way of example, a settlement-proficient lawyer who has agreed with her client to employ the combined hourly and contingent fee billing arrangement, may reduce her customary $400 rate in half to $200 hour in addition to 16.5%, or one half, of her customary one-third contingency rate. Clients may elect to opt for this method because it lowers their hourly billing obligation while giving them a greater share of the settlement.[5] For some lawyers this option may be preferable to tradition "hourly billing" because this fee arrangement affords them the opportunity to capture a desired mix of predictability and "value added."

> *"How should settlement-proficient lawyers calculate the value of efficient, quality outcomes?"*

Value billing is another type of fee arrangement that incorporates the "value added" to early settlement.[6] Attorneys and clients using this type of billing decide at the beginning of the representation the range of the lawyer's fee that the client might agree to pay at the conclusion of the case, dependent on the client's satisfaction with the value of the legal services received.[7] The range may be based on a fixed fee or multiples of the hourly rate. In one example, the attorney and client agreed that the attorney would receive compensation within a range of a minimum of 70% of the attorney's usual rate up to 150% of the attorney's usual rate, based on the client's satisfaction.[8] I suspect that some of our more cynical colleagues are snickering at the thought that a client would opt to pay an attorney on the higher end of the agreed upon range. Although this bill arrangement may not be appropriate for every client, it may be an option for some.

A third billing alternative is providing for a premium for early settlement.[9] Under this fee arrangement, clients agree to pay the attorney a pre-determined premium above the lawyer's customary rate for achieving a specific settlement amount within a specified period.[10] If the attorney is unable to settle the case for the specified amount within the agreed upon period, some clients and attor-

neys also include a declining premium billing agreement. A variation of premium billing, in declining premium billing the client will pay the attorney a lesser, declining premium if the lawyer settles by other pre-determined, agreed-upon dates and settlement amounts.[11] Premium billing is one billing system that helps align the economic interests of lawyers and clients.

Ethical Parameters of Fees and Billing

The New York Rules of Professional Conduct Rule 1.5 Fees and Division of Billing informs us that reasonableness[12] and transparency[13] shape the ethical contours of any billing structure that incentivizes settlement. Specifically, Rule 1.5(a) provides that any fees charged must be reasonable.[14] Relevant factors that determine the reasonableness of a fee include "the skill requisite to perform the legal service;"[15] "the amount involved and the results obtained;"[16] "the experience, reputation and ability of the lawyer or lawyers performing the services;[17] and "whether the fee is fixed or contingent."[18] The concept of "the amount involved and the results obtained," mirror the standard the U.S. Supreme Court articulates in determining the appropriate fees to be awarded to prevailing attorneys in a Title 42 U.S.C. Sec. 1988 case.[19] Moreover, the Court guides that an award of a premium or enhanced award is permitted "in cases of exceptional success" if the hourly rate multiplied by the actual number of hours worked alone does not arrive at a reasonable attorney's fee.[20]

Our New York Rules of Professional Conduct also inform that outcome-based compensation or contingency fees are ethically permissible[21] except for criminal matters[22] and certain domestic relations matters.[23] Interestingly, contingency fee arrangements are not considered to implicate the personal, financial or business conflict prohibitions contemplated in Rule 1.8 Current Clients: Specific Conflicts of Interest.[24] Thus contingency fees are allowed with specific exceptions even though we know that in practice, contingency fee arrangements may at times create a conflict between the client's and attorney's interests. In fact, this tension becomes magnified when clients and attorneys have different risk preferences and different economic goals.

As with any agreed upon billing regime, lawyers have an ethical obligation to fully explain the agreed upon billing regime to their client. Before representation begins or within a reasonable time thereafter, lawyers must communicate to clients the "scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible."[25] Moreover, "in domestic relations matters, a lawyer shall provide a prospective client with a Statement of Client's Rights and Responsibilities at the initial conference and prior to the signing of a written retainer agreement."[26] If the representation is based on a contingent fee, then "the lawyer must provide the client with a writing stating the method by which the fee is to be determined…and any expenses for which the client will be liable regardless of whether the client is the prevailing party. Upon the conclusion of a contingent fee matter, the lawyer shall provide the client with a writing stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination."[27]

Ethically Implementing Innovative Fee Arrangements

As explained in the previous section, lawyers who are considering implementing any of the suggested billing alternatives must ensure that the process of calculating the fees be transparent and the resulting fees be reasonable. In order for the resulting fees to be reasonable, they must clearly comport with the Rule 1.5 ethical parameters and the U.S. Supreme Court mandate that instruct a reasonable fee earned is one that correlates with "the amount involved and the result obtained." Again, questions about appropriate value emerge and bring us back to our threshold question about quantifying the "value added" for settlement.

In addition to generating reasonable fees, lawyers using alternative fee incentives must ensure that at the beginning of the lawyer's representation, the client has an understanding of the terms and rationale for such a fee agreement, transparency. The three billing alternatives discussed may be considered a variation of contingency agreements, and thus, like all contingency agreements, must be in writing.[28] The writing should be presented to the client in a way that clearly delineates in writing the terms of the fee arrangement, specific payment obligations of the client and the rationale for the chosen fee arrangement. As was noted, lawyers involved in matrimonial and criminal cases are ethically excluded from contingency fee arrangements.[29]

Next Steps

While writing this column, I previewed these ideas with several colleagues. Although many were interested, just as many were concerned about how receptive their clients would be to these different billing regimes. After all, even though many clients are demanding cost-effective legal services, they may be leery of considering alternative fee structures that haven't been widely used. However, it would be an error for settlement-proficient attorneys to compartmentalize the discussion about innovative billing as an isolated discussion about fees. Rather, it is part of a continued lawyering evolution in which lawyers are responding to legal consumers' increasing demand for cost-effective legal services.[30] As increasing numbers of lawyers are actively marketing their settlement competence and skill in using dispute resolution, responsive billing incentives are a welcomed part of the lawyering evolution.

Looking at the glass half full, I believe that the global economic tsunami is encouraging our legal profession to become more settlement-proficient and spawn billing innovations that capture the value of early settlement. Responsive billing options allow attorneys and clients to more equitably share the benefits and risks in the sometimes unpredictable road to settlement. However, we have just begun to think of the range of viable responsive fee arrangements that accurately monetize the value skilled dispute resolution professionals offer legal consumers. In future columns we will talk about billing for neutrals. In the meantime, I invite settlement-proficient lawyers, mediators and arbitrators to contact me at greenbee@stjohns.edu to share the billing innovations you have used to capture the "value added" of your early settlement successes.

Endnotes

1. John Lande, Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money (2011).
2. *Id.* at 38.
3. *Id.* at 42.
4. *Id.* at 42
5. *Id.* at 42.
6. *Id.* at 43.
7. *Id.* at 43.
8. *Id.* at 43.
9. *Id.* at 43.
10. *Id.* at 43.
11. *Id.* at 43.
12. N.Y. Rules of Professional Conduct, (22 NYCRR 1200.0) R. 1.5.
13. *Id.* R. 1.5(b), (c).
14. *Id.* R. 1.5(a).
15. *Id.* R. 1.5(a)(1).
16. *Id.* R. 1.5(a)(4).
17. *Id.* R. 1.5(a)(7).
18. *Id.* R. 1.5(a)(8).
19. *See* Hensley v. Eckerhart, 461 U.S. 424 (1983); *see also* Blum, Comm'r N.Y. State Dep't of Soc. Serv. v. Stenson, 465 U.S. 886 (1984).
20. Blum, Comm'r N.Y. State Dep't of Soc. Serv. v. Stenson, 465 U.S. 886, 898 (1984).
21. N.Y. Rules of Professional Conduct, (22 NYCRR 1200.0) R. 1.5(c).
22. *Id.*
23. *Id.* R. 1.5(d)(5).
24. *Id.* R. 1.8(c) comment 4C.
25. *Id.* R. 1.5(b).
26. *Id.* R. 1.5(e).
27. *Id.* R. 1.5(c).
28. *Id.* R. 1.5(c).
29. *Id.* R. 1.5(d).
30. Julie MacFarlane, The New Lawyer: How Settlement is Transforming the Practice of Law (2008).

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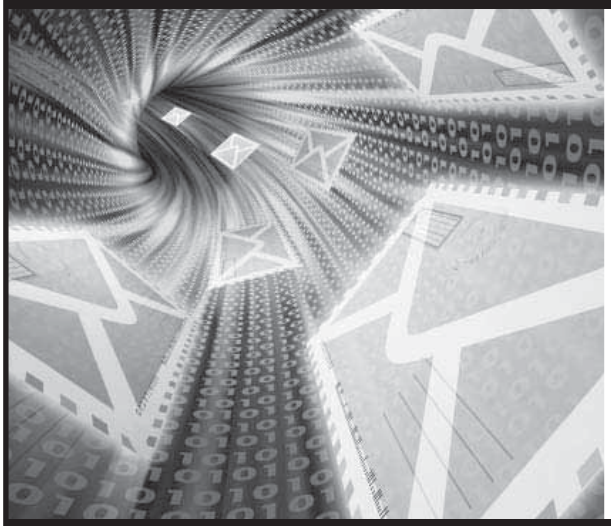

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Déjà Vu: A Personal Reflection on Women in International Arbitration

By Judith S. Kaye

A triangle of coincidences motivates this brief personal reflection. The first is the fiftieth anniversary (gulp!) of my graduation from law school. The second is my arrival back in the law firm world, at Skadden, Arps, Slate, Meagher & Flom. It's what I call my "afterlife," my good fortune after more than 25 glorious years as a judge of the Court of Appeals (New York State's high court), 15 of those years as Chief Judge of the State of New York, both a judicial role and a chief executive officer role.

The third leg of the triangle was the invitation of Edna Sussman to set down my new-world observations, as I have shared with her a sense of "déjà vu all over again" (to quote Yogi Berra) about the place of women lawyers, particularly in the fascinating world of arbitration that is increasingly a part of my extraordinary life at Skadden. And just to make my point most dramatically, I'll stay with the subject of women as arbitrators in international arbitration, recognizing that the picture is somewhat brighter for women as lawyers and administrators in the arbitration field generally.

Getting Beyond the Front Door

I had my first real taste of being a female lawyer in a virtually all-male world in the early 1960s, still in the lifetime of many of our readers. One of ten women in a class of 300 at New York University Law School, I set my sights on the unattainable goal of a position in the Litigation Department of a major Wall Street firm. The Placement Office said it would be "interesting" to see how I did. The more I was turned away the more determined I became to get beyond the front door.

I've heard Justice O'Connor—just a couple of years ahead of me at Stanford Law School—tell of her own extensive job-hunting efforts, which netted her an offer of a secretarial position in a major California firm. Ultimately I did better, securing a spot in the Litigation Department at Sullivan & Cromwell, but only after scores of written and oral rejections saying, in essence, "Our quota of women is filled." The only other Wall Street firm to offer me a position made clear that my compensation would be lower than my male classmates. Today, of course, that is illegal conduct. It's all much more subtle today.

What stands out for me is not simply that law firms did such things but that they did so routinely, openly, even proudly if they actually employed a woman attorney. But even more breathtaking is the fact that women were so accepting for so long. The reasons were, after all, perfectly sound, weren't they? Clients wouldn't have us; we would not be able to travel to distant cities with male colleagues; we couldn't work late (all-nighters were unthinkable); and we were in the law only to find husbands, then we would leave the profession.

The Dawn of Awareness

It wasn't for a decade or two, as our numbers in law school multiplied, that our consciousness, outrage, began to blossom. We proved beyond doubt that clients would have us, we could work late and travel without incident, and even marry and have families without leaving the law.

"Pity that, despite our advances and society's progress, women still have to work so hard simply to find our way through that glass ceiling."

Fast-forward to 1983, and then to 1993, when I became the first woman to serve on the State's high court, and then to preside over the New York State Judiciary. I especially remember that, anticipating my arrival at Court of Appeals Hall, for the first time a lock was placed on the bathroom door behind the courtroom (in case a judge had to slip off the bench during argument). And I will never forget counsel's enthusiastic response to one of my early questions: "Yes, Sir!"

My arrival as one of two or three women Chiefs at the nationwide Conference of Chief Justices ten years later again provoked a small stir. As more women Chiefs Justices joined us over the years, the meetings became less social occasions for the Chiefs and their wives and more intense dawn-to-dusk work sessions. I know that I am as Chief Judge credited with, or blamed for, eliciting greater unanimity in Court of Appeals decisions. And I know that problem-solving courts and family issues that swamp the state courts have assumed greater importance as the number of women Chief Justices nationwide has grown from virtually none to about one-third of the 56 jurisdictions that comprise the Conference. Often I wonder: are these changes purely coincidental, the product of an evolving

society, or are they also in some part chromosomal? Diversity, I am convinced, is an enormously positive value.

The long and short of all this is that the courts are still standing despite significant (though not yet sufficient) growth in the number of women decision makers. Indeed, if not actually enhanced, society is hardly diminished by the presence of women lawyers and judges, even at the helm of court systems, let alone women in high-power positions throughout the world, a consequence of a public, "political" process (whether elective or appointive) that has come to recognize the importance of equal opportunity, diversity and, maybe above all, simply securing the best talent.

Fast Forward Fifty Years

So imagine my disappointment, in 2009, as I settled into my "after (Chief Judge) life" at the great international firm of Skadden, Arps, to be greeted by headlines that for me harked back to the early days, like "Too Few Women Among Top International Arbitrators." In all the articles, the very same few women arbitrators, and single digit statistics, are featured. By now I can recite the names and numbers, not far above those 1962 law school statistics, despite female law school graduates topping fifty percent in recent decades. A Sorbonne professor is quoted as saying, "Of course progress is being made, but the progress is quite slow," the author concluding that "the dynamics of arbitral selection and the incentives at major law firms suggest that parity will be a long time coming." A dismaying message I am seeing played out in real life.

For me a number of the "explanations" offered—for example, that clients prefer experienced lawyers who project an image or gravitas with which they are familiar—resonate with sounds of the '60s. When I visited a recent meeting of Arbitral Women, I saw lots of gravitas, lots of highly credentialed, highly experienced, highly impressive women. Pity that, despite our advances and society's progress, women still have to work so hard simply to find our way through that glass ceiling. (After nearly fifty years as a woman lawyer, I question whether that ceiling is really made of glass, which generally symbolizes a fragile object.)

My essential posture, from 1962 law school graduate to Chief Judge of the State of New York and now to Skadden, Arps, has been one of determined optimism—meaning not passivity, never passivity, but diligent perseverance—which for several reasons remains the most promising prospect today.

The Positive Signs Ahead

First, of course, there are simply more of us—more networking, more channels of mutual support and mentoring, more exposure, all of which translates into greater opportunity.

Second, the fact that I have now collected several articles on the subject of women in international arbitration and learned of surveys on the subject is in a sense even good news. The imbalance, dismal though it may be, is being noticed, talked about. A sign on the wall of a client's facility decades ago left me with an unforgettable message: "People Do What You Inspect." Greater public consciousness, even in the very private arbitration world, matters. Unknown concentrations of matters in the same few hands can unnecessarily add cost and delay. On my court, for example, we had an unwavering tradition of hearing cases one session and handing down the decisions the next session, weeks later, obviously an impossibility when even the most skilled decision makers' private calendars grow too large.

"…the road ahead is distinctly more promising."

Third, and perhaps most heartening, is to see the rise of women in the corporate world. Within recent months, for example, a book *Courageous Counsel,* appeared, chronicling the rise of several dozen women to the position of General Counsel in Fortune 500 companies, simultaneously with the increasing growth of counsel's role as among the central corporate decision makers (again, just coincidences?). During these same months, I have enjoyed seeing *Fortune*'s lists of most prominent women chief executives (small, but a record high) and achievers, and not one but two extensive *New York Times* articles featuring IBM's new CEO, Virginia Rometty. Each of these articles, interestingly, focused on a different aspect of her ascent, as a woman, up through the ranks. Gender mattered, and undoubtedly does, in all of these success stories—unforgettable lessons in the value of diversity, especially for the women who made those trips.

So though I am sorely disappointed that, half a century later, we seem still to be breaking the glass, or reinventing the wheel, the road ahead is distinctly more promising.

Judith S. Kaye joined Skadden's Litigation Group in 2009. Before joining the firm, she served as Chief Judge of the State of New York for 15 years until her retirement in 2008, longer than any other Chief Judge in New York's history. She first was appointed in 1983 by Gov. Mario Cuomo as an Associate Judge of the Court of Appeals, becoming the first woman ever to serve on New York's highest court. Judge Kaye has published and lectured extensively and has received numerous awards recognizing her judicial and scholarly accomplishments.

Taking the Bias Out of the Neutral

By Anne Weisberg

Ten years ago, *Women in Law: Making the Case* (Catalyst, 2001), a study I directed, was released. Tracking the career experiences of three decades of graduates from the law schools at Harvard, Yale, Columbia, Michigan and Berkeley, the study found that over 90 percent of women were practicing, but they were underrepresented in the leadership of the profession. Women made up roughly 15 percent of partners.

That number hasn't budged. In 2011, women make up 15 percent of equity partners in large law firms, according to the ABA's Commission on Women in the Profession.[1] Similarly, there has been no progress in the number of women in arbitration, which has hovered around 5 percent since at least 2004.[2]

This flat line is perplexing, given the tremendous efforts law firms and other organizations have made to become more diverse and inclusive. Most law firms have women's networks; corporate counsel have demanded greater diversity among their law firm providers; CPR has had a task for diversity since 2006. The business case for greater gender diversity has been made. So, what is holding women back?

"[T]here has been no progress in the number of women in arbitration, which has hovered around 5 percent since at least 2004."

The answer, I believe, lies in this simple assumption: "think leader, think male." The fact is that, in our society, most people ascribe the characteristics of leaders—decisive, assertive, ambitious—as male. This implicit assumption is powerful, precisely because it is implicit. We don't even realize we're making it. Similarly, clients want neutrals who are "experienced lawyers who project an image of gravitas,"[3] which is fraught with assumptions about both what qualifies as "experience" and what defines an "image of gravitas."

When we eliminate these implicit biases from decision making, the effect can be staggering. The best example of this is the dramatic rise in the number of women musicians in major orchestras. In 1970, roughly 10% of orchestra members were women. During auditions, although judges believed they were deciding based only on the talent of the musician, their brains were making other associations, including "think musician: think male." But the practice of putting a screen in front of the person auditioning, so judges couldn't see whether the musician was male or female, interfered with that assumption. By the 1990s, women were 50% more likely to pass the first round and 300% more likely to pass the final rounds, as reported in Margaret Heffernan book, *Willful Blindness: Why We Ignore the Obvious at Our Peril* (Walker & Co, 2011). Blind auditions are now standard practice for major orchestras in the United States.

This phenomenon is not limited to orchestras. In evaluating the qualifications of men and women assistant professors, reviewers were "four times more likely to ask for supporting evidence about the woman, such as a chance to see her teach or proof that she had won her grants on her own, than they were for the man."[4] However, when academic papers are blind peer reviewed (i.e., the names are taken off the top), the number of papers written by women that are accepted for publication goes up significantly.[5] Reducing bias not only improves gender representation, it improves performance. In analyzing over 1,000 major business investments, McKinsey found that "when organizations work at reducing the effect of bias in their decision-making processes, they achieved returns up to seven percentage points higher."[6]

I am not suggesting that clients blindly pick their neutrals. The very fact that you can choose who is going to decide your dispute is part of the value of mediation and arbitration. But it is precisely because of this high degree of choice in mediation and arbitration that those making the decision should try to do so with as little bias as possible. Isn't that precisely what a "neutral" is meant to be?

So, how can you as an individual get started understanding how bias is affecting your decisions? Here are three easy steps to take to do so:

- Attacking bias in any decision making process starts with learning about your own implicit assumptions. Take the Implicit Association Test (https://implicit.harvard.edu/implicit/demo/), which was developed by Dr. Majharin Banaji at Harvard University, and represents the most rigorous, world-wide database on bias. Once you have taken the test, have those you work with take the test, and discuss the results as a group.
- Keep a list of your "go to" people. If there are no women on that list, then make it a point to identify women who should be on the list. It may be harder to find them (because there are fewer women in senior roles) but don't use that an excuse not to search.

- Once you have identified a few women for your "go to" list, actively sponsor them. Research has shown that women tend to be over-mentored but under-sponsored.[7] Sponsorship ultimately is about the transfer of your credibility to your protégé, by introducing her to influential decision makers, by advocating for her when opportunities arise and by giving her honest feedback on how she can best position herself for success.
- Spend time with women leaders or in environments where women are in leadership positions. Take them to lunch, and get to know them. If there are no women leaders in your organization, go outside. Attend a women's conference; sign up to hear a woman leader speak. All too often, women leaders are taking to a room full of women, and they notice and appreciate the men in the room!

Besides what you as an individual can do, think about what your group or organization can do. Here are a few suggestions:

- Make sure you use the same criteria to evaluate women as you do for men. Always gather the facts—and the same facts for both men and women. So if women's personal circumstances are relevant, then make sure that men's personal circumstances are also relevant. In the absence of information, give women the same "benefit of the doubt" that you give men.
- If a neutral's experience is the qualification with the most weight, have a group conversation about what "experience" really means. Is it simply the number of years in practice? Or are there other outcomes or metrics that are relevant? What factors are not being considered that should be?
- Have a good gender mix among those who are making the decisions about who to hire, including on the client side, if possible.
- Engage with the client in a conversation about the value of having a diverse slate of neutrals. Many Fortune 500 companies understand the value of diversity and in fact have made diversity a key factor in their choice of outside counsel. It is not a big shift from that to discuss applying this same lens to the decisions on neutrals.

Taking the bias out of choosing neutrals will ensure that you are *actually* getting the best person for the job, rather than the person you know best, and, in the long run, make the entire system of alternative dispute resolution more performance based. And isn't that, in the end, best for everyone?

"When we eliminate…implicit biases from decision making, the effect can be staggering."

Endnotes

1. See also Report of the Sixth Annual National Survey on Retention and Promotion of Women in Law Firms (The National Association of Women Lawyers and the NAWL Foundation, October 2011).
2. See Michael Goldhaber, *The Women of Arbitration: Why Are There So Few?*) (Focus Europe, American Lawyer Media Supplement, Summer 2004); Michael Goldhaber, Deciding Women (Focus Europe, 2009).
3. Goldhaber, 2009.
4. Beyond Bias and Barriers: Fulfilling the Potential of Women in Academic Science and Medicine (National Academy of Sciences, 2006) at 4-28.
5. Id. at 4-27.
6. Daniel Kahneman, Dan Lovallo, and Oliver Sibony, *Before You Make That Big Decision* (Harvard Business Review, June 2011).
7. See, e.g., Nancy Carter, Christine Silva, *Mentoring: Necessary but Insufficient for Advancement* (Catalyst, 2010); Sylvia Ann Hewlett et al., *The Sponsor Effect* (Harvard Business Review, 2010).

Anne Weisberg is Director of Diversity and Inclusion at BlackRock, and a graduate of Harvard Law School. She is the author of several books and many articles on diversity and inclusion, including the best-seller *Mass Career Customization: Aligning the Workplace with Today's Nontraditional Workforce* (Harvard Business Press, 2007).

Then and Now—A Quarter Century of Women in Arbitration

By Louise Barrington

I attended my first international conference as Director of the ICC's Institute of International Business Law and Practice (now mercifully renamed the Institute of World Business Law) in Bahrain in the late 1980s. The occasion was a conference of ICCA and there were about 250 participants at the three-day affair. At a break during the second day, pouring coffee for myself and the woman next in line, we realized that all of the woman in the room had congregated at that table. There were about half a dozen of us. We began to chat, and although the theme of that Bahrain conference has long ago fled my memory, the theme of our coffee break chat has not.

We remarked on the absence of women on the conference panels (there was only one out of about 40 speakers in Bahrain) and even in the audience. Several recalled incidents where they were the lone woman in a room of men, where lead counsel was asked to bring coffee to her junior, and where some male counsel simply ignored their presence. The somewhat rueful laughter led to some curiosity about whether there were other women involved in arbitration whom we hadn't met, whether their experiences were similar, and how were they dealing with life in a world of males.

Back in Paris, I took the list of those women, and added to it another half dozen names I'd encountered during my first few months at the ICC. I sent a note around to the women on the list and asked them to add any names they knew, and send it back to me. I then wrote to the new names and asked them to do the same. The list grew to nearly 150 names in the space of a couple of weeks, and thereafter, others continued to trickle in. I didn't know what I'd do with the list, but figured it might one day serve some useful purpose.

The Institute's Annual Meeting takes place each October, and on the assumption that some of the women on my list would be coming to Paris to attend the conference, I invited them all to a dinner the night before. My secretary and I reserved a private room in a cozy little bistro near the ICC, and I went off to Mexico for a couple of weeks. On my return, my secretary exclaimed, "You'll have to find a bigger place, the bistro can't take more than 40!"

At that first dinner 60 women attended, from 13 different countries. Between the aperitif and the soup, each of the 10 woman at the first table rose briefly to introduce herself and her interest in arbitration. As each course and table took the spotlight, the atmosphere underwent a marked change. The evening had begun with friendly curiosity: who were all these unknown faces and why hadn't we met before? The animation escalated, with the increasing awareness of the talent and power in that room. Many of those who shared that first evening still agree that it was an unforgettable moment.

In the following months and years I continued to receive letters and suggestions from women who had experienced the excitement of that evening and the hope it could lead to something concrete. Women who missed that first dinner wrote in to be added to the list. The list lengthened as I continued collecting CVs. Male colleagues had remarked to me and others: "I'd be happy to appoint a woman arbitrator, but I don't know any qualified ones." The list was our answer. It was a start.

The next task was to find out something about these women, with the goal of finding out what factors contributed to the success of those few whose names were household words. In 1995 I distributed a 5-part extensive questionnaire to all the women (by then over 200) on my list, to see what they could tell me. Eighty of them spent about an hour to tell me about their personal circumstances, their experience in arbitration, their own attitudes and those of their co-workers and their advice to others.

Of the 80, thirty felt that there had been some progress for women in arbitration since the early 1990s. With more women in the practice of law, some achieved recognition as speakers and authors. Women were lining up to take newly established arbitration courses in law schools. There were a few men who actively promoted their female colleagues. And, there were a few successful women who loathed the idea of any focus on gender; they felt a gender-based approach would do more harm than good.

To my amazement, Geoffrey Beresford Hartwell asked me to talk about my findings at a conference of the Chartered Institute of Arbitrators in Boston in 1996. That conference made me famous—or rather infamous—among men who came up to me at coffee breaks saying, "So you're the young lady who wants to replace us?" My answer then and now is the same: we don't want to replace the men, only to join them.

Soon afterwards, while I was starting up ICC Asia in Hong Kong, it was my colleague Mireze Philippe who took on the challenge of creating a Yahoo! Website to focus the energies of those women on the list and to expand it and create a forum for discussion. We began to have irregular dinners and mini-seminars in a number of cities, usually tacked on to an ICC arbitration commission meeting, an international conference or the Vis Moot. The numbers grew and women met and the network strengthened.

Women progressed, but in 2003, Focus Europe's first study of large arbitrations highlighted the dearth of women in the top cases: only two women were arbitrating these cases. By the time Michael Goldhaber published his "Madame La Presidente" article in 2009, women were arbitrating 4% of these cases. A few women were very

successful and busy, but many others had yet to break into the cabal of international arbitration.

Women also have taken on substantial responsibility for arbitration administration. Anne Marie Whitesell recalls being one of only two women counsel at the ICC Secretariat when she arrived. (The very first female assistant counsel promoted to counsel was in 1995.) Anne Marie worked her way to the top job as Secretary General, and when she left in 2009, two-thirds of counsel and assistant counsel were women.

In 2005, again largely through the efforts of Mireze Philippe, ArbitralWomen came into existence as a not-for-profit company under French law. ArbitralWomen is a network dedicated to fostering the role of women in international dispute resolution, through networking, communications and training. The inaugural general meeting took place in Montreal during the ICCA conference. In the seven years of its existence it has grown to close to 500 members around the world.

Today, ArbitralWomen organizes dinners, informal meetings and seminars around the world for its members and guests. In 2008 a mentoring programme began to match up experienced women in the field with those just starting out. ArbitralWomen gives out a number of grants each year to teams competing in the Vis Arbitration Moot in Vienna or the Vis East—provided those teams have at least 50% women. A quarterly Newsletter features members and their activities, and the ArbitralWomen website is a forum for members to post their CVs and exchange messages. A directory of members lets members and visitors alike to locate experts, counsel, arbitrators or speakers with an amazing range of expertise. In addition, countless numbers of professional connections and friendships have formed among ArbitralWomen. The group also recently introduced an award to honour men who have worked to promote the goals and values of the group.

The impetus for recognizing women came from women, but in recent years the broader arbitration community has recognized the importance of encouraging women to exercise their talents. In 2006, the Toronto chapter of the International Law Association featured a star-studded panel called "The Changing Face of International Arbitration" in which a number of prominent men and women commented on the need for diversity in arbitration, and progress made to date. CPR established a diversity committee, and the committee presents an annual award for diversity in arbitration. In 2011, JAMS featured a panel in New York on the role of women in arbitration. Global Arbitration Review (GAR) published a list of the Top 30 Female Arbitration Practitioners in 2007. In GAR's current list of the "Top 40 under 45," women occupy 10 slots. As women now outnumber their male colleagues at law schools around the world, and upon graduation many may enter the international arbitration field, that number should rise.

ICCA, known colloquially as "the gods of arbitration" for decades had one lone female among its 40 members. Today there are three, including one vice-president. Even at the top, there is some slight movement. The Dublin conference of 2008 featured women in 40% of its speaking slots. Sadly, that record has not even been approached in Rio, Geneva, or on this year's programme for Singapore. More positive was the Young ICCA Workshop held in 2011, where of 20 speakers, 7 were women.

As well as the publicity, women are taking interesting gender-based initiatives which may have far-reaching repercussions beyond the realm of gender balance. A network of women's arbitration centres has been created in India. In Albania, a group of women lawyers and dispute resolvers has formed to attempt to bring two competing factions of government to a level of cooperation that will repair their broken system. These and other events highlight the female talent available in the field and recognize talented women who can serve as role models for the future.

Because of the private nature of international arbitration proceedings no one really knows how many new ad hoc cases are introduced each year. But judging anecdotally and from the institutional statistics around the world, it is clear that interest and respect for arbitration has mushroomed in the past 30 years. The growth of arbitration around the world, the feminization of the practice of law, and the efforts of many dedicated women and men together are literally changing the face of international arbitration.

In September of 2011 I attended the Latin American conference in Miami. Of the 360 delegates, over 40% were women, a far cry from half a dozen out of 250 in Bahrain. Many of the Miami women were young, and just starting out in the field. It will be interesting to see how many of them will remain to climb the ladder and join that list of top arbitrators under 45, and then progress to the highest ranks of the field. What does seem clear, however, is that women have come a long way since Bahrain. As one of the GAR laureates was able to say, "…being female may even be an advantage in some respects. People nowadays are more conscious of the need to have balance in cases and conferences. There are more opportunities for women."

Our work is not complete. Until those percentages rise to around 50%, women will need to work hard and work smart to gain and retain the progress we've made. Competition to enter the field is tough, for both women and men. But looking back to 1985, it's comforting to know that the door is now very much open to talented, persistent women who insist on taking their place in the world of international arbitration.

Louise Barrington is FCIArb (Chartered Arbitrator), Principal of Aculex Transnational Inc, Hong Kong, Paris, Toronto, and co-founding president of ArbitralWomen.

Women in Law and Arbitration: Running in Place or Sliding Backward

By Barbara A. Mentz

I. Introduction

In the January 2012 issue of the ABA Journal, ABA President Wm. T. (Bill) Robinson III's Message, *Advancement of Women Lawyers*, stated that the ABA recognized that "overt and subtle barriers continue to deny women full integration and equal participation in the practice of law." President Robinson noted that while nearly half of the law school population is female, "beyond graduation, the statistics are still very discouraging."[1] Among other things, President Robinson cited to statistical evidence of underrepresentation of women in law firm leadership positions and in the judiciary, lower compensation for women in law firms compared to their male counterparts, a decline in the number of women entering big law firm practice, and a high rate of attrition of women from the profession.[2]

Although the information is extremely disappointing, it is, unfortunately, not surprising. In a recent op ed, *The Glass Ceiling*, The New York Times expressed its opinion that although many thought Sandra Day O'Connor's appointment to the United States Supreme Court thirty years ago would "herald the shattering of the law's glass ceiling, but at best it is only cracked."[3] Based upon information from recent studies and reports, the op ed noted that even now the "profession is still resistant to putting women in leadership positions, and many women have abandoned the law altogether…. And pay for female lawyers is generally less—the median income is 74 percent of what men earn—with the gap widening as they move higher." Another study referred to in the op ed found that about 90% of women lawyers report having encountered sex discrimination in the legal profession, a percentage that is unchanged since the 1970s.[4]

The Message, the *Glass Ceiling* and the studies on which they are based clearly demonstrate that underrepresentation of women and compensation differentials are long-term pervasive problems which, at least in part, are the result of gender bias and stereotyping.[5] These problems, together with other factors such as inflexibility with billable hour quotas, stigmatization of part-time, flex-time and time off and unequal treatment of women with respect to credit for business origination and development, are factors in the attrition of women from the profession.[6] This attrition, in turn, narrows the pipeline of women available to advance to partnership and leadership positions within the profession.[7]

Although there is a dearth of studies addressing the progress of women serving as neutrals in domestic arbitrations, the few studies and articles that have tracked the progress of women serving as neutrals in international arbitration suggest that they too are underrepresented, which also, at least in part, is the result of gender bias and stereotyping.[8]

II. Studies of Women in the Law

Two recent studies, the NAWL Report and the Compensation Study, provide a more detailed look at the problems, basically through the eyes of the women in the law who responded to surveys.

A. The NAWL Report

Since 2006, NAWL issued reports based upon its annual national survey that tracks the progress of women lawyers in the nation's 200 largest law firms ("big firms"), provides a comparative analysis of the careers and compensation of men and women lawyers in big firms and analyzes the factors that have helped or hindered women's progress in these firms.

The Report states that its sixth annual survey released in 2011 (the "Survey") "presents a sobering picture of the prospects for women" in big firms. It concludes that the challenges of the current economy explain "neither the uneven progress made by women lawyers compared to their male counterparts nor the backward slide of gender equity in law firms."[9]

The Report found that, despite big firms' commitment to advancing women, the numbers have not improved over the six years of the NAWL surveys. From the number of women entering and remaining in big firms to the number of women advancing to partnership to the disparity in compensation, the survey results do, in fact, present a "sobering picture" of the progress of women lawyers in big firms.

The Report found that there was a slight decline from the previous NAWL surveys in the percentage of women lawyers entering big firms and the percentage of women who are associates and there is a continuing trend of women leaving big firms at a greater pace than their male counterparts. As it is, barely 15% of the equity partners are women, a number that remains unchanged since the 2006 NAWL Report. The Report found that women are "markedly underrepresented" in leadership positions in big firms (11% of big firms have no women on their highest governing committee, 35% have only one woman and only 5% have a woman as the overall managing partner, which is also unchanged since the 2006 NAWL Report). The Report noted its continued concern that this underrepresentation has broad and negative effects for the

advancement of women in that so few women are participating in firm governance discussions and decisions that affect women's careers, including elevation to partnership, billable hour requirements, compensation, and policies for flex-time, part-time and time off.

A disproportionate number of women in big firms are in non-partner positions such as the staff attorney position where 55% are women. Women comprise only 34% of the counsel positions, which at some firms may lead to equity partnership. Thus, there are fewer women than men in the counsel position from whom a big firm may promote to partner.

Exacerbating these problems is the negative effect on women of the structural changes in most big firms. The Report found that women in one-tier firms with only one level of partnership appear to be consistently more successful in both compensation and advancement to equity partnership than in two-tier or multi-tier firms with non-equity partners and fixed-income equity partners. Yet, only 28% of big firms are still one-tier firms. Moreover, in multi-tier firms women constitute almost 80% of the fixed-income equity partners. Apparently, fixed-income equity partners do not have governance rights and non-equity partners have little if any voice in firm governance.

The information with respect to compensation presents an equally "sobering picture." The Report found that women equity partners earn 86% of what their male counterparts earn. They also are less likely than men to receive credit for business development, opportunities for team development of new business, credit for new matters from existing clients and other similar measures of partners deemed to be "rainmakers." The Report found that, whatever the source of the problem, the lack of credit for business development hinders women lawyers from maximizing compensation, advancing into firm leadership, or negotiating beneficial lateral moves.[10]

Moreover, the Report found that at each stage of their career progression, women are likely to earn "noticeably" less than their male counterparts and do not receive their proportionate share of bonuses, even if they are in firms that have a lockstep salary compensation system. The Report expressed the view that "[i]t strains credulity" to believe that, across the board, in all areas and dimensions of practice, that women associates are underperforming their male peers. Thus, the Report concluded that "[a]t least provisionally, therefore, the data suggest that firms' bonus systems incorporate a degree of discretion that permits gender-biased decision-making."[11]

The Report found that these facts have contributed to the negative effect on women in big firms and have contributed to the declining number of women entering and staying in big firms, thereby narrowing the pipeline of women lawyers from whom big firms may draw to promote to partner.[12]

In 2010 PAR and MCCA issued a Compensation Study that identified the challenges that women face when seeking to be compensated on a par with their male peers.

B. The PAR/MCCA 2010 Compensation Study

The Compensation Study combined a review of the literature on attorney compensation, PAR's extensive research into experimental studies on gender bias and the results of a 2009 on-line survey of 694 equity and income partners in large, medium and small firms, virtually all women, entitled: "A Survey of Women Partners on Law Firm Compensation" ("Survey"). The Compensation Study found that underrepresentation of women among law firm equity partners had a "profound influence on compensation decisionmaking." It concluded that the existing compensation systems "open the door to gender bias because they contain tremendous amounts of subjectivity and lack transparency, and because so much of the negotiation surrounding origination credit takes place out of sight."[13]

Many Survey respondents indicated that committees in charge of compensation lacked diversity with either no women on the committee (20% of those surveyed) or only one woman (50% of those surveyed). The Compensation Study noted that research showed that lack of diversity on compensation committees paves the way for in-group favoritism, a potentially powerful form of bias where, for instance, men on the committee tend to give men the benefit of the doubt in determining compensation, but do not do so for women. Moreover, having just one woman serving on the compensation committee could give rise to tokenism dynamics that negatively affect both the woman herself and her ability to influence decision making. In ad-dition to a lack of diversity, many respondents commented that compensation systems lack transparency—which also lends itself to in-group favoritism—and that there was a disconnect between the factors their firms said they considered and what factors actually influenced compensation. The Compensation Study noted that this presented a challenge for women who are not in-the-know and do not have mentors on the committee whereas some of their male counterparts have an in-the-know male mentor who shares this information with his mentee.

A huge majority of respondents questioned whether compensation systems reward the right combination of factors. Origination fees, revenue collected and partners' own billable hours were important or very important in setting partner's compensation whereas institutional investment—i.e., contributions to the firm's human capital, associate development and diversity—typically played little role in determining partner compensation. The Compensation Study found that the underweighting of institutional investment has a particularly deleterious effect on women, especially women of color, because they are often

expected to spend more time on institutional investment than their male counterparts.

Over 75% of those surveyed reported that they had had a dispute over origination fees and about 30% reported that a partner had tried to intimidate, threaten or bully her into backing down over origination credit. The Compensation Study found that this presented issues of gender bias, namely, men are entitled to a share but women are not and if women complain they lack collegiality, but if men complain it's because they know what they are worth. Most of those surveyed reported that their firms allowed the attorney with origination credit to give it to another attorney of his choice if the originating attorney left the firm. Many respondents believed that this system advantaged white men. Moreover, many respondents felt uncomfortable or extremely uncomfortable raising compensation issues. The Compensation Study noted that social studies suggest that women are often reluctant to negotiate compensation due to fear of backlash, fueled by gender stereotypes.

In addition, women partners felt they were not provided with an equal opportunity to participate in client pitches; or, if they were part of a successful effort, either they did not receive a proportionate share of the origination credit or on one or more occasions, they were not ultimately given the opportunity to bill a significant number of hours to the engagement.

Not surprisingly, to the extent women equity partners had been de-equitized, the most common factors identified were a low level of origination fees followed by low billable hours.

Comments made by some survey respondents indicated that subjective criteria used in setting compensation reflected typical patterns of gender bias or stereotyping, bias against women with families, i.e., women must provide more evidence of achievement than men to gain the same level of reward; women don't need a paycheck while men do.

The Compensation Study noted that next to objective criteria the most common input for setting compensation is written self-advocacy which is based upon subjective criteria. Yet, the Compensation Study noted that research documents that there are social reprisals for women who self-advocate.[14]

C. ABA 2011Current Glance

Data collected in the Current Glance from several sources reinforces the conclusions of the Report and the Compensation Study. The Current Glance reported that 19.4% of the partners were women and women represented only 26% of state and federal judgeships combined. The Current Glance also reported that weekly salary of women lawyers as a percentage of male lawyers' salary was 74.9% for 2009, down from 80.5% in 2008.[15]

None of these studies touch upon women lawyers serving as neutrals in the domestic ADR field. However, since 2004 several articles that have addressed the progress of women arbitrators in the context of large international arbitrations have concluded that these women arbitrators are underrepresented and have been subjected to conscious or unconscious gender bias.

III. Women Lawyers in ADR

In the summer of 2003 the American Lawyer conducted its first biennial survey of large international arbitrations ("2003 Scorecard"). According to the 2003 Scorecard, only two women served as arbitrators in more than one dispute between nations and investors under the aegis of the World Bank. The 2003 Scorecard was the subject of an American Lawyer Supplement, Focus Europe, in the summer of 2004, *Women of Arbitration Why Are There So Few?*, which included an article, *Madame La Presidente*.[16] Before writing the article its author, Michael D. Goldhaber, interviewed both male and female arbitrators and advocates who served in big arbitrations.

In answer to the question, "Why Are There So Few?," the author stated: "By consensus, the main reason for the dearth of women in high-stakes cases is a bias in appointments. The clients who make appointments…prefer experienced lawyers who project an image of gravitas, or at least an image of gravitas with which they are familiar."[17] Since, at that time, almost all of the arbitrators in high-stakes arbitrations were older white men, the so-called "echo chamber effect" led to the appointment of male arbitrators. The author concluded that "[a]s both advocates and arbitrators, women are vastly underrepresented by every measure...."[18]

Mr. Goldhaber believed that more women would follow. Unfortunately, it does not appear to be the case.

In a 2007 article, *Network Effects*, the author, David Samuels, posed the question: "Since then [the *Madame La Presidente* article], have things changed?" His answer was that there had not been a shift at the arbitrator level in the biggest arbitrations, citing to the 2007 Scorecard. Mr. Samuels noted that there had been an increase in the number of women senior advocates in the biggest arbitrations from 8 in 2003 to 24 in 2007.[19] He expressed the view that the pipeline to senior arbitrators is fed from the pool of successful advocates and concluded, therefore, that eventually some of these female advocates should make the transition from advocate to arbitrator, thus increasing the ranks of women arbitrators in big arbitrations.[20]

Mr. Samuels, like Mr. Goldhaber, recognized that the women of international arbitration suffered from stereotyping, including bias against women with families, stereotyping of women as lacking in strength, leadership, stature, authority, gravitas, are less creative and, the perception by women that they must work harder to get the

same level of success as men. He also cited to a survey taken by ArbitralWomen, in which 46% of those surveyed stated that they had experienced unwitting bias in a case related to their sex; 38% believed that they would have received more appointments if they had been male; and, 77% felt that being female matters less with age.[21]

In its July 1, 2009 article, *Deciding Women*, Mr. Goldhaber reviewed the 2009 Scorecard and examined the progress of women that had been made since the 2003 Scorecard. He noted that since 2003 the two women arbitrators featured in that article were the second and third busiest arbitrators in big arbitrations. However, only 4% of the arbitrator selections in the biggest international arbitrations were women. This led him to comment that while women have integrated the "highest echelon of the club," women arbitrators had a "precarious foothold" in the high-stakes survey.[22] As it turned out it was very precarious.

In a July 6, 2011 article, *High Stakes,* Mr. Goldhaber reported on the 2011 Scorecard. Among the "constants" reported by Mr. Goldhaber was the fact that there "is a scarcity of female arbitrators, whose numbers declined from ten to nine" since the 2009 Scorecard. Mr. Goldhaber noted that with the exception of the same two women arbitrators referred to in his 2004 and 2009 articles, no women had appeared even twice in these types of arbitrations.[23]

In a February 2012 article, *The (lack of) women arbitrators in investment treaty arbitration*, the author, Gus Van Harten, concluded that based upon the statistical evidence women were underrepresented in investment treaty arbitration. He based his study on 249 known investment treaty cases through May 2010, and found that only 10 of the 247 individuals appointed as arbitrators were women, comprising 4% of those serving as arbitrators. Furthermore, two women captured 75% of appointments of women. Thus, apart from those two individuals, women only garnered 1% of the appointments. In contrast, the two most frequently appointed men accounted for 5% of the appointments of male arbitrators. He concluded that this record casts doubt on the existing appointment process in international investment treaty arbitrations where "men have devoured the opportunities" and called for a reform of the appointment process of arbitrators, by establishing a mandatory roster system.[24]

IV. Overcoming the Barriers

The Compensation Study and a recent article have offered suggestions addressing the underrepresentation of women in leadership positions in law firms and the disparity in compensation. Suggestions, such as self-help, obtaining a powerful mentor, affirmative action by institutions for improving gender equality for women in the law, are similar to those proposed for improving the dearth of women arbitrators in high-stakes arbitrations.[25] Other suggestions for women in law firms which appear in *The Rules (For Women)* are also applicable for women in arbitration as well women in law firms.[26] For instance, it is important to build relationships, network, find a mentor who is in the "in-group," learn what is expected and what arbitration parties and counsel value, write articles and appear on panels to showcase your talents particularly when business is slow, gain positive visibility, project an authoritative, professional image and self-promote.

But, as articles by F. Peter Phillips and the Goldhaber *Madame La Presidente* article note, the need for greater diversity of views and perspectives in decision making cannot be accomplished solely by those women who are trying to establish themselves in the ADR profession.[27] Rather, as suggested, corporations that are otherwise committed to diversity and demand diverse teams of attorneys on their matters should also be examining the diversity of panels, and law firms that recommend arbitrators should become more focused on the issue and demand more qualified arbitrators on the lists from arbitral organizations.

Over the last several years, arbitral institutions such as the American Arbitration Association and the International Institute for Conflict Prevention and Resolution ("CPR") have had initiatives to increase diversity on their panels. To further that goal, they have published articles on what action needs to be taken by both institutions and arbitrators to increase women arbitrators on the lists of panelists.[28] The ABA has been, and continues to be, active in fostering leadership skills of its women members and in advancing workplace policies and providing resources for women lawyers through its Commission on Women in the Profession, its Women in Law Leadership Academy and its Women of Color Research Initiative.[29]

This year, Vincent E. Doyle III, the President of the New York State Bar Association, has challenged the Sections to develop and execute initiatives to increase diversity of its membership, leadership and program initiatives.[30]

Hopefully, these initiatives will have a positive effect on gender equality in the legal profession.

V. Conclusion

Gender equality for women is, as President Robinson noted, a work in progress that requires open discussion and working together. And, it appears to be no longer just about the advancement of women, but also about the retention of women. The renewed attention being focused on gender equality and the importance of retaining and advancing women in the profession for the long term benefit of the profession is a welcome and necessary step in what hopefully will be a reinvigorated introspective look at what has taken place, action plans to obtain gender equality and the execution of those plans.

Endnotes

1. Wm. T. Robinson III, President's Message, *Advancement of Women Lawyers* (the "Message"), A.B.A.J., January 2012, at 8.
2. *Id.*
3. N.Y.Times op ed., *The Glass Ceiling*, October 8, 2011.
4. *Id.*
5. The Message, *supra,* note 1; *The Glass Ceiling*, *supra*, note 3; *see also* Barbara M. Flom and Stephanie A. Scharf, Report of the Sixth Annual National Survey on Retention and Promotion of Women in Law Firms (the "Report"), National Association of Woman Lawyers ("NAWL") and The NAWL Foundation, October 2011; and, Joan C. Williams and Veta T. Richardson, *New Millennium, Same Glass Ceiling? The Impact of Law Firm Compensation Systems on Women* (the "Compensation Study"), The Project for Attorney Retention ("PAR") and the Minority Corporate Counsel Association ("MCCA") in collaboration with the American Bar Association Commission on Women in the Profession, July 2010; *cf.,* for statistical information, *A Current Glance at Women in the Law 2011* ("Current Glance"), the American Bar Association Commission on Women in the Profession (January 2011).
6. The Message, *supra*, note 1.
7. Report, *supra* note 5, at 3, 5-6, 15; *see also,* the Message, *supra,* note 1; *The Glass Ceiling, supra,* note 3.
8. Michael D. Goldhaber, *Madame La Presidente* (*"Madame La Presidente"*), Focus Europe, *The Women of Arbitration: Why Are There So Few?,* American Lawyer Media Supplement, Summer 2004, citing to the American Lawyer 2003 survey of large arbitrations ("2003 Scorecard"). (Because of the confidentiality of these types of arbitrations, the information in the Scorecards referenced in the articles cited herein does not represent all such arbitrations but only those for which the American Lawyer was able to obtain information through public sources such as SEC filings, information reported by counsel in some of the matters and other such sources. Moreover, Mr. Goldhaber stated that his articles focused and reported information only on the largest of the arbitrations reported in the respective biennial Scorecards); Michael D. Goldhaber, *Deciding Women*, Focus Europe, American Lawyer Media Supplement, Summer 2009, citing to the 2009 Arbitration Scorecard ("2009 Scorecard"); Michael D. Goldhaber, *High Stakes*, Focus Europe, *Arbitration Scorecard 2011: The Biggest Cases You Never Heard Of*, American Lawyer Media Supplement, Summer 2011, at 19, citing to the 2011 Arbitration Scorecard ("2011 Scorecard"); David Samuels, *Network Effects* (*"Network Effects*"), Global Arbitration Review ("GAR"),Volume 2, Issue 4, at 9, 2007; Gus Van Harten, *The (lack of) women arbitrators in investment treaty arbitration,* Columbia FDI Perspectives, No. 59, February 6, 2012; *see also, Noemi Gal-Or, The Under-Representation of Women and Women's Perspectives in International Dispute Resolution Processes* (2007*).*
9. Report, *supra,* note 5, at 2.
10. Report, *supra*, note 5. A "snapshot" of the survey results appears at 3-5.
11. *Id.,* at 4, 9, 19.
12. Report, *supra,* note 5, *passim.*
13. The Compensation Study, *supra*, note 5, at 12 and 64.
14. The Compensation Study, *supra*, note 5, *passim*. Key findings appear at 5-8.
15. Current Glance, *supra,* note 5. The salary information was obtained from the 2009 Bureau of Labor Statistics, Median weekly earnings of full-time wage and salary workers by detailed occupation and sex. *Id.,* at 5.
16. Goldhaber, *Madame La Presidente*, *supra*, note 8.
17. *Id.,* at 22.
18. *Id.,* at 20.
19. Samuels, *supra*, note 8, at 9.
20. *Id.,* at 10.
21. *Id.,* at 9-12.
22. Goldhaber, *Deciding Women, supra*, note 8.
23. Goldhaber, *High Stakes, supra*, note 8, at 22.
24. Van Harten, *supra*, note 8.
25. Goldhaber, *Madame La Presidente, supra,* note 8; Samuels, *supra*, note 8; Van Harten, *supra*, note 8.
26. Susan A. Berson, The Rules (For Women), A.B.A.J., at 28.
27. Goldhaber, *Madame La President*, *supra*, note 8; F. Peter Phillips, *ADR Continental Drift It Remains a White, Male Game*, The National Law J., November 27, 2006; F. Peter Phillips, *Diversity in ADR More Difficult to Accomplish than First Thought,* A.B.A. Dispute Resolution Magazine, Spring 2009, 14.
28. *See, e.g.*, Sasha A. Carbonne and Jeffrey T. Zaino, *Increasing Diversity Among Arbitrators: A Guideline to What the New Arbitrator and ADR Community Should Be Doing to Achieve This Goal*, N.Y.S.B.A.J., January 2012, at 33; *See also* the Phillips articles, *supra*, note 27.
29. The Message, *supra,* note 1.
30. New York State Bar Association Section Diversity Challenge 2011-2012.

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Confidentiality in U.S. Arbitration

By Laura A. Kaster

Introduction

Almost all definitions of arbitration include the word "private," whether in reference to the use of a private third-party neutral or in defining the process itself. Many people assume that the privacy of the process equates to confidential treatment of information exchanged during arbitration. Indeed, decisions of the United States Second and Fifth Circuit Courts of Appeals have stated that confidentiality clauses are so common in arbitration that an "'attack on the confidentiality provision is, in part, an attack on the character of arbitration itself.'"[1]

Privacy is the dominant feature of arbitration and distinguishes it from open court proceedings. Both the American Arbitration Association rules[2] and JAMS' Rule 26 (c) (2009) give the arbitrators considerable discretion to exclude any non-party from any part of a hearing.

Nevertheless, the assumption that arbitration will always protect confidential information can be misleading and is certainly overbroad. Moreover, the scope of protections will be impacted by the circumstances in which information is subsequently sought. Therefore, parties should take care to protect trade secrets, sensitive financial information, work product, and attorney-client privileged communications within the arbitration itself by seeking a protective order and appropriately marking and maintaining the information so that confidentiality is maximized. Parties proceed at their peril if they do not consider the scope of confidentiality provided by their agreement and by the orders of the arbitral tribunal. Corporate parties should also be mindful of their reporting obligations and account for them in drafting their confidentiality agreements, because the regulatory reporting or disclosure requirements may not permit them to agree to complete confidentiality.

Organization Rules and Canons Impact Nondisclosure of the Proceedings

It is almost universally the case that the arbitral organization's administrative personnel and arbitrators have an obligation to protect information about the proceeding. However, parties may or may not have confidentiality obligations, and frequently witnesses have no obligation to maintain either procedural or substantive information in confidence.

JAMS Rules are permissive, allowing the arbitrators to establish protective orders relating to trade secrets and other sensitive information, but imposing confidentiality only on the arbitrators and JAMS.[3] Thus, neither parties nor witnesses are covered unless further action is taken.

CPR, the Institute for Conflict Prevention & Resolution, has rules for non-administered arbitration and it provides for confidential treatment of arbitration materials by the parties and arbitrators but not witnesses.[4]

The AAA and ABA have Canons governing the obligations of arbitrators to maintain confidentiality of the proceedings.[5] However, the AAA specifies in its Statement of Ethical Principles[6] that while arbitrators and AAA staff have a duty of confidentiality, it is neutral as to whether the parties should enter into a confidentiality agreement or agreed order pertaining to the confidentiality of the proceeding or the award: "The parties always have a right to disclose details of the proceeding, unless they have a separate confidentiality agreement. Where public agencies are involved in disputes, these public agencies routinely make the award public."

Some strictures may apply automatically. For example, all U.S. arbitrators are bound by the ABA Code of Ethics for Arbitrators in Commercial Disputes (2004).[7] Canon VI of the Code provides that "An arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office." And Canon VI B further elaborates that: "The arbitrator should keep confidential all matters relating to the arbitration." This gives some comfort, but history indicates that the primary concern in most cases will not be breach of confidentiality by arbitrators but by parties and witnesses.

When confidentiality is a central concern, the rules of the selected arbitral organization should be carefully examined. Specific attention to a confidentiality agreement in the arbitration agreement, and additional protections either in the terms of reference or a protective order entered by the arbitral tribunal, are also important because the choice of applicable law in the absence of these pro-active efforts is not always clear.

Federal Law

The U.S. Patent Act

Under the Patent Act, 35 U.S.C. §294, arbitration of patent disputes, including invalidity and infringement are arbitrable, but under §294 (d) and (e), any award must be reported to the Patent Office and becomes part of the patent prosecution file. The award is not enforceable until such a report is made. Thus, full confidentiality is not possible with respect to U.S. patent litigation where issues of invalidity and infringement are raised.

Federal Case Law

Federal courts will enforce arbitration confidentiality between parties to an arbitration confidentiality agreement or arbitral order,[8] but the availability of protections for materials other than attorney-client privileged information,

trade secrets or confidential financial, health or otherwise protected or privileged information as provided in the Federal Rules of Civil Procedure, is much more tenuous. The analytical problem facing parties seeking to protect their information against third-parties was carefully described by Judge Easterbrook in rejecting a plea to protect arbitral information from disclosure in *Gotham Holdings*.[9] In one of few Appellate Court rulings on this issue, the court specified that contracts bind only the parties:

> No one can "agree" with someone else that a stranger's resort to discovery under the Federal Rules of Civil Procedure will be cut off.… Indeed, we have stated more broadly that a person's desire for confidentiality is not honored in litigation. Trade secrets, privileges, and statutes or rules requiring confidentiality must be respected, see Fed.R.Civ.P. 45(c)(3)(A)(iii), but litigants' preference for secrecy does not create a legal bar to disclosure… [The parties] were entitled to agree that they would not *voluntarily* disclose any information related to the arbitration.… Disclosure would be authorized only when a third party had a legal right of access.

In *Lawrence E. Jaffe Pension Plan v. Household Int'l Inc.*,[10] the plaintiff subpoenaed a third party seeking all arbitration documents relating to an earlier, separate arbitration against Household. There was a blanket confidentiality agreement in that arbitration endorsed by the arbitrator. The third party was willing to produce but concerned that he would violate the confidentiality order, Household moved to quash the subpoena. The court refused to reach what it viewed as the novel issue of its authority to countermand the arbitrator's order, staying the discovery against the third-party and requiring the parties to address the discovery issues in the underlying action. Because the material was produced, there was no further ruling.

In another opinion by Judge Easterbrook, the Seventh Circuit addressed and rejected the notion that parties to an arbitration confidentiality agreement could prevent the Court from disclosing information when it was integral to its decision-making function. In *Baxter Int'l Inc. v. Abbott Labs.*,[11] the underlying arbitration involved a patent license agreement. The parties agreed that disclosure would be damaging. The Court noted that the litigation under these circumstances might be a way to leverage the desire for confidentiality to obtain a settlement, but it nevertheless rejected a joint motion of the parties to maintain the confidentiality of certain documents, including portions of the contract in dispute. The Court explained:

> the *dispositive* documents in any litigation enter the public record notwithstanding any earlier agreement. How else are observers to know what the suit is about or assess the judges' disposition of it? Not only the legislature but also students of the judicial system are entitled to know what the heavy financial subsidy of litigation is producing. These are among the reasons why very few categories of documents are kept confidential once their bearing on the merits of a suit has been revealed. In civil litigation only trade secrets, information covered by a recognized privilege (such as the attorney-client privilege), and information required by statute to be maintained in confidence (such as the name of a minor victim of a sexual assault), is entitled to be kept secret on appeal.… [M]any litigants would like to keep confidential the salary they make, the injuries they suffered, or the price they agreed to pay under a contract, but when these things are vital to claims made in litigation they must be revealed.[12]

Moreover, the Court remarked that the means of enforcing a confidentiality agreement when breached by the filing of litigation was damages, not specific performance.[13]

When an arbitration award must be filed in a court to be enforced, a similar analysis may be triggered, thereby exposing it to publication. This issue was addressed in *Global Reinsurance Corp.-U.S. Branch v. Argonaut*.[14] The district court in that case had initially sealed an arbitration award submitted for enforcement but on reconsideration reversed itself, holding that the plaintiff had not made a showing of harm sufficient to justify impinging the presumption of access to judicial materials, particularly in light of the fact that the mere filing of an award for enforcement did not require the submission to the court of any underlying documentation, which could remain protected. This suggests that the greater the information disclosed in an award, the more confidentiality may be threatened, so that the desire for a reasoned award may have to be tempered or satisfied in a form that is separate from the award itself if there is a great desire or need for privacy. In *Alexandria Real Estate Equities, Inc. v. Fair,*[15] the court employed a different rationale for refusing to seal copies of an arbitration award, record and documents that gave an account of an arbitration. In that case, the court relied on a qualified First Amendment right of access to judicial documents and proceedings, which the party seeking the sealing bears the burden of showing that higher values overcome the presumption of public access. Fair was seeking to protect information about his employment history, which the court found insufficiently sensitive, unlike medical information or attorney-client privileged information; the arbitral rules of confidentiality were insufficient to overcome the First Amendment presumption of access.

In *American Central Eastern Texas Gas Co. v. Union Pacific Resources Group,*[16] a motion for injunctive relief and to declare JAMS privacy rules applicable to protect an arbitration award apparently was received with contumely because the court published the prior arbitral finding of

antitrust violations against the Duke defendants in its own decision. The arbitrator in the underlying arbitration had previously refused to impose the JAM's privacy rules, finding that there had been no agreement to adopt them by the parties. The district court found that Duke's claim to irreparable injury was essentially that it would likely face additional claims based on the underlying facts and that was not sufficient in the face of the strong public interest in knowing "the results of arbitration proceedings that involve allegations of anticompetitive and monopolistic conduct."[17]

Courts have also ignored the parties' agreements where public policy strongly supports disclosure. In *Omaha Indem. Co. v. Royal Am. Managers, Inc.*,[18] the court found that if parties to the arbitration testified, federal prosecutors could use arbitration testimony transcripts for impeachment in a criminal trial, even though the material was the subject both of a stipulation of confidentiality and a protective order. In *City of Newark v. Law Dep't of the City of N.Y.*,[19] the City of Newark sought to compel disclosure under the Freedom of Information Law of documents relating to an arbitration between New York City and the Port Authority. The Appellate Court reversed the denial of the petition holding that the arbitration tribunal did not have the power to deny the public access under the Freedom of Information Law.

Other district courts faced with discovery demands have been more sympathetic to the privacy and confidentiality interests of ADR. In *Fireman's Fund Ins. Co. v. Cunningham Lindsey Claims Management*,[20] the court applied a balancing test, weighing the "ADR confidentiality interest" which it viewed as akin to settlement confidentiality against the relevance and significance of the evidence relating to the amount awarded in an arbitration proceeding. Finding that the subject matter of the dispute was relevant but the amount of the award was less so, it did not find a compelling reason for ignoring the ADR confidentiality and denied production. But it must be noted that the court had permitted production of another substantive order from the same arbitration.

State Case Law on Arbitration Confidentiality

If the parties clearly specify their election to be governed by state arbitration procedural and substantive law, that law will control.[21] There are some state courts that appear to be more favorably disposed to confidentiality than their federal counterparts, which apply federal statutory law and look toward the federal rules of evidence and civil procedure.

There are at least four states that have general (although varied) statutory protections for arbitration communications: Arkansas,[22] California,[23] Missouri,[24] and Texas.[25] The Revised Uniform Arbitration Act provides that arbitrators and arbitral organizations are not competent to testify to matters that have come before them.[26] Several states also have selective statutory provisions and rules that govern arbitration confidentiality in specific types of cases.[27]

One Missouri court refused to permit production of arbitration materials, including transcripts of testimony and evidence, and the award itself. It relied upon Missouri's statutory protections, which treat arbitration communications as akin to settlement communication. In *Group Health Plan, Inc. v. BJC Health Systems, Inc.*,[28] Group Health Plan sought an injunction to prevent BJC from obtaining arbitration materials in an arbitration between the two companies, arguing that the arbitrator had exceeded her authority in ordering production of confidential information. The materials sought related to an earlier arbitration to which Group Health Plan had not been party. Testimony was taken by the trial court on the confidential nature of the documents, some of which contained patient information and some of which had been marked attorneys' eyes only in the prior arbitration. The trial court imposed the injunction and on appeal, the Appellate Court affirmed, relying heavily on the statute and the fact that the parties had also entered a stipulated protective order. The statutory language related specifically to evidentiary use of arbitration material. It provided: "No admission, representation, statement or other confidential communication made in setting up or conducting such [arbitration] proceedings not otherwise discoverable or obtainable shall be admissible as evidence or subject to discovery."[29]

The Missouri Court distinguished an earlier ruling by the Colorado Appellate Court in *A.T. v. State Farm Mutual Automobile Ins. Co.*[30] which had rejected a claim of confidentiality for medical information disclosed during a prior arbitration. The Colorado Court relied on the fact that the parties had not entered into a confidentiality agreement and that the arbitration was not conducted under rules that provided for confidentiality. Moreover, the plaintiff had made no effort to secure a protective order to preserve psychological disorder records.

States in which legislation expresses protection for arbitration communications are likely to be far more favorably disposed to parties seeking relief from production. But even in Missouri, the court system will not permit total anonymity for matters that need to be disclosed when arbitration enforcement in court is sought. In *CPK/Kupper Parker Communications, Inc. v. HGL/Gail Hart*,[31] the court noted that the trial court had permitted the filing of the case with the identification of the parties by initials based on arbitration confidentiality. The court specified that because the courts are open and public, only protection of minors could justify anonymous filing.

Protection of Business and Trade Secrets

Independent of the arbitral dispute, preexisting secret processes, financial information, such as offers, bids, profit margins, formulas, data, programs, customer lists, and a wide variety of information may be critical to business

success and to contractual agreements. Although the rules and law discussed above have focused on the protections available generally for matters that arise out of the arbitration, including the facts of the dispute and the award, here the focus is on the protection of the underlying information that the parties treated as confidential prior to the dispute and protecting that information during arbitration. Some of the same provisions, concepts, and rules apply, but by and large, they do not specifically address this issue and they do not define what is protected. In addition, care must be taken to avoid such stringent protections that a party in an arbitration hearing would be unable to meet its burden of proving its case because information is inaccessible to a party with the burden of proof or to its experts under confidentiality protections.

Remedies

Enforcement is a thorny problem. The measure of damages may be difficult and timely preventive action by way of injunctive relief requires knowledge that disclosure is likely.

Injunctive Relief to Enforce Confidentiality

In *ITT Educational Services v. Arce*, 533 F.3d 342 (5th Cir. 2008), the Court of upheld a permanent injunction preventing disclosure of the rulings, decisions and awards of an arbitration and the use of evidence created for that arbitration made confidential pursuant to the agreement of the parties. Arce's counsel had signaled her intent to use information about the arbitration results and other confidential information in a separate similar arbitration proceeding brought by a student against ITT. In the face of the argument that the arbitrator had found that the contract had been induced by fraud, and rejecting the argument that the confidentiality provision was itself unconscionable and against public policy, the Court ruled that the arbitration clause containing the confidentiality provision was separable from the contract that contained it and not vitiated by any finding of fraud. It therefore ruled that the confidentiality agreement had continuing viability and was enforceable. The arbitration provision stated under the heading "Resolution of Disputes" that the enforceability of the arbitration provision would be governed by the Federal Arbitration Act under the Commercial Arbitration Rules of the American Arbitration Association and that: "All aspects of the arbitration proceeding, and any ruling, decision or award by the arbitrator, will be strictly confidential. The parties will have the right to seek relief in the appropriate court to prevent any actual or threatened breach of this provision."

The Court held that without injunctive relief, ITT would be without remedy and would suffer irreparable injury and that the student could prove his own case without benefit of the confidential information as he had bargained for.

However, U.S. courts are chary to permit parties to use confidentiality issues as a shield to prevent enforcement of an arbitration award. In *AT&T Corp. v. Pub. Serv. Enterprises of Pennsylvania, Inc.*,[32] AT&T sued PSE and others seeking to pierce the corporate veil and obtain judgment from a prior arbitration with PSE. PSE filed a complaint claiming that the AT&T suit itself breached the confidentiality agreement in the underlying arbitration. The court granted AT&T's motion to dismiss the PSE complaint, concluding that the case, although novel, was an effort to collect the underlying judgment and was therefore a continuation of the arbitration proceeding. Therefore, the confidentiality provisions were not breached. In addition, the court limited PSE's motion to seal, holding PSE 's concerns did not provide grounds for sealing the entire case: "The parties' confidentiality concerns are fully protected by their ability to designate any filing or portion thereof as 'confidential,' and filing such pleadings or section under seal. To the extent that confidential materials are contained only in an exhibit or an appendix to any court filing, only such exhibit or appendix shall be filed under seal."[33]

The Seventh Circuit has held that when the alleged breach of confidentiality is the act of filing or producing the material in litigation, injunctive relief or protective orders may not be available unless the material is subject to a recognized privilege or the requisite particularized showing of harm is made; damages may be the only resort.[34]

Remedies Before the Arbitration Tribunal

A party denied critical information may certainly raise that issue with the tribunal, particularly where basic fairness is implicated. In addition, breaches of the tribunal's confidentiality orders or rules could also lead to tribunal sanctions or presumptions. Certainly, matters bearing on these issues should at least be preserved with the arbitral tribunal if the affected party will want to challenge enforcement of the award. But the critical role of the tribunal is to keep the barn door closed before the horses escape. The terms of reference and protective orders are critical to this end. The arbitration will not convert information that is not protected as a trade secret into confidential information nor will it insulate witnesses in the arbitration from their duty to provide evidence that is not independently protected.

Practical Conclusions

One of the painful realities of agreements containing arbitration clauses is that those clauses are most commonly an afterthought. Many and varied considerations face the drafter of a contract that includes an arbitration provision. But even in the glow of agreement, the parties, particularly those who have undertaken an ongoing relationship, may be able to agree that if any dispute arises, they will want to resolve it privately and confidentially.

Where the parties agree that confidential treatment of the arbitration itself is the dominant critical issue, the following check list ought to be considered:

a. Draft a provision in the governing agreement to arbitrate specifying confidentiality requirements for documents or other business secrets that will be exchanged, how they will be identified and what steps must be taken to avoid distribution or disclosure.

b. Draft a provision in the agreement to arbitrate that expresses the parties' intent that the fact of arbitration, the matters submitted in arbitration, witness statements, the reasoning of the arbitrators, and the award be maintained as confidential by all participants in the arbitration, the arbitrators, witnesses, experts and administrative personnel, except as required by law or financial reporting requirements.

c. Choose governing law for the agreement that is sympathetic to remedying confidentiality rights.

d. Consider declining to have a reasoned award to avoid having to submit the reasoning to a court where it may be disclosed. Here there are certainly countervailing considerations, but enforcement or challenge to the award is one place where there is a serious potential for unwanted disclosure or publication.

e. Provide that without consent of the parties, only such information as is required by law shall be disclosed in connection with enforcement or challenge to the award.

f. With respect to business secrets, mark them, identify them to the other party and require confidentiality protections for them under the agreement.

g. Have the arbitration tribunal establish a procedure in a protective order or the terms of reference relating to the treatment of business secrets. Maintain procedures for identifying the materials as confidential, and controlling their use and distribution. Make sure witnesses sign a confidentiality undertaking. At the same time, take care to follow requirements pertaining to the business secrets of your opposing party.

h. In the terms of reference or protective order, provide for an arbitral expert to review the documents in the event there is a dispute about disclosure to the arbitration tribunal or opposing party.

Even with the maximum effort and care, there remains exposure to disclosure if third-party non-participants in the arbitration have legitimate need of the information in connection with unrelated litigation.

Endnotes

1. Guyden v. Aetna, Inc., 544 F.3d 376, 385 (2d Cir. 2008), *quoting* Iberia Credit Bureau, Inc, v. Cingular Wireless LLC, 379 F.3d 159, 175 (5th Cir. 2004).
2. The AAA Commercial Arbitration Rules R-23 (2009).
3. JAMS Rule 26 (2009).
4. CPR Rule 18 (2007).
5. Canon VI of the AAA Code of Ethics requires arbitrators to maintain the confidentiality of all matters relating to the arbitration.
6. http://www.adr.org/sp.asp?id=22036.
7. http://www.abanet.org/dispute/commercial_disputes.pdf.
8. E.g., ITT Educational Services v. Arce, 533 F.3d 342 (5th Cir. 2008).
9. Gotham Holdings LP v. Health Grades, Inc., 580 F.3d 664, 665-66 (7th Cir. 2009) (citations omitted).
10. 2004 WL 1821968 (D. Colo. 2004).
11. 297 F.3d 544 (7th Cir. 2002).
12. *Id*. at 546-47 (citations omitted).
13. *Id*. at 548.
14. 2008 WL 1805459 (S.D.N.Y. 2008).
15. 2011 UL 6015646 (S.D.N.Y).
16. 2000 WL 33176064 (E.D. Tex 2000).
17. *Id*. at *1.
18. 140 F.R.D. 398, 400 (W.D. Mo. 1991).
19. 760 N.Y.S.2d 431, 436-37 (NY App. 2003).
20. 2005 WL 1522783 (E.D.N.Y. 2005).
21. Volt Info. Sciences, Inv. v. Bd of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989).
22. Ark. Code Ann. § 16-7-206 (1999).
23. Cal. Evid. Code § 703.5 (West 1995).
24. Mo. Ann. Stat. § 435.014 (West 1992).
25. Tex. Civ. Prac. & Rem. Code Ann. § 154.073 (Vernon 2005).
26. The Revised Uniform Arbitration Act § 14 (d) (2000) provides with limited exceptions**:** "(d) In a judicial, administrative, or similar proceeding, an arbitrator or representative of an arbitration organization is not competent to testify, and may not be required to produce records as to any statement, conduct, decision, or ruling occurring during the arbitration proceeding, to the same extent as a judge of a court of this State acting in a judicial capacity."
27. See Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. Kan. L. Rev. 1255, 1264 (June 2006).
28. 30 S.W.3d 198 (Mo.App.Ct. 2000).
29. V.A.M.S. § 435.014(2).
30. 989 P.2d 219 (Colo.Ct.App 1999).
31. 51 S.W. 3d 881, at n.1 (Mo. App. 2001).
32. 2000 WL 387738 (E.D. Pa. Apr. 12, 2000).
33. *Id*.
34. *Baxter Int'l v. Abbott Labs*, 297 F.3d 544, 548 (7th Cir. 2002).

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Breaking News, Now Leading Precedents on "Evident Partiality": *Scandinavian Reinsurance* and *U.S. Electronics*

By Michael S. Oberman

This article reports on two decisions that made news when they were announced and that should endure as leading precedents on the issue of "evident partiality" under Section 10(a)(2) of the Federal Arbitration Act ("FAA").[1] First, the Second Circuit in *Scandinavian Reinsurance Co. v. St. Paul Fire & Marine Ins. Co*.[2] rejected an unconventional evident partiality challenge that had been accepted by the district court (generating considerable attention and concern in the arbitration community). The Circuit's opinion provides a refreshingly lucid explanation of the scope and meaning of evident partiality, weaving together the Second Circuit's own precedents but importantly also inserting principles from other circuits (thereby narrowing the differences between the standards applied across the country). Second, in *U.S. Electronics, Inc. v. Sirius Satellite Radio Inc*.,[3] the New York Court of Appeals adopted the Second Circuit's standard for evident partiality for when New York courts apply the FAA on review of arbitration awards and corrected an erroneous statement of the law by the Appellate Division, First Department where the cast of characters drew attention to the case.

"The Circuit's opinion provides a refreshingly lucid explanation of the scope and meaning of evident partiality…"

Scandinavian Reinsurance

In September 2007, St. Paul commenced arbitration against Scandinavian to resolve disputes arising from the parties' reinsurance contract. In accordance with the arbitration provision, St. Paul appointed Paul Gentile as an arbitrator, Scandinavian appointed Jonathan Rosen, and the two party-appointed arbitrators selected Paul Dassenko to serve as umpire. All three arbitrators were certified by the AIDA Reinsurance and Insurance Arbitration Society ("ARIAS"). The arbitrators made disclosures in accordance with ARIAS' guidelines, and Dassenko for the panel acknowledged at an organizational meeting that the arbitrators had an ongoing responsibility to make disclosures. While the St. Paul Arbitration was proceeding, another arbitration (the Platinum Arbitration) began, and Gentile and Dassenko were selected to serve as an arbitrator and the umpire, respectively, on the panel. The hearings in the Platinum Arbitration were held before the hearings began in the St. Paul Arbitration. Bart Hodges, a former employee of both Platinum and Scandinavian, testified in the Platinum Arbitration and later in the St. Paul Arbitration. "St. Paul's business was related in several ways to Platinum's,"[4] and the two arbitrations presented overlapping issues of contract enforcement. The panel ruled against Scandinavian in the St. Paul Arbitration.

Scandinavian—claiming that it first became aware of Dassenko's and Gentile's service in the Platinum Arbitration two months after the St. Paul Arbitration Award was issued—filed a petition in the Southern District of New York to vacate the award for evident partiality premised on the nondisclosure by these two arbitrators of their concurrent service in the Platinum Arbitration. On February 23, 2010, the district court vacated the award and remanded the case for arbitration before a new arbitral panel, finding that the two arbitrations '"were presided over by two common arbitrators, overlapped in time, shared similar issues, involved related parties, [and] included Hodges as a common witness.'"[5] The district court further observed that the failure to disclose deprived Scandinavian of the opportunity to object to the concurrent service and/or to "adjust their arbitration strategy," when Dassenko and Gentile had "placed themselves in a position where they could receive *ex parte* information about the kind of reinsurance business at issue in the [St .Paul] Arbitration" and "be influenced by recent credibility determinations they made as a result of Hodges testimony in the Platinum Arbitration."[6] The district court's conclusion was '"strengthened"' by the fact Dassenko and Gentile disclosed '"other less significant or temporally remote relationships"' but not the Platinum Arbitration.[7] '"Taken together, these factors indicate that Dassenko and Gentile's simultaneous service as arbitrators…constituted a material conflict of interest,"' which—because it was not disclosed—amounted to evident partiality under the Second Circuit's reasonable person standard.[8]

The Second Circuit reversed. The court reiterated the circuit's standard that evident partiality "will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration."[9] Accepting the district court's findings, the Second Circuit nonetheless held that the two arbitrators' service in both arbitrations "does not, in itself, suggest they were predisposed to rule in any particular way in the St. Paul Arbitration. As a result, their failure to disclose that concurrent service is not indicative of evident partiality."[10]

Apart from reviewing its own precedents, the court filled in additional details for the reasonable person standard and drew on precedents from sister circuits. Specifically, the court stated:

- The evident-partiality standard is, at its core, directed to the question of bias…. It follows that where an undisclosed matter is not suggestive of bias, vacatur based upon that nondisclosure cannot be warranted under an evident-partiality theory.[11]
- But, in ascertaining whether a relationship is "material"—or, to use the terminology of Applied Industrial, whether it is "nontrivial"—we think that a court must focus on the question of how strongly that relationship tends to indicate the possibility of bias in favor of or against on party, and not on how closely that relationship appears to relate to the facts of the arbitration.[12]
- [W]e do not think it appropriate to vacate an award solely because an arbitrator fails to consistently live up to his or her announced standards for disclosure, or to conform in every instance to the parties' respective expectations regarding disclosure. The nondisclosure does not by itself constitute evident partiality.[13]
- Even where an arbitrator fails to abide by arbitral or ethical rules concerning disclosure, such a failure does not, in itself, entitle a losing party to vacatur.[14]
- We do not in any way wish to demean the importance of timely and full disclosure by arbitrators. Disclosure not only enhances the actual and apparent fairness of the arbitral process, but it helps that the process will be final, rather than extended by proceedings like this one.[15]

In addition, the court adopted the Fourth Circuit's nonexclusive guidelines for evaluating evident partiality: '"(1) the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceedings; (2) the directness of the relationship between the arbitrator and the party he is alleged to favor; (3) the connection of that relationship to the arbitrator; and (4) the proximity in time between the relationship and the arbitration proceeding."[16] It also drew on Seventh Circuit precedent for the proposition that "arbitrators [are] not disqualified merely because they acquired relevant knowledge in a previous arbitration,"[17] on the Ninth Circuit for the proposition that an arbitrator is "'required to disclose only facts indicating that he might reasonably be thought biased against one litigant and favorable to another,"[18] and on Fourth Circuit precedent for the proposition that the "'asserted bias'" may not be '"remote, uncertain, or speculative."'[19]

In finding that the conduct of these two arbitrators did not constitute evident partiality, *Scandinavian* did not suggest if relief might lie under the FAA where a nondisclosure related to the background of an arbitrator (as opposed to a relationship between an arbitrator and a party). But a Second Circuit opinion from June 2011 provides some guidance. *STMicroelectronics, N.V. v. Credit Suisse Securities (USA) LLC*[20] addressed an allegedly inaccurate and incomplete disclosure concerning the arbitrator's background as an expert witness; the issue was whether the arbitrator's experience as an expert would cause him to have a "predisposition" against financial institutions in disputes over account management, and whether the arbitrator failed to inform the parties sufficiently of this experience. The petitioner invoked § 10(a)(3) of the FAA ("other misbehavior by which the rights of any party have been prejudiced").

The Second Circuit rejected the challenge, stating: "It would be strange if such an arbitrator [experienced in the specific business community as to which the dispute arose] were forced to search the record of all prior testimony for any statement that might—however tangentially—relate to any of the many legal issues that might arise in any given case. A party might like to know that information when shopping for arbitrators, but its absence cannot form a ground for vacating an arbitral award."[21]

The N.Y. Court of Appeals Concurs

U.S. Electronics arose from an arbitration commenced by U.S. Electronics ("USE") against Sirius Satellite Radio ("Sirius") on May 11, 2006. USE and Sirius were then parties to agreements granting USE a non-exclusive license to distribute radios capable of receiving Sirius' satellite radio service. USE alleged that Sirius improperly favored a competing distributor (DEI) over USE and asserted claims of breach of contract, breach of the implied covenant of good faith and fair dealing, tortious interference with contract, tortious interference with prospective business relations and unfair competition. USE ultimately sought damages plus interest of approximately $133 million.[22]

In accordance with the agreements and AAA Commercial Rules, the parties selected three neutral arbitrators; William S. Sessions, a former United States District Court Chief Judge/Judge and former Director of the FBI, was appointed the chair of the panel. The panel heard 19 days of testimony and conducted closing arguments following the parties' post-hearing submissions. On August 27, 2008, the AAA delivered the panel's unanimous 149-page award, dismissing all of USE's claims and denying USE any recovery of damages.[23]

In November 2008, USE filed a petition in Supreme Court, New York County, seeking to vacate the award; Sirius cross-moved to confirm the award. USE alleged evident partiality on the part of Chairman Sessions, alleging that the Chairman failed to disclose that his son, Pete, was a member of Congress who—one year after the arbitrators were selected—made certain statements in support of the then-pending merger between Sirius and XM Satellite Radio Inc. USE further contended that the Chairman failed to disclose that Congressman Pete Sessions was a close political ally of Congressman Darrell Issa, the founder of DEI (the competing distributor) who remained a major shareholder and director of DEI.[24]

On July 7, 2009, the court entered judgment denying the petition and confirming the award. Justice Gammerman found that "there is no evidence that Chairman Sessions was aware of his son's isolated statements in favor of the merger" and therefore "there is no showing that the Chairman had any reason to believe that he might have a conflict because of his son's political activities."[25] Justice Gammerman further found that USE had not "shown any personal or business relationship between Chairman Sessions and Congressman Issa."[26] Supreme Court accordingly held that "there is no basis upon which to conclude that the Panel was infected by 'evident partiality.'"[27]

USE appealed to the First Department. On May 11, 2010, the Appellate Division unanimously affirmed the judgment. In the core of its decision, the Appellate Division held:

> Irrespective of when petitioner learned of the congressman's support of the intended merger between Sirius and XM, the chairman should still have made full disclosure. But despite such nondisclosure, petitioner failed to meet its burden of proving by clear and convincing evidence that any impropriety or misconduct of the arbitrator prejudiced its rights or the integrity of the arbitration process or award, since no proof was offered of actual bias or even the appearance of bias on the part of the chairman.… Not only was there no indication of any relationship, business or personal, between the chairman and respondent, but it is difficult to perceive how petitioner's contractual dispute with respondent was impacted by the activities of the congressman on behalf of respondent's proposed merger with XM. Under these circumstances, the alleged undisclosed facts do not provide a basis for challenging the arbitration award.[28]

On November 18, 2010, the Court of Appeals granted leave to appeal.[29] In its November 15, 2011 decision, the Court "adopt[ed] the Second Circuit's reasonable person standard" and said it would "apply it when we are asked, as in this case, to consider the federal evident partiality standard."[30] The Court observed that the Appellate Division reached the correct result but stated a legal standard that could not be "gleaned from federal precedent."[31] The Court held that evident partiality is not shown "premised on attenuated matters and relationships."[32] "That Chairman Sessions' son publicly endorsed the Sirius-XM merger had no impact on the merits of the separate and distinct breach of contract matter. Moreover, the purported connection between Chairman Sessions and Congressman Issa through his son's political relationship is too tenuous to impute partiality to the chairman…. This would be a far different case if USE could allude to a personal or business relationship between Chairman Sessions and Congressman Issa; or if his son had a prominent role at Sirius or DEI…. However, absent such a showing, these allegations, without more, amount to speculation of bias."[33]

Conclusion

In adopting the Second's Circuit's reasonable person test in November 2011, the Court of Appeals expressly pointed to the "settled law" formed by "a plethora of case law from the Second Circuit."[34] *Scandinavian Reinsurance* builds on that settled law, and stands out as the new leading precedent in the "plethora of case law."

Endnotes

1. 9 U.S.C. § 10(a)(2).
2. 668 F.3d 60, 64 (2d Cir. 2012).
3. 958 N.E.2d 891, 893 (N.Y. 2011). The author was lead counsel for Sirius in the arbitration and in the subsequent court proceedings, including before the Court of Appeals.
4. 668 F.3d at 69.
5. *Id*. at 70 (quoting 732 F. Supp. 2d at 307-08 (Scheindlin, J.)).
6. *Id*. (quoting 732 F. Supp. 2d at 308).
7. *Id*. (quoting 732 F. Supp. 2d at 308-09).
8. *Id*. at 70-71 (quoting 732 F. Supp. 2d at 308).
9. *Id*. at 72 (quoting *Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefits Funds*, 748 F.2d 79, 84 (2d Cir. 1984)).
10. *Id*. at 64.
11. *Id*. at 72.
12. *Id*. at 75 (quoting *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 139 (2d Cir. 2007)).
13. *Id*. at 76-77.
14. *Id*. at 77 n.22.
15. *Id*. at 78 (citing Justice White).
16. *Id*. at 74.
17. *Id*. at 78

18. *Id.* at 73-74, citing *Lagstein v. Certain Underwriter's at Lloyd's, London*, 607 F.3d 634, 646 (9th Cir. 2010).
19. *Id.* at 72 (quoting *Three S Del., Inc. v. DataQuick Info. Sys., Inc.*, 429 F.3d 520, 530 (4th Cir. 2007)).
20. 648 F.3d 68, 74 (2d Cir. 2011).
21. *Id.* at 77.
22. *See* Brief of Respondent-Respondent, *U.S. Electronics, Inc. v. Sirius Satellite Radio, Inc.*, 2011 WL 6986868, at *7-8 (N.Y. Mar. 2, 2011) (no. 2011-0185).
23. *Id.* at *8-9.
24. *Id.* at *2-4.
25. *Id.* at *11.
26. *Id.* (citations to record omitted).
27. *Id.* (citations to record omitted).
28. 73 A.D.3d 497, 498-99 (1st Dep't 2010), *aff'd*, 958 N.E.2d 891 (N.Y. 2011).
29. 938 N.E.2d 1013 (N.Y. 2010).
30. 958 N.E.2d at 893.
31. *Id.* The Court did not resolve the tension between Justice Gammerman's finding that "there is no evidence that Chairman Sessions was aware of his son's isolated statements in favor of the merger" and the Appellate Division's critical statement that "the chairman should still have made full disclosure" (most likely because it is not the province of the Court of Appeals to find facts and the Appellate Division had not explained the basis for implying the Chairman had knowledge).
32. *Id.*
33. *Id.* at 894 (internal citations omitted).
34. *Id.* at 893.

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E-Discovery Demystified for Arbitrators—Tips for How to Manage e-Discovery for Efficient Proceedings

By Sherman Kahn

The use of electronic media for the creation, storage and transmission of information has substantially increased the volume of available document discovery. It has also substantially increased the cost of the discovery process. The process of obtaining documentary evidence stored electronically has come to be referred to as "e-discovery."[1]

The prospect of e-discovery has caused great trepidation in the arbitration community. While there is some merit to that trepidation, particularly where increased costs are concerned, the nervousness associated with e-discovery can be substantially reduced with the realization that e-discovery is nothing more than discovery of documents created and stored in electronic form.

"[A]rbitrators should at least familiarize themselves generally with the technological issues that arise in connection with electronic data."

Indeed, e-discovery is really not that different from old-fashioned paper-based discovery. And dealing with it is a necessity. Parties do not retain documentary evidence in hard copy form the way they used to and reference to electronically stored documents may be the only way to reach evidence relevant to a transaction. For example, the revision history of the contract at issue in the arbitration may be obtainable only from electronic documents. Likewise all communications during the negotiation of the contract may have been by email.

What does make e-discovery different from old-fashioned document discovery is that parties are retaining much more material now that may have to be reviewed and produced. The proliferation of electronic media has enabled parties to store massive amounts of information that previously would not have been stored. In addition, the change from communication that would previously have occurred over the telephone or in person to communication by email has created a documentary record of even the most casual of conversations; and often that record is repeated multiple times in multiple places due to extensive lists of recipients and copies.

As a result, production and review of such material can be far more expensive than the economics of even a reasonably large arbitration justify. Costs are further increased if the parties need to go to "vendors" to process and prepare electronic data for production, not to mention attorney review of the material to be produced.

The problem is how to reduce the volume of material to a manageable level without increasing costs and the burden on the parties to unacceptable levels. This article makes some suggestions regarding how to manage the process to minimize costs and avoid disputes.[2]

To be able appropriately to address issues pertaining to the mechanics of e-discovery, arbitrators should at least familiarize themselves generally with the technological issues that arise in connection with electronic data. Such issues include the electronic format in which documents are produced, and the availability and need (or lack thereof) for production of "metadata." A basic understanding by the arbitrator of e-discovery technology and terminology can help the arbitrator reduce discovery costs for the parties.

A short glossary of some important e-discovery terms follows:

- **Native Form**—Electronic documents in native form are documents in the form in which they are created (*i.e.*, Microsoft Word or Lotus Notes).
- **Imaged Documents**—Imaged documents are documents converted from native form to an image of the content of the document (often accompanied by a file (called a load-file or text-file) containing the text of the imaged document so that it can be searched.
    - **TIFF Images**—TIFF (which means "Tagged Image File Format") is an imaging format that is compatible with many litigation support software products.
    - **PDF Images**—PDF (Portable Document Format) is an imaging format proprietary to Adobe Systems. PDF has a number of advantages over TIFF imaging but PDF images are incompatible with a number of document management systems.
- **Metadata**—metadata is data included in an electronic document that is used by the computer to perform operations on the document. Most meta-

data is completely uninteresting to human readers. Some metadata can be helpful, of interest, or even critical to resolving certain issues.

- For example, an Outlook email can have more than 150 associated metadata fields. Only a few of those fields are usually useful (*i.e.*, "from" "to" "cc" "bcc" and "subject" can help with searching and categorizing).
- Word processing documents may store previous changes in metadata fields.
- Spreadsheets often store formulas in metadata fields.
- More often than not, however, the pursuit of metadata is an expensive and useless diversion.

- **Custodian**—Custodian is a term that has developed in the e-discovery field to describe a person who (or in some cases a computer server or system that) may have relevant documents.
  - Limiting the number of "custodians" searched is a key cost-control tool.
- **Keywords or Search Terms**—Another way of reducing the volume of production of electronic documents is for the parties to review only those documents the text of which contains a specified set of keywords which can be agreed upon by the parties.
- **Forensic Preservation**—Electronic documents are easily modified and often are subject to automatic destruction (*e.g.*, autodeletion of email over a certain age). In court litigation parties are obliged to preserve documents from change or destruction. This can be extremely expensive.
- **Backups**—Often companies keep backups of data on tape or in secondary servers. This data, which is kept for emergencies, can be very expensive to recover.

Once an arbitrator understands the above terms, it becomes less of a burden to help the parties implement a manageable e-discovery program appropriate to the size and complexity of a given arbitration.

One important consideration is whether the parties will produce documents in native or imaged format. Production of electronic documents in native format can be faster, simpler and less expensive. However, there are significant disadvantages to production in native format. Documents produced in native format are difficult to manage both for the producing and for the receiving party and the receiving party may not have necessary software. Documents produced in native format will change every time they are used and there is no easy way to control against improper modifications. Documents produced in native format will contain all metadata and that metadata is likely to be unintentionally altered by the recipient of the document during the arbitration. Documents produced in native format are difficult to authenticate. Documents produced in native format are not readily searched across a production database. Email produced in native format is difficult to use.

Advantages of production in imaged form include that imaged documents can be easily used by commercial document management systems; imaged documents cannot easily be modified and are readily authenticated; imaged documents can be searched across an entire production database; and imaged documents can be produced with only necessary metadata attached. Disadvantages of production of electronic documents in imaged form include that imaging may require a third party document vendor and can be very expensive; and imaging can deprive certain documents (especially spreadsheets) of necessary or useful data.

Generally, parties will prefer to produce electronic documents in imaged form. Nonetheless and notwithstanding the long list of possible disadvantages of document production in native form, such production might be appropriate under the circumstances in a given arbitration, particularly with respect to reducing costs. Arbitrators should discuss with the parties, preferably at the initial scheduling conference, whether production in native form is advantageous under the circumstances.

Before the initial scheduling conference an arbitrator may wish to ask the parties to jointly prepare an e-discovery plan consistent with the parties' arbitration agreement while keeping the following considerations in mind:

- Arbitration is not litigation and scorched earth discovery should not be tolerated
- The parties should discuss whether to produce documents in imaged or native form
- The presumption will be, assuming the parties decide to produce documents in imaged format that metadata (other than basic email metadata) will not be produced unless a party makes a showing of need as to a particular document
- Document custodians should be limited to those persons most likely to have relevant documents
- Searches of custodians should be limited to files or folders that are reasonably likely to contain relevant documents
- The parties should consider whether it is appropriate to agree on a set of keywords to reduce the volume of documents

- Data from backups need not be produced without a showing of a particularized need

One advantage of arbitration is that the parties can easily agree to more flexible rules to avoid cost and burden. If the parties are cooperative, the arbitrator may wish to consider suggesting an agreement that the parties use reasonable efforts to search for appropriate documents in good faith without formal rules. Such an arrangement, under appropriate circumstances, can enable the parties to achieve their goals in arbitration at a considerably reduced cost.

One of the main drivers of increased e-discovery cost in litigation is fear by parties and their counsel that they will be accused of spoliation. Parties must begin litigation with elaborate, and often very expensive, measures to preserve massive amounts of electronic documentation. In arbitration, fears of spoliation accusations can be minimized through an agreement between the parties. The arbitrator can explore at the preliminary hearing whether the parties to agree on reasonable measures for document preservation that are not exceedingly expensive and that can be agreed to by both sides.[3]

Endnotes

1. This article discusses "e-discovery" in the context of United States domestic arbitration. The same issues arise in international arbitration although, of course, the amount of document disclosure available in international arbitration is often significantly lower than the amount available in United States domestic arbitration. Arbitrators must be careful to adjust their approach based on the context of the arbitration and the parties' expectations.
2. This article can only present certain practical advice for the arbitrator. For a discussion of e-discovery far beyond the scope of this article, *see* "The Sedona Principles: Second Edition, Best Practice Recommendations & Principles for Addressing Electronic Document Production," Sedona Conference 2007.
3. For additional guidance, please see the New York State Bar Association's Guidelines For the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic, Commercial Arbitrations and Guidelines For the Arbitrator's Conduct of the Pre-Hearing Phase of International Arbitrations.

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To Enforce or Not to Enforce: Two Recent Illustrations of Problems Enforcing International Arbitration Awards Against Foreign Sovereigns in U.S. Courts

By James H. Boykin and Jan K. Dunin-Wasowicz

Two recent decisions from United States Courts of Appeals illustrate a possible reluctance by the U.S. Courts to enforce arbitral awards rendered against sovereign states. In *Argentina v. BG Group*, the Court of Appeals for the District of Columbia Circuit set aside an arbitration award rendered under a bilateral investment treaty between the United Kingdom and Argentina.[1] In *Figueiredo v. Peru*, the Court of Appeals for the Second Circuit dismissed an action to enforce an arbitral award under both the New York and Panama Conventions on the grounds of *forum non conveniens* ("FNC").[2] This article discusses what those cases reveal about the need for further refinement of the law of enforcement of foreign arbitral awards in cases involving sovereigns.

The Republic of Argentina v. BG Group

In the 1990s, the United Kingdom and Argentina ratified a bilateral investment treaty (the "BIT") to promote foreign investment.[3] BG Group (a U.K. company) invested in the privatization of the Argentine gas sector. Like many others, BG Group incurred losses after Argentina enacted emergency legislation, which, *inter alia*, converted dollar-based tariffs into peso-based tariffs at a rate of one peso to one dollar.[4] The BIT provided for investor-state arbitration, but only after the investor litigated its claims for eighteen months in the Argentine courts.[5] On April 25, 2003, BG Group commenced arbitration against Argentina without having first litigated in Argentina. Under the UNCITRAL Rules, which governed the arbitration, the parties are free to choose any location as the formal seat of the arbitration.[6] If the parties cannot agree on the seat, the tribunal makes the selection. Although it is unclear who made that choice, Washington, D.C. was chosen. On December 24, 2007, the tribunal issued an award of $185 million in favor of BG Group.

Argentina moved to vacate the award on the grounds that the tribunal exceeded its authority and lacked jurisdiction. The District Court denied the motion. The Court of Appeals for the D.C. Circuit reversed the District Court's order and vacated the award, holding that the district court "erred as a matter of law by failing to determine whether there was clear and unmistakable evidence that the contracting parties intended the arbitrator to decide arbitrability where BG Group disregarded the requirement […] to initially seek resolution of its dispute with Argentina in an Argentine court."[7]

The Court concluded, "The Treaty provides a prime example of a situation where 'the parties would likely have expected a court' to decide arbitrability.'"[8] It seems unlikely that the parties to the BIT—the United Kingdom and Argentina—intended for a United States federal court to resolve a dispute about the scope of the arbitrators' jurisdiction under an international treaty. The dispute did not have any connection to the United States, and the treaty did not require that arbitral proceedings be conducted there. It would be unfair to criticize this decision based on the fact that the court reviewed what it perceived to be a question of the arbitral tribunal's jurisdiction. This is hardly uncommon.[9] But the decision may fairly be criticized for (i) failing to apply international law in its interpretation of an international instrument; and (ii) perpetuating a jurisprudential confusion that fails to distinguish between questions of jurisdiction and admissibility.

Should International Law Have Played a Role in the Court's Interpretation of the BIT?

The Court did not apply international law when it interpreted the BIT. The Court's only reference to the Vienna Convention on the Law of Treaties is found in its discussion of the arbitral tribunal's analysis of the BIT.[10] The Vienna Convention "now constitutes a statement of customary international law, with the effect that the rules apply to any treaty interpretation whether the states involved are parties to the Vienna Convention or not."[11] Customary international law is the law of the United States.[12] Thus, it could be argued that the Court ignored directly applicable *domestic* law on the interpretation of treaties. Instead, the Court interpreted a treaty between Argentina and the United Kingdom in accordance with United States case law under the Federal Arbitration Act that principally address questions of "arbitrability" arising out of commercial contracts, in such contexts as class actions and consumer claims.[13] Even those justices who are critical of the relevance of international law in the Courts of the United States would be hard pressed to deny the relevance of international law to the interpretation of a treaty between two foreign states.[14]

In contrast, the arbitral tribunal interpreted the BIT in accordance with the Vienna Convention.[15] The tribunal "accept[ed] Argentina's position that as a matter of treaty law investors acting under the Argentina-U.K. BIT must

litigate in the host State's courts for 18 months before they can bring their claims to arbitration."[16] But the tribunal concluded that, "[w]here recourse to the domestic judiciary is unilaterally prevented or hindered by the host State, any such interpretation [precluding arbitration without litigating in the courts for 18 months] would lead to the kind of absurd and unreasonable result proscribed by Article 32 of the Vienna Convention, allowing the State to unilaterally elude arbitration, which has been the engine of the transition from a politicized system of diplomatic protection to one of direct investor-State adjudication."[17] Because Argentina shut the doors to the courthouse, the tribunal held, the Vienna Convention did not permit it to interpret the BIT to preclude the claimant's claims.[18]

Interestingly, the tribunal in *ICS Inspection v. Argentina* ruled on the same issue under the same treaty just a month later.[19] It applied international law to reach the same conclusion as the Court of Appeals holding that, "the Tribunal cannot […] create exceptions to treaty rules, where these are merely based upon an assessment of the wisdom of the policy in question, having no basis in either the treaty text or in any supplementary interpretative source, however desirable such policy considerations might be seen to be in the abstract."[20] The tribunal was "not convinced that futility [had] been futility demonstrated" so as to call into question the mandatory nature of the pre-condition to arbitration, and suggested that jurisdiction may have been proper had "this case [been one] of obvious futility, where the relief sought is purely unavailable within the Argentine legal system."[21]

Jurisdiction or Admissibility?

Relying on the decision of the United States Supreme Court in *First Options*,[22] the D.C. Circuit searched for "clear and unmistakable evidence that the contracting parties intended an arbitrator to decide the gateway question" of arbitrability.[23] The *First Options* framework left the Court no room to consider Argentina's closing of the courthouse in its analysis of the arbitration agreement. Unlike the arbitral tribunal, the Court viewed the local remedies question as one of *jurisdiction* rather than *admissibility*.[24] Professor Jan Paulsson explained the significance of the distinction between these two concepts:

> To understand whether a challenge pertains to jurisdiction or admissibility, one should imagine that it succeeds: [i]f the reason for such an outcome would be that the claim could not be brought to the particular forum seized, the issue is ordinarily one of jurisdiction and subject to further recourse; [i]f the reason would be that the claim should not be heard at all (or at least not yet), ***the issue is ordinarily one of admissibility and the tribunal's decision is final.***[25]

By ignoring this distinction, the Court of Appeals failed to respect the arbitral tribunal's decision as final and gave more teeth to a local remedies requirement than would the International Court of Justice, which has held that "an objection of [a failure to exhaust local remedies] is not a plea to the jurisdiction of the Court, but a plea to the admissibility of the Application."[26]

The *BG Group* decision will surely contribute to a fruitful debate on the role of domestic courts in interpreting arbitration clauses in treaties between two sovereign foreign states, which will likely evolve as the distinctions between private commercial arbitration and treaty-based arbitration become more pronounced and familiar to judges.[27] Some might argue that U.S. jurisprudence needs both a more meaningful integration of the law on the interpretation of treaties and a greater conceptual clarity about the contours of the term "arbitrability."[28] The position taken by U.S. courts is capable of influencing arbitral tribunals' disposition of similar issues. In *ICS Inspection v. Argentina*, the tribunal noted in a footnote "that the above analysis accords with the recent judgment of the US Court of Appeals […] in the BG Group v. Argentina, also under the UK-Argentina BIT, where the court rejected the tribunal's decision to excuse the claimant's non compliance with the 18-month litigation prerequisite on the sole basis that the requirement would produce an absurd and unreasonable result in the circumstances."[29] Thus, while the tribunal provided a detailed discussion of its conclusion under the principles of international law, the tribunal also supported its interpretation of the BIT under the Vienna Convention with a reference to the interpretation of the BIT based upon United States case law construing the Federal Arbitration Act.

Figueiredo v. Peru

An arbitral tribunal sitting in Peru awarded $21 million to Figueiredo *ex aequo et bono*. The Respondent, a Peruvian Ministry, challenged the award before the Lima Court of Appeals. Respondent argued that Peruvian law limited damages to the amount of the contract because the arbitration was an "international arbitration." The Lima Court of Appeals held that the arbitration was a "national arbitration" because Figueiredo had designated itself a Peruvian domiciliary in the contract and the arbitration. As a result, the Peruvian court held that arbitrator's award in equity was permissible. But Peruvian law imposes a limit on the amount of money that a government entity must pay annually to satisfy a domestic judgment. Because of this limitation, the Ministry had paid the claimant just over $1.4 million on the award by the time the U.S. Court of Appeals for the Second Circuit was considering the claimant's petition to enforce the entire $21 million award in New York, where Peru had substantial assets. For purposes of the enforcement action in New York, Figueiredo designated itself a Brazilian national. Peru resisted enforcement on various grounds, including *forum non conveniens* ("FNC").

The draft Restatement (Third) of the U.S. Law of International Commercial Arbitration states that "[a]n action to enforce a [New York or Panama] Convention award is not subject to a stay or dismissal on forum non conveniens grounds."[30] But in *Figueiredo v. Peru*, the Court dismissed an action to enforce a foreign award under both the New York and Panama Conventions on the grounds of FNC.[31] Why did the Court ignore the draft Restatement's bright line rule?

It is tempting to discount the Court's analysis as influenced by equitable considerations. As Professor Brower explains, "[O]ne might describe the claimant's tactics as vexatious, cloaking itself in a Peruvian flag to secure the higher measure of damages available in 'national' arbitrations, then cloaking itself in a Brazilian flag to avoid the three-percent payment cap for national arbitrations."[32] But not so fast. As Professor Brower explains, this decision highlights an "anomaly" in the New York Convention. The Convention "does not require the disputing parties to have diverse nationalities or to engage in transactions that cross national borders [and] for purposes of enforcement in the United States, an award falls under the Convention even if rendered in Paris between two French wine merchants under a contact for the sale of French wine."[33] Professor Brower concludes with a suggestion:

> Given the United States' relative lack of interest in localized disputes between foreign governments and their own nationals on matters of local importance, it seems wise for U.S. courts to preserve forum non conveniens dismissals as a possible antidote for the rare situations in which the New York Convention's and the FAA's unusually broad scope threatens to produce surprising results.[34]

Critics will be wary about recognizing yet another common law limitation on the enforcement of arbitral awards.[35] But the disconnect between the Court and the draft Restatement appears to be the Court's unwillingness to intervene in a domestic dispute involving a foreign sovereign, its subject, and issues of that sovereign's public law.[36] The Court seems to have searched for an exit strategy, and Professor Brower suggests that FNC might provide an off-ramp in similar cases in the future.

Professor Albert Jan van den Berg may originally have described this "anomaly" as a "harmless side-effect" that "scarcely occurs in practice."[37] But Professor van den Berg's "side-effect" may not have seemed harmless to the *Figueiredo* Court when confronted with a Peruvian domestic dispute involving issues of Peruvian public law. Indeed, it is telling that Professor van den Berg's hypothetical modernization of the New York Convention—which he presented at the 16th Annual ICCA Congress and dubbed the "Draft Dublin Convention"—undertook to remedy this "harmless side-effect" by eliminating the possibility of enforcing a purely domestic arbitration award under the Dublin Convention.[38]

It could be argued that the use of FNC as a basis for refusing enforcement risks putting the United States at odds with its treaty obligations under the New York Convention. Viewed with this consideration in mind, Professor van den Berg's hypothetical new convention for the enforcement of foreign arbitral awards deserves serious consideration, particularly if changes in the practice of arbitration, such as the increasing involvement of sovereign parties, have transformed what once was a "harmless side-effect" that "scarcely occurs in practice" into a recurring malady.

Endnotes

1. *Republic of Argentina v. BG Grp. PLC*, No. 11-7021, 2012 U.S. App. LEXIS 905 (D.C. Cir. Jan. 17, 2012).
2. *Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru*, No. 09-3925-CV L, 2011 U.S. App. LEXIS 24748 (2d Cir. Dec. 14, 2011).
3. The Bilateral Investment Treaty between the United States and Argentina was signed on December 11, 1990 and entered into force on February 19, 1993.
4. Argentina has been the Respondent in over thirty international arbitrations brought under various bilateral investment treaties involving similar claims.
5. For a primer on consent in investment arbitration, see Jan Paulsson, *Arbitration Without Privity*, 10 Foreign Investment L. J. 232, 238-39 (1995).
6. UNCITRAL Arbitration Rule 16.
7. *BG Grp. PLC*, 2012 U.S. App. LEXIS 905, at *20.
8. *Id.* at *19 (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (involving arbitration between securities dealer and client)).
9. See, e.g., Nytt Juridiskt Arkiv [NJA] [Supreme Court] 2010-11-12 ¶ 12 Ö2301-01 (Swed.); Emma Lindsey, *The Arbitral Tribunal or the National Court-Who Decides Whether There Is an Agreement to Arbitration?*, N.Y. Disp. Resol. Law., Spring 2011, at 52-54.
10. *BG Grp. PLC*, 2012 U.S. App. LEXIS 905, at *7-8.
11. Richard Gardiner, Treaty Interpretation 7 (Oxford University Press 2008).
12. *The Paquette Habana*, 175 U.S. 677, 700 (1900).
13. For an argument that different types of arbitrations lack a homogenous "fundamental or inherent character," see Gary Born, *The U.S. Supreme Court and Class Arbitration: A Tragedy of Errors*, Kluwer Arbitration Blog (July 1, 2011), http://kluwerarbitrationblog.com/blog/2011/07/01/the-u-s-supreme-court-and-class-arbitration-a-tragedy-of-errors/.
14. See e.g., *Atkins v. Virginia*, 536 U.S. 304, 324-25 (2002) (Rehnquist, J., dissenting).
15. See *BG Group PLC v. Republic of Argentina*, Final Award ¶ 147 (Dec. 24, 2007).
16. *Id.* ¶ 146.
17. *Id.* ¶ 147.
18. *Id.* ¶¶ 148-151. Argentina enacted two decrees, which stayed all suits by those whose rights were affected by the emergency measures for a period of five years.
19. *ICS Inspection and Control Services Limited v. The Argentine Republic*, Award on Jurisdiction, ¶ 273 PCA Case 2010-09 (10 February 2012).

20. *Id.* ¶ 267.

21. *Id.* ¶ 269.

22. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).

23. *BG Grp. PLC*, 2012 U.S. App. LEXIS 905, at *19 (citation omitted). For a discussion on the treatment of the "gateway" issues and the various ways in which the term "arbitrability" is used by courts, see Professor George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37(1) Y. Jour. In't L. (2011).

24. *BG Group PLC v. Republic of Argentina*, Final Award ¶ 157 ("The Tribunal consequently finds *admissible* the claims brought by BG.…") (emphasis added).

25. Jan Paulsson, *Jurisdiction and Admissibility, in* Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Briner (Gerald Aksen et al. eds., 2005) 601, 617; see also *id*. at 611 (criticizing *First Options* for "perpetuat[ing] the unfortunate usage of the word arbitrability as interchangeable with either jurisdiction or admissibility"); W.W. Park, *The Arbitrability Dicta in First Options v. Kaplan: What sort of Kompetenz-Kompetenz Has Crossed the Atlantic*, 12 Arb. Int'l 137 (1996). The necessity of distinguishing between the concepts of jurisdiction and admissibility in the context of investment treaty arbitration was recently the subject of at least one doctoral dissertation. See Lars Markert, *Streitschlichtungsklauseln in Investitionsschutzabkommen, Zur Notwendigkeit der Differenzierung von jurisdiction und admissibility in Investititionsschiesverfahren* (2009) (Cologne University).

26. Interhandel Case (Switz. v. U.S.), Preliminary Objections, 1959 I.C.J. 6, 78-79 (March 21). The tribunal in *ICS Inspection and Control Services Limited v. The Argentine Republic*, (¶ 258) seems also to have blurred the line between questions of jurisdiction and questions of admissibility. On the one hand, it seemed to frame the question as one of admissibility by acknowledging that a Claimant might be excused from pursuing domestic remedies if it were futile for it do so. On the other hand, the tribunal's citation to *Democratic Republic of the Congo v. Rwanda* (*Case concerning Armed Activities on the Territory of the Congo (New Application: 2002)* (Democratic Republic of the Congo v. Rwanda), Judgment of 3 February 2006, 2006 ICJ Reports 6, ¶ 88) framed the issue as one of jurisdiction: "[…] When that consent [to the Court's jurisdiction] is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject must be regarded as constituting the limits thereon. The Court accordingly considers that the examination of such conditions relates to its jurisdiction and not to the admissibility of the application."

27. In the Second Circuit, the distinction between treaty arbitration and commercial arbitration has practical implications. *See* John Fellas, *Using Section 1782 In International Arbitration*, Mealey's Int'l Arb. R. Feb. 2007, at 11. *Compare In re Oxus Gold PLC*, No. Misc. 06-82, 2006 U.S. Dist. LEXIS 74118, at *15-16 (D.N.J. Oct. 10, 2006) (arbitration under a bilateral investment treaty is a "foreign or international tribunal" under § 1782) *with In re Nat'l Broad.*, 1998 WL 19994, at *8 (S.D.N.Y. Jan. 21, 1998), *aff'd*, 165 F.3d 184 (2d Cir. 1999) (private commercial arbitration administered by the ICC is not a "foreign or international tribunal" under § 1782).

28. The term "arbitrability" could "[merely] denot[e] one among many objections to arbitral jurisdiction, namely that the underlying claim may not, as a matter of law, be submitted to arbitration." For a discussion of the benefits that would accrue from such a narrower definition of "arbitrability" see George A. Bermann, *The Gateway Problem in International Commercial Arbitration*, 31(1) Y. Jour. In't. L. (2011).

29. *ICS Inspection and Control Services Limited v. The Argentine Republic*, Award on Jurisdiction, footnote 301 PCA Case 2010-09 (10 February 2012).

30. See § 5–21(a) (Council Draft No. 2, Sept. 27, 2010). The most recent draft of the Restatement provides, "An action to confirm a U.S. Convention award or enforce a foreign Convention award is not subject to a stay or dismissal in favor of a foreign court on forum non conveniens grounds."). § 4-29(a) (Council Draft No. 3, Dec. 23, 2011). The same view was espoused in a report by the New York City Bar Association. See The International Commercial Disputes Committee of the Association of the Bar & of the City of New York, *Lack of Jurisdiction and Forum Non Conveniens As Defenses to the Enforcement of Foreign Arbitral Awards*, 15 Am. Rev. Int'l Arb. 407, 411 (2004).

31. *Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru*, No. 09-3925-CV L, 2011 U.S. App. LEXIS 24748 (2d Cir. Dec. 14, 2011).

32. Charles H. Brower II, *December Surprise: New Second Circuit Ruling on Forum Non Conveniens in Enforcement Proceedings*, Kluwar Arbitration Blog (Jan. 20, 2012), http://kluwerarbitrationblog.com/blog/2012/01/20/december-surprise-new-second-circuit-ruling-on-forum-non-conveniens-in-enforcement-proceedings/.

33. *Id*. (citing Albert Jan van den Berg, The New York Arbitration Convention of 1958 17 (Kluwar Law International 1981)).

34. *Id*.

35. For a description of the history of the manifest disregard doctrine, see John Townsend, *The Rise and Fall of Class Arbitration*, AAA Yearbook on Arbitration & the Law, 23rd Edition, edited by Stephen K. Huber and Ben H. Sheppard, Jr. (Juris Publishing, Inc., 2011); Hiro N. Aragaki, *The Mess of Manifest Disregard*, 119 Yale L.J. Online 1 (2009), http://yalelawjournal.org/2009/09/29/aragaki.html.

36. *Figueiredo Ferraz E Engenharia de Projeto Ltda.*, 2011 U.S. App. LEXIS 24748, at *20 ("With the underlying claim arising (1) from a contract executed in Peru (2) by a corporation then claiming to be a Peruvian domiciliary (3) against an entity that appears to be an instrumentality of the Peruvian government, (4) with respect to work to be done in Peru, the public factor of permitting Peru to apply its cap statute to the disbursement of governmental funds to satisfy the Award tips the FNC balance decisively against the exercise of jurisdiction in the United States.")

37. Albert Jan van den Berg, The New York Arbitration Convention of 1958 18 (Kluwar Law International 1981).

38. See Dublin Convention, Art. 1, http://www.arbitration-icca.org/media/0/12133674097980/hypothetical_draft_convention_ajbrev06.pdf.

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Med-Arb, Arb-Med—A Case Study in Success

By Philip Allen Lacovara

The process of "alternate dispute resolution" includes a range of mechanisms for resolving disputes outside a court room. The two most common mechanisms, mediation and arbitration, are fundamentally different, one looking toward an agreed solution facilitated by a presumably neutral intermediary and the other seeking an imposed determination by a neutral decision-maker.

Concerns About Blurring Roles

One of the most controversial topics in contemporary ADR is whether these two distinct mechanisms can form part of a single process rather than having to be broken into two separate stages. The most important element of the controversy is whether the same "neutral" or "neutrals" can slide from one stage into the other and perhaps back again. The two terms "med-arb" and "arb-med" illustrate the typical sequence in which the issue arises: a mediation that evolves into an arbitration, or an arbitration that morphs into a mediation.

The American Arbitration Association's skepticism is illustrative. The AAA guide to ADR clauses states:

> A clause may provide first for mediation under the AAA's mediation procedures. If the mediation is unsuccessful, the mediator could be authorized to resolve the dispute under the AAA's arbitration rules. This process, is sometimes referred to as "Med-Arb." Except in unusual circumstances, *a procedure whereby the same individual who has been serving as a mediator becomes an arbitrator when the mediation fails is not recommended*, because it could inhibit the candor which should characterize the mediation process and/or it could convey evidence, legal points or settlement positions ex parte, improperly influencing the arbitrator."[1]

On the flip side, there is a similar concern, perhaps even a greater one. For example, the new ICC Arbitration Rules move in the direction of recognizing that even arbitrators have a legitimate role to play in encouraging informal resolution, but the Rules are guarded. In setting out suggested case-management procedures, the Rules say that, in connection with possible "settlement of disputes" the arbitral tribunal may "inform" the parties that they remain free to settle all or any part of the dispute by negotiation, including taking such steps as "mediation under the ICC ADR Rules."[2] The Rules then add:

> where agreed between the parties and the arbitral tribunal, the arbitral tribunal may take steps to facilitate settlement of the dispute, provided that every effort is made to ensure that any subsequent award is enforceable at law.[3]

What is notable about this provision is that it does not say or even imply that, in "facilitating" a possible settlement, the tribunal or any members of the tribunal may play a direct role in the mediation of the parties' negotiations. Indeed, it warns that the tribunal must keep its collective eye on the eventual enforceability of an award, if the efforts to settle the dispute collapse.

The ICC's new ADR Rules provide some additional guidance reflecting the same traditional concerns about blurring the roles of arbitrator and mediator:

> Unless all of the parties agree otherwise in writing, a Neutral shall *not act or have acted* in any judicial, *arbitration* or similar proceedings relating to the dispute *which is or was* the subject of the ADR proceedings, whether as a judge, *as an arbitrator*, as an expert or as a representative or advisor of a party.[4]

This presumptive ban on simultaneous or successive service as both mediator and arbitrator in the same matter reflects the traditional view that the two roles are ordinarily incompatible. As a result, most of the mediators and arbitrators are very reluctant to be drawn into any overlapping involvement, even with the parties' consent, and some adamantly refuse to cross the line. This is unfortunate, because it deprives parties of what may be the most effective resource in resolving their disputes.

In the real world of commercial dispute resolution, business managers and their lawyers are often working in the background to try to resolve disputes in a commercially reasonably way. Especially where there is a continuing business relationship, or at least the prospect of further business dealings, both sides share a common incentive to try to work something out. But many parties and their lawyers simply cannot get to "yes" without enlisting the services of a neutral intermediary.

So, as an alternative to battling it out in court, parties resort to mediation and arbitration. But the central assumption of both of these mechanisms introduces the problems with med-arb and arb-med: in both situations, the process assumes that the ADR actor is disinterested

and "neutral." In arbitrations in particular, this is a rule of law and is enforced by a series of ethics standards and disclosure rules that require a prospective arbitrator to identify and disclose possible relationships with the parties, their counsel, or their dispute; these relationships may render the candidate ineligible to serve. Although the rules for neutrality in mediation are much less formalized, it is standard practice to make similar inquiries into possible "conflicts" and to disclose them to the adverse parties.

The corollary is that, in an arbitration, the arbitrator must protect rigid neutrality by avoiding any *ex parte* communications with a party and must attempt to resolve any issues based solely on formal submissions shared with all parties. Moreover, the arbitrator is expected to filter out any personal reactions to the behavior or personalities of the parties or their lawyers.

By contrast, the essence of the mediation process is that the mediator typically conducts a variety of *ex parte* "break out" sessions with separate parties and their counsel. That process inevitably involves hearing information that the party does not want shared. In addition, it is not uncommon for a mediator to form a clear impression about which party is behaving more reasonably and which is prevaricating or procrastinating. As a matter of natural psychological reaction, these impressions may influence the mediator's approach to bringing the parties toward a resolution, especially when the mediator seeks to push the parties toward an outcome that the mediator personally finds most appropriate.

Thus the problem with med-arb and arb-med: these are two seemingly irreconcilable processes, because it is virtually impossible for a mediator to push a virtual "delete" button in order to wipe out the *ex parte* information and the personal impressions and proclivities and to decide the dispute as an arbitrator solely on the basis of a formal evidentiary record.

Fair and Practical Solutions

Nevertheless, these problems are not insoluble. Contemporary practice and even some current rules encourage flexibility in blending various ADR techniques rather than keeping them hermetically sealed off from one another. Experience has shown that the information and background that a mediator or arbitrator has gleaned from dealing with a dispute can contribute efficiently to resolving the dispute in the opposite role. Thus, the functions of mediator and arbitrator can be viewed as complementary rather than inconsistent.

The key to reconciling the apparent tension between the two roles is informed consent by well-counseled clients. Very few parties are in the business of litigation. Although sometimes there are genuine issues of principle at stake, and in others there may be such intense animosity that no otherwise commercially reasonable compromise is feasible, in most situations the parties to a business dispute are best served by getting a prompt resolution that they believe resulted from a "fair" process, whether a mediation or an arbitration. This allows them to move forward with their lives and to "get back to business." This kind of satisfaction, or at least acquiescence, depends on the degree of trust each party reposes in the fairness and objectivity of the "neutral."

A Case Study of Successful Med-Arb and Arb-Med

Let me illustrate with a matter in which I was involved over the course of five years, which included both med-arb and arb-med and eventually worked out to save the parties money. It allowed them to move forward in pursuing their own commercial interests without the distraction and expense of constant litigation and without the animosity-threatening prospect of a decision that had to choose sides between the contesting parties.

The controversy first came to me in 2006. The dispute involved a falling out between the two leading principals of a multi-billion dollar hedge fund. One of the founders felt constrained to leave and begin a separate fund with a different investment strategy. There was a reservoir of bitterness and mutual recrimination. The departing principal claimed that he was owed tens of millions dollars in capital and in on-going payments. The firm countered that his entitlement was much less. There were also complex issues about intellectual property, solicitation of clients and employees, non-competition arrangements, and so forth. The firm had initiated an arbitration pursuant to a clause in their basic agreement, but both sides decided to try mediation before going too far down the arbitration path.

The mediation employed the standard techniques, including *ex parte* break-outs. By the end of the second day the parties agreed on the essential elements of a settlement. Since the deal covered a dozen different subjects, including releases and descriptions of future relationships, it was not feasible to draft all final documents on site. Instead, the parties included a clause in a "memorandum of understanding" that the settlement was to be considered final and binding even though it was understood that additional papers would have to be prepared.

The MOU anticipated the risk that further disputes about the drafting might cause the entire settlement to unravel. It also sought to counter the risk that the MOU might be considered merely an unenforceable "agreement to agree" because important documents remained to be negotiated and executed. The parties included paragraph acknowledging that, if any disputes arose about the "form

and content" of the documents necessary to "implement" the settlement MOU, any such disputes would be submitted to a "sole arbitrator" to resolve. The parties named me as the standby "sole arbitrator" unless both sides chose to use someone else.

Over the next few months, the lawyers agreed on many of the details of the implementing documents, but reached an impasse on a number of salient issues, so they invoked the stand-by arbitration clause. This led to a formal arbitration, with an evidentiary hearing, generating an award that established what was found to be the appropriate form and content of the additional documents necessary to implement that MOU. The lengthy, "reasoned" award resolved some of the disputes in favor of the departing principal, and others in favor of the firm. The balanced nature of the award, including analysis of each claim and response, may have helped satisfy the parties that their arbitrator acted as an impartial and neutral decision-maker, despite the involvement in the original mediation.

In their drafts of the implementing documents, the parties had included a new arbitration clause, recognizing that compliance with the settlement would extend over five years and could occasion further disputes. They incorporated a clause in the MOU specifying that I was to serve as stand-by arbitrator (unless jointly superseded) and that I would receive periodic reports about implementation of the settlement, including financial statements bearing on the scheduled payments.

For several years, everything operated smoothly. Then in 2010, the train ran off the tracks. Exactly what happened and who was responsible for it were issues to be debated and decided, but the parties were once again at loggerheads over millions of dollars. The former principal invoked the arbitration clause in the settlement documents and submitted a series of demands. The new arbitration required rulings on a variety of motions by both sides. The firm questioned the jurisdiction to resolve certain claims that could affect the interest of absent third-parties. Both sides moved for partial summary disposition on certain issues. In addressing each motion, the various rulings signaled what were considered the relevant legal doctrines and the material factual issues that should guide the parties in preparing their cases.

Several days of evidentiary hearing were set when both sides asked whether I would be willing to try to mediate the pending controversy. Any feasible settlement of the new disputes would have to include the absent third-parties who were not signatories to the original settlement and indeed had formally refused to participate voluntarily in the new arbitration. Thus, whatever the arbitration decided would only finish round one in a wider dispute that otherwise was going to have to move into court to deal with claims against the non-parties.

Transmogrifying the role from arbitrator to mediator could occur only if the parties, on advice of counsel, understood and acknowledged that mediation could bring to the arbitrator/mediator's attention in *ex parte* meetings some information that would not be part of the arbitral process. The parties had to understand that there could be no guarantee that this information and any resulting impressions could be expunged, if the mediation failed and it became necessary to resume the arbitration. All parties had to waive any right to object to any hypothetical award on the ground that it allegedly would have been tainted by such factors. Counsel were to draft an appropriate stipulation and to enlist the absent third-parties and their counsel to join in this mediation process.

The parties (and the non-parties) developed a stipulation with the following material provisions responding to these concerns, which may be useful to counsel in other similar contexts:

> IT IS HEREBY STIPULATED AND AGREED by and between [Clamant] and [Respondent] [and three nonparties] *** (collectively the "Participants") that:
>
> WHEREAS, [Clamant] commenced an arbitration against [[Respondent] before [named arbitrator]. as the sole arbitrator, ***: and
>
> WHEREAS, [Respondent] and [Claimant] proposed to mediate certain disputes among them and [absent third-parties] and requested that [named arbitrator] act as the mediator in such mediation, and agreed that the proposed mediation would occur *** (the "Mediation").
>
> NOW, THEREFORE, in connection with the Mediation:
>
> a. The Participants represent that they have requested that [named arbitrator] mediate certain disputes among them, and that at no time did [named arbitrator] request, encourage or otherwise induce the Participants to either engage in mediation before him, or to select him as mediator for the Mediation.
>
> b. [Respondent] and [Claimant] agree that [named arbitrator] shall continue to serve as the sole arbitrator in the Arbitration should the Mediation fail to fully resolve any disputes among the Participants. Each of the Participants agrees not

to assert and hereby waives any argument in any forum that [named arbitrator], by virtue of his serving as the mediator in the Mediation, is biased, conflicted, unfit or otherwise disqualified to serve as the sole arbitrator in the Arbitration or that any ruling [named arbitrator] may render in the Arbitration is objectionable or otherwise subject to any legal challenge on the grounds that he served as the mediator in the Mediation.

c. The Participants agree that both in anticipation of the Mediation, and during the course thereof, certain *ex parte* communications between any Participant and [named arbitrator] have and will continue to occur. [Respondent] and [Claimant] agree to waive all objections to [named arbitrator] continuing to serve as the arbitrator in the Arbitration as a result of such *ex parte* communications. Each of the Participants agrees not to assert and hereby waives any argument in any forum that [named arbitrator], by virtue of receiving and/or engaging in such *ex parte* communications, has become biased, conflicted, unfit or otherwise disqualified to serve as the sole arbitrator in the Arbitration or that any ruling [named arbitrator] may render in the Arbitration is objectionable or otherwise subject to any legal challenge on the grounds that [named arbitrator] received and/or engaged in any *ex parte* communications with or from any Participant either in anticipation of and/or during the Mediation.

Against this backdrop a mediation session took place with the parties to the arbitration as well as the nonparties who had refused to join in the arbitration. There were three distinct camps, each of which had to be satisfied before any consensual resolution could work. After a hard day of discussions, conducted using the typical techniques of shuttle diplomacy, selective communication, legal analysis, reassurance, professional judgment, and some cajolery, the participants reached a comprehensive settlement. It turned out to be useful that the "mediator" had spent a lot of time in the arbitral proceedings becoming familiar with underlying evidence and controlling case law, because parties to mediations are more comfortable reaching a compromise when they believe that the mediator appreciates the relative "merits" of the dispute.

Not only did the process avoid the need for a further evidentiary hearing and a new award, it also saved all the participants from litigating in court over claims that were not covered by a mutual arbitration agreement. Although only time will tell whether the latest settlement unfolds successfully, the latest memorandum of understanding contains the same kind of backstop provision allowing the parties to come back the same arbitrator/mediator to arbitrate any dispute about the drafting of the implementation documents or about complying with the settlement. It has been several months since the parties inked the MOU.

In this context, no news is good news. With care, informed consent, and realistic expectations, both med-arb and arb-med can fulfill the basic goals of ADR—letting parties get past their disputes without spending years in litigation.

Endnotes

1. American Arbitration Association, *Drafting Dispute Resolution Clauses—A Practical Guide* 38 (2007) (emphasis added).
2. International Chamber of Commerce, *Rules of Arbitration*, App. IV, para. (h)(1) (effective 1 January 2012).
3. *Id.*, para. (h)(2).
4. International Chamber of Commerce *ADR Rules*, Rule 3 (effective 1 January 2012) (emphasis added).

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Med-Arb: Yes or No?

By Louise A. LaMothe

Mediator, Then Arbitrator?

Don't expect a quick answer to that question here; however, in the course of many years of practice as a full-time neutral, I have run across conflicts in which the parties want this solution and have developed some ground rules about using it. There are many permutations of the question, some of which I address here based on my experience.

From the parties' viewpoint, having a single neutral sometime makes sense. Initially at least, lawyers and their clients are more interested in getting the dispute resolved using all of the tools at their disposal. Having a mediator who can also decide any issues that arise later has considerable appeal. It is, of course, far more cost effective for them, since the neutral who understands the case already does not need to be brought up to speed on the issues for decision after mediation.

"How, then, to give the parties and counsel what they want while still preserving a separation between the role of mediator and that of arbitrator?"

On the other hand, most ADR neutrals are understandably wary, because we see the pitfalls that lurk. The problem is that in mediation, we are acting only as facilitators of the parties' settlement discussions. While our style may be evaluative—in that we discuss the likely outcomes if one or more of the issues in the case were presented to a decision maker—we and the parties know that we are not serving in that altogether different role. Moreover, an indispensable tool in our mediation work is the series of private caucuses we hold with each side alone; indeed, we frequently do not even meet in joint session. We tell the parties that we will keep in confidence the information they divulge in those private caucus sessions. Some of this information is admissible evidence, but much more is not and its reliability is untested.

In my experience, it is rare before the mediation session for the parties even to raise the issue that they might wish to have me act as arbitrator after the mediation. Usually, at some point during the session, many or most of the issues either have been solved or I see that they could be if a remaining issue or issues could be dealt with by a decision maker. The parties then express the conviction that it would be best for me to be that decision maker. Frequently, neither lawyer has had an earlier case in which this occurred and neither has thought about the implications of using this device.

I know that it is not entirely possible to forget the private information received in a caucus when deciding an issue that remains after the mediation's conclusion. How, then, to give the parties and counsel what they want while still preserving a separation between the role of mediator and that of arbitrator?

There is little guidance in this area, for the most part. In my experience, when the parties to a mediation request the neutral to rule on issues that remain to be decided after the bulk of the case has settled, the American Arbitration Association requires that the neutral prepare new written disclosures and allow the statutory period (two weeks in California) to elapse before acting in the new capacity.

My first ground rule is: don't initiate this suggestion. Let it come from the parties instead.

Second, get agreement to your service as an arbitrator in writing, drafted by the lawyers and reviewed by you, then signed by the parties themselves. If you are fortunate to have a court reporter handy, as happened to me in an arbitration in which the parties asked me to serve as mediator on the morning of the first day of hearing, all the better. Put the agreement on the record and get the expressed consent of the parties themselves, not just their counsel. (Rule 4.5.6 of the CPR-Georgetown Model Rule for the Lawyer as Third Party Neutral specifically provides for the parties' (not just their lawyers') informed agreement to the process.)

In one recent international case involving claims submitted to escrow for reimbursement after the sale of a business, the parties chose me as their mediator. After a full day mediation session, the parties' representatives were close to settlement on the majority of the claims against the escrow in the case, but three categories of claims were holding up complete agreement. When I suggested settling the issues that could be agreed to, while leaving for an arbitration the remaining issues, the parties seemed interested. Then, one of the lawyers suggested that I serve as arbitrator to decide those three categories of claims. When the other side agreed, they negotiated a procedure for arbitration as well as the content of the evidence to be presented (without oral testimony) to me. They also requested an award that would be enforceable under the New York Convention. That dispute resolution process became part of the parties' settlement agreement signed by the parties' representatives. Later, I received the evidence as agreed and rendered an award. My award referenced the earlier settlement and decided the three categories of claims the parties had submitted to me. The award thus gave a comprehensive and enforceable framework to the entire dispute.

Arbitrator, Then Mediator, Then Arbitrator Again?

No doubt many of us serving as arbitrators have arrived at the hearings only to discover that the parties want to attempt settlement beforehand. Sometimes they wish to do so alone, and I have sat in an empty hearing room, often with the court reporter, waiting to learn if they have been successful. If they are, we put the agreement on the record and my service as their arbitrator is over.

But what about the instance in which the parties want me to shift roles from arbitrator to mediator? Rule R-8 of the American Arbitration Association Commercial Arbitration Rules and Mediation Procedures states: "The mediator shall not be an arbitrator appointed to the case." Is there ever an appropriate instance in which the arbitrator does so anyway?

In an employment arbitration some years ago, when I appeared at the evidentiary hearing, the parties' counsel asked if I would first attempt to settle the case. Since we had a court reporter present to transcribe the hearing, I made a record, first describing the request, confirming that the parties themselves understood and agreed to my serving as a mediator before the hearing started. When all had agreed, I heard opening statements from each party and then mediated the case for several hours in private caucuses. The case settled.

Having been chosen by the parties as their arbitrator in a recent ad hoc arbitration, one week before the evidentiary hearings were set to begin the attorneys asked me to mediate the case before, or at the beginning of, the arbitration hearings. One side suggested that I conduct a mediation, perhaps concluding with a "mediator's proposal" of a settlement number, and only if unsuccessful, go on to hear the evidence and decide the case.

When the suggestion was first made, the other side proposed a different mediation procedure, so I first convened a conference call with the lawyers. After reaching agreement on a procedure, I suggested that the parties file prehearing briefs on the law before the first hearing day as planned, in order to be sure that I had the legal authorities in hand. The lawyers and I agreed that we would reserve one hour at the beginning of the first hearing day for my settlement discussions with the parties. If at the end of that hour, no settlement had been reached, we agreed that we would begin the evidentiary hearings.

Since the hearings in this case will not begin until next week, I cannot report on the outcome. But the experience gives me the third pointer with which I will leave you: design the process with care. Be sure to work through in your own mind the implications for you of wearing two hats. Gather all of the tools you will need to accomplish each of your tasks. Have the parties agree to your roles, have the lawyers agree on a timetable for presentation of legal authorities, and decide how you will conduct both the settlement meetings and the arbitration after, if necessary. The more precision you bring to all of this at the outset, the fewer surprises for you, the parties and their lawyers later.

Ms. LaMothe is a full-time neutral, practicing throughout California. More information about her practice is available at her website, www.dispute-solutions.com.

Hong Kong Appellate Court Upholds Mainland Chinese Arbitral Award Despite Claim of Apparent Bias During "Med-Arb"

By James Hosking and Matthew Draper

In *Gao Haiyan v. Keeneye Holdings Ltd.*,[1] the Hong Kong Court of Appeal enforced a Chinese arbitral award despite allegations that it was tainted by an appearance of bias because the arbitrators had attempted to mediate the parties' dispute during the arbitration. The Court's conclusion that Respondents had waived their right to allege bias by failing to have done so during the arbitration is, perhaps, not that surprising. The Court's alternative holding, however, that an enforcement court should look to local practices at the seat of the arbitration—in this case, mainland Chinese "med-arb" practices—to inform its analysis as to whether enforcing the award would violate the enforcing forum's public policy, is more controversial. The case also highlights the potential for cross-cultural differences arising in the practice of "med-arb"[2] and raises important questions about how those differences can play out in the international context.

Factual Background

While the background is "complicated and murky,"[3] it is clear that in July and August 2008, Gao Heiyan and his wife, Xie Heping ("Applicants"), signed Share Transfer Agreements ("STAs") assigning their indirect interest in a Chinese mining joint venture to Keeneye Holdings Ltd. and New Purple Golden Resources Development Ltd. ("Respondents"). The STAs provided that disputes would be resolved in arbitration under the auspices of the Xi'an Arbitration Commission ("XAC").

Respondents initiated arbitration to enforce the STAs. Applicants counterclaimed that the STAs were void for misrepresentation and duress. An arbitration hearing was held in December 2009, at which the tribunal suggested mediation. The parties agreed. Following the hearing, the tribunal apparently decided amongst themselves to suggest that the parties settle the case by Respondents paying Applicants RMB 250 million. The tribunal enlisted the XAC's Secretary General Pan Junxin to assist them in settling the case. Pan communicated to Applicants the tribunal's suggestion. Pan obtained from Respondents' lawyer the telephone number of a Zeng Wei, a shareholder of Respondents. Pan and Zhou Jian, the Applicants' party-appointed arbitrator, invited Zeng to dinner at the Xi'an Shangri La Hotel. At the dinner, Pan apparently told Zeng that the tribunal had decided on a "result" that the STAs were valid but that Respondents should pay RMB 250 million to the Applicants. Pan and Zhou asked Zeng "to work on" the Respondents to reach settlement with Applicants on these terms.

Respondents subsequently refused to settle the case on the proposed terms. A second arbitration hearing was held, at which Respondents made no complaint about the conduct of Pan or Zhou. In June 2010, the tribunal issued an award finding the STAs not valid and made a non-binding recommendation that the Applicants pay Respondents RMB 50 million. Respondents then challenged the award in the Xi'an Intermediate People's Court of Shaanxi (the "Xi'an Court"), the court with supervisory jurisdiction. Respondents alleged that Pan had pressured the Tribunal to reverse its conclusion that the STAs were valid, and that the Tribunal had shown "favouratism and malpractice." The Xi'an Court rejected these arguments, finding that the events at the Shangri La Hotel amounted to a mediation permitted under the XAC arbitration rules ("XAC Rules"),[4] and enforced the award.

Hong Kong Court of First Instance ("CFI") Denies Enforcement of the Award

The Applicants subsequently sought to have the award enforced in Hong Kong. On April 12, 2011, the CFI refused to enforce the award on the basis that such would be contrary to Hong Kong public policy as the award was "tainted by an appearance of bias."[5] It found that the failed mediation showed apparent bias on the part of the Tribunal because "the impression conveyed, rightly or wrongly, is that Pan and Zhou were acting on their own on an initiative which favoured Applicants."[6] While it was true that the parties had agreed to mediation, the court stated:

> labeling a process as mediation does not mean that anything goes…. The would-be mediator must ensure at all times, especially when one might act as arbitrator later on, that nothing is said or done in the mediation which could convey an impression of bias.[7]

The CFI premised its finding of "apparent bias" on, among others, the following factors: (1) the setting of the *ex parte* "mediation"—an expensive hotel restaurant—was inappropriate; (2) the RMB 250 million settlement proposal seemed to favor Applicants because it was made on the mediators' own initiative and was far larger than previously discussed settlement amounts; (3) the arbitrators involved third parties like Pan and Zheng, rather than going directly to the parties or their counsel; (4) the final arbitral award reversed the settlement proposal and

declined to enforce the STAs; and (5) the award favored the Applicants.[8]

In reaching this conclusion, the CFI rejected two arguments by Applicants. First, it found that Respondents had not waived their right to allege bias at the enforcement stage by failing to do so during the arbitration. The CFI found Respondents were excused from raising the allegation earlier because, "if the Arbitration Tribunal were actually biased, their complaint would be rejected and they would lose everything."[9] Further, the CFI noted that under the XAC Rules, Pan, the XAC Secretary General, may have been the one to decide whether the Tribunal was biased.[10]

Second, the CFI found that it was not prohibited from undertaking its public policy analysis even though the Xi'an Court rejected Respondents' bias arguments in the course of confirming the Award. "That does not prevent the Hong Kong Court from considering the question of bias from the viewpoint of Hong Kong public policy. This is because Hong Kong public policy may well be different from public policy in Xi'an."[11]

Hong Kong Court of Appeal Overturns CFI and Enforces Award

Applicants appealed the CFI's ruling and, on December 2, 2011, the Court of Appeal reversed. It found that Respondents had waived their right to object to the conduct of the mediation at the enforcement stage because they failed to object during the arbitration. The Court noted that the XAC Rules explicitly provide for waiver when a party fails to object to procedural irregularities during the arbitration.[12]

The Court held in the alternative that there was no actual or apparent bias on the part of the Tribunal. The Court noted that in Hong Kong an award will not be enforced if it "would be contrary to the fundamental conceptions of morality and justice of [Hong Kong]."[13] It added that "a determination by an impartial and independent Tribunal which is not influenced, or seen to be influenced, by private communications are basic to notions of justice and morality in Hong Kong."[14]

The Court found, however, that the Xi'an Court was "in a much better position to ascertain the facts and to decide whether those facts established a case of actual or apparent bias,"[15] adding that, "[s]uch a finding, though not binding, is entitled to serious consideration by our court."[16] The Court found that the CFI "should have given more weight to the decision of the Xian Court,"[17] in its consideration of whether the conduct of the "mediation" demonstrated bias in violation of Hong Kong public policy:

> although one might share the learned Judge's unease about the way in which the mediation was conducted because mediation is normally conducted differently in Hong Kong, whether that would give rise to an apprehension of bias, may depend also on an understanding of how mediation is normally conducted in the place where it is conducted. In this context, I believe due weight must be given to the Xian Court refusing to set aside the Award.[18]

The Court reasoned that the public policy exception to enforcement "does not mean, for example, if it is common for mediation to be conducted over dinner at a hotel in Xian, an award would not be enforced in Hong Kong, because, in Hong Kong, such conduct, might give rise to an appearance of apparent bias."[19]

Court of Appeal's Surprising Approach to a Public Policy Analysis

Article V(2)(b) of the New York Convention[20] provides: "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that…[t]he recognition or enforcement of the award *would be contrary to the public policy of that country*" (emphasis added). Most jurisdictions interpret Article V(2)(b) to mean that only the enforcement forum's public policy is relevant.[21] The Court of Appeal's consideration of, and marked deference to, mainland Chinese notions of what constitutes apparent bias is therefore surprising.

The Court of Appeal cited to the English High Court decision in *Minmetals Germany GmbH v. Ferco Steel Limited*[22] for the proposition that "any suggestion that under the guise of allegations of substantial injustice procedural defects in the conduct of an arbitration which have already been considered by the supervisory court should be reinvestigated by the English courts on an enforcement application is to be most strongly deprecated."[23] The *Minmetals* court's deference to the supervisory court's recognition of the award was due in part to "the great weight be attached to the policy of sustaining the finality of the determination of properly referred procedural issues by the courts of the supervisory jurisdiction."[24]

However, reliance on the reasoning in *Minmetals* seems misplaced for two reasons. First, the court in *Minmetals* in fact reviewed the underlying facts presented to the supervisory court and independently concluded that "the application to the Beijing court to revoke the second award appears to have been bound to fail."[25] Second, in *Minmetals,* the Chinese and English public policy concerns under analysis appear to have been identical.[26] But in *Keeneye*, the Xi'an Court had obviously not considered Hong Kong's public policy and, as the CFI concluded, "Hong Kong public policy may well be different from public policy in Xian."[27] While the Court of Appeal appropriately considered the Xi'an Court's factual conclu-

sions and determinations of Chinese law, deferring to its analysis when considering Hong Kong public policy goes farther than courts are generally willing to go in most New York Convention jurisdictions.[28]

What Does the Decision Mean for Med-Arb?

The risks and potential benefits of med-arb have been covered in depth elsewhere.[29] Some jurisdictions have legislated to provide procedural safeguards to mitigate the complexities associated with med-arb. For example, Hong Kong's recent amendment to its arbitration ordinance explicitly recognizes the use of med-arb and possibility of *ex parte* communications during the mediation, but provides that if the mediation is unsuccessful, the arbitrator must disclose any confidential communications if material to the arbitration proceeding.[30] Arbitral institutions, the XAC among them, have also provided med-arb guidelines in their rules.[31]

In *Keeneye*, the CFI judge was careful to state that there was nothing inherently wrong with the med-arb process[32] but he then went on to note the "self-evident difficulties" that create a risk of a "mediator turned arbitrator appearing to be biased."[33] Most importantly, the CFI was concerned with the mediator's need for unilateral dealings with the parties in which he could learn confidential information that might affect the outcome of the arbitration if the mediation failed.[34] U.S. courts, while not prohibiting med-arb, have also expressed the same concerns and emphasized the need to "agree to certain ground rules at the outset."[35] This heightened sensitivity to perceptions of bias clearly influenced the outcome in the CFI Decision.

The Court of Appeal, while expressing some "unease" about the way in which the mediation was conducted, proceeded on the basis that it was a "mediation" for purposes of the XAC Rules and, as discussed above, was more willing to consider the Xi'an Court's interpretation of the probity of the conduct surrounding the mediation. In this respect, one could argue that in the specific context of alleged "apparent bias" and its necessary focus on how the reasonable person may view the allegations, it might be appropriate to look to the cultural norms prevalent at the seat of arbitration (and in this case mediation). This appears to be the Court of Appeal's point in stating that whether the conduct of the mediation "would give rise to an apprehension of apparent bias, may depend also an understanding of how mediation is normally conducted in the place where it was conducted."[36] Faced with the possibility of conflicting cultural perspectives on the mechanics of med-arb, perhaps the Hong Kong Court of Appeal's hybrid approach of considering Hong Kong public policy through the lens of mainland Chinese business custom is a useful compromise. On the other hand, it is a bold departure from the traditional approach to an enforcing court's public policy analysis.

Given the unusual facts surrounding the failed "mediation," it is unclear what weight the *Keeneye* decision will have in subsequent cases involving med-arb—either in Hong Kong or in other (particularly UNCITRAL Model Law) jurisdictions. Indeed, the CFI judge expressed "serious reservations" that the meeting at the Shangri La Hotel constituted a "mediation" at all.[37] But if nothing else, the *Keeneye* decision is a timely warning that users of med-arb must pay careful attention to its mechanics and to recording the parties' consent thereto, so as to minimize any appearance of bias. This issue is all the more important where the award may be subject to scrutiny by a foreign enforcement court in a jurisdiction in which attitudes to hybrid dispute resolution may be different. The parties to a med-arb cannot count on other courts displaying the same degree of cultural forbearance as that evinced by the Hong Kong Court of Appeal in the *Keeneye* decision.

Endnotes

1. *Gao Haiyan and another v. Keeneye Holdings Ltd. and another*, CACV 79/2011, High Court of the Hong Kong Special Administrative Region Court of Appeal, Hon Tang VP, FOK JA and Sakhrani J (December 2, 2011) ("Court of Appeal Decision").
2. The term "med-arb" is used here to encompass any of the variations on proceedings in which a decision-maker acts as both mediator and arbitrator, regardless of how he or she is first appointed. In this case, the arbitrators were appointed and sat as arbitrators before one of them acted as a mediator and then subsequently reverted to being an arbitrator.
3. Court of Appeal Decision, ¶ 7.
4. The XAC Rules provide that if the parties agree, the tribunal may "conduct mediation at any time before the rendering of an award" (Art. 36) and such mediation "may be conducted by the arbitral tribunal or the presiding arbitrator…[or w]ith the approval of the parties, any third party may be invited to assist the mediation, or they may act as mediator" (Art. 37).
5. *Gao Haiyan and another v. Keeneye Holdings Ltd. and another*, [2011] 3HKC 157, High Court of the Hong Kong Special Administrative Region, Court of First Instance, Reyes J. (April 12, 2011) "CFI Decision"), ¶ 99. The CFI Decision arose from Respondents' application to set aside an *ex parte* order of enforcement from August 2, 2010.
6. CFI Decision at ¶ 63.
7. *Id.*, ¶ 79.
8. *Id.*, ¶¶ 52-80.
9. *Id.*, ¶ 87.
10. *Id.*, ¶ 88.
11. *Id.*, ¶ 96.
12. Court of Appeal Decision at ¶¶ 52-55.
13. *Id.*, ¶ 105.
14. *Id.*, ¶ 109.
15. *Id.*, ¶ 64.
16. *Id.*
17. *Id.*, ¶ 68.
18. *Id.*, ¶ 102.
19. *Id.*, ¶ 105.
20. The New York Convention, or The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), provides for the enforcement of foreign arbitral awards in 146 countries. The

Hong Kong Arbitration Ordinance preserves the public policy exception to enforcement of mainland Chinese arbitral awards. Cap. 609 of the Laws of Hong Kong, Section 95(3)(b).

21. International Law Association, Committee on International Commercial Arbitration, Interim Report on Public Policy as a Bar to Enforcement of International Arbitration Awards, p. 30 (2000) *reprinted in*, 19 Arb. Int'l 217, 243 (2003) (noting that France and Germany do not recognize violations of foreign rules of law or policy).
22. [1999] 1 All ER (Comm) p. 315 *et seq*. in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration 1999 - Volume XXIVa*, (Kluwer Law International 1999) at p. 749
23. Court of Appeal Decision at 22-23, *quoting Minmetals* at 661.
24. *Id.*
25. *Minmetals Germany GmbH v. Ferco Steel Limited*, [1999] 1 All ER (Comm) p. 315 *et seq*.
26. In both cases, the party resisting enforcement argued it had been denied its right to present its case. But both the Chinese and English courts agreed that the party had waived its right to make such an objection because it had been provided the opportunity to present its case, but failed to do so. *Id*., at pp. 749-750.
27. CFI Decision at ¶ 96.
28. However, the New York Convention does not *require* a court to deny enforcement of a foreign arbitral award that violates its public policy. *See* Article V (enforcement "may be refused….").
29. *See*, *e.g*., Sophie Nappert & Dieter Flader, "Psychological Perspective on the Facilitation of Settlement in International Arbitration—Examining the CEDR Rules," 2(2) *J. Int'l Disp. Settlement* 459 (2011); Edna Sussman, "Combinations and Permutations of Arbitration and Mediation: Issues and Solutions," in Arnold Ingen-Housz (ed.), *ADR in Business* (Kluwer, 2011); Tai-Heng Cheng, "Reflections on Culture in Med-Arb," in Arthur Rovine (ed.), *Contemporary issues in International Arbitration and Mediation: The Fordham Papers 2009* (Martinus Nijhoff, 2010); Gabrielle Kaufmann-Kohler, "When Arbitrators Facilitate Settlement: Towards a Transnational Standard," 25(2) *Arbitration International* 187 (2009); Beijing Arbitration Commission, "East Meets West: An International Dialogue on Mediation and Med-Arb in the United States and China," 9 *Pepp. Disp. Resol. L.J*. 379 (2009); Tai-Heng Cheng & Anthony Kohtio, "Some Limits to Applying Chinese Med-Arb Internationally," 1(2) *N.Y. Disp. Resol. Law.* 95 (2009); and Gabrielle Kaufmann-Kohler & Fan Kun, "Integrating Mediation into Arbitration: Why It Works in China," 25(4) *J. Int'l Arbitration* (2008).
30. See section 33 of the Arbitration Ordinance (Or. No. 17 of 2010).
31. See also, for example, the joint med-arb rules of the Singapore Mediation Centre and Singapore International Arbitration Centre. Available at http://www.mediation.com.sg/Med-Arb_The_SMC_SIAC_Procedure.htm.
32. CFI Decision at ¶ 71.
33. CFI Decision at ¶ 72.
34. CFI Decision at ¶¶ 73-76.
35. *Bowden v. Weickert*, No. S-02-017, 2003 WL 21419175, at *6 (Ohio App. 6 Dist., June 20, 2003) (unreported) (vacating an award in which the arbitrator had relied on information obtained in his role as mediator without the parties' consent). *See also Society of Lloyd's v. Moore*, No. 1:06-CV-286, 2006 WL 3167735 (S.D. Ohio, Nov. 1, 2006) (applying the presumption of confidentiality to communications during a med-arb).
36. Court of Appeal Decision at ¶ 102.
37. CFI Decision at ¶ 40.

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Exploring Key Elements for Mediation Training and Certification—An Interview with Heather Allen

By Laura A. Kaster and Heather Allen

Q Heather, as you know, last summer I participated in the Center for Effective Dispute Resolution's (CEDR) first United States advanced course granting CEDR Accreditation. It occurred to me that many mediators in the U.S. might be interested to know about the origins of CEDR, the nature of its training generally, and how it has impacted mediation in the UK and Europe.

A CEDR is a not-for-profit organization founded in 1990 in London, UK. CEDR has always had three strands to its work based on the need to forward a high regard for mediation:

- Raising awareness of mediation and other ADR processes (in 1990 mediation was known only in family and community contexts) with government, commerce, the judiciary, the press, lawyers and other professionals. In recent years CEDR has also gained a reputation for effective consultancy in establishing mediation centers, in partnership with local professionals, in jurisdictions where mediation is new.
- Provision of mediation and other ADR services to a high standard.
- Training and accreditation of mediators. In the early years the training was developed with the support of U.S. practitioners such as Eric Greene.

CEDR is now recognized by the government and the judiciary as the leading organization in this field in the UK and has been integral to the civil justice reforms in England and Wales over the last 15 years, and closely involved in the European consultations on the EU Mediation Directive. CEDR has grown to be the largest organization of its kind in Europe and one of the largest in the world; it has now accredited mediators in more than 50 countries, running training courses across Europe from Portugal to the Ukraine, and around the world; in Africa, including Nigeria, South Africa and Uganda; in Egypt and the Gulf States; in Asia, including Hong Kong, India, Pakistan; and, in 2011, even in the USA.

Q Here in the U.S., we are a bit reluctant to establish a certification program and in fact the NYSBA Dispute Resolution Section wrote a report last year deferring any effort to single out a specific program although many court panels and organizations require mediation training of a specified number of hours and sometimes experience. One of the issues is that there are many forms of mediation—transformative, understanding-based, caucus, non-caucus, and I think there has been some feeling that we should let 1,000 flowers bloom. But the ADR community is also concerned that inadequate mediation services may decrease mediation's appeal. For that reason, I wanted to explore with you how you went about determining key elements of mediation training and accreditation?

A CEDR's approach to mediation training and accreditation is that it should be practice driven and performance assessed on the basis of a practical demonstration of competence by the candidate. We identified core competencies on which delegates are trained and tested individually by trained faculty. The CEDR mediator training Faculty is made up of about 30 current mediation practitioners from a wide range of disciplines, although the legal profession is particularly well represented. We use a basic framework focusing on the safety (confidence that nothing discussed in caucus will be disclosed without consent) that can be adapted to suit different business, professional, judicial and national cultures.

Q What were the key criteria that you determined make a "trained" mediator?

A We assess participants against a set of competencies related to the ability to build and maintain good *relationships* with all parties, the delivery of a well–judged and well-managed *process* that is moving the discussion forward, and the ability to work effectively with the *content* of the dispute, creating momentum and enabling progress towards a workable resolution. CEDR also tests understanding of the settlement drafting process and the capacity for self-awareness and self-assessment as the basis for reflective practice as a mediator. Each participant has an individual coaching session and two individual evaluations by the trainers during the course of the training.

Q How did you assure some measure of uniformity to the training and the evaluation of the student-mediators?

A The CEDR Faculty team is selected and trained before full participation as coaches and assessors. All members of the team, however experienced, are shadowed by others at intervals throughout the year, and re-

ceive feedback on their coaching and assessment practice, to ensure consistency in applying the competencies and quality assurance of the feedback provided to course participants. All assessed sessions are recorded on DVD with the agreement of the participants, and there is a robust, advertised appeals procedure available if needed. On all coaching and assessment days course participants are invited to provide anonymous feedback on the coaching and feedback they receive from named members of Faculty who worked with them or assessed them. Each member of Faculty is sent copies of these feedback sheets for information and to encourage self-development. These forms are all reviewed by the Head of Faculty at least annually to identify any training and development needs for individuals and/or for the team.

CEDR Faculty meets as a team four times a year for planning and training purposes, and smaller teams for specific courses or projects will meet more regularly. One of these occasions is always dedicated to reviewing our approach as a team to coaching and assessment, and on another occasion an external trainer is engaged to design an event to extend the team as trainers or as mediators. The members of Faculty are often thanked for their generosity in offering in-depth experience and techniques to the course participants. Members of the Faculty say that, along with bringing their mediation experience to the training, they take useful reflections and insights from the training, coaching and assessing, which enhance their mediator practice.

The content of the teaching is reviewed regularly by lead members and the Head of Faculty and the Director of Training who oversees the whole program.

Participants are always assessed by two different assessors on different occasions, neither of whom will have been their designated coach earlier in the course.

Q What has been the reception of CEDR Accredited mediators and has the performance of CEDR Accredited mediators enhanced the receptivity to mediation in the countries where they practice?

A We believe that the availability of a recognized accreditation has improved acceptance of commercial mediation in the marketplace. In the UK, there are now more than 100 ADR service providers and the number of mediations grows year on year. In addition, CEDR has developed teams of local mediation trainers in several jurisdictions as a way of promoting mediation. We are regularly invited back to run further courses and events in countries around the world, indicating the high regard with which CEDR and its practitioner Faculty are held. Even established mediators have seen value in the accreditation.

Q How many hours of training do you believe are minimally necessary and how many each year?

A Participants in the course bring with them experience and skills from other areas of their lives and work, and the training seeks to help them to adapt these and integrate them into a new process as well as enhancing those existing and adding some new skills. The basic training, which leads to accreditation if the candidate reaches the required standard of performance during the observed/assessed sessions, is generally based on preparation for the course of about three days' study plus another day to prepare for role-plays (say, 24 hours); the course is 42 hours, without counting any breaks, and the post-course assignments are completed on average in a day (6-8 hours); so, a total of about 60 hours, although it is the outcomes and the performance that are assessed. We regard accreditation as a starting point for effective practice and offer advanced training as well as opportunities for assistantships. In addition, four forums are held each year where accredited mediators meet to discuss topics of importance to the field. They also have access to the resources on the CEDR website (www.cedr.com).

CEDR does not specify a particular number of hours a year for continuing education (it used to specify 16), but feedback and selection for panels encourages ongoing education.

Q Do you have any further thoughts that you would like to share with our colleagues in the ADR community?

A Mediation is sometimes seen, especially by those who have little or no experience of the process, as being easy or soft; the reality is very different. One of the major barriers to correcting misconceptions, to raising the profile of mediation and to getting its successes recognized, is the very confidentiality that makes the process work so well. The better experience the public has with mediation, the more it will thrive. Certification is one way to assure that the profession will be highly regarded.

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Heather Allen is Head of the CEDR mediator training Faculty and trains mediators in the UK and internationally. In 2012 she is training mediators in Egypt, Lebanon and Hungary. Heather has been a commercial mediator in the UK since 1995 and she covers a wide range of cases from commercial contract to property, employment and inheritance claims.

What's In It for Me? Mediator Certification and the Laws of Supply and Demand

By Irena Vanenkova

In my role as Executive Director of the International Mediation Institute (IMI),[1] I interact with many users of mediation services and with many mediators. I have found that each will have a rather different set of interests with regard to some aspects of mediation.

Nothing illustrates the diversity of perspectives more than comparing the three most frequent observations and questions I hear from the demand and supply sides of the mediation field on the subject of mediation certification. Users say:

> *Certification can help us address the main problem—getting the other party to the table,*
>
> *Certification is a good platform for finding the right mediator for all the parties, and*
>
> *Transparency on skills and practices needs to be a central feature of any certification.*

The three most common questions I hear from mediators are the following:

> *How can the competency of mediators possibly be certified?*
>
> *Why do I need to become certified—what's in it for me/will I get more work? and*
>
> *How do I become certified?*

I will address all six, but first I must declare an interest of my own.

Mission of the International Mediation Institute

IMI is the only global body certifying competency of mediators. It is a user-driven public interest initiative that convenes users and providers—and is open to all. Although the Board of IMI reflects a balance between the demand[2] and supply[3] sides of the mediation field, the Chair of IMI is always chosen from the demand side. IMI is set up as a charitable foundation funded entirely by donations and provides no services in the marketplace. Although IMI has office accommodation, the true home of IMI is in cyberspace at IMImediation.org.

The Vision of IMI is: *Professional Mediation Worldwide: Promoting Consensus & Access to Justice.* Its Mission is also brief: *IMI will achieve its Vision by setting high competency and ethical standards, convening stakeholders and parties, promoting understanding and adoption of mediation, and disseminating skills for parties, counsel and mediators.*

A key driver of the Mission of IMI is therefore setting and certifying high, transparent practice standards so that mediation becomes more of a profession than just a field.

To implement its Mission, IMI established an Independent Standards Commission (ISC)[4] drawn from all mediation stakeholder groups—mediators, providers, users, counsel and other advisers, trainers, educators, and adjudicators. The ISC develops the quality standards that are approved by the Board. The standards have been devised to be applicable everywhere, at a high level and in all practice fields and styles of mediation.

Providing guidance and advice to the Board and ISC is an Advisory Council comprising visionaries in the international dispute resolution field.[5]

So as my role entails assisting in the development of the standards and the certifying system established by IMI, I declare a vested interest in promoting mediator certification, but I will nonetheless try to give an honest and balanced appraisal of what I have learned in this field in the five years since IMI embarked on its Mission.

The User Perspective

Certification can help us address the main problem—getting the other party to the table

Mediators see the cases that come to mediation. They rarely see those that don't. Many users tell me that the main problem for them is how to get the other party to the table in the right frame of mind. Michael McIlwrath, Associate General Counsel-Litigation for GE Oil & Gas, is a member of the IMI Board. The best I can do is to quote him:

> For every case in which I propose mediation to the other side, perhaps one in twenty, maybe fewer, will actually get to mediation. Why? For a variety of reasons, including outright rejection by the other side's lawyer, excuses like "the time is not right," suspicion of a fishing expedition, fear of incurring more cost, and lack of familiarity with mediation. But a key reason for rejection is lack of confidence in the independent professionalism of mediators and the sense that it is difficult to find a suitable mediator. A uniform international system for certifying competency of mediators is sorely needed.

The main area for growth of mediation is where parties voluntarily agree to mediate, whether they have a dispute or a deal to settle. But even in appointing mediators to court rosters, it would be helpful to have a uniform method for determining a high minimum level of mediation competency.

Users make another important point about certification. When they suggest a mediator to the other party, the recommendation may be rejected merely because the other side made the suggestion, perhaps fearing some prior connection. But if the suggested mediator is certified by an independent international professional body and his/her Profile can be viewed openly online alongside many others who are also professionally recognised, the proposal is much more likely to be viewed as an objective choice. And if the other side does not approve the suggestion, they have many other certified mediators to consider.

Certification is a good platform for finding the right mediator for all the parties

When parties decide to mediate, they typically find mediators in a haphazard way. The most likely selection methods are:

- Ask a lawyer or other professional for a recommendation.
- Input "mediator" + place + field (e.g., family or commercial) into a search engine.
- Consult a directory, or a Hall of Fame listing.
- Go to a mediation provider organization and use its roster.
- Rely on mediators' websites, their self-generated PR, and their reputation.

Even combining all five of these methods is sub-optimal because reliance is not placed on factual information. Gossip, hearsay and innuendo are especially unreliable. Even when mediators get selected, they rarely know for sure what factors really influenced their being chosen. More significantly, they never get to know why they were not selected, or even that they were on a short list and did not get chosen.

Users find guesswork difficult and frustrating. Many delegate the choice to legal or other advisers because there is little or no coherent, objective, information-based reference point on competency, no objective standard they can rely upon, and limited factual evidence to aid their selection. One user told me: *It's like driving in fog.*

Certification levels the playing field for users. The two most important considerations for users are competency and suitability. On competency, the user wants to be able to trust the professional abilities of mediators without even meeting them. On suitability, the user wants to know that the mediator's personality and approach feel right for the case in question. A Certified Mediator's Profile that includes a Feedback Digest prepared by an independent and trustworthy source as an attestation of competency addresses both competency and suitability aspects and increases the likelihood that all the parties will buy into the selection—whether the mediator in question was proposed by themselves, or by the other party or by a referrer, like a judge or arbitrator.

Transparency of skills and practices needs to be a central feature of any certification

As mediation is practiced behind closed doors in confidential environments, the individual abilities and characteristics of those practicing as mediators are hard, often impossible, for users to assess in advance. To select a mediator without guesswork or blind faith requires access to objective information. However, most of the information that is available is subjective, limited and cherry-picked. Users find this lacks credibility.

Mediators should focus on increasing the credibility of information about themselves. One answer is party feedback that surfaces practice skills and competency—but for credibility purposes it needs to be summarised by an independent and trustworthy source and presented in a digestible format (not a stack of feedback forms). Feedback Digests constitute the most credible marketing a mediator could ever dream of having.

The Mediator Perspective

How can the competency of mediators possibly be certified?

Some mediators say that mediation is a purely subjective art form that cannot be certified. But actors and musicians are certified by their schools, are celebrated by awards, and we have all assessed the skills of Bob Dylan and Meryl Streep. Unlike mediators, artists perform under public scrutiny.

Webster's defines *certify* as an *authoritative attestation*. Many mediation training programs employ assessors whose job is to *authoritatively attest* the skills acquired by trainees, often deciding whether to grant a formal accreditation or certification. Most users, especially seasoned legal professionals who represent or accompany clients in mediations, feel perfectly capable of assessing whether mediators are skilled in their work. Managers regularly assess professional subordinates during annual performance appraisals. Mediators cannot escape scrutiny and certification by claiming to be *artists*.

Studies dating from the mid-90s[6] show how mediators' performance can be evaluated. Several local and national certifying bodies use those methodologies. For example, mediators certified by the Netherlands Mediation Institute[7] have undertaken an ISO assessment.

It is possible to authoritatively attest and certify mediator competency. We just need to approach the task objectively and methodically—and set the bar high rather than low.

Why should I become certified? What's in it for me? Will I get more referrals?

Some mediators say they have captive networks and more referrals than they can handle, so why should they bother with certification? Some mediators refuse certification as a matter of principle unless it can be statistically associated with increased or higher quality referrals. The best answer to such mercenary, negative and often knee-jerk reactions to mediator certification is five positives:

First, established mediators, those with more work than they can manage, carry a professional responsibility to uphold and advance the standards of the field within which they are practicing for the benefit of future users and the practitioners following behind. Being certified at a high and transparent practice standard sets a vital aspirational example for others. This upholds both professional standards and user expectations.

Second, mediators may hear that a certain person or organisation recommended them, but they usually do not learn what sources were used to check out that recommendation. They may believe that their website did the trick. But no sound is ever louder than when someone else toots your horn. The echo of the Feedback Digest carries a long way.

Third, although competency as a mediator is critical to user selection, it is not the only factor determining choice. As already mentioned, a mediator's suitability in terms of style, non-mediation skills and other characteristics is also important. Feedback Digests help users on suitability as well as competency. IMI Certification assumes competency, and IMI Certified Mediator Profiles are often used for suitability analyses.

Fourth, a non-service-providing body like IMI can get its search engine into places that provider rosters cannot reach. For example, the IMI Certified Mediator search engine is the only mediator listing embedded in the Kluwer Corporate Counsel Online Mediation Service.[8]

Finally, yes, certification does bring in work. I know international organisations that will now only consider appointing IMI Certified mediators, because the thing that they regard as critical is the Feedback Digest embedded in every IMI Certified Mediator's Profile. As IMI Certification gains wider recognition among users, this trend is sure to increase. Mediators see the referrals they get, not those they don't. In many cases, mediators may never know that the users selected them through their certification listing.

How do I become certified?

There are various certification schemes for mediators in different parts of the world. I will describe the only one that is actually global, which is the IMI Certification scheme.

IMI sets standards. The task of actually qualifying mediators for IMI Certification is carried out by independent service providers, trainers, and educational and professional institutions that have prepared Qualifying Assessment Programs (QAPs) approved by the IMI Independent Standards Commission (ISC). The ISC has established a set of 7 Criteria[9] for QAPs designed to qualify mediators for IMI Certification. They relate to experience, knowledge, skills, transparency, program integrity, monitoring and commitment to diversity. All QAPs are required to have methodologies for assessing experience, knowledge and skills and these must be approved by the ISC. At the time of this writing (April 2012) 19 institutions based in 14 countries have approved QAPs, and their details are all viewable on the IMI portal.[10] Although individual methodologies may vary from one QAP to another, the ISC ensures that all meet a high minimum standard.

To become IMI Certified, a mediator merely needs to be qualified by one of the QAPs.

After being qualified for IMI Certification through a QAP, each mediator constructs a Profile for inclusion on the IMI portal's *Find The Right Mediator* search engine. IMI has created a format for mediator Profiles, designed to help users find the information they need, compile easy shortlists and make quick comparisons. There are six obligatory and six optional sections. One of the obligatory sections is a statement of which Code of Conduct binds the mediator, and which disciplinary process applies. IMI has a default Code of Conduct and disciplinary process that any IMI Certified Mediator may select.

Another obligatory section is the Feedback Digest. Mediators appoint an independent person or institution to act as their "Reviewer," whose role is to summarise feedback that the mediator requests from parties using a Feedback Request Form. The Reviewer implements IMI Guidelines to prepare a summary of those feedbacks and uploads it via the IMI portal onto a section of the mediator's Profile that is reserved for the Reviewer.

IMI Certified Mediators increasingly use the dedicated IMI Certified Mediator logo and link to their IMI Certified Mediator Profile directly from their own websites.

Conclusions

Mediation is an emerging profession. Over the 36 years since the 1976 Pound Conference, modern mediation has developed mainly as a supply-side practice. There are few standards, and none that are globally ap-

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plicable. Anyone has been able to hang out a shingle and proclaim to be a mediator, whether having extensive experience or none at all. Exaggerated claims can be made about knowledge, skills and experience without anyone being able to prove otherwise. Streetwise users know this.

Having reached a critical point in its development, with many outstanding mediators, but also many with inferior skills, mediation is undergoing an inevitable change process in the direction of professionalization. This is an almost worldwide phenomenon, and it is driven by user demand.

The rules of engagement are no longer confined to those established by mediators for mediators. The new rulebook is the one being written by users for their purposes. Users are now more discerning. They want better quality, more credible information. They want greater transparency. Many want to exert more control over mediator selection. This trend is very likely to increase.

It is time for mediators to reconsider the issue of certification, and to appreciate the considerable upsides. An intelligently implemented certification scheme can address both demand and supply needs and interests and drive growth into mediation as an independent profession.

Endnotes

1. www.IMImediation.org.
2. General Electric Company, Northrop Grumman Corp., Shell International and Nestlé.
3. AAA/ICDR, the International Chamber of Commerce– ICC, Singapore Mediation Centre, Singapore International Arbitration Centre, Bahrain Chamber for Dispute Resolution and the Netherlands Mediation Institute.
4. http://imimediation.org/imi-independent-standards-commission.
5. Lord Woolf of Barnes, William Ury, Minister Aleš Zalar, William Slate III, Sheikha Haya Rashed Al-Khalifa, and Professor Tommy Koh (http://imimediation.org/imi-advisory-council).
6. Performance-Based Assessment—a methodology for use in selecting, training and evaluating mediators, National Institute for Dispute Resolution 1995 by Chris Honeyman, et al. at www.convenor.com/madison/method.pdf. For a list of other publications see: www.transformative-mediation.com/training/page/view.php?id=40.
7. www.nmi-mediation.nl/english/welcome.php.
8. http://img.en25.com/Web/WoltersKluwerLawBusiness/{3546928f-1d02-4d9b-8e8b-2695052e8ae5}_WK_CCDR_Brochure_Final_web.pdf.
9. http://imimediation.org/criteria-for-qualifying-assessment-programs.
10. http://imimediation.org/find-a-qualifying-assessment-program.

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The Mediators' Institute of Ireland: A Model for Accreditation, Ongoing Education and Independent Regulation

By Karen Erwin

The Organisation

The Mediators' Institute of Ireland (the MII) is the professional association of Mediators in Ireland with members from both Northern and Southern Ireland. Six years ago the MII had about 120 members—today it has over 600 members practising in many different areas of mediation, and its membership is growing steadily.

In Ireland there is no requirement that individuals have any qualifications to practice as mediators. While this may change under proposed legislation, at present, anyone can hold himself or herself out as a Mediator. The MII, founded in 1992, was established to promote the use of quality mediation as a process of dispute resolution in all areas by ensuring the highest standards of education, training and professional practice of mediation and by increasing public awareness of mediation.

The MII is recognised as the professional institute for Mediators in Ireland. It does not provide mediation services nor is its training accredited by any governmental regulation. Rather, the MII is dedicated to the development of standards in all areas of mediation: MII-approved Mediators are skills-assessed, subject to mandatory mediation training, continuing professional development, and independent regulation. Today, many private and public bodies in Ireland will only use Mediators who hold a current MII practising certificate.

Membership

The MII has a number of different categories of membership—General, Trainee, Associate, Certified and Practitioner Mediator. The basic qualifications recognised to practice under the MII program are 60 hours of training and a mandatory skills assessment conducted by review of a one-hour videoed role play. An individual completing these requirements may apply to become a Certified Member of the MII—the lowest level approved for practice—provided the individual has appropriate professional indemnity insurance in place and agrees to comply with the MII Code of Ethics and Practice and to be subject to its governance and regulatory procedures.

The MII Practitioner Member category is for very experienced Mediators—the assessment for this is by way of an interview by three experienced Mediators. To apply for Practitioner status, a Mediator must have a minimum number of face-to-face mediation hours, as well as evidenced continuing professional development ("CPD") and reflective practice. The questions asked in interviews focus on the development of the Mediator in practice and explore the applicant's understanding of and adherence to high ethical standards.

In addition to individual members the MII also has an organisation membership category for organisations interested in mediation. One organisation member type is the Voluntary community organisation whose volunteer Mediators may avail themselves of heavily discounted membership, course and conference fees.

The MII supports trainee Mediators by offering them free Trainee Membership for the year from the start date of their course and the next calendar year provided they are not approved to practice. On progressing to Certified Member status, the Trainee Membership lapses. The MII has a specified Council member with responsibility to support and encourage trainee Mediators.

"Today, many private and public bodies in Ireland will only use Mediators who hold a current MII practising certificate."

Practising Certificate

Each January, Certified and Practitioner members must apply for an annual MII practising certificate. To obtain their certificate they must complete the registration process, pay the appropriate fee, declare that they have appropriate professional indemnity insurance in place, and declare they have completed the appropriate Continuing Professional Development (CPD) requirements and that they will abide by the Code of Ethics and Practice of the MII. This Code governs the ethics and practice rules required of Mediators by the MII, the breach of which may give rise to a complaint or disciplinary action.

Continuing Professional Development (CPD)

The annual CPD requirements consist of three elements—actual practice hours; reflection on the actual practice either through a professional practice consultant or a sharing and learning group; and attendance at rel-

evant mediation courses or conferences. If the applicant hasn't been able to gain actual practice hours these can be substituted by structured role plays run by the MII.

The philosophy of the MII is that Mediators should not overspecialise so the initial qualification is a general one. The MII believes that there is no Mediator from whom you cannot learn something and in its sharing and learning groups MII tries to include members with different types of practice and from different backgrounds. This broadens the view of the Mediator to the benefit of the parties. MII encourages Mediators to improve their professional knowledge, both with continued development of skill sets of general applicability and the development of specialized expertise in the areas in which they practice. At the same time MII encourages Mediators not to become too dependent on one particular model of mediation but to map each conflict with an open mind rather than through a particular prism.

The opportunity to meet and reflect on practice with others is a highlight of the MII CDP offerings and is much appreciated by its members. The opportunity to share views and perspectives between those more experienced and those just starting out across substantive practice areas is invaluable to improving skills for all.

Ethics and Practice

The MII Code of Ethics and Practice attempts to standardise good practice while recognising that one size does not fit all. If a complaint is made to the MII, the complainant and respondent are encouraged to discuss the issue(s), but if that is not possible or if it is unsuccessful, the Complainant can submit a complaint under the MII Complaints Process (see http://www.themii.ie/complaints.jsp). The Complaints Panel comprises of two non-Mediators and one Mediator who works in the area of mediation in which the complaint arose. The findings of the Complaints Panel may be appealed under the MII's Appeals Procedures (http://www.themii.ie/appeals.jsp). The matter may also go to a Disciplinary hearing (http://www.themii.ie/disciplinary-procedures.jsp). As with the Complaints Panel, both the Disciplinary and Appeals panels consist of a majority of non-Mediators.

Informing the Public

MII's main form of communication with the public is through its website, www.themii.ie, which provides information about MII and its activities. The website also serves as a vehicle for regulation of the organisation as it includes details of the Complaints and Disciplinary procedures available with respect to individual mediators and the organisation itself.

The MII website provides a list of all currently registered Mediators as well as a database search facility to find a Mediator with a current, MII practising certificate. Someone wishing to find a Mediator can search the database, inserting relevant key words to identify the Mediators who best suit their needs. The MII recommends that a person looking for a Mediator contact three Mediators on the list to discuss with them how they might approach the mediation, when they are available, how much they charge, and how and when they would expect payment.

Member Education and Communication

MII's communication with members is by regular email updates by the President directly to all members. These are informative and personal communications that encourage responses and input from members. The MII also produces two "ezines" a year which are circulated to members and third parties. The ezines contain articles from members and non-members on topics of relevance.

Annual conferences that provide cutting edge workshops and presentations relevant to the diverse areas and specialties of MII Mediators, and courses of interest for its members that are offered throughout the year, provide multiple opportunities for CPD. MII also allows an inexpensive and accessible advertising service to third parties that provides courses of interest to MII members. Some of these courses lead to accreditation with other bodies and some are shorter, more focused courses on particular topics relevant to mediation practice.

Advocacy and Prevention

Part of the role of the MII is to meet and communicate with politicians, judiciary, attorneys and other professions, as well as with business and community leaders to persuade them of the values of mediation and of using MII-approved Mediators. MII highlights the benefits of having a professional body that requires accreditation and ongoing education together with independent regulation.

The MII definition of mediation includes not only the resolution of disputes but also dispute prevention, and a number of MII members work with organisations to develop processes of dispute resolution using mediation and tiered clauses.

International and Other Mediation Associations

The MII is associated with the International Mediation Institute (IMI), the European Mediation Network, the Island group and with the Irish Commercial Mediation Association. MII works with other mediation associations to achieve the common aim of high standards and regulation.

The Future

The mediation landscape is changing in Ireland with the likelihood of legislation being introduced to govern the profession. The MII is pushing for Government and businesses to adopt an ADR commitment whereby mediation is attempted in good faith, or at least suggested, before other dispute resolution methods are pursued. Such a commitment will bring mediation further into the mainstream and will cause more Mediators to become members of the MII and be subject to regulation. Already there is European regulation on cross-border European civil and commercial mediations.

Conclusion

The MII punches far above its weight thanks to the dedication and enthusiasm of its Council and Executive Committee, all of whom give their time voluntarily, and are committed to quality and standards in mediation. They are giving back to the profession to enable parties and clients to find highly trained and experienced Mediators who have the required expertise and who are subject to independent regulation. MII is gratified that it has become so well established and recognised in the field and looks forward to mediation being recognised on a statutory basis.

"The mediation landscape is changing in Ireland with the likelihood of legislation being introduced to govern the profession."

Karen Erwin, KarenErwin@erwin-mediation.ie, is the President of The Mediators' Institute of Ireland and a council member of the Irish Commercial Mediation Association. Karen Erwin is a professional mediator and facilitator specializing in conflict resolution with an emphasis on workplace, employment, commercial mediation and elder mediation.

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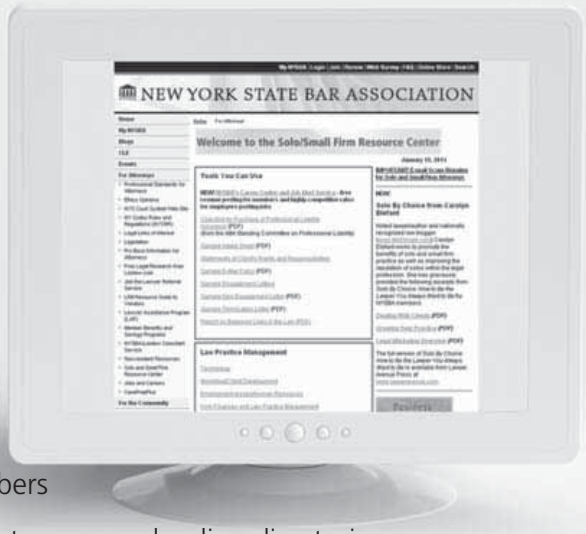

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Personal Injury Mediation: Differences in the U.S. and UK Experience and the Impact of Litigation Funding in the UK

By Deborah A. David

Mediation is slowly increasing in the United Kingdom, where early barriers to its use are gradually giving way and the courts are robustly encouraging ADR. The process is substantially similar to that used in the U.S.: pre-mediation conferences, joint sessions followed by private meetings with a frequent return to joint sessions. Increasingly, UK mediators, most of whom are not retired judges, are moving away from a facilitative approach to a blend of facilitative and evaluative methods, with many experienced mediators being somewhat more evaluative than facilitative.

"Mediation is used far less to resolve personal injury claims in the UK than in the U.S."

Yet, while mediation in the UK is increasingly penetrating the fields of commercial disputes (including complex matters), intellectual property, family law, banking and employment claims, the field of personal injury remains resistant to the mediation process.

Mediation is used far less to resolve personal injury (PI) claims in the UK than in the U.S. There are numerous variations in the two legal systems; but, with the exception of litigation funding, these differences do not entirely explain the markedly lower rate of mediation in the UK. As is the case in the U.S., PI cases tend to settle on the eve of trial in the UK. There is little substantive reason a category of cases that usually settles before trial cannot be successfully mediated earlier at significantly less emotional and financial cost to the parties. What may explain the situation is the manner in which plaintiffs' litigation is currently funded in the UK.

Differences in Litigation Rules and Culture

It is worth considering some of the differences in litigation rules and culture which might account for the relative differences in mediation uptake in the U.S. and UK.

1. **The U.S. civil jury trial**

   There is little doubt that 12 jurors can arrive at unexpected results, making litigation risks significant, thereby creating powerful incentives to mediate. UK law does not allow jury trials in personal injury cases, removing the uncertainty that encourages mediation in the U.S. Still, even in the UK, there remains a degree of uncertainty and risk whenever the facts are submitted for determination to any third party. For every party delighted by the results, there is an opposing party who had confidently predicted a different outcome.

2. **Damages**

   In most U.S. jurisdictions, there is no limitation on general damages in personal injury cases. For defendants, the risks of a jury trial in terms of quantum no doubt exceed those in the UK, where the amount of general damages is determined by the judge based on published, judicially approved guidelines. Still, the UK judge has a degree of latitude when assessing special damages and, particularly in serious injury cases, this creates litigation risks for the defense, with a corresponding incentive to mediate.

3. **Attorneys' fees and expenses**

   As in the U.S., fees and expenses in the UK are a significant driver in settlement negotiations, though there are a number of significant differences between the two countries in terms of how fees and expenses are handled.

   a. **Fees**

      In the UK, the word "costs" signifies attorneys' fees, and under the concept of "loser pays," a majority of "costs" together with disbursements (expenses) can be shifted to the losing party.

      In the U.S., lawyers' fees, as distinguished from disbursements, are not recoverable from the other side in PI cases. The concept of "loser pays" does not exist. While lawyers' fees usually do not motivate claimants represented on a contingent fee basis to settle, mounting fees are a constant factor for the defence in U.S. PI matters. As in the UK, lawyers' hourly fees are high. They mount up quickly in U.S. litigation because of the cost of lawyers' time in preparing for and participating in pre-trial discovery—depositions, written interrogato-

ries, requests for production and requests for admissions, these being discovery activities with little parallel in the UK.

Instead, other characteristics of the UK system drive up fees. Parties are very often represented by a lead solicitor, a junior solicitor, a senior Queen's Counsel barrister and a junior barrister, all charging hourly rates. While pretrial discovery doesn't exist, the parties are required to exchange elaborate and lengthy percipient and expert witness statements which are often supplemented multiple times. Experts are generally required to meet and agree on as many issues as possible and lodge reports with the court. All of this requires extensive time on the part of the lawyers, and fees quickly rise.

b. Expenses

In a complex PI case, these expenses can be very high, running several hundred thousand dollars. Most legal systems in the U.S. have provisions that can shift the burden of costs (but not fees) to the losing party. Plaintiffs who refuse an offer and obtain a lesser amount at trial will not be considered the prevailing party. They will not recover their own expenses, and either all or part of the defendant's expenses will be deducted from the claimant's recovery. As a consequence, while fees may not be an issue for plaintiffs under a contingent fee agreement, the expenses of PI cases are a significant factor for both sides in evaluating settlement options.

Similar to the U.S., litigation expenses and disbursements in a complex PI case in the UK often reach six figures. As in the U.S., the UK has a statutory procedural structure that allows expense shifting where the prevailing party has made a formal settlement offer which the losing party has failed to better. As a consequence, litigation expenses in both countries are a significant factor for each side in evaluating settlement options.

c. The net effect

In both countries, where a losing party is at risk of paying not only his own expenses, but those of the opposition as well, settlement is often the only sensible solution. That risk is magnified under the UK system, where the exposure runs not only to expenses, but also to fees.

Litigation Funding

Which brings us to the complicated area of litigation funding in the UK, a detailed analysis of which would require far more words than allowed in this space.

Litigation funding of plaintiffs' claims in the UK differs substantially from that in the U.S.

UK plaintiffs' cases are usually funded by a combination of Conditional Fee Agreements (CFA) and a policy of After the Event (ATE) insurance. CFAs are negotiated between a lawyer and the client. They call for an hourly rate payable to the lawyer and for what is called an additional success fee or uplift in the event of a favourable outcome. The uplift is set on the basis of the difficulty of the case—a higher percentage signifying a more difficult case. Typically the uplift is between 75% and 100% of the hourly fees. In the event of loss, the plaintiff does not pay fees to his own lawyers. However, under the loser pays provisions, he is responsible for the defendant's fees and costs. ATE insurance is typically taken out by plaintiffs to cover those fees and costs. Unless a defendant succeeds through a pretrial statutory offer in limiting its fee exposure, it faces payment of those costs, as well as up to 100% uplift on the claimant's solicitor's and barrister's fees together with any ATE premium. Moreover, a settlement discounted to reflect risk nevertheless represents a "win" under the terms of the CFA, entitling the claimant's legal team to marked-up fees. Furthermore, both plaintiffs' lawyers and defendants have come to expect that success fee rates and ATE premiums escalate the closer the case gets to trial. Together the CFA and ATE insurance play a complex role in settlement.

In practice, CFAs and ATE insurance discourage the use of early mediation. Many argue the scheme encourages plaintiffs (who have no direct financial stake in the funding) and their lawyers to delay settlement as long as possible, on the assumption that defendants, increasingly concerned about a 100% uplift, will pay more to settle. Together, CFAs and ATE have been increasingly criticised for raising the overall cost of litigation in the UK.

Recent Developments Regarding Litigation Funding

In March 2011, the UK Government indicated its intention to adopt the following changes in litigation funding, which will have a wide-ranging impact in personal injury cases:

1. A successful plaintiff will no longer be able to recover from losing defendants any success fee or uplift agreed under a CFA. Nor will ATE insurance premiums be recoverable. This change will leave plaintiffs with the obligation to pay at least some of the fees.

2. General damages will be increased by 10% to provide some cushion for successful plaintiffs who must now pay their lawyers' success fee.
3. While lawyers may still negotiate as a success fee a 100% uplift on their hourly rate, success fees will now be capped at 25% of total damages to ensure that the plaintiff's damages are not totally swallowed up in the legal fees.
4. There will now be a qualified one-way shifting of fees in PI matters. While a losing defendant will be ordered to pay the plaintiff's attorneys' fees at the hourly rate, a losing plaintiff will no longer be ordered to pay the defendant's fees.

The UK government and judiciary have also increased their praise of mediation, describing it as an "under-used" means of achieving early settlements that reduce the costs of civil litigation. A recent report stressed the need for a "serious" campaign to educate judges, lawyers and the public about the benefits of ADR generally and mediation in particular.

Conclusion

Looking again to the U.S. experience, three factors coalesced to end the early resistance to mediation in PI, as well as other categories of cases. The courts strongly encouraged its use; judicial task forces suggested, and lawmakers passed legislation supporting its use; and, finally, clients began to insist on mediation. It may well be that a similar coalition combined with changes in litigation funding will lead to increased mediation of PI cases in the UK as well.

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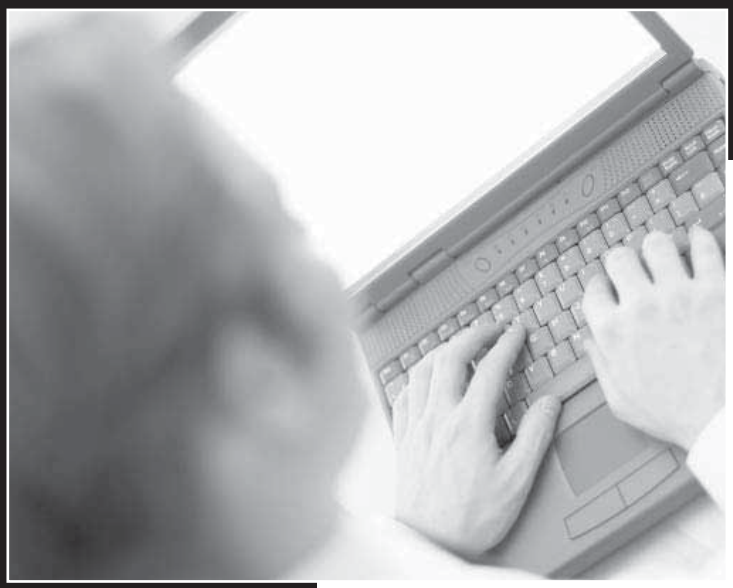

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Online Mediation vs. Traditional Mediation: The Pros and Cons

By Ettore Maria Lombardi

Traditional mediation is conducted in person with all affected parties at a physical "table" with a session orchestrated by the mediator with the parties and their representatives, often utilizing both joint and caucus sessions.[1] Techniques as subtle as non-verbal cues and techniques as overt as removing one party from the mediation room can be used. Online dispute resolution (ODR) takes place in "cyberspace," described by the U.S. Supreme Court as the virtual world "located in no particular geographic location but available to anyone, anywhere in the world, with access to the Internet."[2]

ODR differs from traditional mediation in at least three ways relating to the formation and resolution of disputes. It represents a virtual community which deconstructs Time, Space, and the Physical. Because it eliminates and changes boundaries it is important to rethink the traditional paradigms for resolving conflict and create opportunities for design of an interest-based dispute resolution model for the Internet. This article discusses the differences between traditional mediation and ODR as affected by these differences in Time, Space, and the Physical.

Mediators must understand the technology that created the environment that nurtured the online relationship in which the dispute has arisen. The technology that facilitated the creation of the e-commerce relationship may adequately serve to resolve disputes arising out of that relationship. Moreover, disputes arising from complex relationships require either sophisticated communications media or simple communications media used in sophisticated ways over a period of time by the parties to build the relationship. In either case the same media should be sufficient to resolve online disputes. Therefore online mediation will be adequate in most situations to resolve online disputes.

Development of Online Mediation

As the Internet gained popularity and became commercialized, online disputes began to occur, and the demand for an efficient dispute resolution forum emerged. To meet that demand, a variety of tools were developed for the use of ODR. In many instances, access to ODR was the difference between resolving the dispute and simply allowing the perceived wrong to go uncorrected.

Companies that provide online mediation may be divided into three categories. Some companies use computer communication to facilitate the administration of traditional mediation, but they do not conduct mediation online.[3] Other companies use computer communication as part of the traditional mediation process, and the mediator may use both online and in-person mediation to resolve the dispute.[4] A third group of companies, known for virtual mediation, mediate disputes entirely online or use a computer program as the mediator such as Cybersettle.[5]

This article deals with an online mediation conducted like traditional mediation in which a neutral human third party facilitates discussions between the parties and helps them reach a voluntary settlement. The communication may occur through e-mail communication, such as SquareTrade,[6] and other modalities online such as chat rooms, instant messaging, or online video conferences.[7]

"[Online Dispute Resolution] represents a virtual community which deconstructs Time, Space, and the Physical."

ODR Communications Modalities

Online mediation involves the use of traditional mediation techniques in an online environment.[8] Like traditional mediation, online mediation may be conducted using facilitative, evaluative, or transformative techniques.[9] Unlike traditional mediation, however, the technology used to conduct the mediation may have a tremendous impact on the methods used and the success at settling the dispute.[10]

The "paradox" of online mediation is that it imposes an electronic distance on the parties, while mediation is usually an oral form of dispute resolution designed to involve participants in direct interpersonal contact. Obviously, this means that today's mediation practices cannot simply be duplicated in cyberspace. Cyberspace is not a "mirror image" of the physical world.[11] Its properties of time and space are different and one's presence there is based solely on electronic communication. Online mediation is different from any dispute resolution "space" in the physical world.[12] In online mediation, the sense of taking a break from the mediation is different as the participants create a new environment without leaving their familiar space.

Communication is also different. The oral nature of a telephone conference call, for example, is not the same as text-based communication online. Conventions of per-

sonal interaction that would apply in a telephone call or a face-to-face conference do not apply in cyberspace. One's ability to express emotion online is different; cyberspace currently "comes without all five senses attached."[13] Oral expressions of feelings in a face-to-face setting have a richer and more meaningful context than written expressions of feelings in an e-mail exchange.

While the technology creates and defines a community online that limits certain forms of interaction, ODR also offers useful tools unique to mediating disputes online.

Choosing a Means of Communication

The mediator must consider whether technology should be used to distance the parties psychologically, to bring the parties together, to speed the process up, or slow the process down. Technology is a variable that may manipulate the mediation. Using technology, the mediator may selectively filter out cues that detract from the mediation or add cues incrementally as needed to facilitate mediation. The mediator may also slow down communications by using asynchronous technology (*e.g.*, e-mail) or speed up response using synchronous technology (*e.g.*, instant messaging). Other modalities like video conferencing can be selected. ODR mediators continuously explore new emerging technologies as they become available to select the latest and most effective tools to maximize their chances of successful resolution.

Benefits and Drawbacks of Online Mediation

As with traditional mediation, online mediation allows the mediator to adapt the process to address the particular needs of the disputants.[14] In addition to enhancing some of the benefits of traditional mediation, there are also advantages to resolving disputes over the Internet, because the process will allow for greater flexibility, more creative solutions and quicker decisions.

As with traditional mediation, a benefit of mediation over the Internet is that it can provide substantial savings when compared with traditional litigation, which can be extremely costly. One of the reasons why online mediation can be so successful is because it allows parties who live far apart or cannot get together an opportunity to settle their disputes without having to travel, saving both time and money. In fact, cyber-mediation may be the only feasible option for individuals who are unable to afford traveling long distances, or for those involved in e-commerce disputes for low dollar amounts. It can thus serve to foster e-business and reduce e-business litigation.

Online mediation is also a good tool for parties who are already web savvy. Web sophisticates are familiar with the operations of the web and are more comfortable with what they can do online.

Online mediation also avoids the tension of settling on the spot; parties are not pressured to settle before they are ready to do so. Through online mediation parties are provided with time to absorb all that has taken place in the mediation to date.

There are few of the scheduling difficulties that can arise in traditional mediation, where it is necessary to arrange times and places for meetings. Parties are able to participate in the negotiation when they are ready and at convenient times. The mediator can caucus with either or both of the parties privately, without affecting the flow of the mediation. The amount of idle time that disputants experience is similarly reduced because, in contrast to traditional mediation, the mediator can devote time to one party without wasting the time of the other party, who would traditionally sit around waiting for the next mediation stage.

An additional advantage of resolving disputes through the use of cyber-mediation is that it avoids the issue of whether a particular court has jurisdiction over the dispute. Since disputants can bind themselves to resolution through an agreement, jurisdictional issues can be avoided altogether.[15]

Online mediation creates several disadvantages when compared with traditional mediation. Direct interactive mediation allows for an interaction of body language. The absence of this direct contact may be viewed as a disadvantage of ODR. However, even this aspect of ODR may be a benefit. Some people are uneasy with direct contact because they may be uncomfortable with the way that they look or are hesitant to interrupt to state their opinion. Online mediation eliminates these concerns.

The opportunity to tell one's version of the case directly to the opposing party and to express accompanying emotions can be cathartic for mediation participants. Online mediation, on the other hand, loses the dynamics of traditional mediation because it takes place at a distance and in front of computer screens, rather than with face-to-face communication.[16] In the case of e-commerce that might not raise an issue, but if ODR were to be expanded to matters like family disputes, a good deal would be lost by separating the parties. Granted, the separation would force the parties to logically and rationally tell their story, but they would not be able to see how the other individual is reacting to what is being said. Thus, the effectiveness of cyber-mediation may be challenged in some circumstances by the lack of the direct personal connection.

Additionally, communications online do not express the variable tone, pitch and volume of the participants and cannot transmit personalities or physical cues. In this way, it is more difficult to evaluate the flexibility of a particular party, or the strength of a party's feelings or confidence on particular issues.[17]

Furthermore, the lack of personal presence in cyber-mediation can make it more difficult for the mediator to maintain effective control over the negotiating parties. Mediators may have a hard time deciding how the mediation is progressing because they cannot assess the situation in the same way as they could when the parties are physically before them. Like the participants, the mediator is unable to analyze the body language and gestures of the parties. Therefore, the online medium, at least the e-mail environment, may make it more difficult for the mediator to manage or temper the tone of the interactions.

The mediator, at least in the beginning, is a disembodied voice and cannot use her own physical "personhood" to set the parties at ease and create an environment for sustained problem-solving. Similarly, absent the physical presence of the disputants, the mediator has difficulty using the intuitive cues of body language, facial expression, and verbal tonality that are part of face-to-face mediation processes.[18]

Another drawback to online mediation is that communicating via the Internet also has its limitations. If a participant does not respond to a request there is no way to reach them. One must wait until they decide to check their e-mail and respond before the proceedings can continue. There is also the issue of computer glitches, because like most technology computers break down from time to time and this can put a hamper on the mediation process.

Access to online computers may pose a problem for some individuals, especially those involved in disputes that result from off-line transactions. Continuous Internet access for the length of time it takes to resolve a dispute (which may vary from hours, to days, to weeks) may also pose a problem for those with limited access or those who would find doing so uncomfortable or inconvenient. It may also disadvantage those who are less familiar with computers and their use or those who are incapable of undertaking detailed written communications.

Time is an element that seems to get lost when mediation goes online. Some mediators have begun to implement their own time limits because it seems as if the mediation is at a standstill and parties are neglecting their sessions. Along the same lines, the participants to the mediation may become more locked into their positions because they are given more time to reflect on the situation.[19]

Another issue that emerges is the idea of a loss of momentum. People have busy lives and do other things than just deal with the mediation at hand; many travel and do not check their e-mail while away from the office. This can be frustrating to the mediator and the opposing party. However, conducting everything online may also help avoid the "crisis-like environment" that can result from people trying to coordinate their schedules and costs.

Yet another drawback to online mediation for some may be the faceless mediator. Who is this neutral third party and what qualifications does he or she really possess? Without having full faith and confidence in the mediator, mediation may be doomed from the start. One way to avoid this predicament may be to work from a credentialed mediator list.[20]

Last but not least, some authors have discussed the concern over the protection of confidential material in ODR.[21] Whereas traditional mediation does not create a physical record, online mediation creates an electronic record. Communications which in a traditional mediation are oral and unrecorded, in ODR are preserved, perhaps forever, on computers and servers. This could potentially enable a party to distribute e-mail communications easily and without the knowledge of the other party, even years later. This may hinder the development of open and honest exchanges in online mediation.

"ODR is inevitable. As the world becomes more technologically advanced and people conduct interactions globally, dispute resolution will play a role."

Conclusion

The search for more convenient, cost-effective ways of resolving disputes will continue as long as disputes exist. The questions about online mediation no longer concern the viability of ODR generally, but rather the suitability of a particular dispute for online mediation.

ODR is inevitable. As the world becomes more technologically advanced and people conduct interactions globally, dispute resolution will play a role. Before a transaction can take place allowing commerce to prosper, people need to believe that there will be reliable mechanisms to deal with any dispute that arises. Businesses will need to feel comfortable about the forum for dispute resolution and likely would not be comfortable having to defend themselves under foreign laws or jurisdictions. Thus ODR is the answer for both buyer and seller.

To be validated, the online forum does not need to exclude other forum options. Rather, the online dispute resolution medium should be seen merely as another tool, ready to be pulled from the toolbox when the fuss really does fit online.

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Endnotes

1. See G. Alpa, Mediazione, in FUTURO, GIUSTIZIA, AZIONE COLLETTIVA, MEDIAZIONE 258, 258-263 (G. Conte, V. Vigoriti ed., 2010).
2. *Reno v. Aclu*, 521 U.S. 844, 849 (1997).
3. These programs use the Internet to advertise mediation services, provide information or complete administrative tasks. *See* A.S. Moeves, S.C. Moeves, *Two Roads Diverged: A Tale of Technology and Alternative Dispute Resolution*, 12 WM. AND MARY BILL RTS. J. 843, 865 (2004).
4. L.J. Gibbons et al., *Cyber-Mediation: Computer-Mediated Communications Medium Massaging the Massage*, 32 N.M. L. REV. 27, 28 (2002).
5. Cybersettle permits attorneys or insurance claims adjusters to file an online claim and make three private offers of settlement seriatim. If they are within twenty percent of each other, the program settles the case for their average. If not within twenty percent, company's telephone facilitation process is offered.
6. SquareTrade offers online mediation. One party files a complaint with SquareTrade and may choose mediation. A webpage is created to enable the parties to communicate with the mediator. All communications are through the mediator and are confidential. After receiving all of the information, the mediation suggests a non-binding resolution.
7. *See* Gibbons et al., *supra* note 4, at 32-35; J.B. Eisen, *Are We Ready For Mediation in Cyberspace?*, 1998 BYU L. REV. 1305, 1313-1314.
8. L.M. Ponte, T.D. Cavenagh, Cyberjustice: Online Dispute Resolution (ODR) for E-Commerce 18 (2005); L.M. Ponte, *Throwing Bad Money After Bad: Can Online Dispute Resolution (ODR) Really Deliver the Goods for the Unhappy Internet Shopper?*, 3 Tul. J. Tech. and Intell. Prop. 55, 75-79 (2001).
9. *See* L.J. Gibbons et al., *supra* note 4, at 32-35; L.M. Ponte, *supra* note 8, at 75-78.
10. *See* M.E. Katsch, *Bringing Online Dispute Resolution to Virtual Worlds: Creating Process Through Code*, 49 N.Y.L. SCH. L. REV. 271, 282 (2004-2005); L.J. Gibbons et al., *supra* note 4, at 35.
11. *See* M.E. Katsch, *Dispute Resolution in Cyberspace*, 28 CONN. L. REV. 953, 970-971 (1996).
12. *See* I.T. Hardy, *Electronic Conferences: the Report of an Experiment*, 6 HARV. J.L. AND TECH. 213, 232 (1993).
13. B. Kamin, *Spatial Relations: The Internet Brings Us Together, But Is It the "New Town Square"?*, CHI. TRIB., Dec. 11, 1997, § 5, at 1.
14. See A.M. Braeutigamt, *Fusses That Fit online: Online Mediation in Non-Commercial Contexts*, 5 APPALACHIAN J.L. 275 (2006).
15. See L.Q. Hang, *Online Dispute Resolution Systems: The Future of Cyberspace Law*, 41 SANTA CLARA L. REV. 837, 856 (2001).
16. *See* J.B. Eisen, *supra* note 7, at 1336.
17. *See id.*
18. M.E. Katsch, J. Rifkin, A. Gaitenby, *E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of "eBay Law,"* 15 OHIO ST. J. ON DISP. RESOL. 705, 714 (2000).
19. J.B. Eisen, *supra* note 7, at 1330-1331.
20. *See,* J. Krivis, *Taking Mediation Online*, DISP. RESOL. MAG., Summer 1998, at 129.
21. *See* E. Katsch, *Dispute Resolution in Cyberspace*, 28 CONN. L. REV. 953, 971 (1996).

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Peace, One Dispute at a Time: The Jerusalem Arbitration Center

By Catherine A. Rogers

There is one important fact about Israelis and Palestinians that is not generally reported: every year Israelis and Palestinians engage in an estimated US$4 billion in trade. Israel is by far Palestine's largest trading partner and, according to some estimates, Palestine is Israel's second largest trading partner after the United States. In other words, notwithstanding the seemingly endless stream of dismal headlines about the prospects for peace in the region, peaceful and mutually beneficial exchanges occur every day between ordinary Palestinians and Israelis.

Of course, as with all commercial transactions, disputes sometimes arise out of these exchanges. In those disputes, Israelis generally have full access to the machinery of civil justice under Israeli law. Meanwhile, it can be exceedingly difficult for Palestinians to participate in judicial proceedings in Israel; conversely, Israeli companies can face their own difficulties in enforcement. And, of course, just as with contracts between U.S. companies and French, Japanese, or Brazilian parties, neither party believes that it would be treated fairly in the other party's courts.

Planning the New Jerusalem Arbitration Center

About 2 years ago, a retired Israeli military general named Oren Shachor, now a businessman and the head of the International Chamber of Commerce of Israel (which goes by the acronym "ICC Israel"), and Samir Hulleileh, who heads up one of the largest Palestinian holding companies, decided that the situation had to change. They knew that both Israeli and Palestinian businesses would gain from a more neutral mechanism for resolving their disputes. When they met, they started with seemingly epic questions and insurmountable doubts, but ended with the idea of the Jerusalem Arbitration Center ("JAC"). The purpose of the JAC, as they conceived it, is to resolve through international arbitration the inevitable commercial disputes that arise between Israelis and Palestinians. Despite the region's history, the JAC is now well on its way to being a practical reality.

International arbitration has a long history of providing fair, neutral, and reliable dispute resolution for parties from different cultural and legal traditions. In the absence of arbitration, international commercial exchanges are inevitably hampered by self-help, cumbersome financing, or piecemeal contractual arrangements. The JAC could provide a better alternative for Israeli-Palestinian exchanges and, by eliminating expensive work-arounds, increase the amounts invested in profitable exchanges.

A New "ICC Palestine"

To create the Jerusalem Arbitration Center, the ICC Israel needed a viable partner. Shachor and Hulleileh envisioned a new "ICC Palestine." Perhaps not surprisingly, the Paris-based International Chamber of Commerce ("ICC") was initially reluctant to sign on. The ICC wanted assurances that its reputation for excellence and any resources that it would lend to the project would not be wasted in some quixotic quest for the impossible. But the ICC had long championed the notion of "peace through commerce." After an intensive in-person lobbying effort by ICC Israel, the ICC came around to the view that this was a serious international endeavor. It would be a good test of the mettle of its motto. In record time, the ICC Palestine was established and, by May 2011, a Memorandum of Understanding for the JAC had been signed by the ICC Israel, the ICC Palestine, and the ICC in Paris.

The ICC Palestine still has all the markers of a start-up. It was founded and is chaired by Munib Masri, a successful American-educated businessman who has been dubbed the "Palestinian Rothschild" by Israeli media for his extensive philanthropic works in Palestinian communities and economic enterprises. Administratively, the institution is headed by a vibrant 30-something Palestinian woman named Yara Asad, who has an executive MBA diploma from Duke and is currently finishing her PhD in Paris.

It is a one-room operation running on a shoestring budget out of an office borrowed from a Palestinian pharmaceutical company thanks to its CEO, Talal Nasereddin. What Asad lacks in experience and formal legal training, she makes up for with her determination, sharp managerial skills, and an almost uncanny intuition about legal issues. Asad is emblematic of the new generation of Palestinians who have a vision of the world beyond their troubled, and as yet undefined, borders—and they are determined to make that vision a homemade reality.

The ICC Israel

On the ICC Israel side, Oren Shachor may seem an equally improbable source for the vision to create the JAC. For more than 30 years, Shachor was in the Israeli military. His resume counts him in virtually every major violent clash with Palestinians during that period, including one in which he was wounded. Eventually, former Prime Minister Yitzak Rabin appointed Shachor to serve as the commander in charge of overseeing the occupation

in the West Bank and Gaza. In that role, in his own words, Shachor was "the very symbol of the occupation." It was, however, this close daily work with Palestinians, as well as his pivotal role in negotiating the Oslo Peace Accords, that gave Shachor the background and insight to believe that cooperation through the JAC was possible and could be mutually beneficial.

Today, Shachor proudly states that he is much more "a soldier of peace than a general of war." Despite switching objectives, Shachor's military experience has been essential to creating the JAC—who else but a former general with such a distinguished military background could push through the obstacles and skepticism about the JAC?

Shachor works at the ICC Israel with Baruch Mazor, now a prominent Israeli businessman who also has a distinguished career as a former Israeli military officer and as an informal statesman in international efforts on behalf of Holocaust survivors and their children. Shachor's title is "Director General" of the ICC Israel, and Mazor's is "Secretary General." More than "Generals," however, Shachor and Mazor denominate themselves "Merchants of Peace." They are working to bring the promise of peaceful economic cooperation between Palestinians and Israelis to sometimes wary onlookers in Israel, Palestine, and beyond.

Challenges for the JAC

Creating the JAC requires continued suspension of disbelief and a slow building of reciprocal trust between peoples who have a long history of reasons to distrust each other. But the process of creating the JAC is less about opposing parties staking out positions and strategies for compromise. It is more about working together to build a strong, resilient and independent institution on a solid foundation. For that reason, the seemingly constant flow of political shake-ups, and even incidents of violence, that regularly disrupt efforts at political peace have not derailed the work in putting together the JAC. Perhaps even more surprisingly, while the Israeli Government and the Palestinian Authority have trouble agreeing on almost anything, they have both committed support to establishment of the JAC.

As a practical matter, one of the most significant challenges for the JAC is bridging the vast disparities in business and legal expertise between Palestinians and Israelis, disparities that are also represented in the process of creating the JAC. As Mazor explains, he knows that the ICC Israel has a significant advantage over the ICC Palestine in "know-how" about international arbitration generally and about the ICC as an institution (the ICC Israel has existed for over 50 years and enjoys representation on the ICC Paris' Executive Board). It is also well-known that the Israeli legal profession, Israel's cadre of international arbitrators, and its legal infrastructure (including legal education) hold many advantages over their Palestinian counterparts.

Against this backdrop, the structure of the Jerusalem Arbitration Center is designed to be a symbol of the equality and empowerment that it seeks to ensure through its arbitral processes. Its legal form will be a joint venture, with ownership shared equally between the ICC Israel and the new ICC Palestine. In addition to the prestige of its name, the ICC in Paris has promised to provide essential guidance and international support in everything from selecting the board of the JAC, to management of an arbitral institution, to establishing its internal accounting system. The joint venture agreement and arbitral rules are being developed jointly by Palestinians and Israelis, with input from the ICC in Paris, and administration of the JAC will also be divided equally. While the JAC itself will be headquartered in Jerusalem, there are plans to build contact centers in Ramallah and Tel Aviv, the respective homes of the ICC Palestine and the ICC Israel.

Capacity-Building in Palestinian Institutions

The structure of the JAC alone cannot resolve all the disparities between Palestinians and Israelis, particularly ones that are tied to Palestinian institutions. Accordingly, the ICC Palestine, in conjunction with Penn State Law and with the support of various other institutions (including JAMS; Queen Mary Law School, Center for Commercial Law Studies at University of London; and the International Arbitration Group of the law firm of Wilmer, Cutler, Pickering, Hale & Dorr LLP), is undertaking a series of initiatives aimed at promoting international arbitration in various Palestinian institutions, and building professional capacity in Palestinian business professionals, lawyers, judges and law schools. These initiatives will include various types of educational exchanges and related internships, advocacy training, arbitrator training, and judicial training and exchanges. Long-term plans include joint advocate and arbitrator training programs in conjunction with Israeli attorneys, and a regional international arbitration moot court event involving Palestinian and Israeli law students.

The kick-off event for these initiatives was a "Teach-In" in Ramallah on December 7-8, which provided a general introduction and overview of international arbitration. It was designed to generate "buy-in" and highlight the many challenges ahead in preparing Palestinian professionals and legal institutions to participate in the JAC and other international arbitrations. It was remarkably well-attended not only by members of the Palestinian legal and business communities, but also by law professors from most of the Palestinian law schools, numerous judges, and representatives from various ministries of the Palestinian Authority. Prime Minister Dr. Salaam Fayyad opened the event with an optimistic vision of how local commitment to, and competence in, international arbitra-

tion can help attract foreign investment and increase overall trade with Israel and beyond.

Plans are also under way, in conjunction with the Palestinian Ministry of Justice and the support of the Palestinian Authority, to revise the Palestinian Arbitration Law, which was adopted in 2000 when the Palestinian Authority was first established. Under this law, the level of enforcement of domestic arbitration awards in Palestinian courts is precariously low. The current law has many substantive provisions in common with the UNCITRAL Model Law, a model law that can be adopted by States and ensures national enforcement of international arbitral awards in a manner consistent with the New York Convention (the treaty that obliges Contracting States to enforce international arbitral awards). However, the Palestinian law also includes several loopholes that allow Palestinian courts to engage in an exacting review of arbitral proceedings and outcomes, a level of review that is inconsistent with international standards. The law reform effort will focus on closing these loopholes to ensure that the problems with enforcing domestic awards do not affect enforcement of awards rendered under the auspices of the JAC.

Legal Challenges for the JAC

In addition to challenges within Palestinian legal institutions, there are also several complex legal issues relating to the structure of the JAC and its proceedings. Unlike domestic arbitration, an international arbitration has a "legal seat" that constitutes its "juridical home." The legal seat determines which courts can intervene in various aspects of the arbitral process (such as to respond to requests for interim relief and arbitrator challenges). The legal seat also determines what law applies when courts review an award, and which courts have the power to vacate or nullify an award (as opposed to grant or refuse enforcement of the award). If JAC arbitration had a legal seat that was regarded as within either Israeli or Palestinian courts' jurisdiction, that could subject JAC awards to treatment similar to domestic Israeli or Palestinian awards, as well as potentially deny them the benefits of the New York Convention.

Another legal challenge, at least in the beginning, is with respect to the jurisdiction of the JAC itself. The Memorandum of Understanding currently provides that for the first few years, disputes in excess of $7 million that are submitted to the JAC will revert to the ICC in Paris for resolution. This is effectively a limit on the jurisdiction of the JAC, but an innovative one that has little precedent. It must be disclosed to potential users, but not undermine the confidence in, or functioning and viability of, the JAC.

The JAC as a Model for Other Arbitral Institutions

Other challenges that the JAC faces are not so unique. From one perspective, the JAC may be seen as a particularized example of the "regionalization of international arbitration," meaning the development of regional arbitration centers whose rules and personnel are more familiar with local legal traditions and culture. Just as small community banks can carve out a niche by providing service that is better tailored to the local community than large, nationwide banks, regional arbitration institutions can provide service and know-how that is more tailored to the local market. They can be cheaper, too.

For such regional institutions, the general challenge is how to establish trust and legitimacy for an institution that is new and intentionally disconnected from political and legal apparatus. Building on rules and protocols established by global leaders is a technique that has been used in other new centers from Bahrain (in conjunction with the AAA's international division, the International Center for Dispute Resolution or "ICDR"), to the India Center of the London Court of International Arbitration (or "LCIA"), to the Centro de Arbitraje de México (whose rules are based on the ICC Rules).

From another perspective, the JAC is an example of an institution that is trying to bring binding and legal dispute resolution infrastructure to an economically under-developed jurisdiction. In this regard, its effort may be a model for many other jurisdictions that do not have the legal infrastructure to attract and protect foreign investment. In this vein, initiatives to generate buy-in and to increase Palestinian judges, legal and business professionals' capacity to participate in and manage commercial disputes may be exported to other places like Bangladesh, Peru, and Kenya.

Finally, and seemingly the most unusual feature, the JAC is seeking to bring peaceful dispute resolution to disputants from jurisdictions that are openly hostile to each other and that lack formal diplomatic relations. While this may seem like a problem that is peculiar to the JAC, there are many similar situations around the world. Think of the former Yugoslavia, India and Pakistan, Sudan and Southern Sudan, just to name a few of the most newsworthy. To the extent the JAC is successful in its effort to provide reliable, efficient dispute resolution for parties in a region that is defined by intractable violent conflict, it may be a model for future institutions in similar contexts. It may also create some space for political processes to take a lead from the private sector, for peace to follow from commerce.

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First Tailored Rules for Investor-State Mediation—Draft for Comment Prepared by the International Bar Association State Mediation Subcommittee

By Barton Legum, Anna Joubin-Bret and Inna Manassyan

The State Mediation Subcommittee of the IBA (International Bar Association) Mediation Committee has prepared a draft set of rules specifically to address disputes and conflicts arising between foreign investors and sovereign States that host their investment.

Following discussions at the meetings of the State Mediation Subcommittee at the Buenos Aires, Madrid and Vancouver annual meetings of the IBA, a draft set of rules for investor-State mediation (the "Draft Set of Rules") was prepared and presented at the Dubai annual meeting for comment. It is open for further input and discussion.

"This Draft Set of [Mediation] Rules was prepared against the background of a significant increase in investor-State disputes…"

The Background

This Draft Set of Rules was prepared against the background of a significant increase in investor-State disputes arising from international investment agreements for the promotion and protection of foreign investment. Although a majority of these treaties provide for an amicable settlement period of 3 or 6 months to allow the parties to seek to settle the dispute amicably through negotiation, conciliation or mediation, empirical evidence shows that these alternative means to settle a conflict with an investor are seldom used to their best advantage. With the proliferation of investor-State cases, however, stakeholders have begun to look more closely into alternative approaches available under the treaties or proposed by relevant institutions, as it is felt that international arbitration should not be the only means available to settle a dispute arising from an investment.

On the occasion of earlier IBA annual meetings, the State Mediation Subcommittee reviewed the specifics of investor-State disputes and the oft-expressed desires of the parties for swift, cost-effective and final settlement of the disputes while at the same time preserving the long-term link between the investor and the host State. Some basic elements that could foster a mediated settlement of investment disputes while at the same time providing clear guidance to the parties were identified and discussed. The Subcommittee highlighted a general lack of awareness and understanding by parties and practitioners as to the mediation process. Furthermore, three main obstacles were repeatedly raised by States' representatives, investors and practitioners. The first obstacle is the lack of a specific set of rules adapted to investor-State mediation that could provide sufficient flexibility to the parties seeking to mediate a conflict or a dispute but also offering predictability as to the steps and rules applicable to the process. A second issue perceived as an obstacle to mediation is the lack of a roster or a pool of potential mediators that could be drawn upon by the parties and intervene successfully in investor-State cases. The third is the dearth of a national framework encouraging mediation of investment disputes.

The State Mediation Subcommittee tasked itself with the preparation of a draft set of rules that could be used by State representatives and investors wishing to engage in mediation at any stage of a conflict or dispute. To this end, the Subcommittee established a working group composed of several drafting committees (the "Working Group"). In order to find a common denominator for differing perspectives on an investor-State mediation process in the prospective Rules, the Working Group was comprised of representatives of various stakeholders, including representatives of State entities, mediation institutions and practitioners in the field, with even representation within each of the drafting committees.

It was agreed that the proposed Rules should be drafted in simple and concise terms, to provide the parties with practical guidance without complicating the process. It was felt that mediation rules should not duplicate existing arbitration or conciliation rules, that they should minimize time and costs and that they should be available to parties at any stage of a conflict or a dispute, including after an arbitration has been commenced.

The overarching guiding principle for drafting this set of Rules was to make them accessible to and usable by a wide audience of end-users, to provide flexibility and simplicity to the parties but at the same time to provide predictability and add legitimacy to the process.

The Provisions of the Rules

The Draft Set of Rules propose guidelines for the commencement and the termination of a mediation process, for the conduct of a mediation, for the appointment and the role of a mediator (or co-mediators), for privacy

and confidentiality of the mediation and for related issues such as costs.

The Draft Set of Rules proposes a broad scope of application, in line with the drafting guidelines. The reference to "investment-related differences and disputes" is meant to allow parties to use the prospective Rules in a variety of situations and instances arising from the relationship between investors and States. The Draft Set of Rules leaves the door open for their use in any kind of difference and dispute and at different stages of a dispute, whether it has already materialized or whether it is still in the early stage of a difference or a conflict. In this regard, Article Two of the proposed Draft Set of Rules, which sets out the general outline for commencement of a mediation process, provides for a flexible procedure and the possibility of initiating mediation under the prospective Rules prior to or concurrently with domestic court or arbitration proceedings. The object was to provide for a minimum degree of formality for beginning the mediation process so as to facilitate recourse to this means of dispute settlement by parties.

At the same time, members of the Working Group felt it necessary to provide the parties with predictable and clear guidelines as to the process of designation, resignation and replacement of the mediator or co-mediators. These features are covered under Articles Three to Six of the Draft Set of Rules. Recourse to co-mediators was considered an important option to feature in the investor-State context, where the element of trust and acceptability is essential to the success of the process. Co-mediation, provided in the rules, creates further possibilities of combining mediators' distinct skills and background.

Albeit different from the arbitration context and to facilitate the parties' well-informed choice of a mediator, prior to accepting an appointment of a mediator the Rules provide that a mediator shall disclose any personal interest or other potential conflicts in the difference or dispute in a statement of independence and availability, a model of which is attached to the Draft Set of Rules as Appendix A. This Appendix also seeks to ensure that the availability of the mediator is disclosed from the outset. Parties are also encouraged to agree upon the mediator's disclosed hourly rates or fees at the beginning of the proceedings.

The procedure for the designation of a mediator provided in the Draft Set of Rules seeks to balance the need to ensure that the parties are comfortable and fully engaged in the process while at the same time reducing possible and unnecessary delays in the procedure. The bottom-line principle is that, in any event, the parties have full responsibility and freedom to engage in a mediation process and designate a mediator. However, it was felt that some support could be useful for a party wanting to launch the mediation and to ensure that the other party can make an informed decision about its participation. To this end, the Working Group designed two fallback possibilities to support the party wanting to launch the mediation process with options to facilitate the selection of the mediator: (i) a designating authority can be chosen by the parties in cases where the parties fail to agree on a mediator and (ii) the Secretary-General of the Permanent Court of Arbitration can select a designating authority in cases in which the parties fail to agree on the choice. In addition, in order to ensure a swift and efficient outcome of the designation procedure, the Draft Set of Rules provides a set time limit.

Similar simple and clear-cut rules are proposed for the resignation and replacement of a mediator in Article Five of the Draft Set of Rules. It was also decided to follow the same approach with regard to settlement and termination of the mediation (Articles Eleven and Twelve) where the consensual and party-driven nature of mediation is emphasized. Any party has full discretion to settle or to withdraw from the mediation process at any time, as well as to agree on the terms and conditions of such a decision.

In the same spirit and for practical purposes, the Working Group chose to emphasize the importance of a first mediation management conference to be conducted by the mediator (or co-mediators). Within strict timelines, the background of Article Nine is intended to maximize the mediation process' chance of success and allow both parties to participate in this first and essential step and to make an informed decision as to whether they wish to continue with mediation to settle the difference or the dispute at hand.

An interesting feature of the Draft Set of Rules is also the possibility for institutional support to the mediation process or more generally the possibility for an arbitration and mediation institution to be involved. There was general agreement that given the consensual and ad hoc nature of mediation, the Draft Set of Rules should allow the parties and the mediator(s) to seek the support and the intervention of an institution where appropriate and authorized by the parties.

It was further discussed and then agreed by the Working Group that the prospective Rules will provide for the conduct of mediation and the role of the mediator in broad terms. While the mediator is authorized to make decisions pertaining to the conduct of the mediation in order to move the process towards its conclusion, the powers of the mediator remain strictly within the limits of the agreement of the parties.

Two distinctive features of the Draft Set of Rules in the particular context of investor-State disputes relate to confidentiality of documents and information as well as the confidentiality and privacy of the process.

The Draft Set of Rules originally proposed a default rule that information provided to the mediator by any one of the parties is not, unless otherwise indicated, confiden-

tial vis-à-vis other parties to the mediation and therefore the mediator may disclose information received from a party to any other party to the mediation. However, there was broad consensus in favor of a confidentiality rule, unless the mediator is expressly authorized to disclose said information. The Working Group also crafted broad privacy and confidentiality provisions, so that the mediation can be tailored to the specific needs of investor-State mediation, in order to satisfy the need for transparency that arise when a State is involved in such procedure.

Conclusion

The Draft Set of Rules was presented and discussed at the annual meeting of the IBA in Dubai in November 2011. The feedback received before and during the presentation was very positive and constructive. It is anticipated that the Draft Set of Rules will be circulated broadly among interested stakeholders to generate further comments and views about an instrument. Once adopted, it is believed that the Rules would be useful for States and investors to mediate conflicts and avoid having to resort to a more costly and intrusive dispute settlement process such as international arbitration, where the relationship between the investor and the host State may be adversely impacted.

The draft set of rules can be viewed on http://www.ibanet.org/LPD/Dispute_Resolution_Section/Mediation/Default.aspx.

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This article is adapted from a chapter in a forthcoming book: *New Directions and Emerging Challenges in International Investment Law and Policy*, Roberto Echandi and Pierre Sauvé (Eds). Cambridge University Press, and the substance was presented at the World Trade Forum 2011, New Directions and Emerging Challenges in International Investment Law and Policy, World Trade Institute, University of Bern, 9-10 September, 2011.

Time-Limits for Institutional Challenges Against Arbitrators: Binding Upon the Judge in Setting Aside Proceedings?

By Alexis Mourre

The decision of the Court of Appeals of Reims in the *Avax v. Tecnimont* case, which vacated an award based on a lack of disclosure raises complex issues. The background of the case is well known.[1] Briefly the award was challenged on the grounds that the chairman of the arbitral tribunal, a well-known international arbitrator who is part of one of the world's largest law firms, had failed to disclose certain links between his firm and one party's group. An earlier decision of the Paris Court of Appeals[2] had quashed the award because of this failure to disclose circumstances such as to raise doubts as to his independence and impartiality. That decision of the Court of Appeals of Paris was subsequently annulled by the French *Cour de cassation*[3] because the lower Court had not addressed the argument that the party attacking the award had failed to challenge the arbitrator before the ICC International Court of Arbitration in the 30 days' time-limit provided by Article 11 of the 1998 ICC Rules. The setting aside proceedings were therefore remanded to the Court of Appeals of Reims, which therefore had to consider the question and its impact on the admissibility of the judicial challenge against the award.

The principle is, in French law, that an award can only be challenged on procedural grounds (such as lack of independence and impartiality of an arbitrator) if the challenging party raised the procedural objection during the arbitration, unless of course it was unable to do so (e.g., because such party was unaware of the grounds for its objection).[4] As a consequence, a challenge against the award would be inadmissible on such grounds if the complaining party failed to make objections during the arbitration in spite of its knowledge of the situation.[5]

In the *Tecnimont* case, the party challenging the award had, during the arbitration proceedings, challenged the arbitrator before the ICC International Court of Arbitration, which had rejected the challenge. Before the Court of Appeals, Tecnimont, however, submitted that the institutional challenge had been belated (because it had allegedly been made more than thirty days after the party had knowledge of the facts), and that

> the fact, for a party to an ICC arbitration, to fail to challenge an arbitrator within thirty days following the time when it had knowledge of the facts in dispute, as provided by Article 11 if the ICC Rules, deprives such party from the right to seek the annulment of the award on the same grounds.

The Court of Appeals rejected the argument on the basis that

> the challenge procedure before the arbitral institution and the setting aside proceedings before the judge are distinct procedures that do not have the same scope and are not subject to the same authority.

As a consequence

> the judge who has to decide on the validity of the award is not bound by the time-limit in which a challenge before the arbitral institution has to be made in order to be admissible, which time-limit Tecnimont alleges not to have been respected. The absence of any subsequent challenge against the arbitrator before the ICC based on other facts subsequently discovered by the challenging party does not prevent it from seeking the annulment of the award insofar as such party did not renounce to such action.

The Court of Appeals made it clear that

> any grievance against an award must, in order to constitute the basis for a challenge based on Article 1520-2° of the Code of Civil Proceedings, have been raised, if that was possible, during the arbitral procedure.

The Court of Appeals, however, noted that the challenging party had, in several instances, written to the arbitrator to ask him for explanations. The Court also noted that the decision by the ICC International Court of Arbitration to reject the challenge was an "administrative decision deprived of *res judicata*" and that, after such decision, the challenging party newly wrote to the arbitrator to inquire as to circumstances that could cast doubts on his independence and impartiality and reserved its rights to challenge any award made by that arbitrator. The Court of Appeals concluded that

> the information on the situation of the arbitrator has been evolving and it is not possible to conclude that the challenging party renounced to its right to challenge the award on the basis of the alleged lack

> of independence of the arbitrator due to the non exercise of the institutional challenge procedure.

The question raised before the Court of Appeals was ultimately the following: is a timely institutional challenge a necessary condition for an application to set aside the award on grounds of lack of independence and impartiality that were known by the challenging party during the arbitration? The sole consideration that institutional decisions on challenges are administrative in nature and thus deprived of *res judicata* does not suffice to answer that question in the negative. It is in fact beyond doubt that, in the current state of the case law, the judge is not bound by the decision reached by the institution on an arbitrators' disqualification. This is all the more so in the ICC system, in which no reasons are given for challenge decisions. As a consequence, the judge can perfectly annul the award on grounds of lack of independence of an arbitrator in spite of the institution's decision to reject the challenge. Likewise, a court can reach a different conclusion than that of the institution as to the time when a party became aware of circumstances such as to justify a challenge.

Nevertheless, because the institutional rules adopted by the parties have the force of a contract and are binding to them, it could have been expected that any time-limit provided by the rules would be enforced by the judge. It is one thing is to say that the judge is not bound by the findings of an institution as to the outcome of an application to disqualify (either as to the merits of the application or as to its timeliness), and quite another thing to say that the judge is not bound by the thirty days' time-limit provided by the institutional rules for an application to disqualify. And it is precisely for having disregarded the thirty days' time-limit provided by Article 11 of the 1998 ICC Rules that the Court's decision has been criticized by commentators. Prof. Thomas Clay, in particular, writes that

> no one disputes that the arbitration rules are binding to the parties in dispute, for they are incorporated in the arbitration agreement. They therefore have the same binding force as that of any contract. In the instant case, the applicable arbitration rules provide for the parties' obligation to present any request for challenge to the institution within thirty days from the time when the party was aware of the facts or circumstances justifying the challenge. Pretending that such time-limit is not binding upon the judge necessarily amounts to deny the binding force of the arbitration rules between the parties.[6]

The Court of Appeals, however, did not really deny that the institutional rule is binding between the parties. What the Court in fact said is that the scope of the ICC Rules on disqualifications is limited to the administrative procedure before the institution and does not apply to the question of whether an action to set aside the award is admissible. From that perspective, the question is not really whether the challenge before the ICC was lodged within thirty days; according to the underlying logic of the Court of Appeals' decision, whether a challenge was lodged before the ICC is not in and by itself determinative of whether setting aside proceedings against the award are admissible. What really matters is whether the party attacking the award raised its objections as to the independence and impartiality of the arbitrator during the arbitration if it was aware of such circumstances, for otherwise such party would have waived its right to challenge the award on such basis. Such objections can be raised by asking the institution to disqualify the arbitrator, but it does not necessarily follow from the fact that a request for disqualification is not timely made that the party waived its right to challenge the award. Going further, it should be accepted that a party having objected to a circumstance likely to give rise to a challenge by way of a letter to the arbitral tribunal rather than by way of a request for disqualification to the institution preserved its right to subsequently seek the annulment of the award.

The Court of Appeals' solution may seem counter-intuitive, but it has its logic: as a matter of fact, the contrary solution would lead to the making of a timely request for disqualification before the ICC a pre-requisite to an action to set aside the award, something that is—for obvious reasons—not provided by the rules. In addition, there may be reasons of opportunity not to force a party to lodge a challenge while the arbitration is pending: for example, a party might want not to antagonize the tribunal, or not to make an already tense situation worse.

However, there are in our view even stronger reasons to impose on a party who intends to object to the appointment of an arbitrator to lodge a challenge before the institution as a condition of a subsequent action to set aside the award on the same grounds. In adopting institutional rules, the parties submit to the institutional procedure for disqualifications. The parties' expectation is therefore that, in case of any circumstance susceptible to give rise to a disqualification, the matter will first be submitted to the institution rather than being suspended until after the award. In addition, although a decision by the institution to reject the challenge is not binding upon the judge, it can nevertheless be weighed in setting aside proceedings. This is particularly so if the relevant institution or appointing authority issued a reasoned decision on the matter.[7] All in all, the Reims Court of Appeal decision causes the institutional rule adopted by the parties less effective and less efficient.

Endnotes

1. See, in this respect: A. Mourre, "Challenges: Do Institutional Rules matter? The situation after Tecnimont II," *Kluwer arbitration blog*, 5 Nov. 2010; L. Franc-Menget, "Tecnimont, the saga continues but is not yet over," *Kluwer arbitration blog*, 25 Nov. 2011; A. Mourre, "Conflicts of Interest: Towards Greater Transparency and Uniform Standards of Disclosure?," *Kluwer arbitration blog*, 19 May 2009; L. Degos, *Cahiers de l'Arbitrage*, Recueil, Vol. V, 2010, p. 54; T. Clay, *Rev. Arb.*, 2009.190; P. Schweizer, *Bull. ASA*, 2009.520; M. Henry, *LPA*, 2009, n°144, p.4; A. Muñoz and T. Parigot, *Spain Arb. Rev.*, 2009-6, p.155.
2. *Tecnimont I*, CA Paris, 12 Feb. 2009, *Rev. Arb.*, 2009.186; A. Mourre, "Conflicts of Interest: Towards Greater Transparency and Uniform Standards of Disclosure?," *Kluwer arbitration blog*, 19 May 2009; L. Degos, op. cit.; T. Clay, *Rev. Arb.*, 2009.190; P. Schweizer, *Bull. ASA*, 2009.520; M. Henry, *LPA*, 2009, n°144, p.4; A. Muñoz and T. Parigot, *Spain Arb. Rev.*, 2009-6, p.155.
3. *Tecnimont II*, Cass. 1e civ., 4 Nov. 2010, *Rev. Arb.*, 2010.824; T. Clay, "L'obligation de révélation de l'arbitre au prisme de l'indiscipline de la cour d'appel de Paris," *Cahiers de l'arbitrage/Paris Journal of International Arbitration*, 2010-4, p.1147; B. Lebars and J. Juvénal, *JCP G*, 2010.II.1306; T. Toulson, *Global Arb. Rev.*, 8 Dec. 2010.
4. *SIAB*, Cass., 2e civ., 25 March 1999, *Rev. Arb.*, 1999.319, note Ch. Jarrosson; *DAFCI*, CA Paris, 22 May 2003, *Rev. Arb*., 2004.132; *Republic of Syria*, CA Paris, 19.06.2003, *Rev. Arb.*, 2004.137.
5. *SIAB*, Cass., 2e civ., 25 March 1999, *Rev. Arb.*, 1999.319, note Ch. Jarosson; *SOPIP v. Aresbank*, Cass. 1e civ., 6 May 2003, J-B. Racine, *Rev. Arb.*, 2004.311, J. Ortscheidt, *JCP*, 2003.I.164 n°7; *DAFCI*, CA Paris, 22 May 2003, *Rev. Arb*., 2004.132; *Republic of Syria*, CA Paris, 19.06.2003, *Rev. Arb.*, 2004.137.
6. T. Clay, "L'application perlée du règlement d'arbitrage pour la contestation des liens non révélés entre arbitre et conseil," *Cahiers de l'Arbitrage/Paris Journal of International Arbitration*, 2011-4, p.1109.
7. Although it has no obligation to do so (Article 29(1) of the LCIA Rules of arbitration), the LCIA Court provides reasons along with the decision on challenges (see: P. Turner and R. Mohtashami, "*A Guide to the LCIA Arbitration Rules*," 2009, ¶4.124), as well as the Board of the VIAC (F. Schwarz and C. Konrad, "*The Vienna Rules: A Commentary on International Arbitration in Austria*," 2009, ¶16-045). For cases governed by the Permanent Court of Arbitration rules, the decision-making body will provide reasons for a challenge decision upon request of the parties (G. Born," Institutions Need to Publish Arbitrator Challenge Decisions," *Kluwer Arb. Blog*, 10 May 2010).

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P.R.I.M.E. Finance: A New Dispute Resolution Facility for Conflicts Relating to Complex Financial Products

By Gerard J. Meijer and Camilla Perera

P.R.I.M.E. Finance, the Panel of Recognised International Market Experts in Finance, established to assist judicial systems in the settlement of disputes on complex financial transactions, was recently opened by the Dutch Minister of Finance, Mr. Jan Kees de Jager, in the Peace Palace in The Hague. This short article outlines the reasons for the organization's creation and gives a description of the services and structure of the new dispute resolution facility.

The Need for P.R.I.M.E. Finance

Although the idea of setting up a special dispute resolution facility for disputes between parties in the financial markets was proposed before the financial crisis, the need for such a facility was confirmed by the crisis, in view of the considerable number of financial market disputes it generated. To date, national courts and *ad hoc* arbitration have been unable to produce a settled and authoritative body of law in this particular field. Courts seem to be less familiar with cases involving complex financial products as they often lack the right expertise. Particularly troublesome is the fact that, recently, a serious difference in views was expressed by the English and New York courts on certain subjects—and there is no "supreme court" to reconcile such differences. *Ad hoc* arbitration may provide the proper expertise, but lacks "concentration," which is necessary for the creation of the aforementioned authoritative body of law. P.R.I.M.E. Finance is designed to serve the need for an adequate settlement of complex cases between parties in the financial markets, such as banks, insurance companies, financial institutions, investment funds, pension funds, and customers. By providing one-stop access to the best collective knowledge of law and market practice regarding derivatives and other complex financial products, P.R.I.M.E. Finance attempts to reduce legal uncertainty and to foster stability and confidence in the world of finance.

The idea of creating a specialized facility for the settlement of financial disputes was expressed for the first time by Professor Jeffrey Golden, Visiting Professor at the London School of Economics and Political Science, retired founding Partner of Allen & Overy LLP's U.S. law practice and former Senior Partner in the firm's global derivatives practice, during a conference held in The Hague in December 2007.[1] In October 2010, following the G20 summit of finance ministers and central bankers in Korea, a roundtable meeting took place in The Hague to explore the feasibility of the project. The meeting was chaired by the former Lord Chief Justice of England and Wales, Lord Woolf, who was joined by 60 finance experts including lawyers, judges, market representatives, CLOs, regulators and central bank officials, and many of the founding fathers of the derivatives industry.

The market need for this initiative was further explored through expert meetings in 2010 and 2011 with dealer and "buy-side" market participants, market experts, jurists, and financial market regulators in various financial centers of the world such as Dubai, Moscow, London, New York, Paris, Frankfurt, and Dublin. P.R.I.M.E. Finance was formally established in May 2011 and the first board meeting was held the following month.

"P.R.I.M.E. Finance is designed to serve the need for an adequate settlement of complex cases between parties in the financial markets…"

Organization

P.R.I.M.E. Finance's Advisory Board is chaired by Lord Woolf of Barnes and its Management Board is chaired by Professor Jeffrey Golden. Although the Secretariat of P.R.I.M.E. Finance is based in The Hague, its reach is intended to be global and consequently the provision of services and expertise will be available to market parties worldwide.

P.R.I.M.E. Finance will draw on the knowledge and expertise of more than 80-strong pool of experts, including some of the most senior people in the financial markets. Among the experts are sitting and retired judges, central bankers, regulators, representatives from private practice and, of course, derivative market participants. It is a diverse and international group with a variety of backgrounds in terms of nationality, jurisdiction, location, market activity, and linguistic skills. This distinguished group of individuals has been carefully vetted and is strongly committed to the goals of the organization.

Services

P.R.I.M.E. Finance will develop a centre of excellence aimed at promoting a more sophisticated understanding of matters relating to documentation, law and market practice in the field of derivatives and other complex financial products. Its services will include: (i) *dispute resolution services*: the services to be offered will include arbitration, mediation, expert opinion and advisory services; P.R.I.M.E. Finance expects to be an acceptable

forum for market participants from all over the world, (ii) *judicial training*: from the outset, P.R.I.M.E. Finance will provide training for judges and lawyers through customized training programs, both upon request and through a series of conferences, which will draw upon the knowledge and experience of the organization's experts, (iii) *a library / database facility:* P.R.I.M.E. Finance will develop and maintain a specific database of relevant case law and publications; and (iv) *legal infrastructure support:* working groups will identify areas of potential legal risk and seek, where appropriate, to improve the law in the relevant markets.

As indicated above, P.R.I.M.E. Finance will not limit itself to providing dispute resolution services for the financial markets. Arbitration, mediation, and expert-opinion services constitute only one linchpin on which P.R.I.M.E. Finance will base its future foundation. Its ambitious objectives include developing a centre of excellence that will promote a more sophisticated understanding of matters relating to documentation, law and market practice in the fields of derivatives and other complex financial products. To this end, the services that P.R.I.M.E. Finance will also deliver include the aforementioned training and a database of cases relating to complex financial transactions from all around the world.

The goal of the judicial training is to educate judges and lawyers in international finance and to make them better qualified to deal with complex financial disputes. A working group on the development of the curriculum for the judicial training was recently set up. The group comprises highly qualified judges with broad experience in complex commercial litigation and is chaired by the Hon. Ben F. Tennille (Ret.), one of P.R.I.M.E. Finance's experts.

The development of the P.R.I.M.E. Finance database will aid in the global understanding of issues relating to complex financial transactions from around the world and it will facilitate the accessibility of relevant precedents and documents to judges and scholars. The process of developing the database started with a three-month research project at the Netherlands Institute of Advanced Studies (NIAS), in which senior judge Sir David Baragwanath conducted an analysis of cases that could be submitted to P.R.I.M.E. Finance. During his research, Sir David identified "an immense black hole of legal uncertainty" around global financial transactions. He concluded that there is a pressing need for greater professionalism in handling complex financial transactions and indicated that P.R.I.M.E. Finance is well-placed to bring clarity and authority to the field.

P.R.I.M.E. Finance Arbitration Rules and Mediation Rules

The P.R.I.M.E. Finance Arbitration Rules and Mediation Rules were prepared in consultation with the P.R.I.M.E. Finance's Panel of Experts, comprising arbitration, mediation, and financial experts contributing expertise and knowledge to tailor the rules for disputes arising in financial markets. In addition, the International Swaps & Derivatives Association's (ISDA) working group on arbitration was particularly inspirational as well, providing further insight in the use of arbitration in derivatives markets. The working group indicated that the increase in the use of arbitration in derivatives contracts (and in international financial transactions more generally) is driven primarily by a combination of the unattractiveness of litigating such disputes in the courts of many jurisdictions, particularly in emerging markets, and the huge advantage of international enforcement of arbitral awards under the New York Convention, to which more than 140 Contracting States, which will also apply to arbitral awards rendered under the auspices of P.R.I.M.E. Finance.

The P.R.I.M.E. Finance Arbitration Rules are based on the globally used and well tested UNCITRAL Arbitration Rules 1976 (as revised in 2010). In order to "institutionalise" the UNCITRAL Rules, the P.R.I.M.E. Finance Secretariat has been built in as the body administering the arbitral proceedings. In preparing the Arbitration Rules, deviations from the original text have, to the extent possible, been kept to a minimum, both in order to ensure that reference can be made to the reputable legal commentaries to the UNCITRAL Arbitration Rules and in order to confirm the role that is attributed to the Permanent Court of Arbitration ("PCA") under those Rules. Under the UNCITRAL Rules, as adapted for P.R.I.M.E. Finance, the Secretary General of the PCA, also based in The Hague, may act as appointing authority for P.R.I.M.E. Finance in cases where the parties cannot agree on the appointment of arbitrators, who can be selected from P.R.I.M.E. Finance's approved list of experts. The Secretary General of the PCA has agreed that, if a request to him for the selection of arbitrators is made under the Arbitration Rules of P.R.I.M.E. Finance, he will also select arbitrators exclusively from P.R.I.M.E. Finance's expert list. In addition, the P.R.I.M.E. Finance Arbitration Rules include certain provisions and annexes that reflect further particular needs of dispute resolution in the area of complex financial products. For example, the Arbitration Rules contain special provisions on fast-track proceedings, comprising expedited proceedings, emergency proceedings, and referee proceedings. In order to contribute towards the aim of creating an authoritative body of law, the Arbitration Rules contain a special provision on the publication of arbitral awards. P.R.I.M.E. Finance may publish an arbitral award or order in its entirety if anonymised and if none of the parties objects to such publication within a certain time limit. It may always include in its publications *excerpts* of an arbitral award or order in anonymised form.

The P.R.I.M.E. Finance Mediation Rules are based on the UNCITRAL Conciliation Rules 1980 and on more recent developments in mediation; they have also been amended in order to better suit the purposes of P.R.I.M.E. Finance.

Finally, it is worth noting that disputes resolution proceedings under the Rules of P.R.I.M.E. Finance may be conducted anywhere in the world. However, hearings under the Rules of P.R.I.M.E. Finance may be held at the Peace Palace in The Hague if the parties so wish.

To further improve the services of P.R.I.M.E. Finance and its Rules and—in particular—to address the challenges of making the Rules of P.R.I.M.E. Finance more suitable for dispute resolution in the financial markets, specialized steering groups have been set up, consisting of both dispute resolution and financial experts. Moreover, P.R.I.M.E. Finance will continue to convene consultation meetings regarding its Rules with market parties in various financial centres around the world.

Contact

For further information about P.R.I.M.E. Finance, please contact Mr. Gerard Meijer, Secretary General, P.R.I.M.E. Finance, at g.meijer@primefinancedisputes.org or Ms. Camilla Perera, Registrar, P.R.I.M.E. Finance, at c.perera@primefinancedisputes.org. Information can also be found on P.R.I.M.E. Finance's website (www.primefinancedisputes.org).

Endnote

1. This article draws, with his permission, on previous speeches and writings by Professor Golden, including *"The courts, the financial crisis and systematic risk"* in Capital Markets Law Journal and *"Do we need a world court for the financial markets?"* in Liber in Honorem W.J. Deetman.

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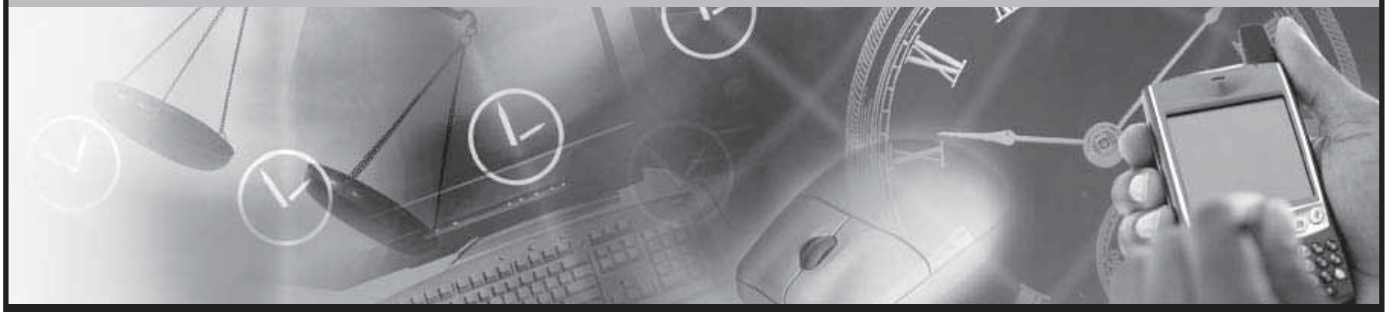

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Book Reviews

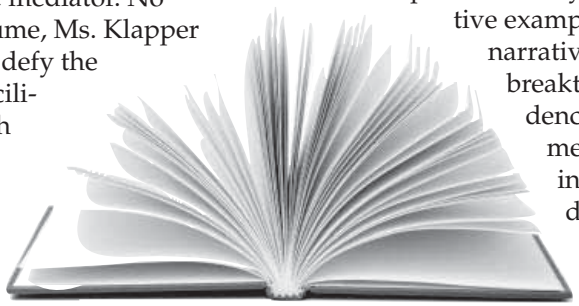
Molly Klapper, the editor of the NYSBA book reviewed here, *Definitive Creative Impasse-Breaking Techniques in Mediation*, passed away in the late fall of 2011. She will be sorely missed. Molly was an advocate and a teacher of mediation committed in every way to helping all of us progress and engaging us with her intelligence, kindness and friendship.

Definitive Creative Impasse-Breaking Techniques in Mediation

Molly Klapper, J.D., Ph.D., Editor (New York State Bar Association 2011)

Reviewed by Stefan B. Kalina

Mediation is the parties' process. When the parties reach an impasse, so too does the mediator. No more. In this unprecedented volume, Ms. Klapper provides mediators with tools to defy the arresting logic of impasse and facilitate a successful outcome through mediation.



On the surface, the book appears to be a practice guide. It offers the "latest cutting-edge trends, techniques, tools and tips" for breaking impasse. It culls them from the collective experience, scholarship and perspective of leading mediators in the field. It makes them available "for immediate implementation across all disciplines." For these reasons, the book is, indeed, a very useful guide.

"In all, the book gives confidence to both advanced and newly minted mediators alike, making it worth re-reading often for valued guidance before or during any mediation."

Its usefulness lies in its accessible array of chapters. Each chapter is stand-alone treatment of breaking impasse. Certain chapters deal with impasse at specific stages of mediation, such as during the pre-mediation phone call, controlling venting during the joint session and dealing with counsel and clients in both joint session and separate caucuses. Some chapters address constant, thorny elements that can occur at any point in mediation, such as responding to insulting first offers, using lawyers to break impasse and reacting to threats of a walkout. Other chapters explain how to bridge cultural, emotional and language divides or how to avoid pitfalls in multi-party or other case-specific situations. The balance of the chapters demonstrate how to confront the negotiation tactics of parties and counsel by using high-low agreements, risk allocation, mediator's proposals and game theory.

This structure enables readers to quickly locate needed strategies to particular problems among the book's "diversified contents" and "breadth of its reach." The creative approaches are credibly presented because they are borne out of each of the contributing author's own experience. They are reinforced by practical, illustrative examples that accompany the easy-to-follow narrative about successful, real-life, mediated breakthroughs. In all, the book gives confidence to both advanced and newly minted mediators alike, making it worth re-reading often for valued guidance before or during any mediation.

While the book may read like a set of case-by-case analyses, it is actually examining broader themes in the process. Ms. Klapper's keen editorial focus runs beyond compiling a set of readily available techniques. She is also delving deeply into the "genesis of impasse" with each chapter to extract deeper insights into mediation that elevate the text to a treatise on the practice generally.

To begin, the book suggests that impasse is inextricably linked to the nature of the dispute, and not an artificial end to the mediation process in and of itself.

> If we understand that the impasses that have prevented the case from settling are not isolated events but part of the dynamic of conflict, we appreciate that each type of impasse requires a customized intervention that addresses the dynamics of conflict.

Impasse, therefore, is not an independent condition, reflective of stalled or failed negotiations that can be easily remedied. Rather, it is an ever-present threat that divides the parties and deserves respect and attention from inception:

> after all, clients are the personal owners of the conflict. If given the opportunity, clients may be able to identify impasses, suggest options to overcome the impasses, and solve their conflicts.

The Mediator is thus charged at the outset with understanding and handling the parties' dispute carefully to prevent impasse from manifesting itself in a destructive manner. This understanding requires several pro-active techniques grounded in preventing impasse. While the techniques may ring familiar, they take on greater significance when viewed through the lens of prevention. For example, the book suggests mediators use active listening and careful attention to the parties' approach to their own conflict:

> This does not mean that mediators are doomed to cause impasse. ***They are probably in a better position than the other participants to become aware of clashing modes*** and to do something to switch the participants and the process to more congruent thinking.
>
> * * *
>
> More than anything else, the mediator's challenge is to listen incredibly hard…. ***To manage the potential for impasse that arises from a conflict in mental modes,*** however, a mediator must engage in a different kind of listening as well.

Equally familiar, but no less significant, the book suggests that mediators facilitate the parties to undertake an objective view of the dispute at the start of any mediation:

> It is a much overlooked but obvious point that if there is an objective range of values in a case, both sides should be able to perceive it and come within a zone of potential agreement. ***But impasse occurs precisely because the parties do not agree on the value of the case.***
>
> * * *
>
> First, from the outset ***we can inoculate ourselves against impasse when we request a mediation statement and ask the parties to prepare for the mediation***… This technique injects some objectivity into the risk assessment process….

While not meant as an exhaustive list, these few examples illustrate the larger themes that are examined throughout the book. First, impasse prevention is a necessary element of impasse breaking. By taking these preliminary steps, impasse may be avoided or at least muted as a hindering force. And when impasse blocks forward progress, the groundwork will have been laid to transition into impasse breaking more easily and, hopefully, with greater success.

As another example: when "culture is a factor" for potential impasse, the book suggests beginning "by acknowledging that during discussions the other person and/or group will have perspectives that are different from your own and from the other party" and to "ask each person and/or group what two things they want to know about the other participant." These "strategies can be used during pre-negotiation sessions, during caucus or they may be incorporated in to the mediation session." While such questioning may seemingly slow the mediation at first, "the time it takes to question, listen, clarify, and understand is ***well spent***."

"As the authors' own experience dictates, impasse can become a managed element of mediation rather than its death knell."

A second, and quite revealing, theme is that the mediator's presence alone serves as a potential firewall against impasse. Interestingly, the book concludes by returning to basic mediating without any specially targeted "skills or bag of tricks." This is not meant to devalue the creative techniques previously presented. Instead, it serves to remind mediators that their positive, cultivating attitude is an equally powerful tool to ward off impasse as much as any other factor. Such an attitude establishes trust, influences the parties' belief that they "can work through this problem together," and helps "keep people in the room" and "support communication and creativity." These are the very elements the creative techniques also strive to accomplish.

In the end, the book affirms the potential mediation holds for resolving disputes. It examines impasse as an element of all disputes, and not as the hallmark of only intractable conflict. From this vantage point, it provides accessible and usable tools to identify, prevent, and break impasse whenever, wherever and however it emerges in any mediation regardless of size or scope. As the authors' own experience dictates, impasse can become a managed element of mediation rather than its death knell. Ms. Klapper's compilation and examination thus deserves a place in every mediator's thoughts and toolbox.

The late Molly Klapper, J.D., Ph.D., Editor of the volume, was a respected litigator, mediator and educator in several fields including dispute resolution.

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* * *

How Leading Lawyers Think: Expert Insights Into Judgment and Advocacy

By Randall Kiser (Springer-Verlag 2011)

Reviewed by Laura A. Kaster

Although all lawyers believe they are sought out for their good counsel and judgment, there is little focused study in law school, legal literature, or practice on how to improve lawyer judgment. Randall Kiser has set out to remedy that deficiency. He has authored three seminal works, a research paper entitled "Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations" by Kiser, Martin A. Asher and Blakely B. McShane,[1] *Beyond Right and Wrong* (Springer-Verlag 2010), and in *How Leading Lawyers Think.* In the earlier works, Kiser systematically studied the literature, analyzed thousands of cases, obtained objective data, and now he has undertaken extensive interviews to examine both errors in judgment and, based on those who less frequently succumb to those errors, how to avoid them. These works document that more than 60% of plaintiffs' counsel and more than 24% of defense counsel turn down settlements only to find at trial that settlement was a better deal. Although the error rate for defendants is lower, the cost of that mistake is nineteen times greater for the defendants than for plaintiffs—if erroneous plaintiffs get $43,000 less (as a mean) at trial after turning down the settlement, the erroneous defendants pay over $1 million more than they could have settled for. In *Beyond Right and Wrong*, Kiser sliced and diced the data in multiple studies to show what type of cases yield different percentages and to dispel any belief that lawyers from more prestigious firms or law schools are exempt from the common mistakes. In *How Leading Lawyers Think*, Kiser moves from the analysis of large bodies of data to close analysis of a group of select lawyers chosen for their ability to beat the odds and make accurate case assessments and good settlements or good decisions to instead try the cases. He examines their habits of mind and approach to their clients, cases, colleagues and opposition in an effort to isolate practices that can assist all of us as advocates and mediators to calibrate our own case assessments and to understand the importance of certain criteria and disciplines in predicting case outcomes.

The body of Kiser's work is really a must for anyone who seeks an improved understanding of good judgment and impediments to good judgment generally and in the more specific context of case assessment. Fisher and Ury in *Getting to Yes* established that all negotiations take place in the shadow of what will happen in the absence of a negotiated settlement, but they never discussed how to assess that Best Alternative to a Negotiated Agreement and assign to it a number value. Much of the literature simply assumes this problem away despite the fact that it is the test weight against which success is purportedly measured. Kiser sends us back to basics, divides up the elements of decision making, and shows us the techniques of those who escape the norm to achieve better judgments.

In *How Leading Lawyers Think*, Kiser mines his previous studies to select attorneys for in-depth interviews. The selected groups' representations correlated with accurate case evaluations and financially effective trial results when settlement was refused. To meet the criteria, the clients' settlement demands or offers had to be within 20% of the ultimate trial or arbitration results and the ultimate results had to be superior to the settlement proposal. Thus, effective decision making, good calibration, and good trial skills were required to participate and the 78 attorneys selected had to meet multiple criteria for excellence and extensive practice. Most of the selected attorneys had tried between 30 and 175 cases in practice areas including personal injury, premises liability, products liability, construction, professional negligence, eminent domain, public entity liability, employment, insurance, contracts and business torts.

"The body of Kiser's work is really a must for anyone who seeks an improved understanding of good judgment…"

The insights of the lawyers interviewed are far too extensive to treat fairly here, but a few should engage you. The lawyers in the study all took responsibility for their good judgment and tracked whether the settlements they refused resulted in decision error. This is itself extraordinary. I have been asking large groups of lawyers for several years whether their firms or corporate law groups, or even insurance groups, kept track of settlement offers and compared them to ultimate results, and I have found that very few lawyers avail themselves of what could be a wealth of information for use in calibrating judgment. Kiser notes that the failure to track results may also correlate with the belief that attorney factors—the preparedness or experience of the lawyer or the opposing lawyer—are generally rated as a very weak factor in influencing the outcome of cases by attorneys themselves; they rate case facts, witness factors, client factors and court factors as much more significant. In taking personal responsibility for outcomes and for accurate assessments, the study attorneys stood apart. Their sense of personal responsibility may have given them a greater impetus to improved judgment.

In addition, the study attorneys seem to be aware of the competing roles they play as advisor and advocate, at once trying to persuade the opposition and the court of the merits of the case and then trying to give objective assessment to the client—many of them viewed themselves as client educators: "part of the education process is

explaining what is realistic and what are problems in the case. If a client comes in telling me what a case is worth, he is not going to be a client unless he's a CPA or there's a liquidated damages clause."(Kiser at 31) All of the study attorneys were able trial attorneys and were known to be willing, able and prepared to try their cases—that was crucial to achieving good settlement results. They were also good at putting themselves in the juror's shoes and seeing the case from the perspective of the jury—the human component, emotional intelligence is a palpable factor throughout: "Our job is not to make the client hear what we think about the case but to tell them what 12 jurors will do with the case. That's different from what *you* think." (Kiser at 53) These lawyers do not accept the proposition that they must reflect what the client wants; they feel a duty to help the client see reality. They may be different than typical experienced senior litigators in that they seek out third-party review from colleagues and outsiders and feedback on the strengths and weaknesses—including focus groups—to counter overconfidence bias.

Kiser collects many studies including those that demonstrate that emotional intelligence is necessary for business cases as well as tort cases: "Jurors' awards of damages in breach of contract cases are affected by concepts of fairness that may override narrow legal factors. Studies indicate, for instance, that jurors 'view breach as a moral harm' and 'breaches to engorge gain are perceived to be more immoral than breaches to avoid loss.'" (Kiser at 115, citing studies) He notes that sixty-six percent of federal judges and fifty-nine percent of state judges attribute parties' failure to settle to an unrealistic assessment by one side of its chances for success on the merits. (Kiser 122)

The last third of Kiser's book is devoted to techniques for improving our evaluation skills for negotiation and mediation. The material here, combined with the material in *Beyond Right and Wrong,* provides an invaluable boost to the learning curve that might otherwise require or depend upon literal trial and error. One of the many valuable insights that struck me was the importance of the client's demeanor and credibility and the difficult need to inform clients when it is true that they are not good witnesses. In a number of mediations, where there was a dramatic difference in this regard, I have found this issue to be one that has a big impact on the negotiations. If I take a lawyer aside and say, "Your client is not a good witness" or to an opposing lawyer, "The client on the other side is very appealing," the lawyers do recognize and act on the significance of this information. It can assist in getting past impasse.

Kiser suggests that the successful study attorneys, despite a track record of accomplishment, remained critical of their work, open, candid and always seeking to enhance their skill and address their biases, even if unconscious, seeking information and opinions from a broad range of people. He sums up their habit of mind as "responsibility, respect, resourcefulness and resiliency." Anyone who aspires to join their ranks would be well served by starting with Kiser's works.

Endnote

1. 5 Journal of Empirical Studies, Vol. 3, 551-591 (2008).

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Attorney Disqualification in Arbitration Proceedings Is an Issue for the Court

Northwestern National Ins. Co. v. Insco Ltd.

By Nicole J. Wetherell

In *Northwestern National Ins. Co. v. Insco, Ltd.*,[1] Judge Shira A. Scheindlin granted a motion to disqualify the law firm of Freeborn & Peters, LLP ("Freeborn") from representing Insco in a pending arbitration after the firm acquired access to 182 pages of the arbitration panel's e-mail deliberations. The court held that attorney disqualification in arbitration proceedings is a substantive matter of law to be decided by the court and not an arbitration panel and that Freeborn seriously breached its ethical duties and tainted the proceedings by deliberately acting to obtain panel communications relating to live and contested matters.

Background

Insco, Ltd. ("Insco") and Northwestern National Insurance Company ("NNIC") entered into arbitration proceedings in February of 2010 to settle disputes arising from a reinsurance agreement. Each party appointed one arbitrator to a panel and a third arbitrator was selected by lottery.

In the fall of 2010, Insco's appointee, Dale Diamond, told Insco's attorneys at Freeborn that he was concerned about the partiality of NNIC's appointee, Diane Nergaard. Diamond said that Nergaard was dependent upon NNIC's counsel, Barger & Wolen LLP ("Barger"), as a source of business. Insco responded by requesting updated conflict-of-interest disclosures from panel members. Nergaard disclosed several arbitration appointments, including two previously undisclosed appointments by Barger. In February 2011, Diamond gave Insco access to several panel e-mails that showed Nergaard's frustration with Insco "attacking" and "slandering" her about her appointments by Barger.[2] Insco subsequently asked all of the panelists to resign because of "evident partiality." Diamond did so immediately; however Nergaard and the lottery-selected third panelist, Haber, did not resign.

Insco then asked the panel to turn over any communications that Nergaard had with Barger, NNIC, or any third party. Accordingly, Diamond gave Insco's counsel, Freeborn, 182 pages of the panel's e-mail communications. Upon discovering that Insco was in possession of these communications on March 4, 2011, NNIC immediately requested further information regarding the nature of the e-mails. Insco treated these requests as being "akin to discovery requests" and "did not provide any useful information about the e-mails."[3] At a pre-motion conference before the Court relating to NNIC's motion to have a substitute arbitrator appointed to replace Diamond, Insco asserted that it intended to file a cross-motion to challenge Nergaard and Haber as impartial arbitrators after they did not resign. The Court rejected NNIC's motion and told Insco that it would not entertain an attack upon the qualifications of the arbitrators until the arbitration concluded, and Insco did not file the cross-motion. Insco appointed a new party arbitrator.

At the next arbitration panel organizational meeting, in June, NNIC insisted that Insco produce the communications that it received from Diamond. The panel ordered the disclosure, but also stated that the issue of the released documents was "not really a panel issue" and "[i]t's not this Panel's issue because I would have to become embroiled in any of that and I avoid that whole circumstance because I go forward in life. I don't go backwards."[4] Insco produced the full 182 pages on June 28. Two days later, the panel issued Interim Order 12, noting that Diamond's release of the e-mails was "highly inappropriate," but that "[n]evertheless, this Panel will continue to decide the case on the facts and the evidence presented."[5] The Order also set guidelines for both parties to destroy all copies of the communications within 10 calendar days and stated that those 10 days would provide enough time for the parties to destroy the e-mails "or make appropriate motions before a court."[6] The arbitration panel refused to further address the issue and stated to NNIC's counsel, "If you believe that you have legal rights that you'd like to have enforced, you know where to get them enforced. We don't want this to go any further before us."[7]

NNIC's summary judgment motion before the panel was denied by a written order on July 19, 2011. On July 21, 2011, NNIC moved to reopen this case in the U.S. District Court for the Southern District of New York and disqualify Freeborn from representing Insco.

Motion for Attorney Disqualification Is a Matter for the Court to Decide

The Court rejected Insco's argument that the issue of disqualification should be for the arbitration panel in the first instance because (1) Courts, rather than industry experts, decide issues of attorney discipline, and (2) the

panel had indicated that it did not intend to address the issue.

Judge Scheindlin relied on established law that requires the courts to supervise the legal profession under applicable state law; the court was not only concerned that industry experts might not have the substantive law expertise but that the dispute relating to disqualification arose in the context of a challenge to one of the arbitrators for bias.[8]

In addition, the court reasoned that "even if the panel were competent to resolve this matter, it has explicitly refused to do so in the present case,"[9] and that it would be "manifestly unfair" for the court to refuse to consider NNIC's motion to disqualify under these circumstances.[10]

Although the court recognized that there is a very high burden for disqualification in light of the potential for tactical abuse and delay, Freeborn's actions in obtaining and hiding the panel's e-mail deliberations in an ongoing arbitration were serious violations under the arbitral guidelines and ethical rules of both the reinsurance industry and the American Arbitration Association.[11] The law firm's actions potentially tainted the proceeding and required disqualification.[12]

Arbitrators may not inform anyone about the substance of panel deliberations and a party is not permitted to probe the decision-making process of an arbitration to prove bias except in the most egregious cases.[13]

Endnotes

1. 2011 WL 4552997 (S.D.N.Y. Oct. 3, 2011).
2. *Id*. at *2.
3. *Id*.
4. *Id*. at *6. The decision does not note which panelist referred to him- or herself in the first person here.
5. *Id*. at *3.
6. *Id*. at *4.
7. *Id*. at *6.
8. *Id*.
9. *Id*.
10. *Id*.
11. *Id*.
12. *Id*.
13. *Id*. at *6-*7.

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Piecemeal Litigation

KPMG LLP v. Cocchi

By Melody Shenassa

State courts, like federal courts, must apply the Federal Arbitration Act's requirement that agreements to arbitrate be enforced even when the result will be piecemeal litigation and arbitration of related issues. In *KPMG LLP v. Cocchi*,[1] the Supreme Court vacated and remanded a Florida appellate court ruling upholding a state trial court's refusal to compel arbitration after determining that two of four claims in the complaint were not arbitrable. Consistent with the prior holding in *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985), the Court held that a court must determine the arbitrability of every claim in a complaint, and compel arbitration of any and all claims deemed arbitrable.

Background

This case is a spinoff of Madoff-related disputes. Respondents were individuals and entities who purchased limited partnership interests in limited partnerships (the Rye Funds) that had invested funds with Madoff and lost millions of dollars. All were managed by Tremont Group Holding, Inc., and Tremont Partners, Inc. ("Tremont defendants"), which in turn were audited by KPMG. In their complaint, Respondents allege four causes of action stemming from the underlying allegation that KPMG failed to use proper auditing standards with respect to the financial statements of the Rye Funds. Claims were based on violations of Florida law, negligent misrepresentation, professional malpractice and abetting a breach of fiduciary duty. KPMG moved to compel arbitration based on the arbitration clause in place between KPMG and the Tremont defendants.[2] The Florida trial court denied the motion after concluding that two of Respondents' claims were not arbitrable under Delaware law; the Florida appellate court affirmed, relying on the reasoning that the arbitration clause could only be enforced if the respondents' claims were derivative in that they arose from the services performed by KPMG for the Tremont defendants under the audit services agreement. The opinion revealed that the Court of Appeal found the negligent misrepresentation and the statutory claims were direct rather than derivative, but it said nothing about the professional malpractice and breach of fiduciary duty claims.

Discussion

Stressing the "federal policy in favor of arbitral dispute resolution," the Court held that there is no discretion under the FAA to deny a motion to compel arbitration of arbitrable claims "even where the result would be the possibly inefficient maintenance of separate proceedings in different forums."[3]

In failing to examine the two remaining claims once it found two claims were direct, the state court failed to undertake the complete examination required. "[C]ourts must examine a complaint with care to assess whether any individual claim must be arbitrated. The failure to do so is subject to immediate review."[4] Accordingly, the judgment of the Court of Appeal was vacated and remanded for examination of the arbitrability of the remaining claims.

The parties' agreement to arbitrate will be honored even when piecemeal litigation results.

Endnotes

1. 565 U. S. __, No. 10-1521 (2011), 2011 WL 5299457 (November 07, 2011).
2. The agreement stipulates that "[a]ny dispute or claim arising out of or relating to…the services provided [by KPMG]…(including any dispute or claim involving any person or entity for whose benefit the services in question are or were provided) shall be resolved." KPMG, 565 U.S., slip op. at 2, 2011 WL 5299457, at *1.
3. Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 217 (1985).
4. KPMG, 565 U.S., slip op. at 4, 2011 WL 5299457, at *2.

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Arbitral Right to Ensure Capability of Compliance

On Time Staffing, LLC v. National Union Fire Insurance Company of Pittsburgh, PA

By Alison L. Genova

The United States District Court for the Southern District of New York has affirmed an arbitral order requiring that a party post a pre-hearing security.[1] The court held that requiring a pre-hearing security does not exceed an arbitrator's authority where the arbitration clause of an agreement uses broad language to describe the scope of the arbitrator's powers. Additionally, the panel has not committed misconduct by issuing an order before a full hearing because arbitrators have the power to ensure that parties will have the ability to comply with their judgments.

Background

This decision arises out of a dispute between On Time Industrial Staffing, Inc. ("On Time") and National Union Fire Insurance Company of Pittsburgh, PA ("National Union"). National Union, a provider of workers' compensation insurance, contended that On Time, one of its policyholders, defaulted on its payment obligations. National Union submitted the issue to an arbitration panel pursuant to a Payment Agreement (the "Agreement") that included a provision requiring the parties to submit all disputes to arbitration. The Agreement outlined the scope of the panel's powers and responsibilities in deciding disputes between the parties. The Agreement relieved the panel from all judicial formalities and stated that the panel had no duty to follow the rules of law. The Agreement also stated that the panel's decision would be final and binding on the parties.

National Union sought pre-hearing security to satisfy On Time's obligation to provide additional collateral when defaulting on payments. National Union submitted an affidavit stating On Time would not have the financial ability to satisfy an award based on its review of On Time's 2008 and 2009 financial statements. In response, On Time submitted an affidavit seeking to establish that a security was unnecessary and they could meet ultimate awards imposed. After hearing oral arguments addressing On Time's financial ability to satisfy an award, the arbitration panel issued an order requiring On Time to post a security.

On Time filed a motion to vacate the panel's order on two grounds. First, On Time contended that the arbitration panel acted outside the scope of its authority and violated §10(a)(4) of the Federal Arbitration Act ("FAA") by ordering the award. Second, On Time contended that the panel committed misconduct under the §10(a)(3) of the FAA by issuing the award without conducting a full evidentiary hearing. Additionally, On Time claimed that the panel's action was impermissible because it was motivated by its desire to force the parties into settlement.

Affirming Arbitral Orders for Pre-Hearing Security

The district court found that the arbitration panel acted within the scope of its authority under the FAA. First, the court held that the arbitrators acted in accordance with the parties' Agreement.[2] Where, as in this case, the language of the clause is broad, arbitrators have discretion to order any remedy they determine to be appropriate.[3] Additionally, where it is established that a party may not be able to meet the ultimate award, arbitrators may require a pre-hearing security. Here, the court found that the panel had the power to require a pre-hearing security pursuant to National Union's affidavit noting, among other financial concerns, On Time's 18.2 percent drop in revenue between 2008 and 2009.[4]

Second, the court found that the panel's decision to order the security before a full evidentiary hearing did not demonstrate misconduct.[5] The Second Circuit has interpreted the FAA to mean that arbitrators must give parties a fundamentally fair hearing. Here, the court found that On Time had ample opportunity to oppose the motion for pre-hearing; in fact, On Time opposed the hearing by submitting affidavits demonstrating its ability to satisfy a final award. The court concluded that the affidavits would satisfy the evidentiary minimum for a federal court to issue an award of a pre-hearing security. Thus, the arbitration panel, governed by an agreement that relieves them of judicial formalities, did not act with misconduct in awarding the security.

Additionally, the court found that nothing in the record suggested that the panel's intent was to force On Time into settlement. The panel had a well-founded concern based on the affidavit submitted by National Union that On Time would be unable to satisfy an eventual award. The court found that the panel had a right to ensure that the arbitration exercise and judgment it rendered would not be meaningless if the losing party could not satisfy the award.

Impact

The refusal of the court to vacate the arbitration security award follows a similar determination made eight years ago by the Court of Appeals for the Second Circuit.[6] These precedents should alert parties that pre-hearing relief may be available to protect the ultimate award.

Endnotes

1. No. 10 Civ. 9583 (JSR), 2011 U.S. Dist. LEXIS 50683 (S.D.N.Y. May 11, 2011).
2. *Banco de Seguros del Estado v. Mutual marine Office, Inc.*, 344 F.3d 255, 262 (2d Cir. 2003).
3. *Id.*
4. No. 10 Civ. 9583 at *453.
5. 9 U.S.C. § 10(a)(3).
6. *Banco*, 344 F.3d at 359.

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Dispute Resolution Section Fall Meeting

Crisis in the Courts—Dispute Resolution as a Solution to Judicial Gridlock

On October 31, 2011 the Section conducted an all-day program at the Fordham Law School, analyzing the impact of the current federal and New York State budget crises on litigants, and use of various alternative dispute resolution processes as possible solutions. Topics included customized dispute resolution systems, court-ordered mediation, and judicial involvement in ADR processes. A special session on impasse-breaking techniques in mediation rounded out the day. Fordham Dean John Feerick and Professor Jacqueline Nolan-Haley welcomed the over 100 participants, and were joined by an outstanding faculty of judges, court and dispute resolution service administrators, arbitrators, mediators and attorneys. The presentations included riveting accounts of cutbacks in Supreme Court, resulting in lost staff and overtime, essentially bringing the courts to a halt at times of the day and early evening when they would otherwise have been fully engaged.

We were told that Small Claims Court in Manhattan, famous for handling large numbers of small cases, has been cut back to one night a week, and that the Civil Court in New York is very short on judicial and other personnel. We also heard heroic stories of efforts that individual judges are making to continue to deliver justice under these tough circumstances.

This budgetary crisis would seem to cry out for increased mediation and arbitration in the court system. However, we learned that, ironically, this is not the case. It appears that the impact of the budget crisis on the clerk's office in Supreme Court, for example, is such that there has been decreased staff available to administer the mediation program, resulting in an under-utilization of that program.

Section Chair Charles Moxley of Kaplan Fox & Kilsheimer LLP moderated a session on how advocates, neutrals and service providers can help break the gridlock. He was joined on the panel by Jack Levin, Michael Young of JAMS, and Eric Tuchmann, General Counsel of the American Arbitration Association. Dan Weitz, Statewide ADR Coordinator, New York Office of Court Administration, moderated a session dealing with the current state of affairs in the courts. He was joined on the panel by the Honorable Shirley Werner Kornreich, Justice of the Supreme Court, New York County, Barry Berkman of Beekman, Bottger, Newman & Rodd LLP, arbitrator/mediator Abigail Pessen, Marc Sheridan of Marcus & Sheridan LLP and Norman Solovay of McLaughlin & Stern LLP. Past Chair Simeon Baum and Mediator/Arbitrator Stephen Hochman paid homage to Molly Klapper, Author, Editor and New York City Administrative Law Judge, discussing her book "Definitive Creative Impasse-Breaking Techniques in Mediation."

After lunch, Elizabeth Shampnoi, Associate Director, Disputes and Investigations of Navignant, moderated a session on judicial initiatives to break the gridlock, focusing on mediation. She was joined on the panel by the Honorable James L. Cott, United States Magistrate Judge for the Southern District of New York; Fordham Law School Professor and Director of its ADR and Conflicts Resolution Program, Jacqueline Nolan-Haley; Elayne Greenberg, Director of the Carey Center for Dispute Resolution at St. John's Law School; Vivian Berger, Nash Professor of Law Emerita at Columbia Law School; and Arbitrator/Mediator Irene Warshauer. Sherman Kahn mediated the afternoon's final program, focusing on arbitration as a judicial response to breaking the gridlock. He was joined on the panel by the Honorable Jacqueline Silverman of the Blank Rome firm and former Administrative Judge of the Supreme Court Civil Term, New York County; the Honorable O. Peter Sherwood, Justice of the Supreme Court, New York County; John Wilkinson, Arbitrator/Mediator with JAMS; and William J.T. Brown, Arbitrator/Mediator.

In addition to the matters described above, panelists discussed med-arb, collaborative law and other dispute resolution alternatives, their relative advantages and disadvantages, how to custom design dispute resolution procedures to ensure cost, procedural and substantive effectiveness and enforceability, how to select neutrals and schedule proceedings to minimize judicial intervention and expedite the proceedings, motions compelling, staying, vacating, and enforcing arbitration awards, interim relief and injunctions, ethics in dispute resolution, and how to educate the bar and the judiciary to make the best use of alternative dispute resolution processes. Seven CLE credits (including ethics credits) were provided.

The program was co-chaired by Geri Krauss, Mediator/Arbitrator, and Evan Spelfogel of Epstein Becker & Green, P.C.

Dispute Resolution Section Annual Meeting

The Dispute Resolution Section held its Annual Meeting at the Hilton New York on January 26, 2012.

Section Chair, Charles J. Moxley, Jr., Esq., gave opening remarks in which he expressed a sense of accomplishment based on the increased participation of Section members and set forth the goal of New York becoming the center for international dispute resolution. In order to accomplish this, Mr. Moxley hopes for even more involvement from not only local attorneys, but from advocates beyond the tri-state area.

Program I: Overcoming Obstacles to Effective Dispute Resolution—How to Mitigate Cognitive Barriers to Accurate Understanding and Good Judgment

By Ross J. Kartez

The first program was a panel presentation entitled Overcoming Obstacles to Effective Dispute Resolution—How to Mitigate Cognitive Barriers to Accurate Understanding and Good Judgment. Daniel M. Weitz, Esq., of the NYS Office of Court Administration, acted as chair and panelist in addition to Laura A. Kaster, Esq., an Arbitrator and Mediator, and Professor Lela Love, of Cordozo School of Law as panelists.

Professor Love discussed some obstacles that hinder the effectiveness of dispute resolution practitioners. Parties in dispute rarely see the whole picture. As human beings, an inability to see the entire picture can be attributed to a natural ignorance to explore beyond our pre-conceived notions. To prove her point, Professor Love showed the audience a famous drawing. The drawing depicts two different women (an old woman and a young woman),[1] but depending on how the drawing is viewed, one can only see one of the two women. Typically, an individual looking at the drawing would only notice the woman seen first and would not look for the second woman. Once the essence of the drawing is known, the viewer becomes aware of the second woman, but even then can only see one woman at a time. Physically, the brain cannot see both women at the same time. Rather, the brain must toggle back and forth to see each woman. Similarly, when involved in a conflict, a party can usually only see the dispute from his/her own perspective. In order to truly understand the conflict, the participant must be able to put him/herself in an adversary's shoes and put aside his/her own perspective, at least for a moment. Professor Love explored a series of other issues that affect the perspectives of those involved in disputes, including emotional barriers, distractions, and the framing of questions. Players in disputes can improve their ability to advocate, mediate and arbitrate by understanding the factors which impact their own as well as the other party's perspectives.

Ms. Kaster addressed how "client think" radically impact the assessment of risk and the decision to settle or go to trial. Based on a series of studies by Randall Kiser and his colleagues of thousands of disputes, attorneys often make decision error in advising their clients to reject settlement proposals. For the purposes of the study, a decision error was refusing to settle if the trial result was worse than the offer made to the party prior to trial. According to the data presented, 61% of the plaintiffs and 24% of the defendants made decision errors. Although plaintiff attorneys made more mistakes concerning settlement, the magnitude of the error was greater for the defense. The average mistake made by a plaintiff cost an additional $43,100, while the average error made by a defendant cost an additional $1,140,000.[2] Thus, many attorneys' inability to accurately evaluate conflict has impacted their clients at substantial costs. In an attempt to avoid the errors caused by unconscious cognitive impediments, Ms. Kaster suggested using a devil's advocate (a colleague appointed to act as an adversary from the inception of the case in order to provide the opposite perspective); or perform a premortem (assume that the case has been resolved in the adversary's favor and predict why this would happen). Such practices can prevent advocates from falling victim to their own unconscious bias at a cost to be borne by their clients.

Mr. Weitz explained how the brain works when presented with an idea that contradicts an accepted belief. A study, which sought to examine what parts of the brain are active when faced with a contradicted belief, was performed using a functional MRI. The results show that the contradicted person would use that part of the brain utilized to access memories and daydream, but only use a small portion of the brain utilized for rational thinking. One conclusion drawn from these results is that the brain searches for remembered arguments in order to defend the belief rather than actually considering or analyzing the contradictory perspective expressed. Therefore, in conflict, the human mind rejects opposing views and an individual must overcome his/her brain's usual functioning in order to make a conscious effort to understand the perspectives of adversaries.

Program II: Effective Strategies for Picking Neutrals—Perspectives from In-House Counsel, Outside Counsel and Administering Organizations on Choice of Arbitrators and Mediators

By Ross J. Kartez

The second presentation was entitled Effective Strategies for Picking Neutrals—Perspectives from In-House Counsel, Outside Counsel and Administering Organiza-

tions on Choice of Arbitrators and Mediators. The chair was Barbara Mentz, Esq., an arbitrator and mediator, and the panelists included Sandra K. Partridge, Esq., of the American Arbitration Association; Nancy Thevenin, Esq., of Baker & McKenzie LLP; Helena Tavares Erickson, Esq., of CPR Institute; Erin Gleason Alvarez, Esq., of Chartis Insurance; and Anne Weisberg, Esq., of BlackRock, Inc.

Ms. Mentz first asked the panel of professionals how they evaluate mediators before selecting a professional to assist in a dispute. Ms. Alvarez, Director of the Office of Dispute Resolution at Chartis, gave a wide range of factors she uses during this process. These factors included experience, which is essential in order to determine if the mediator is appropriate for a particular case; reputation, which provides an advocate with a lot of information in making his/her decision (forcefulness, success rate, work-ethic, understanding of the process, efficiency, determination, and demeanor); whether the neutral had previously served as a judge (this is helpful for parties who are resisting the process), a lawyer (especially helpful when coupled with substantive background in the area), or a non-lawyer (outside expertise can also be useful); the style of the mediator, whether more facilitative or evaluative; whether the fee to be charged is appropriate for this dispute; the location of the neutral; and the neutral's schedule, availability and professional trainings. Ms. Alvarez emphasized considering many factors, and not basing the decision on any single criterion.

Ms. Thevenin, who serves as special counsel and global coordinator of Baker & McKenzie's International Arbitration Practice Group, was asked what type of mediator search she would conduct if considering retention of Ms. Alvarez for an international dispute. Ms. Thevenin stressed the importance of experience because of the value of confidence, guidance, and productiveness. She also spoke about other factors such as training and certifications (now that such certifications are available, firms value them); style (most of the time firms look for a mediator that is facilitative, but having the ability to change styles to fit the case is important); cultural awareness; availability; cost; language capabilities (especially in international cases); and nationality (especially when the dispute revolves around the law of a certain jurisdiction). These are all factors to consider for such conflicts, but may vary in importance depending on the dispute.

Then Ms. Partridge, the Vice President of the Commercial Division for AAA in New York and New England, explained how the American Arbitration Association ("AAA") could assist in this process. Specifically, Ms. Partridge reviewed the current trend in generating lists from which parties select mediators and arbitrators. This trend suggest that there is an increase in the number of parties looking for neutrals with specialized expertise and has led the AAA to separate neutrals based on their ability to mediate complex and non-complex disputes as well as their knowledge in specific subject matters. Her advice to neutrals was to take advantage of their resumes. A mediator should lead with a paragraph regarding a few definitive factors that are key to his/her experience and are distinctive from other professionals. Also, include other qualifications so that a computer-generated keyword search will locate the resume based on the inclusion of specified words. While it is important that a resume is distinctive, the resume is only a tool to be used to assist in this process and it is important to get involved with other members of the field, stay active in the community, and network as much as possible. Many professionals believe if they are listed by AAA, they will automatically be selected for cases. Ms. Partridge stated that she knows professionals on AAA's list that get picked 60% of the time and other professionals that get picked 1% of the time. It is important for a mediator to make a name for him/herself in order to distinguish him/herself from other neutrals. Otherwise, he/she will only be another name on a list.

Ms. Erickson, Senior Vice President & Secretary at the International Institute of Conflict Prevention and Resolution ("CPR"), addressed how CPR assists in the same process. During the selection process, CPR makes sure that lists of neutrals are generated based on the client's demand. CPR acts as a filter, generating a list based on criteria selected by the client. The trend that CPR has experienced is that clients are looking for peers. They are looking for neutrals that have worked for large firms or legal departments and have been involved in complex disputes worth hundreds of millions of dollars. CPR requires that neutrals have specified training in the process. This is different from many similar services because CPR excludes former judges who are not adequately familiar with the forum. Though a former judge may be familiar with disputes, in order to be included on a CPR list, a judge must be familiar with mediation. In addition, Ms. Erickson has found that the mediator's reputation is of substantial importance. Once CPR approves a mediator, his/her biography is available to their clients online at the client's convenience. In choosing CPR to assist with a dispute, it is important to understand that CPR is designed to streamline the process. A case is expected to reach completion within nine months. Thus, this is not a forum for an attorney who wishes to leave no stone unturned.

Ms. Weisberg, Director of Diversity and Inclusion at BlackRock, expressed the importance of diversity issues when selecting a neutral. First, it is clear that cognitive bias exists in all decision-making. Statistics show that performance improves by 7% when bias is excluded from the decision-making process. Once a person becomes aware of his/her biases, such knowledge can be used to mitigate the bias effects and improve the ability to make reasoned decisions. A mediator or neutral may defend against a prospective client's biases by including objective criteria in a resume, such as, success rate, level of experience, and years of experience. Someone in the process of selecting a neutral should take an inventory of the mediator/arbitrator list and if all of the candidates look the same, broaden

the search criteria. In order to help understand an individual's own cognitive bias, Ms. Weisberg suggests taking the implicit association test.[3]

After this program, an announcement was made of those selected to serve as officers of the Dispute Resolution Section in the upcoming year beginning on June 1, 2012. Congratulations to Rona Shamoon, who will be the new Chair; to John Wilkinson, who will be the Chair-Elect; to Sherman Kahn, who will be the Vice-Chair; to Louis B. Bernstein, who will be the Secretary; and to Barbara Mentz, who will be the Treasurer.

Endnotes

1. My Wife and My Mother-in-law. See http://www.planetperplex.com/en/item/my-wife-and-my-mother-in-law/#.
2. To demonstrate our inability, as human beings, to accurately perceive events we see, Ms. Kaster shared a video available at http://www.youtube.com/watch?v=IGQmdoK_ZfY.
3. This test can be found at https://implicit.harvard.edu/implicit/.

Program III: One-Click Conflicts? Ethical Conundrums for the Digital Age

By Glen Parker

The third panel of the NYSBA Dispute Resolution Section's Annual Meeting was chaired by Edna Sussman, Esq. of Sussman ADR, LLC. She and Madhavi Tandon Batliboi, Esq. addressed ethical issues and best practices concerning the use of social media by an arbitrator, mediator or neutral. According to Wikipedia, the term "Social Media" refers to the "use of web-based and mobile technologies to turn communication into an interactive dialogue." Many professionals use social media such as Twitter and Facebook for business development. However, those who practice as mediators and arbitrators should review their use of these media sources with special attention to any unique risks associated with their practice area.

At present, there is no definitive "best practices" regarding the proper use of social media as a professional networking tool, but Ms. Sussman offered her own rule of thumb. Since social media, like Facebook, may be viewed as analogous to meeting someone in person, their use could arguably be governed by the standards that currently inform our face-to-face interactions with prospective clients.

Although "best practices" have yet to be established, there are ethical considerations that are unique to the cyber-social domain. There have been several ethical opinions which examined the question of a judge's use of social media. While the standards of conduct and the basis for review for judges and arbitrators/mediators are different, those opinions are instructive for the ADR world. The opinions address the question of having a lawyer or party who appears before him/her as a "friend" on Facebook or "connection" on LinkedIn. These opinions, from jurisdictions including New York, Florida and Ohio, discuss the use of media by judges as it relates to the perception of impartiality. Ms. Sussman noted that judges and ADR professionals must always first decide "whether a social network contact is actually a close personal relationship that requires recusal or disclosure" regardless of the media connection.

A recent opinion from California provides comprehensive guidance as to the considerations relating to judges and their use of social media. The opinion suggests looking at the nature of the social network, the content posted, the number of contacts [of the judge], how selectively contacts are chosen [on the judge's network] and how regularly the attorney appears before the judge. The same opinion states that when an attorney is appearing before the judge, the judge must "unfriend" him/her, i.e., remove him/her from the judge's network of friends or contacts. This prohibition apparently does not apply to attorneys who *may* appear before the judge; however, a previous Florida opinion regarding the issue did not make a distinction between whether the attorney is "appearing" or "may appear" before the judge and stated that a judge may not add lawyers who could potentially appear before them.

Ms. Sussman recently administered a section-wide survey regarding the usage of social media by members of the NYSBA Dispute Resolution Section. Of those using social media sites for professional connections, only about 12% made disclosures about such contacts when appointed as a neutral. The survey showed that approximately 72% of those who responded had a page on a social networking site like Facebook, LinkedIn or Twitter. Virtually all of the 72% maintained a LinkedIn page and 53% additionally maintained a Facebook page on which approximately 33% listed professional contacts as "friends."

One major distinction between "in person" as compared to social media, which also applies to listserve communication to a lesser extent, is that while an in-person meeting with individuals may be one-time or private, social media interactions have a public and lingering quality.

"Friending" someone or "posting" to their profile wall on Facebook has the potential of being seen by others and such online exchanges are often archived and available for viewing months and even years after they occur. A neutral should carefully consider the long-lasting and public aspects of social media when developing his/her ethical standards in relation to business promotion, disclosure of conflicts and the appearance of impropriety.

Madhari Batliboi addressed the usage of social media websites as a valuable addition to an individual's self-promotion portfolio. After Google.com, Ms. Batliboi explained, Facebook is the most visited site on the web, and 5 of the top 10 sites on the Internet are social media sites. Ms. Batliboi gave some pointers as to the use of these sites. First, be discriminating about who is a contact on your page.

Contacts listed on such sites (i.e., friends, connections or followers) are public information. Furthermore, depending on the website settings, contacts have access to more information about you than someone who is not a contact.

Ms. Batliboi cautions to be careful about the type of information that is shared on your page or in tweets—even seemingly innocuous information may be revealing, for example, personal likes and dislikes on Facebook may engender unwanted speculation about prejudices and may even be raised later concerning questions of neutrality.

It is important to customize privacy settings, which most social media websites permit. Facebook, for example, offers detailed options for privacy controls, while Twitter is less comprehensive in its settings. Each site has default settings about who may view a profile and information. Oftentimes, the default is "Everyone." It is important to change these settings to your desired settings. Furthermore, check these settings regularly since Facebook and other social media sites often change privacy settings without warning or notice.

Program IV: Hot Topics in International Arbitration

By Steven Buchwald

The fourth program of the NYSBA Dispute Resolution Section's Annual Meeting was chaired by Sherman Kahn, Esq. of Morrison & Foerster, LLP and surveyed the "Hot Topics in International Arbitration." Luis Martinez, Esq., Vice-President of the International Center for Dispute Resolution ("ICDR," the International Division of the American Arbitration Association "AAA"), reported that investment treaty arbitration continues to be the subject of much debate in Latin America. Many countries such as Bolivia, Venezuela and Ecuador are expressing their dissatisfaction in very public ways, depicting the international arbitration system in a negative light. This is even more problematic because positive examples of the ICDR's successes are not readily publicized as international commercial arbitration is, for the most part, confidential.

The objective of the states belonging to the Bolivian Alliance for the Peoples of Our Americas ("ALBA") is to pull out of the International Centre for Settlement of Investment Disputes ("ICSID") Washington Convention and the Free Trade Area of the America. These Latin American states bound together hoping to create a regional alternative to the ICSID. Fortunately, Mr. Martinez said, "Brazil did not join in those efforts, and passed its PPP (public private partnership) law which sent a message to foreign investors that they would abide by international arbitration rule provided they take place in Brazil and are conducted in Portuguese."

Furthermore, some investor-states adopted a conservative policy. For instance, the recent U.S.-Australia Bilateral Investment Treaty ("BIT") "forgoes investor-state arbitration in favor of local courts." On the other hand, treaties with Colombia, Panama, and South Korea include investor-state arbitration. Fortunately, the fear that the investment backlash would lead to a broader rejection of all arbitration in Latin America has failed to materialize. Mr. Martinez noted the positive effects of the developing arbitration cultures in the region.

Mr. Martinez provided a telling example of enforcement by a Chinese local court of an ICDR decision. The trademark licensing dispute was decided in favor of the licensor. The full award was confirmed by the Shanghai Intermediate Court No. 1.

Finally, Mr. Martinez noted the increase in international mediations and the concurrent mediation/arbitration clauses on the website as well as the regional competition between international cities to become the leading seat of international arbitration. People and countries have regional bias and prefer settling disputes closer to home.

Victoria Shannon, Esq., a Deputy Director at the International Court of Arbitration for the International Chamber of Commerce ("ICC"), presented the key changes to the rules of arbitration of the ICC, which became effective January 1, 2012.

Article 22, which concerns the conduct of the arbitration, was amended to help reduce time and cost. Section 1 of article 22 imposes a duty on both the ICC tribunal and parties to "make every effort to conduct the arbitration in an expeditious and cost effective manner." Ms. Shannon observed that the arbitration tribunal can also issue order for costs in the case of a party's misconduct, and that the tribunal is empowered to penalize abuse of process. The court has also taken a tougher stance on delays.

Article 6, which in part concerns the interpretation of the arbitration agreement, has also been modified. The process by which it is determined whether a contract dispute is to be adjudicated by the ICC has been streamlined. The Secretary General of the ICC will act as a gatekeeper and send routine issues to the tribunal, whereas the more complex issues will go directly to the court. This should further increase the ICC's efficiency. In addition, the ICC has memorialized complex arbitration issues in the rules. For instance, multiple parties must meet a *prima facie* determination that all the parties are bound together by an arbitration agreement or a network of contract.

One of the major changes was made to article 29, the emergency arbitrator provision. It only applies to parties signatory to the arbitration agreements or their successors in interest. Parties can opt out from this provision, which only applies to arbitration agreements signed after January 1, 2012. However, parties are free to amend their arbitra-

tion agreements if they wish to use this procedure, which is outlined in Appendix 5 of the rules.

Whether to include a provision on confidentiality was hotly debated. No consensus on the issue was reached. Thus, the rule stands as is (see Article 22 provisions 3, and 5). Because there is no mention of confidentiality, it is up to the parties to come to an agreement on that issue. In addition, the tribunal may issue confidentiality orders.

Program V: Mediation for the 21st Century—The Latest in Techniques and Strategies

By Steven Buchwald

The final program of the NYSBA Dispute Resolution Section's Annual Meeting featured a panel discussion on concepts of inclusion in mediation and counterintuitive strategies used by mediators, chaired by Irene Warshauer, Esq., a New York City mediator and arbitrator.

Natalie Holder-Winfield, Esq. addressed the relationship between arbitration and diversity. Ms. Holder-Winfield noted that diversity and inclusion are essential to problem solving and a pathway to mediation. Identifying ways to include parties may promote the creative resolution of conflicts. Ms. Holder-Winfield said that when the parties are not included in the mediation process, they tend to feel as though "the process is working against them, not for them." When this occurs, people are likely to shut down and hamper problem-solving efforts.

In her research, Ms. Holder-Winfield found that there are ten attitudes, *micro inequities, subtle gestures and non-verbal cues* people encounter which result in their feeling like outsiders. These include: assumptions, slights, and other annoyances; isolation; lack of quality work assignment; lack of informal mentoring; insensitivity; being the first and not having a network; being bullied; perceived undervaluation; inability to recover from mistakes. According to Ms. Holder-Winfield, isolation; assumption, slight and other annoyances, and insensitivity are likely to become issues in the context of mediation.

Isolation: Parties are often discovering the mediation process for the first time. Not explaining the process to them may cause them to feel invisible. Explaining the mediation process to clients would prove helpful. Indeed, in unfamiliar settings, people are unlikely to contribute. By ignoring the parties, a mediator disregards one essential source of creative ideas.

Assumptions, slights, and other annoyances: Making assumptions about other people is natural but can be dangerous. A mediator should refrain from assuming that someone would want to engage in a particular conversation because of his/her physical affinities. People should not be treated as an "ambassador for their entire group."

Insensitivity v. inclusion: Making conscious efforts to truly include people is essential, which is different from engaging in head counting. Ms. Holder Winfield offered the following metaphor "Diversity is like being invited to a dance, inclusion is being asked to dance."

The next topic covered the use of counter-intuitive strategies in mediation. Peter Scarpato, Esq., observed that mediators are trained to be proactive but that counter-intuitively, less is often more. Instead of being in charge, better to let the parties discuss, debate, and re-enable them to solve their problems by relinquishing controls.

Mr. Scarpato argues that encouraging the parties *themselves* to dictate the direction, form, and substance of the mediation process contributes to creating an atmosphere of agreement. He further advised that, in the beginning of the process, mediators should only speak 20 percent of the time and listen 80 percent of the time. It is crucial to the process that parties engage in the process, speak, listen and react to the other party. By drawing out the arguments and facts, in a way that *the parties* can understand, they not only can appreciate the other's position but also feel heard and appreciated.

Additionally, asking broad questions to the parties (rather than only their lawyers) in order to get detailed answers is crucial. Parties tell a narrative. Often, from their recitation, their true interests become more apparent. Mr. Scarpato also noted that slower is better and that frequently it takes a long time before the parties are ready to settle. For instance, it is essential to the process that parties trust the mediator and that the mediator truly uncovers and deals with the real issues fueling the dispute. A properly executed, unrushed mediation is more time-efficient than precipitating talking numbers prematurely.

Finally, Mr. Scarpato advised using the power of silence in the context of an irreconcilable impasse. "As humans, we are hard wired to fill in the gaps of uncomfortable silence," Mr. Scarpato says. In his experience, more often than not, someone in the room comes forward with an original idea to break the silence.

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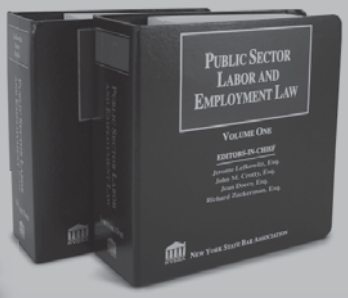

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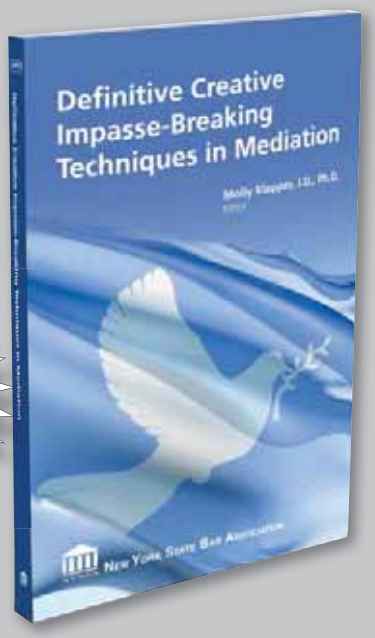

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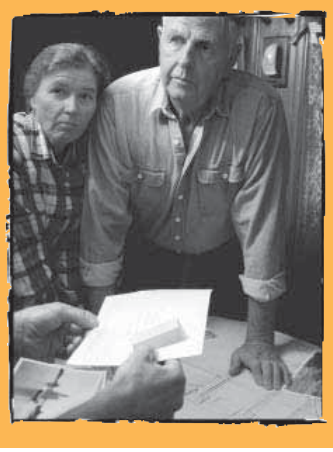

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