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

Message from the Chair

Rona G. Shamoon

On January 17, 2013, the headline on one of the front page articles in *The New York Times* read "Teachers Union and City Fail to Reach an Agreement on New Teacher Evaluations, Costing City School Kids Hundreds of Millions of Dollars." Like many other New Yorkers, I asked myself on that day how it was possible that such a thing could happen? Surely, the New York City school system could not afford the loss of $450 million in State and Federal aid that was the direct consequence of the failure of the mayor and teachers' union to reach agreement?

It seems to me that all too often we have forgotten how to compromise. In his second inaugural speech on January 22, 2013 President Obama noted that "decisions are upon us, and we cannot afford delay. We cannot mistake absolutism for principle…. We must act, knowing that our work will be imperfect." The reality is that all too often, if compromise is not achievable, everyone loses. "Progress not perfection" is a motto we should all be willing to live by, because the cost of failure is simply too high.

It is therefore with great pride that I celebrate the growth of alternative forms of dispute resolution including arbitration, mediation, collaborative law and other dispute resolution techniques as popular alternatives to the resolution of disputes by litigation. Over the past six months, the Dispute Resolution Section and its hard-working officers and committee chairs have done an incredible job of invigorating and expanding the work of the Section.

The Committee on Arbitration, under the leadership of Abigail Pessen and Jim Rhodes, has organized bi-monthly meetings that have included Advocates' and Arbitrators' Tips for Successful Hearings; new initiatives at the AAA and the permissibility of motions in domestic, commercial arbitration.

Our Committee on ADR in the Courts, ably chaired by Hon. Jacqueline W. Silbermann and Steven A. Hochman, has been working with the courts in both the Southern District of New York and the Commercial Division of the New York State Supreme Court, New York County, in an effort to improve the mediation programs in those courts. In addition, the committee has submitted comments on proposals dealing with court mediation programs in matrimonial and commercial division cases in New York State.

The CLE Committee run by Elizabeth Shampnoi and Gail Davis has worked diligently to assist in organizing the Section's Fall and Annual Meetings and Programs. A special thank you to Irene Warshauer and Dan Kolb for arranging an outstanding Fall Program, "New and Improved ADR Techniques for the Modern American

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Message from the Co-Editors


Edna Sussman

In last Spring's issue, this *Journal* along with the journals of the American Arbitration Association, CPR, and the Dispute Resolution Section of the ABA focused on the deplorable absence of women neutrals in ADR, particularly in international and large commercial matters. This failure of private dispute resolution to meet the just demand for representation of women and also of minorities that is much better (although not perfectly) addressed in public dispute resolution is the continuing focus of a number of ADR organizations. Now, CPR has developed an important pledge that needs wide dissemination among corporate users of ADR and their outside counsel. We publish information on that pledge in this issue and we encourage you to share it and, if you are in a corporate setting, to encourage management to sign it. Send it to CPR and your commitment will be published on its website. Many companies already committed to diversity and the better decision-making it has been shown to accomplish are simply unfocused on this issue. Neutrals serve a very important function that often assists or avoids the court system of public dispute resolution; the selection process should include the commitment to diversity that is presumed for judicial selection.

In addition to signing the pledge, users of dispute resolution services can demand diversity for every panel list from providers and remember that selecting on the basis of familiarity may sometimes foster unaddressed bias. Neutrals, advocates in ADR, providers, and parties all have a role to play in improving diversity in our field.

As a Section and a *Journal*, we continue to support the growth of ADR, the increasing professional recognition of neutrals, and a better understanding of the legal, ethical and practical issues that face both domestic and international arbitrators and mediators and advocates in ADR. We have a rich variety of topics and reports on developments and we feel sure that if you peruse the issue, something of particular interest will catch your eye.

Section News

Under Rona Shamoon's leadership the Section has continued and expanded an ambitious schedule of programs, meetings and projects. Section News has brief summaries of many of these activities and more detailed reports of the Midyear and Annual meetings may be found in student reports at the end of the issue.


Laura A. Kaster

Ethics

Elayne Greenberg's Ethical Compass column addresses the promise of confidentiality in mediation and whether it is real. Her column is complemented by an article by Richard Weil on the law in New York on mediation confidentiality.

Arbitration

We have a wide variety of subjects from a proposal for streamlining arbitration by Jane Wessel, to legal and practical considerations relating to emergency relief in arbitration by J. Brian Casey. We look to arbitration's value beyond time and cost with James E. Berger and examine the legal impediments that are being reduced to arbitrating internal trust disputes with S.I. Strong. Finally we take a look at the ingrained use of ADR in Federal acquisition disputes with John A. Dietrich.

Mediation

We move from keeping confidences to disputes relating to animals in our mediation offerings. Richard Weil tackles New York law on confidentiality in mediation in the absence of the Uniform Mediation Act; Norman Solovay reminds us that the media confusion about what is mediation and what is arbitration and whether there is binding mediation is shared by others. Given the key significance of BATNA in reaching a negotiated settlement, Michael Palmer introduces us to a new tool that can assist us to see the case value from both parties' perspectives. And, as noted above, Debra Vey Voda-Hamilton addresses mediating disputes about barking dogs and other animal disputes that come close to home.

International

We are pleased to share with you a summary of the White & Case 2012 International Arbitration Survey that shows preferred practices and is summarized here by Paul Friedland and John Templeman. With the promotion of the New York International Arbitration Center, it becomes important to let people who choose to arbitrate here know that New York law is friendly to international arbitration. Tim McCarthy, David Hoffman and Ryham Ragab contribute to that effort by providing a review of New York decisions that shows the swift enforcement and low rate of successful challenge of awards. We also explore mandatory mediation developments in Italy with

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Lawyer," and to Kathleen Scanlon and David Singer for a compelling Annual Program, "No Longer Business As Usual," "New ADR Tools for A New Age," "Hot Topics in Arbitration and Lessons for the Future" and "Ethically and Effectively Maximizing Mediation Outcomes for Your Client."

Daniel F. Kolb and Alfreida Kenny, Diversity Committee chairs, worked in coordination with the Membership Committee to present on February 6 "Ask the Arbitrator: Meet the Mediator," an innovative program providing minorities and others an opportunity to meet experienced arbitrators and mediators in an informal setting. On March 28, a large, diverse and enthusiastic audience attended a reception and CLE program "Diversity in Dispute Resolution—the Final Frontier" at the offices of Skadden, Arps, where diverse panels organized by Alfreida and Dan provided guidance on how to develop an arbitration or mediation practice. They have also worked with Membership to encourage minorities who have self-identified as interested in ADR to join our Section and have worked with the Mediation Committee to promote its mentoring program.

The Committee on Ethical Issues and Ethical Standards chaired by Kathleen Scanlon and Barbara Mentz has worked on preparation of the ethics CLE at the January 2013 Dispute Resolution Meeting and is planning a Spring breakfast meeting to discuss an interesting topical case.

The Legislation Committee led by Sherman Kahn and Richard L. Mattiaccio is continuing to examine whether the UNCITRAL Model Arbitration law should be adopted in New York and is watching with interest the reintroduction of the UMA in the New York Assembly

The Mediation Committee led by Irene C. Warshauer and David C. Singer organized meetings at which (i) a representative of CPR explained the formation of CPR by corporate executives who wanted a less expensive and more cooperative method of resolving disputes and (ii) FINRA representatives described its mediation & arbitration processes. The speakers also explained how to become a neutral for their organizations.

The Membership Committee has displayed remarkable initiative under Rick Weil and Geraldine Reed Brown, assisting with arranging a Meet the Mediators / Ask the Arbitrators program, compiling an ADR Resource Guide with the help of Cardozo law students, working with the Diversity Committee to recruit potential minority members, drafting a letter to be sent to Section members who did not renew their Section membership, and manning numerous tables at various NYSBA and non-NYSBA events and organizing special iniatives to recruit potential DRS members.

The Committee on Negotiation under Jason Aylesworth and Norman Solovay has been working to organize mock mediation sessions and on organizing a program that deals with the role of neuroscience in the education of effective mediators.

The Publications Committee, co-chaired by Edna Sussman and Laura Kaster, has continued to put out one of the preeminent practitioners' journals in ADR: *New York Dispute Resolution Lawyer*, which includes articles on domestic and international mediation and arbitration, collaborative law and other ADR processes. With two issues per year, the journal provides updates on current developments, book reviews and insights from a wide range of leading practitioners.

The Education Committee, headed by Prof. Jackie Nolan Haley, prepared a letter report that was submitted to the NYS Board of Law Examiners making the case for the inclusion of ADR topics on the Bar exam to which it received an encouraging response.

Marc Goldstein, head of our Liaison and District Rep Coordination Committee, organized the Section's first upstate CLE program that was held in Buffalo on February 15. With highly informative panels and more than 100 enthusiastic attendees, the program proved to be a great success.

The newly formed Law Student Committee under the leadership of Asari Aniagolu and Ross J. Kartez enrolled representatives from a number of area law schools and organized the DRS' second annual and highly successful Student Networking Reception held at Dorsey & Whitney. Currently, the Law School Committee and the Arbitration Committee are working on developing a student arbitration competition.

Leona Beane ably keeps our website humming. The Committee on ADR Within Government Agencies, run by Chuck Miller and Pam Esterman, has focused on seeking opportunities for promoting the use of alternative dispute resolution in place of litigation in matters involving federal, state and local agencies.

The Committee on Collaborative Law, Harriette M. Steinberg, Chair, has been working with law schools in developing curricula in collaborative practice, and with local bar associations to promote the growth of collaborative practice in specific areas of practice.

Our Blogmaster, Geri Kraus, has enrolled a cadre of bloggers for our Section's blog, which will be launched in the near future.

And last but not least, Simeon Baum and Steve Hochman again held a highly successful and well-attended mediator training on March 10-12 at Fordham, while Charlie Moxley is hard at work on his annual arbitrator training program scheduled for June 17-19 at Cardozo.

Rona Shamoon

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

Francesca De Paolis and Giovanni Nicola Guidice. Our final article in this section is a discussion of the Mauritius International Arbitration Act by Shalini O. Soopramanien as that jurisdiction emerges as a venue for arbitrations.

Book Reviews

Our co-editor in chief, Edna Sussman, reviews Anton Maurer's book on *The Public Policy Exception Under the New York Convention*.

Student Notes

Our student editors Joyce Lai, Erica Barrow, Saira Hussain, and Katherine DeStefano have written case notes respectively on recent cases on manifest disregard in the Second Circuit, privilege in collaborative law, arbitrating arbitrability in the Second Circuit and Mediation privilege under the UMA as it applies in New Jersey.

Meeting Minutes

Michelle Kremer, Emily Gornell, Natalie Elisha and Ross J. Kartez, John James Fagan and Adam Jude Breaux, our student reporters give their summaries of the presentations at our Annual Meeting.

Meeting Pictures

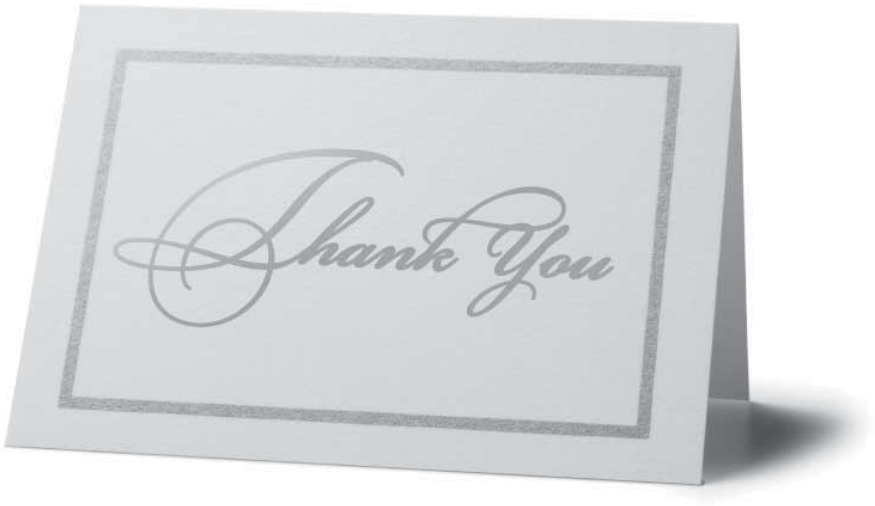
See who we captured at the meeting.

Edna Sussman and Laura A. Kaster

CPR Introduces New Pledge Regarding Commitment to Diversity

The International Institute for Conflict Prevention and Resolution ("CPR") has recently introduced a new program to promote diversity in the selection of neutrals. Corporations and other entities are invited to sign a "Diversity Pledge" which formalizes and underscores their commitment to these goals. A copy of the pledge is available at

http://www.cpradr.org/Committees/IndustryCommittees/NationalTaskForceonDiversityinADR/CPRCommitmentonDiversity.aspx.



You're a New York State Bar Association member.

You recognize the value and relevance of NYSBA membership.

For that, we say thank you.

The NYSBA leadership and staff extend thanks to you and our more than 76,000 members — from every state in our nation and 113 countries — for your membership support in 2013.

Your commitment as members has made NYSBA the largest voluntary state bar association in the country. You keep us vibrant and help make us a strong, effective voice for the profession.

Seymour W. James, Jr.
President

NYSBA

Patricia K. Bucklin
Executive Director

Annual Meeting

The Dispute Resolution Section of the NYSBA held its Annual Meeting at the Hilton Hotel in New York City on January 24, 2013. The Annual Meeting program was co-chaired by Kathleen Scanlon and David Singer and attended by 150 participants. The morning sessions were broad-based and focused on the future of dispute resolution. The first session was a high level discussion of the changing landscape in the legal economy and its impact both on the future of dispute resolution and on outside counsel, in-house and courts. The second session focused on the development of new tools for the implementation of dispute resolution in the private sector and the courts. Panelists included a cross-section of representatives from corporations, law firms, ADR provider organizations and courts.

The afternoon sessions focused on two discrete areas—arbitration and mediation ethics. The arbitration panel highlighted current hot topics in the field, including vacatur and disqualification, class arbitration, med-arb and the newly established New York International Arbitration Center. The final session focused on mediation ethics and included various vignettes and questions for the panel and those in attendance. Both panels had exceptional participants drawn from in-house counsel, law firms, ADR provider organizations and law school faculty.

The day concluded with a cocktail reception attended at the offices of Dorsey & Whitney. The reception of about 100 people included those who attended the Annual Meeting, as well as judges and court personnel, in part to honor the recently retired Maris Buckner, ADR coordinator of the Commercial Division of the Supreme Court of New York County. A wonderful time was had by all.

* * *

October—DR Section at Fordham

On October 15, 2012, the Dispute Resolution Section joined by the Commercial and Federal Litigation Section presented a successful program "New and Improved ADR Techniques for the Modern American Lawyer," hosted by Fordham Law School. Dan Kolb, Esq. and Irene C. Warshauer, Esq. co-chaired the program, which included panel discussions on a variety of topics, such as what actions by arbitrators and mediators drive litigators crazy and best steps to avoid them and vice versa. That panel was chaired by the Hon. Stephen G. Crane (Ret.). Another panel, chaired by David W. Rivkin, Esq., discussed promoting efficiency in international arbitration.

"Mastering the Unconscious—Arbitrators and Decision Makers—Can We Improve," presented by Edna Sussman, Esq. and Laura Kaster, Esq., explained how the unconscious controls a percentage of decision making, even though people are not aware of its influence. This led to a lively discussion with the audience as did the panel on how gender diversity in arbitrator selection enhances the process.

Professor Lela Love gave a brief description of the book she wrote with Eric R. Grafton, *Stories Mediators Tell*. The book is a composite of various mediations, including what was at issue and the process that resulted in a resolution or other termination of the mediations as well as the means used to gathering the stories.

* * *

Opening This Spring: The New York International Arbitration Center

The New York International Arbitration Center ("NYIAC"), founded with the support of 34 leading law firms[1] to promote and strengthen the conduct of international arbitration in New York, will officially open its doors in late Spring 2013.

The Center will enable New York City to enhance its position as a world leader in international arbitration by offering sophisticated dispute resolution programs and services, consistent with the City's role as a world financial capital. NYIAC's Board of Directors include NYIAC Chair and former Chief Judge of the State of New York Judith S. Kaye, now Of Counsel at Skadden, Arps, Slate, Meagher & Flom, LLP, and Vice Chairs Jim Carter of WilmerHale and Edna Sussman of Sussman ADR LLC.

Around the world there is open recognition of the desirability and importance of having arbitrations centered in home cities. The new center will added to an already impressive array of international arbitration resources in New York.

The Center will be located in the heart of Manhattan, in the historic Socony-Mobil Building at 150 East 42nd Street, steps from Grand Central Station, Times Square, the Empire State Building and the United Nations. The Center will offer state-of-the-art hearing space and related services; an up-to-the-minute website containing a wealth of information about planning a hearing in New York and a vast of array of international arbitration resources; and the opportunity for programs and exchanges with the academic, legal, judicial and business communities.

Beyond providing first-rate facilities for international arbitrations, NYIAC will encourage New York arbitration and New York law at conferences around the world, offering unmatched resources with information on arbitration in New York, in addition to preparing research materials to assist lawyers and other users of international arbitration.

Further information about NYIAC is available at www.NYIAC.org. To book hearing room spaces, please contact info@NYIAC.org.

Endnote

1. Allen & Overy LLP, Alston & Bird LLP, Baker & McKenzie, LLP, Boies, Schiller & Flexner LLP, Chaffetz Lindsey LLP, Cleary Gottlieb Steen & Hamilton LLP, Cravath, Swain & Moore LLP, Debevoise & Plimpton LLP, DLA Piper, Dorsey & Whitney LLP, Flemming Zulack Williamson Zauderer LLP, Freshfields Bruckhaus Deringer LLP, Fried, Frank, Harris, Shriver & Jacobson LLP, Fulbright & Jaworski LLP, Greenberg Traurig LLP, Hughes Hubbard & Reed LLP, Kelley Drye & Warren, LLP, King & Spaulding LLP, Kramer Levin Naftalis & Frankel LLP, Latham & Watkins LLP, Milbank, Tweed, Hadley & McCloy LLP, Orrick, Herrington & Sutcliffe LLP, Patterson Belknap Webb & Tyler LLP, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Proskauer Rose LLP, Shearman & Sterling LLP, Simpson Thacher & Bartlett LLP, Skadden, Arps, Slate, Meagher & Flom LLP, Squire Sanders (US) LLP, Sullivan & Cromwell LLP, Thompson & Knight LLP, Wachtell, Lipton, Rosen & Katz, White & Case, LLP, Wilmer Cutler Pickering Hale and Dorr LLP, Winston & Strawn LLP.

Confidentiality: The Illusion and the Reality—Affirmative Steps for Lawyers and Mediators to Help Safeguard Their Mediation Communications

By Elayne E. Greenberg

The Emerging Problem

Confidentiality is one promise of mediation that is increasingly broken, even though judges, lawyers and mediators frequently extol the sacredness of mediation confidentiality as a primary benefit for considering mediation as a settlement forum. We observe that legal challenges to any aspect of the mediation have caused judges to scrutinize mediation communications in a way that renders mediation confidentiality vulnerable at a minimum and violated at the worst.[1] We are finding it a chronic challenge to decipher the precise and appropriate boundaries of mediation confidentiality.[2] Moreover, we are increasingly discomforted to see that even unsuccessful legal challenges to mediation might compel disclosure of what would otherwise have remained confidential mediation communications.[3]

In one such case, *In re. A.T. Reynolds & Sons*, the mediator disclosed mediation communications to help the Court assess whether a party who had been directed to participate in a court-ordered bankruptcy mediation had, in fact, participated in good faith or was actually in contempt of the court order. Reading the facts of the case, we learn that ordering an unwilling party to mediation, sustaining an ongoing contentious relationship between the mediator and the unwilling attorney, and authorizing a mediator to report to the court about that attorney's good faith behavior all contributed to the fiasco that ensued and rendered mediation confidentiality an illusion in that case. Even though the District Court ultimately found that the Bankruptcy court had abused its discretion when it held the mediation party in contempt,[4] confidential mediation communications were made public, and there was no way to make those mediation communications confidential again. Beyond the legal analysis of the case, the *Reynolds* case illuminates problematic issues with the mediation structure and the relationship between the mediator and party that if addressed prophylactically by either the mediator or one of the attorneys might have preserved the confidentiality of the mediation.

With the luxurious benefit of hindsight, I was among the many mediators who questioned how the *Reynolds* debacle could have been prevented. Is there a greater danger in ordering mediation-resistant parties to participate in mediation? Is there value in having parties select mediators they are comfortable working with instead of imposing a mediator on the parties? If the mediator and parties are unable to establish a collaborative, working relationship, should the mediation proceed anyway or be discontinued? How should mediators in court-connected or administrative-annexed programs balance their commitments of confidentiality to the parties with their reporting obligations to the court? And, for purposes of this column, how might we as lawyers and mediators do a more effective job of protecting mediation confidentiality?

Yet, it wasn't until two recent media triggers magnified how mediation confidentiality is not even within the public's ken that I was prompted to finally write this long, percolating column. Just this past December, while the nation was reeling from the seemingly unfathomable massacre at Sandy Hook Elementary School, we were sobered as professionals to hear the mediator who had mediated the divorce of the gunman's family in 2009 disclose to the media details about what transpired in the gunman's parents' divorce mediation.[5] How could that be? Doesn't mediation remain confidential forever? Then, in the second week of January, both my assistant Jean Nolan and members of Maria Volpe's listserve were troubled by a new reality television show that has two lawyer/mediators openly discussing their mediation clients during their hair salon visit.[6] Those television viewers, otherwise unfamiliar with mediation, would surely believe that mediation confidentiality is the illusion, not the reality. Is that the message about mediation confidentiality that we as a profession want conveyed to the public?

Taking a meta perspective from this parade of confidentiality horribles, I suggest a prophylactic approach that attorneys and mediators should observe to honor and safeguard the parties' and mediator's expectations of confidentiality. As grounding for this discussion, I first review the relevant ethical guidelines for mediation confidentiality. Then, I offer specific recommendations that are likely to minimize the legal challenges that compromise mediation confidentiality.

The Ethical Parameters and Purpose of Confidentiality

Ethically, mediation shall be confidential unless the parties, mediator or governing institution contract otherwise. The ABA Model Standards of Conduct for Mediators Standard V (A) on Confidentiality provides that, "A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law."[7] Relevant to this column's discussion, Standard V

(D) further clarifies, "Depending on the circumstance of a mediation, the parties may have varying expectation regarding confidentiality that a mediation should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations."[8] Moreover, Standard V (C) requires, "A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in mediation."[9] Thus, mediators have an affirmative obligation to ensure that parties understand how they will maintain the confidentiality they have agreed upon.

As the mediator works with the parties to harmonize their expectations of confidentiality in mediation, the mediator also needs to inform the parties of any exceptions to confidentiality, such as the mediator's other ethical reporting obligations. For example, if the mediation was referred as part of a court-connected or administrative agency annexed program, Standard V (A) (2) provides, "A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution."[10] In another example, Part 1200 Rules of Responsibility, Rule 8.3 requires a lawyer / mediator to report lawyer misconduct that "raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer."[11]

At times, a mediator's own expectation of mediation confidentiality may or may not comport with the parties' expectation. Granting the mediator discretion whether or not to disclose a mediation communication, Standard V (A) (1) guides, "If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so."[12] By way of illustration, if both parties to a mediation are in court offering contrasting accounts of what was finally agreed upon in their mediation, and they now want the mediator to become the arbiter of truth and testify about what was actually agreed upon in mediation, the mediator has the option of testifying, unless otherwise court compelled. Some mediators may opt to testify, believing mediation is about party self-determination, and the parties have opted on their own for the mediator to testify. Other mediators may question whether both parties are truly exercising self-determination and wonder whether, in fact, one party's desire to compel mediation communications compelled the other party to go along with the idea, motivated solely by the fear of being considered the "less truthful" party. Still other mediators may decide against testifying, believing that confidentiality is such an essential part of mediation and should not be revisited down the road once the parties have initially contracted for mediation confidentiality. All are ethical courses of conduct.

Underlying the ethics, let's not forget that the purpose of mediation confidentiality is to promote candid discussion of the dispute and a freer exploration of settlement options without fear that these discussions will be publicly disclosed or used against mediation participants as evidence in a court proceeding.[13] In practice, mediation confidentiality is a requisite protection that frees mediation parties and their attorneys to shift their conflict discourse from the positional, combative communications that are de rigueur of litigation to the more interest-based, collaborative discourse that is valued in mediation. For those attorneys who are reluctant to embrace the more collaborative advocacy appropriate in mediation for fear that they will put their client at a disadvantage if mediation fails, mediation confidentiality provides some reassurance.

Recommended Prophylactic Steps

Although there is no way to completely immunize mediations from legal challenge and protect mediation communications from compelled disclosure, there are ways to strengthen the integrity of the mediation process to minimize the likelihood of its occurrence.

1. To the extent possible, from the beginning of the mediation and continuing throughout the mediation, parties and their attorneys should be encouraged to voluntarily participate and work with the mediator to shape a collaborative process that promotes party self-determination rather than force those into mediation who have no desire to mediate.

Parties are less likely to challenge a mediated agreement and compel the disclosure of mediation communications if parties are encouraged to help shape the mediation process. As part of party self-determination, parties and attorneys should actively decide whether they even want to participate in mediation. If they are ordered by the court or opt to at least give mediation a try, then parties and their attorneys should be involved in selecting which mediator they would prefer to work with and providing input about how the mediation should proceed.

However, mediation is not for everybody. If a party who remains resistant to mediation is forced into mediation against his will, he may continue to find ways to undermine the mediation process. In the scenario that we are trying to avoid, he may ultimately challenge the mediation and any resulting agreement.

2. The Confidentiality Agreement should be a customized, negotiated process, not just a boiler platform form that is mindlessly signed.

The Agreement to Mediate also known as the Mediation Confidentiality Agreement is a welcomed opportunity for the mediator and the parties' to clarify and harmonize everyone's expectations of confidentiality. Exploring the what if's, clarifying industry norms and concerns

surrounding confidentiality, deciding how to engage with media inquiries, discussing the mediator's ethical obligations, and understanding the limits of the law all help frame a realistic discussion about mediation confidentiality and invite all mediation parties to develop a realistic confidentiality agreement for their particular dispute.

3. Heed red flags. A decision to try mediation does not necessarily mean a commitment to resolve the dispute in mediation.

Parties who have agreed to try mediation sometimes rethink that decision. Parties should be allowed to drop out of mediation, without being coerced into continuing. For example, if personal conflicts develop between one of the parties and the mediator, all should consider whether it is possible to continue or better to discontinue the mediation. Mediation is about creating a mediation process where the parties and mediator have a working relationship, in which they attack the dispute at hand, not each other. It might be a worthwhile approach for all to pass on mediation, rather than suffer through a possible legal challenge by the disgruntled participant to the mediation later on that might potentially compromise mediation confidentiality

4. When parties have reached the agreement-making phase of mediation, the mediator should provide a flexible process that allows parties adequate time to make informed decisions in a way that honors each party's idiosyncratic decision-making process.

The agreement process should allow all participants adequate time to think, consult with helpful experts, assess the feasibility of the proposed agreements, and make suggested revisions before the finalizing agreement. Research shows that parties are likely to honor agreements that they shape.

5. Parties opting to participate in mediation should also have the option of having independent attorneys to help them in mediation.

Mediations in which the parties are pro se such as in divorce mediations may be particularly vulnerable to challenge about a party's informed consent and capacity to participate in the mediation. Attorneys who represent clients in mediation help their clients make informed decisions by not only providing legal guidance, but by clarifying and strengthening the roles of clients, attorneys and mediator. The St. John's OSHA Whistleblower Mediation Advocacy Clinic is one paradigm of how a law school clinic program provides pro se parties legal representation in OSHA Whistleblower mediations.

Conclusion

As a professional group, we may all have different perspectives about the proper bounds of mediation confidentiality. Some may view it as an absolute that should be honored except in clearly defined, limited circumstances. Still others may view it as a contract term to be both negotiated and reconsidered depending on the circumstances. For those mediators and attorneys who believe that confidentiality is one of the central tenets of mediation, then greater attention needs to be given to incorporating practices that are likely to preserve your confidentiality expectations. Experience teaches us that mediation communications have a greater likelihood of remaining confidential if the ensuing mediation satisfies the mediation and confidentiality expectations of all the participants. A strengthened mediation structure that promotes party self-determination and a well-thought-out confidentiality agreement are essential steps that contribute to safeguarding those expectations and withstanding future legal challenges to mediation.

Endnotes

1. *See, e.g., In re* Teligent, 640 F. 3d 53 (2011); Rutigliano v. Rutigliano, 2012 WL 4855864 (N.J.Super.A.D.).
2. *See, e.g.*, The *Uniform Mediation Act and Mediation in New York,* NYSBA's Committee on ADR (Nov. 1, 2002), http://www.nysba.org/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=2725 last visited on 1.22.13 at 2:09 P.M. Although the UMA is about mediation privilege, there are so many exceptions to the privilege that it remains unclear precisely which communications are protected.
3. *See, e.g., In re* A.T. Reynolds & Sons, INC., d/b/a Leisure Times Spring Water, 2011 W. L. 1044566 (S.D.N.Y).
4. *Id.*
5. Connecticut School Shooting Update: Divorce mediator says Nancy Lanza didn't like to leave son Adam alone (December 17, 2012 3:58 PM), http://www.cbsnews.com/8301-504083_162-57559629-504083/connecticut-school-shooting-update-divorce-mediator-says-nancy-lanza-didnt-like-to-leave-son-adam-alone/ last visited on 1/22/13 at 1:52 P.M.
6. Discussion on Maria Volpe's listserve on January 14, 2013 about a new half hour reality show, "Staten Island Law," on OWN in which the mediators publicly talk about the specifics of their mediation. New York City Dispute Resolution Listserve (NYC-DR@LISTSERVER.JJAY.CUNY.EDU).
7. Model Standards of Conduct for Mediators, Standard V (A)(2005).
8. *Id.* at Standard V (D).
9. *Id.* at Standard V (C).
10. *Id.* at Standard V (A) (2).
11. Part 1200 RULE 8.3: Reporting Professional Misconduct

    (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.
12. Model Standards, *supra* note 7 at Standard V (A) (1).
13. Information that is otherwise discoverable does not receive mediation confidentiality protection.

Elayne E. Greenberg is the Assistant Dean for Dispute Resolution Programs, Professor of Legal Practice and Director of the Hugh L. Carey Center for Dispute Resolution at St. John's University School of Law. She can be reached at greenbee@stjohns.edu.

Fast Track Arbitration: A Proposed Solution to the "Elephantine Laboriousness" of International Commercial Arbitration

By Jane Wessel

One of the primary advantages cited for arbitration over litigation as a form of binding dispute resolution is its flexibility, giving an opportunity to craft an arbitration procedure specifically tailored to fit a particular dispute. But in practice, many commentators have observed that arbitration has become more and more formalised over recent years, to the detriment of this flexibility—one of the key features that contributes to contracting parties' decisions to choose arbitration rather than litigation.

The resulting trend towards more formal, longer and more expensive proceedings diminishes the attractiveness of arbitration as a mechanism for dispute resolution, as corporate counsel have in recent years repeatedly bemoaned. Given the recognized advantages of arbitration, including the ability to choose the adjudicator, the possibility of preserving confidentiality and, significantly in international disputes, providing an assurance of a neutral forum that can issue a result enforceable in most jurisdictions around the world, one must ask what can be done to preserve the best of arbitration's advantages and counter this recent trend.

Fast track proceedings, when agreed to by the parties and implemented within the time frame set, preserve arbitration's historical advantages and offer a flexible process that affords the parties a fair opportunity to present their case. Such proceedings can be conducted under all arbitral rules and in ad hoc proceedings. Parties and their counsel, who can control the process, should consider in each case whether they should avail themselves of this opportunity.

The Problem

The recent shift in the practice of arbitration has been attributed to "the rise of the 'arbitration industry'" which tends to cause arbitration to become "as drawn out and expensive as court litigation, squandering the cost-effectiveness that had characterised arbitration as a competitive alternative to litigation."[1] Some commentators have suggested that if it is not addressed, this trend may threaten international arbitration as a dispute resolution mechanism of choice.[2]

Lord Mustill memorably encapsulated the problem in an article on the history of arbitration, asking rhetorically: "Are the [arbitration] proceedings any longer imbued by informality, or do they not have all the elephantine laboriousness of an action in court, without the saving grace of the exasperated judge's power to bang together the heads of recalcitrant parties?"[3]

Many factors have contributed to this situation, of which three may be seen as central. First, the creep of common law style discovery into the international commercial arbitration arena has greatly increased the time and cost of arbitration proceedings;[4] second, there is an increasing tendency towards multiple rounds of written submissions, where in retrospect fewer would have sufficed; and third, participants in international arbitrations frequently bemoan the length of time that arbitral tribunals take to render their final awards.[5]

Recent surveys of international arbitrations users and practitioners have confirmed these perceptions. The time (and therefore necessarily the cost) of international arbitration proceedings was identified in a 2006 survey of corporate counsel as the second greatest disadvantage of international arbitration.[6] Yet some six years later, a 2012 survey revealed that there is no consensus about how arbitration proceedings might be effectively expedited. Only 46% of respondents favoured limiting or excluding document production—one of the procedures that is often blamed for the increased costs of arbitration. As to written submissions, only 46% favoured a tribunal insisting on short time limits; only 31% approved of page limits; and a mere 28% were in favour of a single round of written submissions instead of the more usual two rounds.[7] Seventy-eight percent of respondents considered that a three-member arbitral tribunal should issue its award within six months after the close of proceedings.[8] Experience suggests that this is rarely achieved—although many institutional arbitration rules include time limits for the delivery of a final award,[9] this is more frequently extended by the institution than complied with.

Various constituents of the international arbitration community have made efforts over the years to address these concerns. For example, in 2007, an ICC Task Force published a report on Techniques for Controlling Time and Costs in Arbitration.[10] The IBA's revised Rules on the Taking of Evidence in International Arbitration (2010) set out procedures designed to limit the time and costs of disclosure.[11] Useful though these are, they have had very limited perceptible effect on controlling the escalation of time and costs in international commercial arbitration.

More recently, in the current round of revisions to institutional rules, new provisions have emerged govern-

ing accelerated arbitration proceedings.[12] It is a matter of some doubt whether parties will choose to incorporate these expedited procedures in their agreements to arbitrate, or whether they will be used primarily in circumstances where some emergency relief if sought.

"What is needed is a completely fresh attitude from all interested parties."

Can Fast Track Arbitration Provide the Solution?

If arbitration is to continue to distinguish itself from litigation because of its flexibility, speed and relatively low cost, what is needed is a completely fresh attitude from all interested parties. The focus should be on dealing with the substantive dispute in the most efficient way possible. The parties to the dispute and their legal representatives should avoid the temptation to make every available procedural objection, and to insist on obtaining extensive discovery from their opponents. They should select arbitrators who have sufficient time in their schedules to ensure that the proceedings can progress without delay. The arbitrators should be constantly mindful of time and costs, and do everything in their power to push the arbitration proceedings forward with an efficient schedule. And the institutions responsible for administering arbitrations should encourage all concerned to abide by a strict schedule and avoid unnecessary delays.

Surprisingly, fewer than half of the respondents to the recent Queen Mary survey had any experience in the last five years with fast track arbitration. In 50% of the cases where fast track arbitration had been used, this was required by the arbitration agreement. Thirty-five percent of the respondents rated their experience with fast track arbitration as positive, while 40% thought that it worked well for more simple cases but was inappropriate for complex arbitrations.[13]

The author was recently involved as counsel to one of the parties in a case where the parties themselves had chosen to adopt an expedited arbitration procedure in their arbitration agreement. This provided for disputes to be submitted to arbitration in London before a three-member tribunal under the ICC Rules, and required the tribunal to deliver a reasoned award within 90 days of the appointment of the third member of the tribunal. A complex dispute arose between parties from different continents involving claims and counterclaims for breach of contractual payment obligations, breach of warranty and misrepresentation. Highly technical engineering technology and financial analysis were central to the issues that the parties raised in the arbitration. Due to the complexity of the case, the parties agreed to extend the 90-day time limit to 120 days.

Despite the challenges of a 12-hour time difference and a lack of consensus between the parties, a detailed procedural timetable was put into place three weeks after the appointment of the Chair of the tribunal. This encapsulated an ingenious schedule that was specifically tailored to the dispute and involved the following steps:

- Day 1: Appointment of the Chair.
- Day 22: Procedural timetable adopted.
- Day 25: Each party to provide the other with copies of documents upon which it intended to rely.
- Day 25: Very limited documentary discovery requests to be made under the IBA Rules.
- Day 29: Documents requested to be produced or objection to be filed with the tribunal.
- Day 29: Written statements of witnesses of fact to be exchanged.
- Day 32: Deadline for requests for samples of real evidence to be made.
- Day 41: Respondent's expert witness report on damages to be served.
- Day 43: Rebuttal witness statements of witnesses of fact to be exchanged.
- Day 50: Technical expert reports to be exchanged.
- Day 52: Claimant's expert report on damages to be served.
- Day 56: Technical experts to confer on their reports.
- Day 57: Technical experts to submit a joint report reflecting points of agreement and disagreement, and any report rebutting the expert report tendered by the other party.
- Day 57: Written memorials setting out matters of fact and law to be addressed at the hearing.
- Days 60 to 64: Evidentiary hearing.
- Day 70: Written post-hearing submissions and costs submissions.
- Day 70: Closure of proceedings.
- Day 120: Delivery of the award.

The timetable was more than challenging. Complying with the tight deadlines involved an enormous commitment of time and energy by both of the parties and their legal advisers, as well as by the arbitrators, to ensure that the written submissions and the hearing could proceed on schedule. But the arbitration proceeded to the point of closure of the record on day 70 as scheduled, including

evidence from four witnesses of fact, two engineering experts and two damages experts.[14]

Was anything sacrificed for the sake of speed? There were issues on both sides where new facts, or a new spin on existing facts, emerged during the course of the hearing, but that is not unusual in an arbitration of far longer duration. It may have been useful for both sides to conduct additional factual investigations of some of the subsidiary issues had more time been available. But on the whole the written submissions on both sides were of a very good quality, dealing with all of the legal and factual issues thoroughly and concisely. The witnesses and experts were well prepared, and the hearing itself ran remarkably smoothly. Despite the challenges of dealing with such a constrained timetable, both parties had an adequate opportunity to present their cases, and nothing appears to have been lost as a result of the accelerated procedure.

"If arbitration practitioners and users wish to retain the flexibility and cost-effectiveness…the solution lies in their hands."

It may be that an accelerated schedule such as this would not be possible for a very complex arbitration, but something along these lines could be tailored to fit any case if all involved are willing to commit to making it work. An arbitration run in this way will inevitably be far quicker, cheaper, and arguably more efficient than one run along the usual more attenuated lines.

If arbitration practitioners and users wish to retain the flexibility and cost-effectiveness which have long been hailed as key advantages of international commercial arbitration, the solution lies in their hands. Corporations may choose to include an accelerated schedule in their arbitration agreements. Arbitration lawyers can encourage their clients and tribunals to agree to truncate the proceedings. Arbitrators should ensure they only accept appointments to which they can devote sufficient time, and can encourage the parties to agree to accelerated proceedings in order to minimize the costs and time required to complete the arbitration.

The solution is in our hands.

Endnotes

1. Jones, Techniques in Managing the Process of Arbitration, 78 Arbitration, issue 2, 140 (CIArb 2012).
2. Marian, Freezing the costs: cutting-cost mechanisms for controlling costs in international arbitration [2012] Int'l. Arb. L.R. 87, 95; Ulmer, The Cost Conundrum, in William W. Park (ed.), Arbitration International, vol. 26, issue 2, 221-250, 222 (Kluwer Law Int'l. 2010).
3. Mustill, Arbitration: History and Background, J. Int'l. Arb., col. 6, issue 2, 43-56, 54-55 (Kluwer Law Int'l. 1989).
4. Marian, Freezing the costs: cutting-cost mechanisms for controlling costs in international arbitration [2012] Int'l. Arb. L.R. 87, 92.
5. *See, e.g.*, Ulmer, The Cost Conundrum, in William W. Park (ed.), Arbitration International, vol. 26, issue 2, 221-250, 238 (Kluwer Law Int'l 2010).
6. Queen Mary School and International Arbitration and PricewaterhouseCoopers, International Arbitration Survey: Corporate Attitudes and Practices, 6 (2006).
7. Queen Mary School and International Arbitration and White & Case, International Arbitration Survey: Current and Preferred Practices in the Arbitral Process, 13 (2012).
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9. *See, e.g.*, CIETAC Rules 2012, Rule 46; ICC Rules 2012, Art. 30; SCC Rules 2010, Art. 36.
10. ICC Publication 843 (2007).
11. Available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.
12. *See, e.g.*, German Institute of Arbitration (DIS) Rules of Expedited Arbitration (2008); Conflict Prevention and Resolution (CPR) Global Rules for Accelerated Commercial Arbitration (2009); Stockholm Chamber of Commerce Expedited Arbitration Rules (2010). Notably, the 2012 revisions to the ICC International Arbitration Rules do not include specific provisions for expedited arbitration.
13. Queen Mary School and International Arbitration and White & Case, International Arbitration Survey: Current and Preferred Practices in the Arbitral Process, 14-15 (2012).
14. Unfortunately, the delivery of the award was delayed for reasons to which the parties were not privy.

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Emergency Interim Relief Under the ICDR Rules: Practical and Legal Considerations

By J. Brian Casey

According to the ICDR,[1] there have now been 25 applications for emergency interim relief under the provisions of Article 37. The ICDR with its issuance of Article 37 was a leader in creating a mechanism for the appointment of an emergency arbitrator prior to the tribunal being constituted. The Article is applicable to all arbitration agreements entered into on or after May 1, 2006, unless expressly excluded by the parties. It can be a powerful tool. Article 37.5 provides that:

> The emergency arbitrator shall have the power to order or award any interim or conservancy measure the emergency arbitrator deems necessary, including injunctive relief and measures for the protection or conservation of property. Any such measure may take the form of an interim award or of an order.

While domestic arbitration may lend itself to obtaining interim measures from a court, in international arbitration the actions complained of, or the location of the Respondent, may make a U.S. court order of little use, presuming the court would take jurisdiction in the first place. Seeking interim relief from a foreign court may also prove problematic and time consuming. Some courts will decline jurisdiction on the basis that the arbitration agreement provides a remedy. In appropriate circumstances, counsel are, for both substantive and tactical reasons, deciding it is better to first seek interim emergency relief from an emergency arbitrator rather than go through the courts. This article will look at a few of the legal and practical considerations counsel needs to consider when contemplating bringing or responding to such an application.

The Front End Load

Those familiar with international arbitration know that it is a process that does not allow for learning your case as you go along. This is particularly true with respect to applications for emergency relief. Article 37.2 requires the party seeking relief to notify the administrator and all other parties in writing and to set out:

1. The nature of the relief sought;
2. The reasons why it is needed on an emergency basis, and
3. The reasons why the party is entitled to such relief.

This means that for the Claimant, both the factual underpinnings for the relief, as well as the applicable law, need to be worked up before the application is launched. Once the administrator receives the notice, things happen quickly.

There is no vetting or gatekeeper role for the administrator. Article 37.3 provides that within one business day of receipt of the notice, the administrator "shall" appoint a single emergency arbitrator from a special panel of emergency arbitrators designated to rule on emergency applications. The parties then have one business day to challenge the arbitrator after being notified of the appointment. Once appointed, the emergency arbitrator must, within two business days of appointment, establish a schedule for consideration of the application for emergency relief.

"…[F]actual underpinnings for the relief, as well as the applicable law, need to be worked up before the application is launched. Once the administrator receives the notice, things happen quickly."

Is It An Emergency?

For the Claimant, part of the test requires satisfying the emergency arbitrator that the matter cannot await the formation of the tribunal. Accordingly, it is good practice to already have the factual basis for the relief set out in draft affidavits or witness statements and ready to be finalized and filed on very short notice. Having claimed an emergency, it is bad form to then tell the emergency arbitrator that the schedule should allow for a number of weeks while Claimant pulls its case together.

Further, there is great tactical advantage in being ready to go. It puts Respondent under serious time constraints to get its case together, which can lead to poor quality submissions and even settlement.

For Respondent's counsel, it becomes important to explain to the client the absolute necessity to meet the application with a fully developed factual position. We all know the euphemisms: fire drill, all hands on deck, whatever it takes to meet the Claimant's assertions. The Claimant may have had weeks or months to assemble its case, and the Respondent will be faced with an emergency arbitrator who will want to quickly decide whether or not emergency relief should be granted. While each case turns on its own facts, anecdotal evidence suggests you will not have more than a week or two to have your material submitted.

Respondent may also want to consider leveling the playing field by filing evidence that the matter is truly not an emergency and can await the formation of the tribunal.

This may include giving an undertaking not to carry out some action that the Claimant is concerned about. If a without prejudice undertaking is given, the "emergency" aspect of the application may well be undermined. The emergency arbitrator's primary function is to maintain the status quo in a manner that does not permit one party or the other to take advantage of the effluxion of time. If Respondent can demonstrate it really is not an emergency, but a tactical ploy by Claimant, the emergency arbitrator may well decline to make any order.

A second factor will also help the Respondent. As this is an arbitration, albeit one with very short timelines, there is an obligation on the arbitrator to treat both sides fairly and to permit each side a reasonable opportunity to make its case and meet the case of the other side. This can be used to ensure enough time is given to properly respond to the application.

Legal Niceties

i) Jurisdiction

It is basic law that the arbitrator takes his or her jurisdiction from the agreement of the parties. By agreeing to the Rules of the ICDR, the parties have agreed to give the arbitrator the power to grant any interim or conservancy measure he or she deems necessary. Such power may, however, be circumscribed by the place or "seat" of the arbitration. Regardless of where the emergency application is actually heard, by specifying a seat or place of arbitration, the parties have agreed that the mandatory procedural law for arbitration at that place shall govern the proceedings and the local courts of that place will have supervisory jurisdiction over its conduct. For example, Italy, the Province of Quebec and Greece do not permit arbitrators to issue injunctions.[2] Presumably if no place of arbitration is specified, the ICDR will determine the place, in accordance with the Rules, subject to the discretion of the tribunal, when constituted, to change it.

Further, the parties should check to determine what other mandatory procedural requirements exist at the place of arbitration. For example, if the jurisdiction has adopted the Model Law, the Respondent may argue that Article 24(1) requires an arbitrator to hold an oral hearing if either party demands it.[3]

ii) What Is the Test?

Article 37 leaves it completely open to the emergency arbitrator to order or award any interim or conservancy measure the emergency arbitrator deems necessary. No guidance is provided as to what the test should be in determining this necessity. This does not mean the arbitrator has *carte blanche.* His or her decision must be made in accordance with law and be set out in a reasoned award. On the other hand, counsel should be careful not to presume that the test for an interim injunction that may be applicable in the local court will be the one used by the emergency arbitrator. While not completely free from doubt, the applicable legal test to be applied by the emergency arbitrator is best characterized as procedural in nature and not substantive.

If the test for the granting of an injunction or conservatory measure is determined to be substantive law, then the law specified by the parties would apply. So, for example, in a contract between an American company and a Korean company, if the arbitration clause provided that the dispute is to be determined under Korean law, then this law would have to be applied to determining the test for the emergency measure.

The better view is that the test is procedural. In the recent case of *CE International Resources Holdings LLC v. S.A. Mineral Ltd. Partnership et al.*[4] the court was asked to enforce an arbitrator's order, granting a Mareva-style injunction that froze the respondents' assets *pendente lite.* The parties' contract stipulated that the contract was to be governed by and enforced in accordance with New York law. Respondent asked that the arbitrator's order be set aside on the ground that the arbitrator had acted in manifest disregard of the law, as New York does not permit a plaintiff in an action for a money judgment to obtain pre-judgment security. The Court enforced the arbitrator's order and dismissed the challenge on the grounds that the parties had freely agreed to use the ICDR Rules, and Article 21 clearly gave the arbitrator the jurisdiction to order interim relief that might not otherwise be available from a court under New York law.

The question then becomes what procedural law should the emergency arbitrator apply? Procedural rules, if not agreed to by the parties, will be determined by the arbitrator. It is also important to keep in mind that there is no obligation on an international arbitrator to apply the local procedural rules of court or the Federal *Rules of Civil Procedure* in an arbitration. Only the mandatory arbitration law of the place of arbitration is binding on the arbitrator. The procedural law the arbitrator decides to apply may, in many cases, be of no particular concern, but in other cases the onus the Claimant must meet may well be significantly different depending on the law that is chosen.

If the traditional U.S. test for an interim injunction is followed, the Claimant would have to establish that it is likely to succeed on the merits, that it is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of the equities tip in its favor, and that an injunction is in the public interest.[5]

If the traditional test used in the U.K. and Canada is followed, the Claimant needs only to establish there is a serious issue to be tried, damages would not be an adequate remedy and the balance of convenience lies in granting an injunction.[6]

If the arbitrator is not bound by any particular procedural law regarding the appropriate test, it is quite likely he or she will fall back on generally accepted internation-

al practice. One source to look to is the UNCITRAL Rules for international commercial arbitration. Under those rules, the Claimant must satisfy the arbitrator that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered. Such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed, if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim.[7]

The UNCITRAL test appears to be somewhere between the U.S. and the U.K. / Canada test.

The determination of the test and the onus the Claimant has to meet become important when dealing with procedural fairness. If the Claimant need only establish that there is a "serious issue to be tried," the extent to which there is need for extended oral hearings and cross-examination on affidavits may well be reduced. If, on the other hand, the test is "likely to succeed on the merits," this may call for a more rigorous analysis of the facts.

iii) Enforcement

A further legal and practical concern is whether or not the decision of the emergency arbitrator will need to be enforced. Article 37.5 provides that the interim measure of protection may take the form of an interim award or of an order. For enforcement purposes, the more the Claimant can have the decision characterized as an award, the more likely it will be enforced. Generally speaking, interim orders usually dealing with interim procedural matters are neither enforceable nor subject to judicial review.

Historically, only final awards were considered enforceable in the U.S. but this attitude has changed. In the U.S., the courts will likely enforce an interim award from a tribunal if it can be shown the interim award was necessary to make the ultimate award meaningful.[8] In this sense it is considered sufficiently "final" to be confirmed or enforced.

The same cannot be said internationally. Enforcement of a tribunal's interim award in another country will usually fall to be determined under the New York Convention, which provides for the enforcement of "awards." In many countries, this is interpreted to mean only final awards.[9]

The cases dealing with enforcement up to now have all dealt with enforcement of interim awards granted by the arbitral tribunal. An open question is whether an emergency interim award is sufficiently final so as to be confirmed or enforced. Interim awards granted by an arbitral tribunal remain in place until the final award. Interim emergency measures however are liable to be set aside or modified by the arbitral tribunal once it is fully constituted. This is discussed in more detail in the next section.

"An open question is whether an emergency interim award is sufficiently final so as to be confirmed or enforced."

iv) Judicial Review

The flip side of the question of enforcement is the question of judicial review. The only court that can review and potentially set aside the emergency arbitrator's decision is the court at the seat of the arbitration. Again it will be useful for counsel to consider whether or not the law at the place of arbitration permits judicial review of interim orders, or interim awards.

As discussed above, in the U.S., if an interim award is sufficiently final to be enforced, it is sufficiently final to be subject to judicial review. Equitable awards involving the preservation of assets related to the subject of arbitration are generally considered to be "final" arbitral awards and subject to judicial review.[10]

Does the same reasoning apply to emergency interim decisions? The only case the writer is aware of dealing with Article 37 is *Chinmax Medical Systems Inc. v. Alere San Diego, Inc.*[11] In that case, the court found that the arbitrator's decision was in the nature of a temporary equitable order, issued "in order to facilitate any *consideration by the full panel* of conservancy…" and, by its terms, would "remain in effect pending review of the full arbitration tribunal, once appointed, and thereafter *as the tribunal may order."*

The court concluded:

> When considering the "substance and impact" of the interim order, this Court concludes that the interim order was not a final order and is not subject to review by this Court. *Publicis Commc'n*, 206 F.3d at 729. The rules provide that the full arbitration panel has the authority to "reconsider, modify or vacate" the interim order; thus, the rules expressly retained jurisdiction over the issue for further consideration by the full panel. See *Orion Pictures Corp.*, 946 F.2d at 724. The arbitrator stated that the interim order was issued to facilitate a conservancy order by the full arbitration panel; thus, the arbitrator did not intend the interim order to be final.[12]

As it was not sufficiently final, it was not subject to judicial review. If it was not sufficiently final for judicial review, the question remains was it sufficiently final to be enforced?

Article 37.6 provides that once the tribunal has been constituted, the tribunal may reconsider, modify or vacate the interim award or order of emergency relief issued by the emergency arbitrator. This language does not restrict the power of the emergency arbitrator to make an interim award in mandatory language, which is binding on the parties unless the tribunal modifies or vacates it. The question then becomes one of tactics. Counsel, thinking of enforcement, will want any interim award to have as much "finality" as possible in its language, while another counsel, concerned about any judicial review, may want any decision couched in more "interim" language.

The same considerations may not apply internationally. In the recent decision of *PT Pukuafu Indah and others v. Newmont Indonesia Ltd and another,*[13] the Singapore High Court (the Court) confirmed that it did not have jurisdiction to set aside an interim anti-suit injunction ordered by an arbitral tribunal, thus supporting the growing international practice of courts of simply not interfering with interim measures. It is therefore possible that the supervising court at the place of arbitration will not entertain judicial review of an emergency arbitrator's interim award, while the court at the place of enforcement may find the decision sufficiently final and enforce it. No U.S. court has yet dealt with this situation.

Conclusion

All arbitrators want to do the "right" thing and appear to be quite prepared to grant interim measures necessary to protect the rights of the parties until the tribunal is constituted. This includes granting interim measures that might not otherwise be granted by a court. There is anecdotal evidence that the granting of an emergency measure has, in a number of cases, effectively ended the arbitration. There are also pitfalls in the international context that counsel must think through before embarking down this path.

Properly utilized, the application for emergency interim measures has become an important tool in the toolbox of arbitration counsel. If triggered without consideration to the factors discussed above, however, counsel may find themselves expending time, money and energy that could have been better put to simply getting on with the arbitration itself.

Endnotes

1. Informal discussions with ICDR Management, January, 2013.
2. See, for example, *Lehoussel c. Gagnon*, 2012 QCCS 4020 (Quebec Superior Court).
3. UNCITRAL Model Law Article 24.
4. United States District Court for the Southern District of New York, 2012 U.S. Dist. LEXIS 176158 (2012).
5. *Winter v. Natural Res. Def. Council, Inc.*, 129 S.Ct. 365, 374 (2008).
6. *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396; *RJR-MacDonald Inc. v. Canada*, [1994] 1 S.C.R. 311.
7. UNCITRAL Arbitration Rules, Article 26.3.
8. *See Pacific Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019, 1023 (9th Cir. 1991) ("[t]emporary equitable orders calculated to preserve assets or performance needed to make a potential final award meaningful…are final orders that can be reviewed for confirmation and enforcement by district courts under the FAA"); *Sperry Int'l Trade, Inc. v. Israel*, 689 F.2d 301, 304 n.3 (2d Cir. 1982) (award requiring the establishment of an escrow account pending final determination of the merits was a "final" decision, "ripe for confirmation").
9. See, for example, *Resort Condominiums v. Bolwell*, 118 A.L.R. 655.
10. *Yonir Technologies, Inc. v. Duration Sys. (1992) Ltd.*, 244F. Supp. 2nd 195 (2002); *British Ins. Co. of Cayman v. Water Street Ins. Co.*, 93 F.Supp. 2d 506, 514 (S.D.N.Y. 2000).
11. United States District Court Southern District of California, Case No. 10cv2467 WQH (NLS).
12. *Id.* at p. 8.
13. [2012] SGHC 187.

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Arbitration's Enduring Value: Looking Beyond Time and Cost

By James E. Berger

It has become a virtual truism in the legal and business communities that arbitration is a cheaper and faster alternative dispute resolution mechanism than litigation. And by and large, that remains true. For domestic and relatively small claims that present relatively simple factual and legal issues, and often even for large claims, arbitration can proceed much more quickly than litigation, where clogged federal and state court dockets ensure that even the most straightforward cases must wait their turn—and often wait a long time, frequently several years—to be heard and decided. Likewise, because arbitration proceedings typically feature far less compulsory discovery than the U.S. litigation system provides, and arbitrators are available to hear cases more promptly, parties proceeding in arbitration are usually able to obtain an adjudication of their disputes at a fraction of the time and a fraction of what it would cost to litigate the same matter. For many businesses and their lawyers, the cost and time savings of arbitration represent a substantial benefit that, without more, make it an attractive dispute resolution option.

"Parties…should not be too hasty to run back to the courtroom."

Is Arbitration Really Cheaper and Faster Than Litigation?

The extent to which arbitration offers time and cost savings over litigation has, however, come under scrutiny lately, particularly when those metrics are considered with respect to large, complex, and/or international disputes. For starters, institutional arbitration, even if cheaper than litigation, is not cheap: According to the International Commerce Commission's arbitration cost calculator, the cost of arbitrating a $5,000,000 claim before a three-arbitrator panel administered by that body in 2010 was estimated at over $300,000. These costs are solely the administrative and arbitrator costs, and do not include lawyer time, translators, travel costs, or (for arbitrations taking place in certain non-U.S. jurisdictions), the value added tax, which can raise the cost by almost twenty percent. Where the claim is $500,000,000—certainly not an unheard-of sum for a financial services or infrastructure-related disputes—the total cost jumps to over $1.1 million.[1] Considering that the filing fee for a federal lawsuit is approximately $350—judges and court staff are paid by the government, of course, not the parties—the cost differential for providing a mechanism for dispute resolution is significant.[2]

Nor is arbitration always fast. While the rules governing arbitration afford parties the ability to prosecute their claims quickly, other considerations can slow the process considerably. As but one example, pre-arbitration court challenges to arbitrability can cause significant delay, as can other efforts by parties to avoid the arbitration altogether by filing parallel lawsuits in distant jurisdictions (something that, in addition to causing delay in an arbitration, contributes further to increasing cost). Sometimes parties (particularly in arbitrations featuring three-arbitrator tribunals) experience difficulty in finding consecutive hearing days at which all three arbitrators, witnesses, and counsel can be present. Finally, where a party is unwilling to accept the result of an arbitration, post-arbitral enforcement and/or vacatur proceedings can stretch the process out, sometimes for years, further chipping away at the time and cost savings that parties, when they agreed to arbitrate their disputes, may have hoped to achieve.

In sum, these days certain disputes submitted to arbitration cost as much as, and take as long as, litigation proceedings to come to a final conclusion. If time and cost considerations were once thought to be arbitration's principal advantages, is a reassessment of its desirability in order? Will (or should) parties seek the sure-handedness of litigation—with its more uniform rules and its presumed guarantee of an outcome in accordance with governing law by virtue of the right of appeal—as the preferred way of resolving their disputes if arbitration fails to deliver the cost and time savings long thought to be its primary benefit?

A closer look at arbitration's other benefits suggests that parties who are otherwise inclined to arbitration should not be too hasty to run back to the courtroom solely on those grounds. The ability of the parties to tailor the process to suit the requirements of the case can be a compelling advantage. The possibility of maintaining confidentiality, at least as long as the proceeding stays in the arbitration, can be a significant advantage in some circumstances. For international commercial disputes, arbitration has certain particularly significant advantages that should not be overlooked or lightly dismissed. Following are some of the reasons why.

Avoiding the "Hometown Treatment" and the Race to the Courthouse

Absent a dispute resolution clause—which could take the form of an arbitration provision or a forum selection clause—parties confronted with a potential dispute often feel compelled to commence litigation first, and to do so in a favorable venue, typically the party's home country

courts. This often-precipitous rush to file in court can impede the prospects for settlement, lead to expensive and time-consuming parallel litigation, and vastly complicate disputes. Arbitration agreements avoid this by fixing an agreed-to dispute-resolution mechanism, avoiding the need for parties to rush to court in an attempt to secure the most advantageous forum for the resolution of any dispute that may arise.

Even beyond avoiding the need to rush to court, one of the main substantive reasons why arbitration will remain an indispensable dispute resolution mechanism in international disputes is because it allows all parties to a cross-border transaction to avoid being haled into the courts of the other party's home nation. Litigators often use the term "getting hometowned" to refer to situations where a party from outside the forum is treated—or perceived to have been treated—unfairly. Adherence to the rule of law may be doubted in some countries. Thus when the venue is not a neighboring state, but instead a distant country, the risk of that happening can be quite real.

Even beyond the risk of unfair treatment, however, the burdens of foreign country litigation can be very substantial, particularly for American parties and counsel who are accustomed to the U.S. judicial system. Lawyers from the United States accustomed to the common law system may find litigation in civil law jurisdictions—where judicial precedents generally do not bind later courts and where statutory interpretations may vary from case to case and based on specific facts—uncomfortably unpredictable.

Language barriers can make it difficult for U.S. and/or in-house counsel to follow the proceedings as carefully and closely as they need to. Discovery—a staple of the U.S. system and often the key to the accurate adjudication of complex facts—may be unavailable in foreign proceedings, and almost surely will not be as extensive as U.S. counsel will expect. Courts in some countries are exceedingly slow and cases can languish for many years even at the trial level alone.

An arbitration agreement allows the parties to avoid the uncertainty that surrounds foreign litigation by allowing the parties to choose the forum in which they will arbitrate, the language of the proceedings, and any other procedural aspects of the proceeding that they would like to incorporate in it. Most important, however, it provides firm expectations, assures a fair process and eliminates uncertainty.

Ease of Enforcement

Dispute resolution mechanisms are of little use if they offer illusory or paper relief. And while it may seem counterintuitive, international arbitration awards are, in many instances, more easily enforceable than foreign court judgments. This again is one of the reasons why arbitration of international disputes remains a preferable alternative to litigation.

International arbitration awards are enforceable in the United States through two treaties. The first, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), is the more common, being one of the most widely ratified treaties in the world.[3] The New York Convention is in force in over 140 countries, and imposes an obligation on member states to enforce, as a court judgment, any arbitral award that is not subject to one of the Convention's seven limited grounds for non-recognition, each of which seeks to ensure that the arbitration was conducted in accordance with a valid arbitration agreement and that it was carried out in a manner consistent with basic concepts of due process.[4]

In the United States, and most jurisdictions, proceedings to enforce an arbitration award under the New York Convention are designed to be expedited, and to ensure that arbitral awards are confirmed promptly and in accordance with fixed and well-understood legal standards.[5] Under the New York Convention, only a court at the seat of the arbitration—known as a "primary jurisdiction" court—has the authority to vacate the award.[6] Even where an award has been vacated, however, that does not automatically prevent it from being enforced in other New York Convention jurisdictions.[7] France and Luxembourg, for example, have adopted a policy against deferring to annulment decisions, and will confirm awards that meet the standards for confirmation under their respective national laws implementing the New York Convention. In all, agreeing to arbitration helps to ensure that disputes will be resolved definitively, and that adjudications will be respected and implemented.

Adjudication by Specialists

Judges are experts in law, and are assigned randomly to cases. There is no guarantee that a court will understand the particular business customs that prevail in an industry and that may dictate the proper outcome of a dispute. Arbitration agreements, however, may fix specific qualifications for arbitrators, and require that they have specific education, experience, and/or knowledge that will allow them to readily understand all aspects of the dispute. It is also possible to select arbitrators that are conversant in more than one legal tradition that may be relevant, have language skills that would be helpful to the case, and are experienced in dealing with cross-cultural differences.

Conclusion

Arbitration is being used increasingly as a method of resolving large and complex disputes, and when it is used

for such disputes, the time and cost advantages so long associated with arbitration may in some cases be less compelling. But arbitration enjoys many other advantages that make it a particularly effective dispute resolution method for international commercial and investment disputes, and those substantive advantages remain even where the cost and time advantages recede.

"Arbitration's…substantive advantages remain even where the cost and time advantages recede."

Endnotes

1. See http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/cost-and-payment/cost-calculator/.
2. It must be noted that the International Chamber of Commerce reported that only 18% of the costs incurred by the parties were attributable to the costs of the arbitrators and the institution. The remaining 82% was spent on other costs including lawyer fees and expenses, expenses related to witness and expert evidence and other case preparation costs. International Chamber of Commerce Commission on Arbitration, *Techniques for Controlling Time and Costs for Arbitration*. Thus in the many cases in which arbitration does conclude more quickly than litigation and the lawyers accordingly have less time to devote to the case and run up costs, it seems irrefutable that significant overall cost savings are achieved.
3. 21 U.S.T. 2517, 330 U.N.T.S. 38 (Jun. 10, 1958). The New York Convention is implemented by Chapter Two of the Federal Arbitration Act, 9 U.S.C. § 201 *et seq*. The other is the Inter-American Convention on International Commercial Arbitration (the "Panama Convention"), 1438 U.N.T.S. 245 (Jan. 30, 1975), which has been ratified by the majority of states in the Americas and which governs arbitration proceedings between parties of member states. The Panama Convention is implemented in the United States by Chapter Three of the Federal Arbitration Act, 9 U.S.C. § 301 *et seq*.
4. *See* New York Convention, art. V.
5. *See, e.g., Compagnie Noga D'Importation., S.A. v. Russian Federation*, 361 F.3d 676, 683 (2d Cir. 2004) (noting strong U.S. public policy favoring international arbitration); *Yusuf Ahmed Alghanim& Sons, W.L.L. v. Toys 'R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997) (noting the "twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation").
6. This aspect of the New York Convention (which also is applicable under the Panama Convention) renders it critical for parties considering agreeing to arbitration to designate a seat that has a reliable court system whose judges are familiar with the Convention and with arbitration, as well as appropriate legislation implementing the Convention.
7. *See* New York Convention, art. V(e) (providing that "[r]ecognition and enforcement of the award may be refused if…[t]he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made").

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Mandatory Trust Arbitration in the U.S. and Abroad

By S.I. Strong

This article provides a brief introduction to mandatory arbitration of internal trust disputes in the United States and elsewhere. This is an area of increasing interest as settlors try to find ways to resolve trust disputes more quickly, quietly and inexpensively. However, trust arbitration gives rise to several unique problems not seen in other areas of law, particularly regarding the arbitrability of trust disputes and whether a trust is sufficiently contractual to support an arbitration agreement.

Mandatory trust arbitration is a matter of growing interest in numerous countries around the world. Though trusts are often seen only as family planning devices, the vast majority of money held in trust in the United States is in commercial as opposed to personal trusts. However, arbitration of internal trust disputes (meaning those matters internal to the operation of the trust rather than involving external third parties) in both the personal and commercial trust context gives rise to a number of analytical difficulties not seen in other types of arbitration, primarily regarding issues of arbitrability and the validity of the arbitration agreement. The following discussion introduces the various ways internal trust arbitration is addressed in the United States, followed by a brief summary of developments in other countries so as provide a flavor of current developments in this area of law.[1]

U.S. States With Legislation Explicitly Permitting Arbitration Through Inclusion of a Provision in the Trust Itself

The easiest situation to consider involves jurisdictions with statutes recognizing the validity of an arbitration provision found in a trust. Two U.S. states have done so to date. Florida's provision appears relatively broad, though it has not yet been judicially considered.[2] Arizona enacted its statute specifically to overturn the well-known case of *Schoneberger v. Oelze*, as discussed below.[3] Arizona's statute is to be construed broadly to include "any matter involving the trust's administration, including a request for instructions and an action to declare rights."[4]

U.S. States With Legislation Explicitly Permitting Arbitration of Trust Disputes but Without Reference to Provisions Found in the Trust Itself

Numerous U.S. states provide for trust arbitration without making reference to arbitral provisions found in the trust itself. While the precise language used varies by jurisdiction, typical language is found in the Uniform Trust Code (UTC), which has been adopted in whole or in part by twenty-four U.S. states.[5]

Although Section 111 of the UTC lists a range of trust-related matters that can be made subject to arbitration, including, among other things, interpretation of the trust, approval of a report or accounting by the trustee, or liability of a trustee for actions relating the trust, the drafters of the UTC were purposefully vague when it came to identifying who could enter into these sorts of nonjudicial agreements.[6] Therefore, the statute does not state whether arbitration may be required pursuant to an arbitration agreement in the trust or whether the trustee is the only person who can enter into an arbitration agreement. Two other states—Washington and Idaho—have enacted statutes that include an even larger number of matters that are considered arbitrable.[7] However, the Washington and Idaho statutes are just as ambiguous as the UTC when it comes to describing how arbitration may be triggered and by whom.

U.S. States Without Legislation Concerning Trust Arbitration

Most U.S. states have not adopted statutes regarding trust arbitration. While there is some perception that precedent in this area of law is "thin and underdeveloped,"[8] there actually is a growing amount of case law concerning mandatory trust arbitration. Only a few of these new developments can be discussed herein,[9] but two lines of cases will be introduced to show developments in this field. One line relates to older decisions that once acted as significant stumbling blocks to the arbitration of trust disputes but that have now been abrogated while another line involves contemporary cases considering whether an arbitration provision in a trust is enforceable under the relevant arbitration statute.

Cases That Have Been Recently Abrogated

The most well-known recent reversal involves *Schoneberger v. Oelze*, an Arizona case that denied enforcement of an arbitration provision in a trust because a trust is not a contract.[10] This case was superseded by statute in 2008.

Another case that was frequently cited as curtailing the arbitration of trust disputes was *In re Jacobovitz' Will*, a New York state court decision from 1968 that held that wills (and, by extension, trusts) were non-arbitrable as a matter of public policy.[11] However, *In re Jacobovitz' Will* has recently been called into question by *In re Blumenkrantz*,[12] which allowed arbitration of internal trust matters.

Michigan has undergone a similar shift. For years, *Meredith's Estate*, a 1936 decision from the Supreme Court of Michigan, was read as prohibiting trust arbitration because trust disputes are *in rem* proceedings.[13] However, *Meredith's Estate* was superseded by implication by *In re Nestorovski Estate*,[14] which concluded that an arbitration proceeding did not improperly oust the court of jurisdiction over probate concerns.

"Because arbitration is 'a creature of contract,' arbitration agreements typically must either be contained within a contractual document or independently meet the necessary contractual criteria."

Recent Judicial Developments

Perhaps the biggest problem facing mandatory trust arbitration relates to the nature of the trust itself. Because arbitration is "a creature of contract," arbitration agreements typically must either be contained within a contractual document or independently meet the necessary contractual criteria. These requirements can create difficulties for trust arbitration, since trusts are typically only signed by the settlor, not by other parties, and often do not involve the exchange of consideration.

Several U.S. states have recently addressed this issue. In *Diaz v. Bukey*, the California Court of Appeal considered whether a dispute between a trustee and a beneficiary can be made subject to arbitration pursuant to a provision in the trust itself.[15] The defendants here claimed that plaintiffs should not be allowed to accept some of the benefits under a trust without accepting all of the trust provisions, including the arbitration clause, based on either a third party beneficiary or an equitable estoppel theory. The court denied the motion to compel arbitration on both grounds, holding that the arbitration provision was unenforceable because arbitration agreements must be contracts or contained within a contract and a trust is not a contract under California law. However, the California Supreme Court vacated the appellate court decision in *Diaz* and remanded the matter for reconsideration consistent with the California Supreme Court's decision in *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC*, which held that a housing association, along with its constituent members, could be required to arbitrate its disputes with a developer pursuant to arbitration provisions found in a recorded covenant.[16] This is an intriguing development, since it suggests that California may be abandoning the type of contract-based analysis reflected in Arizona's now-superseded decision in *Schoneberger v. Oelze.*

Roehl v. Ritchie is another California case.[17] Here the court considered certain problems associated with a series of arbitral awards rendered by an arbitrator who was dealing with an accounting issue under a trust. At no point did the court suggest the arbitration provision might be unenforceable, even though that provision was contained in the trust itself. While the initial appellate decision in *Diaz* attempted to limit *Roehl* on the grounds that none of the parties in *Roehl* objected to the use of arbitration, *Diaz* has been vacated, thus removing any limitations on the applicability of *Roehl*.

Texas has also considered contract-based defences to mandatory trust arbitration. In *Rachal v. Reitz*, the Court of Appeals decided that a trust is not a contract and that the arbitration provision in question was therefore invalid.[18] However, the decision generated a very interesting dissent that noted that the Texas Arbitration Act only mentions an "arbitration agreement" rather than an arbitration "contract."[19] The case has been appealed to the Texas Supreme Court, with a decision due in early 2013.

Contract-related claims regarding mandatory trust arbitration were also heard in *New South Federal Savings Bank v. Anding*.[20] According to the court, "[m]utuality of obligations is not required for a contract to be enforceable under Mississippi law. Accordingly, this court is not persuaded that the agreement to arbitrate contained in the Deed of Trust is deficient."[21] The court also held that the contract provision was not procedurally or substantively unconscionable.

International Developments

The United States is not alone in considering internal trust arbitration. Guernsey, one of the leading jurisdictions for offshore trusts, enacted a statute in 2007 specifically contemplating the possibility that the arbitration can be mandated through a provision included in the trust instrument itself.[22] The statute, which has extraterritorial application, also expressly indicates that beneficiaries of the trust may be bound by the outcome of the arbitration.

Similar reforms may soon follow in other offshore jurisdictions. Indeed, the Bahamas are currently in the process of enacting legislation that is even broader than that currently in place in Guernsey.[23]

Conclusion

Mandatory trust arbitration is gaining increased interest, but faces something of an uphill battle in most U.S. states. Florida and Arizona are the only two states that permit mandatory trust arbitration by statute. Parties in other U.S. states either face ambiguous legislation or difficult case law, if the issue has even been considered by lawmakers at all.

However, there are a significant number of other judicial decisions, not discussed herein, that provide support for mandatory trust arbitration.[24] Furthermore, commentators have concluded that there is nothing about trust disputes that would prohibit their being made subject to an arbitration provision in the trust itself, if proper language and procedures are used.

In moving towards a more arbitration-friendly trust regime, the United States is joining trends seen in several of the more important locations for offshore trusts. Furthermore, the American Arbitration Association (AAA) has a specialized rule set (the AAA Wills and Trusts Arbitration Rules) that attempts to address some of the specialized issues in trust arbitration. All signs suggest that this is an area of law that will only increase in importance, and arbitration specialists should keep on top of current developments.

Endnotes

1. The author discusses these issues at length in other publications. See S.I. Strong, Arbitration of Internal Trust Disputes: Improving Arbitrability and Enforceability Through Proper Procedural Choices, 28 ARB. INT'L 591 (2012); S.I. Strong, Arbitration of Trust Law Disputes: Two Bodies of Law Collide, 45 VAND. TRANSNAT'L L. REV. 1157 (2012); S.I. Strong, Empowering Settlors: How Proper Language Can Increase the Enforceability of a Mandatory Arbitration Provision in a Trust, 47 REAL PROP., TR. & EST. L. J. 273 (2012); S.I. Strong, Trust Arbitration in the United States: Recent Developments Show Increasing Diversity as a Matter of Statutory and Common Law, 18 TR. & TRUSTEES 659 (2012).
2. Fla. Stat. Ann. §731.401 (2011).
3. *See* Schoneberger v. Oelze, 96 P. 3d 1078, 1082-83 (Ariz. Ct. App. 2004), *superseded by statute,* Ariz. Rev. Stat. Ann. §14-10205 (2011), *as recognized in* Jones v. Fink, No. CA-SA 10-0262, 2011 WL 601598 (Ariz. Ct. App., Feb. 22, 2011).
4. *Jones,* 2011 WL 601598 at *2.
5. *See* National Conference of Commissioners on Uniform State Laws (NCCUSL), Uniform Trust Code (2000), §111, last revised or amended in 2005, *available at* http://www.law.upenn.edu/bll/archives/ulc/uta/2005final.htm [hereinafter UTC].
6. *See id.* §111, cmt.
7. *See* Idaho Code Ann §§15-8-101, 15-8-103 (2011); Wash Rev Code §§11.96A.010, 11.96A.030 (2012).
8. Erin Katzen, Arbitration Clauses in Wills and Trusts: Defining the Parameters for Mandatory Arbitration of Wills and Trusts, 24 QUINNIPIAC PROB. L. J. 118, 118-19 (2011).
9. For more detail, see authorities cited in note 1, *supra.*
10. *See* Schoneberger v. Oelze, 96 P. 3d 1078 (Ariz. Ct. App. 2004), *superseded by statute,* Ariz. Rev. Stat. Ann. §14-10205 (2011), *as recognized in* Jones v. Fink, No. CA-SA 10-0262, 2011 WL 601598 (Ariz. Ct. App., Feb. 22, 2011).
11. *See* In re Jacobovitz' Will, 295 N.Y.S. 2d 527, 529 (Sur. Ct. Nassau Co. 1968), *superseded by implication by* In re Blumenkrantz, 824 N.Y.S. 2d 884, 887 (Sur. Ct. Nassau County 2006).
12. *See Blumenkrantz,* 824, N.Y.S. 2d at 887.
13. *See* Meredith's Estate, 266 N.W. 351, 354, 356 (Mich. 1936), *superseded by implication by* In re Nestorovski Estate, 769 N.W. 2d 720, 732 (Mich. Ct. App. 2009).
14. See Nestorovski Estate, 768, N.W. 2d at 732.
15. *See* Diaz v. Bukey, 125 Cal. Rptr. 3d 610 (Cal. Ct. App. 2011), *vacated and remanded,* 287 P.3d 67 (Cal. 2012).
16. *See* Pinnacle Museum Tower Ass'n v. Pinnacle Market Dev. (US) LLC, 282 P.3d 1217, 1227-28 (Cal. 2012) (holding that arbitration can result even in the absence of a contract per se).

"[T]he American Arbitration Association (AAA) has a specialized rule set (the AAA Wills and Trusts Arbitration Rules) that attempts to address some of the specialized issues in trust arbitration."

17. *See* Roehl v. Ritchie, 54 Cal. Rptr. 3d 185 (Cal. Ct. App. 2007), *declined to extend by Diaz,* 125 Cal. Rptr. 3d at 610, *review granted and opinion superseded by Diaz,* 257 P.3d at 1129.
18. *See* Rachal v. Reitz, 347 S.W.3d 305, 311-12 (Tex. App.—Dallas 2011, pet. granted).
19. *See id.* at 313 (Murphy, J, dissenting).
20. *See* New South Federal Savings Bank v. Anding, 414 F. Supp. 2d 636, 643 (S.D. Miss. 2005).
21. *See id.*
22. The Trusts (Guernsey) Law 2007, §63, *available at* http://www.guernseylegalresources.gg/ccm/legal-resources/laws/trusts/the-trusts-guernsey-law-2007.en.
23. *See* Trustee (Amendment) Bill 2011, §18, *available at* http://www.bacobahamas.com/PDF/Trustee%20(Amendment)%20Bill%202011%20-%2015%20April%202011.pdf.
24. *See* sources discussed *supra* note 1.

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The Firm Roots of ADR in Federal Acquisition

By John A. Dietrich

Federal contracts, grants, and cooperative agreements,[1] in Fiscal Year 2011, accounted for $1.104 trillion, or 33.7% of federal spending.[2] This spending did not include direct payments (Social Security, retirement, employee salaries, etc.), loans, insurance, or other expenses.[3] Spending on this staggering scale literally requires millions of transactions in a given year,[4] and represents about 8% of the gross domestic product of the United States.[5] Given this extraordinary presence in the nation's marketplace, it is not surprising that alternative dispute resolution (ADR) processes have rooted themselves in Federal statutes, regulations, clauses, and business practices.

A. ADR Expressly Allowed by Statutes and Regulations

The Administrative Dispute Resolution Act of 1996 (ADRA of 1996) established fundamental principles of Federal ADR for agencies in the Executive Branch and modified several statutes to tailor ADR to specific fields. The ADRA of 1996 was intended, in part, to allow Federal Agencies to be creative and "take the lead in further development and refinement" of ADR techniques.[6] In the field of government contracting, the ADRA of 1996 directed agencies to "review each of its standard agreements for contracts, grants and other assistance" to "determine whether to amend any such standard agreements to authorize and encourage the use of alternative means of dispute resolution."[7] The Act also directed amendments to the Federal Acquisition Regulation (FAR)[8] and the Contract Disputes Act of 1978 (CDA) to allow contracting officers to use ADR to resolve claims.[9] Consistent with the fundamental principles established in the ADRA of 1996, ADR for federal contract and grant disputes remains strictly voluntary[10] and even arbitration may not be required as a condition in the award of a contract, grant, or other benefit.[11]

The current FAR expressly authorizes agencies to use ADR for protests,[12] claims,[13] and appeals.[14] Whereas ADR is "acceptable" for the resolution of protests,[15] it is more strongly encouraged for contract disputes and appeals:

> The Government's policy is to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer's level. Reasonable efforts should be made to resolve controversies prior to the submission of a claim. Agencies are encouraged to use ADR procedures to the maximum extent practicable.[16]

The Government implements this policy by including necessary language in the mandatory "Disputes" clause:

> (g) If the claim by the Contractor is submitted to the Contracting Officer or a claim by the Government is presented to the Contractor, the parties, by mutual consent, may agree to use alternative dispute resolution (ADR). If the Contractor refuses an offer for ADR, the Contractor shall inform the Contracting Officer, in writing, of the Contractor's specific reasons for rejecting the offer.[17]

The authority of the Contracting Officer to settle a matter using ADR generally continues through an appeal at a board of contract appeals, and the boards have established procedures to encourage the use of ADR.[18, 19]

B. Streamlined Access to ADR at the Federal Aviation Administration

The Federal Aviation Administration (FAA) is statutorily exempt from many acquisition statutes and regulations applicable to most of the Executive Branch. In its place, the FAA has instituted the "Acquisition Management System" (AMS), and streamlined its protest and dispute processes to focus on ADR. In fact, the enabling statute requires that the AMS, "at a minimum," provide for "the resolution of bid protests and contracts disputes related thereto, using consensual alternative dispute resolution techniques to the maximum extent practicable."[20]

The FAA has refined protests and disputes into processes that give the parties immediate access to experienced neutrals at the Office of Dispute Resolution for Acquisition (ODRA). For protests, a "Dispute Resolution Officer" is appointed within five business days to explain ADR and offer either mediation or early neutral evaluation.[21] These ADR sessions are conducted in person, over the telephone, or by video-teleconferencing, and frequently result in a resolution.

Parties also use mediation or early neutral evaluation to resolve disputes during performance of a contract. The AMS does not impose the FAR and CDA requirements for a Contracting Officer's Final Decision as a pre-requisite to filing an appeal.[22] Instead, the parties may request that the ODRA provide a neutral for a "pre-dispute ADR,"[23] or simply proceed directly to the ODRA by filing a "contract dispute."[24] Most cases at the ODRA resolve using ADR, but unresolved matters are adjudicated by Dispute Resolution Officers using Administrative Procedure Act processes.[25] ADR is encouraged throughout the adjudication. As a matter of practice, a Dispute Resolution Officer who served in an ADR capacity will not participate in the adjudication.

C. ADR for Grants and Other Agreements

Whereas the FAR regulates the contracts of many agencies in great detail, no similarly comprehensive regulation controls grants.[26] Instead, individual agencies have promulgated their own regulations or standard terms that embrace the use of ADR. For example, the Departmental Appeals Board of the Department of Health and Human Services' procedural rules provide for mediation of grant disputes.[27] Similarly, the Department of Defense (DoD) Grant and Agreement Regulations encourage defense agencies to use mediation and other ADR techniques for grant disputes. [28] In turn, DoD components like the Department of the Navy have incorporated ADR into the terms and conditions of their grants:

> **Alternative Dispute Resolution (ADR).**
>
> The Parties shall endeavor to agree upon an ADR technique (such as discussions, mediation, or mini-trial) appropriate to resolve any dispute, and they shall use ADR to the maximum extent practicable.[29]

As with other federal ADR provisions, this type of clause clearly establishes that ADR is purely voluntary.

D. Creative Uses of ADR, Conflict Avoidance, and Negotiation

While federal ADR regulations and clauses do not mandate ADR, they certainly provide the necessary authority and encouragement. Parties use ADR when they perceive gains in terms of simplified processes, lower costs, risk management, personal considerations, customer relations, time savings, or other benefits. These are the primary drivers for individual contracting specialists, program officials, grantees, and contractors to improve the ways they avoid or resolve disputes. Through their experience and creativity, a wide variety of ADR processes are used in the acquisition community to avoid disputes or resolve them quickly.

One example of dispute avoidance ADR is "facilitated partnering," used by the Naval Facilities Engineering Command.[30] This form of partnering engages an outside facilitator at the very beginning of a construction project. The facilitator promotes communications between the parties so that issues do not fester or positions harden. The facilitator, who does not have a stake in the project, ensures that potential controversies are addressed early and fully. The Department of the Navy and its contractual partners have had great success with this program and in 2006 won the Office of Federal Procurement Policy ADR Award.

Partnering, in a sense, sometimes occurs on a broader scale than a simple project or contract. Some agencies, like the Department of the Air Force, enter into corporate-level agreements wherein the principals of the agency and a corporation commit their respective organizations to endeavor to use ADR first whenever a controversy arises.

Agencies also stress the importance of direct negotiation, and frequently they provide negotiation training to their contracting officers and program officials. Such training typically includes interest-based bargaining as standard curricula. Building on this kind of training, some agencies use tiered discussion clauses to avoid formal adjudication. One such agency, the National Institutes of Health (NIH), has the following clause in its standard Cooperative Research and Development Agreement (CRADA):

> **Article 11. Disputes**
>
> 11.1 Settlement. Any dispute arising under this CRADA which is not disposed of by agreement of the NIH CRADA Extramural Investigator / Officer(s) and CRADA Collaborator PI(s) will be submitted jointly to the signatories of this CRADA. If the signatories, or their designees, are unable to jointly resolve the dispute within thirty (30) days after notification thereof, the Assistant Secretary for Health (or his / her designee or successor) will propose a resolution. Nothing in this Paragraph will prevent any Party from pursuing any additional administrative remedies that may be available and, after exhaustion of such administrative remedies, pursuing all available judicial remedies.[31]

In theory, the tiered discussion process creates incentives for lower-level employees to cooperate, while also creating a way to trivialize the dispute. For example, a $10,000 dispute may be viewed as a major problem for a new grants specialist, but he has an incentive to solve the problem rather than dumping it on the desk of a very senior political appointee like an Assistant Secretary for Health. If it does reach the Assistant Secretary, however, she and her corporate counterpart have the power to solve it as simply a minor bump in their overall grant relationship.

Sometimes ADR processes are used to improve the acquisition system, as demonstrated by the ombudsman regulation found in FAR § 16.505. An agency must establish a senior level ombudsman when it signs indefinite delivery / indefinite quantity contracts with more than one contractor for the same goods or services. The ombudsman's role is to ensure that the competing contractors are afforded a fair opportunity to be "considered [for award of delivery orders], consistent with the procedures in the contract[s]."[32] Frequently the ombudsman recommends improvement to the awards of future delivery orders rather than termination of an improper award.

E. Beyond the Government Contract—ADR for Subcontracts

Federal spending spurs contractors to enter into subcontracts for materials and services. Lacking privity of contract with the Government, subcontractors have no standing to bring protests, claims, or appeals against the Government and by the same reasoning are not subject to the ADR policies discussed above. Subcontractors may assert claims against the Government through their prime contractors or simply against the prime contractor itself.

"The Federal Government dispute tribunals have embraced well-proven forms of ADR, such as mediation and early neutral evaluation, while agency-level organizations exercise their freedom to try newer ideas like partnering, tiered discussion clauses, corporate-level agreements, and ombuds."

Unlike the prime contract with the Government, a subcontract can mandate the use of ADR, whether in the form of arbitration, mediation, or other processes, between the prime contractor and the subcontractor. Parties seeking a neutral for a subcontract dispute should carefully consider any specialized expertise that might have a bearing on the matter. One experienced subcontract neutral, Gerry Doyle, who is a partner in the government contracts law firm of Doyle & Bachman LLP and is also co-chair of the ADR Committee of the ABA Public Contract Law Section, explains, "It is a distinct advantage over litigation for parties to provide in their ADR agreement that the neutral who will assist in the resolution of their disputes must be experienced in government contract law generally, and, if they wish, in the subject matter as well (e.g., aviation maintenance). This flexibility tends to allow the ADR process to proceed more efficiently and predictably than with a neutral having no relevant background."

Observations and Conclusions

Since the passage of the ADRA of 1996, many regulations, clauses, and policies have encouraged the use of voluntary ADR processes for acquisition controversies. The Federal Government dispute tribunals have embraced well-proven forms of ADR, such as mediation and early neutral evaluation, while agency-level organizations exercise their freedom to try newer ideas like partnering, tiered discussion clauses, corporate-level agreements, and ombuds. In short, ADR is well-rooted in the field of Federal Government acquisition.

Endnotes

1. The differences in these transactions is described in the simplest terms as follows:

   > Contracts shall be used only when the principal purpose is the acquisition of supplies or services for the direct benefit or use of the Federal Government. Grants or cooperative agreements should be used when the principal purpose of the transaction is to stimulate or support research and development for another public purpose.

   48 C.F.R. § 35.003(a) (paraphrasing and implementing the Federal Grant and Cooperative Agreement Act (FGCA), codified at 31 U.S.C.A. §§ 6303-6305 (West 2012)). Government contracting professionals cite to 48 C.F.R. ch. 1 as "FAR," e.g., FAR § 35.003(a) (2012), in lieu of the full citation to the Code of Federal Regulation. Current and archived versions of the FAR are available online at https://www.acquisition.gov/far/. Citations to the FAR in this article include amendments thru FAC 2005-63, effective December 10, 2012.
2. The combined spending figure of $1.085 trillion, representing 33.7% of total federal spending in FY 2011, comes from www.USAspending.gov (last visited on December 10, 2012).
3. *Id.*
4. Official data shows 3,347,722 contract transactions (awards of contracts, delivery orders, purchase orders, etc.) in FY 2011, and 537,692 grant and cooperative agreement transactions. www.USAspending.gov (last visited on December 10, 2012).
5. *See* Office of Mgmt. and Budget, *Fiscal Year 2013 Historical Tables, Budget of the U.S. Government*, Table 1.3, showing FY 2011 total spending as a percentage of gross domestic product (GDP) at 24.1%. By extension, the one third (33.7%) of federal spending for contracts, grants, and cooperative agreements (n. 2, *supra*), represents approximately 8% of GDP.
6. Administrative Dispute Resolution Act of 1996 (ADRA of 1996) § 2(7), Pub. L. No. 104-320, 110 Stat. 3870.
7. ADRA of 1996 at § 3(d).
8. *Id.*
9. *Id.* at § 6.
10. *Id.* at § 4, codified at 5 U.S.C.A. § 572(a) (West 2012).
11. *Id.* at § 4, codified at 5 U.S.C.A. § 575(a)(3) (West 2012).
12. The term "protest" generally refers to challenges to a solicitation, a contract award, or the non-award of a contract. *See* FAR § 33.101 (2012); *see also*, 14 C.F.R. §§ 17.13 to 17.15 (2012) (Federal Aviation Administration (FAA) regulations addressing protests under its unique Acquisition Management System).
13. A "claim" is a written demand or assertion "by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms or other relief arising under or relating to" a particular contract. FAR Clause 52.233-1, "Disputes (Jul 2002)." *See also* 14 C.F.R. § 17.3(h) (2012) (defining "contract dispute" under the FAA's Acquisition Management System). The Contracting Officer operating under the FAR must issue a "final decision" on the claim, which gives the contractor the opportunity to file an appeal. 41 U.S.C.A. § 7103(g) (West 2012).
14. A contractor holding a FAR-based contract who is not satisfied with the Contracting Officers' Final Decision on a claim may file an "appeal" for a *de novo* hearing before a board of contract appeals, or the United States Court of Federal Claims. 41 U.S.C.A. § 7104 (West 2012). The FAA does not have a similar process.
15. FAR § 33.103(c) (2012) (addressing agency-level protests, usually directly to a contracting officer). The Government Accountability Office (GAO) also has protest jurisdiction under the Competition in Contracting Act and offers its brands of ADR, which it calls "outcome prediciton" and "negotiation assistance." GAO, *Bid Protests at GAO: A Descriptive Guide* (9th ed. 2009), GAO-09-471SP, at 6, 27-28.
16. FAR § 33.204 (2012); s*ee also* § 33.214.
17. FAR § 52.233-1, "Disputes (July 2002)." Whereas contractors are required by contract to give written reasons for refusing an offer of

ADR, Contracting Officers have a similar obligation arising under FAR § 33.214(b) (2012).

18. *See, e.g.*, Civilian Board of Contract Appeals Rules of Procedure, R. 54 (August 17, 2011); Armed Services Board of Contract Appeals, Notice Regarding Alternative Methods of Dispute Resolution (23 February 2011).
19. The rules are different at the United States Court of Federal Claims, where the Department of Justice holds settlement authority instead of an agency-level contracting officer. The ADR rules for the court are found in General Order No. 44, "Notice of ADR Automatic Referral Program and ADR Automatic Referral Procedures," June 21, 2007. The court has a robust ADR program for contract appeals, but ADR typically is not used for bid protest matters.
20. 49 U.S.C.A. § 40110(d)(1) (West 2012).
21. 14 C.F.R. § 17.17(b)(5) (2012)
22. *See* footnote 13, *supra*.
23. 14 C.F.R. § 17.59 (2012).
24. *Id.* at § 17.25.
25. 49 U.S.C.A. § 40110(d)(4) (West 2012).
26. See 2 C.F.R. pt. 215 (2012), which provides far less detail than the FAR.
27. 45 C.F.R. § 16.18(a) (2012).
28. 32 C.F.R. § 22.815 (2012).
29. Department of the Navy, Office of Naval Research, *For-Profit Organizations Research Grant Terms and Conditions*, at Article 30 (Feb. 2011). Last viewed November 1, 2012, at http://www.onr.navy.mil/Contracts-Grants/submit-proposal/grants-proposal/~/media/Files/Contracts-Grants/Grants-Terms/2011/For-Profit-Organization-Grant.ashx.
30. NAVFACINST 11013.40A, "NAVAL FACILITIES ENGINEERING COMMAND (NAVFAC) PARTNERING POLICY," 28 December 2004.
31. *Model PHS CRADA for Extramural-PHS Clinic Research* at http://www.ott.nih.gov/forms_model_agreements/forms_model_agreements.aspx.
32. FAR § 16.505(b)(6) (2012).

Administrative Judge John Dietrich mediates and adjudicates contract disputes and protests filed at the Federal Aviation Administration's (FAA) Office of Dispute Resolution for Acquisition (ODRA). Prior to joining the ODRA, he served in several civilian positions for the Department of the Navy, including Assistant General Counsel (ADR) and Senior Trial Attorney within the Navy Litigation Office. For several years he has been an active speaker on ADR matters, and has served in leadership positions for both the Interagency ADR Working Group, the ADR Committee of the American Bar Association's Section of Public Contract Law, and the National Conference of Administrative Law Judiciary.

The views expressed in the article do not necessarily represent the views of the Federal Aviation Administration, the Department of Transportation, or the United States.

Benefits of Arbitration for Commercial Disputes

We offer this overview of arbitration benefits prepared by the Dispute Resolution Section of the American Bar Association. It is available in brochure form upon request for distribution.

Arbitration has been part of the dispute resolution landscape for centuries: (i) some commentators date arbitration back to the time of the Phoenician merchants; (ii) Alexander the Great's father, Phillip the Second, used arbitration as a means for resolving border disputes; (iii) George Washington had an arbitration clause in his will; and (iv) the English used arbitration for commercial disputes as early as 1224.

Arbitration is preferred by many as a way to resolve commercial disputes. It has many advantages over litigation in court, such as party control of the process; typically lower costs and shorter time to resolution; flexibility; privacy; awards which are final and enforceable; decision makers who are selected by the parties on the basis of desired characteristics and experience; and broad user satisfaction.

Party Control

- Unlike litigation in court, arbitration is a creature of contract. This means that parties can agree to design the arbitration process to accommodate their respective needs and can continue to do so as the proceeding moves forward. Both at the contractual stage and after the arbitration has commenced, the parties can determine the nature and scope of discovery (including whether to allow depositions), the conduct of the hearing (including testimony by live video), the length of time for the entire process, as well as pre-screening the arbitrators for disclosure issues and availability.

Length of Time

- According to statistics furnished by the largest arbitration providers, for the year 2011, the median length of time from the commencement of a commercial arbitration to the issuance of a final award ranged from 7 to 7.3 months.[1]
- By contrast, in 2011, the median length of time from filing through trial of civil cases in the U.S. District Court for the Southern District of New York was 23.4 months and considerably longer in some of the busier courts.[2]
- The median length of time in 2011 from filing of a civil case in district court to disposition of appeal by the Second Circuit Court of Appeals was 30.8 months and considerably longer in some of the busier courts.[3]
- The Bureau of Justice Statistics reports that for state court contract cases in the 75 largest U.S. counties, the average length of time from case filing to trial in jury cases was 25.3 months and for bench trials 18.4 months.[4] Appeals times are not reported.

Expense

- Attorneys' fees and expenses are by far the most significant cost of litigation, and they increase in direct proportion to the time to resolution of the case. Attorneys' fees and expenses can be minimized in arbitration because arbitrations are generally concluded in far less time than cases in court.
- While cases litigated in court do not have arbitrator or institutional charges, the International Chamber of Commerce reports that those charges represent only 18% of the cost of arbitration.[5] This 18% (and substantially more) can be recouped quickly because of the increased speed and efficiency of arbitration and the ability to tailor the arbitration to the specific needs of the parties.
- Court cases generally require more counsel time and, thus, more expense for preparation and trial than is needed in arbitration. For example, broad pre-trial motion practice and exhaustive discovery pursuant to rules of civil procedure are not common in arbitration. Many hearing-related matters which consume time and money in court are usually not part of arbitration such as extensive evidentiary issues, *voir dire*, jury charges, proposed findings of fact, endless authentication of documents, qualification of experts and cumulative witnesses. Finally, post-hearing appeals and court proceedings are far more limited in arbitration than in court.

Flexible Process

- Arbitration is a flexible process which permits parties to schedule hearings and deadlines to meet their objectives and convenience. Other common practices which result from arbitration's flexibility include choosing a location for the hearing that will minimize costs; taking witnesses out of order or interrupting a witness to accommodate individual needs; continuing a hearing outside of normal business hours in order to complete a witness or to finish the hearing; taking testimony of distant witnesses by video conference or by telephone; ordering testimony so that all experts on a topic testify directly after one another or even all at the same time; and using written witness statements for some or all of the witnesses in lieu of time-consuming, oral direct testimony.

- When negotiating their underlying commercial contract, parties often include provisions in the arbitration clause which will enhance the efficient conduct of any arbitration that might thereafter arise. Most commonly, such clauses set time limitations for concluding the entire arbitration, as well as limitations on interim phases such as discovery and commencement of the hearing. It is far easier for the parties to agree on such matters when they negotiate their commercial contract than when a dispute has actually arisen and the parties are in an adversarial relationship.
- The flexibility of arbitration fosters a relatively informal atmosphere. Together with the privacy of the arbitration proceeding, this serves to reduce the stress on the witnesses and on what are often continuing business relationships between the parties.

Confidentiality

- Arbitral hearings are held in private settings and are attended only by those designated by the parties and their counsel, in contrast to trial proceedings held at the court house, which are open to the public.
- The parties can agree to maintain the confidentiality of the arbitration proceeding, unlike in court, where requests to seal the record are seldom granted. Most arbitral institutions have specific rules regarding the confidentiality of proceedings and awards. As long as the proceeding stays in the arbitration forum, confidentiality can be preserved by agreement of the parties. In some jurisdictions confidentiality is provided by law.
- Confidentiality is an important feature for many corporations, particularly when dealing with disputes involving intellectual property and trade secrets or when there are concerns about publicity or damage to reputation or position in the marketplace.

Arbitrator Selection

- A great benefit of arbitration is that the parties can select their arbitrators, both under the party-appointed system and the list system, and thereby choose arbitrators with qualifications tailored to the needs of the arbitration in question. These desired qualifications can include attributes such as subject matter expertise; reputation for competence; temperament; number of years of experience; number of arbitrations chaired; availability; and commitment and ability to conduct an efficient, cost-effective arbitration.
- The ability of parties to select arbitrators with desired expertise and competence contrasts with most court cases where judges are assigned randomly without regard to whether they possess qualifications particularly suited to the dispute in question.
- An additional benefit is the parties' ability to provide for a panel of three arbitrators to hear complex and/or high-dollar disputes.

Discovery and Related Matters

- Unless specifically agreed otherwise by the parties, discovery and related procedures are generally considerably more limited in arbitration than in litigation.
- In court litigation in the United States, the governing Federal Rules of Civil Procedure or parallel state court rules often allow for broad, burdensome and expensive discovery, including lengthy depositions and the extensive production of electronic data.
- The parties in arbitration may limit discovery and engage in other cost-efficient procedures by adopting guidelines such as the New York State Bar Association's *Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic Commercial Arbitrations and International Arbitrations.*[6] Among other things, these *Guidelines* contain significant suggested limits on processes including document discovery, e-discovery, depositions, discovery motions and dispositive motions. Guidelines like these are binding when adopted by the parties. But even if they are not adopted, arbitrators often rely on these *Guidelines* as a framework for the efficient conduct of the pre-hearing phase of arbitration.
- Arbitrators are actively involved in the management of the case and can conduct a telephonic or in-person supervised session to assure expeditious proceedings much more promptly than our overburdened courts.

Finality

- In many cases it is important that commercial disputes be resolved quickly and finally because drawn-out indecision significantly increases costs and may cause business paralysis. Arbitration provides finality and does so quickly and economically because lengthy, expensive appeals like those encountered in court are not available under the Federal Arbitration Act ("FAA") and state arbitration statutes. These statutes severely limit a court's ability to vacate arbitration awards except on narrow grounds, which are difficult to prove and rarely succeed.
- In some cases, parties to a large dispute may want a more comprehensive appeal than is permitted under the FAA and state arbitration statutes. They can accomplish this (without sacrificing the efficiency of

arbitration) by providing for an appeal to a second arbitrator or panel of arbitrators on traditional legal grounds. An appeal within the arbitration framework can be conducted quickly and cost effectively, without significantly delaying the final resolution of the case.

Decisive Result

- Studies have repeatedly and conclusively shown that arbitrators do not split the baby. For example, a 2007 study showed that in only 7% of the cases were damages awarded in the mid-range of 41-60% of the amount claimed, results almost identical to a similar study conducted six years earlier.[7]

International Commercial Disputes

- Arbitration permits the parties to choose adjudicators with the necessary special expertise to decide a cross-border dispute, a choice which is not available in court. This special expertise can include knowledge of more than one legal tradition (e.g., common law and civil law), experience, understanding and ability in harmonizing cross-border cultural differences between parties, and fluency in more than one language.

- In the international context, arbitration provides a uniquely neutral forum for dispute resolution and enables the parties to select decision makers of neutral nationalities or of recognized neutrality who are detached from the parties and their respective home state governments and courts. Thus, arbitration avoids any perceptions of potential bias and provides reassurance that that rule of law will be observed. Arbitration also avoids delays in court which, in some jurisdictions, can exceed five or even ten years.

- A critical feature of international arbitration is the existence and effective operation of the New York Convention to which over 140 nations are parties. The Convention enables the enforcement of international arbitration agreements and awards across borders. In contrast, judgments of national courts are more difficult and often impossible to enforce in other countries.

Studies Prove That Arbitration Is an Effective Process

- **Satisfaction—**Studies have shown that a majority of users believe arbitration is better, cheaper and faster than litigation.[8]

- **Fairness—**Studies have shown that 80% of attorneys and 83% of business people report that arbitration is a fair and just process.[9]

- **International—**Studies have shown that 86% of corporate counsel are satisfied with international arbitration.[10]

- **Expertise—**Studies have shown that the majority of parties find arbitrators, since they can be chosen by the parties, to be more likely to understand the subject of the arbitration than judges.[11]

- **Lack of bias—**Studies have concluded that three arbitrators are less likely to be influenced by unconscious biases than is a single decision maker.[12]

- **Compliance with awards—**Studies have shown that the rate of voluntary compliance with arbitral awards is over 90%.[13]

- **Financial benefits—**Studies have shown that speedier resolutions result in significant financial benefits to all parties as parties know what they owe or are owed and can move forward.[14]

Endnotes

1. Data on file with authors.
2. *Judicial Business of the U.S. Courts, U.S. District Courts—Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/appendices/C05Sep11.pdf.
3. *Judicial Business of the U.S. Courts, Table B-4A.U.S. Courts of Appeals—Median Time Intervals in Months for Merit Terminations of Appeals Arising From the U.S. District Courts, by Circuit,* at http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/appendices/B04ASep11.pdf.
4. *Civil Justice Survey of State Courts, Bureau of Justice Statistics 2005, available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cbjtsc05.pdf.
5. International Chamber of Commerce Commission on Arbitration, *Techniques for Controlling Time and Costs for Arbitration, available at* http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf.
6. *Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic Commercial Arbitrations and International Arbitrations, available at* http://www.nysba.org/ArbitrationGuidelinesBooklet.
7. American Arbitration Association, *Splitting the Baby: a New AAA Study, available at* http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_014038.
8. Rand Institute for Civil Justice, *Business to Business Arbitration in the United States, Perceptions of Corporate Counsel ("Rand"),* p. 1, 30 (2011).
9. *Id.*
10. PriceWaterhouseCoopers, *International Arbitration, Corporate Attitudes and Practices,* ("PWC"), p. 8 (2008).
11. Rand, *supra* note 8 at p. 32.
12. Chris Guthrie *Misjudging,* 7 Nev. L.J. 420, 451-453 (2007).
13. PWC *supra* note 10 at p. 8.
14. *See* B. Roy Weinstein & Stevan Porter, *Economic Impact on the County of Los Angeles and the State of California of Funding Cutbacks Affecting the Los Angeles Superior Court* (Dec. 2009), *available at* http://www.micronomics.com/articles/LA_Courts_Economics_Impact.pdf.

Is Mediation Confidential in New York?

By Richard S. Weil

Confidentiality is often regarded as a critical element in mediation. It allows participants to speak frankly without fear that their statements and admissions will be used against them if a case goes to trial.

But in New York mediation is not always confidential. No statutes assure confidentiality. Some courts have rules that protect it, others do not. Private mediation agreements vary in their terms. The few court decisions that have implicated mediation confidentiality provide no clear guidance for attorneys.

The Meaning of Mediation Confidentiality

"Mediation confidentiality" is not self-defining. It may include statements such as one or more of the following:

1. Statements, admissions and / or conduct in the course of mediation are not subject to discovery and are inadmissible in evidence if the case being mediated goes to trial.
2. Statements, admissions and / or conduct in the course of mediation are not subject to discovery and are inadmissible in any legal proceeding.
3. Statements, admissions and / or conduct in the course of mediation cannot be disclosed to a third party.
4. Documents created solely for the mediation are inadmissible and not subject to discovery.
5. The mediator cannot be called to testify or produce his or her notes.
6. The mediator cannot make reports to a court or must make certain reports.

Sources of Mediation Confidentiality

Statutes

No federal or New York statute creates a mediation privilege or guarantees confidentiality, with the single exception of McKinney's Judiciary Law sec. 849-b. It prohibits disclosure of a mediator's writings and files, but applies only to Community Dispute Resolution Centers, not courts. Ten states and the District of Columbia have enacted the Uniform Mediation Act, which has a mediation privilege, and California has a confidentiality statute. To date, New York has not adopted the UMA.

Both federal and New York laws recognize a privilege for settlement negotiations. However, the privileges are limited. Rule 408, Federal Rules of Evidence, and CPLR section 4547 make conduct and statements made during compromise negotiations inadmissible when offered to prove liability or damages. However, both statutes expressly allow them into evidence when offered for any other purpose and do not bar discovery.

Court Rules

Courts that have established mediation programs generally adopt rules that protect confidentiality to varying degrees. The Southern District rule says: "The entire mediation process shall be confidential. The parties and the mediator shall not disclose information regarding the process, including settlement terms, to the assigned Judge or to third persons unless all parties agree or the assigned Judge orders in connection with a judicial settlement conference….persons authorized by the Court to administer or evaluate the mediation program shall have access to information and documents necessary to do so…The mediation process shall be treated as a compromise negotiation for purposes of the Federal Rules of Evidence and state rules of evidence." (Southern District Local Rule 83.9(1).)

The Eastern District offers greater protection to confidential statements and documents. It requires parties and their attorneys to sign an agreement before mediation begins that (1) makes all written and oral communications during mediation confidential and prohibits their disclosure or use for any purpose unrelated to the mediation, unless the parties otherwise agree; (2) prohibits calling the mediator as a witness or subpoenaing the mediator's notes, unless in a proceeding related to the mediator's alleged misconduct; (3) bans from court files all documents generated by the mediation process; (4) prohibits reports to the Court about what transpired in mediation without the written consent of all parties; and (5) prohibits discovery of all confidential information. (Eastern District Local Rule 83.8(d).)

While 28 U.S.C. sec. 652(d) authorizes Federal Courts to create their own confidentiality rules, there is no New York statute permitting state courts to adopt such rules. Nevertheless, several New York state courts have done so.

The Commercial Division of the New York County Supreme Court is one. Rule 6 of its "Rules of the Alternative Dispute Resolution Program" provides that (1) nothing that occurs in mediation shall be disclosed outside the mediation proceeding, except as provided in the Rule, (2) neither the mediator, the parties or their attorneys shall disclose any communications, documents prepared for the mediation or notes of the proceeding; (3) no party shall seek to compel production of mediation documents in that action or any other legal proceeding; (4) no party shall seek to compel the testimony of any other party or the mediator concerning mediation communications, including whether the parties agreed to settle the matter; and (6) documents and information otherwise discoverable under the CPLR shall not be shielded from disclosure because they are submitted or referred to in the mediation. Before the mediation begins, counsel on behalf of the parties must sign a form certifying that they have read and will comply with these Rules.

The New York City Family Court has a mediation program. The program description states that "Mediation is a…confidential process" without further explication. The Westchester County Supreme Court has a matrimonial mediation pilot project that features a detailed confidentiality rule that bars discovery or disclosure of all oral, written, or other communications made during the course of the mediation by any party, mediator or any other person present in any present or future judicial or administrative proceeding. The Rule also prohibits providing details of the mediation to the judge, except in certain circumstances.

In the Appellate Division of the First Department, the attorneys in charge of the appeal may be required to participate in a Pre-Argument Conference, which is akin to mediation. While the Pre-Argument Conference Program says the "conference is a confidential proceeding," no further explanation is provided. Even the Court's rule establishing pre-argument conferences, 22 NYCRR sec. 600.17, says nothing about confidentiality. In appeals from judgments, confidentiality may not matter because the Court will make its decision on the trial record. But if the appeal is interlocutory, or if the Appellate Department sends the case back to the trial court for further proceedings, confidentiality remains a concern.

Some courts that have confidentiality rules permit exceptions for reports to the court or other authorities. For example, Rule 6(c) of the Commercial Division requires the mediator to report information whose disclosure would prevent a participant from engaging in an illegal act, including one likely to result in death or serious bodily injury. In the First Department of the Appellate Division, Rule 600.17(h) permits sanctions against an attorney "who fails to demonstrate good faith during the pre-argument process," which impliedly permits the mediator and opposing counsel to report alleged "bad faith."

Contracts

Private mediation providers, such as JAMS, AAA, FINRA, NAM and individual mediators have rules and contracts that protect confidentiality. Their terms vary. The JAMS Mediation Agreement states, "All statements made during the course of the mediation are privileged settlement discussions…and are inadmissible for any purpose in any legal proceeding…[they] will not be disclosed to third parties except persons associated with the participants in the process, and are privileged and inadmissible for any purposes, including impeachment, under Rule 408 of the Federal Rules of Evidence and any applicable federal or state statute, rule or common law provisions."

AAA Rule M-10 is less comprehensive. Subject to applicable law or the parties' agreement, it requires mediators not to divulge confidential information and documents; prohibits requiring the mediator to testify or produce records in any proceeding; and prohibits parties from offering evidence in any proceeding of the following: views expressed about settlement, admissions, proposals or views expressed by the mediator or a party's willingness to accept the mediator's settlement proposal.

The FINRA (Financial Industry Regulatory Authority) Mediation Submission Agreement prohibits the parties and the mediator from disclosing or offering in evidence opinions, suggestions, proposals, offers or admissions in any legal proceeding, unless authorized in writing by the parties or required by applicable law (which "applicable law" is not specified.)

NAM Comprehensive Rule 51 states that the "parties agree not to rely upon or introduce as evidence in any subsequent arbitral or judicial proceeding" views expressed about settlement, admissions and mediators' proposals. The Rule does not say directly such evidence is inadmissible or cover all statements made in mediation, nor does it mention documents prepared for the mediation. Also, it is not clear whether "subsequent" includes the case being mediated.

Court Decisions Involving Mediation Confidentiality

Very few New York federal and state court decisions address mediation confidentiality. Some are inconsistent; a number simply ignore confidentiality.

When a party or counsel fails to attend a court-ordered mediation, confidentiality rules probably do not bar evidence of non-attendance. Such evidence does not involve a "communication." In *Johnson v. Webb*, 740 N.Y.S.2d 892 (2002) the Third Department affirmed sanctions awarded against a party in a visitation proceeding who failed to attend three court-ordered mediation sessions. The order was based on the testimony of the parties at a fact-finding hearing. The Third Department did not mention confidentiality and did not mention whether any court rule mandated attendance at mediation.

But confidentiality rules do affect evidence of what transpired at the mediation. *In re A.T. Reynolds & Sons*, 452 B.R. 374 (S.D.N.Y. 2011), addressed the proper interpretation of General Order M-390 of the Bankruptcy Court for the Southern District of New York. It requires the mediator to report to the Court any willful failure to attend or to participate in the mediation in good faith. Based on the mediator's report, the Bankruptcy Court sanctioned a party for failing to participate in good faith by (1) failing to send a representative with sufficient settlement authority, (2) entering the mediation with a "no pay" position rather than engaging in risk analysis; and (3) by demanding, prior to the mediation, that it be confined to specific topics.

The District Court rejected the Bankruptcy Court's subjective test of good faith because it required testimony about the content of mediation. The Court held that "confidentiality considerations preclude a court from inquiring into the level of a party's participation in mandatory, court-ordered mediation, i.e., the extent to which a party discusses the issues, listens to opposing viewpoints and analyzes its liability." Instead, the Court adopted an objective test of good faith. It held that a party satisfies the good faith requirement if it attends the mediation, provides pre-mediation memoranda and produces organizational representatives with sufficient settlement authority.

Proving and enforcing mediated settlement agreements have also been a source of litigation. Well-drafted settlement agreements provide that the agreements are admissible in evidence as an exception to confidentiality in order to enforce them. But may a party use confidential information to prove an oral agreement? And when a party claims to have signed a mediated agreement as a result of fraud, duress or mistake, do rules concerning mediation confidentiality permit the court to admit evidence of what occurred during the mediation?

Delyanis v. Dyna-Empire, Inc. (E.D.N.Y. 2006) 465 F. Supp.2d 170, applying New York state law, held that a settlement agreement reached in mediation, but not signed, was enforceable. The mediator had drafted a handwritten document with the agreed terms, but it stated that the document was not meant to be binding. Later, when the mediator asked whether he could notify the court that the case had been settled, the plaintiff's lawyer answered affirmatively. The plaintiff refused to sign the settlement, and the defendants sought to enforce it. The Court agreed to do so, based on the lawyer's statement. In reaching this decision, the Court apparently heard evidence about what transpired during the mediation without facing the issue of whether it was admissible.

Stoll v. Port Authority (First Department 2000) 701 N.Y.S.2d 430 also involved the enforcement of a settlement agreement negotiated by counsel in mediation, which plaintiff refused to sign. The Court held that the attorney had settlement authority because the mediator had instructed counsel to come to the mediation with full settlement authority. The Court apparently permitted, without comment, the attorneys' declarations of what occurred in the mediation.

Even when a written, mediated settlement agreement is otherwise enforceable, a party may attempt to prevent its enforcement by claiming that her agreement was procured by fraud, coercion or duress during the mediation process. Under these circumstances, a court must decide whether to permit exceptions to the rule of mediation confidentiality.

In *Chitkara v. New York Telephone Co.* (CA2 2002) 45 Fed.Appx. 53), the plaintiff resisted the enforcement of a settlement agreement he had signed, claiming the mediator had harangued and pressured him to sign it and had, in addition, made a material misrepresentation of fact. The District Court, in rejecting this argument, relied on affidavits from the plaintiff and defense counsel about what occurred during the mediation. The Second Circuit affirmed. Neither the Second Circuit, nor apparently the District Court, said anything about mediation confidentiality.

In a state court case, a party to a divorce sought to subpoena the mediator to testify about the circumstances surrounding the execution of a mediated separation agreement. The mediator, citing the confidentiality agreement the parties signed, moved to quash the subpoena. The Supreme Court refused to do so; the Fourth Department Appellate Division, agreed, holding that the mediator's testimony was required in order for the Court to fulfill its duty to determine whether the terms of the agreement were fair and reasonable, *Hauzinger v. Hauzinger*, 43 AD 3d 1289 (4th Dept. 2007). The Court of Appeals unanimously affirmed, finding that the confidentiality agreement permitted disclosure if both parties consented, which they had, 10 NY 3d 923 (2008).

In re Teligent, Inc., 640 F.3d 53, 57-58 (CA 2 2011), addressed a party's request for disclosure of confidential mediation statements. The parties agreed to mediate their case under the terms of the SDNY Bankruptcy Court standard protective order, which imposes limitations on the disclosure of mediation information. After mediating, the parties reached a settlement agreement. Subsequently, the plaintiff sued his former law firm for malpractice. The firm filed a motion to lift the confidentiality provisions of the protective order so it could obtain discovery of documents leading up to the Settlement Agreement, "including all mediation and settlement communications."

The Second Circuit, noting that the Bankruptcy Court Protective Order provided no guidance on the circumstances under which disclosure of confidential mediation information could be compelled, held that disclosure may be permitted when the party seeking it demonstrates "(1) a special need for the confidential material, (2) resulting unfairness from a lack of discovery, and (3) that the need for the evidence outweighs the interest in maintaining confidentiality." In formulating this rule, the Second Circuit relied on the Uniform Mediation Act (which has not been enacted in New York), the Administrative Dispute Resolution Act of 1996, and the Administrative Dispute Resolution Act of 1998. The Court held that the law firm failed to satisfy any of these three prongs.

Conclusion

There is no iron-clad way to guarantee mediation confidentiality. Mediation agreements that spell out what is confidential and how it is protected are the best approach; court rules are generally less comprehensive; both are subject to court interpretations and applications.

There are several practical ways to protect confidentiality: disclosing confidential information to the mediator only in private caucuses; labeling documents "Confidential: Prepared for Use in Mediation Only"; and incorporating the elements of confidentiality in settlement agreements, with an exception for enforcement. It may be possible to enter private mediation agreements in court-annexed mediations where parties believe the court's rules are insufficient. No court rules permit this, but none prohibit it, either.

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Are You Sure You Can Still Tell Mediation and Arbitration Apart?

By Norman Solovay

The article's title was suggested by a recent U.S. District Court decision, *Cummings v. Consumer Budget Counseling, Inc.*[1] staying a litigation pursuant to a routine motion under the Federal Arbitration Act to compel arbitration but then ordering that the "dispute shall be submitted to mediation…to abide by the decision of the mediator…."

While many mediators and others feel the *Cummings* case judge was way off base in issuing that direction, not much seems to have been written about it so far. The large and vociferous reaction to the *New York Times* June 30, 2012 headline "Mediator Halts City's Plan to Overhaul 24 Schools" stands in sharp contrast. There, the story behind the headline made it clear that it was an arbitrator's decision that halted the plan. New York's most prominent Alternative Dispute Resolution ("ADR") Listserv, managed by Maria Volpe, was deluged with dozens of e-mail comments about the headline, most outraged that the *Times* could have made such a mistake. Many of those responding went on to explore ways to make sure it was corrected. Maria Volpe herself prepared an editorial entitled *Mediation Remains Elusive in Public Discourse Despite Its Ubiquity,* which she sent to the *Times* so it could correct its error. But although her editorial, which was also circulated among Listserv members, was deservedly warmly received by them, the *Times* never published it. Moreover, one responder to the editorial cited to a still apparently valid dictionary description of arbitration and mediation as "synonyms."

Although the two matters were quite different, there is some similarity in that many ADR practitioners who would still view the phrase "decision of the mediator" as something of an oxymoron would connect them as both being mediation/arbitration definitional mistakes. However, mediation's explosive growth and importance serves to legitimatize discussion of binding mediation. For example, Construction Dispute Resolution Services, LLC in Santa Fe, New Mexico has published a manual entitled *Binding Mediation* (the "CDRS Manual") describing the process as "a relatively new form of alternative dispute resolution," providing details as to how it is presently being used to resolve construction and various other disputes, and urging its broader use.[2]

Perhaps the most balanced and authoritative discussion of the pros and cons of utilizing various "hybrid" combinations of mediation and arbitration (herein the "Hybrid ADR Process Chapter")[3] likewise recognized the existence of binding mediation by including and writing about it. However, it went on to note that "Care must be taken in designing the process" and quoted the following reasoning of one court for rejecting it:

> If binding mediation is to be recognized, what rules apply? The arbitration rules, the court-ordered mediation rules, the mediation confidentiality rules, or some mix? If only some rules, how is one to choose? Should the trial court take evidence on the parties' intent or understanding in each case? A case-by-case determination that authorizes a "create your own alternate dispute resolution" regime would impose a significant burden on appellate courts to create a body of law on what can and cannot be done, injecting *more* complexity and litigation into a process aimed at less.[4]

In discussing the better-known hybrid process, med-arb, also involving a mediator being authorized to issue a binding (arbitration) decision in the event of an impasse, the Hybrid ADR Process Chapter notes that questions have also been raised by U.S. courts about med-arb decisions.[5] However, it is clear that med-arb occupies a very different status from binding mediation. Far from being "a relatively new form of alternative dispute resolution," the process, although only named med-arb in the 1970s, dates back in time to at least the ancient Greeks and was and still is widely utilized both abroad and in the U.S. long prior to being given its present name. Moreover, after falling out of favor in the U.S. among facilitative mediators it has been staging a strong comeback in use and popularity.

Since arbitration awards rendered pursuant to properly conducted med-arb proceedings will now normally be enforceable, one might ask why not just re-label the *Cummings* decision as a *de facto* direction to the parties to use that process and move on to more interesting cases? Before returning to the Hybrid ADR Process Chapter for an authoritative answer to this question, it may be interesting to explore reactions to it of interested would-be newcomers to the practice of med-arb who were attending a program on it.[6] Notably, this was a group of lawyers looking forward to the expanded use of med-arb who, for the most part, knew of and had already adjusted to the idea that the process was valuable enough to be worth running the commonly cited risk of possibly diminished ability to confide separately in a mediator who might turn into an arbitrator. Accordingly, the almost uniformly negative reaction to what the *Cummings* court had done in a discussion that followed a distribution of the decision was mildly surprising to the program's organizer and presenter.[7]

What became apparent was that, without necessarily being clear why, most of the attendees resented a court directing a party who clearly wanted to litigate to participate, like it or not, in a hybrid process of this sort, irrespective of its name. The speaker, despite being a long-time advocate and proponent of the use of med-arb, joined them in objecting to what the *Cummings* Court had done on the ground that it was not a properly conducted med-arb proceeding.

The Hybrid ADR Process Chapter summarized the problem this way:

> However, the courts [while willing to approve med-arb awards] caution that informed consent is essential. Absent informed consent, the arbitration award rendered in the med-arb or arb-med-arb context will not be confirmed. The devil here may be in the details. What must the consent include to effectively bar challenges to any arbitral award that may ultimately be rendered?[8]

Then it went on to spell out what the consent must include by utilizing the following quote from a court that had wrestled with the problem:

> Such [med-arb] proceedings, when properly executed, are innovative and creative ways to further the purpose of alternative dispute resolution. However, given the confidential nature of mediation, the high degree of deference enjoyed by an arbitrator, and the high probability that both proceedings are likely to be employed before their disputes are resolved, it is essential that the parties agree to certain ground rules at the outset. At a minimum, the record must include clear evidence that the parties have agreed to engage in a med-arb process, by allowing a court-appointed arbitrator to function as the mediator of their dispute. The record must also contain: (1) evidence that the parties are aware that the mediator will function as an arbitrator if the mediation attempt fails; (2) a written stipulation as to the agreed method of submitting their disputed factual issues to an arbitrator if the mediation fails; and (3) evidence of whether the parties agree to waive the confidentiality requirements imposed on the mediation process… in the event that their disputes are later arbitrated.[9]

The *Cummings* Court's reliance on a one-line agreement in a contract to force a party who had chosen to litigate to instead engage in an unspecified type of "binding mediation" does not begin to rise to such a level of recorded informed consent. But what it does do is suggest that the Court, like many others, including the *New York Times*, had begun to view mediation and arbitration as somehow interchangeable. It might be argued in view of the apparent respectability of binding arbitration and of a dictionary definition of mediation and arbitration as "synonyms," that perhaps the *Times* wasn't as completely stupid as its critics were charging.

It might also be pointed out that one Listserv responder to the Volpe article who called on the ADR community to take the lead in recognizing the true difference between arbitration and mediation made no better progress than the article. So it may be fair to assume that any complaints our readers may make about the *Cummings* decision which seek to promote that distinction are likely to fare no better.

However, there is one thing we as ADR lawyers can do to avoid getting injured by the apparently still tumbling walls between mediation and arbitration: Namely, to meticulously insure that the requirements of informed consent are fully met in all disputes we handle.

Endnotes

1. CV-11-3989, NYLJ 1202572415433, at *1 (EDNY, Decided September 19, 2012).
2. http://www.construction disputes-cdrs.com/about_binding_mediation.htm. The CDRS Report also cites to a book by John Cooley, *Arbitration Advocacy* (2d Edition) for a fuller description and explanation of the "binding mediation process."
3. The discussion appears as a chapter by Edna Sussman, entitled "Combinations and Permutations of Arbitration and Mediation: Issues and Solutions" in Arnold Ingen-Housz, *ADR in Business: Practice and Issues across Countries and Cultures, Volume II* (Kluwer International, 2011).
4. Hybrid ADR Process Chapter, p. 390, citing *Lindsay v. Lewandowski*, 139 Cal. App. 4th 1618, 43 Cal. Reptr. 3d 846 (Ct. Appeals, 4th Dist. Div. 3, 2006) at 43 Cal. Reptr. 3d, at 850.
5. *Id.*, p. 384.
6. Those reactions are coincidentally available as a result of the recent attendance of a sizable audience after the *Cummings* decision was handed down at a program conducted at the New York State Dispute Resolution Association's 2012 Annual Conference entitled "MED-ARB Is Here to Stay: Do You Know When and How to Use It?"
7. Full disclosure requires identifying the author of this article as the program organizer and presenter.
8. Hybrid ADR Process Chapter, page 387.
9. *Id.*, pp. 387-388, citing *Bowden v. Weickert*, No. S-02-017, 2003 WL 21419175 (Ohio App. 6 Dist. 20 Jun. 2003).

Norman Solovay, while a very full-time litigator, authored several books on arbitration and mediation, which led to his heading the ADR practice of a well-known law firm. Most recently, however, after being asked to form the U.S. branch of the Indo-American Chamber of Commerce, he established his own practice (http:www.solovaypractice.com), now able to handle on a conflict-free basis domestic and international mediations, arbitrations and med-arb proceedings.

Estimating the Financial Value of a Lawsuit With the Case Value Analyzer™

By Michael Palmer

Months before the 2012 election, Nate Silver of *The New York Times* predicted the eventual outcomes of both the Presidential and all open Senate elections with great accuracy—not just who won and lost, but the percentages of the vote as well.[1]

On the other hand, many highly experienced political strategists and pundits such as Karl Rove and Dick Morris got the Presidential election wrong by a wide margin.[2]

Why did a political novice like Silver do so well, while seasoned strategists like Morris and Rove got it wrong?

Put simply, Silver used a statistical model and an evaluation method. The partisan strategists were victims of the Overconfidence Bias and the Wishful Thinking Effect.[3]

Silver built his statistical model before the 2008 election and tweaked it over the past four years. His method consisted of selecting and evaluating the relevant information and feeding it into a collection of mathematical formulas, which churned out revised predictions as new information became available. His method told him which information was relevant (polling data, economic indicators, etc.) and how to adjust raw data for such things as biased polling results.

Silver's secret lay not in some special genius about political elections. (Before he began concentrating on political races, Silver was a Sabermetrician, making predictions about baseball players.) Nor is it just that he is smart (although he is). Rather, Silver applied his own intelligence intelligently, using sophisticated tools that assist human intelligence, where it otherwise is not up to the task.

What about Dick Morris, who predicted with near certainty even on election night that Mitt Romney would win by a "landslide"? Where and, more important, why did he go wrong?[4] He is, after all, a seasoned veteran of many political elections, comparable in experience and expertise to a senior litigator with 30+ years of trying cases. To answer the question completely would require a book-length discussion of subconscious biases and heuristics. But I can provide a brief summary of the explanation here.

Hundreds of independent studies have shown that professionals—including lawyers, auditors, physicians, money managers, political scientists, and others—consistently make inaccurate predictions while simultaneously thinking that their predictions will be on the money.[5] The phenomenon is called the Overconfidence Bias; it is as much a part of our mental equipment as our ability to hear sounds and see colors.[6]

In his magisterial book, *Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients*, Randall Kiser shares the results of two studies of thousands of cases, one in California and the other in New York, showing that about 60% of plaintiffs and 24% of defendants got worse results at trial than they could have achieved by accepting the last settlement proposal—not counting the additional time, money, and grief it cost to get a final judgment.[7]

Sad to say, most of us are like Dick Morris, at least some of the time. Few can claim the accuracy of Nate Silver.

Hedgehogs and Foxes

Wanting to understand misprediction better, Philip Tetlock embarked on a 20-year longitudinal study of the public predictions of social scientists.[8] The results confirmed the persistence of the overconfidence bias. No surprise there. But Tetlock dug deeper and found a distinction between two types of cognitive styles, which he labeled hedgehogs and foxes, taking the labels from an essay by Isaiah Berlin,[9] who in turn took his inspiration from a fragment from the Greek poet Archilochus: "The fox knows many things, but the hedgehog knows one big thing."

Tetlock described the difference in cognitive styles as follows: "The intellectually aggressive hedgehogs knew one big thing and sought, under the banner of parsimony, to expand the explanatory power of that big thing to 'cover' new cases; the more eclectic foxes knew many little things and were content to improvise *ad hoc* solutions to keep pace with a rapidly changing world."[10]

Or as the late master litigator John Tucker once put it to colleagues at Jenner & Block, lawyers who represent plaintiffs and defendants promiscuously tend to have better judgment about each case than those who specialize and represent only one type of client. The first are foxes, the latter hedgehogs.

Tetlock found that all social scientists in his study displayed the overconfidence bias. But foxes were much less afflicted by it than were hedgehogs. In other words, it pays to know many things. Having multiple perspectives on the matter under consideration helps calibrate our predictive judgments.

The Win Before Trial Method of Case Valuation

Is it possible for litigation professionals to estimate the financial value of lawsuits using a method and tools similar to those Nate Silver used to predict the election?

Can litigation professionals protect themselves from overconfidence and other biases[11] by using a method to predict litigation outcomes with greater accuracy than we currently achieve?

I believe we can. The Win Before Trial Method of Case Valuation and the Case Value Analyzer™ help make this possible. Both constitute a way for hedgehogs to think more like foxes and for foxes to be better foxes.

The WBT Method breaks down the net present financial value of the case into four main outcome predictions and their respective probabilities:

1. The probability that the judge/jury will find the defendant liable to the plaintiff.
2. The probability that some major contingency will occur that dramatically affects the viability of plaintiff's case or disposes of it altogether (e.g., summary judgment, death of an undeposed indispensable witness, change in the law midstream such as in *Erie v. Tompkins*).
3. The weighted average of a range of possible damage awards.
4. The total *remaining* costs that each side will incur to get a final, executed judgment.

Various and many are the things that influence the values of each the four components. In most cases, the admissible evidence and the law will have the biggest effect on the probability of a liability finding and the amount of damages. The advocacy skills of the lawyers play a major role in the values of these components as well. The composition and prejudices of the jury, the jurisdiction, the judge, the type of case, and much more can be factors too.

The Case Valuation Formula

It is readily apparent that the complexity of even one component of case valuation far exceeds the capacity of our short-term memory. Without some tool (or set of tools) to assist our thinking, we are likely to focus too much on some aspects while neglecting others.

The first such tool is a simple formula for computing the net present financial value of a lawsuit from both the plaintiff's and defendant's perspective:

Plaintiffs:

$$[P(L) \text{ X } P(C_{1..n}) \text{ X } D] - \text{Costs} = \text{NPFV}$$

Defendants:

$$[P(L) \text{ X } P(C_{1..n}) \text{ X } D] + \text{Costs} = \text{NPFV}$$

P = probability, L = Liability, C = Contingency, D = estimated weighted average damage award, Costs = costs, and NPFV = net present financial value.[12]

Stated in words, the probability of a liability finding multiplied by the probability of each known remaining contingency times the projected weighted average damage award minus the remaining costs equals the net present financial value (NPFV) for the plaintiff. The only change in the defendant's formula is the *addition* rather than the subtraction of the costs: $[P(L) \text{ X } P(C_{1..n}) \text{ X } D] +$ Costs = NPFV.

"Is it possible for litigation professionals to estimate the financial value of lawsuits using a method and tools similar to those Nate Silver used to predict the election?"

An experienced litigator should be able to get a decent approximation of the value of a lawsuit at any point by spending 20-30 minutes estimating each of the four components and then computing the result on the back of an envelope. This quick-and-dirty estimate will produce better results in most cases than unassisted intuitive judgments. This is particularly true for unusual cases or cases in areas where we have limited experience.

Obviously, Garbage in = Garbage out. If the estimates of each of the components are bad, the final result (NPFV) will be bad as well. But if we put in golden estimates, we will get golden results. It is critical, therefore, to take reasonable steps to gather sufficient information to get the best quality estimates possible.[13] This method provides more assistance in this regard than the decision-tree analysis which focuses on the end result estimate for each process "node."

The Case Value Analyzer™ (CVA)

The CVA helps mediators or litigators manage the complexity associated with estimating the values of each of the four components of the case valuation process. It is a software program designed to help conduct detailed analyses of the evidence, arguments, and extraneous factors that affect case outcomes and to use those analyses as the basis for probability estimates on liability, contingencies, and damages.

To analyze a case, we set up the tables for each party. In addition to a summary page, there are additional pages on which we enter information about damages, costs, and each element of the cause of action. For example, in a *quid pro quo* sexual harassment case, the plaintiff must prove each of six elements by a preponderance of evidence to make out a *prima facie* case. We include a page for each of those elements.

To assess the sufficiency and weight of evidence for each element, we use a modified version of the Pro/Con Decision-making Tool invented by Benjamin Franklin.[14] Having collected and sorted the evidence, arguments, and extraneous factors likely to influence the jury's decision on a given element, we then estimate the probability that the jury will decide in plaintiff's favor on that element. We then aggregate the probability estimates for each ele-

ment and multiply those percentages times each other to get the estimated probability of a finding that the defendant is liable to the plaintiff.

Having performed similar analyses for each component of the case valuation formula, we then bring the results forward to the summary page, like that shown below, which contains additional spaces with which to compute prejudgment interest and present discounted value. This template is also set up to compare the results from each side's estimates and to determine whether a Zone of Potential Agreement exists. It looks like the graph below.

Used in mediation, this tool helps each side see previously unrecognized strengths and weaknesses of their respective cases and discovers ways each can get a better outcome than the likely result of a trial. After a demonstration to a group of senior litigators, one lawyer asked: "Can I pay…not to show this to plaintiffs?"

Some of the Benefits

The CVA assists your thinking by helping you feed the best available information into your subconscious, which then performs a kind of black-box magic and produces intuitive judgments and insights that would otherwise be unlikely to occur:

- captures and retains thought in a systematic and easily accessible way, thereby freeing the mind from having to think about / remember everything;[15]
- helps generate awareness and insights that otherwise might be missed by requiring the litigation professional to focus on specific aspects of the case, including the strengths / weaknesses of the opposing case;
- makes the impact of new developments on the overall value of the case more readily apparent;
- forces the litigation professional to think through each element and affirmative defense, thereby helping her spot severe weaknesses, while mitigating the confirmation and overconfidence biases;
- helps free the litigation professional from nagging doubts about whether she has forgotten anything;
- highlights weaknesses that the confirmation bias tends to suppress but that lawyers must address if they want to win;

Plaintiff's Analysis

	Probablity	Gross	Net
Low damage estimate			$0.00
Med. damage estimate			$0.00
High damage estimate	100%		$0.00
Weighted Average Damage Award			$247,346.70
Def. SJ Motion	95%		
Contingency 2	100%		
Contingency 3	100%		
D's Liability	29%		
WADA Times Cont. & Liability			**$67,862.04**
Months from claim to judgment			
Prejudgment Interest		1% x # months	$0.00
Projected Final Judgment			**$67,862.04**
Remaining Legal Fees	0%		$0.00
Remaining Expenses	0%		$0.00
Costs (Lost Opp.)	100%	$0.00	$0.00
Costs (Hedonic)	100%	$0.00	$0.00
Total Costs			$0.00
Projected Judgment Minus Remaining Costs			**$67,862.04**
Discount Rate	3%		
Months to Verdict	48		
Present Discounted Value			**$60,197.24**
Plaintiff's Net Present Financial Value			**$60,197.24**
Zone of Potential Agreement (ZOPA)			**$60,197.24** to **$323,257.07**
Midway Point of ZOPA (Optimal Settlement)			**$191,727.16**
			$22,394.47
Defendant's Current Settlement Offer			**$95,000.00**

Defendant's Analysis

	Probablity	Gross	Net
Low damage estimate	15%	$25,000.00	$3,750.00
Med. damage estimate	65%	$75,000.00	$48,750.00
High damage estimate	20%	$150,000.00	$30,000.00
Weighted Average Damage Award			$82,500.00
Def. SJ Motion	95%		
Contingency 2	100%		
Contingency 3	100%		
D's Liability	60%		
WADA Times Cont. & Liability			**$47,025.00**
Months from claim to judgment			
Prejudgment Interest		1% x # months	$0.00
Projected Final Judgment			**$47,025.00**
Remaining Legal Fees	100%	$119,616.75	$119,616.75
Remaining Expenses	100%	$8,268.75	$8,268.75
Plaintiff's Fees & Expenses			$189,506.25
Costs (Lost Opp.)	100%	$0.00	$0.00
Costs (Hedonic)	100%	$0.00	$0.00
Total Costs			$317,391.75
Projected Judgment Plus Remaining Costs			**$364,416.75**
Discount Rate	3.00%		
Months to Verdict	48		
Present Discounted Value			**$323,257.07**
Defendant's Net Present Financial Value			**$323,257.07**

Sample of the CVA Summary Page

- can be updated at any time with new information; and
- contributes to an overall litigation strategy.

Try It Out

It is not possible in this short space adequately to describe what the Case Value Analyzer™ does or how it works. I invite you to get in touch (mike@winbeforetrial.com) for an introductory demonstration.

This tool *assists* thinking. It doesn't replace it. But used well, it can supercharge your decision-making skills.

Endnotes

1. *See* http://fivethirtyeight.blogs.nytimes.com for Silver's final forecast.
2. Morris predicted with near certainty even on election night that Mitt Romney would win by a "landslide." *See* video of Morris making his prediction on Fox News on November 5, 2013, http://www.realclearpolitics.com/video/2012/11/05/dick_morris_stands_by_prediction_romney_will_win_325_electoral_votes.html.
3. "The Overconfidence Bias" is the name scientists use to designate the human tendency to believe our predictions have greater accuracy than is generally true. Instead of saying, for example, that there is insufficient information to predict more than a range of, say, 30 to 60% probability, we tend to choose the high end of such a range, particularly if it is an outcome we favor. Over the past 40+ years, judgment and decision-making scientists have published hundreds of studies on overconfidence. An incisive presentation of this knowledge is available in Daniel Kahneman, *thinking, Fast and Slow* Part III, 199-268 (New York: Farrar, Straus and Giroux, 2011).
4. Morris provided his own answer to this question in an article on DickMorris.com entitled "Why I Was Wrong" (http://www.dickmorris.com/why-i-was-wrong/#more-10133). I leave to others the discussion of the flaws in Morris's analysis of his overconfident prediction.
5. *See, e.g.*, Jane Goodman-Delahunty, Pär Anders Granhag, Maria Hartwig, and Elizabeth Loftus, "Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes," 16(2) *Psychology, Public Policy, and Law* 133 (2010); Marijke Malsch, *Lawyers' Predictions of Judicial Decisions* (doctoral thesis, University of Leiden, The Netherlands, 1989); Derek J. Koehler, Lyle Brenner, and Dale Griffin, "The Calibration of Expert Judgment: Heuristics and Biases Beyond the Laboratory," in Thomas Gilovich, Dale Griffin, and Daniel Kahneman, *Heuristics and Biases: The Psychology of Intuitive Judgment* 686, 705 (Cambridge: Cambridge University press, 2002); Elizabeth Loftus and Willem A. Wagenaar, "Lawyers' Predictions of Success," 28 Jurimetrics Journal 437 (1988). *Cf.* Randal Kiser, *Beyond Right and Wrong, infra,* 124-126. References for the other professions mentioned are available on request.
6. Over the past 40+ years, judgment and decision-making scientists have published hundreds of studies on overconfidence. An incisive presentation of this knowledge is available in Daniel Kahneman, *Thinking, Fast and Slow* Part III, 199-268 (New York: Farrar, Straus and Giroux, 2011).
7. Randall Kiser, *Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients* 89-140 (New York: Springer 2010). Every litigator should read this book and consult it often.
8. *See* Philip E. Tetlock, *Expert Political Judgment: How Good Is It? How Can We Know?* (Princeton: Princeton University Press, 2005).
9. Isaiah Berlin, *The Hedgehog and the Fox* (London: Weidenfeld & Nicolson, 1953).
10. Tetlock, *supra,* at 20-21.
11. Several independent studies have shown that lawyers—like auditors, physicians, money managers, political scientists, and almost all other professionals—consistently make inaccurate predictions while simultaneously thinking that their predictions will be on the money. *See, e.g.,* Jane Goodman-Delahunty, Pär Anders Granhag, Maria Hartwig, and Elizabeth Loftus, "Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes," 16(2) *Psychology, Public Policy, and Law* 133 (2010); Marijke Malsch, *Lawyers' Predictions of Judicial Decisions* (doctoral thesis, University of Leiden, The Netherlands, 1989); and Elizabeth Loftus and Willem A. Wagenaar, "Lawyers' Predictions of Success," 28 Jurimetrics Journal 437 (1988). *See generally* Derek J. Koehler, Lyle Brenner, and Dale Griffin, "The Calibration of Expert Judgment: Heuristics and Biases Beyond the Laboratory," in Thomas Gilovich, Dale Griffin, and Daniel Kahneman, *Heuristics and Biases: The Psychology of Intuitive Judgment* 686, 705 (Cambridge: Cambridge University press, 2002). *Cf.* Randall Kiser, *Beyond Right and Wrong: supra* 124-126.
12. This simplified version of the formula does not include the elements for computing the present discounted value of the result (which is built into the Case Value Analyzer™). When doing a back-of-the-envelope calculation, however, you can compute this number with a financial calculator by entering the envelope result as the future value, entering the number of months until trial and the discount rate (interest rate) and then solving for present value.
13. Nate Silver's predictions depended both on the appropriateness of his model (analogous to the case valuation formula here) *and* the quality of the information he fed into it. As he explains in his book, *The Signal and the Noise: Why So Many Predictions Fail but Some Don't* (New York: the Penguin Press, 2012), he had to weight the different opinion polls he used in terms of their reliability in order to make them useful. He could not simply take an average, because some were historically much less accurate than others.
14. Benjamin Franklin described this device in a letter, dated September 19, 1772, to fellow scientist Joseph Priestly, who had written asking his advice on some now unknown matter. Franklin said he was unable to provide any substantive advice but told Priestly how to go about making the decision for himself. Draw a line down the center of a piece of paper and write "Pro" over the left column and "Con" over the right. Over the course of 3-4 days, jot down every thought that comes to mind in favor or against the decision under consideration. Then strike through each thought in the left column that is of roughly equal weight to those in the right. Upon completion of this exercise, if one column still contains supporting reasons, decide the matter in that way. Franklin wrote that this tool might be called a moral or prudential algebra.

    In the modified Franklin Pro/Con Tool that is used in the CVA, we enter numerical weights for the various items of evidence or arguments, add up the weights for each column, and then determine which column has a larger number. But anyone using this template can also strike through roughly equivalent entries on each side just as Franklin did.
15. You can always go back and re-examine what went into a judgment about a particular element or component and ask whether you should add more evidence, change an argument, modify a probability judgment etc.

Mike Palmer has been a lawyer since 1980 and a dispute resolution professional since 1993. *Win Before Trial* helps lawyers and their clients develop strategies to obtain the Best Outcome Possible™, an aspect of which is more accurately estimating the financial value of the case from each side's perspective. Mike can be reached at mike@winbeforetrial.com and (802) 870-3450.

Barking Up the Right Tree: Animals Deserve ADR, Too

By Debra Vey Voda-Hamilton

As we watch Alternative Dispute Resolution (ADR) become an increasingly respected mainstream method of resolving commercial and matrimonial litigations, a surprising new group is beginning to stick its paw into the waters of ADR. Conflicts among people about animals have only recently begun applying mediation and collaborative practice to their disagreements prior to litigation.

The Legal System Approach to Animals

These often emotionally charged conflicts have long been reluctantly received in courtrooms. The dichotomy between the emotional value of a pet, as a family member and companion, and the legal value, as personal property, makes the resolution of a conflict in a court, under the present state of the law, rarely "fair" to the pet owner. Legally, animals are defined as "property," much like a chair, in the legal system. However, pets have always had intangible emotional value, much like children, that the legal system cannot capture.

Last year, 64% of U.S. households owned a pet[1] and they spent $52 billion on pet care and supplies.[2] Traditionally, when conflicts arise, these very same pet owners spend thousands of dollars to sue a vet, kennel, groomer, neighbor or ex-spouse to avenge a wrong or keep their pet regardless of the expense and projected legal outcome. Often pet owners sue because they don't realize there is an alternative way to resolve their conflict. Litigators take these cases, at the insistence of the pet owner, to trial, often costing the pet owner more than the replacement value of the pet. Neither realizes there is a better way to resolve these disagreements.

The end result of litigation is that the pet owners often obtain a decision that hardly ever meets their needs, hopes or desires. This is because custody arrangements for pets, neighbor conflicts and awards for malpractice or negligence from the court cannot take into account the emotional value or personal loss felt by the pet owner, the neighbor or the pet professional. They may win the lawsuit, spending thousands of dollars along the way, yet in the end have no process for reconciliation. The litigant has won the battle but lost the war.

ADR Works for Pets

Recently, some savvy pet owners, attorneys and courts have chosen to use Alternative Dispute Resolution in animal conflicts instead. They are beginning to try it and usually like it. In divorce cases it eliminates the oft-used strategy of "holding hostage" a pet to get even for an unrelated slight. In neighbor disputes, it provides a space for holding a conversation, which often eliminates the problem, yet engenders respect and understanding enabling "neighborliness" to flourish. These types of disputes are examples of only a few of the many conflicts that arise involving the smallest dog walker problem to the largest divorce settlement issue.

"Pets have always had intangible emotional value, much like children, that the legal system cannot capture."

Why do ADR strategies tend to resolve these issues so well? The parties in conflict are able to work within a forum that values emotion as a factor in the dispute. Parties are not limited to "just the facts, ma'm."

In divorce or relationship conflict situations, the animal involved is often the last and best thing that survives the relationship. There may be a true and lesser caregiver for the pet, yet both have invested time, energy and emotion in the pet. Their pet has impacted their emotional lives by its positive presence. If the pet is awarded exclusively to one person, with no consideration of the other party's needs or feelings, it more than likely leaves that party feeling disrespected and the conflict really unresolved.

In the 2011 *Miami Herald* article, "When Couples Split" by Kristin Tillotson[3] several attorneys were asked about outlandish agreements made by their clients in divorce cases when animals were involved. One attorney said incredulously, "My client left $20,000.00 on the table to keep a dog, and it was old." Several other attorneys interviewed for the article gave similar responses to the amount of money left on the table or the difficulty in equally splitting several animals among the parties to meet the 50/50 marital split. None of these attorneys really understood the key underlying emotional issue at stake.

If they had dug a little deeper and gone more to the heart of the conflicts, they may have found the motivation for this "money solves all" strategy. Instead, they chose to deal in more concrete ways with their clients.

Resolution Examples

Using mediation or collaborative process as tools to de-escalate disputes around pets usually results in atypical agreements involving ongoing care of the pet. These solutions work for both the ex's and for the pet. One recent divorcing couple used mediation in their pet

custody disagreement to work out a vacation and "weekend warrior" dog care and visitation schedule. Though the ex's may never want to see each other again, the pet was a part of their mutual lives. In the end they worked out a method of transfer, keeping the dog as the focus of a mutually acceptable transition. The pet then truly experiences the best of both worlds. No kennel is needed during vacations and the continued love and affection from both its owners is sustained.

"Conflicts between people about animals can and should be approached in a whole new way."

In neighbor disputes, having a discussion about how an animal's actions impact everyone's life is incredibly difficult. A barking dog often creates an intolerable situation for both a dog owner and a long-suffering neighbor. Emotions on both sides are raw. The annoyed or sleep-deprived neighbor is at wit's end; the dog owner is protective and worried about fallout from the dog's behavior. Often the pet owner knows the law and relies on being within the law to shut down a neighbor's complaint. However, the neighbor doesn't want to hear about being within the law. He or she wants the barking dog to stop.

Mediation strategies create necessary space for discussion. If the parties are willing to sit down together they can have a conversation about working on an acceptable time and place for the barking, keeping the dog and people happy. These discussions can also include ways of informing neighbors of schedule changes due to extraordinary circumstances. Meetings like these create positive dialogue. Who knows, they may end with one neighbor offering to let out the other neighbor's dog.

These kinds of extraordinary resolutions are truly unavailable within the litigious solution and often impossible to see in one-to-one discussions between the parties

Conclusion

Conflicts between people about animals can and should be approached in a whole new way. The ADR professional is already applying these concepts and strategies in commercial and divorce cases. Civil disputes are slowly recognizing the benefits of applying mediation or collaborative practice to their conflicts first, to achieve a more party-centered outcome. The time has come for us to further apply our craft to emotional conflicts involving animals. Next time you see a disagreement among people about animals, help them to *bark up the right tree*. Suggest using ADR as a resolution process. The pets and people will be glad you did.

Endnotes

1. American Pet Products Association—Industry Statistics and Trends: Pet Ownership, *available at* http://media.americanpetproducts.org/press.php?include=143498.
2. *Id.*, Pet Spending, http://www.americanpetproducts.org/press_industrytrends.asp.
3. Kristin Tillotson, *When Couples Split*, Miami Herald, April 07, 2012, *available at* http://ww.miamiherald.com/2012/04/07/27346931/when-couples-split.html?story_link=email_msg.

Debra Hamilton's sole focus in practice is helping people in conflict over animals solve those disputes by using ADR. She uses mediation and collaborative process to diffuse conflicts between people about animals in divorce, landlord-tenant, breeder-owner-handler and vet disagreements. Debra lives in Armonk with her husband and two sons. She also has nine dogs who live in the house and go to the office with her. See www.hamiltonlawandmediation.com.

The 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process

By Paul Friedland and John Templeman

In October 2012, the School of International Arbitration at Queen Mary, University of London, and White & Case LLP released the results of a global survey on practices in international arbitration. Entitled "2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process," the survey examines the extent to which harmonized practices are emerging in international arbitration and whether they reflect the preferred practices of the international arbitration community.

The survey comprised responses by 710 private practitioners, arbitrators and corporate counsel to a written questionnaire, plus 104 interviews to contextualize the quantitative findings. The pool of questionnaire respondents and interviewees was diverse, consisting of participants from a wide range of industry sectors, roles, legal backgrounds and locations. The unprecedented number and diversity of participants makes this survey the most comprehensive empirical study ever conducted in the field of international arbitration.

In a departure from previous International Arbitration Surveys, views were sought not only from in-house counsel, but also from private practitioners and arbitrators. This provided a pool of respondents which was both highly knowledgeable of international arbitration and dramatically larger than earlier surveys. This critical mass of participants provided authoritative empirical evidence as to what actually occurs in international arbitration, and also enabled the results to be broken down by categories of respondents, whether by different geographic regions, legal backgrounds or roles.

The results of the survey are set out under seven thematic sections which broadly follow the life of an arbitration. This article provides a summary of each section's key findings:

1. Selection of arbitrators

- A significant majority of respondents (76%) prefer selection of the two co-arbitrators in a three-member tribunal by each party unilaterally. This shows that the arbitration community generally disapproves of the recent proposal calling for an end to unilateral party appointments.
- There has been a long-standing debate about whether pre-appointment interviews with arbitrators are appropriate. The survey reveals that two-thirds of respondents have been involved in them, and only 12% find them inappropriate. The chief disagreement is not on whether such interviews are appropriate, but on the topics that may properly be discussed.
- Almost three-quarters of respondents (74%) believe that party-appointed arbitrators should be allowed to exchange views with their appointing party regarding the selection of the chair.

2. Organizing arbitral proceedings

- The IBA Rules on the Taking of Evidence in International Arbitration ("the IBA Rules") are used in 60% of arbitrations: in 53% as guidelines and in 7% as binding rules. In addition, a significant majority of respondents (85%) confirm that they find the IBA Rules useful.
- Tribunal secretaries are appointed in 35% of cases. Only 10% of arbitrators said that tribunal secretaries appointed in their cases prepared drafts of substantive parts of awards, and only 4% said tribunal secretaries discussed the merits of the dispute with them.
- The most effective methods of expediting arbitral proceedings are (in order): identification by the tribunal of the issues to be determined as soon as possible after constitution; appointment of a sole arbitrator; and limiting or excluding document production.
- Even though fast-track arbitration is regularly cited as a prime method of cost control, the survey reveals that it is not commonly used in practice. The vast majority of respondents (95%) either had no experience with fast-track arbitration (54%) or were involved in only 1-5 fast-track arbitrations (41%). However, 65% of respondents are either willing to use fast-track clauses for future contracts (5%) or willing to do so depending on the contract (60%).

3. Interim measures and court assistance

- Despite being the subject of significant legal commentary, requests for interim measures to arbitral tribunals are relatively infrequent: 77% of respondents said they had experience with such requests in only one-quarter or less of their arbitrations. Even rarer are requests to courts for interim measures in aid of arbitration: 89% of respondents had experience with them in only one-quarter or less of their arbitrations.
- Survey respondents report that 35% of all interim measures applications addressed to the arbitral

tribunal are granted. Of those applications which are granted, the majority are complied with voluntarily (62%) and parties seek their enforcement by a court in only 10% of cases.

- There is no consensus on whether arbitrators should have the power to order interim measures *ex parte* in certain circumstances. Just over half of respondents (51%) believe that arbitrators should have such a power, while 43% believe they should not (6% were unsure).

4. Document production

- Requests for document production are common in international arbitration: 62% of respondents said that more than half of their arbitrations involved such requests.
- The survey confirms the widely held view that requests for document production are more frequent in the common law world: 74% of common lawyers, compared to only 21% of civil lawyers, said that 75-100% of their arbitrations involved such requests.
- Notwithstanding the differing traditional approaches to document production in civil and common law systems, the survey reveals that 70% of respondents believe that Article 3 of the IBA Rules ("relevant to the case and material to its outcome") should be the applicable standard for document production in international arbitration.
- How important are disclosed documents to the outcome of the case? The survey reveals that they are crucial in a statistically significant percentage of arbitrations: a majority of respondents (59%) stated that documents obtained through document production materially affected the outcome of at least one-quarter of their arbitrations.

5. Fact and expert witnesses

- In a significant majority of arbitrations (87%), fact witness evidence is offered by exchange of witness statements, together with either direct examination at the hearing (48%) or limited or no direct examination at the hearing (39%). Fifty-nine percent of respondents believe that the use of fact witness statements as a substitute for direct examination at the hearing is generally effective.
- The vast majority of respondents believe that cross-examination is either always or usually an effective form of testing fact (90%) and expert witness evidence (86%).
- While mock cross-examination of witnesses prior to their appearance at a hearing is considered unethical in some legal cultures, the survey shows that it is commonly done and often considered acceptable in international arbitration. Fifty-five percent of respondents reported that there was mock cross-examination of witnesses in their arbitrations, and 62% of them (civil and common lawyers alike) find it appropriate.
- In the vast majority of arbitrations, expert witnesses are appointed by the parties (90%) rather than by the tribunal (10%). However, survey respondents' preferences are less stark: only 43% find expert witnesses more effective when they are appointed by the parties, while 31% find tribunal-appointed experts more effective.

6. Pleadings and hearings

- Not only does sequential exchange of substantive written submissions occur much more regularly (82%) than simultaneous exchange (18%), there is also a strong preference for this type of exchange (79%).
- The survey reveals that only a small minority (15%) of merits hearings are held outside the seat of arbitration.
- The most common duration of a final merits hearing is 3-5 days (53%), followed by 6-10 days (23%), 1-2 days (19%) and 10+ days (5%).
- Civil lawyers have traditionally claimed that their hearings are shorter than those of common lawyers. The survey confirms this to be true. Thirty-one percent of civil lawyers said the average duration of their merits hearings was 1-2 days, with only 9% of common lawyers reporting that the average duration of their hearings was only 1-2 days.
- Time limits are imposed for oral submissions and / or examination of witnesses in two-thirds of arbitration hearings. Most respondents prefer some form of time limits (57%), while only 6% prefer no time limits at all (34% said it depends on the case).

7. The arbitral award and costs

- How long should a tribunal take to render an award? For sole arbitrators, two-thirds of respondents believe that the award should be rendered within 3 months after the close of proceedings. For three-member tribunals, 78% of respondents believe that the award should be rendered either within 3 months (37%) or within 3 to 6 months (41%).
- A common criticism of arbitration is that tribunals unnecessarily "split the baby." Overall, respondents believe this has happened in 17% of their arbitrations, while those actually making the rulings—the arbitrators—said this occurs in only 5% of their arbitrations.

- Tribunals allocate costs according to the result in 80% of arbitrations, and leave parties to bear their own costs and half the arbitration costs in 20% of arbitrations. However, only 5% prefer this latter approach, which shows there is a desire for tribunals to allocate costs according to the result more frequently than they are currently doing.
- An overwhelming majority of respondents (96%) believe that improper conduct by a party or its counsel during the proceedings should be taken into account by the tribunal when allocating costs. This sends a strong message to arbitrators that they are expected to penalize improper conduct when allocating costs.

"We now know which practices in the arbitral process are most common around the world and which are preferred."

Conclusion

Despite the dominance of international arbitration as the dispute resolution method for international business, little empirical evidence exists about what goes on in this inherently private process. The 2012 International Arbitration Survey closes this gap, providing empirical evidence of a quality not seen before. We now know which practices in the arbitral process are most common around the world and which are preferred. We hope that the survey acts as a reference point for the international arbitration community for years to come, not least when arguing points of procedure before arbitrators.

The survey can be found at: http://arbitrationpractices.whitecase.com/.

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Review of New York Federal Petitions for Confirmation of Arbitral Awards Shows Swift Resolutions and Certainty of Awards

By Tim McCarthy, David Hoffman, and Ryham Ragab

Introduction

To allay any possible concern that American litigiousness could make New York a difficult venue for expeditious confirmation of arbitral awards,[1] the authors undertook a review of post-award proceedings in the United States District Court for the Southern District of New York, under the auspices of the Arbitration Committee of the New York City Bar Association. This review of the 200 cases decided since 2005 reveals that post-award proceedings generally are decided by the Southern District expeditiously, with an average time from petition to final judgment of 42 weeks for all arbitrations. For awards in international arbitrations, the average time from petition to final judgment was shorter, at 35 weeks. Additionally, and in keeping with New York law's and American federal law's deference to arbitral decisions, the Southern District confirms the overwhelming majority of awards presented to it.[2]

"The average time from petition to final judgment was 42 weeks, [and for] petitions resulting from international arbitrations…35 weeks."

The Research

Petitions to confirm or vacate arbitration awards adjudicated by the United States District Court for the Southern District of New York ("SDNY") were collected and reviewed for the period from the start of 2005 through year-end 2011. The petitions reviewed involved all sorts of arbitral awards, including awards arising from domestic commercial arbitrations, international arbitrations, labor, securities, admiralty and insurance arbitrations. The international awards included awards issued by both *ad hoc* and institutional tribunals in London, Paris, Hong Kong and Stockholm to name but a few. The arbitral institutions and providers involved included the American Arbitration Association, the International Chamber of Commerce ("ICC") International Court of Arbitration, the Financial Industry Regulatory Authority, the Judicial Arbitration and Mediation Service, the Society of Maritime Arbitrators, regional centers around the world, and industry-specific institutions.

The data collected included the type of arbitrations; whether the petition sought confirmation or vacatur of the award; whether the petition was opposed; whether the award was in fact confirmed or vacated; and centrally, the time from filing of the initial petition to an order of confirmation or vacatur, and then final judgment.

The United States generally is pro-arbitration, and its statutory *lex arbitri* provides very narrow grounds for nullifying arbitral awards. The Federal Arbitration Act ("FAA") applies to both domestic and international arbitration awards. Reflecting the stated policy priorities of U.S. and New York law, the FAA limits the intervention of courts in the results of arbitration, thus upholding the parties' agreement to arbitration.[3]

The Results

Distribution of Awards and Proceedings

As noted, the arbitrations that gave rise to the post-award proceedings reviewed involved a wide range of subject matters. Of the 200 petitions reviewed, the largest number were labor and employment arbitrations, which accounted for 68 post-award proceedings. In keeping with New York's role as a preferred seat for international arbitration, international arbitrations accounted for 45 post-award proceedings, or almost one-quarter of the total. Reflecting New York's position as a center of finance and trade, 25 of the post-award petitions were brought upon awards in securities arbitrations, and 17 were brought in admiralty cases. Insurance and reinsurance proceedings accounted for 18 of the petitions reviewed. Domestic commercial arbitrations, somewhat surprisingly, resulted in only 27 petitions, or just over 10 percent of the total.

Relief Sought and Frequency of Opposition

In keeping with usual arbitral practice, the majority of the petitions presented to the Southern District during the period studied sought confirmation rather than vacatur of an arbitral award. Specifically, 136 of those petitions were for confirmation, while 64 were for vacatur. Most of the petitions heard by the Southern District were opposed, but a significant minority were unopposed: Out of the 200 petitions, 54 (or over one-quarter) were unopposed, with the remaining 146 being contested.

Frequency of Confirmation, Partial Confirmation, and Denial of Confirmation

Both New York and American federal law maintain a policy of deference to arbitral decision-making,[4] and the results of the Southern District post-award proceedings during the period studied reflect this policy. Of the 200 proceedings reviewed, only 15 resulted in a complete denial of confirmation. The arbitral awards at issue were wholly confirmed in 136 of the proceedings, and partially confirmed in another 8 cases. Eleven proceedings concluded with the

entry of an order granting some other kind of relief other than denial of confirmation—including most often instances in which a petition seeking vacatur was denied, but no order of confirmation was entered.

Awards in almost all categories of arbitrations enjoyed roughly the same high level of deference. The outliers were found in post-award proceedings arising out of domestic commercial arbitrations, in which 5 out of 27 petitions—or almost 20%—resulted in a denial of confirmation or the granting of a motion for vacatur. However, international arbitrations enjoyed a very high rate of confirmation, with 40 out of 45 petitions—or approximately 90%—being confirmed in whole or in part. With regard to the five international awards that were denied confirmation or vacated, one award was vacated due to an untimely disclosure of a conflict of interest by the Chairman of the tribunal and another was denied confirmation because the governing forum selection clause provided for confirmation proceedings only in Bulgaria. The remaining three international awards were denied confirmation due to lack of U.S. personal jurisdiction over the respondent.

In sum, the few denials of confirmations found by the study arose from plain errors of administration, a clearly mistaken choice of venue, or simple lack of U.S. personal jurisdiction over the respondent upon the petition. Tellingly, not a single international arbitral award was denied confirmation by the Southern District on the ground that the arbitrators' decision involved a manifest disregard of applicable law (a widely circulated shibboleth regarding U.S. *lex arbitri*). Thus, it appears from the results of the study that international arbitral awards may be presented to the Southern District for confirmation with a very high degree of confidence, provided that jurisdiction is proper.

Insurance and reinsurance arbitration awards were uniformly confirmed, with zero denials of confirmation in 18 cases. Labor and employment awards were denied confirmation in only 2 of 68 cases, and only 1 securities award was denied confirmation, out of 25 such petitions. In admiralty cases, similarly, only 2 of 17 awards were denied confirmation.

Time from Petition to Final Judgment

The key metric that the project sought to discern was the time taken from the filing of a petition for confirmation or vacatur until the entry of a final, enforceable judgment by the Court. Across all of the 200 Southern District proceedings reviewed, and across all sorts of arbitrations, the average time from petition to final judgment was 42 weeks, or just over three calendar quarters. This average varied across different categories of arbitrations. Admiralty proceedings were the shortest of all, at 27 weeks. Petitions resulting from international arbitrations took the second-shortest length of time to resolve, at 35 weeks. Insurance and reinsurance petitions took an average of 38 weeks, and squarely in the middle were domestic commercial arbitrations, averaging 41 weeks from petition to final judgment. Labor and employment post-award proceedings took an average of 47 weeks. Securities arbitrations resulted in the lengthiest post-award proceedings, averaging 56 weeks.

For many years, New York has traditionally been among the most favored seats for international arbitrations, along with London and Paris.[5] In recent years, Singapore, Hong Kong, and Dubai have also become leading options. Similar data regarding post-award confirmation proceedings in these other jurisdictions are not readily available. Our study indicates that parties choosing venues for enforcement of international awards can be confident that New York courts are likely to consider their petitions promptly and that their awards are highly likely to be confirmed.[6]

Conclusion

The results of the study strongly indicate that the Southern District's swiftness in resolving post-award proceedings, as well as New York and federal law policy favoring deference to arbitral decision-making, are compelling incentives for parties to arbitrate in New York and, when jurisdictional prerequisites are met, to submit their post-award petitions for confirmation to the Southern District.

Endnotes

1. *See*, *e.g.*, Final Report of the New York State Bar Association's Task Force on New York Law in International Matters ("Task Force Report"), at 32; Loukas A. Mistelis, *Arbitral Seats: Choices and Competition*, Wolters Kluwer Arbitration Blog, Nov. 26, 2010 (listing New York third as a chosen seat of arbitration, behind London and Paris).
2. The authors identified cases in the Southern District involving the confirmation or vacatur of awards since filing of cases by ECF became obligatory. First, decisions were identified through Lexis or Westlaw by boolean searching, *e.g.*, "arbitrat! w / p (confirm! or vacat!) w / p award." Relevant decisions were then categorized by type of arbitration proceeding. The ECF docket sheet for each case was then examined and the time periods from petition to judgment were calculated. While there may have been cases during the relevant time frame that were not captured by this methodology, there is no indication that any omitted materials would change the conclusions of this report.
3. *See* Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*
4. *See* Task Force Report, at 36 (recounting policy and citing cases); *David L. Threlkeld & Co., Inc. v. Metallgesellschaft Lt.d (London)*, 923 F.2d 245, 248 (2nd Cir. 1991).
5. *See* Prof. Christophe Seraglini, *et al.*, *The battle of the seats: Paris, London or New York?* (Practical Law Company ed., 2011).
6. In keeping with these findings, the International Chamber of Commerce has opened an office in New York in 2012. In 2013, the New York International Arbitration Center will open, providing additional infrastructure for the conduct of proceedings in New York.

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The Italian Saga of Mandatory Mediation: The Constitutional Court Ruling

By Francesca De Paolis and Giovanni Nicola Giudice

A previous article written by one of this article's co-authors[1] on the recently enacted Legislative Decree calling for mandatory mediation in Italy tellingly concluded with the following statements:

> *Many believe that encouraging parties to engage in mediation rather than forcing it upon them via legislation is the preferable option. Mediation is indeed intended to be a voluntary process entered into by the disputing parties, not one which they are compelled to follow. And as "the beginning is the most important part of any work" coercing people may simply lead parties attending a mediation to "tick a box" instead of really understanding and trusting the process. […] The Decree has been heralded as a turning point in the administration of justice in Italy. However, whether the Decree will be effective in reducing the caseload of an overburdened judicial system, and will therefore represent an audacious step forward, or if those with vested interests will find a way to diminish it to a small step that preserves the* status quo *of inefficiencies remains to be seen. But the Decree represents a strong motivator for serious discussions in Italy about mediation as an extrajudicial tool for solving commercial and civil disputes.(Footnotes omitted)*

"The future of mediation in Italy depends on the ability of mediation providers to create a market for mediation services."

Following the Italian Legislative Decree No. 28/2010[2] (the "Decree"), the Constitutional Court of Italy ruled on October 24, 2012, with its reasoning released on December 6, 2012,[3] that the Italian Government had exceeded its legislative authority in making mediation a mandatory precursor to trial. Immediately following the Court's ruling, Italian newspapers deemed it "The end of mediation,"[4] an interpretation which was endorsed by many lawyers. Their logic, it seems, is that if mandatory mediation is declared unconstitutional, then mediation itself will no longer exist. We argue that this is not the case. Though it is no longer compulsory, the opportunity for mediation still remains strong in the Italian judicial system.[5] This article will consider the future of mediation in Italy in light of the recent Court rulings.

A Brief Overview

Before the enactment of the Decree, the Italian Parliament promulgated a law from which the Decree would eventually be conceived. Article 60 of Law 69/2009 ("Act 69")[6] authorized the Government to adopt one or more legislative decrees on mediation and conciliation in commercial and civil matters. Act 69 in turn implemented the 2008 European Community Directive 52/2008 ("Directive 52"), and neither required states to enforce mediation nor precluded such enforcement. Finally, the Decree was enacted on March 4, 2010 and entered into force on March 20, 2010. This legislation introduced in Italy the first comprehensive mandatory approach to mediation, covering both cross-border and domestic disputes, and only applied to rights which could be freely disposed of by the relevant parties ("*Diritti Disponibili*"). The Decree introduced a mandatory preliminary mediation procedure, which applied before any litigation concerning insurance, banking and financial agreements as well as other matters such as property rights, division of assets, leases in general, gratuitous loans, medical liability or defamation.

The Decree stated that the mediation procedure would have become effective as of 20 March 2011. After that date, parties to civil and commercial disputes that involve alienable rights were required to attempt mediation before commencing a court action. Last but not least to mention, the Decree also gave the Ministry of Justice the power to decide about the organization of the mediation providers and mediator training programs. Unfortunately, the Ministry waited until the end of October 2010 to follow up this delegation, when the Ministerial Decree No. 180 of 2010 was enacted, creating a register for mediation providers, as well a list of official mediation trainers. Not redundant to say, this late regulation gave the mediation providers and the mediators themselves such a short time to organize—four months only before mandatory started running—causing therefore notable problems in terms of mediators training quality, and efficiency.

On March 20, 2011 (one year later) a second part of the reform entered into force, and therefore mediation became *condizione di procedibilitá*: parties to civil and commercial disputes that involved alienable rights were required to attempt mediation before commencing a court action.

On November 22, 2010, the OUA (*Organismo Unitario dell'Avvocatura Italiana*[7]) appealed to the *TAR Lazio* (Regional Administrative Court) against the compulsory mediation for some civil disputes. On April 12, 2011, the

TAR Lazio referred the issues raised by the OUA to the Constitutional Court.[8]

On March 20, 2012, mediation became mandatory additionally in property rights, specifically in condominium law, and for damages compensation due to accidents from the use of vehicles and boats.[9]

On October 24, 2012, the Italian Constitutional Court made its ruling, and on December 6, 2012 the Court filed the reasons that led it to declare the Decree unconstitutional.

The Ruling

The Court's ruling was limited to provisions of the Decree concerning mandatory mediation: whether the Decree exceeded its authority, delegated by Act 69; whether the Decree complied with the European Community rules laid down in Directive 52; and finally whether the costs of mediation mandated by the Decree placed an excessive burden on those seeking to mediate, thereby preventing access to justice, guaranteed by Article 24 of the Italian Constitution.

The Court ruled mandatory mediation unlawful because Act 69 granted no express specific authority for the Government to introduce mandatory mediation. In doing so, the Court ruled on the Decree's preemption of the legislature in excess of the authority it was delegated, and not on the constitutionality of compulsory mediation. It should be noted that compulsory mediation was declared unconstitutional by virtue of a technicality, the excess of delegated authority, in the preparation of the Decree. Act 69 did, however, give the Government the power to issue a mediation regulation provided that it did not obstruct justice. Therefore, the Court's ruling rests on a procedural defect that could theoretically be cured. The question that remains, then, is whether or not it would be productive to reintroduce the Decree in such a way that the defect would be cured but the effect, compulsory mediation, would still remain intact.[10]

One thing that is undoubted is that the Decree and court proceedings have raised awareness as to the issue of mandatory mediation. Despite its unpopularity,[11] the Decree has allowed people to imagine an alternative to the historic inefficiencies in the Italian justice system. It is clear from the Court's rulings that enforcing mandatory mediation, beyond all reasonableness, would not alone be an effective way to reduce the massive caseload of an overburdened judicial system. However, the Decree has brought into discourse one way in which the system may be reformed. Accordingly, we may now begin to focus on a future in which the Italian justice system considers this treasured tool of alternative dispute resolution an opportunity to improve the system as a whole.[12]

What Does the Constitutional Court Ruling Mean for the Future of Mediation?

The Constitutional Court ruling strikes crucial aspects of the Decree. Without delving into details, it is important to highlight three main points.

First, attempting mediation before going to trial is no longer mandatory. This ruling has already had immediate consequences. Since the ruling, mediator providers have seen a decrease in requests for mediation (approximately 60%, according to preliminary data[13]).

"The Court's ruling rests on a procedural defect that could theoretically be cured."

A second aspect concerns the suppression of Article 8, paragraph 5 of the Decree, under which the party invited to mediation was required to carefully consider it; failure to participate in a mediation session, without a valid reason, penalized the party in a subsequent trial, as the judge could have punished the non-complying party. Such punishment could include requiring the non-complying party to pay the opposing party's legal fees, and allowing the non-complying party's refusal to engage in mediation to be entered into trial as evidence of that party's guilt. By striking down this point, the Court's ruling provides that hereafter, parties will be free to choose to decline mediation without any risk or prejudice.

A third aspect relates to Article 13 of the Decree, which provided that the rejection of a mediator's proposal could be sanctioned by the court. Only in a few cases have Italian mediators submitted proposals to parties. Hence this last point does not cause crucial consequences for mediation.

Mandatory mediation has always been subject to criticism because it undermines the very essence of mediation itself, its voluntary nature. For similar reasons, the imperative that the party invited to mediate attend an initial mediation session was highly criticized, because it forced unprepared parties to start negotiating without fair warning. Finally, the imposition of a penalty on parties who reject the mediator's proposal is highly criticized, again for its egregious contradiction with the fundamental nature of mediation itself. Together, these three main issues seem to suggest that the legislators, in drafting the Decree, were intent on creating an entirely new institution, one with many compulsory and punitive features completely different and apart from mediation.

At this point it is worthwhile to ask what remains in place of the rule, after the intervention of the Court. In our opinion, there are many considerable benefits of the Decree that contribute greatly to the empowerment of the Italian judiciary system, but that have been overshad-

owed by the spotlight on the mandatory aspect of the Decree. For one, the Decree remains a groundbreaking set of rules regulating mediation, where confidentiality is protected, tax incentives are identified, and other meaningful aspects—such as the enforceability of the mediation agreement—are rewarded. It is an avant-garde regulation that assigns great importance to mediation delegated by the court. It has also done a great deal to underline the validity of mediation clauses, which have been included in an increasing number of contracts over the last two years. Finally, the Decree has influenced the culture of mediation in recent years, with a significant number of lawyers and counsel being trained in this field and more and more parties considering the use of this incredible extrajudicial tool.

The future of mediation in Italy depends on the ability of mediation providers to create a market for mediation services going forward. Undoubtedly many of them will encounter serious difficulties to make ends meet, due to the foreseen sudden reduction of cases, as an aftermath of the Court ruling. It will lie with the more experienced and quality-oriented providers to demonstrate the validity of mediation itself, regardless of incentives and constraints legislatively imposed.

Endnotes

1. Francesca De Paolis, *Italy Responds to the EU Mediation Directive and Confronts Court Backlog: the New Civil Courts Mandatory Mediation Law*, in volume 4, number 1 (Spring 2011) of the NY Dispute Resolution Lawyer, a publication of the Dispute Resolution Section of the New York State Bar Association.
2. The Legislative Decree No. 28 on Mediation in Commercial and Civil Matter was enacted in Italy on March 4, 2010 and entered into force on March 20, 2010.
3. Constitutional Court Ruling No. 272/2012. To read the whole ruling: http://www.cortecostituzionale.it/actionPronuncia.do.
4. Considering that the reasoning of the ruling came out only last December 6, there are not that many doctrinal articles released on this topic. However, few comments can be read on the Chamber of Arbitration of Milan on-line blog: www.blogconciliazione.com.
5. On this topic, an interesting comment: Cesare Cavallini, *Mediazione, ripartire dall'obbligatorietà*, on Bocconi University Blog http://www.viasarfatti25.unibocconi.it/notizia.php?idArt=11353.
6. According to the Italian legislative system, the Parliament is the body retaining the legislative power and therefore adopting legislatives acts, such as Laws and Implementation Laws. Parliament can, moreover, authorize the Government to adopt legislative acts (Legislative Decrees) on certain highly complex technical matters outside the exclusive jurisdiction of Implementation Law.
7. The OUA is the Italian's National Union of Lawyers. Website: http://www.oua.it/.
8. The Constitutional Court of Italy (*Corte Costituzionale,* sometimes named *Consulta,* because its sessions are held in *Palazzo della Consulta* in Rome) passes on the constitutionality of laws of the State with no right of appeal. For further information on the court, its role, structure, and members: http://www.cortecostituzionale.it/ActionPagina_324.do.
9. Deferment included in the "*Decreto Milleproroghe*"–Law 10/2011).
10. Mediation is required by law in the field of telecommunications and industrial subcontracting, fields in which compulsory mediation, in the past, has been repeatedly upheld by the Constitutional Court, and, therefore, it can be reintroduced into our system at any time, provided there exists a suitable legal instrument.
11. Si vedano i vari sciopereri e manifestazioni della categoria degli avvocati avvenuti in tutto il corso del 2011.
12. A general overview of 2012 mediation statistics may be consulted at Italian Ministry of Justice website: http://www.governo.it/backoffice/allegati/68027-7686.pdf.
13. According to preliminary data from Milan Chamber of Arbitration-Mediation Service.

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Mauritius International Arbitration Act

by Shalini O. Soopramanien[1]

I. Introduction

The Mauritius International Arbitration Act 2008, which came into effect in January 2009, has been hailed as a major milestone in the country's efforts to position itself as a new international arbitration center. Its stated purpose was to promote the use of Mauritius as a jurisdiction of choice in the field of international arbitration. It contains some unusual, even unique, features designed to assure a fair and effective process and enhance the attraction of Mauritius as an arbitral venue.

II. Scope and Content of Act

According to the *Travaux Préparatoires*, which accompanied the passage of the Bill in Parliament, the Act is based largely on the UNCITRAL Model Law, as amended in 2006 ("Amended Model Law"). The Act not only benefits from lessons of international experience, but also adopts solutions specific to Mauritius.

The Act is organized into several Parts as follows: Part I lays down provisions governing its interpretation, and scope of application, and draws a sharp distinction between domestic and international arbitration, making it clear that it applies exclusively to international arbitration.

Part II lays down the minimum requirements for an arbitration agreement. Part III sets out the general provisions governing the composition of the arbitral tribunal and mode of appointment of the arbitrators, including the role and functions of Permanent Court of Arbitration ("PCA").[2]

Part IV deals with interim measures. Part V reaffirms the obligation of the tribunal to treat parties "with equality," and lays down the general procedural guidelines which apply in the absence of a specific agreement between the parties.

Besides provisions on the applicable law, Part VI also provides for the correction and interpretation of awards following delivery to the parties, and the issuance of additional awards, as well as a right of recourse to the Supreme Court to have the award set aside. Finally, Part VII provides for miscellaneous matters, including the constitution of the Supreme Court in arbitration-related cases and a right of appeal to the Judicial Committee of the Privy Council.

III. Key Features of Act Revisited

There are many factors which are key to the success or otherwise of the Act. We review in turn: a) the form of arbitration agreement, b) the distinction between domestic and international arbitration, c) the role of supervisory bodies, d) the right of representation before the arbitral tribunal, e) the public policy ground of challenge, and f) confidentiality of proceedings.

A. Form of Arbitration Agreement

An arbitration agreement, according the Act, a) may be in the form of an arbitration clause in a contract or other legal instrument, or in the form of a separate agreement, and b) shall be in writing.

The Act introduces a "forward-looking" definition of an agreement in writing, according to which an agreement is deemed to be in writing if its contents are recorded in any form, whether or not the arbitration agreement or the contract has been concluded, orally, by conduct, or other means.

B. Domestic v. International Arbitration

The Act sets out the two cumulative criteria which an arbitration must satisfy to qualify as an international arbitration: first, the seat of arbitration must be Mauritius, and, second, the subject matter of the dispute must come with an international nexus.

There are a number of situations in which the international nexus can be deemed established, and for the most part they are modeled on the Amended Model Law. An international nexus can also be established, according to the Act, where "the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one state, or that the Act is to apply to their arbitration." The first part of this provision is derived from the Amended Model Law, whilst the second—which is not—simply allows parties to contract out of domestic arbitration.

By breaking new ground and doing away with the fiction of an international nexus, making international arbitration available "on demand"—so to speak—the Act reaffirms its pro-arbitration credentials.

C. Role of Supervisory Bodies

One of the significant benefits of arbitration is the option that it offers of bypassing the traditional court system in order to have issues adjudicated promptly and efficiently by a mutually acceptable panel of arbitrators, using pre-determined procedures.

1. Role and Functions of Supervisory Bodies

According to the Act, the Supreme Court may be involved at multiple points in the arbitration process. The Supreme Court rules on applications on a variety of

issues, ranging from interim measures to competence to the validity of the final award. Conversely, the functions of the PCA are more administrative than judicial, ranging from the appointment of arbitrators to their fees and expenses to the extension of time limits.

The *Travaux Préparatoires* seeks to minimize the role of the courts in the arbitration process, deeming it exceptional and limited. The Act also carves off a significant slice of supervisory functions to be handled by an independent international organization in the form of the PCA. The PCA is an established organization, with a track record, and its involvement as one of the supervisory bodies is meant to reassure. More importantly, it has the ability to bring value-added in terms of expertise and ability to promote Mauritius as an arbitral jurisdiction.

Mauritius is fortunate in having a strong and independent judiciary, with a well-respected Supreme Court. With its long tradition of excellence, professionalism and intellectual rigor, the Supreme Court has established itself as a body that can be counted on to deliver. Whilst there is no reason to question the capacity of the Supreme Court, there are also concerns and challenges to take into account.

2. Concerns and Challenges

First, from the point of view of judges who have not been previously exposed to issues of international arbitration, novelty is a challenge. So is the ability of the Supreme Court to break with its past, and cope with its revamped role and functions under the Act. The Act applies a definition of international arbitration designed to isolate the regime governing international arbitration from that of domestic arbitration. One measure of the success of the Supreme Court will be its ability to adapt to the seemingly counter-intuitive approach that the Act prescribes.

Second, the potential for delays in the response time of the court is a source of concern. The court, if called on to act, is an integral part of the arbitration process, and the role that it plays is critical. Any benefits accruing from arbitration would be of no avail if parties were to be held hostage to courtroom delays. Delays in the delivery of justice are commonplace. Some of the more notorious cases of delays in the justice system have been attributed to the Supreme Court. Going forward, the Supreme Court may wish to consider having special service standards for arbitration matters in place to match the tight deadlines embedded in the arbitration process and incorporated in the Act.

Third, the current practice of having judges serve as arbitrators is a multiple source of concern. There are reservations about what would appear to be a blanket authorization given to judges to serve as arbitrators. In the case of officials who use their public office for private gain, there is invariably a perception of abuse. There is also the attendant risk that highly remunerated outside business activities tend to take priority over official duties.

More importantly, the involvement of judges as arbitrators also raises the specter of conflict. The supervisory role of the Supreme Court presupposes that the tribunal and the court will operate at arm's length from one another. From a PCA perspective, an arbitrator/judge who serves partly as arbitrator, and partly as judge and member of a Supreme Court panel reviewing arbitration-related applications, is a potential source of embarrassment.

In most jurisdictions, rules of ethics would not permit an active national court judge to serve as arbitrator without permission. Few, if any, of these jurisdictions have embraced an absolute prohibition on the appointment of judges as arbitrators. Whatever the rules, they have to be clear, transparent and known in advance, and not left to conjecture or speculation.

D. Parties' Representation

According to a curiously worded provision of the Act, a party to arbitral proceedings may be represented in the proceedings "by a law practitioner or other person chosen by him, who need not be qualified to practice law in Mauritius or in any other jurisdiction."

Notwithstanding the strong case in favor of foreign legal representation made in the *Travaux Préparatoires*, the Act itself gives less than a ringing endorsement to representation by foreign lawyers. Nor does it seek to clarify the conditions under which representation by non-lawyers would be permissible. Contrary to what is suggested in the *Travaux Préparatoires*, there is no positive stipulation in the Act in favor of representation by foreign practitioners.

The intent of the Act was two-fold to begin with: first, to allow for representation by lawyers, local and foreign alike, and, second, to extend the right of representation to non-lawyers. It is submitted that the Act as currently worded does not quite reflect its intent.

E. Public Policy Ground of Challenge

A final award is subject to challenge if "[it] is in conflict with public policy in Mauritius." Whether the exception is intended to serve as the last bastion against any corruption of public morals, or just another unnecessary bureaucratic hurdle in the path to dispute settlement, is an open question.

1. Heads of Concern

The concern about the public policy exception is three-fold. First, there is concern about its nebulous character. Public policy is an elusive concept and one that is notoriously difficult to define. Second, there is the risk of

abuse of the public policy exception as cover to engage in the review of the merits of an award. Many jurisdictions have adopted an expansive interpretation of the public policy exception as the prelude to an intrusive judicial review of awards. Third, there is understandable skepticism about the relevance of the public policy of Mauritius in an international arbitration award, whose linkage to Mauritius may be tenuous, or driven more by choice of forum than any substantive connection with the country. To apply a public policy exception in such a situation is to add an unnecessary bureaucratic layer to the arbitration process.

"An arbitration center is only as good as the assets, instruments and resources that it has to count on."

The public policy exception opens the door for unwarranted judicial scrutiny from the courts to set aside awards on the basis of an interpretation of public policy that is best suited to domestic arbitration.[3]

2. Pro-Enforcement Approach

The public policy exception does not have to be the weak link in the arbitration chain; nor are courts necessarily bound by the much-criticized expansive interpretation. Public policy is a well-established ground to preclude enforcement and recognition of a foreign arbitral award, and its scope and limits have been addressed in jurisdictions from the U.S. to France to Germany.

An expansive and unpredictable interpretation of public policy by state courts serves as an incentive for the losing party to seek to resist enforcement or have the award set aside. Conversely, a strict definition of public policy raises the bar on the public policy exception and serves the cause of enforcement. In the U.S., as in Germany and France, courts have adopted strict definitions of public policy, which have in turn resulted in sharp limits on the scope of its application. None of these jurisdictions would allow the public policy exception to be used as cover for national courts to revisit the merits of awards.

Many jurisdictions have resorted to choice of law rules in order to limit or mitigate the application of legal principles and values of a jurisdiction with which the award has little or no connection other than as the seat of arbitration. In some cases, choice of law rules have enabled the application of the public policy of a foreign state, presumably on the ground that it is the state most closely connected to or concerned with the award.[4] Even where the applicable law is that of the seat of arbitration, there has been a tendency to construe the reference to the public policy of a country as a reference to international, not domestic, public policy.

3. Way Forward

The *Travaux Préparatoires* stops short of providing any guidance on the scope of the public policy exception. Accordingly, the onus will be on the court to demonstrate that it can apply it judiciously and with restraint in order to protect the legitimate interests of Mauritius but without driving away potential clients.

F. Confidentiality of Proceedings

Faced with a policy choice between creating a presumption of confidentiality rebuttable by contrary agreement between the parties, and an equally rebuttable presumption of transparency and openness, the Act opted for a third way, adopting a posture of silence, and leaving it to tribunals and the courts to "muddle through" the issue of confidentiality.

1. Basis for Obligation of Confidentiality

English courts have traditionally maintained that confidentiality exists as an implied term of the agreement to arbitrate or as a natural extension of the private nature of arbitration.[5] According to English courts, the obligation of confidentiality "arose as a corollary of the privacy of arbitration proceeding."[6]

The presumption of confidentiality as reflected in English law has not been universally followed in other major jurisdictions. One Australian court took issue with the implied obligation of confidentiality,[7] making it clear that confidentiality was not an essential attribute of Australian arbitration.[8] Both Sweden and the U.S. appear to have endorsed the Australian position, rejecting the notion of an implied confidentiality obligation, but leaving open the possibility of giving effect to a confidentiality agreement.

The *Travaux Préparatoires* appears to support confidentiality in arbitral proceedings but, curiously enough, leaves it to the tribunals and the courts to determine whether—if at all—confidentiality applies in arbitral proceedings. It is not clear on what legal basis tribunals and the courts will proceed to define the scope and content of confidentiality, without treading the fine line between judicial interpretation and judicial activism.

2. Limits on Confidentiality Obligation

Confidentiality is not an absolute concept; nor does it exist in a vacuum. A presumption of confidentiality is invariably subject to contrary agreement between the parties. Different degrees of confidentiality apply to different aspects of arbitral proceedings. Confidentiality is also subject to overriding considerations of public policy.

3. Policy Considerations for the Future

Going forward, there are additional policy considerations that are likely to weigh in. First, there are growing public expectations of honesty and integrity in govern-

ment, which have generated matching demands for openness and transparency in the conduct of business, public and private alike. What was once a presumption of confidentiality in the conduct of business has given way to a presumption in favor of access to information. Second, dissemination of awards has the potential to promote public awareness of arbitration, contribute to a body of precedents, and serve as a source of knowledge and authority for future guidance.

"Whether Mauritius succeeds as a jurisdiction of choice will in no small measure depend on the performance of its judiciary."

4. A Missed Opportunity

The *Travaux Préparatoires* correctly notes that the issue of confidentiality is "one of great complexity."[9] But complexity alone is not a bar to legislative craftsmanship. By choosing to defer to tribunals and the courts on an issue which is essentially one of policy, the Act may have missed an opportunity to be at the forefront of progress and development in the field of international arbitration.

IV. Conclusion

Mauritius offers a strong record of good governance and political stability, with a friendly business environment, a vibrant legal sector and an independent judiciary, along with other necessary attributes of an emerging international arbitration center. The adoption of the Act was an important milestone in the process.

The Act is not a model of perfection, but a solid beginning and a strong platform to build on. Its implementation is bound to stretch the limits of the legal and judicial infrastructure, and test the capacity of its judiciary. Whether Mauritius succeeds as a jurisdiction of choice will in no small measure depend on the performance of its judiciary.[10]

An arbitration center is only as good as the assets, instruments and resources that it has to count on. There are important challenges ahead, but Mauritius has a good record of dealing with challenges, constantly re-inventing itself to adapt to shifting priorities and circumstances. There is no reason to doubt that Mauritius will take full advantage of the benefits of the Act, using it as a platform to promote Mauritius as a jurisdiction of choice in the field of arbitration.

Endnotes

1. This article has benefited from inputs and contributions provided by Rajen Soopramanien, also a lawyer and former World Bank lead counsel, to whom I owe a debt of gratitude. I am also grateful to my many distinguished friends and colleagues—practitioners, former classmates, law professors—who kindly agreed to review and comment on the initial draft of the article, and provided valuable insights, comments and suggestions. My debt of gratitude notwithstanding, the views expressed in this article are mine and mine only. So are the errors, omissions or misstatements to be found in the article.
2. The PCA is an intergovernmental organization established pursuant to the Convention for the Pacific Settlement of International Disputes 1899 (as subsequently amended), based in The Hague, and designed to provide a variety of dispute resolution services to the international community. Pursuant to a host country agreement between Mauritius and the PCA, the PCA has appointed a permanent representative in Mauritius. For the purposes of the Act, the PCA will act through its Secretary-General, who will in turn be assisted by its permanent representative in Mauritius.
3. N. Blackaby, C. Partasides, et al., *Redfern and Hunter on International Arbitration* (Oxford University Press, 2009), p. 614.
4. Gary B. Born, *International Commercial Arbitration*, (London: Kluwer Law International, 2009), p. 2622.
5. I. M. Smeureanu, *Confidentiality in International Commercial Arbitration* (Kluwer International Arbitration, 2011), p. 2.
6. *Ibid.*, p. 30.
7. *Ibid.*, p. 37.
8. *Esso Australia Resources Ltd v. Plowman* (Minister for Energy & Minerals) (1995) 183 CLR 10.
9. *Travaux Préparatoires*, Note on "Confidentiality," para. 104.
10. *Travaux Préparatoires*, para. 17 (a).

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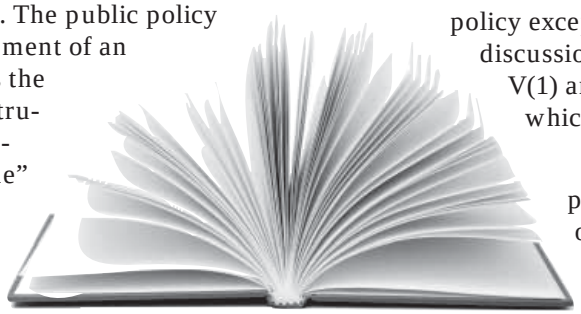
Book Review

The Public Policy Exception Under the New York Convention

Author: Anton Maurer

Reviewed by Edna Sussman



This book is a comprehensive treatment of article V(2)(b) of the New York Convention. The public policy exception to recognition and enforcement of an arbitral award is viewed by many as the most controversial aspect of that instrument. Described variously as an "unruly horse," an "untrustworthy guide" and "an uncertain one," the public policy exception has led to unpredictability and inconsistency in the application of the convention, a result at odds with the convention's intended purpose of providing ease, expedition and uniformity in support of arbitration as the mechanism for resolution of cross-border disputes. The public policy exception is accordingly a subject on which a work of this broad scope is welcome.

Maurer draws on an extensive background in international arbitration over several decades and professional involvement in disputes in over 80 jurisdictions to present a comprehensive global perspective on this critical exception to the convention.

The book is structured in five main chapters taking the reader from a background on the New York Convention to specific applications in different countries.

Following chapter one's introduction, chapter two provides an overview of how conventions and treaties are to be interpreted under international law. The chapter reviews the relevant provisions of the Vienna Convention starting with the principle of *pacta sunt servanda* (agreements are to be kept) and discusses the accepted use of the *travaux préparatoires* (working papers) to aid in the interpretation of the text.

In chapter three, the author provides a detailed review of the negotiation of the convention and its public policy exception and discusses the various proposals made, accepted and rejected. Those who have never studied the *travaux* will be interested to read about the history of the introduction of the word "only" in article V to limit the scope of court review; the decision to use the word "may" rather than "shall" to describe the authority given to the courts in exercising their right of review to afford courts discretion to enforce an award even if one of the provisions of article V is met; and the rejection of the proposal that enforcement could be denied if the award involved a violation of any law of the state where enforcement is sought, thus limiting the scope of permissible review.

Chapter four's analysis focuses on the import of the phrases used in the convention. Drawing upon the travaux, it dissects the meaning of each phrase to support the conclusion that the drafters intended that the public policy exception be narrowly construed. A discussion of the relationship between article V(1) and V(2)(b) and the circumstances in which each may be applicable follows.

In a tour de force, chapter five provides a comparative law analysis of the application of the convention in 20 jurisdictions. For each country, the discussion starts with the date of its accession to the convention and the local implementation mechanism, whether self-executing or by law. The author goes on to review local court decisions that discuss the public policy exception or refuse enforcement because of a violation of public policy.

The chapter then explores whether each country applies its views of international public policy or its own domestic public policy in applying the exception. Exhaustive footnotes to scholarly writings on the approaches of the various jurisdictions are supplied. It also provides quotations from various courts that have tried to articulate the narrow construction to be given to the public policy exception.

Importantly, the book devotes a significant portion of the text to the BRIC countries—Brazil, Russia, India and China. Chapter six explores each of these countries in depth. As global commerce continues to increase in these important growth markets, attention must be devoted to whether there are effective and reliable dispute resolution mechanisms. The author concludes, based on his analysis and review of the case law and the scholarly writings, that only Brazil construes the public policy exception as narrowly as most other member states. But the author suggests that there is hope that as the law on arbitration in these countries develops, their approach will more consistently be in line with that of other nations.

In the final chapter, the author concludes that the New York Convention has accomplished one of its key objectives: an analysis of 850 arbitration enforcement decisions under the convention shows that enforcement was refused in only 70 cases. However, the author also notes that the public policy exception has been the most misused ground for non-enforcement.

The work ends with the author's assessment of whether a state breaches public international law if its courts refuse recognition and enforcement of an award in violation of the New York Convention and the potential for use of bilateral investment treaties, where the investment requirement can be satisfied, to obtain redress.

The book's thorough review of the development of the public policy exception and its interpretation and application by courts in multiple jurisdictions is a significant contribution to the international arbitration community. Those seeking quick access to insights on a jurisdiction of interest will find this book an invaluable resource. Those interested in a comprehensive study of the public policy exception will find this book a treasure trove.

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Second Circuit Highlights the Extraordinary Difficulty in Establishing Manifest Disregard

Goldman Sachs Execution & Clearing v. The Official Unsecured Creditors' Committee of Bayou Group, LLC, et al.

By Joyce Lai

The Second Circuit continues to apply manifest disregard law as a ground for vacatur after the decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*[1] However, in *Goldman Sachs Execution & Clearing v. The Official Unsecured Creditors' Committee of Bayou Group, LLC, et al.*,[2] the Second Circuit makes clear that manifest disregard is a difficult standard to meet and will not undermine the deference due to arbitral decisions. To qualify for a finding of manifest disregard, the proponent of vacatur must first establish that the legal rule alleged to have been misapplied is well defined, explicit, and clearly applicable. Moreover, the petitioner has to establish that the arbitration panel knew about the clearly governing legal principle, but chose to ignore it. Ambiguous legal rules defeat a claim of manifest disregard and if the arbitral panel makes a simple award, without explanation, the reviewing court must uphold the arbitral award if there could be any discernible ground to support it.

Background

In *Goldman*, the Second Circuit affirmed the decision of Judge Rakoff of the Southern District of New York ("SDNY") denying Goldman Sachs Execution & Clearing, P.C.'s ("Goldman") petition to vacate a $20 million arbitration award in favor of The Official Unsecured Creditors' Committee of Bayou Group, LLC (the "Committee") and, instead, granting the cross-petition by the Committee to confirm the award.

In 1999, Goldman began serving as the sole clearing broker and prime broker for Bayou Fund, LLC hedge fund. In 2003, Goldman began serving in the same capacity for four new Bayou hedge funds[3] (together, with Bayou Fund, LLC, the "Bayou Funds"). The Bayou Funds operated as a massive ponzi scheme and collapsed in 2005. In 2006, the Bayou Funds filed for bankruptcy.

The Committee's basis for arbitrating its claim was an agreement between Bayou Funds and Goldman to arbitrate before FINRA. Two main sets of money transfers facilitated by Goldman were at issue in arbitration. The first set was $6.7 million in transfers from outside accounts into the four new Bayou hedge funds from June 2004 to June 2005. The Committee alleged that these funds were recoverable from Goldman because it was an "initial transferee" under the Bankruptcy Act, 11 U.S.C. § 550(a) and the transfers were "fraudulent transfers" under Section 548 of the Act. The second set of money transfers involved $13.9 million in transfers from Bayou Fund, LLC to the four new Bayou hedge funds on March 5, 2003. The Committee alleged that these transfers were fraudulent conveyances under New York's Debtor and Creditor Law and were therefore voidable transfers under Section 544(b) of the Bankruptcy Act.

On June 24, 2010, the FINRA arbitration panel awarded the Committee $20,580,514.52. After Judge Rakoff denied Goldman's petition to vacate the award, Goldman appealed to the Second Circuit. Goldman presented several arguments to support vacatur of the arbitration award under the banner of manifest disregard of the law. With regard to the $6.7 million in transfers, Goldman argued that the arbitration panel manifestly disregarded the law because it should have found that Goldman was a "mere conduit" and thus not an "initial transferee," a requirement to establish recovery by the trustee asserting a fraudulent transfer. As to the $13.9 million in transfers, Goldman asserted that the transfers failed to reach the level of "conveyances" because the Bayou Funds should have been treated as a single entity under New York law. Furthermore, Goldman argued that the arbitration panel allowed the Committee to obtain double recoveries.

Goldman Failed to Establish Manifest Disregard of the Law by the Arbitration Panel

Goldman argued in the petition to vacate that the arbitration panel manifestly disregarded the law in concluding that Goldman was an "initial transferee," rather than a "mere conduit" for the $6.7 million in transfers into four Bayou funds from outside accounts. However, the district court held that the facts presented to the panel were strikingly similar to *Bear, Stearns Securities Corp. v. Gredd*, a recent SDNY case that held in favor of the creditors' committee that Bear Stearns was an initial transferee. *Gredd* also involved a debtor trustee seeking to recover from Bear Stearns monies that the debtor hedge fund had transferred into its account prior to bankruptcy.

Despite the fact that *Gredd* was a district court decision that had not been adopted (or rejected) by the Second Circuit, the existence of a case providing grounds for the panel decision was sufficient to defeat a claim of manifest disregard of law. Goldman clearly exhibited the same type of dominion and control over the transferred funds, which allowed the trustee in *Gredd* to recover funds from Bear Stearns, including the ability to require Bayou Funds

to deposit collateral, maintain positions and margins, lend securities, and liquidate securities without notice to satisfy minimum maintenance requirements. This control protected both Goldman and Bear Stearns from the hedge funds' short trading losses.

Goldman also claimed that the arbitration panel should not have found the $13.9 million in transfers between the original Bayou Fund and the four new Bayou funds to be conveyances under New York's Debtor and Creditor Law because all the funds should have been treated as a single entity, just as they had been treated for bankruptcy proceeding purposes. Although Goldman presented two cases in support of its claims, which the Second Circuit found distinguishable, it identified no clear, on-point authority governing whether these transfers constituted conveyances and therefore Goldman failed to meet the high bar imposed to establish manifest disregard.

Goldman further argued that the arbitration panel manifestly disregarded the law because the $13.9 million in transfers did not fall within the definition of conveyances under New York law. However, because the definition of "conveyance" under New York law is broad and can include "every payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property, and also the creation of any lien or incumbrance," [4] there was no clear authority to sustain Goldman's argument. To the contrary, there was a colorable argument that a new security interest, and thus a conveyance to Goldman, was created each time funds moved between Bayou accounts.

Goldman contended that the arbitration panel improperly awarded the Committee double recoveries but failed to prove that the funds were returned dollar-for-dollar, a factual question remained, and the Second Circuit gave deference to the decision of the arbitral panels.

The Second Circuit affirmed the SDNY in its entirety.

Conclusion

Thus, although manifest disregard of the law is available to challenge arbitral awards in the Second Circuit, its application will be rare and will be applied only after the court imposes a very stringent burden of proof.

Endnotes

1. *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 585 (2008).
2. *Goldman Sachs Execution & Clearing, L.P. v. Official Unsecured Creditors' Comm. of Bayou Group, LLC*, 2012 U.S. App. LEXIS 13531 (2d Cir. 2012).
3. The four new hedge funds were Bayou Accredited Fund, LLC, Bayou Affiliates Fund, LLC, Bayou No Leverage Fund, LLC, and Bayou Superfund, LLC.
4. N.Y. Debt. & Cred. Law § 270.

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Court Denies Disqualification of Attorney in Matrimonial Litigation Despite Attorney's Initial Participation in Collaborative Law Process

Mandell v. Mandell, 36 Misc. 3d 797, 949 N.Y.S.2d 580 (Sup. Ct., Westchester Co. 2012)

By Erica Barrow

Collaborative law is relatively new on the ADR scene and there is not a well-developed body of case law. In this dispute, the Supreme Court of Westchester County held that an attorney who was exposed to confidential information during a collaborative law process was nevertheless permitted to participate in ensuing matrimonial litigation because the parties had not signed a collaborative law participation agreement barring the attorneys who participated in the collaborative process from representing their clients if they pursued litigation.

Collaborative law is a form of dispute resolution in which the parties work together to obtain a divorce settlement. The parties retain counsel specially trained in collaborative law and typically enter into a contract to cooperate in negotiating a settlement without involving the court or a third party arbitrator. A key feature of the collaborative agreement is the commitment to retain new attorneys if the collaboration fails and litigation is pursued.

The four-way participation agreement to disqualify attorneys from any litigation in the event the collaboration fails is justified because it encourages: (i) the parties to engage in candid good faith negotiations towards a settlement without any pre-litigation posturing; (ii) the parties to reach settlement because the alternative of hiring new counsel imposes additional costs and time; and (iii) the attorneys to reach settlement because they will lose the matter if they fail to reach a settlement and are then disqualified from litigating.

Here, the court reasoned that although the notion of collaborative process is based on attorney disqualification, the actual commitment of the parties is a contractual one. The parties here had discussed, reviewed but never signed the participation agreement, according to the plaintiff, because an interim support agreement could not be reached. Having been put on notice that the plaintiff would not sign, the defendant nevertheless proceeded with the collaborative process. In the absence of a signed contract agreeing to the disqualification between the disputing parties (the defendant and his attorney had agreed to a limited representation and not to represent him in any litigation), there is no basis for disqualification.

Collaborative law is a creature of contract law and depends upon a contract voluntarily undertaken. Principles of contract law are determinative to the parties' rights and their voluntary relationship with their attorneys. In *Mandell v. Mandell*, it was undisputed that neither party nor their counsel ever signed the participation agreement, which contained an article limiting the scope of counsels' representation. ("The parties understand that their Collaborative Law attorneys' representation is limited to the Collaborative Law Process"). The court concluded that the participation agreement was unenforceable in the matrimonial action since it was neither duly signed nor acknowledged by the parties. The parties' signature and acknowledgement are statutory requirements for the enforceability of all matrimonial agreements made before or during the marriage.[1] Therefore, since the parties never entered into a valid participation agreement, there was no basis for attorney disqualification.

Defendant admitted that he was on notice that the parties had not signed the agreement. The fact that he continued negotiations without the signed agreement precluded disqualification of his wife's attorney. The court refused to find a constructive agreement warranting attorney disqualification.

Defendant argued that, by virtue of Plaintiff's attorney's participation in the collaborative law process, she became privy to confidential information. However, the court found that Defendant's arguments lacked merit since he failed to establish how counsel's information exposure was prejudicial. Collaborative law is a settlement technique. As in all settlement discussions, the information exchanged during the collaborative law process is excluded as evidence in a court of law.[2] The Defendant was not prejudiced any more than would be a party who engaged in the garden-variety practice of settlement discussions with opposing counsel.

The burden of proof lies with the party moving for disqualification. In this case, the moving party could not establish either an agreement requiring disqualification or a prior attorney client relationship with his wife's counsel in light of the fact that the former and current representations are both adverse and substantially related. The moving party was also unable to establish a violation of the advocate witness rule where the lawyer acted as both a testifying witness and advocate warranting disqualification.[3]

As an aside, the court noted in dicta that the agreement to limit counsels' representation with their clients does not violate rules of professional conduct, but the court declined to rule on whether those agreements are enforceable.[4]

Conclusion

If parties wish to enter into a collaborative law process in an effort to reach a divorce settlement, they must first sign and acknowledge an agreement to limit counsels' representation to the collaboration and to require that the collaborative lawyers are disqualified if litigation is required in the event negotiation fails. Simply entering into a collaborative law process without a signed agreement does not confer the right to attorney disqualification.

Endnotes

1. Domestic Relations Law §236 [B][3].
2. N.Y. C.P.L.R. 4547 (McKinney).
3. NY ST Rules of Prof'l Conduct R. 3.7 (2009); *Mandell v. Mandell*, 36 Misc. 3d 797, 804, 949 N.Y.S.2d 580 (Sup. Ct., Westchester Co. 2012).
4. N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.0 ("Rule 5.6: Restrictions on right to practice").

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Arbitrating Arbitrability—The Second Circuit's Application of the "Clear and Unmistakable" Standard

By Saira Hussain

Whether any specific contested issue is arbitrable is of great practical importance to parties who are contesting the forum for dispute resolution. The question: who decides whether the arbitrators have jurisdiction, the courts or the arbitrators themselves, was addressed by the Supreme Court in *First Options of Chicago, Inc. v. Kaplan*:[1] "[A]rbitration is simply a matter of contract between parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration."[2]

Who, the court or arbitrators, should decide issues of arbitrability is thus a question that the parties can opt to have arbitrators decide. If the parties agreed to submit the arbitrability question to arbitration, then the court reviewing the arbitrator's decision on that question employs the same deferential standard that it applies when it reviews other matters that the parties have agreed to arbitrate.[3] In contrast, when the parties do not agree to submit the arbitrability question to arbitration the court decides.[4]

When there is a disagreement or silence among the parties on whether they in fact agreed to submit the arbitrability question to arbitration, the courts, not arbitrators, must decide whether the parties agreed to arbitrate arbitrability.[5] The Supreme Court cautioned, that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability *unless there is 'clea[r] and unmistakeabl[e]' evidence that they did so.*"[6]

Werner Schneider v. Thailand[7]

In *Werner Schneider v. Thailand*, decided August 8, 2012, the Second Circuit endeavored to apply the "clear and unmistakable standard."[8] The Second Circuit held that as a consequence of *First Options*, "a party resisting confirmation of an arbitration award is entitled to an independent court review of a question of arbitrability," *regardless of whether the issue had to do with the formation or scope of an agreement to arbitrate*, "unless there is clear and unmistakable evidence that the parties agreed to arbitrate that question."[9]

Werner Schneider v. Thailand involved an arbitration proceeding brought under a bilateral investment treaty entered into in 2002 by Germany and Thailand concerning the Encouragement and Reciprocal Protection of Investments ("German-Thai BIT").[10] The German-Thai BIT provides that disputes concerning "approved investments" between a contracting party, here Germany or Thailand, and an investor of the other contracting party may be resolved by arbitration at the request of either party.[11] Thus the contracting party is not itself a party to the underlying BIT.

Schneider, the German equivalent of a bankruptcy trustee, initiated arbitration under the German-Thai BIT on behalf of Walter Bau AG, a German firm whose predecessor in interest had made an investment in a Thai toll road.[12] Walter Bau asserted that Thailand had unlawfully interfered with investments made by Walter Bau's predecessor.[13]

Thailand objected to the arbitration tribunal's jurisdiction on the ground that the investment was not an "approved investment" because Walter Bau had not obtained the appropriate certificate from Thailand's Ministry of Foreign Affairs.[14] Walter Bau responded that the investment was an "approved investment" because the Thai Council of Ministers approved the project at various stages and because the Thai Board of Investment issued two certificates of investment for the project.[15]

The arbitral tribunal bifurcated the proceedings, dealing initially with the jurisdictional matter of whether the investment in question was an "approved investment," and then with the merits.[16] After a two day hearing on the jurisdictional issue, the tribunal found that the investments were "approved investments" within the meaning of the German-Thai BIT and that the tribunal had jurisdiction.[17] An eleven-day hearing on the merits followed and the tribunal awarded Walter Bau over 30 million euros in damages.[18]

After the conclusion of the arbitration, Walter Bau petitioned for confirmation of the award in the Southern District of New York.[19] Thailand cross-moved to dismiss, arguing that the tribunal had lacked jurisdiction to render an award since Walter Bau did not make an "approved investment."[20]

The district court concluded that it did not need to conduct a *de novo* review of the arbitration award because it found that the issue of whether the tollway project involved "approved investments" was an issue of the arbitration agreement's scope and not a question of agreement formation.[21] Applying the deferential "Manifest Disregard Standard," as set out by Section 10(a) of the Federal Arbitration Act, the district court confirmed the arbitration award.[22]

The Second Circuit

Thailand appealed. The Second Circuit determined independently, without deference to the arbitrators, whether the district court was required to make an independent determination of the arbitrability of the dispute.[23] Arbitrability, the Second Circuit explained, "is a term of art covering disputes about whether the parties are bound by a given arbitration clause [i.e., formation] as well as disagreements about whether an arbitration clause of a concededly binding contract applies to a particular controversy [i.e., scope]."[24] The Court determined that a valid arbitration agreement existed between the parties and that

the question of whether the tollway project involved "approved investments" concerned the scope of the arbitration agreement.[25] However, the court continued, the fact that the issue of "approved investments" was a question of the scope of the arbitration agreement did not absolve the district court of the need to apply the "clear and unmistakable" test.[26] The district court was still required to determine whether there was clear and unmistakable evidence that the parties intended to submit the question of whether an investment was an "approved investment" to arbitration.[27] Specifically, the court stated:

> [W]hether the district court properly declined to determine independently whether the tollway project involved "approved investments" does not turn on whether that question was one of scope or formation. *It turns on whether there was clear and unmistakable evidence of the parties' intent to commit that question to arbitration*. For in the absence of such clear and unmistakable evidence, questions of arbitrability are presumptively resolved by the court, *regardless of whether they are of scope or formation*.[28]

The Second Circuit went on to find that there was clear and unmistakable evidence that the parties intended to arbitrate arbitrability.[29] The parties had agreed that the arbitration would be conducted under the Arbitration Rules of the United Nations Commission of International Trade Law (UNCITRAL).[30] The Court found that that under Article 21 of the UNICITRAL Arbitration Rules, the parties agreed to have questions of arbitrability decided by the arbitrators.[31] Article 21 of UNICITRAL Arbitration rules provides:

> The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.[32]

The Second Circuit stated, where, as here, "parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator."[33]

Conclusion

Courts typically give an arbitrator's decision on the merits of a dispute considerable deference. However, when deciding whether parties intended to arbitrate arbitrability, the court will apply the more onerous "clear and unmistakable" test as set out by the Supreme Court in *First Options.* As seen in *Schneider*, arbitrating arbitrability can be a murky subject. Some commentators believe that the Second Circuit's decision in *Schneider* has opened the door for those resisting arbitration to argue before the court that facets of an agreement to arbitrate rise to the level of questions of arbitrability, requiring that the court address them before referring a case to arbitration.[34] If the parties are successful in characterizing a dispute as one of arbitrability, the district courts in the Second Circuit will have to evaluate the issue and the proponent of arbitration will have to meet the clear and unmistakable standard.

Endnotes

1. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995).
2. *Id.* at 943.
3. *Id.* at 944.
4. *Id.*
5. The Supreme Court stated that when a court decides whether parties agreed to arbitrate arbitrability the court, as a general matter, should apply state law principles that govern the formation of contracts. *Id.*
6. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995), quoting AT&T Tech. v. Commc'n Workers, 475 U.S. 643, 649 (1986) (emphasis added).
7. Werner Schneider v. Thailand, 688 F.3d 68 (2012).
8. *Id.* at 71.
9. *Id.* citing *First Options*, 514 U.S. at 944, 947.
10. *Id.* at 70.
11. *Id.*
12. Werner Schneider v. Thailand, 688 F.3d 68, 70 (2012).
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. Werner Schneider v. Thailand, 688 F.3d 68, 70 (2012).
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 71.
22. Werner Schneider v. Thailand, 688 F.3d 68, 71 (2012).
23. *Id.*
24. *Id.* (internal citations and quotations omitted).
25. *Id.*
26. *Id.* at 72 ("The district court should not have refused to determine independently whether the tollway project involved 'approved investments' without first finding clear and unmistakable evidence of the parties' intent to submit that question to arbitration.").
27. Werner Schneider v. Thailand, 688 F.3d 68, 72 (2012).
28. *Id.* at 71 citing Republic of Ecuador v. Chevron Corp., 638 F.3d 384, 393 (2d Cir. 2011) and Granite Rock Co. v. Int'l Bhd. of Teamsters, 130 S. Ct. 2847, 2856 (2010).
29. *Id.* at 73.
30. *Id.* at 72-73.
31. *Id.* at citing Republic of Ecuador, 638 F.3d at 393.
32. *Id.* at 72.
33. Werner Schneider v. Thailand, 688 F.3d 68, 72 (2012), quoting Contec Corp. v. Remote Solution, Co. Ltd., 398 F.3d 205, 208 (2d Cir. 2005).
34. Lawrence W. Newman & David Zaslowsky, *Who Decides Arbitrability*, N.Y.L.J., Oct. 3, 2012.

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Mediation Privilege Under the UMA—Two Recent Cases from New Jersey

By Katherine DeStefano

The New Jersey Superior Court has recently permitted testimony about mediation results in cases seeking to enforce settlements reached in mediation, finding that the mediation privilege that applies under the Uniform Mediation Act in New Jersey was either waived or inapplicable when the parties waived the confidentiality provision of the Uniform Mediation Act.[1] For the reasons set forth below, the court held the confidentiality of the mediation privilege was waived in each case.

In *Willingboro Mall, Ltd. v. 240/242 Franklin Avenue, L.L.C., et al.*,[2] decided on August 9, 2011, the plaintiff agreed to sell property to a defendant, who in turn transferred the property to two other defendants in this suit as tenants-in-common. Defendants had also executed an indemnification agreement, agreeing to pay certain outstanding municipal fines and penalties. When they failed to pay, the plaintiff sought to foreclose and the parties were referred to court-ordered mediation. The mediation resulted in a settlement memorialized in a letter to the Court sent by the counsel for defendants and setting forth the terms of the settlement. A second letter followed two weeks later, stating that the defendant had escrowed $100,000 to fund the settlement.

The plaintiff refused to accept the settlement, arguing that a final, binding settlement was never reached at the mediation session. Defendants subsequently filed a motion to enforce the settlement agreement; supported the motion with a certification of their attorney and mediator; and served the plaintiff with an offer of judgment for $100,000, which the plaintiff rejected. At the plenary hearing lasting four days, five witnesses testified including the mediator and the plaintiff's attorney. The judge concluded that a binding settlement had been reached at the hearing.

The plaintiff appealed that ruling by arguing that Rule 1:40-4(i) (which incorporates the Uniform Mediation Act's mediation confidentiality provision) precluded enforcement of any alleged oral settlement resulting from a mediation settlement that had not been reduced to writing and signed by all parties. He argued that enforcement was contrary to the "non-binding nature of the process."[3] The appellate court rejected the argument and held that a settlement is a contract, which may be enforced. Furthermore, the court found that the parties may waive the privilege provided by the statute and rule for mediation communications. The rule also provides that when the parties have reached a settlement the terms are to be reduced to writing and circulated to the parties.[4] However, the court rejected the contention that any agreement must be reduced to writing *during the mediation session*; the agreement can be reduced to writing shortly after the conclusion of the mediation. The mediation is non-binding only in the sense that the process does not impose a result on any party that does not mean that the result is meaningless.

The appellate court acknowledged that if an agreement were exclusively an oral agreement and the parties had not waived confidentiality, there would be obstacles to the enforcement of the agreement. However, here the appellate court further held that both parties waived the confidentiality conferred on the proceeding. The defendants who supported the enforcement of the settlement waived confidentiality when they supported their motion to enforce the settlement with a certification from the mediator, followed by testimony from the mediator at trial. The plaintiff failed to object to that testimony.

The second case, *Rutigliano v. Rutigliano*,[5] which cites to *Willingboro Mall, Ltd. v. Franklin Avenue, L.L.C., et al.*,[6] is an unpublished opinion issued on October 15, 2012. It involves a dispute between two brothers regarding their mother's will. The plaintiff filed a complaint against the defendant, his brother, asserting that the defendant fraudulently induced their mother to alter her will to leave property to the defendant's two children. In a six-and-a-half hour court-ordered mediation, a settlement was reached between the parties and the mediator notified the court. Shortly thereafter, the plaintiff's attorney sent the defendant's attorney a letter indicating that the plaintiff did not believe that there was a final, binding meeting of the minds and offered to settle the matter on new terms. The defendant's attorney responded a day later with a letter asserting that the mediator fully disclosed the terms and conditions of the settlement, which both parties orally agreed on, and promptly filed a motion to enforce the settlement. The plaintiff opposed the motion, arguing that they never entered into a written settlement agreement and that neither party should be allowed to testify concerning what happened during the mediation. At a plenary hearing, the judge did not consider testimony from either party's attorney or the mediator, but gave each party the opportunity to give limited testimony regarding what happened when the mediator brought the parties together to set forth the terms of the settlement. The judge reasoned that the limited testimony did not violate the confidentiality requirements of New Jersey law or Rule 1:40-4(d) because those provisions only apply to matters that are discussed during the actual mediation. Here, the parties had completed the mediation and they were merely finalizing the terms of the settlement.

The defendant testified as to the terms of the settlement at the hearing, while the plaintiff did not. Plaintiff did not testify because he believed if he did, it might be construed as a waiver of his right to maintain the confidentiality of what occurred in the mediation. The defendant testified that both parties agreed to the terms; the plaintiff never questioned them; and that the plaintiff had to leave because of a previous obligation, which is why the settlement agreement was not reduced to writing. Further, the defendant testified that the plaintiff did not object to disclosure of the settlement when the mediator asked if he could disclose the settlement to the court. The plaintiff declined the opportunity to cross-examine the defendant. At the conclusion of the hearing, the judge found the defendant's testimony to be credible and determined that the plaintiff authorized the settlement. The absence of a written agreement was not a "fatal flaw," and the judge enforced the settlement.

On appeal, the court held that both parties had waived the mediation privilege prior to the plenary hearing when they each consented to permit the mediator to notify the court that the case had been settled and thereby encouraged the court to mark the matter as settled on the docket. Having waived the mediation privilege, the additional testimony was proper. There was ample evidence in the record supporting the judge's conclusion that a settlement had occurred and the specific terms of that settlement.

These cases raise interesting process issues for the parties and for mediators—the best practice is to assure that at least a signed term sheet results from the mediation.

Endnotes

1. *See Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C., et al.*, 421 N.J. Super. 445, 24 A.3d 802 (App. Div. 2011); *Rutigliano v. Rutigliano*, No. L-3822-10 (App. Div. Oct. 15, 2012).
2. *Willingboro Mall*, *supra*, 421 N.J. Super. 445 (App. Div. 2011).
3. *Id.* at 451.
4. N.J.S.A. 2A:23C-4 (2004); R. 1:40-4(i) (2007).
5. *See Rutigliano*, *supra*, No. L-3822-10 (App. Div. Oct. 15, 2012).
6. *See Willingboro Mall*, *supra*, 421 N.J. Super. 445 (App. Div. 2011).

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The NYSBA Dispute Resolution Section held its Annual Meeting on Thursday, January 24, 2013 at the Hilton New York. After Welcoming Remarks by its Chair, Rona Shamoon, the program consisted of two panel discussions in the morning, followed by a networking lunch at Morrison & Foerster, LLP, and thereafter, two panel presentations followed by a cocktail reception at the offices of Dorsey & Whitney LLP in honor of Maris Buckner, who recently retired as the ADR Coordinator of the Commercial Division of the NYS Supreme Court of New York County.

Program I: No Longer Business As Usual

Michelle Kremer

The first program was a panel discussion entitled *No Longer Business as Usual*, which was moderated by David Singer, Esq., a partner at Dorsey & Whitney LLP and included David Abeshouse, Esq., a solo practitioner litigator, arbitrator, and mediator; Vincent Castiglione, Esq., General Counsel at Coby Electronics Corporation; Kathleen Bryan, President and CEO of the International Institute for Conflict Prevention and Resolution ("CPR"); Andy Levander, Esq., managing partner at Dechert LLP; and Zachary Carter, a partner at Dorsey & Whitney LLP.

Mr. Singer opened the discussion by citing a recent survey of chief legal officers in corporations indicating that internal corporate counsel are under moderate to high pressure to reduce financial costs, which result has occurred internally within the corporation, but that there has been little indication of change from law firms. Mr. Castiglione noted that his biggest frustration as a corporate legal officer is encountering outside counsel who do not understand his business. Mr. Levander added that as outside counsel, his focus is to determine where the client wants to end up, since such goals will affect whether arbitration makes sense to the client and counsel's decisions and recommendations.

Mr. Singer then asked how recent monetary concerns have affected client practice. Mr. Abeshouse responded that as a solo practitioner, cost control has been an issue for years and that lawyers are increasingly being held to a higher standard, with more accountability to clients for each charge. Thus, the onus is now on counsel to monitor her own behavior, and to ensure that clients are satisfied with work product. Mr. Levander noted that many corporate clients today prefer a fixed or flat rate billing structure rather than reviewing billing details. Mr. Castiglione, Ms. Bryan and Mr. Carter added that a new wave of internal corporate management utilizes the value added approach, which focuses on whether the value and goals to be obtained are worth the cost as a means of evaluating accountability for decisions and in achieving efficiency in spending.

Next, the panelists considered that a large part of trial expenses stem from the cost of discovery, which may encourage parties to turn to arbitration or other alternate dispute resolution ("ADR") options. Mr. Castiglione noted that suggesting and utilizing ADR frequently leads to a productive and extended relationship with a client.

The panelists agreed that settlements have increased and are predicted to further increase, indicating that litigation has become less desirable as corporate tolerance for risk has decreased. Mr. Castiglione reiterated that the pressure to manage money efficiently affects decision-making, and Mr. Carter added that all participants in the legal system must accept responsibility for time and cost management. Mr. Levander pointed out that some parties intentionally choose litigation and to waste time since it is more productive than a settlement in achieving their goal. Ms. Bryan discussed a new CPR corporate pledge in which companies commit to creating a systematic approach to disputes using tools such as early case assessment, analyzing goals, and what alternatives and preventative mechanisms may be instituted to achieve a more holistic plan resulting in decreased costs and risks.

The final discussion involved whether and how legal firms have changed to handle ADR. Mr. Abeshouse explained how he has been migrating his practice over to ADR, since it has been better for himself and his clients and is "the present and future" of legal practice. The other panelists each described steps that firms have taken or may take to accommodate changes to the legal landscape, such as increasing their international arbitration group worldwide, outsourcing massive discovery under supervision of a firm attorney, alternative fee arrangements with clients, better drafting of arbitration clauses to shift discovery costs, and custom designing contract mediation and arbitration process and clauses to fit a client's needs (of which sample arbitration clauses are available on the AAA website).

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Program II: New Tools For a New Age

By Emily Gornell

A new age has arrived for dispute resolution practitioners, which has left practitioners needing to update their tools. The panel discussion focused on the advances in ADR infrastructure in the court system and in the world. Additionally, the audience was introduced to new tools dispute resolution providers have made available to assist in the process.

The panel was moderated by Kathleen M. Scanlon, Esq., principal of the Law Offices of Kathleen M. Scanlon, PLLC. The panelist included: Justice Sherry K. Heitler, Administrative Judge of the Supreme Court, Civil Term of New York County; Sasha A. Carbone, Esq., Associate General Counsel of the American Arbitration Association ("AAA"); and Kathleen A. Bryan, President and Chief Executive Officer of International Institute for Conflict Prevention and Resolution ("CPR").

The discussion began with an observation by Justice Heitler that California State courts are phasing out their ADR programs due to lack of funding. Meanwhile, New York courts are taking the opposite approach by promoting ADR, with each court setting up platforms for mediation and early neutral evaluation.

Ms. Bryan went on to discuss how corporations have also begun to develop programs for early dispute resolution. For example, GlaxoSmithKlein has created the MASTER Program. MASTER is an acronym for "Maximizing Savings Through Early Resolution." This is a conflict management tool used to create an internal system for early case-assessment and litigation risk-assessment. It is essentially an early discovery procedure.

The model revolves around a three-prong approach: prevention, early case assessment, and customizing the resolution. Using this program, the company will learn approximately 80% of what will ever be known about a dispute within sixty days after an issue arises. The company will know enough to provide business partners with key factual, legal, and financial information and will utilize this early period as an ideal point to choose a resolution strategy. However, the challenge with early dispute resolution is that cooperation is voluntary for business partners, requiring an agreement to participate in the process from the other side.

The panel then shifted its focus to AAA tools that have been recently developed. Ms. Carbone walked the audience through these new tools, to be utilized in various disputes. The first tool discussed was the AAA Clause Builder that was introduced last month. This is a free resource that can be accessed at clausebuilder.org. AAA has developed this resource based on the apparent need for contracting parties to craft more customized dispute resolution clauses that best suit their own particular needs.

The second tool discussed was the Judicial Settlement Conference. AAA now offers settlement conferences conducted exclusively by retired judges that mirror court conferences in litigation. The names of numerous available retired judges can be accessed via the AAA website. The main advantage of the Judicial Settlement Conference is the use of a judge's effectiveness in evaluating each party's legal case either orally or in writing.

The third tool was the Employment Discovery Protocol. Under this Protocol, parties are required to make an early exchange of information within 30 days after a response is filed in arbitration. This protocol is a pilot program currently available only in New York.

CPR has also developed a very useful tool: the CPR 21st Century Pledge ("Pledge"). By signing this agreement, companies pledge "to commit resources to manage and resolve disputes." Often, the request to pursue ADR can be viewed as a sign of weakness. The Pledge seeks to eliminate this concern by providing an opening for the parties to approach each other about ADR without appearing weak should a dispute arises.

The panel concluded with a discussion of the role of outside settlement counsel. Ms. Scanlon encouraged the Dispute Resolution Section members to be creative in their pursuit of ADR. She emphasized that an arbitration clause does not preclude other forms of ADR.

It is important to keep the Three Cs of Dispute Resolution in mind: Creativity, Cooperation and Courage. As the ADR field continues to grow, combining the Three Cs with these new tools will create a powerful force for dispute resolution.

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Program III: Hot Topics in Arbitration and Lessons for the Future

By Natalie Elisha and Ross J. Kartez

The third panel for the day, entitled *Hot Topics in Arbitration and Lessons for the Future*, was moderated by David Singer, Esq., partner at Dorsey & Whitney LLP. The panel members included Edna Sussman, Esq., principal of Sussman ADR LLC; Michael Oberman, Esq., partner at Kramer Levin Naftalis & Frankel LLP; and Louis Epstein, Esq., Senior Vice-President and Deputy General Counsel at Transammonia, Inc. The panelists spoke about vacatur, class-action arbitration, mediation-arbitration ("Med-Arb") and the newly established New York International Arbitration Center ("NYIAC").

Michael Oberman began his presentation by speaking about vacatur and confirmation of arbitration awards which can be time-intensive, burdensome and expensive, thereby defeating the advantages of ADR. Mr. Oberman articulated a detailed history of important cases on vacatur which included the issues of "evident partiality" of an arbitrator, which had been interpreted differently throughout the state until recently resolved by the New York Court of Appeals. Regarding another area of vacatur, Mr. Oberman discussed the different interpretations of arbitration clauses under New York law as compared with Federal law. When applied, the Federal Arbitration Act ("FAA") provides a restrictive standard of review of an award; however, States may allow a more expansive review under state law, which may be counter-productive to the financial and other benefits of arbitration. Lastly, Mr. Oberman spoke about "manifest disregard" of the law, a standard of review based on an arbitrator knowing the law, but refusing to follow it. Although in *Hall Street*, Justice Souter stated that the standard of review provided by the FAA was exclusive and that "manifest disregard" should not be considered an additional review standard, some courts have applied it anyway and other courts have found that the FAA preempts "manifest disregard" entirely and that it is no longer available. The courts are split and are in need of guidance.

Louis Epstein then spoke about class-action arbitration. He began by stating that a few years ago, practitioners believed class-action arbitration was dead, which is no longer true. Mr. Epstein then went through a detailed review of case law dealing with class-action arbitration. Some major issues included silence of class-action in arbitration clauses, implied inclusion of class-action in overbroad arbitration clauses, the arbitrator's authority to interpret whether the parties intended to include class action when the clause is silent, and the validity of class-action waivers. The discussion led Mr. Epstein to review two important cases regarding such waivers: *AT&T Mobility LLC v. Conception*, 131 S.Ct. 1740 (2011) and *In re American Express Merchants' Litig.*, 667 F.3d 204 (2d Cir. 2012). In *Conception*, the Supreme Court found that arbitration agreements are enforceable under the FAA despite the presence of a class-action waiver. However, in *American Express*, the Second Circuit refused to enforce an arbitration clause based on the presence of a class-action waiver. In distinguishing the cases, Mr. Epstein explained that a court may find, as it did in *American Express*, that class-action is the only economically feasible way for a party to vindicate its claim. Thus, in cases where class-action is necessary, a class-action waiver can render the entire arbitration clause invalid. The Supreme Court is expected to clarify this issue in the upcoming year.

Last, but not least, Edna Sussman spoke about a momentous (or perhaps far-reaching, newsworthy, influential or consequential) upcoming event in New York and in the international arbitration community—the opening of the New York International Arbitration Center ("NYIAC"). Ms. Sussman began by thanking the firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP for hosting the NYIAC's celebration the prior night. She then gave a brief summary of the organizing efforts and a description of the NYIAC's operations. This noteworthy achievement would have been impossible without its many supporters, which includes various individuals, 33 law firms, and the NYIAC's current chair, Judith S. Kaye, former Chief Judge of the New York Court of Appeals. Thanks to their efforts and of numerous others, the NYIAC is scheduled to open in May 2013 at 150 East 42nd Street, on the entire 17th floor.

Hot Topics in Arbitration was a worthwhile program that instructed practitioners about evolving areas and gave the audience much to consider. The discussion of the progression of law and current events made for an exciting program.

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Ross J. Kartez is an associate at Franzino & Scher, LLC, practicing primarily in commercial litigation and dispute resolution. Mr. Kartez is also a Co-Chair of the Section's Law Students Committee.

Program IV: Ethically and Effectively Maximizing Mediation Outcomes for Your Client

By John James Fagan and Adam Jude Breaux

Kathleen M. Scanlon, Esq., principal of the Law Offices of Kathleen M. Scanlon PPLC, moderated the fourth and final panel of the NYSBA Dispute Resolution Section's Annual Meeting, which centered around the nuanced ethical predicaments mediators may face. The distinguished panel included John Feerick, Esq., Professor and former Dean of Fordham University School of Law; Kim Landsman, Esq., a partner at Golenbock, Eiseman, Assor, Bell & Peskoe; and Margaret Shaw, Esq., a mediator with JAMS NYC.

Ms. Scanlon presented vignettes based on hypothetical mediation sessions. The panelists and Ms. Scanlon discussed each vignette's ethical issues from the point of view of both advocate and mediator, while simultaneously opening the dialogue to spectators for questions and comments. The context of the hypothetical mediation concerned an individual now permanently disabled as a result of a stroke, and a pharmaceutical company that manufactured medication for depression prescribed to the individual.

The first issue addressed whether the mediator should disclose the fact that one of her relatives also suffers from depression. Mr. Feerick pointed out two aspects to this issue. First, the importance of mediator impartiality, both actual and perceived; and secondly, concern for the privacy of the relative. While he stated there did not seem to be a duty to disclose this fact, he indicated that it would be relevant if the relative had had a similar reaction to the same medication; however, he would only disclose this after receiving the relative's clear consent to do so and.

Ms. Shaw observed that the closer the relative, the greater the potential for bias. Mr. Landsman raised the fact that California has been using similar "life events" as a factor in evaluating bias and impartiality and that, in this hypothetical, the pharmaceutical company might be interested in investigating how similar those life events were.

The second topic dealt with an attorney asking other firms about the mediator and consequently discovering that the mediator's nephew was applying to a law school where the attorney sits on the admissions committee. Further, the attorney casually mentions his power on the committee to the mediator during caucus.

While it was generally agreed that the attorney's position was of little importance to the neutral, the disclosure during caucus could reasonably be inferred as a threat toward the mediator. Mr. Landsman pointed out that this is distinct from small talk and pleasantries and stated that he would withdraw if he felt it would threaten his neutrality and the only question would be one of billing. Ms. Scanlon found this to be a grey area since the mediator does not warrant the same level of candor as a tribunal. Mr. Feerick called upon his previous experience as an arbitrator and noted that while the statement did not impact his impartiality, he might disclose the comment to both attorneys for their consent to move the process along.

The next issue concerned a client telling his advocate potentially conflicting information from what was disclosed to the mediator in caucus. The question posed was whether or not an attorney ought to disclose the possible misrepresentation to the mediator.

Mr. Feerick, as the attorney, would proceed by speaking his client to understand why there were two different statements of fact and noted that while the court is not a tribunal, advocates do not know how information is being used by the mediator and should proceed with honesty; otherwise the integrity of the process and potential agreement could be in jeopardy.

Ms. Shaw pointed out that the statement was by the client rather than the attorney, and that advocates cannot communicate with the mediator without the client's consent. She cautioned mediators not to take facts at face value and to focus on helping parties seek agreement.

The final hypothetical dealt with a party conveying information regarding stock performance during a caucus and suggesting that stock be offered instead of cash in a settlement agreement.

The panel agreed that bringing up the stock option outside caucus without the party's explicit consent would not be advisable and gave ideas of ways to gain explicit consent to share information and settlement options and of what would be the impact on confidentiality if an insider trading investigation ensued.

Mr. Feerick pointed out that attorneys and mediators have the right to defend themselves from prosecution while Mr. Landsman noted that, as a mediator, if the issue dealt with the perpetuation of fraud, there may be a requirement to disclose party confidences, and that if he were approached to take any action contradictory to strict

confidentiality, he would not proceed without a court order or intervention.

Earlier in the discussion, Mr. Landsman had offered two general rules by which he mediates: first to "disclose, disclose, disclose, " and second, that no mediator is indispensable. However, as the panel closed, it became clear that there are no bright line rules to be found when addressing ethical issues. The panelists seemed to agree that each matter is fact-sensitive and must be considered in light of all the circumstances. While answers were often provided with caveats and qualifications, the theme was facilitating a fair, open and honest conversation. The conscientious pursuit of upholding the integrity of the mediation process is the greatest weapon the mediator can wield in combating ethical quandaries.

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