

New York Dispute Resolution Lawyer

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

Message from the Chair

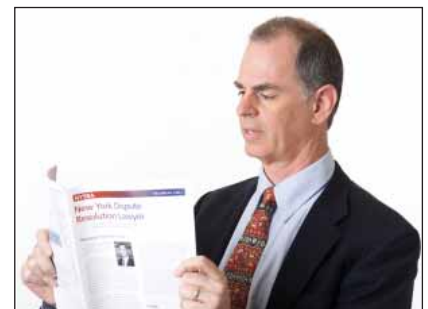
There are a host of reasons why the members of this Association chose to go to law school. Of course, we all want to make a good and honorable living; but at the core, one may wager that a healthy number of us hoped to *help others* through the practice of law and perhaps gain wisdom in the bargain. While not applying the medical arts to relieve physical suffering, we *juris* doctors also aim to relieve suffering through work on our social “mechanism.” We repair breaches of faith, correct breaches of contract, and shift property or money to compensate wrongs and help those who have suffered from acts or omissions of others.

The more time one spends laboring in the vineyards of the law, however, the more one sees that life is messy and multi-variegated. Even with a refined understanding of this social mechanism, we not only find odd variations in the ladder of statute and *stare decisis* but also observe that the wants and circumstances of parties do not necessarily fit into neat classifications of right and wrong, tort or breach.

Faced with parties in dispute, we see the uniform objective mechanism called into question. We also see the human, subjective realm all too often overlooked. From hornbook black and white through case law grey, we find human life is in living color. And the most significant enterprise may be not developing the objective structure (which, of course, remains critical) but helping the people involved.

The manner in which we practice law also matters. For years we have called for civility in the law. NYSBA’s 108th President, Vince Buzard, made it one of his watchwords. In 2006, civility was at the heart of a NYSBA

program in Albany; and last April it was front and center in a Commercial and Federal Litigation Section presentation in Buffalo. The Association as a whole has adopted Guidelines on Civility in Litigation.



Simeon H. Baum

Beyond the tone between siblings at the Bar, there is also the question of consequences of litigating disputes. We come into law caring for all people. We seek to empower all; to foster creativity, compassion and justice. Law is a fascinating engagement, and like reinsurance, an honorable undertaking. We have long benefited from the adversarial system. But does what we seek always entail fighting oppression? Does the pursuit of justice require corpses on the floor?

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Inside

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- New Books

TO JOIN THIS NEW NYSBA SECTION, SEE PAGE 10 OR GO TO WWW.NYSBA.ORG/DRS

Message from the Editor

We were pleased with the favorable reception of our inaugural issue of *New York Dispute Resolution Lawyer*. Our goal continues to be to provide up-to-date information about practice and case law developments as well as to offer some more reflective pieces about subjects we trust will be of interest. We continue to solicit your contributions and suggestions, and we invite you to be an active participant in what we hope will become a venue for dialogue among members. Letters to the editor and article submissions are welcome.

Section Activities

Legislation introduced in the 110th Congress that has been reintroduced in the 111th Congress would invalidate arbitration agreements in, inter alia, consumer, employment and franchise disputes and, by virtue of certain broad provisions, threatens to cripple all domestic and international business arbitration. We summarize briefly the Section's report on this troublesome legislation. We also report on the Section's very successful inaugural Annual Meeting and CLE as well as the excellent program offerings at the Section's first NYSBA Annual Meeting. The Section's efforts to launch a mediation program to assist homeowners caught in the subprime mortgage debacle are highlighted.

New Features

With this issue we are introducing several new features that we will be including in each issue. 1) Our own Elayne Greenberg will be contributing an ethics column, "The Ethical Compass," to keep us informed of our obligations and call our attention to some of the thornier ethical dilemmas that may arise. 2) Mediation has particular application and utility in different areas of practice for reasons related to the unique nature of each. This issue discusses mediation's special utility in resolving workplace, intellectual property and estate disputes. Future issues will offer parallel discussions in other practice areas. You are invited to submit a short précis for review to the editor if you want to contribute an article on mediation in your practice area. 3) Since the ADR field continues to evolve, we have added a book review section to enable our readers to stay current on the ADR literature and continue to add tools to their ADR toolbox.

Med-Arb and Arb-Med

Recently combined arbitration and mediation processes have been gaining in appeal as parties seek to resolve disputes more expeditiously and at reduced costs.

Issues relating to confidentiality, procedural due process and the effectiveness of the mediation step in such a hybrid process have been the subject of several law review articles. Cross-cultural differences relating to such mixed processes have been noted. We have gathered in this issue reflections on med-arb and arb-med from jurisdictions around the world. We hope that this sharing of perspectives on the efficacy and fairness of med-arb and arb-med will assist ADR specialists and parties in designing their dispute resolution process.



Edna Sussman

ADR News

The globalization of ADR and the movement by Western ADR institutions into non-Western locales and the concomitant movement of non-Western ADR institutions into Western locales inspired a thoughtful article recounting these moves and their benefits. The selection of a mediator for the Nobel Prize is noted as recognition of the important role that can be served by negotiation in reducing strife between and within nations.

Case Law Developments

This issue provides a review of several areas of developing case law. An analysis of the cases that discuss the nature and scope of court review of arbitration awards after the Supreme Court decision in *Hall Street* last year suggests that even courts finding that manifest disregard is no longer good law under *Hall Street* find ways under the Federal Arbitration Act (FAA) to effectively apply essentially the same court review. Two important decisions issued by the Second Circuit are discussed: 1) a decision addressing a class action waiver in an arbitration agreement and 2) a decision dealing with third-party discovery in arbitration under the FAA. The more common use of step clauses in contracts, calling for some combination of negotiation, mediation, arbitration or litigation, occasioned a discussion of the case law relating to the enforcement of such clauses. As always, decisions on arbitrability remind us of the need to draft the contractual dispute resolution clause with care.

Practice Developments

In order to keep our readers apprised of the continuing efforts by leading institutions and organizations to

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Sometimes, the preferred goal involves transforming conflict into harmony. This latter approach preserves all parties but alters the quality of their interaction, reorients them, and opens possibilities of resolution that offer optimal solutions and ongoing behavior.

Sometimes, as lawyers, what we learn is not just the legal system but the nature of actual life and the human heart. At times, rather than a final judgment, we see a living resolution emerge like a butterfly from the chrysalis of conflict.

These reflections mirror some of the thought and sentiment that led to the State Bar's June 2008 creation of the Dispute Resolution Section. For nearly 30 years, NYSBA had a committee on Alternative Dispute Resolution: first a special committee and then, for the last 18 years, a standing committee. Last year, recognizing that dispute resolution is not a mere alternative but is at the heart of what we do as attorneys, the State Bar embraced the reality of the widespread use of negotiation, mediation, arbitration, neutral evaluation and the host of processes for resolving disputes; lifted the 100-member cap associated with committees; and opened the door to the creation of the Section as a forum, resource, voice and network for all lawyers interested in the varied field of dispute resolution. We particularly have to thank past ADR Committee Chairs—first Elayne Greenberg for getting the Sectionhood ball rolling, and then Jim Moore, for obtaining its approval by the New York State Bar Association.

In half a year, membership has risen from 93 ADR Committee members to nearly 800 Section members—and the count is rising. The Section's ambitious membership goal of 2009 in 2009 reflects our sense that thousands of lawyers in New York find themselves regularly engaged in dispute resolution. We perceive a strong and pervasive interest in this field and believe that much can be gained from enhancing one's knowledge and conscious involvement in these processes—not the least of which is the feeling of satisfaction that we are expressing and actualizing the very ideals that first carried us to law school.

Since last June, the Section's 11 standing committees have been brimming with activity. Our Arbitration Committee, with Carroll Neesemann and Sherman Kahn at the helm, has been considering best practices for arbitrators in handling discovery in commercial arbitration. The Mediation Committee, led by Abigail Pessen and John Wilkinson, has been exploring the timely topic of creation of a mediation panel to foster resolution of mortgage foreclosures, as well as best practices for mediation. The Legislative Committee, under the leadership of Charles Moxley and Bill Brown, has been promoting enactment of the Uniform Mediation Act and Revised Uniform Arbitration Act—both of which were previously approved by the State Bar. Our Publications Committee, chaired by Edna Sussman, generated a 70-page first issue of the *New York Dispute Resolution Lawyer*, which is available in print and online. Our Ethics Committee, led by Elayne Greenberg, has been hosting stimulating breakfast programs, including such topics as ethical obligations to disclose a mediator's style as affecting informed consent and self-determination and ethical issues concerning discovery in arbitration; and we have had similarly exciting programs from the Collaborative Law Committee, chaired by Norman Solovay and Chaim Steinberger. The Executive Committee's monthly meetings, hosted at Paul Hastings', with thanks to the nurturing of IP Super Lawyer Vicki Cundiff, have featured non-stop discussions and reports, with 40 persons regularly in attendance.

The Section's Fall and Winter meetings were also amazing displays of enthusiasm, and are described elsewhere in this issue by CLE Chair Rona Shamoon and Winter Program Chair Abigail Pessen. They presented an array of top-rate substantive programs; luncheon events with keynote speakers John D. Feerick, former Dean of Fordham Law School, and Hon. Ann Pfau, Chief Administrative Judge, State of New York; more Committee meetings; and two cocktail events. Reflecting wide acceptance of dispute resolution by the Bar, it bears noting that at least four past, present or future Presidents of NYSBA—Jim Moore, Mark Alcott, Bernice Leber and Steve Younger—were in attendance together with many prominent judges, scholars, mediators, arbitrators, commissioners, OCA leaders, advocates and counselors.

Simeon H. Baum

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Section Activities

Dispute Resolution Section's First NYSBA Annual Meeting

The Dispute Resolution Section's first Annual Meeting, chaired by CLE Committee Chair Rona Shamoon and Mediation Committee Co-Chair Abigail Pessen, was well attended and well received. Two plenary programs were presented, followed by two concurrent workshops. The first plenary program, chaired by Section Chair Simeon Baum, featured Daniel M. Weitz, Robert B. Davidson and Kathleen A. Bryan discussing interesting new developments in arbitration, mediation, collaborative law, and the use of settlement counsel, and the trend toward blurring the lines among these processes. The second plenary program, chaired by Ethics Committee Chair Elayne Greenberg, focused on New York State's new Rules of Professional Conduct, which take effect April 1, 2009. John D. Feerick, Carol Ziegler and Helena Tavares Erickson discussed several new provisions affecting neutrals in these Rules and opined on hypothetical ethical dilemmas the provisions may create. For the final hour of the meeting, attendees were able to choose between a workshop chaired by Nancy Kramer, with panelists Mark Bunim, John Wilkinson, Cheryl Agris, Irene Warshauer, Vivian Berger and James Rhodes highlighting critical junctures in a typical employment mediation; and an arbitration roundup chaired by Deborah Masucci with panelists Jamie Levitt, Eric Tuchmann and Edna Sussman. Following the workshops, Chief Administrative Judge Ann Pfau delivered the keynote speech at the Section's luncheon. The formal sessions were followed by committee meetings and a well-attended reception. The materials assembled for the meeting should prove to be a valuable resource for the attendees.

Dispute Resolution Section Inaugural Annual Meeting and CLE Program

On November 13, 2008, the Dispute Resolution Section held its inaugural Annual Meeting and CLE Program in front of a sold-out crowd at the Hotel Pennsylvania in New York City. More than 130 attendees were treated to three invigorating programs, a fascinating keynote address by Dean John D. Feerick and a rousing speech of encouragement from NYSBA President Bernice Leber. Additionally, all of the attendees were supplied with a generous booklet of CLE materials, which included articles by both panelists and members of the Dispute Resolution Section.

The day began with an 8 a.m. executive committee meeting at which the various committee chairs provided an update on their activities. The morning panel, "Anatomy of a Mediation—Effective Strategies for Maximizing

Positive Outcomes," was moderated by Rona Shamoon and featured a spirited and fascinating discussion among panelists Louis Bernstein, Peter L. Michaelson, Charles Miller and Hon. Kathleen Roberts about how both mediators and counsel can maximize the effectiveness of a mediation. After the lunch break, the panel "Discovery in Arbitration—Blight or Boon?," moderated by Jonathan Honig and featuring William Brown, Hon. Milton Mollen, Marco Schnabl and Felix Weinacht, included a vigorous debate about the amount of discovery that is appropriate in arbitration. The final panel of the day, "The Uniform Mediation Act—Is It Time for New York to Get on the Bandwagon?," was moderated by Legislation Committee Chair Charles Moxley and included presentations from Hon. Michael B. Getty and Professor Richard Reuben, two of the leading experts in the field, with an equally informative presentation from our own Elayne Greenberg. All of the programs included perceptive questions from the audience. Following the final panel, and despite the late hours and long day, many of the participants stayed to mix and mingle for the cocktail hour.

Subprime Mortgage Foreclosure Crisis Mediation

The Mediation Committee has been attempting to launch a mediation program aimed at the subprime mortgage foreclosure crisis. Immediately following passage last August of the New York State statute mandating settlement conferences in subprime foreclosure proceedings, the Committee wrote to Dan Weitz, the OCA Coordinator of ADR, expressing the Committee membership's strong desire to participate in the conferences as mediators after taking any required training. This was followed up by a Committee meeting at which Mr. Weitz's colleague, Lisa Courtney, and Lynn Armentrout, a homeowner advocate, presented their rather pessimistic views on the likelihood of establishing such a program. At the Annual Meeting on January 29, 2009, Judge Pfau welcomed the Committee's interest in serving as mediators in foreclosure cases but noted that the settlement conferences conducted thus far have been plagued by problems and adjournments, and that a mediation program remains premature. The Committee plans to request a meeting with Judge Pfau to continue to press for starting a mediation program as many other states have done.

Section Report on the Arbitration Fairness

The Dispute Resolution Section issued a report in January 2009 opposing many aspects of the Arbitration Fairness Act. The bill was supported in the last Congress by leading senators and over 100 members of the house, and it has been reintroduced in the House of Representa-

tives. It would invalidate pre-dispute arbitration agreements for consumers, employees and franchises disputes. The report urges careful consideration of remedies to arrive at the optimal solution for each of these categories if legislation is to be enacted.

The bill also would invalidate pre-dispute arbitration agreements for disputes “arising under any statute intended to protect civil rights” and, in the 2007 version, also those arising under statutes “intended to regulate contracts or transactions between parties of unequal bargaining power.” This vague language threatens to nullify a host of arbitration agreements, discourage parties from entering into arbitration agreements and deriving its benefits, and lead to unnecessary and expensive side trips into court.

The statute further overturns for all arbitration, not just the designated classes, the established division of authority between the court and the arbitrator (separability and competence-competence). It provides that “an issue as to whether this chapter applies to an arbitration agreement shall be determined by Federal law. Except as otherwise provided in this chapter, the validity or enforceability of an agreement to arbitrate shall be determined by the court, rather than the arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.” Virtually every arbitration could end up in court, and the 40 years of precedents following the seminal Supreme Court decision in *Prima Paint* would be overruled.

The report is available on line at <http://www.nysba.org/Content/NavigationMenu58/DisputeResolutionReport/DrReport.doc>

Arbitration Discovery Report

On March 4, 2009, the Dispute Resolution Section Executive Committee unanimously approved the Arbitration Committee’s Report on Arbitration Discovery in Domestic Commercial Cases (“the Report”). To prepare the Report, the Arbitration Committee formed a subcommittee that conducted in-depth interviews with numerous leaders of the New York arbitration bar, including advocates, arbitrators, in-house counsel and representatives of administering organizations—bringing a variety of different perspectives to bear on the question of arbitration discovery. The subcommittee also studied work done by other organizations on the subject of arbitration discovery and did legal research on the issue. The result of this effort was a set of precepts that hopefully will help arbitrators effectively handle discovery in domestic, commercial cases in a manner that is both cost-effective and fair, and that—with due regard to freedom of contract—is consistent with the expectations of the counsel and parties who selected the arbitration process. The Arbitration Committee also hopes that the Report will be useful to help manage party expectations regarding available discovery and to continue the long tradition of arbitration as an efficient and effective alternative to litigation. Look for the Report on the Section’s Website.

LET YOUR VOICE BE HEARD!

Request for Submissions

If you have written an article you would like considered for publication in the *New York Dispute Resolution Lawyer* or have something you want to share in a letter to the editor, please send it to the editor-in-chief:

Edna Sussman
SussmanADR
20 Oak Lane
Scarsdale, NY 10583
esussman@sussmanadr.com

Articles and letters should be submitted in electronic document format (pdfs are not acceptable) and include contact and biographical information.

www.nysba.org/DisputeResolutionLawyer

THE ETHICAL COMPASS

Truth and Consequences:

What Should a Mediator Ethically Disclose About Her Mediation Style? How Might a Mediator's Style Compromise a Mediator's Neutrality?*

By Elayne E. Greenberg

Transparency is fast becoming the buzzword of mediation. Part of that transparency includes the ethical obligation of mediators to disclose in a meaningful and comprehensible way precisely how that mediator will conduct the mediation. Yes, mediation consumers have an ethical right to such information so that they may then make informed decisions about which mediator to select. Isn't that what the long-held mediation tenets of consent and self-determination are all about? Legitimizing this ethical entitlement, the revised 2005 Model Standards for Mediators guides:

A mediator shall conduct a mediation based on the principle of self-determination. Self-determination is the act of coming to a voluntary uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of mediation, *including mediator selection* [italics added for emphasis], process design, participation in or withdrawal from the process, and outcomes.¹

Mediators, what do you tell your clients about your mediation style prior to beginning a mediation? Advocates, what do you and your clients really know about a potential mediator's style before selecting that mediator? What information should mediators disclose about their mediation style in their oral and written mediation communications so that mediators comport with this ethical mandate? As we shall see, the devil lies in the detail.

Disclosing your mediator style is no easy task. If asked, many mediators may avow the practice of one of the recognized mediation ideologies: evaluative, facilitative, transformative or understanding based. Others may espouse employing a more eclectic approach. However, merely evoking a mediation ideology without more may be an inadequate response to the mediator's ethical obligation to disclose mediation style.² After all, outside the walls of our cloistered mediation community, what do these ideology labels really mean to a mediation consumer? Moreover, even if a sophisticated mediation consumer intellectually understands the meanings of these different ideologies, how accurately do these labels describe and predict how a mediator will actually mediate?

Professor Len Riskin offers a more realistic approach to describe a mediator's mediation behavior and rescue us from this ethical quagmire. In his ground-breaking article that bridges the disconnect between mediation ideology labels and mediation practice, Professor Riskin conceptualizes a mediator's behavior as a dynamic behavior that varies on a continuum from elicitive to directive.³ On this continuum, an elicitive mediator tends to support party-generated communications, ideas, options and decisions, while a directive mediator tends to guide the parties in the directions that the mediator believes they should go. As with any dynamic behavior, a mediator may, during any one mediation, exhibit a spectrum of behaviors on this continuum ranging from elicitive to directive.⁴ Moreover, a mediator may exhibit different mediation behaviors on the elicitive-directive continuum when mediating the procedural components of the mediation than when mediating the substantive components of a mediation. For example, a mediator may be primarily elicitive during the parties' discussion of the conflict while being more directive in structuring the time of mediation sessions, requiring pre-mediation submissions and holding caucuses.⁵ Thus, a mediator may exhibit a range of behaviors on the elicitive and directive continuum in the course of any given mediation.

Continuing to flesh out this more accurate conceptualization that describes a mediator's behavior, Riskin elaborates that mediators also vary in how they characterize the conflict to be mediated, from narrow to broad.⁶ A mediator who characterizes the conflict as narrow focuses on mediating the presenting conflict; whereas a mediator who defines the conflict as broad takes a more expansive view of the conflict and tends to address not only the presenting conflict but other ancillary issues as well. It is the confluence of the mediator's dynamic mediation behavior, ranging from elicitive to directive, intersecting with the mediator's definition of the conflict, ranging from narrow to broad, that helps provide a more accurate prediction of how mediators will actually mediate. Therefore, if we wish to accurately describe our mediation style, the mediator should not merely assume a mediation ideological label but explain the dynamic behavior and conflict definition that will be used in the mediation and how they may intersect.

You may be reading this, still wondering how you may explain what you do as a mediator. The task becomes more daunting for those mediators who "handle many

different types of disputes and really do not know how we are going to handle the mediation until we talk to the parties, see how its going and what feels right on the spot. We do not have one defined style of mediation, and it can change in the course of the day.”⁷ Unfortunately, that is the challenge. As Riskin explained, whether or not a mediator subscribes to one mediation ideology, that mediator is likely to display different types of mediation behavior in any given mediation. Mediators may find it helpful to review their mediation behavior by stepping back and, applying Riskin’s framework, analyze their practice (truth and consequences).

Once the mediator has figured out how to accurately describe her mediation style in a way that satisfies the ethical mandates, the next challenge is to consider how any of a mediator’s practices may impinge on a party’s right to self-determination. Answering the following questions will help meet this challenge:

- A. Are you a directive mediator?
- B. Do you decide whether the presenting mediation conflict is discussed in a broad or narrow way?
- C. Do you control or shape the way the mediation process is set up or structured in any way?
- D. Do you ever assess the strengths and weaknesses of each side’s case, predict outcomes of court or other processes or propose position-based compromise agreements based on your substantive knowledge or experience?
- E. Do your ideas about good mediation practice influence in any way how you mediate?

If you have answered affirmatively to even one of the questions, you may be exhibiting directive behavior. Directive behavior without informed party consent may be in violation of a mediation party’s right to self-determination⁸ (truth and consequences once again). Even though debate abounds about whether or not directive behavior actually impinges on a mediator’s neutrality and impartiality, it is an issue worthy of your consideration.⁹ Again, this is an opportunity for the mediator to step back and re-evaluate what she may disclose about her mediation style to potential mediation consumers so that they may continue to exercise their right to informed consent and self-determination.

Although too many of you may be groaning and dismissing this conversation, along with many other conversations about ethics, as one of those esoteric discussions that have nothing to do with real-world practice, ethically savvy practitioners are taking heed and rethinking customary practice:

- How do you describe your mediation style in a way that is understandable and reflects your actual practice in any given mediation?

- How accurately do your agreement to mediate and other written communications describe what your actual mediation style is?
- How much of your mediation style and practice comports with parties’ ethical right to make informed decisions and exercise self-determination?
- If you are going to be directive, how may you alert the parties in a way that promotes mediation consumers’ meaningful informed consent and self-determination?

Like many ethical discussions, unfortunately this article presents more questions than answers. However, hopefully the ideas that are put forth will help you to recalibrate your ethical compass and more adroitly address the truth and consequences.

Endnotes

1. Model Standards for Mediators Standard IA Self-Determination (August 2005); see also Virginia standards of ethics and professional responsibility for certified mediators D 1:
 - c. The parties must be given an opportunity to express their expectations regarding the conduct of the mediation process. The parties and the mediator must include in the agreement to mediate a general statement regarding the mediator’s style and approach to mediation to which the parties have agreed.
 - d. The stages of the mediation shall be described by the mediator.
2. Frank E.A. Sander, *Achieving Meaningful Threshold Consent to Mediator Style(s)*, 14 disp. resol. mag 2, 9 (Winter 2008).
3. Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 Notre Dame L. Rev. 1 (2003).
4. *Id.*
5. *Id.* at 11.
6. *Id.*
7. E-mail from Edna Sussman to author on 1/8/09.
8. *Id.*
9. Susan Nauss Exon, *The Effects That Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation*, 42 U.S.F.L. Rev. 577 (2008).

Elayne E. Greenberg, elayneegreenberg@juno.com, is now Chair of NYSBA’s Dispute Resolution Section Ethics Committee and author of “The Ethical Compass,” a column in this publication raising emerging ethical issues in dispute resolution. At present, Ms. Greenberg is Director of ADR Programs at St. John’s University School of Law. She is also a mediator, a dispute resolution system consultant and a dispute resolution trainer who has developed programs, written and lectured internationally on the subject of dispute resolution. Ms. Greenberg has had the joy and privilege of serving as Chair of NYSBA’s Committee on ADR (2004–2006).

****This column is intended for the education of the readership and does not intend to give advice to a specific individual.***

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The Globalization of the Arbitration Service Industry: Current Developments in the Institutional Provider World

By Barry H. Garfinkel and Christos Ravanides

Nothing abides. Heraclites' famous apothegm could not have been more accurate for describing arbitration, whose formidable advance into erstwhile dominions of state-sponsored adjudicatory authority could not have been foreseen by either the arbitration enthusiasts conferring at Lake Mohonk on the eve of the 20th century¹ or those who, two world wars later, drafted the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,² a monumental paradigm of transnational consensus. The concept of nonjudicial dispute resolution has, in fact, proven so irresistibly popular in international business over the last half-century that few, if any, controversies are now considered out of reach for arbitration.

The appearance of arbitration centers was the by-product of this tremendous rise in interstate commerce and arbitrable subject matters. As the size and procedural and substantive complexity of disputes entrusted to private decision makers outgrew the administrative capacities of the parties, more and more (and increasingly more sophisticated) private enterprises emerged to oversee the private adjudication process unburdened by constraints applicable to courts. The role of these centers has essentially been to assist the parties in making critical procedural decisions—such as selecting arbitrators out of a pool of reputable professionals—and proffer solutions when disagreements arise.

Until recently, the epicenter of the international arbitration provider industry has been in the Northern Hemisphere, where most arbitral institutions have been seated. The oldest of all, the London Court of International Arbitration (LCIA),³ was established in 1893. Since its foundation in 1926, the American Arbitration Association (AAA) has had its principal office in New York City. Also seated in the United States is the International Centre for the Settlement of Investment Disputes (ICSID), based in Washington, D.C., which is the undeniable queen of international investor-state arbitration.⁴ The French capital has been, since 1923, the seat of the International Court of Arbitration of the International Chamber of Commerce (ICC), regarded as the “most widely used and internationally accepted international organization.”⁵ The Permanent Court of Arbitration (PCA), the first supranational institution charged with the settlement of inter-state controversies, was founded in 1899 in The Hague.⁶ The Arbitration Institute of the Stockholm Chamber of Commerce, founded in 1917, was the preferred forum for East-West commercial arbitrations during the Cold War.⁷ Lesser-known institutions, yet not insignificant in terms of market share, such as the Court of Arbitration and Mediation of the Swiss Chambers of Commerce,⁸ the Netherlands

Arbitration Institute,⁹ the International Arbitral Centre of the Austrian Federal Economic Chamber,¹⁰ or the British Columbia International Commercial Arbitration Centre in Vancouver¹¹ are also located in Western Europe or North America.

Efforts to diversify the arbitration service industry through regional, non-Western-based institutions occurred only after the Second World War and were not always crowned with success. Our research indicates that the Japanese International Commercial Arbitration Committee was the first center to be created outside Europe and the United States. Established in 1950 under the Japan Chamber of Commerce, it was reorganized in 1953 as an autonomous institution with its own arbitration rules under the name Japanese Commercial Arbitration Association (JCAA).¹² Unfortunately, it never acquired the status or caseload of an international heavyweight: 15 new cases were registered in 2007, which were 6 less than the ten-year high of 21 registered in 2004.¹³

China's experimentation with arbitration has followed a different course. A predecessor to what is now known as the China International Economic and Trade Arbitration Commission (CIETAC), presently one of the busiest arbitration centers in the world,¹⁴ was first set up in 1956 under the supervision of the State Council for the Promotion of International Trade. This institution acquired international recognition only in the 1980s, when government reforms opened up the Chinese economy to foreign trade and investment.¹⁵ As a result of foreign investors' distrust of China's judicial system due to its notorious lack of independence,¹⁶ arbitration emerged as an effective and impartial dispute resolution avenue. Reflecting the growth of transnational commercial activity involving Chinese companies, CIETAC's caseload has catapulted from a mere 37 new cases in 1985 to an impressive 1,118 in 2007, almost as many as the aggregate of new cases filed with the ICC and the International Centre for Dispute Resolution (ICDR), the AAA's international arm, the same year.¹⁷ With separate arbitration rules for general commercial and financial matters, various offices across the country and privileged access to the Chinese (the world's largest) ADR market, CIETAC is the rising giant in conflict management.

The other populous nations of the continent, India and South Korea, obtained their first national arbitration institutions in 1965 and 1966, respectively. The Indian Council of Arbitration¹⁸ and the Korean Commercial Arbitration Board¹⁹ still lack global appeal, maintaining a relatively low, if not dwindling, annual flow of international cases.²⁰

Next came the “twins”: the Cairo and the Kuala Lumpur Regional Centers for International Commercial Arbitration, both created in 1978 pursuant to the recommendations of the Asian African Legal Consultative Committee (AALCO), an intergovernmental consultative organization.²¹ In subsequent years, AALCO-sponsored regional centers were also established in Lagos (1989), Tehran (2004)²² and, more recently, in Nairobi (2007).²³

Hong Kong has had its own international arbitration center since the mid-1980s (the Hong Kong International Arbitration Centre, or HKIAC) and the Singapore International Arbitration Centre (SIAC) was created in 1991.²⁴ Located in two of the world’s most vibrant business centers, both these fora have, in a short period of time, gained international praise for the reliability of their services.

Arbitration centers continued springing up in Asia (e.g., in India, Malaysia, Kazakhstan)²⁵ and Latin America (e.g., Brazil and Colombia),²⁶ but their operational radius never extended beyond national boundaries. CIETAC is a different animal. Since 1985, riding on the wave of China’s stunning economic development, CIETAC ascended steadily to the enviable position of prominence it now holds in the arbitration world in terms of case volume. In Hong Kong and Singapore, too, the annual index of new international cases filed has continued its upward momentum. The causes of this success can be easily traced in the business ethics and political environment in these former British colonies. Long before the creation of local arbitration institutions, the pervasive influence of the common law business model, which emphasizes party autonomy and freedom of contract, had sowed the seeds of acceptance of privatized litigation alternatives among the local tradesmen.

At the turn of the 21st century, however, the total fresh annual caseload of all nonWestern-based institutions, including those in China, Hong Kong and Singapore, still amounted to less than half of all new international arbitrations filed globally.²⁷ The arbitration service industry remained, until less than a decade ago, a stronghold of institutions situated in Europe or North America. The enduring Western dominance of the field and the outcomes in controversial investment arbitrations gave rise to perceptions of arbitration as tainted with Western-centric bias and hostile to the interests of developing nations.²⁸ These concerns have been, however, mitigated not only as a result of the ascendancy of China and the Southeast Asia economies and the consolidation of the market position of locally grown institutions, like CIETAC, but also by reason of internationally oriented operational strategies pursued by the established historic arbitration institutions.

To the End of the World

The explosion of international commerce at the dawn of the 21st century brought about an explosion of

demand for arbitration services. In the new age of multilateral and bilateral investment treaties and global free trade, controversies between actors of international commerce are rarely resolved through the court machinery; arbitration is the default mode of dispute settlement. In this new legal order that nurtures experimentation with ADR techniques, the arbitration provider industry has flourished and gone global.

The globalization trend has unfolded in two fashions: some institutions, in a demonstration of attentiveness to local business needs, have renewed their interest in collaborative agreements and joint ventures with peripheral arbitration centers; others have opted instead to establish field offices or even branches in parts of the world other than Europe and the United States.

This approach was first adopted by the AAA, arguably the front-runner in the go-global race. In 1996, the AAA created an autonomous division for the administration of controversies cutting across more than one jurisdiction—the International Centre for Dispute Resolution (ICDR).²⁹ Endowed with a custom-made set of arbitration and mediation rules and administrative resources, the ICDR has, in its 13 years of existence, pursued an undeviating strategy of expanding its operational reach. In addition to the 62 collaborative agreements the ICDR boasts having concluded with other arbitration centers,³⁰ a full-service ICDR office was opened in Dublin, Ireland in 2001.³¹ Other outreach initiatives followed in Latin America, the Middle East and Asia. In 2006, the ICDR and the Mediation and Arbitration Commission of the Mexico City National Chamber of Commerce agreed to sponsor the opening of an ICDR office in Mexico City. The new office would channel domestic cases to the local institution and international cases to the ICDR—a “win-win” situation for both partners.³² In 2006, the ICDR also announced the establishment in Singapore of a new office with its own arbitration rules, a joint enterprise with the highly respected SIAC.³³ The official opening of the office in October 2007 was hailed as “a major step towards the establishment of Singapore as a leading arbitration center in Asia” and a development that would “enhance institutional arbitration services for” U.S. investors in Asia.³⁴ Finally, in December 2008, the ICDR agreed with Bahrain’s Ministry of Justice to jointly found the Bahrain Chamber for Dispute Resolution (BCDR) in the Persian Gulf state.³⁵ Not unlike the Mexico City market division arrangement, the new center will administer cases of domestic/regional nature, while an ICDR field office affiliated with the BCDR will take up international matters. A novel feature of this project is the assumption by the ICDR of capacity-building functions: in a separate understanding with the Ministry, the ICDR has agreed to train local officials, jurists, and judges and share its expertise with the government.

Last year, the LCIA instigated its own rigorous cooperation with regional arbitration fora. In Febru-

ary 2008, the Deputy Ruler of Dubai cut the ribbon at the new LCIA-sponsored arbitration center in the Arab Emirate, founded under the aegis of the Dubai International Financial Center (DIFC).³⁶ Aspiring to capture the Arab market for arbitration services, the new forum establishes a cooperative model: the DIFC provides the facilities and its knowledge of the local market; while the LCIA offers brand name, a modified version of its long-standing arbitration rules and the wealth of its resources (arbitrator databases, know-how, etc.). Ambitions are lofty—through the new center, the DIFC aims “to be the key source, and sole body, in providing unique and efficient arbitration services . . . for the business and commercial community in the DIFC, Dubai, the region, and internationally”³⁷—but competition among big-name affiliates (the ICDR office in Bahrain and the LCIA-DIFC joint center) and not-negligible local players like the Cairo Regional Center for International Arbitration, all concentrated in a comparatively small geographical area, promises to be intense.

Already enjoying the benefits of a far-reaching network of national committees and field offices, the ICC recently opened in November 2008 a full-fledged branch in Hong Kong. The ICC Secretariat implant in Asia is the first-ever branch outside Paris. Intended to boost the ICC’s “visibility” in a “vital part of the world,” the new office is staffed with one case-management team operating in the same (or approximately the same) time zone as Asian arbitration users while remaining integrally incorporated in the ICC’s structure.³⁸ In announcing the venture, ICC officials explained their desire to penetrate the ever-growing market for China-related arbitration services; in their view, the ICC’s reputation for neutrality and high quality of services, including the unique internal quality control of ICC arbitral awards, makes it the “logical choice” for Asian economies.³⁹ This confidence also underlies the ICC’s decision to proceed alone without the assistance or contribution of experienced local organizations like HKIAC. Pioneering though it may be, this move places the ICC in direct competition with strong institutional service providers that dominate the ADR market for China-related disputes—namely, HKIAC and CIETAC—whose aggregate annual case registrations closely rival (if not outmatch) that of the ICC and the AAA’s ICDR together.⁴⁰

For its part, the PCA has concluded a series of “host country agreements” with selected contracting parties to either the 1899 or the 1907 Hague Convention for the Pacific Settlement of International Disputes.⁴¹ These agreements purport to ensure the unhindered conduct of PCA-administered arbitration proceedings venued in the territory of the host countries on an ad hoc basis under conditions closely resembling those guaranteed under the PCA’s headquarters agreement with the Netherlands. The PCA exerts ultimate control over case administration and, basically, cedes logistical tasks to the hosts; but these arrangements generate business for local companies,

raise the countries’ profiles among international investors as investor-friendly arbitration seats and help the hosts develop local infrastructure and expertise in conflict administration. Such host agreements have so far been concluded with Lebanon (2006), Singapore (2007), South Africa (2007), Costa Rica (2008) and India (2008). Not dissimilar in substance are ICSID’s arrangements with regional organizations that allow proceedings to be held, at the parties’ election, in venues other than Washington, D.C.⁴²

Following in the steps of well-established international players are notable Western-based domestic arbitration providers, which gradually abandon their national focus and extend their service platform beyond local market boundaries. For instance, a large U.S. domestic ADR provider, JAMS—The Resolution Experts (f.k.a. Judicial Arbitration & Mediation Services or JAMS), headquartered in California since 1979, has not only adopted “international arbitration rules” in 2005⁴³ but also formed MEDAL—The International Mediation Services Alliance with conflict-management service providers in France, the United Kingdom, the Netherlands and Italy. Furthermore, in 2007 JAMS entered into a strategic alliance with HKIAC.⁴⁴

The only major non-Western regional institution to join the chorus of arbitration organizations with global aspirations is, unsurprisingly, CIETAC. The swelling volume of international commerce originating from China or implicating or affecting Chinese companies has prompted CIETAC to form a non-China-based affiliate exclusively committed to the resolution of China-related international controversies. The project materialized in July 2008, when the so-called Chinese European Legal Association (CELA) came into being under the joint sponsorship of CIETAC and the Hamburg Bar Association in Hamburg, Shanghai’s sister city.⁴⁵ Apart from raising awareness among international investors about the legal parameters of doing business in China or with Chinese companies, the new organization has its own dispute resolution forum: the Chinese European Arbitration Center (CEAC).⁴⁶ CEAC has an exclusive focus on the prevention, management and resolution of China-related disputes. CEAC’s subject matter jurisdiction is broadly defined—it encompasses contractual disputes arising out of foreign investments in China or Chinese companies’ activities in general.⁴⁷

CEAC is designed to assist investors in bypassing cultural or legal barriers that stand in the way of credible and fair resolution of disputes involving Chinese actors and, thus, hinder these actors’ integration into a globalized economy. It is well known, for example, that the recognition and enforcement of Chinese court judgments abroad and foreign judgments in China are fraught with difficulties; arbitration, at least insofar as signatory states to the 1958 New York Convention are concerned, could furnish a more streamlined and informal process to overcome such difficulties. The CEAC Hamburg Arbitration Rules, furthermore, encourage resort to less confronta-

tional dispute settlement methods, such as mediation and conciliation, in accord with Chinese dispute resolution mores.

Chinese companies' business partners in Europe may well find in CEAC the ideal dispute resolution forum because of its emphasis on Sino-European business disputes and association with CIETAC. On the other hand, the high number of Europe-based arbitration centers raises serious questions about the viability of yet another ADR forum in the continent—particularly when Hong Kong and Singapore have already become meeting points between Chinese and Western business practices.⁴⁸

Educational Mission

All in all, recent years have witnessed a great deal of cross-border institutional mobility in ADR services. Historic institutions have been keen on spreading their tentacles around the globe, hoping to seize for themselves as large a piece of the evergrowing arbitration business as possible. In building alliances with local institutions, wishing to make partners of former competitors or taking the riskier path of self-sustained ventures into foreign business territories, international arbitration organizations have one common goal: to create platforms for the widespread propagation of ADR in areas of the world with promising business prospects. By lending their prestige to regional offices affiliated with local arbitration centers or planting their own flag in foreign lands, leading arbitration providers endeavor to gain access to burgeoning local markets.

In addition to satisfying local demand for ADR services, the physical presence of a bigname branch could drive this demand up by making ADR services more readily available and, thus, more attractive. Arbitration institutions, after all, are de facto preachers of the arbitration cause to business and legal communities, especially where the "monotheism" of statesponsored justice reins supreme. As rich depositories of knowledge and experience on ADR issues, institutional service providers such as the ICC or the AAA's ICDR are uniquely positioned to fulfill crucial educational functions, i.e.:

- disseminate their expertise through freely accessible libraries, or special information departments;
- sponsor conferences and publish scholarship on international dispute resolution with a view to demystify arbitration to lawyers, businessmen and the public; and
- disprove myths about ADR and cultivate a pro-ADR culture in regions where a credible alternative to domestic courts is needed.⁴⁹

Of course, stirring up enthusiasm for ADR is in the institutional players' own best interest: by arousing the curiosity of local businessmen and foreign investors about ADR and enhancing their level of comfort with

ADR techniques, arbitration organizations increase the chances that more disputes will be submitted to arbitration in the future.

Despite the global recession, market conditions in Southeast Asia and the Middle East—two popular destinations of the new arbitration service franchises—bode well for the future of such institutional experiments. Long-term prospects for significant continued growth remain strong as does the potential for more, and more complex, arbitrable conflicts to arise. Internationalization of commerce has a direct impact on dispute resolution mores too: parties to international transactions are more likely to prefer a-national fora for the resolution of their differences.

No country exemplifies these trends better than China. The number of new arbitrations registered at the CIETAC and HKIAC centers have almost doubled between 2000 (841 new international cases) and 2007 (1566 cases).⁵⁰ If one adds to the calculus the 213 new international cases registered at the Japanese, Korean, Singapore and Kuala Lumpur arbitration centers in 2007, it becomes obvious that the scale is tipping in favor of Asia.⁵¹ These figures promise a good return for investments in the ADR field. They also shed some light on the reason why the premier Chinese arbitration center, CIETAC, is marketing itself as an exporter of arbitration services through its collaboration with the Hamburg bar, exuding confidence about its capacity to manage Sino-European disputes and zealously defending its eminence in the market for China-related arbitration services.

Risks and Downsides

Despite the optimistic outlook of the expansionist moves described above, the emergence of more and more arbitration centers, "now in a neighborhood near you," is not without business hazards. The constant addition of new service providers, without thorough assessments of corresponding demand patterns, may simply saturate the institutional service market. To be sure, present market indicators, especially for Asia and China, point in the opposite direction: the aggregate annual number of new cases at CIETAC and HKIAC has increased at rates exceeding 50% in the last five years.⁵² In addition, arbitration industry insiders share a common, not unfounded, belief that the dispute resolution markets in many regions of the world, like the Middle East, remain relatively underdeveloped.

Yet there are signs that a turn may be impending. The end users of the arbitration product now can choose among a wide variety of services. Enhanced consumer choice has inevitably intensified competition among existing market players, urging them to emphasize product superiority and cost-effectiveness in order to maintain their clientele.⁵³ The need to officially address thorny issues like delays and costs demonstrates not only the heightened criticism facing arbitration centers on such

matters but also the robustness of the competition among the leading players.

Bridging the Gap

Business considerations aside, there are two areas where the expansion of Western-based institutions can improve the status quo. The first is bridging the gap among dispute resolution cultures and ADR perceptions in various regions of the world. The internationalization of the operational network of arbitration powerhouses beforehand concentrated in Europe and North America signals the institutional world's receptiveness to charges of proWestern bias in international arbitration proceedings. Sensibility to local idiosyncrasies is a delicate matter to many, as the lasting dominance of Western-based enterprises in the international dispute settlement arena has sparked accusations of structural prejudice against developing nations and their investors, particularly in the context of investor-host state arbitration.⁵⁴ Global institutions, like the AAA and the ICC, have already paid heed to the importance of a deeper understanding of cultural sensitivities in relation to dispute resolution.⁵⁵

Looking Ahead: Leveling the Playing Field

The other area where the globalization of the institutional service industry can make a difference is the diversification of the pool of international arbitrators. It is no secret that the market for international arbitrators is centered around a closely knit "fraternity" of highly experienced individuals who alternate in the roles of party counsel, party-appointed arbitrator, chairman of tribunal and expert witness.⁵⁶ Membership in this somewhat "exclusive group" is obtained primarily through peer and client screening. The key is a strong record of experience in the private adjudication field; cumulating experience, however, is no easy task.⁵⁷

The globalization of the institutional provider market can correct these market deficiencies by broadening the circle of qualified professionals who are included in arbitrator rosters maintained by institutional providers. This presupposes adequate training: regional arbitration centers ought to establish local "arbitrator greenhouses," initiating local jurists into the world of international arbitration. Reinforcing the local dispute settlement infrastructure and the self-reliance of regional arbitration markets would not only open up the profession of arbitrator and diversify the ADR practice in general but also increase the inclusiveness and, thus, enhance the legitimacy of the institution of international arbitration itself.

* * *

Globalization presents old institutions with new challenges. The arbitration industry's current shift eastward is certainly a positive development—for the leading market players, the regional centers, the developing economies, the international business community and international arbitration itself. In our view, this geographi-

cal expansion of an industry until recently dominated by European and U.S. entities offers a wonderful opportunity for a profound transformation—democratization may be a more precise term—of the international arbitration landscape that would allow arbitration providers to contribute more meaningfully to the resolution of societal conflicts. This opportunity should not be lost.

Endnotes

1. The Lake Mohonk Conferences on International Arbitration took place between 1895 and 1916 and were instrumental in the creation of the Permanent Court of Arbitration. See, *inter alia*, Editorial Comment, *Lake Mohonk Conference on International Arbitration*, 1 AM. J. INT'L L. 140 (1907).
2. 330 U.N.T.S. 38 (1959).
3. See <http://www.lcia-arbitration.com/>.
4. See http://icsid.worldbank.org/ICSID/ICSID/AboutICSID_Home.jsp. ICSID's structure and mandate was thoroughly presented in the previous issue of the Review. See J. Whittaker, *Investor-State Arbitration: An Overview on ICSID*, New York Dispute Resolution Lawyer 51 (Fall 2008).
5. See JULIAN D. M. LEW, ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 38 (2003).
6. See <http://www.pca-cpa.org/>.
7. See <http://www.sccinstitute.se/uk/About/>.
8. See <https://www.sccam.org/sa/>.
9. See <http://www.nai-nl.org/english/>.
10. See <http://www.wko.at/arbitration/>.
11. See http://www.bcicac.com/bcicac_about.php.
12. See <http://www.jcaa.or.jp/e/index-e.html>.
13. See appendix for statistics on international commercial (*not* investment) arbitration cases.
14. In 2007, 1118 new cases, domestic and international, were registered with CIETAC, more than double the fresh caseload registered in 2000. See appendix.
15. See CIETAC-Introduction, at http://www.cietac.org.cn/english/introduction/intro_1.htm.
16. In the words of Zou Keyuan, corruption in China is "rampant" and "exceptionally severe" and "laughs at law enforcement." See CHINA'S LEGAL REFORM—TOWARDS THE RULE OF LAW 84 (2006).
17. See appendix and the second chart at www.hkiac.org/HKIAC/HKIAC_English/en_statistics.html (detailing the caseload growth at HKIAC and CIETAC since 1985). The post-2000 data for CIETAC and the ICC in these charts allegedly reflect "domestic" as well as "international" cases, a distinction arbitration centers draw not always clearly and not in a uniform way. Even these mixed data, however, are representative of the rising acceptance of ADR in China.
18. See <http://www.ficci.com/icanet/services.htm#1>.
19. See www.kcab.or.kr/jsp/kcab_eng/index.jsp.
20. In 2007 the Korean Board received 59 cases—exactly as many as in 1998. See appendix. We did not include statistics for the Indian Council of Arbitration because no more than ten new international cases have been filed with the Council every year since 2003. See 39th Annual Report at 14, 40th Annual Report at 13, 41st Annual Report at 11, 42nd Report at 14, 4d Annual Report at 13 (available at <http://www.ficci.com/icanet/activity-report.htm>).
21. See <http://www.crcica.org.eg/history.htm> and <http://www.rcakl.org.my/about.htm>, respectively.
22. See <http://www.trac.ir/static.aspx?id=2>.

23. See <http://www.aalco.int/Regional%20Arbitration%20Centre.htm>.
24. See Singapore Regional Arbitration Center, <http://www.siac.org.sg/aboutus.htm>; and Hong Kong Regional Arbitration Center, http://www.hkiac.org/HKIAC/HKIAC_English/main.html. See also Michael Moser, *International Arbitration in Asia*, THE ASIA PACIFIC ARBITRATION REVIEW (2009), available at <http://www.globalarbitrationreview.com/handbooks/12/sections/47/chapters/487/international-arbitration-asia> (mentioning other arbitration centers in Asia).
25. These centers are the Indian Institute of Arbitration & Mediation (http://www.arbitrationindia.com/htm/about_us.htm), founded in 2001; the Malaysian Institute of Arbitrators (<http://www.miarb.com>), founded in 1991; and the International Arbitration Court of the Juridical Centre "IUS" of Kazakhstan (http://iusea.com/index_en.php), created in 1993 and since 2002, encompassing under its umbrella an independent arbitral institution based in St. Petersburg, Russia.
26. These are the Arbitration and Conciliation Center of the Bogotá Chamber of Commerce (<http://www.cacccb.org.co/ingles/portal/default.aspx>), created in 1983; the Brazilian Chamber of Business Arbitration (<http://www.camarb.com.br/principal/default.aspx>), founded in 2000; and the Chamber of Mediation and Arbitration of the São Paulo Industrial Center (<http://www.camaradearbitragemsp.org.br/ingles>), established in 1995.
27. See appendix. In 2000, the score was 1393 (for Western-based centers) vs. 985 (for non-Western-based centers). This trend persisted until 2005, when the latter overtook the former in terms of new cases filed (1433 vs. 1407). These statistics may be tainted by the inclusion of "domestic" cases in the data concerning some of the centers included in the charts, but even so, the increase of arbitrations filed with Asian-based institutions in recent years undoubtedly attests to a significant change of regional market dynamics in the arbitration provider industry.
28. See, *inter alia*, A.S. El-Kosheri, *Is There a Growing International Arbitration Culture in the Arab-Islamic Juridical Culture in INTERNATIONAL DISPUTE RESOLUTION: TOWARDS AN INTERNATIONAL ARBITRATION CULTURE* 47, 47-48 (A. J. van den Berg ed., 1998) (attributing the Arab world's skepticism toward international arbitration to perceptions of bias by Western-centered institutions and arbitrators); A. A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT'L L. J. 419 (2000).
29. See http://www.adr.org/about_icdr.
30. *Id.*
31. See ICDR 2001 Annual Report at 3, <http://www.adr.org/si.asp?id=3613> ("We chose Ireland, because of its healthy business climate, its accessibility to Europe, and a body of law that is very supportive of the arbitration process.").
32. See *ICDR Opens Office in Mexico City*, Press Release, February 16, 2006, www.adr.org/sp.asp?id=28529.
33. See *ICDR to Open Office in Singapore*, Press Release, February 16, 2006, www.adr.org/sp.asp?id=28518.
34. See *ICDR and SIAC Open Office in Singapore*, Press Release, October 15, 2007, <http://www.adr.org/si.asp?id=5090>.
35. See *Kingdom of Bahrain and AAA Partner to Establish Domestic and International Mediation and Arbitration Center*, Press Release, December 2, 2008, <http://www.adr.org/si.asp?id=5612>.
36. See *The Launch of DIFC / LCIA Arbitration Center*, Eye of Dubai News, February 19, 2008, <http://www.eyeofdubai.com/v1/news/newsdetail-18496.htm>.
37. *Id.*
38. See *ICC International Court of Arbitration Opens First Asia Office in Hong Kong*, Press Release, November 19, 2008, <http://www.iccwbo.org/icccffjg/index.html>.
39. *Id.*
40. In 2007, 1220 new cases were registered at the ICC and the AAA/ICDR, less than the 1566 new cases registered at HKIAC and CIETAC. See appendix. On the other hand, the inclusion of "domestic" cases in some of the data in the chart may be said to affect the accuracy of these numbers. See also *supra* notes 17 and 27.
41. See Host Country Agreements, http://www.pca-cpa.org/showpage.asp?pag_id=1276.
42. See http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=RightFrame&FromPage=Co-operation%20agreements&pageName=Coop_with_Oth_Inst. ICSID's caseload is ballooning: out of 281 cases handled by ICSID in its 42 years of existence, more than half have been filed in the last five years. See <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=Main&actionVal=ViewAllCases>.
43. See http://www.jamsadr.com/rules/international_arbitration_rules.asp.
44. See http://www.jamsadr.com/press/show_release.asp?id=220 and http://www.jamsadr.com/press/show_release.asp?id=262.
45. See <http://www.cela-hamburg.com/>.
46. See <http://www.ceac-arbitration.com/>.
47. See *Vision, Goals and Function of CEAC*, <http://www.ceac-arbitration.com/2-Vision-Goals-Function-of-CEAC.9.0.html>.
48. See *Asia2Europe Newsletter*, Edition N. 7, July 2008, <http://www.ceac.search-solution.de/fileadmin/CEAC/English/Asia2Europe.pdf>.
49. For a list of activities sponsored by the ICC in these directions, see A.M. Whitshell, *How does the International Chamber of Commerce (ICC) Contribute to Capacity Building? The way forward, in Making the Most of International Investment Agreements: A Common Agenda*, Symposium Co-organized by ICSID, UNCTAD, and OECD, 12 December 2005, at <http://www.oecd.org/dataoecd/22/46/37215823.pdf>. Along the same lines, the AAA has founded a resourceful ADR university (<http://www.aaauonline.org/>), while JAMS has established the JAMS Foundation to fund conflict resolution initiatives at the national or international level and share its dispute resolution expertise for public interest purposes. See <http://www.jamsadr.com/JAMS-Foundation/JAMS-Foundation.asp>.
50. See appendix. For the inclusion of "domestic" cases in the 2007 data, see *supra* note 17.
51. *Id.* As Michael Moser, *supra* note 24, notes, "More and more Asian parties are questioning the benefits of the traditional paths to London, Paris, Stockholm and Zurich, and are seeking to resolve disputes closer to home."
52. In 2003, 996 new cases were received at both CIETAC and HKIAC; in 2007, this index climbed to an impressive 1566. See appendix.
53. See, e.g., *Techniques for Controlling Time and Costs in Arbitration*, Report from the ICC Commission on Arbitration (2007), http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf; ICDR Billing Guidelines, at <http://www.adr.org/sp.asp?id=31618>; see also *The Case for Administered Arbitration*, at www.lcia.org/LCIA_folder/lcia_main.htm.
54. In a recent wave of nationalism in Latin America, e.g., Bolivia denounced the ICSID Convention. See *Bolivia Submits a Notice Under Article 71 of the ICSID Convention*, Press Release, May 16, 2007, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement3>.
55. See, e.g., www.adr.org/icdr ("The ICDR's international system is premised on its ability to . . . understand cultural sensitivities . . ."); www.lcia.org/LCIA_folder/lcia_main.htm (taking pride in the fact that the LCIA Court consists of 35 members, of whom "no more than six may be of UK nationality."); See also Jason Fry & James Morrison, *International Arbitration in South and East Asia—Opportunities, Challenges and the ICC Experience*, THE ASIA PACIFIC ARBITRATION REVIEW (2009), <http://www.globalarbitrationreview.com>.

com/handbooks/12/sections/46/chapters/483/international-arbitration-south-east-asia-mdash-opportunities-challenges-icc-experience (stressing that the ICC has recently “grown in size and diversity” and noting that members have been appointed to the ICC Court from Bangladesh, China, Hong Kong, India, Indonesia, Japan, South Korea, Malaysia, Nepal, Pakistan, Philippines, Singapore, Sri Lanka, Taiwan and Thailand).

COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 49–50 (1996).

57. For the barriers to entry in the arbitrator market, see Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 AM. U. INT’L L. REV. 957, 967–69, 977–80 (2005).

Barry H. Garfinkel, Barry.Garfinkel@skadden.com, co-heads the international arbitration practice of Skadden, Arps, Slate, Meagher & Flom LLP; Christos Ravanides, Christos.Ravanides@skadden.com, is an associate in the firm’s international arbitration practice.

56. See Iran-U.S., Case No. A/18, 5 Iran-U.S. Cl. Trib. Rep. 251, 336 (1984) (noting that “professional arbitrators . . . form[] an exclusive club . . . automatically brought into almost any major dispute by the operation of predetermined methods”); YVES DEZALAY & BRUYANT GARTH, *DEALING IN VIRTUE: INTERNATIONAL*

APPENDIX

Chart A

International Arbitration Cases Received

(Source: www.hkiac.org/HKIAC/HKIAC_English/en_statistics.html)

	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
AAA	387	453	510	649	672	646	614	580	586	621
CIETAC	645	609	543	731*	684*	709*	850*	979*	981*	1,118*
HKIAC	240	257	298	307	320	287	280	281	394	448
ICC	466	529	541	566*	593*	580*	561*	521*	593*	599*
JCAA	14	12	10	17	9	14	21	11	11	15
KCAB	59	40	40	65	47	38	46	53	47	59
KLRCA	7	10	11	1	2	4	3	6	1	2
LCIA	70*	56*	81*	71*	88*	104*	87*	118*	133	137
SIAC	67	67	83	99	114	100	129	103	119	119
STOCKHOLM	92	104	73	74	55	82	50	56	141	84
VANCOUVER	49*	60*	88*	88*	71*	76*	84*	77*	76*	82*
VIENNA	100	100	100	100	33	45	50	55	N/A	40

AAA	American Arbitration Association
CIETAC	China International Economic and Trade Arbitration Commission
HKIAC	Hong Kong International Arbitration Centre
ICC	International Chamber of Commerce
JCAA	Japan Commercial Arbitration Association
KCAB	The Korean Commercial Arbitration Board
KLRCA	Kuala Lumpur Regional Centre for Arbitration
LCIA*	London Court of International Arbitration
SIAC	Singapore International Arbitration centre
STOCKHOLM	Arbitration Institute of the Stockholm Chamber of Commerce
VANCOUVER*	British Columbia International Commercial Arbitration Centre
VIENNA	International Arbitral Centre of the Austrian Federal Economic Chamber

*The statistics include domestic as well as international arbitrations

Mediator Receives the Nobel Peace Prize

By Irene C. Warshauer¹

The award of the Nobel Peace Prize in 2008 to Martti Ahtisaari is in recognition of his extraordinary dispute resolution work throughout the world as well as confirmation that mediation has come of age. The Nobel Committee found that Mr. Ahtisaari's "efforts have contributed to a more peaceful world and to 'fraternity between nations' in Alfred Nobel's spirit."² The announcement describes Mr. Ahtisaari as "an outstanding international mediator. Through his untiring efforts and good results, he has shown what role mediation of various kinds can play in the resolution of international conflicts. . . . and [the Nobel Committee] wishes to express the hope that others may be inspired by his efforts and his achievements."³

"It's a disgrace for the international community that we have allowed so many conflicts to become frozen, and we are not making a serious effort to solve them."

Mr. Ahtisaari's activities as a mediator span the globe. He assisted in the creation of the independent country of Namibia, was central to the resolution of the Aceh dispute between rebel forces and the Indonesian government, and worked in Kosovo to resolve the conflict there. He also worked to mediate disputes in the Horn of Africa, Northern Ireland and Central Asia.

Personal Background of Mr. Ahtisaari

Mr. Ahtisaari was born in 1937 in Viipuri, Finland. The area was taken over by the Soviet Union, and his family moved around frequently. This presumably made him feel comfortable with people he did not know while simultaneously being an outsider. "He said that experience had given him a lifelong sympathy for the 'eternally displaced' and a 'desire to advance peace and thus help others who have gone through similar experiences.'⁴ He trained as a primary school teacher and worked as a teacher until 1965, when he joined Finland's foreign ministry. He speaks many languages, including French, English, Swedish and German in addition to his native Finnish, an ability that could only assist his international mediations and negotiations.

In 1973 he became Finland's ambassador to Tanzania, his first post in Africa. He was actively involved with the United Nations and served as its representative in many parts of the world, especially in Africa, where from 1977 to 1981 he was a UN Commissioner for Namibia. He later was "the special representative in charge of the United

Nations Transition Assistance Group or Untag, [where] he helped smooth along Namibia's transition to independence." He "served on and off in the region through 1991."⁵ From 1994 to 2000 he was president of Finland.

During the course of his career he worked to resolve many African disputes. Of all of his accomplishments, he is most proud of his part in the "negotiations that led to the independence of Namibia from South African rule in 1990."⁶ Mr. Ahtisaari stated that those negotiations were "absolutely the most important because it took such a long time."⁷ A review of Mr. Ahtisaari's mediation activities places him in the center of many major international controversies. He was an arms inspector in Northern Ireland and a UN Special Envoy in the Horn of Africa, working on the humanitarian crisis. He worked to "end the conflict in Kosovo and in 2005 . . . [was] . . . appointed UN special envoy for final status talks."⁸

He created the Crisis Management Initiative of which he was Chairman from 2000 to 2004. Through that organization he arranged meetings between Iraqi Shiite and Sunni Muslims. Mr. Ahtisaari's view of the responsibility of the international community with respect to conflicts is that

it's a disgrace for the international community that we have allowed so many conflicts to become frozen, and we are not making a serious effort to solve them.⁹

Gareth Evans, president of the International Crisis Group called . . . [Mr. Ahtisaari] "a brilliant negotiator and mediator, with a tremendously effective personal style that combines charm and good humor with an iron determination." Mr. Evans wrote that Mr. Ahtisaari "combines, to great effect, immense personal charm with a tough, no-nonsense, tell-it-like-it-is approach to conducting negotiations."¹⁰

Mr. Ahtisaari's work with the Indonesian government and the Aceh rebels ended a fight that had gone on for 30 years. In addition to his "charm and good humor and iron determination," his style is epitomized by a quote from one of the negotiators in the Aceh conflict: "His method was really extraordinary. He said, 'Do you want to win, or do you want peace?'"¹¹

An example of Mr. Ahtisaari's global views and tenacity is his recent statement that "President-elect Barack Obama should move quickly to try to resolve conflicts in the Middle East . . . urging Mr. Obama to give the region high priority in during his first year in office."¹² He is quoted as saying, "The credibility of the whole international community is at stake. . . . We cannot go on, year

after year, simply pretending to do something to help the situation in the Middle East. We must also get results.’”¹³

Conclusion

Mr. Ahtisaari exemplifies the skills and talents of a mediator: patience, willingness to work with all types of parties, persistence, creativity and a sense of moral responsibility. His receipt of the Nobel Peace Prize for his international mediation work is a great and well-deserved honor for him, as well as a benefit to the mediation profession by providing public attention and knowledge to the work, skills and results that can be achieved by mediators in mediation.

Endnotes

1. The author has relied upon the various sources cited in this article for the majority of its content rather than on any independent research by her.
2. Announcement of the Nobel Peace Prize for 2008 by The Norwegian Nobel Committee, Oslo, October 10, 2008, available at Nobelprize.org.
3. *Id.*
4. NYtimes.com 10/11/2008 <http://www.nytimes.com/2008/10/11/world/europe/11nobel.html>.
5. *Id.*

6. BBC News, Profile of Martti Ahtisaari, November 2008.
7. *Id.*
8. BBC News, “Ahtisaari wins Nobel Peace Prize,” <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/Europe/7662922.stm>.
9. Telephone interview by Adam Smith, Editor-in-Chief of Nobelprize.org with Martti Ahtisaari, recorded three hours after the announcement of the 2008 Nobel Peace Prize, on October 10, 2008.
10. “Former Finnish President Wins Nobel Peace Prize,” NYTimes.com 10/11/2008.
11. *Id.*
12. “Nobel Winner Urges Obama to Act,” NY Times 12/11/08 p. A10.
13. *Id.*

Irene C. Warshauer is an attorney, arbitrator and mediator with broad experience in a wide variety of business disputes and serves on many prominent panels, including the American Arbitration Association and the International Institute for Conflict Prevention and Resolution. Her practice is in New York City. She is the Co-Chair of the Diversity Committee of the NYSBA's Dispute Resolution Section. She can be reached at icw@irenewarshauer.com or on her Website www.irenewarshauer.com.

Editor's Note: President Obama's Memorandum on Collaboration

On January 21, 2009 President Obama issued a memorandum to launch an effort to “ensure the public trust and establish a system of transparency, public participation, and collaboration.” The memorandum calls for:

- (1) increased transparency in government
- (2) increased opportunities for Americans to participate in policy making
- (3) increased use of innovative tools, methods and systems to enable cooperation and collaboration among all levels of Government, and with nonprofit organizations, businesses and individuals in the private sector

The memorandum directs the development within 120 days of recommendations for an “Open Government Directive” that will instruct executive departments and agencies to take specific actions to implement these principles. Federal Register, Vol. 74, No. 15 January 26, 2009.

Tailoring Your Arbitration Proceeding with the New CPR Protocol

By Lawrence W. Newman

There is uncertainty in every form of dispute resolution: judges may handle their calendars differently; courts in various parts of this country have different practices. Moreover, unless a locality has only one judge, there is uncertainty as to who will hear the case. But there is some predictability in that there are codified rules of procedure, both general and local, that govern the way procedural matters are to be dealt with.

In arbitration, on the other hand, there is less certainty. The rules of arbitral institutions deliberately leave open to the arbitrators and the parties the fashioning, in particular cases, the ways in which arbitrations will be conducted. Arbitrators come from varying backgrounds. They may be businessmen, former judges, engineers or, most frequently, lawyers. Drawing on their experience, they bring to arbitration proceedings their own understanding as to how proceedings should be conducted. A former judge may have a strong sense of how to run proceedings, whereas a businessman may have no well-formed ideas.

“The approach that an arbitral tribunal will take in a given case cannot be easily predicted.”

The differences are most evident in two areas—the extent of discovery permitted by one party of an adversary’s documents and the way in which witnesses are examined in hearings. These differences in arbitrators’ practices manifest themselves most often when the arbitrators or the parties are from different nations. Arbitrators from different cultures have varying ideas about how proceedings should be conducted.

The approach that an arbitral tribunal will take in a given case cannot be easily predicted. An arbitral institution may, in an international case, appoint arbitrators or a chairman from a culture quite different from that of one or more of the parties or of the arbitrators appointed by them. The parties often have little way of knowing the background and culture of the arbitrators who will be appointed and therefore of the way in which the arbitration will be carried out. Even when each party appoints its own arbitrator, the chairman, who has great influence over procedural matters, may have unpredictable procedural predilections.

For example, an American party may expect to support its case by obtaining documents from its adversary through an order that it hopes to get from the arbitrators.

But when the arbitration comes to pass, the American party may learn, to its dismay, that the chairman or other panel members abhor the concept of “discovery” and believe that, unless there are exceptional circumstances, neither party should be obliged to produce to the other side or the tribunal any documents other than those it chooses to present in support of its case. Conversely, a European party may go into an arbitration never thinking that any of its internal documents could see the light of day in the proceedings. But an American-oriented tribunal may take it as a given that the parties will engage, prior to the evidentiary hearing in the case, in an exchange of each other’s documents, including internal documents.

Similarly, a party may believe it to be an important part of its case to take the depositions, prior to the hearing, of witnesses from the other side or of third parties in order to learn more about the other party’s case. The arbitrators may, however, reject such a notion. A party may expect to put its witnesses on the stand in the arbitration to present their direct testimony orally. But the arbitrators may, in the interest of economy, order that all direct testimony be presented in the form of written witness statements. A party may expect to obtain admissions from an adversarial witness on cross-examination but may be told that his time for such an inquiry is sharply limited by the tribunal.

When businessmen experience these kinds of culture shocks, and thereafter the arbitration turns out badly for them, they may turn against arbitration as a means of dispute resolution. Cognizant of the finality of arbitration, with its virtual lack of an appellate process, these persons may not, in the future, want to take the risks of agreeing to arbitrate when they cannot have some reasonable confidence that the proceedings will be conducted in a way they can predict.

Recently, steps have been taken to enable users of arbitration to obtain greater predictability as to the procedures that will be followed in their arbitrations. The International Institute for Conflict Prevention & Resolution (CPR) issued, in January of this year, its *Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration*, which addresses the various ways in which arbitrations may be conducted and enables the parties to consider and select among them.¹ The CPR Protocol breaks new ground by setting out alternatives, called “modes,” as to the varying levels of procedural complexity from which parties may elect to have their arbitration governed. Their choices can be made as early as the time when they enter into their agreement to arbitrate, set forth

in the dispute-arbitration clause contained in the document setting out the deal made by the parties.

With respect to disclosure of documents, the Protocol suggests that the parties include, in their agreement to arbitrate or in a stipulation after the dispute arises, the following language: “The parties agree that disclosure of documents shall be implemented by the Tribunal consistently with Mode [] in Schedule 1 of the CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration.”

The modes in Schedule 1 permit the parties to select among, at one extreme, no disclosure of documents other than of documents that each side will present in support of its case to, at the other end of the spectrum, “pre-hearing disclosure of documents regarding non-privileged matters that are relevant to any party’s claim or defense, subject to limitations of reasonableness, duplication and undue burden” (Schedule 1, Mode D). The two modes in between these two extremes, modes B and C, provide, generally, for the pre-hearing disclosure of documents “essential to a matter of import in the proceeding for which a party has demonstrated a substantial need.” Mode B limits this disclosure to documents in the possession of another party, and Mode C provides, in addition, for disclosure of the documents in the possession of persons who are noticed as witnesses by the party requested to provide disclosure.

Thus, the parties have the capability, by incorporating by reference a mode from one or more of the schedules in the CPR Protocol, of establishing the general scope of the document disclosure that will be permitted in their arbitration. What is important is that once a mode is selected, the arbitrators are obligated not to deviate from the parties’ selection of the mode of documentary disclosure unless they determine that “there is compelling need for such disclosure”—to deal with such situations as the occurrence of unexpected events not taken into account by the parties when they selected their disclosure modes (§ 1(c)).

The Protocol also deals with electronic disclosure and, again, breaks new ground by providing descriptive language setting out various levels of electronic disclosure ranging from the minimal to the most liberal. Thus, Mode A limits disclosures by each party to copies of electronic information in support of that party’s case in “reasonably usable form” such as printouts. On the other end of the spectrum, Mode D provides full documentary disclosure similar to what would be permitted in a U.S. court—information regarding non-privileged matters that are “relevant to any party’s claim or defense, subject to limitations of reasonableness, duplicativeness and undue burden.”

The middle two electronic-disclosure modes (modes B and C) permit the parties to limit the extent of their other electronic disclosure in various ways: by the number of

designated custodians whose electronic information is to be produced; by the dates of creation of the electronic information; and by the ways in which the electronic information is stored. In any event, Mode B also provides that there may not be disclosure of information “other than reasonably accessible or active data.” Mode C is similar to Mode B except that it permits the parties to enlarge the number of custodians whose electronic information will be produced and to provide for a wider time period to be covered. The parties may also, under Mode C, agree to permit, “upon showing a special need and relevance,” the disclosure of “deleted, fragmented or other information difficult to obtain other than through forensic means.”

“The CPR Protocol breaks new ground by setting out alternatives . . . as to the varying levels of procedural complexity from which parties may elect.”

In addition, Schedule 2 of the Protocol provides that parties selecting modes B, C or D must meet and confer, prior to an initial scheduling conference with the tribunal, concerning the “specific modalities and timetables for electronic information disclosure” (see Schedule 2, Mode D). In dealing with electronic information, the Protocol goes further than other institutions, such as the American Arbitration Association and the Chartered Institute of Arbitrators, which, although they address in their guidelines the phenomenon of electronic disclosure, do not attempt to describe or categorize various levels of disclosure of electronic information.

The Protocol also deals with the varying ways in which the testimonies of witnesses at arbitration hearings must be presented. Section 2 of the Protocol directs parties’ and arbitrators’ attention to the option of presenting the direct testimony of witnesses through written statements submitted in advance of the hearings. The practice of shortening hearing time through the use of witness statements is well known in international arbitrations but is relatively seldom used in domestic arbitrations. The Protocol describes the ways in which witness statements may be used and recommends that some introductory questioning of the witness be permitted, prior to the interrogation of the witness on cross-examination (§ 2(a)).

The Protocol also addresses the possibility of the use of discovery depositions—the taking of the testimony of witnesses prior to their appearance at the evidentiary hearing before the arbitrators. The Protocol does not encourage the use of discovery depositions, stating that they should be permitted only where the testimony is expected to be material to the outcome of the case in and where certain exigent circumstances apply. These circumstances include where witness statements are not being used, the parties agree to the deposition and/or the witness is not likely to be available to testify before the tribunal (§ 2(c)).

The Protocol contains two provisions relating to cross-examination of witnesses.² The Protocol also suggests that the form and length of cross-examination should be such as to afford a fair opportunity for the testimony of a witness to be fully clarified and/or challenged (§ 2(g)).

As with respect to documentary disclosure, the parties are afforded, in Schedule 3, different modes of presenting witnesses, ranging from the submission in advance of witness statements to no witness statements with some depositions.

Thus, the Protocol suggests to the parties to a prospective or existing arbitration that they may wish to exercise their right to select the kinds of disclosure and witness testimony they want by agreeing to make applicable one or more of the modes in the Protocol schedules. They may make their selection when they are entering into their agreement to arbitrate or later on, such as at the time of the scheduling hearing with the arbitrators. The Protocol, which offers suggestions to the arbitrators concerning the expeditious handling of arbitrations, suggests to arbitrators that in any event, the scope and timing of disclosure may be taken up at a scheduling conference (Schedule 1(e)(1)).

The modes may be used not only for arbitrations under the CPR Arbitration Rules but also for proceedings under the rules of other arbitral institutions or those governing ad hoc arbitrations. The Protocol is intended to be applicable to both domestic and international arbitration proceedings.

It is to be hoped that the use of the modes of the Protocol will serve to remove some uncertainty from the minds of parties and counsel contemplating the resolution of commercial disputes in arbitration by affording them a greater measure of predictability in the proceedings by which their disputes will be resolved. Moreover, it may well be that disputes will be resolved with greater efficiency through the use of the Protocol's modes. To the extent that the participants in arbitration have a clearer understanding of the procedural avenues down which they will likely proceed, there will be fewer time-consuming detours for collateral disputes about procedural issues.

Endnotes

1. See CPR Website, www.cpradr.org.
2. Section 1(e)(3) and § 2(g)—the Protocol suggests that a party may use documents not previously disclosed by it to the other party if the documents are used only for the impeachment of the other party's witnesses (§ 1(e)(3)).

Lawrence W. Newman is a partner in the Litigation Department of the New York office of Baker & McKenzie, where he specializes in international litigation and arbitration. Mr. Newman is the Chairman of the Arbitration Committee of CPR, which drafted the Protocol, and he was the Chairman of the working group of the Committee that was responsible for Section 1 of the Protocol, on the disclosure of documents. He can be reached at lwn@bakernet.com.

Please come—You are all invited to our meetings

Dispute Resolution Section Schedule of Executive Committee Meetings

All meetings, except the November, January, and April Meetings, will be held at:

Paul Hastings
75 East 55th Street, New York, NY
Conference Rooms 701/702
8:30 a.m. - 10:00 a.m.

Please RSVP to Sue Fitzpatrick at sfitzpatrick@nysba.org if you plan to attend.

- **April 23**—Time TBA Sheraton New York Hotel & Towers
(held in conjunction with Spring Meeting of ABA Section on Dispute Resolution)
- **May 21**
- **June 8**—Room 701/702 (1st Meeting of next Term)

Notes on the Final Report of the ABA Section of Dispute Resolution Task Force on Improving Mediation Quality

By R. Wayne Thorpe

An American Bar Association Task Force has issued a Final Report on mediation quality in “high-end” civil cases in which parties are represented by counsel. The ABA Section of Dispute Resolution Task Force on Improving Mediation Quality performed its investigation and analysis principally by interviewing and surveying mediation users (lawyers and parties) from around the United States. The Report summarizes observations from those interviews and surveys and makes certain recommendations about follow-up activities. The full Final Report may be found at <http://www.abanet.org/dch/committee.cfm?com=DR020600>.

These are some notes on the Report and the work of the Task Force. They are by no means intended as a comprehensive review of either the Report or the group’s work.

One of several focal points of the Report is “Analytical Techniques Used by the Mediator.” The others include preparation, subject matter expertise, customization, and persistence, and these other topics are each related in a variety of ways to the topic “Analytical Techniques.” A large percentage of the lawyers and parties surveyed endorsed various forms of analytical techniques, although importantly a large minority did not support these approaches. It is useful in this discussion to understand how the Report defines analytical techniques; they may include, for example:

- mediator questioning about specific legal and factual issues, sometimes referred to as “reality” testing;
- mediator discussion and analysis of legal and factual issues . . . without necessarily articulating conclusions and opinions;
- generalized mediator opinions or observations, such as, “Either side could win,” “I like the other side of the case better than yours,” “You should win the case, but I am having a hard time with your damages claim”;
- mediator suggestions or proposals about settlement—based upon mediator perception of case “value,” mediator view of how a case may realistically settle, or perhaps both; and,
- specific mediator opinions about outcomes, dispositive issues or settlement values.

Some of these approaches will sound like an “evaluative” style to some; others may not. The Task Force made no effort to address the “philosophical” debate over the propriety of using evaluative techniques. Rather, the Task Force observed that a large percentage of lawyers and parties in lawyer-represented civil cases do expect mediators to use what we called an analytical approach, while also noting that many other users do not approve of those techniques. Accordingly, the Task Force cautioned against their wholesale use without regard for the wishes of the participants.

“A large percentage of the lawyers and parties surveyed endorsed various forms of analytical techniques.”

It is especially important to consider analytical techniques in the context of “customization.” Under this label the interviewees repeatedly told us that mediations can no longer be treated as “cookie cutter” processes, and that mediator and counsel must determine case by case how best to proceed toward a goal of resolving the pending dispute. One important aspect of the customization issue is the recognition that not every case, not every party, not every counsel and for that matter not every mediator needs or permits any or all of these analytical techniques. Experienced and able mediators and counsel should recognize that these various techniques should be chosen with care and deliberation, and generally used in the least interventionist manner that can effectively help parties find a way to resolve their dispute.

One other Observation in the Report bears a close relationship to the discussion of analytical mediation. To a substantial degree, the subjects in the Task Force studies endorsed a need for mediators having subject matter knowledge, especially in complex areas of law practice. This trend may have increasing significance in the practice of mediation in civil cases where parties are represented by counsel. The development may be explained by at least two factors: 1) a desire by many users for the previously discussed analytical approaches to mediation, and 2) the development of subject matter specialization among civil litigators and trial lawyers in many practice areas, including business, construction, employment, environmental, insurance, intellectual property, product liability, professional liability and many other kinds of disputes. While this desire for subject matter expertise

should rarely (and arguably never) serve to minimize the substantial importance of mediation process skills and expertise, not all users uniformly and consistently accept this viewpoint.

Finally, one of the Task Force's recommendations—described in the Report as Promotion of Local Efforts to Improve Mediation Quality, principally to be undertaken through conduct of local/regional focus groups similar to the ones conducted by the Task Force—may be of particular interest to readers of these notes. In conducting its research, the Task Force conducted ten focus group dialogues with lawyers and parties in nine different cities, typically in several groups of five to ten participants at a single meeting place. The meetings took place in Atlanta, Chicago, Denver, Houston, Miami, New York, San Francisco, Toronto and Washington, D.C. The group interviewed more than 200 people, who were mostly lawyers. Task Force members and local volunteers served as facilitators. The administration of the meetings and the collection, organizing and distillation of data was a very substantial undertaking by the Task Force members, local volunteers and ABA staff. Several Task Force members and staff have compiled the documentation used to administer and conduct these focus groups, and the Task

Force has made the documentation available to the public for use in administering similar focus groups.

The Task Force has encouraged state and local bar and ADR professional groups to consider using the protocols developed in this project to conduct local, state or regional focus groups. The group believes that these types of focus group dialogues provide an excellent opportunity for the mediators in a given community to hear what users have to say about the manner in which mediations in their community are conducted. Groups in several cities have already made preliminary inquiries about conducting these programs. The documentation for the focus groups can be found on the Section's Website at <http://meetings.abanet.org/webupload/commupload/DR020600/relatedresources/Toolkitdocument.pdf>. The Task Force encourages readers to access the full report on line to gain greater insights into the results.

Mr. Thorpe is a mediator and arbitrator with JAMS in Atlanta, Georgia. He served as the Co-Chair of the ABA Section of Dispute Resolution Task Force on Improving Mediation Quality, and he is the current Vice Chair of the Section.

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New Rule 5.5 of the New York Rules of Professional Conduct and the Representation of Parties in New York Arbitrations by Lawyers Not Licensed to Practice in New York

By Christopher M. Mason

For a number of years, the New York State Bar Association (the Association) has been working on a modified form of the Model Rules of Professional Conduct (the Model Rules) promulgated and maintained by the American Bar Association (ABA). On November 3, 2007, the Association's House of Delegates approved a form of such rules as a recommended replacement for the existing New York Code of Professional Responsibility.¹

This past December, the Appellate Divisions of the New York Supreme Court announced the adoption of new Rules of Professional Conduct based on the Association's proposal.² The new Rules take effect on April 1, 2009. But while they include most of the recommendations of the Association, the new Rules do not include *everything* the Association proposed.³

In particular, the Association had recommended adoption of the ABA's Model Rule 5.5(c)(3) on the issue of unauthorized practice of law in arbitration. New Rule 5.5 of the New York Rules of Professional Conduct, however, does not include this provision. Instead, it closely follows existing Disciplinary Rule 3-101⁴ on the issue of the unauthorized practice of law.

This result shows no disrespect to the Association. Although almost all states have now adopted the Model Rules in some form,⁵ fewer have adopted Model Rule 5.5(c)(3), and only a small minority has adopted it (as proposed by the Association) without substantive modification.⁶ Indeed, the choice not to adopt Model Rule 5.5(c)(3) is probably a very good one for most lawyers because it leaves otherwise undisturbed New York's historically progressive approach to the issue of representation of parties in arbitration.

New York's Historical Position

For many years, New York has had two ethical, and two legal, prohibitions concerning the unauthorized practice of law that may apply to the question of someone not licensed in New York representing a party in arbitration in New York. The two ethical prohibitions have until now appeared in Disciplinary Rule 3-101 of the New York Code of Professional Responsibility. First, Disciplinary Rule 3-101(A) prescribed that "[a] lawyer shall not aid a non-lawyer in the unauthorized practice of law."⁷ Second, Disciplinary Rule 3-101(B) stated that "[a] lawyer shall

not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction."⁸ These two prohibitions related to certain ethical concerns described in Canon 3 of the New York Code of Professional Responsibility, but neither the Canons nor the Disciplinary Rules made any special mention of arbitration in this context.⁹

"[T]he choice not to adopt Model Rule 5.5(c)(3) is probably a very good one for most lawyers because it leaves otherwise undisturbed New York's historically progressive approach to the issue of representation of parties in arbitration."

The two legal, as opposed to ethical, prohibitions on the unauthorized practice of law in New York in general appear in §§ 478 and 484 of the New York Judiciary Law.¹⁰ Unlike the prohibitions of Disciplinary Rule 3-101, the Judiciary Law's provisions are not limited to lawyers bound by the New York Code of Professional Responsibility. They apply to everyone. On the other hand, they apply only to proceedings in courts and certain particular acts done for money rather than to law practice generally. First, § 478 makes it

unlawful for any natural person to practice or appear as an attorney-at-law or as an attorney and counselor-at-law for a person other than himself in a court of record in this state . . . without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state.¹¹

Second, Section 484 forbids anyone from asking, or receiving,

directly or indirectly, compensation for appearing for a person other than himself as attorney in any court or before any magistrate, or for preparing deeds, mortgages, assignments, discharges, leases or any other instruments affecting real estate, wills, codicils, or any other instrument affecting the disposition of prop-

erty after death, or decedents' estates, or pleadings of any kind in any action brought before any court of record in this state, or make it a business to practice for another as an attorney in any court or before any magistrate unless he has been regularly admitted to practice, as an attorney or counselor, in the courts of record in the state.¹²

As this indicates, just as with the state's ethics rules, New York statutory law does not make any special mention of the practice of law in arbitration—and in fact, the relevant statutes would not seem to apply generally to that question.

Neither the ethics rules nor the Judiciary Law have defined what constitutes "practicing law," either. Ethical Consideration 3-5 stated that a precise definition was "neither necessary nor desirable," noting only,

The essence of the professional judgment of the lawyer is the educated ability to relate the general body and philosophy of law to a specific legal problem of a client. . . . Where this professional judgment is not involved, non-lawyers, such as court clerks, police officers, abstracters, and many governmental employees, may engage in occupations that require a special knowledge of law in certain areas.¹³

In interpreting the Judiciary Law, New York courts have also found the issue of "practicing law" highly dependent on particular facts and circumstances. In *Spivak v. Sachs*, for example, a California attorney, not admitted to practice in New York, flew to New York to meet with a client about her divorce.¹⁴ While he never made any court appearance, the California attorney did counsel his client on issues such as financial provisions and possible choices of jurisdiction.¹⁵ The New York Court of Appeals held that rather than a potentially forgivable, "single, isolated incident,"

here we have a California lawyer brought to New York not for a conference or to look over a document but to advise directly with a New York resident as to most important marital rights and problems. . . . To say that this falls short of the "practice of law" in New York is to defeat section 270 and the policy it represents.¹⁶

But "[t]here is, of course, a danger," the Court noted that

section 270 could under other circumstances be stretched to outlaw customary

and innocuous practices. We agree with the Supreme Court of New Jersey . . . that, recognizing the numerous multi-State transactions and relationships of modern times, we cannot penalize every instance in which an attorney from another State comes into our State for conferences or negotiations relating to a New York client and a transaction somehow tied to New York. We can decide those cases when we get them but they are entirely unlike the present one.¹⁷

The New York Court of Appeals has not yet decided a case squarely involving representation of a party in a New York arbitration by someone not licensed to practice law in New York. Nonetheless, the New York law on the subject has, given the flexibility offered by the language in cases such as *Spivak*, become fairly well settled on the subject over the years. In general, and at least as to attorneys licensed and in good standing elsewhere, appearance by such an attorney for a party in arbitration in New York will not violate New York law or the New York rules of ethics even if the attorney is not admitted to practice law in New York.

This position is often deemed to have its source in a 1975 report by the Committee on Labor and Social Security Legislation of the Association of the Bar of the City of New York (now the City Bar Association). That report concluded that "representation of a party in an arbitration proceeding by a non-lawyer or a lawyer from another jurisdiction is not the unauthorized practice of law. Even if it is held to be the practice of law, there are sound and overriding policy reasons for permitting such non-lawyer representation in the labor arbitration field."¹⁸

In 1982, Judge Edward Weinfeld, relying in part on this 1995 report, held flatly that "representation of a party in an arbitration proceeding by a non-lawyer or a lawyer from another jurisdiction is not the practice of law" in New York.¹⁹ He reasoned that "[a]n arbitration tribunal is not a court of record; its rules of evidence and procedures differ from those of courts of record; its fact finding process is not equivalent to judicial fact finding; it has no provision for the admission pro hac vice of local or out-of-state attorneys."²⁰

In 1991, Judge Robert Ward similarly held that "[r]epresentation of a party in an arbitration proceeding by a non-lawyer or a lawyer from another jurisdiction is not the unauthorized practice of law" in this state.²¹ Also in 1991, a City Bar Association committee reiterated that "[w]e are of the unanimous view that, as a matter of New York law, and professional ethics, parties to international or interstate arbitration proceedings conducted in New York may be represented in such arbitration proceedings by persons of their own choosing, including lawyers not admitted to practice in New York."²²

More recently, Judge Jed Rakoff (after declaring Judge Weinfeld “perhaps the greatest judge ever to sit in” the Southern District of New York), reaffirmed in 2008 the view that “unauthorized practice rules” do not apply in arbitration in this state, noting,

Although, in the quarter century since Judge Weinfeld wrote, arbitration proceedings have become more protracted and complex, not to mention costly, they still retain in most settings their essential character of private contractual arrangements for the relatively informal resolution of disputes. Indeed, the Court notes that the rules of the New York Stock Exchange, where the Sahni arbitration was held, do not require members of the arbitration panel to be lawyers at all. See N.Y. Stock Exch. Rule 607. It would be incongruous to apply a state’s unauthorized practice rules in such an informal setting. Whatever beneficent purposes New York’s prohibition against the unauthorized practice of law may serve in protecting clients and regulating lawyers’ conduct, it is not designed as a trap for the unwary or as a basis on which New York lawyers can extend a monopoly over every private contractual dispute-resolving mechanism.²³

Finally, late last year, the City Bar Association reaffirmed its position, arguing that, even if Model Rule 5.5(c)(3) were adopted, it should be interpreted so as not to alter the existing, progressive approach to permitting out-of-state lawyers to represent clients in New York arbitrations without fear that such representation would constitute the unauthorized practice of law.²⁴

The Risks to Adopting Model Rule 5.5(c)(3)

Collectively, the New York opinions described above represent a progressive rule of law and ethics favoring client choice in arbitration and avoiding parochial interests of mere revenue raising or maintenance of monopoly positions for local lawyers.²⁵ While Model Rule 5.5(c)(3) would not necessarily have required a change in this approach, the experience of other states when adopting it indicates that such a risk existed.

Model Rule 5.5(c)(3) as recommended by the Association would have provided that

(c) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this state that

* * *

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission. . . .²⁶

Because of the various qualifying conditions in this Model Rule (for example, whether the services at issue “*arise out of or are reasonably related* to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice” or whether they are “*reasonably related* to a pending or potential arbitration”), some party to a New York arbitration would undoubtedly have tried to narrow the current simplicity of case law on the subject—and, unlike today, would have had at least some textual hook for an argument. In addition, and particularly in difficult economic times, the language of the proposed Model Rule almost invites amendments and additions.

The experience in Florida demonstrates the latter risk. In 2003, without a history of judicial interpretation like that in New York, the Florida Supreme Court decided that the representation by a Washington, D.C., lawyer of clients in purely federal securities arbitrations in Florida was the unauthorized practice of law.²⁷ Faced with a strong negative reaction to this opinion, the state bar then began considering language based on current ABA Model Rule 5.5(c)(3). But amendments to the Model Rule’s language have left Florida with a highly restrictive view of when lawyers licensed in another state may represent a client in arbitration there.²⁸

Today, lawyers licensed in another state but not in Florida may represent clients in arbitration proceedings in Florida only by providing “temporary legal services” either performed with the active assistance of a Florida attorney, performed prior to a pro hac vice admission or performed for the pending or potential arbitration itself (if the services are for a client in the lawyer’s home state or are related to the lawyer’s practice in a jurisdiction in which he is admitted).²⁹ While this may at first seem a reasonable approach, there is a further catch: such lawyers can appear in only three arbitrations within any 365 days.³⁰ An attorney who exceeds this limit will be presumed to be engaged in the “general [and unauthorized] practice” of law in Florida.³¹ Like a number of other states, Florida also seeks to raise revenue from such out-of-state lawyers.³²

New York Avoids the Risks of Adopting Model Rule 5.5(c)(3)

The Appellate Divisions in New York have avoided the risks of both the qualifications in the language of Model Rule 5.5(c)(3) and the related risks of inviting future modifications and complications to the rule. Instead, new Rule 5.5 of the New York Rules of Professional Conduct simply states,

- (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction.
- (b) A lawyer shall not aid a non-lawyer in the unauthorized practice of law.³³

This language is almost identical to former Disciplinary Rule 3-101. Subsection (b) of the new Rule is the same as subsection (a) of the old Disciplinary Rule.³⁴ Subsection (a) of the new Rule has been edited, but its substance remains the same as subsection (b) of the old Disciplinary Rule. The new Rule says, “A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction”;³⁵ the old Disciplinary Rule says, “A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.”³⁶

“New York law and ethics should continue to allow attorneys not licensed in this state to appear and freely represent clients in arbitrations held here.”

Conclusion

There is no indication that the rearrangement and slight shortening of language in the new Rules of Professional Conduct are meant to change the substance of New York legal ethics. There is therefore no reason to believe that the new Rule should provide any basis for arguing that New York law should change. Thus, consistent with New York’s role as the center of national (and international) commerce, consistent with the general trend over the past decades protecting the perceived informal benefits of arbitration,³⁷ and consistent with the clear view that party choice should be of great importance in arbitration,³⁸ New York law and ethics should continue to allow attorneys not licensed in this state to appear and freely represent clients in arbitrations held here.³⁹

Endnotes

1. The proposed rules were part of the COSAC Report made to the House of Delegates. COSAC is an acronym for the Committee on Standards of Attorney Conduct.
2. See, e.g., Hon. Ann Pfau, Press Release, *New Attorney Rules of Professional Conduct Announced* (Dec. 16, 2008), available at http://www.courts.state.ny.us/press/pr2008_7.shtml (last viewed Feb. 5, 2009). The federal courts in New York will follow these new Rules of Professional Conduct in due course. See, e.g., S.D.N.Y. & E.D.N.Y. Local Civ. R. 1.3(a) & 1.5(b)(5) (2009); N.D.N.Y. Local Prac. R. 83.1(a)(1) & 83.4(j) (2009); W.D.N.Y. Local R. Civ. P. 83.1(b)(5)(G) (2003).
3. The “Administrative Board of the Courts . . . approved most of the State Bar’s proposals, though in some instances it retained the language of existing Disciplinary Rules in whole or in part.” Hon. Ann Pfau, Press Release, *supra* n.2. For a summary comparison of the new rules to the old ones, see Roy Simon, *Comparing the New NY Rules of Professional Conduct to the Existing NY Code of Professional Responsibility* (pts. I and II), N.Y. Prof’l Responsibility Rep. 1 (Feb. 2009), N.Y. Prof’l Responsibility Rep. 1 (Mar. 2009).
4. D.R. 3-101, N.Y. Comp. Code R. & Regs. (hereafter N.Y.C.R.R.) tit. 22, § 1200.16 (1990). The language of this rule is similar to old ABA Model Rule 5.5 before the amendments that created Model Rule 5.5(c)(3). See Model Rules of Prof’l Conduct R. 5.5 (Discussion Draft 1983). Some other states still use a rule similar to old Model Rule 5.5. See, e.g., Ala. R. of Prof’l. Conduct R. 5.5 (2008); Me. Bar R. 3.2(a) (2008); see also Idaho R. Prof’l Conduct R. 5.5 (2006) (but also adding four specific exceptions under which out-of-state attorneys may practice law in Idaho).
5. All states except California and Maine. See, e.g., American Bar Association, *Model Rules of Professional Conduct Dates of Adoption*, available at http://www.abanet.org/cpr/mrpc/alpha_states.html (last viewed Feb. 5, 2009).
6. Only 13 states have adopted Model Rule 5.5(c)(3) verbatim. See American Bar Association, *State Implementation of ABA Model Rule 5.5*, available at http://www.abanet.org/cpr/jclr/5_5_quick_guide.pdf (last viewed Feb. 5, 2009). Those states are Arkansas, Arizona, Indiana, Iowa, Maryland, Massachusetts, Nebraska, New Hampshire, Oregon, Rhode Island, Utah, Vermont and Washington. *Id.*
7. D.R. 3-101(A), N.Y.C.R.R. tit. 22, § 1200.16(A).
8. D.R. 3-101(B), N.Y.C.R.R. tit. 22, § 1200.16(B).
9. Canon 3 stated, “A Lawyer Should Assist in Preventing the Unauthorized Practice of Law.” N.Y. Jud. Law app. Canon 3 (McKinney 2003 & Supp. 2009). The Disciplinary Rules implementing this Canon were the primary source of positive law applicable to lawyers in this area.
10. N.Y. Judiciary Law (hereafter N.Y. Jud. L.) §§ 478, 484 (McKinney 2008).
11. N.Y. Jud. L. § 478. There are some narrow non-lawyer exceptions to this prohibition, none of them related to arbitration. See *id.*
12. N.Y. Jud. L. § 484. The same narrow non-lawyer exceptions found in § 478 also apply to § 484. See *id.*
13. N.Y. Jud. Law app. EC 3-5 (McKinney 2003 & Supp. 2009). *Cf., e.g., In re Creasy*, 12 P.3d 214, 216-17 (Ariz. 2000) (defining “the practice of law” as “those acts, whether performed in court or in the law office, which lawyers customarily have carried on from day to day through the centuries constitute the practice of law. Such acts . . . include rendering to another any other advice or services which are and have been customarily given and performed from day to day in the ordinary practice of members of the legal profession. . .”).
14. 16 N.Y.2d 163, 165, 211 N.E.2d 329, 329-30, 263 N.Y.S.2d 953, 954 (1965).
15. *Id.*

16. *Id.* at 167–68, 211 N.E.2d at 330–31, 263 N.Y.S.2d at 956.
17. *Id.* (citing *Appell v. Reiner*, 204 A.2d 146 (N.J. 1964)). New Jersey law has since changed. In 1994, New Jersey’s position was simply that “an out-of-state attorney’s representation of a party in an arbitration proceeding conducted under the auspices of the [American Arbitration Association] in New Jersey does not constitute the unauthorized practice of law.” Unauth. Prac. Comm. Op. 28, 138 N.J.L.J. 1558 (N.J. Dec. 12, 1994), 3 N.J.L. 2459 (N.J. Dec. 19, 1994), available at http://lawlibrary.rutgers.edu/ethics/cuap/cua28_1.html (last viewed Feb. 5, 2009). New Jersey has, however, since then adopted a variation of ABA Model Rule 5.5(c)(3). See, e.g., N.J. R. Prof’l Conduct R. 5.5(b), (c) (2009), available at <http://www.judiciary.state.nj.us/rules/apprpc.htm> (last viewed Feb. 10, 2009). This allows attorneys not licensed in New Jersey to “represent[] . . . a party . . . in arbitration” only if such representation is “on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, and the dispute originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice.” N.J. R. Prof’l Conduct R. 5.5(b)(3)(ii); see also Kevin H. Michels, *New Jersey Attorney Ethics* § 40:10-1 (Gann 2006). The out-of-state attorney must meet five additional requirements, including an annual fee payment and compliance with any rules requiring him or her to maintain a New Jersey office. N.J. R. Prof’l Conduct R. 5.5(c)(5), (6); see also Unauth. Prac. Comm. Op. 43 (supplementing Op. 28), 187 N.J.L.J. 123 (N.J. Jan. 8, 2007), 16 N.J.L. 191 (N.J. Jan. 29, 2007), available at http://lawlibrary.rutgers.edu/ethics/cuap/cua43_1.html (last viewed Feb. 10, 2009).
18. Committee on Labor and Social Security Legislation, Labor Arbitration and the Unauthorized Practice of Law, *Committee Report*, 30 The Record of the Association of the Bar of the City of New York 516, May/June 1975, at 422.
19. *Williamson, P.A. v. John D. Quinn Constr. Corp.*, 537 F. Supp. 613, 616 (S.D.N.Y. 1982).
20. *Id.*
21. *Seigel v. Bidas Sociedad Anomina Petrolera Indus. y Comercial*, No. 90 Civ. 6108 (RJW), 1991 U.S. Dist. LEXIS 11455, at *16 (S.D.N.Y. Aug. 19, 1991) (quoting *Williamson*, 537 F. Supp. at 616). The 1982 *Williamson* language says that arbitration is not “the practice of law,” 537 F. Supp. at 616, while the language of *Siegel* 1991 says it is not “the unauthorized practice of law,” 1991 U.S. Dist. LEXIS 11455, at *17 (emphasis added).
22. Committee on Arbitration and Alternative Dispute Resolution, Recommendation and Report on the Right of Non-New York Lawyers to Represent Parties in International and Interstate Arbitrations Conducted in New York, 49 The Record of the Association of the Bar of the City of New York 47, at 47-48 (1991).
23. *Prudential Equity Group, LLC v. Ajamie*, No. 07 Civ. 5606, 2008 U.S. Dist. LEXIS 14108 at *7-8 (S.D.N.Y. Feb. 27, 2008). Judge Rakoff also expressly rejected the reasoning of the notorious California case of *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Ct.*, where the court had held that “in the absence of clear legislative direction, we decline to . . . allow[] unlicensed legal practice in arbitration. . . .” 949 P.2d 1, 8 & n.4 (Cal. 1998) (citation omitted). Like New York today (and in the future with new Rule of Professional Conduct 5.5), California Rule of Professional Responsibility 1-300 largely follows the old ABA Model Rules of Professional Conduct and simply directs lawyers not to “aid . . . in the unauthorized practice of law” and “not [to] practice law in a jurisdiction where to do so would be a violation of regulations of the profession in that jurisdiction.” Cal. R. Prof’l Conduct R. 1-100(B)(2) (1992). After much negative publicity from the *Birbrower* decision, California adopted procedural rules to allow out-of-state counsel to obtain permission (in effect, from an arbitrator after a filing with the state bar association) to represent a party to an arbitration in California. See Cal. R. Ct. 983.4 (2006); Cal. Code Civ. Proc. § 1282.4 (Deering 2009). A Connecticut state court, denying a motion to admit a New York lawyer pro hac vice in an arbitration, similarly held several years ago that “[n]otwithstanding the credentials of the applicant . . . [Connecticut law] contains no provision which would authorize this court to allow [a New York attorney] to represent his clients in a Connecticut arbitration. . . .” *In re Application to Admit Attorney James Glatthaar Pro Hac Vice*, No. 05-4015630, slip op. at *2 (Conn. Super. Ct. Hartford Oct. 24, 2005); but see *Doctor’s Assocs., Inc. v. Jamieson*, No. NNHCV064020952, 2006 Conn. Super. LEXIS 2220, at *7-11 (Conn. Super. Ct. July 19, 2006) (admitting lawyer pro hac vice to arbitrate). And this is similar to the problem that used to exist in Ohio. See *Disciplinary Counsel v. Alexicole, Inc.*, 822 N.E.2d 348, 349 (Ohio 2004), overruled by adoption of Ohio R. Prof’l Conduct R. 5.5 (2007) (based on Model Rule 5.5(c)(3)). The historical approach of New York law has allowed this state to avoid these somewhat artificial issues of whether arbitration requires a pro hac vice admission.
24. See Committee on Arbitration, Unauthorized Practice of Law and the Representation of Parties in Arbitration in New York by Lawyers Not Licensed To Practice in New York, Committee Report 63 The Record of Bar of the City of New York 700 et seq. (2008). That report also surveyed the law and ethics rules elsewhere.
25. Cf. N.Y. Jud. Law app. EC 3-9 (McKinney 2003 & Supp. 2009) (“[T]he legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of a client or upon the opportunity of a client to obtain the services of a lawyer of the client’s choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice.”).
26. New York State Bar Ass’n Comm. on Standards of Attorney Conduct, Proposed R. Prof’l Conduct R. 5.5(c) (as approved by the House of Delegates Mar. 31, 2007), available at <http://www.nysba.org/Content/NavigationMenu38/CommitteeonStandardsOfAttorneyConductHome/COSAC033107.pdf> (last visited Feb. 5, 2009). This language was the same as the ABA’s current Model Rule.
27. *The Florida Bar v. Rapoport*, No. SC01-73, 2003 Fla. LEXIS 250 at *10 (Fla. Feb. 20, 2003).
28. See generally, e.g., Amendments to R. Regulating the Fla. Bar, 907 So. 2d 1138 (2005). Florida is not alone in imposing “local counsel” rules requiring the retention of a lawyer licensed in the jurisdiction, either. See, e.g., Wyo. R. Prof’l Conduct R. 5.5(c) (2006), available at http://courts.state.wy.us/CourtRules_Entities.aspx?RulesPage=AttorneysConduct.xml (last visited Feb. 5, 2009).
29. See Amendments to R. Regulating the Fla. Bar, 907 So. 2d at 1156-57 (citing Fla. Bar Reg. R. 4-5.5(c)(1)-(3)); see also *id.* at 1157 (citing Fla. Bar Reg. R. 4-5.5(c)(4)). The jurisdictional qualifications are derived directly from the ABA Model Rules. See Model Rules of Prof’l Conduct R. 5.5(c)(3)-(4).
30. Fla. Bar Reg. R. 1-3.11, available at <http://www.floridabar.org/divexe/rrtfb.nsf/FV/60A2F6198D8AD63C852570DF0052D642> (last visited Feb. 5, 2009). South Carolina has a similar “three strikes” rule. See S.C. App. Ct. R. 404(g), 407 R. 5.5 (2008); S.C. R. Prof’l Conduct R. 5.5(c)(3) (2005); S.C. R. Prof’l Conduct R. 5.5, cmt. 12. California law has no specific limit but provides that “[i]f the attorney has made repeated appearances, the certificate shall reflect the special circumstances that warrant the approval of the attorney’s appearance in the arbitration.” Cal. Code Civ. Proc. § 1282.4(c)(10).
31. Amendments to the R. Regulating the Fla. Bar, 907 So. 2d, at 1150. This strongly disfavors businesses with repeat arbitration issues who may wish to have in-house lawyers handle cases on a national basis. It also disfavors attorneys who develop expertise in fields where arbitrations are not so common as to provide a local market, yet common enough to make expertise valuable. In general, the restrictions simply increase prices for legal services in Florida, both to outsiders and to Florida residents. Incidentally,

the out-of-state lawyers most affected by the Florida approach are New Yorkers. See Gary Blankenship, *Year-Old Bar MIP Rules Are Working Smoothly*, FLA. BAR NEWS (Nov. 15, 2006).

32. See, e.g., Amendments to the R. Regulating the Fla. Bar, 907 So. 2d at 1150 (\$250 fee per appearance); see also, e.g., Nev. R. Prof'l Conduct R. 5.5A(c) (2008) (\$150 annual fee), available at <http://www.leg.state.nv.us/courtrules/RPC.html> (last viewed Feb. 5 2009); S.D. R. Prof'l Conduct 5.5(c)(4)(5) (2004) (must purchase sales tax license), available at http://www.sdbar.org/Rules/Rules/PC_Rules.htm (last visited Feb. 5, 2009); S.D. Codified Laws § 10-45-1, et seq. (2007). See generally Peter M. Panken & Mirande Valbrune, *Representing Nationwide Clients Where They Do Business—But You Are Not Admitted—Do Good Fences Make Good Neighbors?*, SL018 ALI-ABA 731 (July 28–30, 2005).
33. N.Y. R. Prof'l Conduct R. 5.5, N.Y.C.R.R. tit. 22, § 1200.16 (effective Apr. 1, 2009).
34. Compare *id.* R. 5.5(b), N.Y.C.R.R. tit. 22, § 1200.16(B), with D.R. 3-101(A), N.Y. Comp. Code R. & Regs. tit. 22 § 1200.16(A).
35. N.Y. R. Prof'l Conduct R. 5.5(a), N.Y.C.R.R. tit. 22, § 1200.16(A).
36. D.R. 3-101(B), N.Y.C.R.R. tit. 22, § 1200.16(B).
37. E.g., *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996); *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 281 (1995).
38. E.g., *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 57 (1995); *Volt Information Sciences v. Board of Trustees*, 489 U.S. 468, 472 (1989).
39. In general, ethical constraints of a licensing jurisdiction attach to a lawyer by virtue of his or her admission to the bar of that jurisdiction and follow that person around so long as the person is generally admitted to that bar. See N.Y. R. Prof'l Conduct R. 8.5, N.Y.C.R.R. tit. 22 § 1200.5-A.5 (effective Apr. 1, 2009); ABA Model Rule Prof'l Conduct R. 8.5; Susanna Felleman, Note, *Ethical Dilemmas and the Multistate Lawyer*, 95 COLUM. L. REV. 1500, 1501 (Oct. 1995). Thus, New York's approach does not seem to create any significant moral hazard that will unduly encourage unscrupulous attorneys to appear in New York arbitrations—out-of-state attorneys must still fear discipline under some ethics rules (rules that with only two exceptions will now be rather similar to New York's because of the widespread use of most of the ABA Model Rules by most states). But see Joel Stashenko, *New Lawyer Conduct Rules Adopted; Standards Aligned with ABA Model*, N.Y.L.J., Dec. 17, 2008, at 1 (comments of Professor Roy Simon that, without adoption of Model Rule 5.5(c), "some lawyers will continue to practice in New York in a 'shadow-land' without clearly being subject to the regulation of New York's disciplinary rules.").

Mr. Mason is a partner in the firm of Nixon Peabody LLP, where he currently serves as Deputy Head of the Financial Services and Securities Litigation Practice Group and Co-Head of the firm's Class Action Defense Team. A litigator and trial lawyer, he has spent a substantial part of his career dealing with arbitration, mediation, and other forms of alternative dispute resolution. The views in this article are his own and not necessarily those of his firm or the New York State Bar Association. He can be reached at cmason@nixonpeabody.com.

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Protocol for E-Disclosure in Arbitration Issued by the Chartered Institute of Arbitrators

By Steven A. Certilman

Like a procedural soldier advancing on ever-higher ground, the process of e-disclosure in the United States has surmounted the point of commonplace in the litigation theater and stands poised to overtake a major hill—arbitration. The moral high ground of the resistance, if it may be thought of as such, arises directly from arbitration's mantra: *quicker, cheaper, better*—the attributes that are proudly viewed as its historical foundation. Whether this will be a quick or a bloody battle depends largely on the attitudes of the disputants or, more particularly, their counsel.

As we know, one of the great philosophical divides between litigation and arbitration, at least in the United States, can be found by looking at the way in which information gathering is conducted prior to the hearings. While parties in litigation have a virtually unfettered right of access to the discoverable matter of their adversaries (“reasonably calculated to lead to admissible evidence . . .”), their counterparts in arbitration may find that the governing rules place a great deal of discretion on the arbitrator, who will often bring a cost-benefit analysis into the equation.¹ In the international arbitration arena particularly, there is a broad consensus that there is no place for litigation-style discovery practices.

With much of the business world now conducting substantially all of its business communications by e-mail and other electronic means, discovery of evidence in electronic format can hardly be ignored. There is a great deal at stake for the arbitral process in the manner in which it comes to accept e-disclosure and fit its costly and demanding burdens, as well as its resulting evidence, into its processes. Can arbitration stand resolutely in opposition to e-disclosure? Not a chance. Should it allow e-disclosure to become e-discovery and, thus, blur, perhaps, the distinction between litigation and arbitration which is most advantageous to its users? Most would argue not. Arbitration must find a way to adapt. The debate is well under way.

Putting another log on the fire, The Chartered Institute of Arbitrators (CIArb)² has published a *Protocol for E-Disclosure in Arbitration* (the Protocol).³ The October 2008 protocol, principally drafted by David J. Howell, was the work of the Arbitration Sub-committee of The Chartered Institute's Practice and Standards Committee, chaired by John Wright. It is presented to bring focus on many of the issues typically arising in e-disclosure requests and to aid arbitrators, counsel and parties in analyzing such requests. While effective management of

e-disclosure requests is the ultimate goal of the Protocol, it is intended as both a recommended set of guidelines and, if deemed appropriate by the parties, a binding set of rules which the parties may adopt by agreement.

“In the international arbitration arena particularly, there is a broad consensus that there is no place for litigation-style discovery practices.”

From the outset, in cases in which issues relating to e-disclosure are likely to arise, the Protocol encourages parties to confer “at the earliest opportunity” to facilitate preservation and disclosure of electronic evidence. Pushing the issue front and center, arbitrators are also encouraged to inquire “no later than the preliminary meeting” whether e-disclosure is likely to play a role in the case.

To assist arbitrators, parties and counsel with their analysis of the e-disclosure process, the Protocol highlights some of the most important related concerns such as methods and media of storage, retention concerns, and governing law, rules and agreements. Suggestions are made for methods of reducing the burdens and cost of e-disclosure such as limitations on categories of documents, document date ranges and custodians, use of agreed-upon search terms, and software tools and output formatting.

The Protocol makes a real effort to encourage an application of e-disclosure principles that uses arbitration values in balancing the need for relevant evidence to be produced against the risk of excessive cost and burden in its production. Clearly, fishing expeditions are not welcome. This is consistent with the view of dispute resolvers throughout most of the world where such un-targeted disclosure requests are impermissible. This balanced approach becomes clearly evident in the section dealing with the requests for e-disclosure. Rather than endorse open-ended requests, the Protocol calls for a description of each requested document or a narrow and specific category of documents. Nevertheless, it would still appear permissible to request documents by referring to key words or phrases contained therein. Requests also must describe the relevance and materiality of the requested documents, recite that the requested documents are not in the possession and control of the requesting party, and give the reason why the requested documents are assumed to be in the possession and control of the produc-

ing party. Perhaps this final condition may fail a cost-benefit analysis, given the ability of a disclosing party to respond to requests for documents it does not actually possess or control by simply making a statement to that effect.

Guidance is offered to the arbitrators in issuing orders for e-disclosure. This guidance may, of course, become a control on the arbitrators if the parties have adopted the Protocol by agreement. Arbitrators are encouraged to apply the specific balancing considerations of reasonableness and proportionality and fairness and equality of treatment of the parties. Included in the balancing test is consideration of the costs and burdens of compliance with an e-disclosure order.

The Protocol discourages ordering e-disclosure of hidden metadata and other disclosure where the materials would come from inactive data such as backup tapes, erased data and archived data routinely deleted. Rather than incorporate a bar to such disclosure, however, the Protocol conditions such disclosure on a showing that the relevance and materiality of such production outweighs the costs and burdens of retrieving and producing the material requested.

In order to provide a baseline for e-disclosure production, the Protocol establishes that as a default, electronic documents are to be produced in their native format subject to agreement of the parties or the discretion of the arbitrators to order otherwise.

Although there is nothing about the CI Arb's Protocol that makes it incompatible with all types of arbitration, domestic or international, it was drafted expressly for use in "those cases (not all) in which potentially disclosable documents are in electronic form and in which the time and cost for giving disclosure may be an issue." In this respect, its focus differs slightly from the protocols and guidelines of other major arbitral organizations such as the CPR (International Institute for Conflict Prevention and Resolution) and the ICDR (International Centre for Dispute Resolution), which are in various stages of development and adoption. Moreover, as it was envisioned to apply primarily in international arbitration cases, the Protocol appropriately references the International Bar Association's Rules on the Taking of Evidence in International Commercial Arbitration,⁴ a most important resource on the subject.

It has been suggested that the very existence of guidelines such as the Protocol will give rise to inappropriate demands for disclosure of electronic documents in arbitrations in which no such issues should arise.⁵ There is certainly reason to be concerned about the inappropriate use of requests for e-disclosure. Such disclosure tends to be more costly, and although the arbitrator is empowered to re-allocate the costs, the requests themselves are often used more as a tactic of oppression than as a means of seeking evidence. Given that the preponderance of

cases settle before award, in many cases there may never be an opportunity to have those costs reallocated. For this reason, the Protocol sensibly encourages arbitrators to allocate the costs of e-disclosure at the time of making such an order (rather than waiting for allocation upon the issuance of the award), a means of mitigating the potentially oppressive effect of an e-disclosure order. I would like to believe that the concerned commentators would agree that the deterrent to such tactical use of requests for e-disclosure is vigilance and assertiveness among arbitrators, not curtailment of the discussion and its resulting recommendations.

I have always believed that in both litigation and arbitration, 90% of the evidence is uncovered with 10% of the effort and expense. The growth of arbitration as a dispute resolution method, with its core values of speed and cost-effectiveness, reflects a widespread appreciation among parties of the value of the 90-10 Rule. This view is also reflected in the spirit of the Protocol.

Endnotes

1. Contrast Federal Rules of Civil Procedure Rule 26 and Civil Practice Law and Rules § 3101 with, e.g., Commercial Rules, American Arbitration Association, Rule R-21:

R-21. Exchange of Information

(a) At the request of any party or at the discretion of the arbitrator, *consistent with the expedited nature of arbitration, the arbitrator may direct*

i) the production of documents and other information, and

ii) the identification of any witnesses to be called.

(b) At least five business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing.

(c) The arbitrator is authorized to resolve any disputes concerning the exchange of information. (emphasis supplied)

See also *ICDR Guidelines for Arbitrators Concerning Exchanges of Information* at <http://www.adr.org/si.asp?id=5288>.
2. Founded in 1915 and now with 11,000 members across more than 100 countries, CI Arb is a center of excellence for the global promotion, facilitation and development of all forms of dispute resolution (<http://www.arbitrators.org>).
3. The Chartered Institute of Arbitrators e-Disclosure Protocol may be downloaded at <http://www.ciarb.org/Institute/EDisclosure.asp>.
4. This may be downloaded at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=E9FE4F0E-E81B-4623-B26A-1D9808F2B450>.
5. See, e.g., Fulbright Alert, International Arbitration, *Protocol for e-Disclosure in Arbitration Issued by the Chartered Institute of Arbitrators*, October 3, 2008.

Steven A. Certilman is an arbitrator, mediator and attorney with offices in Stamford, Connecticut, and New York, New York. He is a Chartered Arbitrator and the chairman of the Board of Trustees of The Chartered Institute of Arbitrators.

Guidelines for Interviewing Prospective Arbitrators

By Hew R. Dundas

The Chartered Institute of Arbitrators (CI Arb), with approximately 11,500 members in approximately 105 jurisdictions, *inter alia*, promulgates best practice guidelines in a number of areas of arbitration procedure. The guidelines are practical; they suggest what an arbitrator should do if certain situations arise, as opposed to repeating the law. They have recently been completely revised and put into an international context with input from CI Arb members around the world (approximately 30 jurisdictions were consulted). As part of its work, the CI Arb has published guidelines on interviewing arbitrators (the Guidelines).¹

Introduction

In most state court systems, parties are allocated the next available judge or judges, possibly one with some particularly relevant legal expertise, possibly one with no knowledge or understanding of the subject matter of the dispute. One of the many reasons to arbitrate is to have the opportunity to select the tribunal, particularly in those cases where each party selects one arbitrator (a party-appointed arbitrator, or PAA), and the two PAAs (or an institution) then appoint the third. Arbitral rules or the applicable procedural law may constrain the choice of the PAA, e.g., in cases where he or she must be of a different nationality to the parties.

How then should a party choose its PAA? One approach is for the appointer to interview a list of prospective PAAs prior to making the appointment. This is routine and unexceptional in some jurisdictions but unknown or even anathema in others. Actual experience shows that a comprehensive interview can be conducted without jeopardy to the neutrality of the PAA.

The Guidelines do not address non-neutral behavior where either the appointer looks for a hired gun/closet advocate as PAA, or where the PAA, consciously or otherwise, acts in a non-neutral manner. Challenge procedures exist to deal with such circumstances

Should Interviews Be Permitted or Prohibited?

A very small minority of those consulted by the CI Arb objected to the mere concept of interviews; a larger number accepted the concept but stated (for differing reasons) that they personally would decline to be interviewed and would do no more than discuss availability and terms of business. However, few (if any) enquiries made of potential arbitrators stop at the simple terms/availability questions. In addition, the prospective arbitrator cannot realistically contemplate receiving an appoint-

ment without providing any information to the many appointers who feel they must ascertain certain minimum information (see below).

A number of highly reputed authors have considered the issue. For example,

- (1) Redfern and Hunter state, "However, it is hard to perceive the practice [i.e., of interviews] as being objectionable in principle, provided that it is not done in a secretive way and that the scope of the discussion is appropriately restricted."²
- (2) A U.S. perspective was given by Professor Lowenfeld:

[I]f . . . one of the principal functions of a party-appointed arbitrator is to give confidence in the process to the parties and their counsel, some basis for that confidence needs to be established. Sometimes that confidence can be based on mutual acquaintances, without direct personal contact; some potential arbitrators become well known through published writings, lectures, committee work or public office. Others are not so well-known, and I understand that lawyers or clients or both want to have a first-hand look. I think, however, that some restraint should be so shown by both sides.³

- (3) In their article, R Doak Bishop and Lucy Reed state, "The ability to appoint one of the decision-makers is a defining aspect of the arbitral system and provides a powerful instrument when used wisely by a party"⁴

The ABA's "Code of Ethics for Arbitrators in Commercial Disputes" (February 9, 2004) appeared to be the only formal code that addressed the interview process. Canon III(B) provides (*inter alia*) that

[a]n arbitrator or prospective arbitrator should not discuss a proceeding with any party in the absence of any other party, except in any of the following circumstances:

- (1) When the appointment of a prospective arbitrator is being considered, the prospective arbitrator:
 - (a) may ask about the identities of the parties, and the general nature of the case; and

(b) may respond to inquiries from a party or its counsel designed to determine his or her suitability and availability for the appointment. In any such dialogue, the prospective arbitrator may receive information from the party or its counsel disclosing the general nature of the dispute but should not permit them to discuss the merits of the case.

The Guidelines

It is not practicable to repeat the Guidelines in full in this article, but I will briefly cover the key features.

The Guidelines are available for use in any jurisdiction, and their use is not restricted to CI Arb members. They can be used to cover the superficially routine telephone inquiry that falls short of (often by very little) an interview. They can, of course, be used in telephone interviews as well as in face-to-face ones. They are stated to be recommendations with no implication of being mandatory.

There is an overriding principle that the following may not be discussed either directly or indirectly: (1) the specific circumstances or facts giving rise to the dispute; (2) the positions or arguments of the parties; (3) the merits of the case.

Subject to that overriding principle, in order for the interviewee's suitability (expertise, experience, language proficiency and conflict status) to be assessed, the following may be disclosed: (1) the names of the parties in dispute and any third parties involved or likely to be involved; (2) the general nature of the dispute; (3) sufficient detail, but no more than necessary, of the project to enable both interviewer and interviewee to assess the latter's suitability for the appointment; (4) the expected timetable of the proceedings; (5) the language, governing law, seat of and rules applicable to the proceedings. Questions may also be asked to test his or her knowledge and understanding of (1) the nature and type of project in question; (2) the particular area of law applicable to the dispute; (3) arbitration law, practice and procedure. Such questions should be general in nature and neutrally put in order to test the interviewee and should not be put in order to ascertain his or her views or opinions on matters that may form part of the case. Questions concerning the interviewee's publishing history may be put subject to the same proviso. By way of example, I recently chaired a tribunal where one of my co-arbitrators had been selected by the appointing institution for apparently possessing certain expertise and, in fact, had no relevant expertise at all. An interview would have revealed that in five minutes.

The Guidelines are based on the premise that an appointment as an arbitrator does not carry with it any

duty to the appointing party except the internationally generally-accepted ones of ensuring (1) that an appropriate chairman/presiding arbitrator is selected and (2) that the appointing party's case is both understood and fully considered in the tribunal's deliberations—this is wholly different to arguing that case. The Guidelines are intended to ensure that the interview process does not damage the neutrality of the PPA.

Any interview should normally be led by a senior representative of the interviewing party's external lawyers because they can be expected to have a greater appreciation of the sensitivities of the process. A record of proceedings should be taken and should be disclosed to the other side in the dispute, as well as to the appointing body, at the earliest available opportunity. The Guidelines envisage either a tape recording or a detailed file note being made.

In the interests of minimizing the opportunity of the process going off the straight and narrow, the interview should be as professional as possible, and no interview should take place over lunch or a beer, etc. Conventional business pleasantries before, during or after the interview are not excluded.

The Guidelines provide, somewhat controversially, that the actually appointed arbitrator not be reimbursed his or her expenses until after the formation of the tribunal, and that those expenses be submitted into the arbitral process, thereby ensuring transparency and also eliminating the creation of a commercial relationship between appointer and appointee.

The Guidelines do not require that they be adopted in full and it is open to parties to agree to something extra or to delete something. The CI Arb suggests that the fundamental principles are not open to jettison, but that some of the details may be varied or omitted.

The Guidelines do not address the issue of communications between appointor and PAA after the arbitration commences for the simple reason that, in the CI Arb's view and subject to certain exceptions, there should be no such communication, both parties being obliged to communicate with the tribunal, not with any individual member thereof.

Discussion

For much of 2007, no arbitration conference was complete without an animated discussion about the principles and process of interviewing prospective arbitrators and of the CI Arb Guidelines. Apart from the few who still rejected the entire concept, there were surprisingly few negative views and many positive ones of the Guidelines as issued. Equally surprising (or perhaps the Guidelines were in very good shape already!) was that few suggestions were made for any revision of the Guidelines. One

was that they should cover the separate but related (and also potentially difficult) process of the two PAAs selecting the third arbitrator where some limits are required beyond which those in the discussion of the appointer/appointee (i.e., the PAA).

"[A]n interview can be a valuable tool in a party's selecting the ideal arbitrator for its dispute remembering that that arbitrator will be neutral and will serve both parties."

It has been suggested that the Guidelines are too prescriptive and should not replace or supersede sound professional judgement. Although certainly, as stated, in some cases the Guidelines can be varied or indeed even dispensed with by agreement, the specificity of the Guidelines can often be extremely useful to appointors. For example, assuming that large, highly experienced law firms are involved, I suggest that it be open to the law firms to agree that each side will interview prospective PAAs but will not be constrained by the CI Arb Guidelines. I am aware of a case where precisely this occurred. Conversely, I have been interviewed (pre-Guidelines) by the general counsel of a large commercial company who had no idea what he could do or say or not do or not say; all he knew (from his external lawyers) was that there were difficult issues involved in the process and that he should be very careful. He would have found the Guidelines invaluable.

More recently I have become aware of a case where the parties, being sophisticated and with top law firms representing them, and each from a jurisdiction where interviewing is rare, have agreed to use the CI Arb Guidelines so that each knows where the other stands.

Summary

The question of whether or not to interview, or to permit interviews, remains controversial, with some arbitrators (and lawyers) bitterly opposed to either view. However, an interview can be a valuable tool in a party's selecting the ideal arbitrator for its dispute remembering that that arbitrator will be neutral and will serve both parties. The CI Arb Guidelines do not claim to be the ideal solution but they do offer a very practical and flexible solution in this very difficult and sensitive area. They are available for those that want or need them and for the present at least, constitute the worldwide standard.

Endnotes

1. Chartered Institute of Arbitrators Guidelines for interviewing arbitrators, available at www.ciarb.org/arbinterview.
2. *Law & Practice of International Commercial Arbitration*, 4th ed. at § 4-50.
3. "The Party-Appointed Arbitrator in International Controversies: Some Reflections" ([1995] 30 Texas Int. Law Journal at 59).
4. R Doak Bishop and Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-appointed Arbitrators in International Commercial Arbitration* ("Arbitration International" Vol. 14, No. 4 at 395).

Hew R. Dundas, dundas.energy@btinternet.com, is an International Arbitrator, Mediator and Expert Determiner who practices in more than a dozen jurisdictions including the United States. He was formerly General Manager, Legal, at what is now the United Kingdom's fourth largest oil company and is particularly expert in energy disputes. He was President of CI Arb in 2007 and is Presidente Honorario, Centro Internacional de Arbitraje e Mediación (Quito), and Member of the Advisory Board, Chinese European Arbitration Centre (Hamburg). He has played a leading role in the preparation and drafting of the Arbitration (Scotland) Bill 2009.

Why a Uniform Collaborative Law Act?

By Norman Solovay and Lawrence R. Maxwell, Jr.

Introduction

A recent book by Professor Julie Macfarlane based on extensive empirical research and subtitled “How Settlement Is Transforming the Practice of Law” has been much discussed and well received in alternative dispute resolution (ADR) circles.¹ The preface points out that “A 98 percent civil settlement rate and the increasing use of negotiation, mediation and collaboration in resolving lawsuits have dramatically altered the role of the lawyer.” Going on to describe the “signs that the patience and deference of the consumers of legal services is beginning to fray around the edges” and has ignited a growing demand among clients of all types—individual and corporate—for their lawyers to serve as “conflict resolvers” rather than “warriors,” Professor Macfarlane’s book references family law as “an area in which voluntary participation in alternatives to litigation (ADR) has grown exponentially, primarily in the form of family mediation or collaborative family lawyering.”

What is now frequently referred to as the “mediation explosion” of the 1980s was initially sparked by family lawyers appalled by the harm that litigated divorces were inflicting on their clients. Notwithstanding the initial skepticism and opposition of many, it ushered in the broad acceptance and use of mediation for the resolution of all kinds of disputes. In 1990, a Minnesota family lawyer, Stuart Webb, likewise dismayed with the negative impact of litigated divorces but also concerned with problems divorcing couples often encountered in the mediation process, “invented” the collaborative dispute resolution process (“collaborative law”) sometimes referred to as a “cousin” of mediation and now a rising ADR star, both in the United States and, increasingly, abroad.

Although collaborative law originated with and still continues to be practiced principally in family law matters, where its success rate is demonstrated by its still-expanding popularity, advocates are promoting and predicting its widespread use in non-family law civil matters, including business, trusts and estates, intellectual property, employment, personal injury, medical error, real estate and construction disputes. The private collaborative law agreements or protocols initially developed by family law practice groups are increasingly being adapted for broader use.

In contradistinction to mediation, the parties in a collaborative law matter are each represented every step of the way by separate counsel dedicated to their respective clients’ interests. Another distinguishing feature is that the collaborative process more fully employs interest-based negotiations rather than positional bargaining. Unlike mediation, which in some jurisdictions can be court or-

dered, collaborative law cannot be court ordered. Rather, the collaborative process is a voluntary, structured, non-adversarial approach to resolving disputes whose protocols include commitments to cooperation, teamwork, full disclosure, honesty, integrity, respect and civility. A cornerstone of the process is the undertakings of both the parties and their counsel for counsel to withdraw and not participate in any future litigated proceeding involving the subject matter of the collaborative process in the event that no mutually satisfactory settlement is reached.

The process builds on the tradition of lawyers as problem solvers and counselors, and it is credited with enabling individuals, families, businesses and organizations to maintain control over their relationships by resolving their disputes amicably. It is poised to receive even greater attention with the anticipated finalization this year of the Uniform Collaborative Law Act, which makes no distinction between family collaborative law and the use of collaborative law in other practice areas.

The Work of the Uniform Law Commission

In early 2007, the Uniform Law Commission² identified a need for uniformity in the practice of collaborative law from state to state and recommended the preparation of a uniform collaborative law act. The drafting committee assembled to draft the uniform act presented the draft Uniform Collaborative Law Act (UCLA or the Act) for its first reading and debate in July 2008 at the annual conference of the Uniform Law Commission. It is currently engaged in refining the Act in preparation for a presently scheduled second reading at the Uniform Law Commission’s July 2009 meeting. If the Commission approves the Act, it then will be considered by the ABA. Once approved by the ABA, it can then be considered by the individual states for legislative enactment. The goal of the UCLA is to support the development and growth of collaborative law by making it a more uniform, recognized and accessible option for parties to resolve disputes in a broad range of practice areas.

The Act’s Treatment of Collaborative Law Participation Agreements

Fundamental to a collaborative law process is a record of a participation agreement³ in which the parties (1) state their intention to attempt to resolve the matter without the intervention of an adjudicatory body, (2) define the nature and scope of the subject matter of the collaborative law process, and (3) identify each party’s collaborative lawyer.⁴ The participation agreement must also contain a signed acknowledgment by each party’s collaborative lawyer confirming the lawyer’s engagement.⁵ The Act establishes minimum standards for participation agree-

ments and permits parties to add individualized provisions to their agreements that are not inconsistent with the provisions of the Act. However, any such additional provisions cannot waive certain provisions of the Act.⁶

If a participation agreement is in a record and states the parties' intention to engage in a collaborative law process but does not meet the specific requirements for participation agreements, or the disclosure requirements regarding suitability for the process have not been met, a tribunal nevertheless may enforce an agreement produced in the process in which the parties engaged. The Act provides for this, however, only if the tribunal finds that the parties intended to enter into a participation agreement and reasonably believed they were participating in a collaborative law process, and the ends of justice so require it.⁷ Earlier drafts of the Act did not require a signed record evidencing the parties' intent to enter into a collaborative law process or an explicit finding by a tribunal that the parties intended to enter into a collaborative law process. These requirements were added to protect parties from the possibility of being found to have engaged in the collaborative law process when it was not their intent to do so.

Further, the Act anticipates that wider practice of collaborative law may give rise to claims that agreements reached in collaborative processes should not be enforced, or that the attorney disqualification and evidentiary privilege provisions of the Act (discussed below) should be found inapplicable because of failures of collaborative lawyers to meet requirements of the Act. The Act takes the view that failures of collaborative lawyers to meet requirements of the Act in drafting a participation agreement should not adversely impact parties who reasonably believed they were participating in a collaborative law process. Similarly, the Act requires a collaborative lawyer to fully inform a prospective client of the collaborative law process before the client executes a participation agreement to enable the client to make an informed decision about the suitability of collaborative law for her matter vis-à-vis other possible methods of dispute resolution.⁸ But a collaborative lawyer's failure to meet all disclosure requirements in and of itself will not preclude an enforceable collaborative law process.⁹

When the Process Begins and Terminates

The collaborative law process begins when the parties have signed a participation agreement. It ends when (1) a party terminates the process, (2) all parties reasonably believe the process has ended because a party has initiated another proceeding¹⁰ substantially related to the matter without the consent of all parties or sought the intervention of an adjudicatory body in a pending proceeding substantially related to the matter without the consent of all parties, or (3) a collaborative lawyer withdraws or is disengaged from further representation of a party.¹¹ The Act allows for reinstatement of the process following a collaborative lawyer's withdrawal or

discharge, however, if within 30 days of the withdrawal or discharge, the unrepresented party engages a successor collaborative lawyer; all parties consent to the continuation of the process by reaffirming the participation agreement and amend it to identify the successor lawyer; and the successor lawyer acknowledges the engagement in a signed record.¹²

The Act provides that with the agreement of all parties, a proceeding can be initiated or a motion can be filed in a pending proceeding to ask a tribunal to approve an agreement or sign orders to effectuate an agreement reached in a collaborative law process without terminating the collaborative process.¹³ The Act also provides that parties to a proceeding pending before a tribunal can begin a collaborative law process by signing a participation agreement and notifying the tribunal. The filing of such a notice of the collaborative process with the tribunal stays the pending proceeding until the tribunal receives notice that the collaborative law process has terminated.¹⁴

Disqualification of a Collaborative Lawyer

The defining feature of a collaborative law process is the requirement that, if a collaborative law process ends without resolution of the dispute, the collaborative lawyers, and the lawyers in the firms with which the collaborative lawyers are associated, are disqualified from representing the parties in the matter or any substantially related matter.¹⁵ The disqualification requirement is intended to create an environment in which parties and their counsel are focused on resolving the dispute without thoughts of possible litigation. The potential for attorney disqualification incentivizes parties to reach agreement and avoid the increased time and expense of engaging new counsel and the cost of litigating¹⁶ and also removes the possible financial incentive that counsel could have in a case failing to settle, instead keeping the focus on accomplishing the client's goals by reaching an agreement. Another rationale for the disqualification requirement is that a collaborative lawyer generally obtains a great deal of confidential information about his client's case and the other party's case that he likely would not obtain outside of a collaborative process, and that permitting a collaborative lawyer to continue the representation would give the lawyer unfair advantage in the subsequent litigation.

The disqualification requirement has been the subject of controversy. Opponents have charged that it gives a party's adversary the power to fire the party's lawyer and thereby creates the possibility of serious settlement pressure in a collaborative process. Others voice concern that it renders collaborative law ill suited to non-family law civil practice, where lawyers and law firms commonly have continuing relationships with clients, rather than one-time engagements as are routine in family law, and will be loathe to run the risk of being disqualified from representing a client in the event a dispute is not settled in the collaborative process. Proponents maintain, however, that the requirement is an essential motivator for parties

in a collaborative law process to reach resolution of their dispute, and that its removal or the ability to circumvent it would fundamentally alter the collaborative process. The possibility of parties mutually rescinding the disqualification requirement, furthermore, has been specifically rejected, with § 3(b)(2) of the current draft of the Act stating that parties to a collaborative law participation agreement may not agree to waive or vary the effect of the disqualification provisions in § 8 of the Act.

Although the disqualification requirement vexes some, Professor Macfarlane, despite her repeatedly expressed favorable views of collaborative law, has suggested that such a requirement may become irrelevant within the next ten years as collaborative law, and the interest-based settlement processes associated with it, become more established and ingrained as part of standard practice.¹⁷ Moreover, as David Hoffman, another leading collaborative lawyer practitioner, has pointed out, collaborative law is just one of a number of ADR methods, each having its place in appropriate cases, and need not be the method of choice for resolving every dispute.¹⁸

If parties wish to engage in a collaborative law process but are concerned about the disqualification requirement, measures can be taken to accommodate the concern. For example, the Participation Agreement developed by the Texas Collaborative Law Council¹⁹ nevertheless allows for the use of arbitration under limited circumstances and if agreed to by all parties for the purpose of breaking an impasse on a specific issue (such as the value of a parcel of real estate), which would not require the withdrawal of counsel. And it has been suggested that a more economic and perhaps more satisfying impasse breaker like med-arb could be similarly utilized.²⁰

This draft of the Act also continues to include exceptions to the disqualification rule for collaborative processes involving low-income parties and government entities. The Act defines a collaborative process involving a low-income party as one in which a party has an annual income not exceeding 125% of the Federal Poverty Guidelines amounts and the collaborative lawyer represents the party without a fee.²¹ In such instances, upon the termination of a collaborative law process, the Act provides that a lawyer in the law practice, legal services organization or law department with which the collaborative lawyer is associated may represent the party if the participation agreement provides for this and the collaborative lawyer is screened from participation in the matter and any substantially related matters.²² The rationale for the exception is that low-income parties may have difficulty retaining successor counsel.²³

This provision has been criticized, however, as potentially giving unfair advantage to low-income parties in subsequent litigation on the basis that firewalls may be ineffective, and that the prospect of an ineffective firewall in subsequent litigation creates unfair leverage for low-

income parties in the collaborative process. Collaborative lawyers experienced in pro bono representation, moreover, have reported that application of the disqualification requirement has not been an obstacle for low-income parties in practice. Similar to the exception for collaborative processes involving low-income parties, when a party to a participation agreement is a government entity and the collaborative law process terminates, a lawyer in the law firm, legal services organization or law department with which the collaborative lawyer is associated may represent the party if the participation agreement provides for this, and the collaborative lawyer is screened from the matter and any substantially related matters.²⁴

Collaborative Lawyer's Duties Upon Termination of the Process

The Act does not clarify the responsibilities of collaborative counsel in transferring a matter to new counsel when settlement is not reached in the collaborative law process. The UCLA drafting committee considered leaving this question to ethics regulations or inserting a section in the Act instructing that, if a collaborative law process terminates without a settlement, collaborative counsel may not communicate with successor counsel except to fulfill the professional obligations that apply when a lawyer withdraws or is discharged from a representation. The drafting committee concluded at its November 2008 meeting, however, to include a comment to the Act noting that participation agreements can be used to regulate this behavior. Since ethical rules governing a lawyer's withdrawal or discharge from a representation generally do not direct the withdrawing or discharged attorney to discuss the matter fully with new counsel or prohibit the attorney from doing so, it would be prudent for parties to specify in their participation agreement what a collaborative attorney may and may not communicate to successor counsel in the event no settlement is reached in the collaborative law process.

Disclosure, Confidentiality and Evidentiary Privilege

The UCLA places an affirmative duty on parties in a collaborative law process to make timely and full disclosure of information reasonably related to the matter at a party's request without formal discovery, and if the duty to disclose is continuing.²⁵ Although the Act calls for full disclosure and provides an evidentiary privilege, discussed below, it does not deem communications made during a collaborative law process confidential, except to the extent agreed to by the parties or as provided by state law.²⁶ The Act thus encourages parties to reach agreement on general confidentiality matters on their own. Some urge that the UCLA should be strengthened in this regard and made similar to state ADR statutes that provide, unless parties agree otherwise, that all communications in a collaborative process, including the conduct and demeanor of parties and counsel, are confidential and

may never be disclosed to anyone.²⁷ The drafting committee, however, has determined it more appropriate to leave the question of the confidentiality of collaborative communications to the parties to decide in the context of the particulars of their dispute. Although for some it may be very important to establish that collaborative law communications will not be disclosed outside of the collaborative process, others may want to be able to discuss collaborative communications with family members, business associates and others without the risk of civil liability that a statutory prohibition of disclosure could pose.

The Act provides, however, that a communication made by a party or non-party participant²⁸ in a collaborative process is privileged and protected from disclosure in subsequent legal proceedings.²⁹ By applying to non-parties, the privilege accommodates the joint retention of neutral experts, which is a common practice in collaborative processes and considered advantageous for reasons of expert impartiality and cost savings. If a collaborative law process terminates without a settlement, a non-party participant, such as a financial planner or psychologist, can assert the evidentiary privilege and decline to testify about a collaborative law communication in a subsequent proceeding even if all parties would like the non-party to testify. This feature of the Act is based on similar provisions in the Uniform Mediation Act and aims to encourage free and open communication of information, perspectives and ideas in the collaborative process, facilitating resolution of the dispute without concern that the communications may be used against a party in subsequent legal proceedings.

The Act provides that the privilege applies unless waived³⁰ or precluded by an exception under the Act. Exceptions to the application of the privilege mirror those provided in the Uniform Mediation Act and relate largely to situations in which the interests of justice and society are deemed to outweigh the interest in confidentiality of the collaborative law communication, such as where there is a need for protection from serious bodily injury, crime prevention or for someone who has been accused of professional misconduct to be able to defend himself.³¹ The Act notably provides that parties can agree that all or part of a collaborative process will not be privileged.³² It also makes clear that the privilege protects communications made in a collaborative process but not the underlying evidence giving rise to the communication, and that information otherwise subject to discovery will not become protected from discovery solely by having been a collaborative law communication.³³

The Promise of the UCLA

In *The New Lawyer*, Professor Macfarlane coined the phrase “conflict management advocates,” referring to a new advocacy role for lawyers engaged in conflict management and dispute resolution. The task of lawyers practicing in this area should be to assist clients in meet-

ing their goals and interests, resolving disputes ethically, with civility and professionalism, as quickly, peacefully and economically as possible. The phrase “conflict management advocates” and the book’s subtitle, *How Settlement Is Transforming the Practice of Law*, bring to mind the 1976 Pound Conference convened by the American Bar Association to examine concerns about the efficiency and fairness of the courts systems.

Following the Pound Conference, Derek Bok, the former Dean of Harvard Law School and the former President of Harvard University, reflected on the significant events of the conference and opined,

Over the next generation, I predict, society’s greatest opportunities will lie in tapping human inclinations towards collaboration and compromise rather than stirring our proclivities for competition and rivalry. If lawyers are not the leaders in marshaling cooperation and designing mechanisms that allow it to flourish, they will not be at the center of the most creative social experiments of our time.

Collaborative law is indeed one of the “mechanisms” envisioned by Derek Bok. The process can be tailored to the needs of the parties in the context of the unique characteristics of their dispute, which benefits parties by encouraging the voluntary, early and peaceable settlement of disputes utilizing interest-based resolutions to meet the goals, concerns and interests of all parties. Its future growth and development holds out significant benefits for clients and for the legal profession.

Enactment of the UCLA will encourage and support this further future growth and development by setting minimum standards and providing for consistency in the practice of collaborative law from state to state. It will establish and/or confirm important features of collaborative law, including the collaborative lawyer disqualification requirement and evidentiary privilege for collaborative law communications, and it will facilitate the enforcement of participation agreements. Collaborative law offers parties to disputes a meaningful choice in the selection of a dispute resolution method. It gives parties to a dispute the flexibility to individualize both the collaborative law process and its outcome while at the same time, encouraging parties to reach resolution in order to avoid the significant expense that, unfortunately, will be incurred in any adversarial process.

Endnotes

1. Julie Macfarlane, *The New Lawyer: How Settlement Is Transforming the Practice of Law* (UBC Press 2008). This book is reviewed in this issue of *New York Dispute Resolution Lawyer*.
2. The Uniform Law Commission, formerly known as the National Conference of Commissioners for Uniform State Laws, is a non-profit, unincorporated association that works for the improvement of state laws by drafting uniform state laws on subjects where uniformity is desirable and practicable. It consists of state

- commissions on uniform laws from each state, the District of Columbia, the Commonwealth of Puerto Rico and the U.S. Virgin Islands, it is the oldest state governmental association and it is the source of more than 250 uniform acts. See the Uniform Law Commission's Web site at <http://www.nccusl.org> and Frequently Asked Questions About the Uniform Law Commission at <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=5&tabid=61>.
3. Sections 3(a)(1) and 2(12) of the January 2009 Draft of the Uniform Collaborative Law Act (available at <http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=279>) require participation agreements to be "inscribed on a tangible medium" or "stored in an electronic or other medium" and "retrievable in perceivable form," precluding oral agreements.
 4. UCLA § 3(a) (January 2009 Draft).
 5. UCLA § 3(a)(6) (January 2009 Draft).
 6. The lawyer disqualification provisions in § 8, full disclosure provisions in § 11 and the provisions regarding informed consent and screening for domestic violence in § 11 cannot be waived by the parties.
 7. UCLA § 17 (January 2009 Draft).
 8. UCLA § 12(a) (January 2009 Draft).
 9. UCLA § 17 (January 2009 Draft).
 10. UCLA § 2.10 defines "proceeding" as "a judicial, administrative, arbitral, legislative, or other process adjudicative in nature before a tribunal, including related pre-hearing and post-hearing motions, conferences, and discovery."
 11. UCLA §§ 4(b) and (c) (January 2009 Draft).
 12. UCLA § 4(d) (January 2009 Draft).
 13. UCLA § 4(e) (January 2009 Draft).
 14. UCLA §§ 5(a) and (b) (January 2009 Draft).
 15. UCLA §§ 8(a) and (b) (January 2009 Draft). Section 8(b) of the draft Act states that

[a] lawyer in a law firm with which the collaborative lawyer is associated shall not knowingly represent a party in the matter or a substantially related matter and may not appear before a tribunal to represent a party in a proceeding substantially related to the matter if the collaborative lawyer is disqualified from doing so by subsection (a).
 16. David A. Hoffman, *Colliding Worlds of Dispute Resolution: Towards a Unified Field Theory of ADR*, 1 J. DISP. RESOL. 26, 42 (2008) (noting that economic data suggest that, in the event parties terminate a collaborative process, the cost associated with litigating the matter would exceed significantly the cost of educating new counsel).
 17. Comments in response to questions following Professor Macfarlane's keynote address entitled *The Evolution of the New Lawyer*, delivered at Fordham Law School's Third Annual ADR Symposium on October 24, 2008.
 18. See *supra* n.16 at 42 (advocating for greater acceptance of the diversity of dispute resolution practices, including negotiation, collaborative and cooperative processes, mediation, arbitration, litigation, and variations and hybrids thereof). This article was among the materials distributed at Professor Macfarlane's Fordham program, *supra* n.17.
 19. http://collaborativelaw.us/articles/TCLC_Participation_Agreement_With_Addendum.pdf.
An Addendum to the Participation Agreement provides that the parties may customize their agreement by providing for mediation or arbitration.
 20. Although the name was applied to it for the first time in 1970, the process has a long history that, with some possible variations, typically involves participation by disputing parties in a mediation and if no settlement is reached, converting the mediator into an arbitrator who issues a binding decision.
 21. UCLA § 9(a) (January 2009 Draft).
 22. UCLA §§ 9(c) and 2(5) (January 2009 Draft). Section 9(c)(2), regarding screening a collaborative lawyer who represented a low-income party; and § 10(c)(2), regarding screening a collaborative lawyer who represented a government entity, discussed below, relies on the definition of "screened" provided by the ABA Model Rules of Professional Conduct, Rule 1.0(k).
 23. UCLA Prefatory Note entitled *Collaborative Law and Low-Income Parties* (July 2008 Draft), available at http://www.law.upenn.edu/bll/archives/ulc/ucla/2008_amdraft.htm.
 24. UCLA § 10 (January 2009 Draft).
 25. UCLA § 11 (January 2009 Draft).
 26. UCLA § 13 (January 2009 Draft).
 27. Texas Family Code, Collaborative Law §§ 6.603 and 153.0072.
 28. The term "non-party participant" is defined by section 2(7) of the draft Act as "a person, other than a party and the party's collaborative lawyer, that participates in a collaborative process" and includes financial planners, psychologists and other experts.
 29. UCLA §§ 14(a) and 14(b) (January 2009 Draft).
 30. Section 15(a) of the draft Act specifies that a party's privilege may be waived if expressly waived by all parties, and a non-party participant's privilege may be waived if waived by the parties and the non-party participant. Further, if all parties and the non-party participant agree, a stipulation of the findings and/or opinions of the non-party participant may be filed in a subsequent proceeding before a tribunal.
 31. UCLA § 16(a) (January 2009 Draft).
 32. UCLA § 16(e) (January 2009 Draft).
 33. UCLA § 14(c) (January 2009 Draft).

Norman Solovay chairs the Alternative Dispute Resolution (ADR) practice at McLaughlin & Stern, LLP. He has authored several books on arbitration and mediation (the most recent, entitled *The Internet and Alternate Dispute Resolution: Untangling the Web*, was published by the New York Law Journal press). He presently co-chairs the Collaborative Law Committee of the Dispute Resolution Section of the New York State Bar Association. He can be reached at: nsolovay@mclaughlinstern.com.

Lawrence R. Maxwell, Jr., is a mediator, arbitrator and collaborative law attorney in Dallas, Texas. He is a co-founder and President of the Global Collaborative Law Council and Co-chair of the Collaborative Law Committee of the ABA Section of Dispute Resolution and the Section's Advisor to the Uniform Law Commission Committee, which is drafting the Uniform Collaborative Law Act. He can be reached at lmaxwell@adr-attorney.com.

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The Dark Before the Dawn

How New York's Venerable but Outdated Arbitration Statute Has Fallen into Desuetude, and How Enactment of the Revised Uniform Arbitration Act Can Restore Logic and Reason to New York Arbitration.

By William J.T. Brown

In 1920, New York was the leader, the first of the states to enact an arbitration statute directing courts to enforce the agreements of commercial parties to resolve their future disputes through arbitration. That 1920 enactment remains at the core of New York's present arbitration law, Civil Practice Law & Rules (CPLR) article 75. New York's 1920 enactment was also the model for the Federal Arbitration Act (FAA), which Congress adopted in 1925. The two acts co-existed for decades with little suggestion of conflict. In general concept, the New York arbitration statute applied when parties brought an arbitration-related dispute into New York state court. The Federal act applied when such a dispute came before the federal court, which could occur only when there was an independent basis for federal jurisdiction, such as diversity of citizenship.

Some conceptual change did occur in 1956, when the Supreme Court decided the case of *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 200 (1956), a diversity case in which the Court held that Congress's power to adopt the FAA was based on its power over interstate commerce, not its authority to adopt rules of decision for federal courts, and, thus, that federal courts were without authority to apply the FAA in an employer-employee relationship that was deemed outside the stream of commerce. That meant that the federal court had to apply state arbitration law.

Federal Preemption

In a countervailing development, however, the Supreme Court decided that one section of the FAA, § 2, which the Court identified as the "primary substantive provision" of the FAA (see *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), had to be enforced in state courts as well as federal courts. *Southland Corp. v. Keating*, 465 U.S. 1 (1984). The substantive rule of that section is that an agreement to arbitrate arising from "a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." In three Supreme Court decisions, most recently in Justice Scalia's 2006 opinion in *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440 (2006), the Court has been at pains to point out that FAA § 2 is "the only [FAA] provision that we have applied in state court." *Id.* at 447. See also *Volt Information Sciences v. Board of Trustees*, 489 U.S. 468, 477 n.6, and *Southland Corp.*, *supra*, 465 U.S. at 16

n.10. The Court has acknowledged that the FAA was not intended to occupy the entire field of arbitration (*e.g.*, *Volt, supra*, 489 U.S. at 477), and states are free to use their own procedures to implement the basic federal rule that the arbitration provision in an agreement linked to interstate commerce must be enforced unless revocable on state law grounds that would be applicable to any contract.

The author would state that all Supreme Court cases holding that an aspect or provision of state arbitration law is preempted are based on conflict with FAA § 2. To cite just a few examples, the Montana rule that arbitration clauses would not be enforced unless written in large letters violated § 2 because it discriminated against arbitration, allowing arbitration agreements to be revoked on grounds not applicable to "any contract." *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996). Dispute resolution by California officials under the Talent Agencies Act (TAA) conflicted with § 2 because it would have supplanted parties' agreements to arbitrate issues that California wanted to reserve for official decision under the TAA. *Preston v. Ferrer*, 128 S. Ct. 978 (2008). State enactments allowing various categories of parties to opt out of their agreements to arbitrate—employees, consumers, franchisees—have also been preempted for conflict with § 2. *E.g.*, *Southland Corp.*, *supra* (California statute relating to franchisees).

New York arbitration law, whether established by state court decision or legislative enactment, seems to have been particularly hard hit by § 2 preemption. The New York statute that nullifies consumer agreements to arbitrate, § 399 (c) of the General Business Law, would be preempted in cases linked to interstate commerce but is enforced in consumer cases not involving commerce. See *Ragucci v. Prof. Construction Services*, 25 A.D.3d 43 (2d Dep't 2005). The Supreme Court's rule of *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), that the arbitrator, rather than the court, must decide whether a party was induced by fraud to sign a commercial agreement, was held to preempt the contrary rule that had been developed by New York courts. See *Weinrott v. Carp*, 32 N.Y. 2d 190 (1973), overruling *Matter of Wrap-Vertiser Corp.*, 3 N.Y.2d 17 (1957). The Court of Appeals' rule that the addition of an arbitration clause to an existing contract had to be proved by "express, unconditional" evidence rather than by the preponderance standard applicable to other amendments was preempted as discriminating against

arbitration. *Progressive Casualty Ins. Co. v. C.A. Reasegureadora Nacional*, 991 F.2d 42, 46 (2d Cir. 1993), preempting the rule set forth in *Marlene Indus. Corp. v. Carnac Textiles, Inc.*, 45 N.Y.2d 327 (1978). Of broader impact were federal decisions such as *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52 (1995), preempting New York's judge-made rule that arbitrators lacked power to award punitive damages, even where the facts of the case would have justified a court in awarding such damages; or *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193 (2d Cir. 1996), preempting the rule of CPLR section 7502 (b) that, despite the parties' agreement to arbitrate all issues, a judge may decide as a preliminary matter whether the statute of limitations bars the claim; or preempting the New York rule that the arbitrator lacks authority to make an award of attorneys' fees except where the parties have so agreed.

To be sure, these preemptive changes to New York arbitration law applied only to arbitration cases linked to interstate commerce. Nor did they apply to cases where the parties had agreed to arbitrate under New York arbitration law, as FAA § 2 calls for the enforcement of agreements to arbitrate, leaving the parties free to adopt and demand the enforcement of such terms as they may wish. *E.g.*, *Volt, supra*. This left open an important question: What arbitration law applies if the parties have agreed on a choice of law clause providing that the commercial agreement containing their arbitration clause shall be governed by New York law? When such a choice is made, does that mean that New York arbitration law is also applicable? In *Mastrobuono* the Supreme Court held that a New York choice of law clause in a commercial agreement was not intended to apply to arbitration under the agreement. And the New York Court of Appeals has held, asserting its own policy in favor of arbitration, that the parties' adoption of a New York choice of law clause will not be deemed to import the limitations that New York law would impose on the authority of the arbitrator (*Smith Barney Shearson Inc. v. Sacharow*, 91 N.Y.2d 39, 47 (1997)); that would result only if the parties made their choice of New York arbitration law clear as by providing that "enforcement" of the agreement would be subject to New York law.

A Different Kind of Preemption—Voluntary Adoption of Federal Law

At the same time as New York courts were coming to terms with § 2 preemption, they embarked, almost imperceptibly at first, on a different, far broader form of voluntary preemption or abnegation of New York arbitration law not required by FAA § 2—adopting the notion that New York arbitration law should be considered as replaced by analogous provisions of the FAA when the arbitration case arose from a transaction involving interstate commerce; and that, in such cases, New York courts should act, in effect, as though they were federal

courts carrying out the FAA's procedural directives and exercising the powers conferred by Congress upon the federal courts. The author would trace the origins of this development to the Court of Appeals decision in *Salvano v. Merrill Lynch, Pierce, Fenner & Smith*, 85 N.Y. 173 (1995). That case involved an agreement by the parties to arbitrate under New York Stock Exchange Rules a dispute that plainly arose from transactions linked to interstate commerce. One party to the arbitration had been placed under severe pre-arbitration restraints by a federal court in Illinois, affecting his ability to carry on his business. In view of the apparent urgency, a New York court, which had jurisdiction, intervened under CPLR 7506 (b) to order that the panel accelerate its proceedings. However, the resulting expedited award was ordered set aside by the New York Court of Appeals on grounds that such an arbitration was governed by the FAA, and New York courts were without authority to accelerate proceedings. The case might have been decided upon the narrower ground that the parties had agreed to arbitrate under NYSE rules and that FAA § 2 required their agreement to be respected, leaving no room for a court to exercise its supervisory power under provisions of CPLR article 75. Instead the Court of Appeals made a broad statement about application of the FAA in general in securities cases.

The statement that "the FAA applies" has been repeated in a succession of cases, and New York state courts have indeed made direct application of various sections of the FAA, as though they considered that those provisions addressed by Congress to the federal courts were also addressed to state courts. *See, e.g., Imclone Systems, Inc. v. Waksal*, 22 A.D. 3d 387 (1st Dep't 2005) (enforcement of arbitrators' discovery order under FAA § 7); *Sawtelle v. Waddell & Reed, Inc.* 304 A.D.2d 103 (1st Dep't 2003) (FAA §§ 9, 10 and related federal case law used as standards for review of awards), § 7 (authority to enforce arbitrator subpoenas) and § 4 (stay of proceedings to permit arbitration). In *Diamond Waterproofing Sys. v. 55 Liberty Owners Corp.*, 4 N.Y.3d 247, 250 (2005), the Court of Appeals indicated, at least in dictum, that all provisions of the FAA were potentially applicable in a commerce-related case.

This approach reached a climax in *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, *cert. dismissed*, 127 S. Ct. 34 (2006), an arbitration case concerning authority to manage New York City real estate. The First Department, fresh from a review of the Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995), which had held that the commerce clause gave Congress no power to regulate the introduction of guns into the local school yard, thought that it followed that Congress could not use the commerce power to regulate disputes about the management of New York City office buildings and so declared, proceeding to review an arbitration award under standards of New York State arbitration law. At almost

the same time, the Supreme Court had made a sharp distinction between supervision of school yards and supervision of commercial arbitration, holding in *The Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003) that Congress had far broader power over arbitration and that, in the FAA, Congress had made the broadest permissible exercise of its commerce power. *Id.* at 56. In light of *Alafabco*, the Supreme Court, issuing its writ directly to the Appellate Division, First Department, summarily reversed that court's holding that New York office buildings were beyond Congress's power to regulate. In that summary reversal, the Supreme Court did not address the question whether it followed that the state court should make direct application of FAA provisions to review an arbitration award. As noted above, the Supreme Court had repeatedly stated that § 2 of the FAA was the only provision that it had held applicable in state court. Nonetheless, the First Department took the summary reversal as mandating direct application of FAA §§ 9 and 10 and federal case law, and applying those standards, vacated the award. On appeal, the Court of Appeals assumed the applicability of the same federal standards and found that they called for affirmance of the award

The result is that today, in commerce-related cases, New York state courts appear to be making direct application of provisions of the FAA which on their face appear to be addressed only to federal courts, with no explanation as to how those provisions became applicable in state court. The contrasting practice of the California courts, which apply their own arbitration standards to review of commerce-related awards (see *Cable Connection Inc. v. DIRECTV, Inc.*, 44 Cal. 4th 1334 (2008)), seems to confirm that New York courts are engaged in a voluntary abandonment of the statutory criteria adopted by the state legislature in 1920.

Every Arbitration Case a Constitutional Case

The decision that New York state courts must apply one set of legal criteria in commerce-related cases and another set in cases outside the stream of commerce means that every arbitration case raises a constitutional issue and may require a difficult factual determination—whether the underlying transactions fall within the broadest permissible scope of Congress's authority to regulate commerce, as contemplated by *Alafabco, supra*. Some state courts appear reluctant to recognize just how broad the federal commerce power may be. See *Ragucci, supra*, where a million-dollar home renovation project was held to be a consumer transaction not involving interstate commerce, and thus the agreement to arbitrate was held to be nullified under General Business Law § 399 (c). Similarly, arbitration agreements relating to schools, teachers, municipal construction projects and the like may well fall within the outer limits of Congress's power to regulate, but it may seem unpalatable

to exclude state arbitration procedures in such a context; and, as suggested above, federal arbitration law does not dictate such a result. In any case, the practitioner cannot be sure where the state court will draw the line as to interstate commerce, nor can one be sure whether the state court will even persist in the notion that FAA provisions are directly applicable in state court. The prudent course may be for counsel in most cases to apply for the requested relief on alternative grounds of pertinent provisions of CPLR article 75 and FAA, leaving it to the court to say which is applicable.

"[I]n commerce-related cases, New York state courts appear to be making direct application of provisions of the FAA."

The Fate of Pro-Arbitration Provisions of New York Law

An additional substantive issue is presented as to whether provisions of New York State arbitration law that are in fact more favorable to arbitration than the analogous federal rule are also displaced by the federal rule. One example is the unfortunate provision in FAA § 9, indicating that after an arbitration award is rendered, judgment will be entered thereon only if the parties had included in their arbitration agreement a formalistic statement that judgment should indeed be entered on the award. New York law is far more sensible, and CPLR 7510 allows judgment to be entered with no such requirement. Does application of the FAA mean that New York state courts are now saddled with this archaic federal requirement?

Of similar importance is New York's provision in CPLR 7503(c) authorizing a party to give notice in its demand for arbitration that, if the respondent contends that he is not obligated to arbitrate, he must commence an action to stay arbitration within 20 days or forfeit his right to dispute the point. The Court of Appeals has recently reaffirmed the vitality of this provision in a case involving lease of coin-operated video and music machines for use in a bar, without mention of the issue whether such entertainment operations involved interstate commerce. *In re Fiveco, Inc. v. Haber*, 11 N.Y.3d 140 (2008). Would application of the FAA nullify this provision of New York State law, even where the parties would otherwise be subject to New York law or where the arbitration is to be held in New York? Whether federal courts would enforce this provision of New York arbitration law is said to be uncertain. See *I.K. Bery, Inc. v. Irving R. Boody & Co.*, 2000 U.S. Dist LEXIS 1872, note 10 (S.D.N.Y. 2000).

As a final example, we can point to the New York rule that the party who denies that he agreed to arbitrate

but chooses to participate in arbitration, rather than ask a court to rule that he has no obligation to arbitrate, is bound by the arbitrator's decision on the point. See *In re Blamowski v. Munson Transp. Inc.*, 91 N.Y. 2d 190 (1997). The federal rule is more lenient—a party can assert in arbitration that he is not required to participate but participate nonetheless, and, then, if the arbitrator finds that he was indeed obligated to arbitrate, go to court to assert that the arbitrator had no authority over him. See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). Which rule should be applied in New York state court in a commerce-related arbitration sited in New York?

“Adoption of the RUAA should also help restore New York to its rightful position as a leader in arbitration and a favored arbitration venue.”

Conclusion

The author would submit that in seeking to harmonize federal and state arbitration, we New Yorkers have deviated too far from the basic rule that state arbitration law should be applicable in state court except to the extent it may be preempted by the single federal rule that, in the context of commerce, the parties' agreement to arbitrate must be enforced according to its terms. As shown above, and despite the venerable origins of New York State's arbitration law, there is now so much confusion and uncertainty about the application of that law that a fresh start is required. Eschewing the rivalry between New York State arbitration law and the FAA, virtually all of the states, beginning in 1956, had adopted the Uniform Arbitration Act, as recommended by the National Conference of Commissioners on Uniform State Laws. That uniform act has been updated in recent years and has become the Revised Uniform Arbitration Act (RUAA), and it has already been enacted by some 12 states. Designed

to supplement the FAA and operate in harmony with it, a New York version of the RUAA, as reviewed and adapted by a New York task force over the past several years, would eliminate the idiosyncratic provisions that place New York law in conflict with the FAA while preserving pro-arbitration features of New York law, such as the party's ability to obtain an early decision as to its right to arbitrate by giving notice of intent to arbitrate. The RUAA will also ensure greater fairness in arbitration by recognizing a potential right to discovery of evidence, requiring disclosure of potential conflicts by the arbitrator and authorizing the arbitrator to grant provisional remedies to prevent irreparable harm while the arbitration process goes forward.

The New York State Bar Association, supported by the New York City Bar and the New York County Lawyers' Association, has recommended enactment of the RUAA, and appropriate bills have been introduced in the New York State Legislature. By such enactment, the legislature will establish clear and comprehensive rules to be applied by the state courts in harmony with FAA requirements, thus ending the present state of overlap and confusion. The RUAA will respect the present New York rule that consumer agreements to arbitrate future disputes are null and void. Its comprehensive terms should ensure fairness in the arbitration process and predictability of application, so that a need for resort to the courts for interpretation will be minimized. Adoption of the RUAA should also help restore New York to its rightful position as a leader in arbitration and a favored arbitration venue.

William J.T. Brown, williamjtbrown@gmail.com, is an independent arbitrator and attorney practicing in New York. He recently retired from the Dewey & LeBoeuf firm and was formerly a partner of LeBoeuf, Lamb, Greene & MacRae. His interest in the law that courts apply to arbitration is derived from experience in litigating cases such as *The Shaw Group, Inc. v. Triplefine International Corp.*, 322 F.3d 115 (2d Cir. 2003).

Manifest Disregard of the Law after *Hall Street*: A Continued Role for an Extra-Statutory Doctrine?

By Sherman Kahn with assistance from Jordan Nodel

In the inaugural issue of this publication, Carroll Neesemann¹ posed the question of whether the judicially created doctrine of manifest disregard for the law as a ground for vacating an arbitration award made under the Federal Arbitration Act (“FAA”) would survive the Supreme Court’s decision in *Hall Street Assocs. v. Mattel, Inc.*² Courts have begun to grapple with the question, and the initial answer appears to be a qualified “Yes”—but only as a gloss on FAA Section 10(a)(4). This article discusses the developing law on this issue.

A. What Is Manifest Disregard of the Law, and What Did *Hall Street* Do to It?

In *Hall Street*, the Supreme Court held that FAA § 9 limits review of arbitration awards to the specific grounds set forth in FAA §§ 10 (*vacatur*) and 11 (modification). The Supreme Court held that parties may not, through contract, agree to expanded or alternative standards of review of an FAA arbitration award.³

The parties in *Hall Street* had entered into an arbitration agreement to resolve a disputed issue raised in a lease dispute the parties were litigating in federal district court. The parties’ agreement, which the district court had entered as an order, stated that the district court could review the arbitration award for findings of fact not supported by substantial evidence or erroneous conclusions of law.⁴ Thus, the arbitration agreement at issue in *Hall Street* provided for review substantially less deferential than that authorized specifically under FAA §§ 10 and 11. Section 10 allows for *vacatur* only where:

- (1) the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators; (3) where the arbitrators were guilty in misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.⁵

Section 11, in turn, provides for modification of an award only where:

- (a) there was an evident miscalculation of figures or an evident material mistake in the description of any person, thing or

property referred to in the award; (b) the arbitrators have awarded on a matter not submitted to them, unless it is a matter not affecting the merits of the decision on the matter submitted; or (c) the award is imperfect in a matter of form not affecting the merits of the controversy.⁶

Before the Supreme Court’s decision in *Hall Street*, the courts of appeal had supplemented the statutory grounds set forth in FAA Sections 10 and 11 with the judicially created doctrine of “manifest disregard for the law.” While each circuit had a slightly different formulation of this doctrine, generally it provided that an arbitration award could be overturned where the arbitrators had been aware of a clear principle of law but had deliberately disregarded it. For example, in the Second Circuit, manifest disregard of the law can be demonstrated where “the arbitrator knew of the relevant principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it.”⁷

In *Hall Street*, Hall Street argued that expanded review should be allowed, taking the position that the judicially created manifest disregard standard supported the proposition that the FAA statutory factors were not the only grounds upon which an arbitration award could be vacated.⁸ Hall Street pointed to the Supreme Court’s decision in *Wilko v. Swan*,⁹ which is generally credited with creating the manifest disregard standard, in support of its position. The Supreme Court disagreed, stating that *Wilko* could not bear the weight Hall Street sought to put on it.¹⁰ While recognizing that some Circuits have treated manifest disregard as a further ground for *vacatur* in addition to those listed in § 10, the Supreme Court said:

Maybe the term “manifest disregard” was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them. Or, as some courts then thought, “manifest disregard” may have been shorthand for § 10(a)(3) or § 10(a)(4), the subsections authorizing *vacatur* when the arbitrators were “guilty of misconduct” or “exceeded their powers.”¹¹

Hall Street did not overrule, or even explicitly construe *Wilko*, but rather set forth conflicting interpretations and stated that the case did not support the position urged by Hall Street. So, while *Hall Street* held that §§ 10 and 11 were the sole grounds for overturning an arbitration

award, it left open the question of whether the “manifest disregard” doctrine would continue to be viable.

Since *Hall Street* was decided, a number of courts have addressed the continued viability of the manifest disregard standard. We discuss their findings below.

B. Courts Finding Continued Viability for Manifest Disregard

It did not take long for the courts to begin to confront the issues raised by the Supreme Court’s decision in *Hall Street*. As of the time of submission of this article, the Second and the Ninth Circuits have found a continued role for the doctrine of manifest disregard.¹² The Sixth Circuit has done the same, albeit in an unpublished opinion.¹³

The Second Circuit’s analysis in *Stolt-Nielsen SA v. Animalfeeds, Int’l.*, (“*Stolt-Nielsen*”) is quite detailed. The Second Circuit first sets out that under its pre-*Hall Street* jurisprudence, manifest disregard provided for *vacatur* of an arbitration award only in very limited circumstances—i.e., a federal court cannot vacate an award if there is a barely colorable justification for the outcome reached by the arbitrators.¹⁴ The Second Circuit then set out a three-part test that must be met before an arbitration award can be vacated for manifest disregard of the law: (1) the law alleged to have been ignored must be clear and explicitly applicable to the matter at issue; (2) the law must have, in fact, been improperly applied, leading to an erroneous outcome; and (3) the arbitrators must have actually known of the law’s existence and its applicability.¹⁵

The *Stolt-Nielsen* court then considered the effect of *Hall Street* on the scope and vitality of the use of “manifest disregard of the law” as a ground to vacate an arbitration award. The Second Circuit acknowledged that *Hall Street*’s holding that the enumerated grounds in the FAA are the exclusive grounds for vacating an arbitration award is inconsistent with *dicta* in some Second Circuit cases to the effect that “manifest disregard” is a ground for *vacatur* separate from those enumerated in the FAA.¹⁶ However, the *Stolt-Nielsen* court observed that, in *Hall Street*, the U.S. Supreme Court had also speculated that “manifest disregard” might have referred to the § 10 grounds collectively rather than adding to them or might have been used as a shorthand for § 10(a)(3) or § 10(a)(4).¹⁷ The Second Circuit thus concluded that the U.S. Supreme Court had not abrogated the manifest disregard doctrine entirely.

Following a footnote stating that the Second Circuit will adhere to its precedent where the U.S. Supreme Court has “cryptically cast doubt” on prior holdings,¹⁸ the *Stolt-Nielsen* Court referred with approval to the law of the Seventh Circuit and, in particular, to *Wise v. Wachovia*,¹⁹ in which the Seventh Circuit held that the doctrine of manifest disregard of the law was a species of situation in which the arbitrators had exceeded their powers, putting the doctrine squarely within 9 U.S.C. § 10(a)(4).²⁰ While we do not yet have the benefit of a post-*Hall Street*

ruling from the Seventh Circuit itself on this issue, the Northern District of Illinois has decided, in accord with *Stolt-Nielsen*, that the manifest disregard doctrine survives in the Seventh Circuit because it is a species of 9 U.S.C. § 10(a)(4).²¹

Stolt-Nielsen, therefore, raises the question of whether the doctrine of manifest disregard of the law has been narrowed in the Second Circuit. The rationale of the decision does not inexorably lead to that conclusion, but it is possible that courts in the Second Circuit will circumscribe the doctrine more tightly to ensure it remains consistent with Section 10(a)(4). The Second Circuit’s footnote regarding adhering to precedent suggests that it will follow existing Second Circuit precedent, but its discussion of the Seventh Circuit’s rule suggests the Second Circuit might look at the issue more narrowly going forward. We will have to wait to see how the law develops.

The Ninth Circuit has joined the Second Circuit in reaffirming the continued viability of manifest disregard. Before *Hall Street* was decided, in a case entitled *Comedy Club, Inc. v. Improv West Associates*, the Ninth Circuit had vacated an arbitration award in part for manifest disregard of California’s ban on covenants not to compete (California Business & Professions Code § 16600).²² The U.S. Supreme Court vacated and remanded the case to the Ninth Circuit for further review in light of *Hall Street*. Upon reconsideration, the Ninth Circuit reaffirmed its finding of manifest disregard. The Ninth Circuit characterized its previous standard, as articulated in *Kyocera v. Prudential Bache T. Services*,²³ to be that manifest disregard was a species of violation of 9 U.S.C. § 10(a)(4) (i.e., the arbitrators exceeded their powers).²⁴ Accordingly, the Ninth Circuit held in *Comedy Club* that manifest disregard survives, stating, “We cannot say that *Hall Street Associates* is clearly irreconcilable with *Kyocera* and thus we are bound by our prior precedent.”²⁵

The only other Circuit to directly hold that manifest disregard of the law continues to be a viable independent ground for challenge of an arbitration award following *Hall Street* is the Sixth Circuit—although it addressed the issue in an unpublished opinion. In *Coffee Beanery, Ltd. v. W.W., L.L.C.*,²⁶ the Sixth Circuit discussed manifest disregard as an extra-statutory ground for *vacatur*, citing *Wilko*, and held that “[i]n light of the Supreme Court’s hesitation to reject the “manifest disregard” doctrine in all circumstances, we believe it would be imprudent to cease employing such a universally recognized principle.”²⁷ The Sixth Circuit resolved to continue employing the doctrine.²⁸

C. Courts Finding that Manifest Disregard Is No Longer Good Law

The Fifth Circuit has squarely held that “manifest disregard” of the law is no longer viable as an extra-statutory ground for *vacatur*.²⁹ In *Citigroup Global Markets Inc. v. Bacon*, the Fifth Circuit concluded that manifest

disregard of the law could not survive, at least in the Fifth Circuit’s formulation, as an independent ground to vacate an arbitration award.³⁰ The court first looked at the history of the manifest disregard doctrine, pointing out that the Fifth Circuit had been one of the last Circuit Courts of Appeal to adopt the doctrine.³¹ It then examined the post-*Hall Street* authority on the issue, finding a continued role for the doctrine. The Fifth Circuit flatly rejected the Sixth Circuit’s *Coffee Beanery* decision, finding that it failed to address the Supreme Court’s express holding that the grounds for *vacatur* in § 10 are exclusive and misread the Supreme Court’s discussion of *Wilko v. Swan*.³² The Fifth Circuit was far less dismissive, however, of the Second Circuit’s decision in *Stolt-Nielsen* and the Ninth Circuit’s in *Comedy Club*, as those decisions cast manifest disregard as a gloss on FAA § 10(a)(4)—a description of manifest disregard the Fifth Circuit described as “very narrow.”³³ Thus, while the Fifth Circuit, in *Citigroup Global Markets* clearly rejects manifest disregard “as an independent, nonstatutory ground for setting aside an award” the decision leaves open the possibility of a future in the Fifth Circuit for manifest disregard as a gloss on FAA Section 10(a)(4).

The First Circuit has also said that it now rejects manifest disregard, but suggested such only as an aside, in a case that did not involve the Federal Arbitration Act.³⁴ Interestingly, the first direct statement that manifest disregard of the law is no longer viable came not from a federal court at all, but from the Supreme Court of Alabama. In *Hereford v. Horton*, the Supreme Court of Alabama initially held that “manifest disregard” standard was no longer viable.³⁵ However, the Supreme Court of Alabama recently revised its ruling to include a new footnote suggesting that the issue of “whether manifest disregard of the law remains as a judicial gloss on the grounds specified in § 10(a) of the Federal Arbitration Act or is merely shorthand for § 10(a)(3) or § 10(a)(4)” was still to be decided.³⁶ Nonetheless, the *Hereford* decision’s result remained the same—rejecting the appellant’s claim because she “raised manifest disregard of the law as the only ground on which she seeks to have the arbitrator’s award vacated.”³⁷ The Alabama Supreme Court thus appears to have hedged its bets but, nonetheless, stuck with its ruling that manifest disregard cannot be raised as an independent ground for *vacatur*.

Scattered district courts have also held that manifest disregard cannot survive *Hall Street*. For example, at least one decision of the Southern District of New York rejected the doctrine—although that decision has now been overruled by the Second Circuit’s decision in *Stolt-Nielsen*.³⁸

The District of Minnesota has also rejected manifest disregard in light of *Hall Street*.³⁹ In rejecting the doctrine, the District of Minnesota reasoned “[i]t would be somewhat inconsistent to say that the parties cannot contractually alter the FAA’s exclusive ground for vacating or

modifying an arbitration award, but then allow the courts to alter the exclusive grounds by creating extra-statutory bases for vacating or modifying an award.”⁴⁰

D. Courts Declining to Decide the Issue

A variety of courts have deferred ruling on *Hall Street*’s effect on the manifest disregard doctrine. The Fifth Circuit initially took this approach, addressing the issue but deciding that, because it was affirming the challenged arbitration award, there was no need to determine whether manifest disregard remains good law after *Hall Street*.⁴¹ A variety of district courts similarly deferred the issue.⁴²

E. Conclusion

It is still too early to tell whether a consensus will emerge regarding the continued viability of manifest disregard of the law. However, it appears that there is a trend toward continued viability of the manifest disregard doctrine under the rubric of an act beyond the arbitrator’s powers under 9 U.S.C. § 10(a)(4). No doubt, in the coming months there will be more decisions on this evolving issue—perhaps those decisions will provide clear direction regarding the issue.

Endnotes

1. *New York Dispute Resolution Lawyer*, Vol. 1, No. 1, p. 13.
2. 128 S. Ct. 1396 (March 25, 2008).
3. *Id.*
4. 128 S. Ct. at 1400-01.
5. Title 9 U.S.C. § 10(a).
6. Title 9 U.S.C. § 11.
7. *Westerbeke Corp. v. Daihatsu Motor Co., Ltd.*, 304 F.3d 200, 217 (2d Cir. 2002).
8. 128 S. Ct. at 1403.
9. 346 U.S. 427 (1953).
10. 128 S. Ct. at 1404.
11. *Id.*
12. *Stolt-Nielsen SA v. Animalfeeds Int’l Corp.*, 548 F.3d 85, 94 (2nd Cir. 2008) (*Hall Street* “did not, we think, abrogate the ‘manifest disregard’ doctrine altogether”); *Comedy Club, Inc. v. Improv West Associates*, 553 F.3d 1277, 2009 US App. LEXIS 1634, *29 (9th Cir. 2009). See also, *Americredit Financial Services, Inc. v. Oxford Management Services*, 2008 U.S. Dist. LEXIS 76720, at *18-19 (E.D.N.Y. 2008) (decided before *Stolt-Nielsen*; discussing manifest disregard standard under *Hall Street* and applying pre-*Hall Street* Second Circuit rule); *Mastec North America, Inc. v. MSE Power Systems, Inc.*, 581 F. Supp. 2d 321 (N.D.N.Y. 2008) (also decided before *Stolt-Nielsen*, interpreting *Hall Street* to treat manifest disregard as a gloss on the § 10 requirements and analyzing it under Second Circuit case law).
13. *Coffee Beanery, Ltd. v. W.W. LLC, et al*, 2008 U.S. App. LEXIS 23645, at *12 (6th Cir. 2008).
14. 548 F.3d at 92.
15. *Id.* at 92-93.
16. *Id.* at *94 (citing *Hoeft v. MDL Group, Inc.*, 343 F.3d 57, 64 (2d Cir. 2003) (describing manifest disregard as an additional ground not prescribed in the FAA); *Duferco Int’l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 389 (2d Cir. 2003) (observing

- that the doctrine's use is limited to instances "where none of the provisions of the FAA apply"; *DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818, 821 (2d Cir. 1997) (referring to the doctrine as "judicially created"), *cert. denied*, 522 U.S. 1049 (1998); and *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986) (same).
17. 2008 U.S. App. Lexis 22838 at *24.
 18. *Id.* at *25, fn. 9, citing *State Employees Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 84, 86 (2d Cir. 2007).
 19. *Wise v. Wachovia Sec. LLC*, 450 F.3d 265, 269 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 582 (2006).
 20. *Joseph Stevens v. Cikanek*, 2008 U.S. Dist. LEXIS 52611 at *11-12 (noting that the Seventh Circuit "has specified that the 'manifest disregard of the law' standard is cabined entirely within 9 U.S.C. § 10(a)(4)").
 21. *Id.*, at *11-12 (N.D. Ill. 2008). One pre-*Hall Street* case from the Seventh Circuit presents an interesting issue. In *Edstrom Industries, Inc. v. Companion Life Ins. Co.*, 516 F.2d 546 (7th Cir. 2008), Judge Posner interpreted an arbitration clause requiring that the parties "strictly abide" by the terms of an insurance policy and "strictly apply" the substantive law of Wisconsin to, in effect, restrict scope of the arbitrator's discretion in interpreting the substantive law. *Id.* at 549. Judge Posner said that the question before the court in *Edstrom Industries* was different from that posed in *Hall Street* (which, at the time, was pending before the Supreme Court)—"whether the arbitrator can be directed to apply specific substantive norms and be held to the application." *Id.* The Seventh Circuit went on to rule that the arbitrator had ignored applicable Wisconsin law contrary to his instruction under the arbitration agreement. It is an open question whether the reasoning of *Edstrom Industries* remains sound after *Hall Street*, unless the case is viewed as an application of the "manifest disregard of the law" standard.
 22. *Comedy Club, Inc. v. Improv West Associates*, 502 F.3d 1100 (9th Cir. 2007), *vacated and remanded*, 129 S. Ct. 45 (2008).
 23. 341 F.3d 987, 997 (9th Cir. 2003) (*en banc*).
 24. 553 F.3d 1277, 2009 U.S. App. LEXIS 1634, at *29 (9th Cir. 2009).
 25. *Id.*, at *29. It remains to be seen how whether the Supreme Court will be asked to review the *Comedy Club* decision again now that the Ninth Circuit has announced its application of *Hall Street*.
 26. 2008 U.S. App. LEXIS 23645 at *9-12.
 27. *Id.* at *12; *cf. Martin Marietta Materials, Inc. v. Bank of Oklahoma*, 2008 U.S. App. LEXIS 25681, at *6 (6th Cir. Dec. 17, 2008) (unpublished decision decided after *Coffee Beanery* stating that *Hall Street* calls manifest disregard into question but applying the standard nonetheless "in order to allow future panels and litigants to choose for themselves whether to challenge these premises or to continue to walk down the same calf-path as we have").
 28. *Id.* The Supreme Court of New York, New York County, reached a similar conclusion in *Chase Bank USA, N.A. v. Hale*, 859 N.Y.S.2d 342, 348-49 (N.Y. Sup. 2008) (reasoning that "the Supreme Court appears to have done nothing to jettison the 'manifest disregard' standard of *Wilko*").
 29. *Citigroup Global Markets Inc. v. Bacon*, Fifth Circuit Court of Appeals Docket No. 07-20670, at 15 (slip opinion). Before *Citigroup Global Markets* resolved the issue in the Fifth Circuit, one decision from the Eastern District of Texas had at least implicitly held that manifest disregard of the law is no longer good law. *The Householder Group v. Caughran*, 576 F. Supp. 2d 796, 800 (E.D. Tex. 2008) ("[i]n light of the Supreme Court's holding in *Hall Street*, the court will limit its analysis to the statutory grounds enumerated in the FAA"). However, another division of the same court found this issue unclear and analyzed a challenge to an FAA arbitration award under both the statutory factors and manifest disregard. *Acuna v. Aerofreeze, Inc.*, 2008 U.S. Dist. LEXIS 87346, at *5-6 (E.D. Tex. 2008) ("this Court will analyze the parties' arguments under both the Fifth Circuit's judicially-created 'manifest disregard' standard as well as the statutory bases under the FAA that the Supreme Court has declared as exclusive grounds for a vacatur").
 30. *Id.*
 31. *Id.*, at 8-11.
 32. *Citigroup Global Markets Inc.*, slip opinion at 12-13.
 33. *Id.*, at 13-15.
 34. In *Stolt-Nielsen*, the Second Circuit appears to have interpreted the First Circuit's decision in *Ramos-Santiago v. UPS*, 524 F.3d 120 (1st Cir. 2008) as concluding that the doctrine does not survive. 548 F.3d at 94. The Ninth Circuit also appears to interpret *Ramos-Santiago* in this way. *Comedy Club*, 553 F.3d 1277, 2009 U.S. App. LEXIS at *30. However, it is not clear that *Ramos-Santiago* supports this interpretation. In *Ramos-Santiago*, which involved a non-FAA arbitration, the First Circuit observed that *Hall Street* had held "that manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award" in FAA cases. 524 F.3d at 124. However, the First Circuit declined to reach the question of whether *Hall Street* precluded the application of manifest disregard to the case before it because, regardless of whether it applied, the court held that the challenge to the award failed. *Id.* See also *ALS & Associates, Inc. v. AGM Marine Constructors, Inc.*, 557 F. Supp. 2d 180, 185 (D. Mass. 2008) (interpreting *Ramos-Santiago* to reject manifest disregard as a ground to vacate an arbitration award).
 35. *Hereford v. Horton*, 2008 Ala. LEXIS 186 (Ala. 2008), *revised*, *Hereford v. Horton*, 2009 Ala. LEXIS 1 (Ala. Jan. 9, 2009)
 36. 2009 Ala. LEXIS 1, at *13 fn. 1.
 37. *Id.* at *14.
 38. *Robert Lewis Rosen Assocs., Ltd. v. Webb*, 566 F. Supp. 2d 228, 233 (S.D.N.Y. 2008).
 39. *Prime Therapeutics LLC v. Omnicare, Inc.*, 555 F. Supp. 2d 993, 998-999 (D. Minn. 2008) .
 40. *Id.* at 999.
 41. *Rogers v. KBR Technical Services, Inc.*, 2008 U.S. App. LEXIS 12320, at *5-6 (5th Cir. 2008) (decided before *Citigroup Global Markets*); *Ramos-Santiago v. UPS*, 524 F.3d 120 (1st Cir. 2008); see also *Sole Resort v. Allure Resort Management LLC*, 2008 U.S. App. LEXIS 22507 (2nd Cir. 2008) (decided before *Stolt-Nielsen*).
 42. See, e.g., *O'Leary v. Salomon Smith Barney, Inc.*, 2008 U.S. Dist. LEXIS 98483, at *8 (D.N.J. 2008) (holding that the court need not reach the issue because the challenge to award failed on both manifest disregard and statutory grounds); *Acuna*, 2008 U.S. Dist. LEXIS 87346 at *5-6 (analyzing challenge to arbitration award under both standards); *DMA Int'l, Inc. v. Qwest Communications Int'l*, 2008 U.S. Dist. LEXIS 76164, at *13 (D. Colo. 2008) (holding it need not reach this issue as challenge to award failed on both manifest disregard and statutory grounds); *Millmaker v. Brusco*, 2008 U.S. Dist. LEXIS 79480 (S.D. Tex. 2008) (considering manifest disregard because Fifth Circuit had not yet ruled on effect of *Hall Street*) (decided before *Citigroup Global Markets*); *Halliburton Energy Services, Inc. v. VS NL Industries*, 553 F. Supp. 2d 733 (S.D. Tex. 2008) (same); *Fitzgerald v. H&R Block Financial Advisors, Inc.*, 2008 U.S. Dist. LEXIS 45472, at *8 (E.D. Mich. 2008) (citing *Hall Street* for statutory standard but analyzing manifest disregard without comment); *Jimmy John's Franchise, LLC v. Kelsey*, 549 F. Supp. 2d 1034 (C.D. Ill. 2008) (same).

Messrs. Kahn and Nodel are attorneys with the New York office of Morrison & Foerster LLP. Mr. Kahn is co-chair of the Arbitration Committee of the Dispute Resolution Section of the New York State Bar Association. They can be reached at skahn@mofocom and jnodel@mofocom. Morrison & Foerster's Washington D.C. and Los Angeles offices represent Mattel in the *Hall Street* litigation. The views expressed in this article are the authors' own.

Non-Party Discovery in Arbitration: The Second Circuit Weighs In

By Marc J. Goldstein

It is an often-overlooked fact that the Federal Arbitration Act (FAA) is now a very “old” statute. Enacted in 1925, and not notably amended since then (except to add Chapters 2 and 3, governing matters under the New York and Panama Conventions, respectively), the FAA is 13 years older than the Federal Rules of Civil Procedure.

The 83-year-old first chapter of the FAA says either nothing or very little—depending on one’s reading of § 7—about pre-hearing discovery in arbitrations subject to the Act. That is understandable, because the FAA was motivated mainly by a concern about the enforceability of arbitration agreements and the enforcement of arbitral awards, and not by a desire to establish procedures to be followed by arbitrators.

Section 7 is the singular exception to this. It is concerned with the subpoena power of the arbitrator. It was and is a special provision vesting in arbitrators some of the powers to secure evidence by compulsory process that were vested in federal district judges under rules governing subpoenas that predated Rule 45 of the Federal Rules of Civil Procedure.

Section 7 provides in relevant part that the arbitrators may subpoena persons to “appear before them to give testimony” and “to bring with them” relevant documents. Over the years, arbitrators have acted with varying degrees of adherence to these seemingly unambiguous words, and courts have drawn conflicting conclusions on whether § 7 permits subpoenas for pre-hearing discovery. In November 2008, the U. S. Court of Appeals for the Second Circuit in *Life Receivables Trust v. Lloyd’s of London Syndicate*,¹ embracing a Third Circuit decision in 2004 (written by a notable strict statutory constructionist, then-Circuit Judge now-Justice Samuel Alito)², held that § 7 does not permit issuance of arbitral subpoenas for pre-hearing discovery from non-parties. *Life Receivables Trust v. Lloyd’s of London Syndicate* 102, 549 F.3d 210 (2d Cir. Nov. 25, 2008).

The Life Receivables Trust Decision

The *Life Receivables* decision arose from arbitration over an obscure insurance product. Arbitration ensued when the defendant Lloyd’s of London Syndicate denied payment on the claimant insured’s claim. The Syndicate sought documents from claimant, including documents of a claimant affiliate. Claimant said it had no “control” over the affiliate and could not produce its documents. The

arbitral tribunal issued a subpoena to the affiliate for pre-hearing document discovery; the District Court granted a motion to compel compliance, and the affiliate brought this appeal to the Second Circuit.

“Over the years, courts have drawn conflicting conclusions on whether § 7 permits subpoenas for pre-hearing discovery.”

The holding of the Second Circuit is in fact quite narrow, although some effort is required to discern the holding and its limitations. And, as is often the case, even what the Court states to be the “holding” cannot be understood without reference to other amplifying remarks. At one point, the Court states that under the clear language of § 7³ “[d]ocuments are only discoverable in an arbitration when brought before arbitrators by a testifying witness.”⁴ This is in fact quite close to being what the case holds, even though at another point a few sentences later the Court purports to “join the Third Circuit in holding . . . that section 7 of the FAA does not authorize arbitrators to compel pre-hearing document discovery from entities not party to the arbitration proceedings.”⁵

But the Court was careful to avoid having its decision interpreted as prohibiting all document disclosure from non-parties that occurs at a stage of the proceedings earlier than the “hearing on the merits,” i.e., the hearings scheduled, normally after submission of documentary exhibits and legal briefs, for the presentation of oral testimony, upon direct and cross-examination and under questioning by the Tribunal. Noting that § 7 “does not leave arbitrators powerless” to order document production from non-parties, the Court stated that “arbitrators may, consistent with Section 7, order ‘any person’ to produce documents so long as that person is **called as a witness at a hearing**.”⁶ And, referring to a 2005 Second Circuit decision⁷—in which this § 7 issue was raised, but not decided—the Court noted that “section 7 authority is not limited to witnesses at merits hearings, but extends to hearings covering a variety of preliminary matters.”⁸ Essentially, according to the Second Circuit, § 7 imposes “a presence requirement . . . forc[ing] the party seeking the non-party discovery—and the arbitrators authorizing it—to consider whether production is truly necessary.”⁹

Implications for Practice

What are the practical consequences for practitioners and arbitrators conducting arbitrations in New York after the Second Circuit's decision?

Certainly in many cases a party to the arbitration will be interested mainly in obtaining documents from a non-party, reviewing those documents in advance of merits hearings, and deciding whether any oral testimony from the producing party or person is needed. The Second and Third Circuit decisions do not interpret the word "witness" in § 7 in a limiting fashion.¹⁰ Further, neither § 7 nor these decisions imposes a requirement that the non-party appear as a witness at a particular stage of the case.

Therefore, the arbitrator seeking to accommodate a party's desire to obtain a third party's documents before the hearings on the merits could lawfully issue a subpoena to a records custodian directing the custodian to appear to give testimony on a particular date and to bring the documents on that date. Nothing in the Act prevents the testimony from being confined to an examination of the custodian concerning, for example, the efforts made to search for documents, and document retention policies. This is not a circumvention of § 7, which creates only a modest requirement for the presence of a witness and an arbitrator at the time of document production, and arguably requires that the testimony and the documents be made part of the arbitral record.

But perhaps this does not mean that § 7 is always satisfied when at least one of the arbitrators is present, and perfunctory testimony is presented, at the time of a non-party document production. Section 7 states that the documents obtainable are those that "may be deemed material as evidence in the case." These words appear to define a narrower scope than the Federal Rule of Civil Procedure standard of "might lead to discovery of admissible evidence." It would appear that the requesting party must show with specificity that the documents requested could be material evidence. The operative language of § 7 — "may be material as evidence" — appears to be considerably narrower than the Federal Rules discovery standard "might lead to the discovery of admissible evidence." There is little if any guidance from the courts on the meaning of the § 7 standard, but there does appear to be more room than in federal litigation for a party opposing the subpoena, or the non-party, to protest a "fishing expedition."¹¹ It is noteworthy that § 7's standard compares favorably with the standard for party disclosure in the IBA Rules on the Taking of Evidence in International Arbitration. IBA Rules 3(a) and 3(b) require that a Request to Produce contain a specific description of the requested document or of a "narrow and specific category of requested documents," and that the Request describe "how the documents requested are relevant and material to the outcome of the case." Arbitrators and parties in international cases may wish to refer to IBA Rules

3(a) and 3(b) as a guideline for the tribunal's discretion in limiting the scope of a non-party document subpoena.

In some cases, arbitrators may wish to streamline proceedings and limit the involvement of non-parties by issuing a non-party subpoena for the appearance of the witness during the hearings on the merits at which other testimony will be heard. This substantially eliminates any "pre-hearing discovery" element of obtaining the non-party's evidence. Such limitations are not required by § 7, as the Second Circuit made clear in the *Stolt-Nielsen* case,¹² but an arbitrator acts well within her discretion in imposing such limits (bearing in mind that § 7 creates no right of a party to obtain the issuance of an arbitral subpoena).

Further, even if § 7 would permit the non-party "witness" to be a records custodian, arbitrators are not required to accept requests for subpoenas to custodians of records. As a streamlining measure in appropriate cases, the arbitrator might elect to permit a non-party subpoena for records only if the records will be brought to a hearing by a material witness. Section 7 certainly supports, even if it does not require, an approach that gives primacy to material fact testimony of the non-party witness. It calls for (i) issuance of subpoena for the testimony of a witness, and (ii) only "in a proper case," for a subpoena directing such a witness to bring along documents. The arbitrator in her discretion might decide that "a proper case" for a non-party records subpoena should be limited to a situation in which a party cannot effectively present its case without particular documents that are known to be, or reasonably believed to be, in the non-party's possession.

Unlike a subpoena issued in litigation by a party's attorney, compliance with the arbitral subpoena cannot be waived or compromised by fewer than all the parties to the arbitration. Although the issue is not entirely clear, if all parties agree to waive the appearance of the subpoenaed non-party, § 7 does not appear to present an obstacle to the arbitrator accepting the waiver. Section 7 addresses only what the arbitrators may compel, not what the parties might agree with the witness under the influence of that compulsion. But what should happen if the witness contacts the arbitrator to ask that pre-hearing production without testimony be accepted, and all parties do not agree? Nothing in the FAA empowers the arbitrator to accept such a request; this, in effect, modifies the subpoena to require only pre-hearing disclosure outside the presence of any arbitrator, and thus violates § 7 according to the construction given by the Second and Third Circuits.

Arbitrators should also apply § 7 in a fashion the respects the parties' ability to cross-examine the witness. Several measures may be taken. One step would be to require by procedural order that if one party receives documents from the subpoenaed non-party in advance of the return date of the subpoena, those documents must

be disclosed immediately to all parties. Another feasible measure is to treat the non-party as a witness under the control of a party, if this relationship is considered to exist based upon facts presented to the arbitrators. In that case, any general requirement that witnesses provide witness statements in advance of hearings, and that parties disclose their exhibits prior to the hearings, may be extended to the testimony and documents of a non-party. This approach prevents a party from manipulating § 7 to shield a cooperating non-party witness from the rules imposed by the arbitrator concerning voluntary witnesses. A related point is that, especially in the case of a non-party that might be friendlier to one side than the other, the arbitrator in setting limits on the scope of the subpoena for records should afford both sides reasonable scope for obtaining documents useful as direct evidence and as impeachment. Finally, where records are in fact brought to the hearing at which the non-party's fact testimony is given, and the documents cannot be assimilated by the parties quickly enough for them to prepare questions immediately, reasonable regulation of the timing of the testimony (e.g., asking the witness to return on a later date in a multi-day hearing) should not offend § 7 by making the subpoena for "pre-hearing" discovery.¹³

In complex cases, where the challenge of digesting large volumes of non-party documents before testimony is foreseeable, the scheduling of appearances by non-party custodial witnesses as a separate, relatively early procedural phase of the case, should meet the needs of the parties and the requirement of § 7.

Conclusion

Arbitral practice has varied widely on the involvement of non-parties through the compulsion of arbitral subpoenas. The Second Circuit's decision holding that all disclosure by non-parties pursuant to subpoena must, to comply with the FAA, take place in the presence of one or more arbitrators in connection with testimony by the witness, is faithful to the text of the FAA and the context in which it was enacted. The decision is evidence of a growing consensus that under existing federal law there are distinctive differences between litigation and arbitration in the ability to obtain and present evidence from non-parties.

Endnotes

1. *Life Receivables Trust v. Lloyd's of London Syndicate* 102, 549 F.3d 210 (2d Cir. 2008).
2. *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004).
3. Section 7 provides in pertinent part: "The arbitrators . . . or a majority of them . . . may summon in writing any person to attend before them or any of them as a witness, and in a proper case to bring with him or them any book, record, document or paper which may be deemed material as evidence in the case."
4. *Life Receivables Trust*, *supra* note 1, 549 F.3d at 216.

5. *Id.* at 216–217.
6. *Id.* at 218, emphasis added.
7. *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567 (2d Cir. 2005).
8. *Id.*
9. *Id.*
10. Indeed the Second Circuit's 2005 decision in *Stolt-Nielsen*, *supra* note 7, sustained the validity of the arbitral subpoena where the initial testimony was that of a document custodian to authenticate the records, and the hearing was then adjourned so that counsel could review the documents privately.
11. For a useful reminder that any pretrial discovery was contrary to the prevailing rules and culture of federal litigation at the time of enactment of the FAA, see *Matria Healthcare, LLC v. Duthie*, 2008 U.S. Dist. LEXIS 102812 (N.D. Ill. Oct. 6, 2008).
12. *Supra* note 7.
13. This point was discussed expressly by the Second Circuit in *Stolt-Nielsen*, which rejected as preposterous the proposition that the result of such an adjournment would be to make the initial testimonial appearance of the non-party witness, with documents, a prohibited instance of pre-hearing discovery. 430 F.3d at 580.

Marc J. Goldstein, www.lexmarc.us, founded Marc J. Goldstein Litigation & Arbitration Chambers in 2007. He participates in arbitrations as an advocate and arbitrator. Other commentaries by Mr. Goldstein on arbitration issues may be found on his Web site and at <http://arbblog.lexmarc.us>.

Message from the Editor

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enable improved ADR services and provide guidance to neutrals and counsel, we include in this issue a discussion of a new CPR arbitration protocol, new guidelines from CIArb for e-discovery and for interviewing the neutral, an ABA report on improving mediator quality, and the application of New York State's new ethics rules on representation of a party in arbitration by an attorney not licensed to do business in New York. We review the reasons for adoption of the Revised Uniform Arbitration Act that is being considered in New York and the content and progress of the Uniform Collaborative Law Act, which is nearing completion.

Much has transpired in recent months relevant to ADR, and undoubtedly much will transpire in the coming months that will affect our ADR world. We look to all of you to keep us current by contributing to this publication and by alerting us to subjects you think we should cover. Please e-mail me with your input at esussman@SussmanADR.com and help make this publication a success.

Edna Sussman

Is It Arbitrable?: Case Developments

By Stuart M. Riback

Conventional wisdom holds that arbitration is faster and cheaper than litigation. That may or may not necessarily be true. One thing is for certain, though: arbitration can't be faster than litigation if the parties spend years arguing over whether they should be litigating or arbitrating—and there continues to be a steady stream of cases in the courts that concerns just that question.

“‘Yes, I agreed to arbitrate, but not this dispute’ is usually not a winning argument.”

Courts generally favor arbitration. Usually they can see through even the most creative effort to avoid an arbitration clause. Some recent cases highlight the way courts tend to figure out ways to get cases into arbitration—with the caveat that there can be surprises.

(1) “Yes, I agreed to arbitrate, but not *this* dispute” is usually not a winning argument. In two recent cases, the plaintiff tried to litigate his dispute in court on the theory that, although there was an arbitration clause, the particular dispute at hand was not the kind of dispute the arbitration clause covered.

In *3M Co. v. Amtex Security*, 542 F.3d 1193 (8th Cir. 2008), 3M had hired Amtex to perform various management and administrative services at a 3M production plant in Greenville, S.C. Under the parties' agreement, 3M was required to pay a fixed amount per year to Amtex for its services, subject to adjustment if Amtex's costs fell above or below specified levels. If that happened, the parties had to try to agree on why the variation occurred; if the variation occurred for reasons not within Amtex's control, the price would be adjusted. Disputes about the variations were subject to arbitration.

Amtex argued that 3M was requiring it to provide services beyond the scope of the contract, and it sued in state court. 3M then commenced an arbitration and sought to stay the state court action. Amtex countered by adding claims in its state court action—fraud, tortious interference and violations of the South Carolina Unfair Trade Practices Act. 3M argued that the new claims were just variations on the breach of contract claim, and therefore were covered by the arbitration clause. The district court upheld 3M's position.

On appeal, Amtex argued that the arbitration clause did not apply because the parties were arguing about the scope of services rather than cost variations. The Eighth Circuit was not impressed: like most courts, it read the

arbitration clause broadly. In its view, a dispute over scope of services arguably related to the legitimacy of change orders, which meant it was covered by the arbitration clause. More to the point, the court rejected Amtex's position that its claims for fraudulent inducement and punitive damages were outside the arbitration clause. The reason is that a party can't get around an arbitration clause by clever pleading: trying to convert contract claims into tort claims won't work. The court should look only at the facts of the dispute. If the facts relate to the underlying contract in a manner consistent with the arbitration clause, the dispute has to be arbitrated no matter how the claims are cast.

JPD Inc. v. Chronimed Holdings, Inc., 539 F.3d 388 (6th Cir. 2008) is similar. As in the *3M* case, the plaintiff in *Chronimed* argued that the subject matter of the dispute was not arbitrable. DiCello, the principal of JPD, sold his specialty pharmacy business, Northland, to Chronimed in 2005, for \$12 million. As part of that deal, DiCello agreed to work for Chronimed, and Chronimed agreed to pay DiCello as a sweetener the amount that Northland's EBITDA would exceed \$2.7 million in 2006. Under the parties' agreement, Chronimed would send DiCello its calculation of EBITDA, and DiCello had the right to object to the calculation. If the parties could not agree on the calculation, the matter would be submitted to arbitration by KPMG.

At the end of 2006, Chronimed calculated EBITDA at significantly below \$2.7 million. DiCello attributed the shortfall to Chronimed's bad business decisions that prevented Northland from reaching the \$2.7 million threshold. DiCello sued. Among other things, he argued that the arbitration clause covered disputes about the calculation of the EBITDA shortfall, but not about the reasons for the shortfall. On appeal, the Sixth Circuit decided that because the arbitration clause covered “all issues having a bearing on” the EBITDA calculation, the arbitration clause **could** be read to cover the issues about Chronimed's business decisions—and under normal arbitration law, if a clause can be read to cover the dispute, it is read to cover the dispute. Therefore, the case had to be arbitrated.

This may seem like old hat, but it does bear repeating: If you sign a contract with an arbitration clause in it, it will be very hard to have a dispute with the other party to the contract decided anywhere but in arbitration. It matters not that you might believe the subject matter of your dispute is outside the arbitration clause; courts will usually find a way to send the dispute to arbitration.

(2) Once a claim is held arbitrable, almost all issues, procedural or otherwise, will be referred to the arbitrator. *Chronimed* had other interesting nuggets, too. Under the parties' agreement, when Chronimed supplied to DiCello its calculation of EBITDA, it was supposed to provide further documentation and backup, which it did not do. DiCello argued that Chronimed therefore had failed to satisfy a contractual precondition to arbitration. Under the Sixth Circuit's view, however, this was a matter of contractual interpretation. Therefore, because the case was arbitrable, it was for the arbitrators, not the courts, to decide whether Chronimed had complied with the contract and, if it had not, what the effect of non-compliance was.

The *Chronimed* case does, however, show the outlines of where a court might step in. The Sixth Circuit acknowledged that if a party acts inconsistently with arbitration or frustrates the ability to go to arbitration, it is deemed to have waived arbitration. In this case, Chronimed's actions were sufficiently ambiguous that they were not "completely inconsistent" with its later insistence on going to arbitration. Consequently, the Sixth Circuit held there was no waiver. It is important to note, though, that in a proper case, a court **could** preclude a party from insisting on arbitration if it had previously acted in a manner inconsistent with an intention to arbitrate.

There are, however, instances in which the court will refuse to send the matter to arbitration—which bring us to the next case.

(3) A non-party to an arbitration clause can't insist on arbitration merely because its dispute has some factual overlap with an arbitrable dispute. In *Sokol Holdings Inc. v. BMB Munai Inc.*, 542 F.3d 354 (2d Cir. 2008), Sokol entered into a contract with one Tolmakov to buy 70% of Tolmakov's interest in Emir Oil LLP, which was exploring and developing a gas field in Kazakhstan. Sokol and Tolmakov agreed to arbitrate their disputes in Kazakhstan. Months later, Sokol sued BMB, claiming that BMB tortiously interfered with Sokol's contact with Tolmakov and caused Tolmakov to sell his interest to BMB instead of to Sokol. The complaint asserted a number of different claims arising from the alleged interference.

BMB argued that the case had to be arbitrated. According to BMB, a court could not decide whether BMB interfered with the Sokol-Tolmakov contract without also deciding whether Tolmakov breached his contract with Sokol. Because there was an arbitration clause in the Sokol-Tolmakov contract, the dispute between Sokol and BMB was "inextricably intertwined" with an arbitrable dispute and therefore was arbitrable.

"If you want to keep your arbitration clause narrow, be sure to write it narrowly."

The Second Circuit refused to send the case to arbitration. Yes, there are indeed certain instances in which a non-signatory to an arbitration contract can compel arbitration. But in those cases not just the facts were intertwined—the party who signed the contract and the party who didn't were so closely related that the court was justified in treating them as both being subject to the arbitration clause. Typically, in such cases the signatory and non-signatory are affiliates. Here, though, when Sokol entered the contract with Tolmakov, BMB was an unrelated entity. That means there was no basis for believing that Sokol had surrendered his right to have disputes with BMB heard in court rather than arbitration.

* * *

It should be clear, therefore, that arbitration clauses can be a trap for the unwary. Because courts construe them so broadly, it is possible that a party may find itself required to arbitrate a dispute beyond the scope of what it thought it was agreeing to arbitrate. It cannot be emphasized enough how important careful drafting is. If you want to keep your arbitration clause narrow, be sure to write it narrowly. Precision is important. But the consolation is that, most of the time, you can't be forced to arbitrate with someone you never agreed to arbitrate with.

Stuart M. Riback SRiback@sillerwilk.com is a partner in Siller Wilk LLP in New York City. He counsels businesses on ways to avoid or win disputes, and practices in federal and state trial and appellate courts (including the U.S. Supreme Court) as well as arbitral tribunals.

Step Clauses: Obstacles to Enforceability

By Barbara A. Mentz

Introduction

Step clauses generally refer to multi-tiered dispute resolution clauses or contracts that require parties to engage in two or more dispute resolution steps in sequence in the event a resolution is not reached in the earlier dispute resolution step. Typically, depending on the type of contract (commercial, construction, or employment), step clauses could require: mediation which, if unsuccessful, is followed by arbitration; or submission to a dispute resolution board, some other professional organization or internal informal procedures within a company which, if unsuccessful, is followed by mediation or arbitration or both in sequence. Unless the final step is binding arbitration, a step clause may contain a provision that permits the parties to resolve the dispute in court only if the prescribed step clause procedures have been followed and are unsuccessful. Multi-tiered step clauses “are grounded on the notion that disputes are best resolved by relatively informal, flexible, efficient, and inexpensive means, and that binding adjudication through arbitration or litigation should be reserved as a final step in the event all else fails.”¹ While step clauses have been enforced by some courts (using various analyses or little or no analysis at all), there are obstacles to enforceability.²

“While step clauses have been enforced by some courts (using various analyses or little or no analysis at all), there are obstacles to enforceability.”

This article reviews decisional law dealing with step clauses and identifies areas which the courts have focused on in analyzing the enforceability of such clauses:³ the language of the step clause, the conduct of the parties both before and after commencing an action, and the relief sought.

The Language of the Step Clause

Where the dispute resolution clause of an agreement includes a step clause procedure that allows the parties the option to use either mediation or arbitration, the Eleventh Circuit has recently held that the mandatory provisions of the Federal Arbitration Act (FAA),⁴ including mandatory stays and orders to compel arbitration may not be invoked by a party seeking to enforce the step clause.⁵ Instead, that party must look to contract law, other statutory law or the court’s inherent, discretionary authority when seeking a stay in aid of mediation or an order compelling mediation.⁶

In *Advanced Bodycare*, the Eleventh Circuit, on interlocutory appeal, affirmed the district court’s denial of a motion for a stay pending arbitration on the grounds that mediation was not arbitration within the meaning of the FAA.⁷ *Advanced Bodycare* involved a license agreement that provided for exclusive marketing and distribution rights.⁸ The agreement contained a multi-step dispute resolution procedure that provided the parties must first engage in an informal dispute resolution process.⁹ If no resolution was reached, the dispute was to be followed by either mediation or non-binding arbitration—one of these options was required to be exercised before any litigation could be commenced.¹⁰ The defendant moved to stay the litigation pending arbitration pursuant to the mandatory stay provisions of § 3 of the FAA.¹¹ Since the agreement’s step clause gave either party the option (referred to by the court as an unconditional right) to choose between mediation and arbitration, the court first analyzed whether mediation (or non-binding arbitration) was an agreement “to settle by arbitration a controversy” under the FAA.¹² The court answered the question in the negative.¹³ Having determined that mediation was not arbitration under the FAA, the court found:

Accordingly, FAA remedies, including mandatory stays and motions to compel, are not appropriately invoked to compel mediation. Further, a dispute resolution clause that may be satisfied by arbitration or mediation, at the aggrieved party’s option, is not ‘an agreement to settle by arbitration a controversy’ and thus is not enforceable under the FAA either.¹⁴

The Eleventh Circuit emphasized the limited nature of its ruling and noted that it was not holding that agreements to mediate were per se unenforceable or that stays in aid of mediation were per se impermissible. Rather, “[t]hey might be specifically enforceable in contract or under law; . . . [D]istrict courts have inherent, discretionary authority to issue stays in many circumstances, and granting a stay to permit mediation (or to require it) will often be appropriate.”¹⁵

The decision in *Advanced Bodycare* did not address the enforceability under the FAA of a step clause that required as a first step mediation which, if unsuccessful, is followed by binding arbitration.¹⁶ However, parties seeking to compel conciliation or mediation procedures in a step clause should consider arguing that conciliation and mediation are integral parts of arbitration in a step clause and are, therefore, entitled to the mandatory remedies of the FAA. In the alternative, the party seeking enforcement

should consider arguing that conciliation and mediation are enforceable under the principles of contract law, other statutory law if applicable, and under the court's inherent, discretionary authority.

Conduct of the Parties

Where a step clause requires a party to mediate or engage in some other form of alternative dispute resolution before it can invoke arbitration, some courts have not ordered the parties to arbitration or stayed the proceedings under the FAA unless the parties first followed the steps required by the agreement.

In *Kemiron Atlantic, Inc. v. Aguakem Int'l, Inc.*,¹⁷ in a *per curiam* opinion, on interlocutory appeal, the Eleventh Circuit affirmed the district court's denial of a motion to stay pending arbitration.¹⁸ *Kemiron* involved a commercial contract that contained a multi-step dispute resolution clause. The clause required, in sequence, informal conciliation and, failing resolution, notice of a request for mediation after receipt of which the matter "shall be mediated." In the event that the dispute was not settled, the step clause required notice of arbitration after receipt of which "the parties shall submit the matter to arbitration."¹⁹ The district court denied the petition to stay pending arbitration and ruled that the duty to arbitrate had not been triggered because the parties had not performed the necessary steps set forth in the step clause.²⁰ The Eleventh Circuit found that under the plain language of the contract, to invoke the arbitration provision, either party must first take two steps: first, request mediation and provide notice to the other party. Second, if the mediation failed, provide notice and request arbitration. "Then, and only then, is the arbitration provision triggered."²¹ The court acknowledged the FAA's policy in favor of arbitration but noted, citing *Mastrobuono v. Shearson Lehman Hutton*,²² that the FAA "policy did not operate without regard to wishes of the contracting parties."²³ The court found that "[h]ere, the parties agreed to conditions precedent before arbitration can take place and, by placing those conditions in the contract, the parties clearly intended to make arbitration a dispute resolution mechanism of last resort . . . [but,] [b]ecause neither party requested mediation [even after the litigation was commenced], the arbitration provision has not been activated and the FAA does not apply."²⁴ The court did not decide the issue of whether the defendant had waived its right to arbitration.

The First Circuit, in *HIM Portland, LLC v. DeVito Builders, Inc.*,²⁵ followed *Kemiron*. Like *Kemiron*, the First Circuit affirmed the district court's denial of a motion to compel arbitration and to stay the proceedings.²⁶ *HIM* involved a construction contract that contained a multi-step clause requiring, *inter alia*, that any dispute first be submitted to an architect for decision. If the architect failed to render a timely decision or any decision, the

agreement provided that the dispute "shall . . . be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party."²⁷ The contract also provided that failing resolution by mediation, the issue was to be decided by final and binding arbitration.²⁸ In reaching its decision, the First Circuit cited the Supreme Court decisions in *AT&T Technologies Inc. v. Communications Workers of America*²⁹ ("a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit"), and *Mastrobuono* ("the FAA's proarbitration [sic] policy does not operate without regard to the wishes of the contracting parties").³⁰ The court held that "where contracting parties condition an arbitration agreement upon the satisfaction of some condition precedent, the failure to satisfy the specified condition will preclude the parties from compelling arbitration and staying proceedings under the FAA."³¹ In *HIM*, since neither party had requested mediation, or even attempted to mediate the dispute, the court held arbitration had not been triggered and neither party could be compelled to submit to arbitration.³²

"Where a step clause requires a party to mediate . . . before it can invoke arbitration, some courts have not ordered the parties to arbitration or stayed the proceedings under the FAA unless the parties first followed the steps required by the agreement."

Other courts have also determined that where a party seeks to compel arbitration, but fails to follow a "condition precedent" required by a step clause, the arbitration provision is not triggered and the motion to compel arbitration will be denied.³³

Both *Kemiron* and *HIM* have been criticized because the courts in effect did not allow the parties to waive mediation (assuming the parties intended to waive it), and the courts thereby effectively invalidated the parties' multi-step dispute resolution clauses, forcing the parties to litigation.³⁴ They have also been criticized on the basis that in dealing with the arbitrability issue, the courts ignore the Supreme Court cases that address the procedural arbitrability question.³⁵

In 1964, the Supreme Court, in *John Wiley & Sons, Inc. v. Livingston*,³⁶ addressed the issue of whether the court or the arbitral body was the appropriate body to determine questions of arbitrability. In making that determination, the Court drew a distinction between substantive and procedural arbitrability. *Wiley* was an action brought by a union under the Labor Management Relations Act to compel arbitration under a collective bargaining agreement. The Court held that it was for the court to de-

termine the threshold question, which it referred to as substantive arbitrability, as to whether there was a valid enforceable agreement between the parties (whether or not the parties were bound to arbitrate) and, if so, whether the dispute fell within the scope of the agreement.³⁷ Having determined that the parties were obligated to submit the subject matter of the dispute to arbitration, the Court determined that the “procedural” questions “that grow out of the dispute and bear on its final disposition should be left to the arbitrator.”³⁸ The Court reasoned that procedural issues as to “[d]oubt whether grievance procedures or some part of them apply to the particular dispute, whether such procedures have been followed or excused, or whether the unexcused failure to follow them avoids the duty to arbitrate” cannot ordinarily be answered without consideration of the merits of the dispute that is presented for arbitration.³⁹ The Court noted that even if there were a contrary rule, a court “could deny arbitration only if it could confidently be said not only that a claim was strictly ‘procedural,’ and therefore within the purview of the court, but also that it should operate to bar arbitration altogether, and not merely limit or qualify an arbitral award.”⁴⁰ The Court characterized such cases as likely to be rare.⁴¹ In *Wiley*, the questions of procedural arbitrability that the court determined were for the arbitrators were whether the union failed to follow the first two steps of the three-step grievance procedure, which were prerequisites to arbitration, and whether it failed timely to file notice of any grievance as required by the agreement.⁴²

In *Howsam v. Dean Witter Reynolds*, the Supreme Court again addressed the arbitrability issue.⁴³ The Court reversed the Tenth Circuit’s decision and determined that the issue of whether a dispute was time-barred under the rules of the National Association of Securities Dealers was for the NASD arbitrator, not the court.⁴⁴ In reaching its determination, the Court made it clear that the question of arbitrability was of limited scope, applicable in the kind of “narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing the parties to arbitrate a matter that they may well not have agreed to arbitrate.”⁴⁵ On the other hand, procedural questions that grow out of the dispute and bear on its final disposition, as well as allegations of waiver, delay, or a like defense of arbitrability, are presumptively not for the court but for the arbitrator.⁴⁶ In addition to citing earlier Supreme Court cases as precedent, the court also cited to § 6(c) and comment 2 of the Revised Uniform Arbitration Act of 2000 (RUAA).⁴⁷ Section 6(c) of RUAA states that “the arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.” Comment 2 notes that §§ 6(b) and 6(c) are intended to

incorporate the holdings of the vast majority of state courts and the law that has developed under the FAA and that absent an agreement to the contrary, “issues of procedural arbitrability, i.e., whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide.”⁴⁸

As noted, some courts have either failed to address or to properly analyze the procedural arbitrability question while the decisions of other courts that have addressed the question are not uniform.⁴⁹ It should be noted that some courts have compelled arbitration where the arbitration agreement has incorporated the procedures of an organization whose rules provide that the arbitrator decides issues of both substantive and procedural arbitrability.⁵⁰

Given the current precedent in *Kemiron* and *HIM* as well as those of other jurisdictions, if the required steps are not followed prior to making a motion to compel or for a stay, at least in those jurisdictions, the result may be that the parties end up in litigation rather than contractually agreed-upon step dispute resolution procedures. Even in those jurisdictions, if the parties have a broad arbitration clause or the arbitration agreement incorporates rules of an organization that provide the arbitrator with authority to decide issues of jurisdiction and enforcement, the court may determine that arbitration should be compelled based upon the agreement and the Supreme Court decisions.

The Relief Sought

What relief is requested from the court and how the arguments are framed could also impact whether a party seeking to enforce a step clause ends up in unwanted litigation or with the action being dismissed without obtaining an order compelling the parties to engage in the dispute resolution required by the terms of the agreement. While the cases in this area turn on the facts, if the relief requested is a motion to dismiss rather than a motion to compel or a motion to stay, some appellate courts have refused to construe the motion as one to compel arbitration or for a stay pending arbitration.

In *Bombardier Corp. v. National Railroad Passenger Corp.*⁵¹ the D.C. Circuit held that it did not have jurisdiction under § 16 of the FAA⁵² to hear an interlocutory appeal from the district court’s denial of a motion to dismiss.⁵³ Bombardier filed an action for an amount in excess of \$200 million and National Railroad Passenger Corp. (“Amtrak”) filed a § 12(b)(6)⁵⁴ motion to dismiss. In its motion, Amtrak asserted that Bombardier had not exhausted the contract’s dispute resolution procedures, which it argued were a condition precedent to litigation.⁵⁵ The district court denied the motion to dismiss and held that the contract’s dispute resolution procedures were, in effect, non-binding mediation, not a condition precedent to litigation. It also found that compelling the parties to

mediation was futile and a waste of time since the dispute resolution board could issue only binding awards for an amount of \$5 million or less.⁵⁶ On appeal, Amtrak argued, *inter alia*, that the court should treat the motion to dismiss as a motion to compel arbitration or a motion to stay proceedings pending arbitration under the FAA.⁵⁷ In dismissing the appeal for lack of jurisdiction, the D.C. Circuit stated:

Amtrak did not base its motion to dismiss on the FAA's requirement that arbitration agreements be strictly enforced. It sought an outright dismissal under 12(b)(6) on the grounds that Bombardier failed to comply with the dispute resolution procedures, which it did not contend was arbitration. In the memorandum supporting its motion, Amtrak repeatedly referred to the contractually provided procedures, but never as arbitration. Neither did it suggest that the procedures were covered by the FAA. More importantly, unlike a motion to compel or stay under the FAA, Amtrak's motion exhibited no intent to pursue arbitration—indeed, it sought outright dismissal with no guarantee of future arbitration. Therefore, we decline to 'treat' Amtrak's motion as anything other than what it was—a motion to dismiss under 12(b)(6).⁵⁸

Although not involving a step clause, in a case of first impression relating to arbitration, in a recent decision the Second Circuit pointed out in *Wabtec Corp. v. Faiveley Transport Malmo AB*⁵⁹ the necessity of having the relief sought track the allowable remedies of the FAA. In *Wabtec*, the court addressed the question of whether a motion to dismiss based upon an arbitration clause can be construed as a motion to compel arbitration within the scope of the FAA. Under the circumstances in *Wabtec*, the Second Circuit answered the question in the negative.⁶⁰ The court determined that it did not have jurisdiction to hear the interlocutory appeal under the FAA and the appeal was dismissed.⁶¹ In *Wabtec*, Wabtec and Faiveley's predecessor-in-interest had entered into an agreement that contained a "competent jurisdiction" clause, which provided that "[a]ny dispute arising out of or in connection with this agreement shall be finally settled by arbitration without recourse to the courts . . . The arbitration proceeding shall be held in Stockholm."⁶² Faiveley commenced an arbitration in Stockholm and filed an application in the Southern District of New York for a preliminary injunction to bar Wabtec from engaging in certain commercial activities relating to the licensing agreement and for expedited discovery in aid of the pending arbitration.⁶³ Wabtec moved to dismiss on grounds that the district court lacked jurisdiction pursuant to the "com-

petent jurisdiction" clause of the license agreement.⁶⁴ The district court denied the motion, holding that where an agreement was silent as to the availability of injunctive relief, the court could grant such relief.⁶⁵ Wabtec filed an interlocutory appeal and Faiveley cross-moved to dismiss the appeal on the grounds, *inter alia*, that it was not an appealable order under the FAA.⁶⁶

The Second Circuit acknowledged that courts are divided as to whether a motion to dismiss based upon an arbitration clause should be treated as a request for an order compelling arbitration, that circumstances may vary and that one rule may not fit all cases.⁶⁷ The court concluded that "[u]nder the plain language" of § 16(a) of the FAA, "the denial of a motion to dismiss based upon an arbitration clause is not an order from which an appeal may be taken."⁶⁸ The court found that the motion did not explicitly ask the district court to direct that an arbitration be held.⁶⁹ Nor did it implicitly seek to have the district court compel arbitration.⁷⁰

Rather than affirmatively seek arbitration in accordance with the agreement, Wabtec's motion focused on preventing Faiveley from resolving any dispute in the courts, in accordance with the agreement's provision that disputes would be settled "without recourse to the courts." In other words, Wabtec did not frame its arguments in terms of mandatory arbitration but in terms of judicial preclusion.⁷¹

Thus, the Second Circuit concluded that the motion to dismiss was "just that," and the Court would "not construe it as a request to compel arbitration. . . . Moreover, Wabtec's motion to dismiss argued that the district court lacked jurisdiction to do anything, including, one assumes, compel arbitration."⁷²

In some circumstances, perhaps including *Wabtec*, due to the facts of the case, the parties may not be in a position to move to compel or for a stay or to frame the arguments in a positive way. However, whenever possible to avoid the obstacle that *Bombardier* and *Wabtec* illustrate, the parties should carefully consider not only the type of motion, but also how the arguments are framed.

Conclusion

The intention behind step clauses is to provide parties with an informal, flexible, cost-efficient and effective method for settling disputes prior to taking a more formal step of arbitration or litigation. Unfortunately, the courts have not been uniform in enforcing step clauses or the rationale for their enforcement. The parties faced with the need to resort to the courts to enforce step clause procedures may increase the likelihood of enforcement and avoid the obstacles to enforceability by addressing the issues raised by the above decisional law.

Endnotes

1. Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 Nev. L.J. 427, 458 (Fall 2007).
2. See *Woods v. Boston Scientific Corp.*, No. 07-1785-CV, 2007 U.S. App. LEXIS 20245, at *1 (2d Cir. Aug. 24, 2007) (unpublished opinion) (The Second Circuit held in a summary order that the district court's injunction that enjoined defendant from engaging in certain acts in derogation of a merger agreement's dispute resolution clause was not clearly erroneous. The district court had found that defendant corporation had attempted to circumvent a multi-tiered dispute resolution provision "over which the parties had carefully bargained for." The Second Circuit upheld that portion of the injunction directing defendant to conduct the entire dispute resolution process in good faith from the beginning); *Omni Tech. Corp. v. MPC Solutions Sales, LLC*, 432 F.3d 797, 801 (7th Cir. 2005) (the court vacated the district court's denial of a stay and remanded the case with instructions to stay the litigation while the accountant resolved the dispute pursuant to the parties' agreement); *Fisher v. GE Med. Sys.*, 276 F. Supp. 2d 891, 894, 896 (M.D. Tenn. 2003) (finding that the agreement to mediate before filing a claim in court was binding under the FAA, the court granted employer's motion to compel mediation and plaintiff was ordered to comply with the multi-tiered step resolution process of the agreement, including the third step of mediation, before returning to court to litigate under the Fair Labor Standards Act of 1938); *Florida Farm Bureau Ins. Cos. v. Pulte Home Corp.*, Case No. 8:04-CV-2357-T-EAJ, 2005 U.S. Dist. LEXIS 21903, at *1 (M.D. Fla. June 6, 2005) (Based on a motion to dismiss for refusal to submit to mediation or binding arbitration or to stay action and to compel arbitration pursuant to the FAA, the court ordered the parties to mediate the dispute and participate in binding arbitration if they failed to resolve their dispute through mediation. The step clause provided that the dispute was to be settled first by mediation and, failing resolution, then by binding arbitration.); *Design Benefit Plans, Inc. v. Enright*, 940 F. Supp. 200, 207 (N.D. Ill. 1996) (the court granted the motion to compel mediation and arbitration in accordance with the step clause of the agreement and stayed the action); cf., *Riviera Distributors v. Jones*, 517 F.3d 926, 929 (7th Cir. 2008) (In an action where a party sought to shift fees to losing party, the court stated that the action was a good candidate for fee shifting because it was filed in the teeth of an agreement not to sue but to engage in alternative dispute resolution, and the agreement had to be enforced.); *CB Richard Ellis, Inc. v. Am. Envtl. Waste Mgmt.*, No. 98-CV-4183(JG), 1998 WL 903495, at *1 (E.D.N.Y. Dec. 4, 1998) (The parties agreed that the FAA governed whether the court should grant an order compelling mediation. The court held that where the mediation clause required the parties to mediate before engaging in litigation, mediation was ordered and the action was stayed.); see also, *Disputing Irony: A Systematic Look at Litigating about Mediation*, 11 HARV. NEGOT. L. REV. 43 (Spring 2006) (the authors constructed a database of every case from 1999 to 2003 that implicated mediation issues including those that dealt with enforcing pre-dispute mediation/arbitration clauses); see generally, Stipanowich, *supra* note 1.
3. Courts have raised other issues relating to enforceability of step clauses, such as unconscionability, see, e.g., *Pokorny v. Quixtar Inc.*, Case No. 07-00201SC, 2008 U.S. DIST. LEXIS 28439, *1 (N.D. Cal. March 31, 2008), but an analysis of those issues is not within the scope of this article; see also Laura A. Kaster, *Unconscionability—Should We Revisit This Backdoor Challenge to Arbitration?*, 1 New York Dispute Resolution Lawyer 31 (Fall 2008).
4. 9 U.S.C. § 1 *et seq.* (2000 ed. & Supp. V).
5. *Advanced Bodycare Solutions, LLC v. Thione Int'l, Inc.*, 524 F.3d 1235, 1240-41 (11th Cir. 2008).
6. *Id.* at 1241.
7. *Id.* at 1236.
8. *Id.*
9. *Id.* at 1237.
10. *Id.*
11. *Id.*
12. *Id.* at 1238-40. Since arbitration is not defined in the FAA, the court analyzed the decisions discussing the question of what constitutes arbitration under the FAA.
13. *Id.* at 1240 ("[B]ecause the mediation process does not purport to adjudicate or resolve a case in any way, it is not 'arbitration' within the meaning of the FAA").
14. *Id.* The court did not decide whether non-binding arbitration, which was one of the options, is within the scope of the FAA. *Id.* at 1240-41.
15. *Id.* at 1241 (citations omitted). See *AMF, Inc. v. Brunswick Corp.*, 621 F. Supp. 456, 461 (E.D.N.Y. 1985) (The court enforced the parties' non-binding agreement under FAA and its equity jurisdiction, holding that "whether or not the agreement be deemed one to arbitrate, it is an enforceable contract. . . . the agreement may be enforced in equity.").
16. For a discussion of the potential consequences for parties seeking to enforce med-arb agreements after *Advanced Bodycare*, see, David J. McLean and Sean-Patrick Wilson, *Compelling Mediation in the Context of Med-Arb Agreements*, 63 Disp. Resol. J. 28 (August/October 2008); Manjit Gill, *ADR ALERT: Is Mediation Arbitration?*, 12 Conflict Management, Issue 4 at 3 (Summer 2008).
17. *Kemiron Atl., Inc. v. Aguakem Int'l, Inc.*, 290 F.3d 1287, 1291 (11th Cir. 2002).
18. *Id.* at 1291.
19. *Id.* at 1288-89.
20. *Id.* at 1290.
21. *Id.* at 1291.
22. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995).
23. *Id.*
24. *Kemiron*, 290 F.3d at 1291.
25. *HIM Portland, LLC v. Devito Builders, Inc.*, 317 F.3d 41 (1st Cir. 2003).
26. *Id.* at 42.
27. *Id.* (emphasis in original).
28. *Id.* at 43.
29. *AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648 (1986).
30. *Mastrobuono*, 514 U.S. at 57.
31. *HIM*, 317 F.3d at 44. It should be noted that the party seeking the stay did not seek a determination whether the section of the contract that appeared to contemplate mediation as a condition precedent to both arbitration and litigation did in fact establish a valid condition precedent to bringing the lawsuit, which the Court characterized as a "broader, more difficult question." *Id.*, note 1.
32. *Id.*
33. See, e.g., *In re Pisces Foods, L.L.C.*, 228 S.W.3d 349, 353-54 (Tex. App. 3d Dist., Austin 2007) (The Texas appellate court denied defendant employer's writ of *mandamus* to order the trial court to compel arbitration on the grounds that the right to compel arbitration had not yet occurred. In denying the writ the court noted that the employer did not have a right to compel arbitration pursuant to § 4 of the FAA since the contractually required mediation prerequisite step of the four step dispute resolution process had not been met. There was no evidence that either party requested mediation, participated in it or that the plaintiff employee had declined to participate in it. The court expressed no opinion as to whether the employee waived the right to arbitration after it satisfied the mediation prerequisite or whether the lawsuit should continue despite the fact that the plaintiff had not complied with

the requirements of the step clause and the defendant had not properly invoked it.)

34. See Rachael Jacobs, *Note & Comment: Should Mediation Trigger Arbitration in Multi-Step Alternative Dispute Resolution Clauses?*, 15 AM. REV. INT'L ARB. 161 (2004); Stipanowich, *supra* note 1 at 457–461 (citing to *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), and *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), for support that questions relating to such issues as “conditions precedent” are for the arbitrator, not the courts; see also Unif. Arbitration Act § 6(c) (revised 2000) (“An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.”).
35. *Id.*
36. *Wiley*, 376 U.S. at 544.
37. *Id.* at 546–547.
38. *Id.* at 557.
39. *Id.*
40. *Id.* at 557–558.
41. *Id.* at 558.
42. *Id.* at 555–556.
43. *Howsam*, 537 U.S. at 84.
44. *Id.* at 81–83.
45. *Id.* at 83–84.
46. *Id.* at 84 (quoting *Wiley*, 376 U.S. at 557, and *Moses H. Cone Mem'l Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983)).
47. *Id.* at 84–85.
48. *Id.*
49. See Jacobs, *supra* note 34, and Stipanowich, *supra* note 34, and the cases cited therein.
50. See, e.g., *Contec Corp. v. Remote Solution Co., Ltd.*, 398 F.3d 205 (2d Cir. 2005) (The action did not involve a step clause.) (The issue of arbitrability was referred to the arbitrator on the grounds that incorporation of the American Arbitration Association Rules in the arbitration agreement provided the required clear and unmistakable evidence that the parties intended that the question of arbitrability should be decided by the arbitrator. Thus, the court did not have to reach the issue of whether the party was estopped from seeking arbitration.); but see *Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1 (3d Cir. 2005) (The court determined that the question of waiver by conduct was for the court, but did not discuss or take into consideration the fact that the arbitration agreement was to be conducted pursuant to the rules of the American Arbitration Association.). In *HIM* the court made reference to the fact that the arbitration agreement was to be governed by the American Arbitration Association’s Construction Industry Arbitration Rules unless otherwise agreed. There was no indication in the opinion whether the rules were adopted by the parties and, if so, whether under those rules the issue of arbitrability was for the arbitrator. *Cf.*, *Philadelphia Printing Pressmen’s Union No. 16 v. Int’l Paper Co.*, 648 F.2d 900, 903 (3d Cir. 1981) (The court noted that the parties could have but did not provide that any dispute over whether there is an arbitrable dispute would be for the arbitrator. Therefore, the court concluded that the issue of arbitrability remained with the court.).
51. *Bombardier Corp. v. Nat’l Railroad Passenger Corp.*, 333 F.3d 250, 253–54 (D.C. Cir. 2003).
52. 9 U.S.C. § 16.
53. *Bombardier*, 333 F.3d at 251.
54. Fed. R. Civ. P. 12(b)(6).
55. *Bombardier* 333 F.3d at 252. The clause required that: (1) all claims be referred to a Contracting Officer’s representative for a non-binding determination; (2) if the determination was unsatisfactory to Bombardier, it could appeal the determination to the Contracting Officer whose decision was final and binding as to all matters except money damages and certain rulings as to whether services or work required by change orders were outside the general scope of the contract; (3) Bombardier could appeal the non-binding issues to a three-member dispute resolution board whose decisions were binding as to disputes under \$5 million and with respect to claims over \$5 million were binding only if the parties agreed. The board’s determination of the size of the dispute was final and binding; (4) if the parties were unable to resolve their disputes through the board or negotiation, they could pursue their rights “in law or in equity” with respect to any claim for which a final and binding decision had not been issued. *Id.* at 251.
56. *Id.* at 252.
57. *Id.* at 254.
58. *Id.*
59. *Wabtec Corp. v. Faiveley Transp. Malmo AB*, 525 F.3d 135 (2d Cir. 2008).
60. *Id.* at 141.
61. *Id.*
62. *Id.* at 137.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 139–40. The Second Circuit cited to *Bombardier*, 333 F.3d at 253, and *Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 5–6 (1st Cir. 2004) (The court found that the district court’s denial of a motion to dismiss the complaint was effectively a request for an order to arbitrate where, on motion for rehearing to the district court, a request for a reference to arbitration had been made and the district court had addressed the request. Therefore, the court found that the denial of the motion to dismiss was immediately appealable under the FAA.).
68. *Id.* at 140. *Wabtec* involved an international arbitration to be held in Stockholm. The court noted that Section 16(a)(1)(b) and its cross reference to Section 4 of the FAA did not apply because it dealt with the denial of a petition to order arbitration proceedings that take place *within the district* in which the petition for an order directing such arbitration is filed. The arbitration was filed in Stockholm, not the Southern District of New York. Therefore, the court also analyzed Section 16(a)(1)(c). *Id.* at 139.
69. *Id.* at 140.
70. *Id.*
71. *Id.*
72. *Id.* (citations omitted). The Second Circuit also noted that Faiveley had commenced an arbitration a week before the motion to dismiss was made and there was no reason therefore to compel arbitration. Further, *Wabtec* had asked the International Chamber of Commerce Court to dismiss the arbitration as not covered by the contract. *Id.* at 140–41.

Barbara A. Mentz is a lawyer, arbitrator and mediator. She is a Fellow of the Chartered Institute of Arbitrators (CIArb) and a member of arbitration and mediation panels, including the International Institute for Conflict Prevention and Resolution, the National Futures Association and mediation panels for the state courts in New York and New Jersey. She is the co-chair of the Diversity Committee of the NYSBA’s Dispute Resolution Section. She can be reached at bmentz@mentz.org.

Class Action Waivers in Arbitration Agreements: The Second Circuit Speaks

By James Benjamin Gwynne

In a case of first impression, the Court of Appeals for the Second Circuit in *In re American Express Merchants' Litigation*¹ faced the question of whether a class action waiver in an arbitration agreement should be enforced. The court declined to uphold this contractual provision on the facts before finding that valid grounds existed for the "revocation" of the clause under Section 2 of the Federal Arbitration Act (FAA). The Court expressly did not hold that class action waivers in arbitration agreements were *per se* unenforceable.

The issue of whether class actions can be barred in an arbitration clause has been the subject of vigorous debate in recent years, particularly with respect to claims by consumers as class action waivers have become part of mandatory arbitration agreements in many contracts. Several courts have grappled with this question by looking at whether the FAA preempts state law contract unconscionability principles and have reached differing conclusions.²

Background of the Case

In *In re American Express Merchants' Litigation* an initial class action complaint, filed by the one of the plaintiffs (Italian Colors Restaurant) in the U.S. District Court for the Northern District Court of California, was consolidated with other class action complaints and transferred on a motion by American Express to the United States District Court for the Southern District of New York. At issue between the parties was a provision in the Card Acceptance Agreement with American Express (Amex) which contained a mandatory arbitration clause. As of 1999, the standard agreement also included a class action waiver clause, thereby leaving merchants and retailers with only the recourse of individual arbitrations for any resolution of any disputes.

The substantive claim by the plaintiffs was that Amex required an "honor all cards" provision in their contracts which forced merchants to honor all cards issued by Amex, both the traditional higher end, high transaction price Amex card and the more recently developed mass-market oriented Amex cards. The merchants alleged that Amex charged a supra-competitive fee on the new mass-market products, causing them damage. The plaintiffs claimed that requiring merchants to honor all cards was "an illegal 'tying arrangement' in violation of Section 1 of the Sherman Act, 15 U.S.C. Section 1."

The District Court granted Amex the right to compel arbitration pursuant to the Card Acceptance Agreement.

The District Court rejected the plaintiffs' argument that the class action waiver "would effectively strip them of the ability to assert their claims because 'each individual plaintiff would have to incur discovery costs amounting to hundreds of thousands of dollars, despite seeking average damages of only \$5,000.'" The court was skeptical of this argument, stating that the Clayton Act would allow recovery of "threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee," 15 U.S.C. § 15(a).³

Second Circuit Holding

The Court reaffirmed the federal policy in favor of arbitration and noted that it recognized and frequently enforced mandatory arbitration clauses included in commercial contracts, stating that "[w]e do so on the principle that 'it is difficult to overstate the strong federal policy in favor of arbitration, and it is a policy we have often and emphatically applied.'"⁴ With respect to who should decide the class action waiver question as between the arbitrator and the court, the Second Circuit emphasized that it was within the Court's purview, not the arbitrator's, to make a determination to the validity of the class action waiver as it presented a "gateway" dispute as to the binding effect of the arbitration clause itself.

Editor's note: Third Circuit on class action waivers

Shortly after the Second Circuit decision in *In re American Express Merchants' Litigation*, the Third Circuit decided *Homa v. American Express Co.*, No. 07-2921, 2009 WL 440912 (3d Cir. 2009, Feb. 24, 2009). In *Homa*, the court held that (1) the Federal Arbitration Act does not preclude the court from applying state law unconscionability principles to void a class-arbitration waiver; (2) that New Jersey law applied based on New Jersey's public policy over Utah law which was specified in the contract as the governing law, an issue of significance because Utah law sanctions class action waivers by statute; and (3) where there is a contract of adhesion, if the claims at issue are of such a low value as effectively to preclude relief if decided individually, then the class-arbitration waiver is unconscionable. The court reversed the District Court order dismissing the case in favor of arbitration and remanded for further proceedings.

The Second Circuit reviewed the opposing schools of thought presented by commentators and legal practitioners in the arbitration field as to class action waiver clauses. Those who oppose the waivers contend that the ability to aggregate claims is essential to protect the rights of individuals. Those who support the waivers argue that plaintiffs exploit the class action procedure in order to obtain large and unfair settlements from defendants. Notwithstanding the intense debate, the Court chose only to examine the record before it, and did not decide “whether class action waiver provisions are either void or enforceable *per se*.”

The Second Circuit concurred with the plaintiffs that enforcing the waiver against class action would impose an insurmountable burden as the “record abundantly supports the plaintiffs’ argument that they would incur prohibitive costs if compelled to arbitrate under the class action waiver.”⁵ To support their claim that absent a class action they would be unable to pursue their claims, plaintiffs offered an expert who testified that it would cost hundreds of thousands to millions of dollars to develop and present the antitrust case and conduct the necessary economic and markets studies. Crediting this evidence, and reversing the district court, the Second Circuit held that the plaintiffs had “demonstrated that their antitrust claims against Amex can, for all intents and purpose, only be pursued through the aggregation of individual claims, either in class action litigation or in class arbitration.”⁶ The Court noted that enforcing the waiver would grant Amex “*de facto* immunity from antitrust liability.”⁷ Citing FAA § 2, which provides that an agreement to arbitrate “shall be valid, irrevocable and enforceable save upon such grounds as exist in law or equity for the revocation of any contract,” the Court concluded that as a “valid ground exists for revocation of the class action waiver, it cannot be enforced under the FAA.”⁸ In essence, the Court established that the enforcement of the waiver would deny the plaintiffs statutory rights afforded to them by the Federal Arbitration Act.

The Court did not reach the question of whether the class action waiver was severable from the remainder of the arbitration provision because plaintiffs were willing to proceed in arbitration as long as it was a class action, while the defendants were uncertain as to whether they would proceed to arbitration if the class action waiver was not enforced.

Assessing Enforceability of a Class Action Waiver

The Second Circuit expressly stated that its decision had nothing to do with the size of the plaintiffs, who described themselves as small merchants, and noted that it was not following the line of cases that have found unconscionability under state law. Rather, the Court relied on a “vindication of statutory rights analysis which is part of the federal substantive law of arbitrability.”⁹ Thus the analysis is not dependent upon the size of the

plaintiff but rather on whether “the size of the recovery received by any individual plaintiff will be too small to justify the expenditure of bringing an individual action.”

The Court emphasized that *each* case that presents a question of the enforceability of a class action waiver in an arbitration agreement must be considered on its own merits, governed with a healthy regard for the fact that the FAA “is a congressional declaration of a liberal federal policy favoring arbitration agreements.”¹⁰ The Court quoted the Eleventh Circuit approach in *Dale v. Comcast*, 498 F.3d 1216, 1224 (11th Cir. 2007), with approval:

[T]he enforceability of a particular class action waiver in an arbitration agreement must be determined on a case-by-case basis, considering the totality of the facts and circumstances. Relevant circumstances may include, but are not limited to, the fairness of the provisions, the cost to an individual plaintiff of vindicating the claim when compared to the plaintiff’s potential recovery, the ability to recover attorneys’ fees and other costs and thus obtain legal representation to prosecute the underlying claim, the practical effect the waiver will have on a company’s ability to engage in unchecked market behavior, and related public policy concerns.¹¹

Conclusion

The decision by the Second Circuit is one in a series of efforts by courts and legislatures to ensure that arbitration agreements are not used to deprive litigants of access to meaningful justice. It is likely to be a decision of great importance as the law evolves to address these concerns.

Endnotes

1. *In re American Express Merchants’ Litigation*, No. 06-1871, 2009 WL 214525 (2d Cir. Jan. 30, 2009).
2. Compare *Gay v. CreditInform*, 511 F.3d 369 (3d Cir. 2007) with *Shroyer v. New Cingular Wireless Services Inc.*, 498 F.3d 976 (9th Cir. 2007).
3. *Id.* 2009 WL 214525, at *14.
4. *Id.* 2009 WL 214525, at *2.
5. *Id.* 2009 WL 214525, at *13.
6. *Id.* 2009 WL 214525, at *14.
7. *Id.* 2009 WL 214525, at *17.
8. *Id.* 2009 WL 214525, at *17.
9. *Id.* 2009 WL 214525, at *16.
10. *Id.* 2009 WL 214525, at *17 (citations omitted).
11. *Id.* 2009 WL 214525, at *18.

James Benjamin Gwynne, MPA, JD, is a member of the new ADR Section of the New York State Bar Association. He can be reached at jbgwynne@aol.com.

Mediation and Estate Litigation

By Leona Beane

Trusts and estates attorneys regularly deal with disputes among distributees, beneficiaries, relatives and business associates of the deceased, particularly when dealing with dysfunctional and/or non-traditional families, including second and third marriages. Dealing with tremendous emotional factors is an integral aspect of the trusts and estate practice. Emotions can cause disputes to fester for years, as was so brilliantly portrayed by Charles Dickens in *Bleak House*¹ in his description of a will contest case:

This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least. . . . Innumerable children have been born into the cause; . . . innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties . . . without knowing how or why; whole families have inherited legendary hatreds with the suit . . . but Jarndyce and Jarndyce still drags its dreary length before the court perennially hopeless.

Long-standing family quarrels continue in the Courts. For example, in the December 9, 2008 issue of the *New York Law Journal*,² there appeared an article reporting on the ongoing disputes between two sisters and a brother regarding the estate of their father, who died in 1956 (over 50 years ago)!

“Dealing with tremendous emotional factors is an integral aspect of the trusts and estate practice.”

Family Probate Disputes

A hypothetical situation can assist in demonstrating the nature and complexity of the convoluted estate disputes that can arise within a family where the parties have distrust and animosity toward each other. Consider the following scenario:

Uncle Joe died last month; his Will was drawn up about 20 years ago. He kept saying he was going to do a new Will, but no new Will or codicil has been located. Uncle Joe had no children and left his entire estate to be divided equally among his six nieces and nephews. The named Executrix was his wife (who died last year); the Substitute Executor named is his brother Bill (age 89), who indicates he doesn't want to take on the job of Execu-

tor as he is getting on in years, and doesn't want to have to deal with the six nieces and nephews (two of whom are his own children) because they all have been arguing among themselves for years, since they were kids.

Uncle Joe's probate assets include the house he lived in, which contains some antiques, and a stamp collection and coin collection. One of the nephews (Jack) claims that Uncle Joe promised he would leave the valuable stamp and coin collections to Jack.

Another asset is the upstate cottage on the lake; the last 10 years or so, Betty (niece) had stayed at the cottage with her children for the entire summer. Uncle Joe promised Betty she would always be able to spend her summers at the cottage and he was including this in his Will. Some of the others also stayed at the cottage different times during the year.

Uncle Joe had owned and operated a clothing store for many years. For the past 10 years or so, Mary and Arthur (niece and nephew) had been working and managing the store; several years ago, Uncle Joe gave them each 10% of the shares in the corporation owning the store, and had promised that, when he died, the store would belong to both of them. None of this is in writing.

There are no provisions in the Will relating to tax planning or tax apportionment; there are no trusts or life estates indicated. There is no nominated Executor eligible and willing to serve. Based on some information, it is believed the probate estate will be valued at between \$5 million to \$6 million or more.

Uncle Joe had an IRA account valued at about \$500,000. The named beneficiaries are three of the nieces. Uncle Joe maintained several substantial bank accounts; most of them (in different amounts) are payable on death to several named individuals. These assets are referred to as non-probate assets; they are transferred to the beneficiary by "operation of law," and are not affected by any provisions in the Will, but these assets are included in the taxable estate. Although the probate estate is about \$5 million to \$6 million, the taxable estate will be about \$8 million to \$9 million.

Jack insists Uncle Joe always promised him the stamp and coin collections; he is not giving that up. Betty insists she wants to continue to stay at the cottage during the months of July and August (as this was promised to her) and she refuses to agree for the cottage to be sold. Arthur and Mary claim they are entitled to the clothing store—they've worked and managed the store all these years receiving very low salaries; Uncle Joe promised to leave them the store. They insist there must be another

written document signed by Uncle Joe, leaving them the remaining 80% of the shares of stock in the clothing store corporation

Two of the nieces plus one nephew go to attorney “A” for advice. Two of the other nieces and nephews contact attorney “B”; and the remaining nephew retains his own lawyer, “C.” Thus, three attorneys representing the six nieces and nephews.

Most Trusts and Estates attorneys would find the above situation somewhat familiar—the names and property and amounts are different, but virtually all trusts and estate attorneys at some time have been faced with similar controversies among distributees, beneficiaries and other relatives.

A large family meeting was held among the six nieces and nephews (plus several spouses) and the three attorneys. After about two hours, it was just too much of a screaming match. Another meeting of the three attorneys didn’t last long, either.

Probate Litigation

In order to submit the Will to probate, any of the nieces and nephews could file a petition requesting probate of the Will.³ They discuss who should file for probate—certainly any one of the six can petition for probate. Each one does not want to agree to give up the right to be administrator of the estate. Several insist they will file for probate, and let the others file objections (if they want); they are very concerned the Surrogate might appoint a stranger as the administrator of the estate.

If they litigate, the probate litigation could be extensive and very time-consuming since it appears they don’t want to agree about anything. Proceedings in the Surrogate’s Court generally are initiated by filing a petition; all interested parties are required to receive notice. Thus, each of the nieces and nephews can oppose and file objections to a petition, or they can file consents to the petition. If consents are filed, the petition is reviewed by the Court for legal sufficiency, and if appropriate, the Surrogate might issue a decision within a few days; if the petition is more complex, it will take longer. If there is opposition, the decision will take much longer (possibly several months going into years). Thus, if the parties can agree and they each sign consents to the petition, the Surrogate’s decisions will be that much faster—the Surrogate might not have to even know the detailed provisions of their agreement, as long as the consents to the petition are filed.

Once an administrator is appointed, one of the important tasks is to arrange to file the estate tax returns and pay the estate tax within the requisite period⁴ to avoid penalties and interest. Uncle Joe’s estate has serious liquidity issues because the IRA account and most of the bank accounts have named beneficiaries and are not

immediately available to pay the estate taxes; the probate assets do *not* have sufficient liquid assets (e.g., bank accounts and brokerage accounts).

The Administrator may decide to commence a proceeding seeking the Court’s guidance regarding raising sufficient funds to timely pay the estate taxes and other issues. If the others object, that will entail further litigation and delay.

The accounting proceeding (at the time of distribution) will entail additional litigation if the nieces and nephews file objections. If they all agree as to the distribution of the assets (and as long as there are no parties under a disability), they can proceed with an “informal accounting,” which is speedy and much less expensive than a judicial formal accounting. If a party is not satisfied with the Court decree (after a judicial accounting), the party has the right to appeal to a higher Court, thus entailing more litigation, more costs, and more frustration and aggravation.

Litigation of estate matters can be extremely costly and time-consuming, and emotionally draining. At the end of the litigation, the parties will likely still be complaining because they don’t trust each other and will continue to be angry and frustrated no matter how the dispute is resolved in court.

Professor Lela Love indicates:

The costs of litigation can be staggering. Litigation can take too long, can alienate family members from each other and polarize families into warring camps, sometimes for generations. Funds spent on lawyers can preclude there being available monies for education and fun . . . Most testators want to leave a richer legacy.⁵

In litigation, the end result is made by a judge (or judge and jury) based on complicated rules of evidence,⁶ and how the applicable statute is interpreted by the Judge.⁷ Generally, one person wins and the other person loses. In the end, even the person(s) who wins may not be happy when he or she considers the extensive litigation costs that were entailed, and the extensive personal time (away from family and business) necessary to achieve the result, the aggravation suffered and, perhaps most importantly, the damage to family relationships.

Benefits of Mediation in Estate Matters

Mediation is extremely well-suited for resolving interpersonal disputes, including probate, trusts, estate and guardianship litigation.⁸ In dealing with estate matters, there often is a prior history of sibling rivalry, jealousy, animosity, prior disputes, and other emotional issues related to the family dynamics. Sometimes the disputes

and animosity have been festering for years. That prior history continues to be an integral underlying aspect of the parties' actions, motives, and agenda in any dealings with each other, particularly after the death of a loved one while they are experiencing grief. Grief associated with the death of a loved one creates extra tension.⁹ After the estate matter is finally resolved in court, the ongoing family disputes, jealousy and animosity may continue into the future. However, mediation can assist them in mending fences (putting the prior negative relationships and disputes behind them) and working toward the future family relationships. Mediation also will assist in setting a framework for resolving any later or ongoing disputes within the family.

"Mediation of a family dispute can promote harmony in future dealings among relatives."

Mediation provides an opportunity for each of the participants to 'vent' and voice his or her complaints. There is a benefit and value to 'venting'¹⁰—at least someone finally heard and listened to what the party was complaining about all these years, and hopefully the others will be able to better understand what he or she has been and is complaining about. Some people in family situations are frustrated because none of their siblings and relatives ever listens to their complaints.

Many times, a complicated matter can be fully resolved within a day or a few days of mediation, whereas litigation in this case (with the scenario indicated at the beginning of this article) might entail years, with extensive motions, depositions and discovery, entailing many, many thousands of dollars for litigation, along with the possibility of multiple appeals.

Mediation of a family dispute can promote harmony in future dealings among relatives. At the end of the day, they generally feel "satisfied" with the mediated resolution; after all, it is their agreement; nobody forced them to agree, and mediation enabled them to work together with additional creative options and solutions "outside the box" to accommodate all interests.

During litigation, the parties and their spouses and family are under a great deal of stress and aggravation. Litigation affects the emotional well-being of the participants and their families, and takes a large toll out of the participants' lives. It affects their employment and business relationships in addition to the day-to-day relationship with spouse and close family—they can't fully concentrate because they're always thinking of, and being aggravated by, the hazards of the litigation. The emotional well-being of the clients should be seriously considered and factored in when continuing with extensive litigation. We may not be able to place an actual price tag on

the value of "emotional well-being," but it certainly does affect the parties.

One of the primary additional advantages of mediation in estate matters is that mediation is confidential. Discussing family disputes in a courtroom creates interesting stories for the media. Confidentiality permits the discussions of the family disputes to remain private and thus enables the family to avoid publicity while it encourages more frank discussions and creative problem-solving at the mediation. Even if the mediation does not result in an agreement resolving all disputes, the mediation is still generally beneficial. Often at least a few of the disputes are resolved, which assists in the later resolution of the full matter.

Compared to Court Settlement Conference

Some attorneys say, what about a settlement conference in court? That's not the same as mediation. In a settlement conference, generally only the attorneys appear; they are on guard not to reveal portions of their case that may be a "hot potato." In mediation, the parties themselves must be present in order for the mediation to be effective, and the parties are encouraged to fully participate. Many times the attorneys end up taking a back seat in mediation. It is the parties' dispute, especially in an estate matter. There are different advocacy skills for attorneys in mediation¹¹ as opposed to traditional litigation.

Settlement conferences in court provide the court with great results as they assist in reducing the number of cases on the judge's docket. But, settlement conferences do *not* provide all the benefits of mediation, as generally significant litigation costs have already been incurred and the court conference is relatively short compared with the number of hours usually devoted to mediation. In a court settlement conference, the judge (or referee) may put pressure on one of the parties and/or attorneys, even threatening not to approve attorneys' fees requested, so as to force a settlement.¹² Mediation is a voluntary consensual process—nobody is pressured to settle.

New Approaches to Mediation of Estate Matters

It has been suggested by Professor Lela Love that attorneys should include mediation clauses in their Will and Trust Documents, providing that in case of a dispute the parties agree to utilize mediation first before commencing litigation.¹³ Revising the Uniform Probate Code to incorporate provisions encouraging mediation has also been considered.¹⁴

Another concept that has been developing is the holistic approach to estate planning. In effect, the person who will be executing a Will and other estate planning documents arranges for a mediator to be present during a family meeting to discuss several different possibilities and how the estate will be divided; at that time the father

or mother (or other senior member) can provide reasons and hear comments from the various family members.¹⁵ By having the holistic planning approach in advance, when the parent dies, nobody is caught by surprise because everyone pretty much knew and agreed and understood the reason(s) for the estate planning and what was being done. It is the families' desires that control the result,¹⁶ and not the court's construction of the Will after disputes arise.

Conclusion

Extensive convoluted litigation can incur tremendous legal fees, and in some cases the total legal fees can conceivably exceed the value of the entire estate assets. Surely this is not what the testator intended.

When engaged in such a Will contest or other estate dispute as an advocate, party or friend, think mediation instead!

Endnotes

1. Chapter 1 in *Bleak House* by Charles Dickens, depicting the Will contest case of Jarndyce and Jarndyce.
2. N.Y.L.J. Dec. 9, 2008, page 1, reporting on the Estate of Max Sakow, pending in Bronx County, Surrogate's Court.
3. Since there is no named executor who is willing to serve, the Surrogate's Court can appoint an administrator CTA (with the Will annexed). The administrator will have authority to administer the estate, similar to the duties and obligations of an Executor.
4. The estate tax is required to be paid within nine (9) months after death (even if all funds are not yet collected and marshaled). During 2008, any estates with assets over \$2 million are subject to the federal estate tax. During 2009, estates with assets over \$3.5 million are subject to the federal estate tax. Estates with assets over \$1 million are also subject to the N.Y.S. Estate Tax. If estate taxes are not timely paid, additional interest and penalties are imposed.
5. Lela Love, *Mediation of Probate Matters: Leaving a Valuable Legacy*, 1 Pepp. Disp. Resol. L.J. 255, 256 (2001).
6. For example, the dead man's statute and "hearsay" and other evidentiary rules come up frequently in trusts and estates litigation.
The parties don't understand all the technical rules, and don't understand why these rules have an effect on Uncle Joe's estate.
7. Many times, two different judges in the same courthouse may rule entirely different from each other. Thus, the litigation result may be perceived as being similar to the result of the toss of the dice.
8. See, e.g., Lela Love, *supra* note 5; Mary Radford, *An Introduction to the Uses of Mediation and Other Forms of Dispute Resolution in Probate, Trust, and Guardianship Matters*, 34 Real Prop. Prob. & Tr. J. 601 (2000); Leona Beane, *Should Mediation Be Available as An Option to Reduce Litigation in Contested Guardianship Cases?*, NYSBA Journal, June 2002, at 27; Susan Gary, *Mediating Probate Disputes*, 13 Probate & Property 11 (1999); Catherine Jacobs, *Facilitative Mediation—A Good Option*, 22 Mich. Probate & Estate Plan. J. 4 (Fall 2002).
9. Susan Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes Over Guardianship and Inheritance*, 32 Wake Forest

L. Rev. 397, 422 (1997). Professor Gary explains that a common by-product of grief is anger. Although anger may result from confronting the loss of the decedent, the survivor may attribute the anger to another cause, such as the actions of other family members, seen as unfair or greedy by the survivor. In the early stages of grief, a survivor may want to blame someone for the death, and may redirect feelings of anger toward family members or friends of the decedent. Further, the loss of an anticipated inheritance may be magnified by feelings of loss over the death of a loved one.

10. Venting of the parties is a positive aspect of the mediation process. It enables the parties to release their emotions, who then are able to move on to more productive discussions relating to the future.
11. Some attorneys handle an opening mediation statement as though they were opening to the jury, ready to argue, fight and litigate. By doing so, they are defeating the benefits of Mediation. See, e.g., Simeon Baum, *Top 10 Things Not to Do in Mediation*, N.Y.L.J. (April 25, 2005, page S-4); Mort Irvine, *Some Do's and Don'ts of Mediation Advocacy*, Dispute Resolution Journal (February/April 2003, page 12-14); Joel Davidson, *Successful Mediation: The Do's and Don'ts*, at 71, and other chapters contained in *Handbook on Mediation* (American Arbitration Association, Carbonneau & Jaeggi, Eds., 2006).
12. That approach, utilized in many court settlement conferences, violates one of the basic inherent fundamental principles of mediation, that of "self-determination" per Standard I of the Model Rules, which provides in part: "Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome."
13. See *supra* note 5. Professor Love includes a sample mediation clause at 265: "In keeping with the desire that our family remain strong and harmonious, any disputes arising under this will shall be resolved by mediation. The estate shall pay the cost of the mediation. I recommend the following mediators be considered: ."
14. Andrew Stimmel, *Mediating Will Disputes: A Proposal to Add a Discretionary Mediation Clause to the Uniform Probate Code*, 18 Ohio St. J. on Disp. Resol. 197 (2002).
15. E.g., perhaps one person really wants the farm and it was extremely important for that person to be able to own the farm; without this family meeting and discussion, that might never have been known.
16. M. Street, *A Holistic Approach to Estate Planning: Paramount in Protecting Your Family, Your Wealth, and Your Legacy*, 7 Pepp. Dis. Res. L.J., 141, 146 (2007).

Leona Beane handles Wills, probate, trusts, estate and guardianship matters. She is an Arbitrator and Mediator for several different forums and was previously Chair of the ADR Committee at NY County Lawyers Association for four years. She is currently Vice Chair of the Dispute Resolution Section of the NYSBA; she has written several articles relating to Mediation and other legal topics. She is the author of Chapter 26, "Mediation," in the *New York Lawyers Deskbook* (NYSBA). She can be reached at LBMediateADR@aol.com or LBeaneLaw@aol.com.

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Why Mediation Works to Resolve Workplace Disputes

By Ruth D. Raisfeld

I. Introduction

The following is a common workplace scenario that invariably will lead to litigation: A company fires an employee “for performance related reasons” after several years of employment. Although the company had an employee manual requiring progressive discipline, the supervisor did not document the reasons for the termination, but said he is frustrated by the employee’s failure to do the job. The employee had no chance to meet with a human resources manager or any higher-level manager to offer her view of the situation. The employee goes to a lawyer who hears the circumstances of the termination and the employee’s belief that she was fired because she objected to harassment by the supervisor. The employee’s lawyer sends a letter to the employer, states that the termination may be unlawful and asks for an opportunity to negotiate a reinstatement or at least a severance package before the employee commences a lawsuit.

This scenario represents a workplace-related dispute that is appropriate for resolution through mediation. In mediation, the employer and employee can sit down with each other and their lawyers, and with the help of a neutral third party, review the facts that led to the employee’s termination and reach a resolution before either side incurs unnecessary legal fees, additional emotional wear-and-tear, and disruption of normal business activities. This article will describe why the process of mediation works particularly well in employment matters.

A. Employment Disputes Typically Revolve Around Discharges from Employment, the Industrial “Capital Punishment” That Has Economic and Emotional Ramifications for Both the Employer and Employee

Employment disputes typically involve one or more statutory claims challenging a discharge from employment. While the legal issues may be familiar to the employment lawyers, the impact on the individual (or multiple individuals) is significant. Job loss causes not only economic injury but also undermines the former employee’s self-esteem and the perceptions of others about the employee’s ability to succeed at work. Similarly, employer representatives often feel they have done everything possible to motivate the employee to provide the required job performance and to avoid the discharge, so decision-makers at the company also will have emotional reasons to support their belief that the employee was treated “fairly.”

A negotiation between lawyers over the phone or outside a courtroom deprives the parties to the dispute—the employer and employee—of the emotional catharsis that is available when both sides can sit down, review

what led to the challenged employment decision and the impact on the people involved, and turn toward devising a resolution that will allow both sides to progress toward the future. The opening statement in a mediation session is often the first time an employee has an opportunity to explain why he or she believes the employer was unfair or acted illegally. From the employee’s standpoint, the ability to explain his or her side of the story, and the economic and emotional impact that the challenged employment decision has had, is a turning point which may enable him or her to accept the reality of an employment decision and allow the employee to move on with life. From the employer’s standpoint, the mediation gives the employer an opportunity to learn something about the employee, the supervisor, and the workplace that they were not aware of previously, or that they knew of but had not completely or properly addressed. While the ultimate resolution may be economic, discussion of economics can proceed more easily when a neutral third party helps both sides come to terms with the emotional impact of employment decisions.

B. In Employment Disputes, the Damages Recoverable Are Often Exceeded by the Attorneys’ Fees and Costs of Litigation, Making Early Resolution More Desirable

A unique feature of employment litigation is that the costs of litigation and attorneys’ fees often exceed the damages that can be obtained in court even if the employee is successful. Damages in the form of back-pay and front-pay are a function of the employee’s compensation; however, the costs of litigation are the same whether the employee was a low earner or high earner. In addition, in employment litigation there are fee-shifting statutes that enable the prevailing party plaintiff to shift responsibility for the plaintiff’s attorneys’ fees and costs to the employer. Thus, an employer has the risk of footing its own legal fees and the costs and attorneys’ fees of the employee should the employee prevail. Faced with the prospect of paying for both sides, the opportunity to settle in mediation before fees and expenses climb is an important benefit unique to employment litigation. By the same token, mediation gives the employer an opportunity to convey to the plaintiff, that should the plaintiff lose or receive less in a lawsuit than the employer offered as a settlement, the employer may recover its costs of defense . . . an eventuality that may convince an employee to take a settlement even though it is less than the employee hoped he or she would recover in litigation.

C. A Mediator Can Offer a Fresh Perspective on the Facts and Law

Quite often, employment counsel and the client get so involved in the minutiae of moving through discovery

toward the ubiquitous summary judgment motion that they “lose the forest for the trees.” Counsel may dread the call from a client wanting an update on the status of a case filed long ago; the client may become dissatisfied with counsel’s view of the case, which has migrated from “optimistic” to “doubtful.” In such cases, a mediator can provide a “reality check” about the prospects for success at trial that counsel may have difficulty communicating to the client or that the client is having difficulty hearing. A mediator who has employment law experience and is aware of relevant legal developments in the area can help counsel and clients assess and communicate about the strengths and weaknesses of a case. Further, the mediator does not have the same emotional investment in “winning” that the counsel and parties have and is able to provide a dispassionate viewpoint that can move the parties away from a stalemate.

D. Parties Can Obtain in a Mediated Settlement Results That May Not Be Awarded by a Court or Jury

Mediation is an extremely effective dispute resolution mechanism in employment cases because the parties can fashion remedies that may not be available through litigation. The most common of these remedies are transfers and reassignments, letters of reference, assistance with out-placement, provision of health insurance, or provision of training. In employment mediation, the mediator and counsel can provide the employee and employer with an opportunity for a private face-to-face confidential conversation that they never had prior to or at the time of termination; that way “unfinished business” can be conducted outside the presence of counsel, a court reporter, or a judge or jury. Very often, these intimate conversations about issues that only the employer and employee can truly understand pave the way to resolution outside of litigation. Mediation can also provide an opportunity for apologies that would never be available in litigation. Similarly, in disputes over unpaid wages, commissions, or bonuses, mediation provides an opportunity for both sides to “work through the numbers” without spending inordinate time battling over depositions or expert opinions.

E. Mediation Provides “Face-Saving” Cover for Settlement Discussions Between “Repeat Players”

The employment-law Bar is a small one in which firms typically exclusively represent management, unions, or individual employees. Counsel may oppose each other in a number of cases at one time or over the years. Similarly, employers may have claims against them from multiple employees represented by the same plaintiffs’-side firm. Mediation gives “repeat players” an opportunity to engage in settlement discussions without being perceived as “weak” or uncertain about the strengths of a particular case. Counsel may also be concerned about appearing zealous and confident in

front of their clients. While mediations can and do get contentious, an effective mediator can encourage a “let’s-just-get-along approach” that adversaries may be unable to accomplish on their own.

F. Mediation Provides Confidentiality and Avoids Publicity

The privacy afforded by mediation processes is a key factor contributing to the success of mediation in resolving employment disputes. Both employers and employees may wish to avoid the glare of public attention and scrutiny that often accompany employment litigation. The most recent obvious examples of publicity surrounding employment litigation include the Anouka Brown verdict against Madison Square Garden, the sexual harassment case against Bill O’Reilly, the sex discrimination case against Morgan Stanley, and the class actions against Wal-Mart and Starbucks. Airing employment disputes in the press and before a judge or jury may affect personal relationships of the parties involved, the reputation of witnesses and interfere with the conduct of daily business transactions, and even the plaintiff’s ability to secure new employment without fear of retaliation. The confidentiality provided in the mediation process encourages candor, problem-solving, and creativity in resolving employment-related disputes while avoiding the destructive impact of negative publicity.

G. Mediation Is More Predictable Than Litigation

No lawyer can ethically or practically guarantee a client a particular result in court. Litigation is unpredictable: a document can surface that no one remembers, a witness can crumble on the stand, a jury may not appreciate the nuances of an argument. Particularly in employment litigation, memories fail, the emotional significance of an employment decision fades, and the witnesses may have dispersed to other jobs. In mediation, without rules of evidence or procedure, the parties can use less structured means to convey the heart of a problem to the mediator and the other side, which may facilitate settlement discussions, concluding the matter without suffering through the vagaries of litigation.

II. Conclusion

Mediation is not a panacea for all hotly contested employment cases; there will be those extremely emotional current or former employees who won’t back down and those cases where an employer won’t settle unless a court order is entered against them. However, mediation can provide efficient and effective dispute resolution long before the parties are on the courthouse steps.

The author, Ruth D. Raisfeld, Esq., is a mediator and arbitrator of employment matters. She may be reached at rdradr@optonline.net or through her Web site, www.rdradr.com.

Mediating IP Disputes

By David W. Plant

I. Introduction

Virtually every IP (Intellectual Property) dispute is difficult. Sometimes, extraordinarily so. Success in IP negotiation and mediation requires each person concerned to be thoroughly prepared, and to bring to the table all his or her interpersonal skills, cultural sensitivity, patience, open-mindedness, creativity and commitment. This may not come easily. It calls for care and commitment.

Care and commitment are required as to each person's emotional issues—emotional issues unique to the person or specific to a particular IP conflict, or those more generally felt by each of us as ordinary, everyday citizens of this world. Each person should be sensitive to his or her own emotional investment in the conflict, matters that affect his/ her role in the conflict and its resolution, and his or her own emotional hot buttons. This goes for parties, counsel and mediators alike.

All this is vital to assuring that the parties' real interests and real needs are satisfied, and resolution of the IP dispute is in sight.

II. The Nature of IP Disputes

IP disputes entail many questions and reach across many borders—to people from widely different backgrounds and with fundamentally different views of the world, and often in unfamiliar venues. Fair and durable resolutions demand that players talk. To do so calls for courage, careful attention and practicable processes.

Courage is required to be the first person to move, the first to invite dialogue, the first to disclose real interests and real needs, the first to acknowledge another's real interests and needs, the first to explore options, and the first to propose an even-handed solution that benefits all parties.

Careful attention must be paid to countless questions, in light of differences in legal environments, institutional practices, cultural norms and individual idiosyncrasies. These differences cut across all kinds of IP, e.g.—

In the case of an "*invention*," Who is the creator or inventor? More than one person? What indeed is the invention? Whose resources were utilized? Who owns the invention? Does a contract answer questions or invite questions? Does the invention have value? Today? Tomorrow? How best to realize that value?

In the case of a *trademark* or *service mark*, What is the mark? Can it be used? How?

On what products or services? By whom? Under what controls as to quality and compliance with trademark laws? Must another's mark be considered? Can costly enforcement procedures be effective?

Is a *domain name* legitimately registered or part of a cyber-squatter's illegal scheme?

Similar questions may occur with respect to *copyrights* and *trade secrets*.

Other questions may arise as to whether or not to—

Protect IP. Why? What property? How? Where? At what cost? With what reward? Is an IP right implied in law or created by contract? Will IP be challenged? By whom?

Enforce an IP right. Against whom? Why? Where? What are the consequences of a win, a loss or a settlement? The consequences of different outcomes in different jurisdiction with different parties? Cost?

Avoid IP rights. How? Why? Cost?

Negotiate for rights under IP? Why? How? Where? Cost? Risk? Rewards?

Exploit IP. Why? Exploit what? How? Where? By whom? Cost? Rewards?

Acknowledge IP. Why? To whom? How? Terms and conditions? Cost?

Ignore IP. Yours? Theirs? Why? Risk? Cost?

Grant IP rights. What rights? To whom? Why? Terms and conditions? Consequences of a breach of the agreement?

Delineating IP questions is easier than divining answers. Where the analysis entails IP rights, power or position of another party (or parties), potential conflict must be anticipated and addressed. If unassisted negotiation does not resolve an issue, mediation may work.

III. IP Disputes Suitable For Mediation¹

Virtually all IP disputes are suitable for mediation—assuming parties to the IP dispute are willing to negotiate in good faith with the shared goal of finding a durable resolution.

Exceptions include a need for immediate injunctive relief (e.g., in counterfeiting, cyber-squatting, gray goods or severe market erosion situations), a need for a precedent, or a party is using the dispute for tactical or strategic purposes in the marketplace, or a party is unwilling to negotiate at all, let alone in good faith.

Notwithstanding these exceptions, IP mediation is frequently appropriate. Many patent, trademark, copyright, trade secret, licensing, joint venture, and research and development disputes have been successfully resolved through mediation. Many issues have been narrowed in scope. Many relationships have been repaired, or created—often before an enormous expenditure of energy, time and resources. Even one-off IP disputes have been resolved through mediation.

Animosity, anger and distrust engendered by keen competition, conflicting personalities or scorched-earth litigation do not necessarily preclude IP mediation. On the contrary, the opportunity afforded by IP mediation to vent and to address emotions may be the primary factor in empowering parties to join together in finding a solution to their problems. The presence of palpable emotion may be the very reason parties should mediate. Emotion can be dealt with, even welcomed, and the negotiation can stay on track.

In contrast to polarizing IP litigation and IP arbitration, IP mediation frees parties to approach the dispute or a potential deal in a joint problem-solving mode. The transformation from an adversarial, confrontational mode to a joint problem-solving mode permits the parties to consider options and create solutions unhampered by the constraints of the formalities of IP litigation or IP arbitration. The parties are free to explore business solutions ranging far beyond the four corners of a litigation or an arbitration. Indeed, they can embrace impasse and redouble their exploration of options. They are constrained only by the reach of their imaginations and the usual legal and business parameters considered when negotiating any business deal.

Among the drawbacks of IP litigation is the specter of inconsistent results achieved at substantial cost in different courts and jurisdictions—both in arriving at the results and in sorting them out. Arbitration is not always the answer in connection with multi-jurisdictional and multi-party IP disputes, especially in light of the wide variations from jurisdiction to jurisdiction with respect to (a) the arbitrability of IP disputes, (b) the enforcement of arbitral awards in the IP field, (c) applicable procedures (even with respect to different arbitrations under the rules of the same institution), (d) applicable substantive law, and (e) diverse tendencies of different arbitrators.

Most IP mediations can and do create value, even without a binding substantive agreement. At minimum, every IP mediation can create a deeper understanding of the problem, the players, everyone's real interests and

real needs, the options for solving the problem, the reasons why parties are stuck, and how to create and claim value.

The principal reason value is created through IP mediation is party control. Resolution often flows from the parties' control over the process, the definition of the problem and the solution. The parties themselves create the solution. It is not imposed on them by a third person, i.e. a judge, a jury, or an arbitrator. The opportunities for creating value, i.e., for finding a win-win solution, are virtually unlimited.

The reason for the increased opportunities is that the parties are not constrained by the words within the four corners of formal pleadings, by the facts that may be material to the formally defined IP dispute, by sophisticated procedural rules, or by arguments of counsel. The parties can get behind (or beyond) formally asserted positions and entitlements and focus on their real interests and real needs.

In mediated resolutions of IP disputes, real interests and real needs are evident and play a paramount role. The critical role played by interests and needs will seldom be performed unless the parties have control of the process for finding a solution to their problem.

Another advantage of IP mediation is the real prospect of preserving old relationships and creating new ones. Litigation and arbitration—confrontational, adversarial processes—have precisely the opposite effect. Litigation and arbitration exacerbate dislike and distrust. In contrast, mediation inherently turns adversaries into partners—problem-solving partners.

Some examples—

After years of arbitration and related litigation, and thousands of pages of hearing transcript, Advanced Micro Devices and Intel agreed to mediate. They reached agreement on a solution they themselves crafted. The virtue of mediation was two-fold: (1) the parties' real interests and real needs could be taken into account, and (2) the parties could fashion a solution that was both their solution and broader than a solution imposed by an arbitrator or a judge. It is interesting to speculate about the costs that would have been avoided and the value that would have been created, if the parties had devoted only a minor fraction of their arbitration and litigation efforts to mediation at an early stage in their dispute.

In another IP litigation, after extensive discovery and on the eve of a hearing on the patent owner's motion for a prelimi-

nary injunction, the parties agreed to mediate. They did so at the encouragement of the judge. In two days, the matter was settled. The patent owner saved its patent from a potential holding of invalidity, and the accused infringer avoided a potential injunction. Value was created.

In another patent litigation, each party had expended hundreds of thousands of dollars on discovery. Trial was unlikely in the foreseeable future. The parties mediated pursuant to court order. One party wanted to sell the business related to its patents. The pending lawsuit stood in its way. The other party staked its future on one of its patents, and it was especially important to its private investors to preserve this asset. The principals were able to share this information with one another and craft a solution in light of it. They accommodated each other's real interests and real needs in a way a judge could not. The two principals got to know and to understand one another—and to grasp each other's real interests and real needs.

Inadvertently, a family opened a summer camp whose name was virtually identical to the name of another camp a thousand miles away. The distant camp had been around for decades. By the time the dispute arose, the family had operated its camp for decades. The trademarks were important to each. Mediation resulted in a solution.

In an arbitration between a Japanese company and a US company regarding ownership of pharmaceutical IP, after the arbitrator resolved issues as to Japanese law, mediation ensued. During the mediation, it came to light that the Japanese company had already booked potential income as actually received. The parties agreed to a long-term payout of a sum that permitted the Japanese company to preserve its accounts as recorded. The parties' own resolution saved the cost of further arbitration, which might not have solved the accounting problem.

IV. Barriers to IP Mediation

Every IP dispute is an opportunity to create value, not necessarily a war to be won.²

Lack of preparation poses an enormous barrier to creating and claiming value. Without thorough prepa-

ration, a party is likely to miss an opportunity, through mediation, to take charge of defining the problem, identifying all the players, understanding real interests and real needs, exploring options, acknowledging emotional and cultural issues, and creating a jointly satisfactory resolution of the dispute. Preparation must begin the moment alternatives to litigation or arbitration are considered, or the moment a negotiation of a potentially new (or repaired) relationship appears to be heading in the wrong direction.

In IP mediation it is common for counsel and clients to focus on formally stated positions and fail to consider and think through both business and personal interests and needs—not only that player's own interests and needs but also the interests and needs of every other player, including the adversary and players not at the table (e.g., insurers, indemnitors, significant investors, creditors, debtors, vendors, vendees, licensors, parent companies).

To lower barriers in IP mediation, it often is advisable to have a principal present who is not emotionally invested in the dispute, and who can stand back and assess the situation objectively. Barriers can be, and have been, dissolved when the principals prepare and behave and communicate as reasonable, objective business people. That is, if they talk.

V. End Note

Many of us go to our graves with the music still inside us.³

Mediation of the most intractable IP disputes will enable contestants to avoid that sadness—and to create and claim value that otherwise would be lost.

Endnotes

1. "The best companies are the best collaborators. . . . The next layers of value creation—whether in technology, marketing, biomedicine, or manufacturing—are becoming so complex that no single firm or department is going to be able to master them alone." Thomas L. Friedman, *The World Is Flat*, pp. 352–353 (2005).

"I am absolutely surprised that you have left this incredibly important and significant decision to the court . . . I have always thought that this decision, in the end, was a business decision." U.S. District Court Judge James R. Spencer in *NTP v. RIM*, quoted in the *New York Times*, Feb. 25, 2006.
2. Attributed to Tom Arnold, a leader in IP mediation.
3. Oliver Wendell Holmes.

David W. Plant, DplantADR@aol.com, with decades of experience at Fish & Neave, is a mediator, arbitrator, special master and teacher. He has written and spoken extensively on ADR issues and has led courses and workshops in arbitration, mediation and negotiation.

Developing an Effective Med-Arb/Arb-Med Process

By Edna Sussman

"[Med-arb] proceedings, when properly executed, are innovative and creative way to further the purpose of alternative dispute resolution."

Bowden v. Weickert

The buzz is all about whether arbitration has become too much like litigation. Regardless of whether this query is based in reality for the vast majority of arbitrations and regardless of whether it is the arbitrators or the lawyers/clients who are the cause of some arbitrations having taken on a litigation-like process, there is no question that mediation is on the rise. As parties search for a more expeditious and less costly means for resolving their disputes, attention is increasingly being paid to hybrid processes—to combinations and permutations of arbitration and mediation that can serve the parties' needs and best fit the forum to the fuss. These combined processes are not new. Arbitrators attempting to settle cases (arb-med) and mediators serving as arbitrators if settlement is not achieved (med-arb) have been the subject of learned articles for many years¹ and have been part of the local culture in many parts of the globe for generations.²

The two-fold concerns raised most frequently as to the use of a hybrid process are applicable only if the same neutral serves as both arbitrator and mediator, a practice which serves the parties' purpose of maximizing efficiency and minimizing expense. First, it is generally accepted that the confidentiality of mediation is an essential element to successfully conducting a mediation as parties reveal their true interests and perspectives on the dispute. It is argued that if the parties know that the mediator will be the arbitrator if the mediation fails, they will not confide in the mediator and will instead try to "spin" the would-be arbitrator to achieve a better result in the arbitration. Second, there is concern, on the other hand, that the mediator will be privy to confidential information derived from private caucus sessions with the parties and the opposing party will not know what was said and will not have the opportunity to rebut the information in the arbitration phase, a breach of concepts of natural justice and due process. Some argue that these concerns are insurmountable and that a hybrid of mediation and arbitration jeopardizes both processes. Others argue that these issues can be dealt with in various ways and that, in any case, the parties should be able to design their own process and contract for the one that suits them best.

The Combinations and Permutations

The mediation and arbitration processes have been combined in a variety of ways. These include: (a) Med-

arb: If an unbreachable impasse is reached, the same person serves as the arbitrator; (b) Arb-med or arb-med-arb: The appointed arbitrator attempts to mediate (or conciliate) the case but failing resolution returns to his or her role as arbitrator; (c) Co-med-arb: The mediator and the arbitrator hear the parties' presentations together but the mediator then proceeds to attempt to settle the dispute without the arbitrator, who is only called back in to enter a consent award or to serve as an arbitrator if the mediation fails; (d) MEDALOA (Mediation and Last Offer Arbitration): If the mediation fails, the mediator-now-arbitrator is presented with a proposed ruling by both parties and must decide between the two, as in a baseball arbitration.

Techniques to implement a combined arbitration-mediation process have been developed to avoid the problems identified with same neutral med-arb and arb-med. For example, the mediation can be conducted without caucus sessions, thus assuring that all parties are aware of the information being presented to the neutral with full opportunity to respond.³ Or the arbitrator can complete his or her award following the hearing, but seals it and keeps it confidential pending an attempt to mediate the dispute between the parties. Or the parties can be allowed to opt out of the same neutral serving as the arbitrator after the mediation fails. Or two party appointed arbitrators can co-mediate the dispute without the chair, who is held in reserve for the hearing untainted by having been privy to confidential communications in case no settlement is reached. These and other process refinements can serve to ameliorate the difficulties presented in combining arbitration and mediation, but party consent may be viewed as overcoming all objections.

Can Consent Overcome Later Challenges?

While the case law in this area is still emerging, the courts in the United States that have had occasion to address med-arb have uniformly endorsed the ability of the parties to design a med-arb process to suit them. However, the courts 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?

The court in *Bowden v. Weickert*⁴ dealt with an arbitrator who attempted to mediate the dispute. Upon failure of the mediation process, the arbitrator returned to his role as arbitrator and rendered his award. The court reviewed the med-arb process and delineated the nature of the agreement necessary for such a hybrid:

The mediation-followed-by-arbitration proceeding engaged in by the parties in this case is sometimes referred to as a combined, or hybrid, “med-arb” proceeding. Such 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.⁵

Finding that the arbitrator had relied on information obtained in his role as mediator in violation of statutory protections of mediation confidentiality and that there had been no explicit agreement by the parties regarding the use of confidential information, the court found that use of the same neutral as arbitrator and mediator rendered the arbitrator’s decision “arbitrary and capricious” on its face.⁶

In *Gaskin v. Gaskin*,⁷ the court noted that the mediation process encourages candid disclosures, including disclosures of confidential information, to a mediator, creating the potential for a problem when the mediator, over the objection of one of the parties, becomes the arbitrator of the same or a related dispute. The court concluded that it would be improper for the mediator to act as the arbitrator in the same or a related dispute “without the express consent of the parties.”⁸

Where the parties have consented, the use of confidential information by the arbitrator in the arbitration decision should not serve to provide a basis for vacating the award. In *U.S. Steel Mining Company v. Wilson Downhole Services*,⁹ the parties had agreed to have the mediator serve as the arbitrator if the mediation failed to lead to a resolution and empowered the mediator, now arbitrator, to select between the parties competing proposals in a baseball arbitration. The parties expressly authorized the mediator-arbitrator to rely on confidential mediation disclosures in reaching his decision. The parties’ agreement provided:

The Parties anticipate that *ex parte* communications with the Arbitrator will occur during the course of the mediation. The Parties agree that the Arbitrator, in evaluating each Party’s best and final offer, may rely on information he deems relevant, whether obtained in an *ex parte* communication or otherwise, in making the final Award.¹⁰

In attacking the award, the challenging party claimed fraud in the presentation of information in the mediation. The court held that such evidence of fraud had to be clear and convincing and no such finding could be made on the facts presented in the face of the consent given.

In an analogous case, in *Conkle and Olesten v. Goodrich Goodyear and Hinds*,¹¹ the court reviewed a challenge to an arbitration award where the party had waived disclosure by the arbitrator and did not know that the arbitrator had previously mediated a closely related case. The court refused to set aside the award finding that the “waiver was direct and unequivocal.”¹² The court said that to adopt an “absolutely-cannot-waive-disclosure rule would give one party the unilateral right to repudiate any arbitration it didn’t like.”¹³

Nor will the court necessarily vacate the award even absent express consent on use of confidential information in limited circumstances. In *Logan v Logan*,¹⁴ the loser in the arbitration sought to set aside the award on the grounds that the mediator-arbitrator referred to confidential information from the mediation in his arbitral award. The court noted that:

if there was an improper reference to the mediation in the arbitration proceedings, this would constitute grounds for vacating or modifying the arbitration order and subsequent judgment, if the reference materially affected appellants’ substantial rights.¹⁵

However, on the facts before it, the court refused to set aside the award, stating that no showing had been made that the reference in the arbitration order to matters that

occurred at the mediation “materially affected substantial rights.”¹⁶

Care must be taken in designing the process, crafting the consent document and in the terminology used if an enforceable award is to be achieved. In *Lindsay v. Lewandowski*,¹⁷ the parties agreed to “binding mediation” by the mediator upon the conclusion of a failed mediation. The court refused to enter judgment on the stipulated settlement agreement, which included provisions determined in “binding mediation” on unresolved terms following a mediation by the same neutral. The court noted the confusion that would result from allowing the development of myriad alternative dispute resolution processes such as “binding mediation” for which no legal guiding principles existed:

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.¹⁸

Clarity as to the nature of the roles to be played and the use of constructs and terminology with which the law is familiar and as to which legal principles already exist are important in drafting the contract language establishing the process to be used.

Thus the court in *Lindsay v. Lewandowski* expressly recognized that such a combined process could be developed by the parties. The court stated that it did not preclude the parties from agreeing, if the mediation fails, to proceed to arbitration with the same neutral. But the court warned that whether or not this arbitrator (*née* mediator) may consider facts presented to him or her during the mediation would also have to be specified in any such agreement. As confirmed in the concurring opinion, “only a clearly written agreement signed by the parties can set forth a process whereby an unsuccessful settlement conference (or mediation) morphs into a *de facto* arbitration. The key to approval of such agreement is clarity of language and informed consent.”¹⁹

As the courts have held, the success of the hybrid mediation/arbitration process depends on the efficacy of the consent to the process entered into by the parties. A sample of a consent form for consideration by the reader was developed by Gerald Phillips, a well-known Cali-

fornia mediator and arbitrator and a strong supporter of med-arb, which addresses many of the concerns.²⁰

Do You Have the Right Neutral?

The differences between the demands of the job and the skill sets required for an arbitrator versus a mediator were summed up in an anecdote by a world-class neutral who reported that his wife always knew whether he had arbitrated or mediated that day. If he arbitrated he came home in time for dinner with energy for companionship and conversation. If he mediated he came home very late, emotionally drained, and went immediately to bed.

Arbitration and mediation are two entirely different processes. In arbitration the arbitrator is charged with managing the proceeding efficiently, providing a fair opportunity to each side to present its case and analyzing the facts and the law based on the evidence to arrive at the ultimate award. The mediator is charged with working with the parties to craft a process most likely to lead to a resolution, uncover the parties’ interests, understand their relationship and their motivations, explore the strengths and weaknesses of the respective positions, assist in developing workable solutions and help parties overcome psychological barriers to settlement. Bottom line: The mediator’s role requires use of many of the skills of a psychologist, while the arbitrator’s role requires use of many of the skills of a judge.

The trainings offered for each discipline bear little resemblance to one another. For example, a good deal of attention is devoted in arbitration training to how to manage the pre-hearing process efficiently, while in mediation training significant attention is devoted to how to overcome impasse. The good mediator and good arbitrator employs a completely different approach and set of tools in each role. Not every arbitrator is qualified to be a good mediator and vice versa.

In selecting the neutral, it is not only important to consider the qualifications of the neutral for each role but to select someone with a strong reputation for integrity who the parties can trust and respect to handle appropriately the special challenges associated with combining the roles of arbitrator and mediator.

Conclusion

Combining mediation and arbitration in a hybrid process with the same neutral can be an effective mechanism for reducing costs, increasing efficiency and maximizing the possibility of achieving the win-win result that optimizes the position of all parties and arrives at the best resolution of a dispute. If the parties are fully informed and consent knowingly to same neutral mediation and arbitration, party autonomy should be respected and the resolution derived from the process should be honored.

Endnotes

1. See, e.g., Barry C. Bartel, *Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis and Potential*, 27 Willamette L. Rev. 661 (1991); John T Blankenship, *Developing Your ADR Attitude*, 42-NOV Tenn. B. J. 28 (2006); Harold I. Abramson, *Protocols for International Arbitrators Who Dare to Settle Cases*, 10 Am. Rev. Int'l Arb. 1 (1999); James T. Peter, *Med-Arb in International Arbitration*, 8 Am. Rev. Int'l Arb. 83 (1997).
2. For a review of institutional rules on combined neutral functions around the world, see Francesco Anchini, "Concentration: The Ultimate Example of ADR," 13 World Arb. & Mediation Rep. 162 (2002).
3. Indeed, a no-caucus model is the basic premise of the understanding-based model of mediation. See Gary Friedman and Jack Himmelstein, *Challenging Conflict: Mediation Through Understanding*, American Bar Association and Harvard Program on Negotiation (2008). The book is reviewed in this issue of *New York Dispute Resolution Lawyer*.
4. *Bowden v. Weickert*, No. S-02-017, 2003 WL 21419175 (Ohio App. 6 Dist. June 20, 2003). The case went back for a second arbitration; see *Bowden v. Weickert*, No. S-05-009, 2006 WL 259642 (Ohio App. 6 Dist. Feb. 3, 2006).
5. *Id.* at *6.
6. *Id.* at *7.
7. *Gaskin v. Gaskin*, No. 2-06-039-CV, 2006 WL 2507319 (Tex. App.-Fort Worth, Sept. 21, 2006).
8. *Id.* *2 (citations omitted). See also *Wright v. Brockett*, 150 Misc. 2d 1031, 571 N.Y.S. 2d 660 (Sup. Ct., Bronx Cty. 1991); in reflecting on a proposal to expand the use of med-arb, the court cautioned that careful study was required before full implementation "to insure that there is a legally sufficient written 'plain language' consent by the parties both to the arbitration of the dispute and the specific procedures to be employed." *Id.* at 150 Misc. 2d at 1039.
9. *U.S. Steel Mining Company v. Wilson Downhole Services*, No. 02:00CV1758, 2006 WL 2869535 (W.D. Pa. Oct. 5, 2006).
10. *Id.* at *5.
11. *Conkle and Olesten v Goodrich Goodyear and Hinds*, Nos. G033972, G034063, 2006 WL 3095964 (Cal. App. 4 Dist. Nov. 1, 2006).
12. *Id.* at *12.
13. *Id.* at *12. See also, *Estate of McDonald*, No. B189178, 2007 WL 259872 (Cal. App. 2 Dist. Jan. 31, 2007) where the parties entered into a settlement agreement following a mediation and agreed to a binding decision by a retired judge on disputed items; the court refused to set aside the decision, holding that the challenger was estopped from challenging the procedural settlement mechanism she had accepted.
14. *Logan v. Logan*, No. F051606, 2007 WL 2994640 (Cal. App. 5 Dist. Oct. 16, 2007).
15. *Id.* at *1.
16. *Id.* at *3. See also, *Society of Lloyd's v. Moore*, No. 1:06-CV-286, 2006 WL 3167736 (S.D. Ohio Nov. 1, 2006) where the party attempted to set aside an award rendered by an arbitrator who heard the case, wrote the award and sealed it while he unsuccessfully attempted to mediate the case based on a communication by the arbitrator/mediator in the course of the mediation. The court held that the communication was protected by mediation confidentiality and was not admissible.
17. *Lindsay v. Lewandowski*, 139 Cal. App. 4th 1618, 43 Cal. Reprtr. 3d 846 (Ct. Appeals, 4th Dist. Div. 3, 2006).
18. *Id.* at 43 Cal Reprtr. 3d at 850.
19. *Id.* at 43 Cal Reprtr. 3d at 853. See also, *Weddington Productions Inc. v. Flick*, 60 Cal. App. 4th 793, 71 Cal. Reprtr. 2d 265 (Ct. Appeals, 2d District, Div. 2, 1998).
20. Gerald F. Phillips, *Same Neutral Med-Arb: What Does the Future Hold?* 60- Jul Disp. Resol. J. 24 (May-July, 2005). This article is reprinted in this issue of *New York Dispute Resolution Lawyer*.

Edna Sussman is a principal of Sussman ADR LLC and is the Distinguished ADR Practitioner in Residence at Fordham Law School. With decades of litigation experience, she serves on the arbitration and mediation panels of many of the leading dispute resolution institutions, including the AAA, ICDR, CPR, WIPO and FINRA and the mediation panels of the federal, state and bankruptcy courts in New York. She can be reached at esussman@sussmanADR.com or through her Web site www.SussmanADR.com

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Same-Neutral Med-Arb: What Does the Future Hold?

By Gerald F. Phillips

“A dispute is to be resolved together, not to be won.”

Tom Arnold, mediator and arbitrator

In 1906, Dean Roscoe Pound suggested that our legal system must adjust its principles, doctrines and institutions of justice from a purely “mechanical,” “rule-centered approach” to one that considers “the human conditions they are to govern . . . putting the human factor in the central place.”¹ He also recognized that “the most important and most constant cause of dissatisfaction with all laws at all times is to be found in the necessarily mechanical operation of legal rules.”² This observation is as true today as it was early in the 20th century, especially when it comes to new methods of conflict resolution. Often changes are discouraged or even forbidden because critics assert that they violate some rule or another. That seems to be the case with a process this article calls “same-neutral med-arb”³—a process that I believe will become increasingly more important in the future. Is same-neutral med-arb, to which the disputing parties give their informed written consent, rejected because of a “mechanical” rule?

Many mediators and arbitrators agree that parties should have the right to use same-neutral med-arb. Richard Chernick, vice president and managing director of arbitration practice at JAMS, and a respected arbitrator and mediator has opined:

If one adopts the view that the parties should be permitted to craft their own process, there should be no prohibition against a neutral acting as a mediator and arbitrator in the same case notwithstanding the potential risks, so long as there is a full understanding of those risks. The neutral should ensure that the parties have made an informed decision regarding their participation and the neutral’s role.⁴

Thomas J. Brewer and Lawrence R. Mills concur. They wrote, “In our view, when consenting adults make such judgments with an understanding of the advantages and the possible disadvantages of the med-arb process, they should be free to contract for the dispute resolution process that seems best to them”⁵ Lawrence Waddington, a retired judge of the Los Angeles Superior Court and a respected neutral, opined that “med-arb is a valuable addition to the constantly maturing world of alternatives to litigation . . . the increasing use of mediation by the Bar has developed experienced lawyers who recognize a variety of techniques to settle cases and med-arb is one option. No mediator should ignore this potential for resolution of a dispute.”⁶

This article examines the disadvantages and advantages of same-neutral med-arb. It also discusses how this hybrid process can be adapted to meet various challenges.⁷

Same-Neutral Med-Arb Defined

Same-neutral med-arb is a two-prong process usually beginning with mediation and followed by arbitration, if it becomes necessary to resolve unsettled issues. A key feature of the process is that the parties want the same person to serve as the mediator and arbitrator and they are prepared to stipulate in writing that they agree and understand this process and waive any objection to its use.⁸ If the dispute is not resolved during the mediation, the entire matter or perhaps one issue, which was not resolved during the prior mediation, will then go to the same neutral who has already been designated to be the arbitrator. This process may consist of moving from mediation to arbitration and again back to mediation.

Some arbitrators and mediators believe that mixing mediation and arbitration is heretical and even unethical and that arbitrators should never even suggest to the parties that they consider using mediation, even when the mediator is to be another person. I could not disagree more. If arbitrators don’t raise the subject of mediation with the parties at the opening of the arbitration, the parties may not consider it at all. That would be unfortunate since that process is the most economical, efficient and satisfying means of dispute resolution available. When I sit as an arbitrator pursuant to a contractual arbitration provision, I find that the attorneys have rarely tried to mediate, or have even advised their client about that process until I mention that possibility. Many courts around the country require judges to send cases to mediation before the cases are to be tried. Why should not an arbitrator do the same?

Ethical Issues

True, same-neutral med-arb raises ethical issues. For example, a key issue is that the arbitrator’s decision could be influenced by confidential information learned during private caucuses. Information disclosed during private discussions between a mediator and a party is confidential and may not be communicated to the adversary unless the disclosing party agrees. In addition, in a private caucus a party may tell the mediator something that would not be admissible in a subsequent litigation.

In the commercial context, however, the parties are usually sophisticated and can be fully informed of any

ethical problems and decide to waive any objections they may have to the med-arb process. That is why the parties' informed consent to same-neutral med-arb is so critical.

Those who believe that the same person should never serve as both a mediator and arbitrator in the same case even when the parties give their informed consent are guilty of taking a mechanical, rule-centered approach to dispute resolution, which Dean Pound warned against. That approach would deprive the parties of free choice to decide on the process they wish to use to resolve their dispute.

Disadvantages of Single-Neutral Med-Arb

Although med-arb is referred to in the literature, most discussions are brief and tend to stress the disadvantages of using this hybrid process without acknowledging and opining on its advantages. Opponents of same-neutral med-arb say this:

- Arbitrators should stick to arbitration and stay out of mediation.
- The role of the mediator is inconsistent with that of the arbitrator.
- Arbitrators should only make decisions on the evidence presented in hearings at which each side has the opportunity to challenge the evidence.
- An award might be unfairly influenced by evidence that could not be challenged at the arbitration hearing because it was communicated only to the mediator in a private caucus, but not to the other party.
- Parties are not as candid or willing to admit weaknesses in same-neutral med-arb as they are in mediation followed by arbitration with another neutral.
- The attorneys may attempt to “spin” the mediator towards the client’s side in preparation for the arbitration.
- The neutral has too much power, which he or she may abuse.
- Consciously or unconsciously, the neutral may use the threat of a binding award to coerce the parties during the mediation stage.
- The neutral selected may have difficulty switching from being a problem solver to being a decision maker.

The American Arbitration Association does not recommend same-neutral med-arb “except in unusual circumstances because it could inhibit the candor which should characterize the mediation process and/or it could convey evidence, legal points or settlement posi-

tions *ex parte* improperly influencing the arbitrator.”⁹ However, it is important to note that the Association will administer a case using same-neutral med-arb if that is what the parties want. JAMS also does not recommend same-neutral med-arb, but it too will administer such a case if the parties expressly agree to it.¹⁰

The ADR literature also tends to compare same-neutral med-arb to mediation or arbitration separately, and does not explain the advantages of combining mediation with arbitration using one neutral, or how the problems with doing so can be addressed. I endeavor to fill that void here. I also hope to encourage well-established ADR organizations like the AAA and JAMS to actively encourage same-neutral med-arb if the process is fully explained to the parties and they stipulate in writing to its use.

Advantages of Single-Neutral Med-Arb

Here are some of the advantages of combining mediation and arbitration using the same neutral.

- There is no need for the parties to review the qualifications of potential arbitrators if no agreement is reached in mediation because the same neutral will arbitrate the dispute. Selecting a new arbitrator is often time-consuming. Considerable time is saved by having the mediator become the arbitrator.
- Very little time is necessary at the end of an unsuccessful (or partially successful) mediation to commence the arbitration phase of same-neutral med-arb. This greatly expedites the arbitration phase.
- The process is flexible and allows the parties to resume mediation after the arbitration phase has commenced. For example, if the parties learn that the arbitration may take a long time to be completed, that could be enough of an incentive for the parties to give mediation another try. Indeed that happened in a case in which I served. I was first designated the mediator but when it became clear that the parties could not settle the dispute, I became the arbitrator pursuant to the parties’ written stipulation. However, after two days of hearings on one issue, both counsel recognized that arbitrating all the issues would be long and costly, and suggested that mediation should be resumed. The case settled during the second mediation effort.
- Remedies not available in arbitration alone can be worked out in the mediation. For example, the parties can mutually decide to rewrite their business arrangement or even terminate it with an agreed division of assets. Such agreements are not possible in arbitration.
- The dispute can be resolved faster because the arbitrator is already familiar with the facts of the case. This allows the parties to get back to business more quickly. This is not the case if a new arbitrator must

be selected. In fact, with the same person as the arbitrator, there may not even be a need for a hearing. If the parties agree, the arbitrator can make an award based on the facts already presented in mediation.

- An atmosphere more conducive to settlement is created in same-neutral med-arb. James P. Groton of Sutherland, Asbill & Brennan in Atlanta, Georgia, who is a construction neutral, explained this as follows. “Unquestionably the knowledge that a binding decision would soon be imposed if the parties didn’t agree on a resolution always helps to impel the parties toward resolution.”¹¹ Mediation followed by arbitration with an unknown person does not create the identical atmosphere, perhaps because the arbitration seems more remote. When the mediator will be the arbitrator the imminence of a binding award seems closer at hand. This can put subtle pressure on the parties to reach a voluntary agreement on all or some issues. This is especially true when the mediator helps the parties test the strengths and weaknesses of their positions.
- The parties’ business relationship is more likely to continue after same-neutral med-arb since the dispute is likely to be settled in whole or in part in mediation. The settlement agreement can also provide for the relationship to continue.
- Same-neutral med-arb eliminates the problem of attorneys thinking that suggesting mediation or settlement discussions is a sign of weakness. If the parties’ agreement calls for arbitration only, the attorney can suggest med-arb to the arbitrator, thereby opening the door to productive discussions.

In my view, same-neutral med-arb is the most flexible of all the ADR processes and hybrids. It allows the parties to move from mediation to arbitration when needed and then interrupt the arbitration to mediate again, if that seems desirable. This process allows the parties to profit from the advantages of both mediation and arbitration and offers benefits that neither process offers alone. I believe it motivates the parties to work harder because they want to avoid having to arbitrate. Furthermore, if arbitration becomes necessary, it ensures that a final and binding award will be issued more quickly.

Using a different neutral for each phase of med-arb is neither efficient nor economical. It requires the parties to choose a person with no knowledge of the pertinent facts, rather than a person who already knows them and in whom the parties have developed trust and confidence.

Curiously, I found that parties behave better during same-neutral med-arb than in classic mediation. This is probably because they do not want to alienate the potential arbitrator.

Overall, same-neutral med-arb is more efficient and less costly than any other ADR process. It gives the neutral more leverage during the mediation phase because the parties know an award will be imposed upon them if they do not come up with a solution they find acceptable.

Drafting the Med-Arb Clause

A contract may provide for mediation or arbitration or both. When a contract only provides for mediation, the parties can always agree to arbitrate if they do not settle. Likewise, if the agreement only provides for arbitration, the parties can always agree after a dispute arises to mediate first. When the contract calls for both mediation and then arbitration, it is rarely contemplated at the point of contracting that the arbitrator will be the same person as the mediator. In future agreements we may find more provisions providing for same-neutral med-arb.

In cases where there is only an arbitration clause, same-neutral med-arb usually comes about after a dispute arises and the parties have selected an experienced, knowledgeable arbitrator who asks them if they have weighed the advantages and disadvantages of mediation. (I always do.) That question often prompts the parties to mediate the dispute first. Unfortunately for the parties, many arbitrators feel it is wrong for arbitrators to encourage settlement or mediation. I think this does a disservice to the parties who might be able to dispose of their dispute more quickly and economically in mediation.

When the parties agree to submit the controversy to mediation or the contract provides only for mediation, or for mediation prior to arbitration, the parties may later ask the mediator to serve as the arbitrator if all issues cannot be settled in the mediation. I have been appointed to serve as the neutral in same-neutral med-arb under both of these scenarios.

Of course it is possible to provide for same-neutral med-arb in the transaction documents. The *Rutter Group California Practice Guide on Alternative Dispute Resolution (California ADR Practice Guide)* offers this med-arb clause: “All disputes not resolved by mediation shall be determined by arbitration administered by [ADR provider] in accordance with its applicable rules. The mediator shall serve as arbitrator unless the parties agree to select a different person as arbitrator.”¹²

The following simple clause was used to appoint me in a med-arb: “Any and all disputes arising out of the Agreement between the Parties shall be resolved by mediation and then by arbitration. The arbitrator (who shall be Gerald F. Phillips) shall also serve as the mediator.” The attorneys decided to use this clause after same-neutral med-arb was suggested by one of them because he had previously had a good experience using the process.

Selecting the Neutral

In same-neutral med-arb, as in any ADR process, the parties and their counsel should look for a neutral with a strong reputation for integrity. Because the neutral will serve as a mediator, they should designate a person they respect and trust. Since the neutral may also become the arbitrator, they also need a person who can quickly understand the facts and issues in dispute and is familiar with conducting an arbitration proceeding. So the ideal person to serve as the neutral in same-neutral med-arb is an experienced, knowledgeable arbitrator/mediator whose interpersonal skills are so strong that the parties want to have him or her decide the dispute if they cannot settle it themselves.

When selecting an arbitrator or mediator, counsel should consider whether the candidates for the position have the necessary knowledge of the industry and the skills necessary to conduct both processes, and be willing to serve both as the mediator and the arbitrator. Selecting such a person would give the parties the option of using the same neutral at some point down the line.

Need for a Stipulation and Waiver

If, after a dispute arises, the parties tell the arbitrator or mediator that they want to use same-neutral med-arb, the parties must be advised of all ethical problems raised by this hybrid process and give their informed consent. To protect the neutral and the ultimate award, the neutral should ask the parties and their counsel to sign a stipulation as to their knowledge of the risks of the process and a waiver agreeing to forego the right to disqualify the neutral and challenge the award.

The *California ADR Practice Guide* contains an acknowledgment of the ethical problems caused by having a mediator become the arbitrator in the same case. It states, in relevant part: “The parties understand that this process will likely cause the arbitrator to receive information that might not otherwise have been received as evidence in the arbitration and to receive information confidentially from each of the parties that may not be disclosed to the other side.” It also has the parties acknowledge that the arbitrator might be influenced by confidential information learned in the mediation and sign a waiver giving up the right to disqualify the arbitrator and vacate the award on account of this. The *Guide* acknowledges, however, that such waivers may be unenforceable.¹³

I have used a stipulation and waiver along the following lines. (Other forms of stipulations can be used.) It includes an acknowledgment of the discussion had with the parties and their counsel concerning the disadvantages of participating in same-neutral med-arb.

Stipulation and Waiver

The parties hereto acknowledge, understand, agree and stipulate as follows:

1. We have agreed to use med-arb and have asked [name of neutral] who has been appointed as the arbitrator in this matter, in accordance with the applicable [name of ADR provider] Rules, to first assist them in settling this controversy and to act as a mediator.
2. The mediator will serve as an impartial, neutral intermediary who will assist us in reaching our own settlement of the controversy. The mediator cannot impose a settlement but will assist the parties toward achieving their own settlement.
3. The mediator is a neutral third party and not an advocate for any party. The mediator will not give legal advice and no attorney-client relationship will be created between any party and the mediator by reason of his/her service as a mediator in the parties' controversy.
4. Any settlement agreement reached in the mediation will be admissible in any subsequent proceeding.
5. [Name of neutral] shall not incur any liability for any act or omission arising out of or in connection with his/her service as a mediator in the parties' controversy.
6. Should it become necessary to arbitrate any issues not resolved in the mediation, [name of neutral] shall act as the arbitrator, who will hear testimony and render an enforceable, final and binding award.
7. If [name of neutral] undertakes the role both of mediator and arbitrator, no claim or challenge to the arbitration or any award will be made by either party based on the services of [name of neutral] in both capacities, or the receipt of confidential communication in the mediation. We hereby forever waive and relinquish (a) any and all claims or objections to [name of neutral] serving as both mediator and arbitrator in this dispute; (b) any and all claims or objections to an arbitration award issued by [name of neutral] as a result of his/her service as the mediator in this dispute; (c) any claim of prejudice, conflict of interest, or impropriety due to the arbitrator having served as the mediator in this dispute; and (d) any right to challenge the determination, outcome or decision of the arbitrator due to the arbitrator having served as the mediator in this dispute.

We acknowledge that:

1. [Name of neutral] has disclosed to our counsel and us the disadvantages of participating in same-neutral med-arb. For example, [name of neutral] has told us that: (a) during the mediation, the parties will likely disclose to him/her confidential, *ex parte*

communications that could include, without limitation, their respective settlement positions, potentially damaging facts and law, their views of the strengths and weaknesses of their case, and other matters that probably would not be disclosed to a person serving as the arbitrator in the dispute; and (b) if it becomes necessary to arbitrate any issues not resolved in the mediation, the confidential information disclosed in the mediation could consciously or unconsciously influence the determination, outcome, or decision of the arbitrator.

2. We are represented by counsel and [name of neutral] has told us that we are free to consult counsel at any time during the mediation.
3. [Name of neutral] has told us and our counsel that we can appoint someone else to act as the mediator or arbitrator.

The stipulation and waiver should be signed before proceeding with same-neutral med-arb.

Conclusion

My experience as a neutral in same-neutral med-arb has been very positive. The process is very flexible, allowing for the full creativity of mediation, while leaving the door ajar for the same neutral to decide any unresolved issues in an arbitration proceeding. Same-neutral med-arb satisfies Dean Pound's caution to avoid mechanical rules and put the "human factor in the central place." It can give the parties what they desire and require. I believe that the advantages of same-neutral med-arb outweigh any theoretical disadvantages. To paraphrase former presidential candidate Senator John F. Kerry: Whether an idea is good or bad depends on whether it works out. When parties use the right neutral in same-neutral med-arb, they should find that it works out very successfully.

Endnotes

1. Roscoe Pound, "Mechanical Jurisprudence," 8 *Colum. L. Rev.* 605 (1980).
2. Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," reprinted in 20 *J. AM. Judicature Soc'y* 178, 179 (1937).
3. This term is used in lieu of the more common "med-arb" in order to clarify and distinguish it from the process whereby mediation is followed by arbitration using a different neutral. See, Barry C. Bartel, Med-Arb, A Distinct Method of Dispute Resolution: History, Analysis and Potential, Paper submitted at the Willamette Univ. College of Law (1990). This paper discusses the advantages and disadvantages of med-arb. Mr. Bartel credits Sam and John Kagel with pioneering med-arb as a distinct process of dispute resolution.
4. Richard Chernick & Kimberly Taylor, "Ethical Issues Specific to Arbitration," in *Dispute Resolution Ethics—A Comprehensive Guide* 201-203 (B. Garth and P. Bernard, eds. ABA Dispute Resolution Section 2002).
5. Thomas J. Brewer & Lawrence R. Mills, "Combining Mediation Arbitration," 54 (4) *Disp. Resol. J.* 33-39 (November 1999).
6. In a letter he wrote to the author.
7. There is a debate going on in some states as to whether an attorney is legally required to advise a client about the availability of mediation and arbitration. See, e.g., Gerald F. Phillips, "The Client Has the Right to Be Advised by Counsel About ADR," *DRS Newsletter* (Winter 2002); and "The Obligation of Attorneys to Inform Clients About ADR" 14 (4) *Prof'l Law.* (2003). Most attorneys familiar with ADR agree that even if discussing ADR options with the client is not required, attorneys should have these discussions anyway. At present, a few states require attorneys to discuss the availability of ADR with their clients (examples are Virginia, Michigan and Colorado), and other states say that attorneys "should" do so.

I know of no rule that expressly requires attorneys to discuss the availability of other ADR options before arbitrating. I believe that arbitrators should raise the subject with the parties at the first preliminary conference, even if not legally required to do so. Since some arbitrators feel this is inappropriate, it would be helpful to have guidance on this matter from authoritative organizations.
8. There is legal precedent for the mediator to switch hats and become the arbitrator. See Valerie Sanchez, "Towards a History of ADR: The Dispute Processing Continuum in Anglo-Saxon England and Today," 11 *Ohio St. J. Disp. Resol.* 1-39 (1996): "During the earliest period of English legal history, legal documents show disputes being processed on a continuum that called upon arbitrators and judges to act as third party decisionmakers and then to change hats—as judges often do in modern settlement conferences—serving as mediators who facilitate negotiated outcomes."
9. *AAA Drafting Dispute Resolution Clauses—A Practical Guide* (2002) ("If a dispute arises from or relates to this contract or the breach thereof, and if the dispute cannot be settled through direct discussions, the parties agree to endeavor first to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Rules before resorting to arbitration. Any unresolved controversy or claim arising from or relating to its contract or breach thereof shall be settled by arbitration administered by the [AAA] in accordance with its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. If the parties agree, a mediator involved in the parties' mediation may be asked to serve as the arbitrator.").
10. JAMS has a form stipulation whereby the parties can stipulate to same-neutral med-arb.
11. In a letter to the author.
12. Judge H. Warren Knight *et al.*, *Alternative Dispute Resolution (The Rutter Group California Practice Guide)* Form 17, p. 35. (Thomson West 2003).
13. *Id.*

Gerald F. Phillips is a full-time mediator and arbitrator specializing in large, complex commercial and entertainment disputes. A founding member of the College of Commercial Arbitration, he is an adjunct professor at Pepperdine University School of Law, where he teaches ADR in the entertainment industry. Mr. Phillips welcomes comments from readers about their med-arb experiences. He can be reached at gphillips@plllaw.com.

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Med-Arb Should Be Dead

By Jeff Kichaven

Med-arb should be dead.

And, for good reasons.

Med-arb is touted as a means to make dispute resolution more efficient, while preserving the effectiveness and integrity of its two component processes, mediation and arbitration.

But, it just can't be done. The confidentiality rules governing mediation and arbitration are so irreconcilable that med-arb simply cannot achieve its goals. A simple conceptual analysis, and a detailed analysis of a recent California state court case, prove the point.

In mediation, most say that confidentiality is key to the effectiveness of the process. The more the better! Proponents state that only confidentiality engenders the candor that makes mediation click. That's why mediators have worked so hard to enact the Uniform Mediation Act, the California Mediation Confidentiality Statute (Cal. Ev. C. 1115 *et seq.*) and other confidentiality laws.

"The confidentiality rules governing mediation and arbitration are so irreconcilable that med-arb simply cannot achieve its goals."

Arbitration, though, is different. The integrity of arbitration depends, in part, on courts having some power to review and vacate improper arbitration awards. The rules which give courts these powers require some disclosures to those courts of what did and didn't happen at the arbitration. The Revised Uniform Arbitration Act, for example, provides for *vacatur* for, among other things, certain misconduct by an arbitrator, refusal to consider material evidence, or conduct of the hearing that substantially prejudices a party's rights. Similarly, CPLR 7511 allows *vacatur* where arbitrators "fail to follow the procedure of this article. . . ." The Federal Arbitration Act, 9 § U.S.C. 10(a)(3), also allows *vacatur* where arbitrators fail to hear material evidence or engage in any other misbehavior by which the rights of any party have been prejudiced. All of these statutes require a reviewing court to take evidence of what did and didn't happen along the way.

These regimes are hard to square. Let's look at it this way: There are only two possibilities in a med-arb. Either the "med" and the "arb" are sequential, or they are concurrent. In neither case can the conflicting confidentiality requirements of the two processes be reconciled.

First, assume the "med" and the "arb" are sequential. That is, you mediate either to settlement or to impasse, and if an impasse, however defined, is declared, the "med" stops and the "arb" begins. The "med" was presumably conducted under mediation's confidentiality rules, which require that nothing said is admissible in court. But you need a record of what evidence was and was not considered in the "arb" to create the proper record for possible *vacatur* or confirmation motions. So everything said in the "med" has to be repeated, on the record, in the "arb." If increased efficiency is your goal, the need to repeat everything when you go from "med" to "arb" hardly helps you.

Sequential med-arb is also unlikely to yield either effective mediation or an arbitration with integrity. Mediation confidentiality is supposed to make parties more candid, more comfortable in disclosing the weaknesses as well as the strengths of their case. But we know better. What is the incentive to be candid and disclose your weaknesses when you know that, at some point, a mediator may turn into an arbitrator who might well hold your admissions against you? Zealous advocates are more likely to use the "med" phase strategically, first by securing a promise from the mediator that conversations in private caucuses are confidential from the other side, and then larding up those caucus conversations with who-knows-what about the other side. Once the well is duly poisoned, these strategic players will drive the negotiation to an impasse. Let the arbitration begin!

Concurrent med-arb is even worse. If your goal is to increase efficiency by eliminating the need to repeat every pre-impasse statement in the post-impasse "arb" stage, while still creating the proper record for later judicial review of the arbitrator's award, then, inescapably, the mediation confidentiality rules do not apply at all at any stage of the proceedings. Without that confidentiality, how can the "med" stage be effective? You are dooming yourself to, at best, a more conversational and informal "arb."

One dramatic California state court case proves the point. *Travelers Casualty and Surety Company v. Superior Court*, 126 Cal. App. 4th 1131 (2005), gets it right. *Travelers Casualty* arises out of the alleged child sexual abuse litigation against the Catholic Church that has so roiled our society in general—and the Los Angeles Superior Court in particular. Specifically, *Travelers Casualty* arises out of some 90 cases of alleged child sexual abuse known collectively as "Clergy Cases I." These cases and others like them, because of their number, complexity, and societal significance, posed daunting challenges to the

Los Angeles Superior Court, and the court went to great lengths to get them settled rather than tried. In July 2003, Los Angeles Superior Court Judge Peter D. Litchman was appointed as Settlement Judge. Judge Litchman is widely regarded by the Bar as one of the smartest and fairest members of the bench. Yet, in *Travelers Casualty* the appellate court severely criticized the core elements of his settlement process, and restrained him in significant ways.

The court described Judge Litchman's errant process as follows: On April 30, 2004, Judge Litchman issued an order for the parties and the insurers to participate in a "Valuation Hearing," after which the Court would "render findings reflecting its determination of (i) the verdict potential of the sexual abuse cases if they were to proceed [to a jury trial], and (ii) the reasonable settlement value of such cases." According to the April 30 order, those findings were "intended to constitute an independent adjudication of liability and damages, based on an actual trial as that standard has been construed in California, and may be used by the parties or judicial officers in subsequent proceedings only to the extent lawfully permissible and for whatever legal relevance they may have." Judge Litchman felt this method . . . was warranted by the parties' inability to reach a settlement. 126 Cal. App. 4th at 1135–36. And, the court had no difficulty ruling, at the very outset of its opinion:

Petitioners (Travelers Casualty and others) are the Church's liability insurers. They seek to vacate a written order by a settlement judge purporting to: (1) determine the good faith settlement value of the cases; (2) preclude the insurers from declaring a forfeiture of coverage should the Church settle without their consent; and (3) provide evidence of the insurers' bad faith for future use. As set forth below, we grant the petition because the settlement judge exceeded his authority by making factual findings and otherwise preparing a coercive order in violation of the fundamental principles governing mediation proceedings.

126 Cal. App. 4th at 1135.

Critical to this is the court's recognition of the statutory constraints on the role of a mediator. Based on the California Evidence Code, the court observed that:

Although mediation takes many forms and has been defined in many ways, it is essentially a process where a neutral third person who has no authoritative decision-making power intervenes in a dispute to help the parties reach their own mutually acceptable agreement.

126 Cal. App. 4th at 1138–39.

There was no doubt that all participants in Judge Litchman's settlement process considered it to be a "mediation" and Judge Litchman to be a "mediator." *Id.* at 1139, n. 8. Judge Litchman crafted this process to put pressure on the insurers to finance a settlement that the insurers did not, for whatever reasons, want to make. Apparently, the Church wanted to settle with the plaintiffs without their insurers' consent, with a covenant that the plaintiffs would not seek collection from the Church's assets, but rather solely from its insurers. Such an agreement, however, would have resulted in a forfeiture of the Church's insurance coverage under the No-Voluntary-Payments provisions of its General Liability policies. *Id.* at 1141. The forfeiture would not result, though, if an "actual trial" to determine the Church's liability had preceded the settlement. As the court observed:

[T]he ("actual trial") rule demands proof of an insured defendant's liability to a third party plaintiff through some form of independent fact-finding determination as a prerequisite to holding the defendant's insurance liable to either the insured or the third party for benefits under the policy. A variation of the rule was applied in *Hamilton v. Maryland Casualty Co.*, (2002) 27 Cal. 4th 718, 725–726 . . . where the court held that an insurance company defending its insured cannot be held liable on the policy where the insured settles without the insurer's participation or consent and without the benefit of an actual trial to determine its, and thus the insurer's, actual liability.

Id. at 1136, n.3.

The court found that Judge Litchman expressly intended his settlement process—although a mediation—also to be an "actual trial" with serious legal and practical implications for Travelers Casualty:

By ordering that his settlement valuation constituted an actual trial for purposes of precluding a declaration of coverage forfeiture by the insurers, Judge Litchman purported to make binding factual determinations. He also ruled that the Valuation Order could be used as evidentiary fodder for any future bad faith claim by the Church against the insurers. Finally, the order stated that it would become available to the parties for use in open court within 60 days, unless barred by this court. The net effect of these provisions was two-fold: First, they purported to cut off the insurers' rights to declare a coverage forfeiture in the event of an unauthorized settlement;

second, they dangled over the insurers' heads the threat of a bad faith action that was already fortified with the weight of a judge's findings. This left the insurers backed into a corner where the easiest way out would be to withdraw their reservation of rights and pay money to settle the cases.

Id. at 1142.

It was obvious to the court that "the Valuation Order's factual findings and future use provisions were coercive" and "(a)s a result, the court abandoned its designated role as a neutral facilitator without decision making authority." *Id.* Judge Litchman had conducted the functional equivalent of a med/arb. He tried to mediate, but held coercive powers in his hip pocket.

The appellate court was faced with an unappealing prospect. If the coercive powers were upheld, mediation confidentiality would have been forfeited, and the highly sensitive information disclosed during the process, and in the Valuation Order, would have become public. There was only one way for the court to avoid this disaster. The Valuation Order was vacated, retroactively stripping Judge Litchman of his power to "med" and "arb" at the same time. To preserve the confidentiality of the "med," the role of the mediator is constrained. No fact-finding. No actual trials. No "arbs." In California, after *Travelers Casualty*, "med-arb" should be considered dead. When you serve as a mediator in California, you may not also have the power to adjudicate anything for or against anybody without imperiling the entire process.

This is a good result. As mediators, we treasure parties' rights to self-determination. But, in med-arb, the neutral's power to adjudicate inherently gives that neutral the power to intimidate and bully the parties into a settlement they do not want, in fear of the result that same neutral may well impose. Not exactly an atmosphere in which the right to self-determination is likely to reign supreme.

Jeff Kichaven, jk@jeffkichaven.com, is a leading California mediator. In 2007 he taught the Master Class for Mediators for Harvard Law School. His new firm, Professional Mediation & Arbitration, will soon be opening an office in Manhattan.

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A Case Study: Med-Arb Worked in U.S. for Real Estate Partnership Claims

By Philip S. Cottone

While in recent years there has been a great deal of discussion about the pros and cons of med-arb, it is not a new process; it was successfully used in resolving numerous claims in the 1990s. Abuses in syndicated real estate limited partnerships, very popular in the U.S. in the late 1970s and early 80s prior to the Tax Reform Act of 1986, caused Prudential Securities to be sanctioned by the Securities and Exchange Commission (SEC) and the National Association of Securities Dealers (NASD, predecessor to FINRA) in the early 1990s. Prudential was the sponsor of these partnerships and an affiliate usually served as a general partner. In a global settlement with both regulatory bodies, Prudential was required to establish a \$500 million settlement fund, and Irv Pollack, a former SEC commissioner, who was at the time Chair of the NASD National Arbitration Committee, was designated Claims Administrator and empowered to design and implement a procedure whereby aggrieved investors could apply for payment from the Fund.

A med-arb process was developed and neutrals around the country were selected to hear the cases, initially as mediator. If the parties did not reach agreement, the same neutral was empowered to act as an arbitrator to decide the matter. Consent of the parties to this procedure was required to obtain a payment from the Fund. The author of this article was a neutral who presided over more than 60 cases in Pennsylvania and New Jersey, both by phone and in person. The claimants had to establish that they were affected by one of the violations cited by the regulatory bodies (causality), and had to prove damages as a result of those abuses.

The process was highly successful. The Claims Administrator reported that 300,000 claim forms were dis-

tributed and about 160,000 claims paid, of which a little more than 2,000 were referred for mediation-arbitration. The fund grew to more than \$1 billion because Prudential had to post additional deposits, but total payout was just under \$1 billion, and the process was completed in two years. The experience of the author was that about 95% of the cases settled in mediation. In those few cases where a decision had to be made as an arbitrator, an abbreviated hearing was conducted and an award was rendered. By and large the parties and their counsel felt the process was fair, that their arguments were heard and considered, and that the result was acceptable, and few, if any, complaints were received.

“By and large the parties and their counsel felt the process was fair, that their arguments were heard and considered.”

Med-arb worked effectively in these cases where liability was clear-cut if causality could be established based on the violations found by the regulators, and if resulting damages could be proved. The neutrals selected were experienced arbitrators and mediators who were required to hear the matter in an expeditious fashion and to report the results promptly to the Office of the Claims Administrator so checks could be drawn and sent out without delay. The process worked exceedingly well.

Phil Cottone of Malvern, PA, is an experienced arbitrator and mediator for FINRA, the AAA commercial and real estate panels, and The Counselors of Real Estate. He has also served as an arbitrator for JAMS. He can be reached at phil.cottone@comcast.net.

Making Med-Arb Work in Australia

By Alan L. Limbury

While commercial arbitration has a long history in Australia and commercial mediation took off in the late 1980s, hybrid processes are known but little used.

Arb-med is considered unattractive because, unless the arbitration can be compressed into a very short time, the cost of the arbitration will be high and will also be wasted if, as happens in about 80% of all mediated cases, the dispute is settled at the mediation stage.

Despite offering both the possibility of resolution by the parties' own agreement and, failing such agreement, the certainty of resolution by the binding decision of the arbitrator (the award), med-arb is also considered unattractive. The reasons for this need to be examined because corporate counsel in Australia are growing more concerned to manage both the time and cost involved in resolving disputes.

Where the neutral has the skills necessary to conduct both processes, there is a saving in both time and money in combining them in med-arb, since the neutral is already "up to speed" when changing from one role to another and may gain insights during the mediation phase that could contribute to a more appropriate award. If agreement is reached in mediation, the parties may sign a binding settlement agreement or the neutral may, by consent, convert their proposed settlement into an arbitral award. If the mediation does not produce agreement on all issues, the mediator becomes arbitrator and hears and determines the unresolved issues. The award may be non-binding or binding depending upon the agreement entered into by the disputants.

Lest med-arb be thought to be a novel process, Professor Derek Roebuck has traced its use back to the ancient world:

Everywhere in the Ancient Greek world, including Ptolemaic Egypt, arbitration was normal and in arbitration the mediation element was primary.¹

Modern Criticisms of Med-Arb

In Australia med-arb attracts numerous criticisms, mainly from lawyers, including:

- (a) parties are likely to be inhibited in their discussions with the mediator if they know that the mediator might be called upon to act as arbitrator in the same dispute. In particular, they are unlikely to let the mediator know what settlement proposals they are likely to accept;²

- (b) disputants may use the mediation phase as mere preparation for arbitration, thereby making it more probable that the dispute will reach arbitration;
- (c) mediators often make suggestions or try to persuade a party to make or accept an offer. In the context of med-arb, this may be taken as pressure, in the form of an implied threat to make an adverse decision as arbitrator if the party is perceived as unreasonable during the mediation. It again raises doubt as to whether the arbitrator will be impartial.

These criticisms raise behavioral issues and need not be fatal to a successful outcome. Parties will be as forthcoming with the mediator as they think appropriate. If no mediated agreement is reached, the dispute will still be resolved by arbitration within a pre-arranged time. Experience will show whether the opportunity to mediate before arbitrating with the same neutral turns out to be useful.

More serious are the following criticisms:

- (a) the parties would be denied natural justice, aka procedural fairness (being informed of the case they have to meet) in the arbitration unless what was said privately in the mediation were fully disclosed to them;
- (b) a person who mediates and then assumes the role of arbitrator may appear to be and may actually be biased by information conveyed confidentially in the mediation process.³

Apparent or actual bias in the arbitrator and lack of procedural fairness will attract the supervision which the courts may exercise over the arbitrator's conduct of the proceedings. The Commercial Arbitration Act (1984) of New South Wales (replicated in State counterparts) requires any question arising to be determined by law unless the parties agree otherwise—s.22(1). The award may be set aside where there has been misconduct by the arbitrator or where the award has been improperly procured— s.42(1). An arbitrator may be removed for misconduct or incompetence or where undue influence has been exercised in relation to the arbitrator— s.44. "Misconduct" includes corruption, fraud, partiality, bias and a breach of the rules of natural justice— s.4(1).⁴ The last three are particularly relevant to a consideration of med-arb.

In international commercial arbitration, awards may be set aside by the courts in the country in which the arbitration takes place and enforcement may be refused wherever the award was made if, among other things,

“the arbitral procedure was not in accord with the agreement of the parties.”⁵

How Might the Most Valuable Features of Mediation Be Combined Effectively and Economically with the Certainty of Resolution by Arbitration?

While a competent med-arbiter can exclude from consideration confidential information in the same way as a competent arbitrator or judge can exclude from consideration evidence he or she has heard but ruled inadmissible, there is an important difference between the two situations: All parties in arbitration are aware of the evidence that has been ruled inadmissible, while in med-arb only one party knows what confidential information it has confided in the med-arbiter.

Enacted before mediation became widely used in commercial disputes, section 27 of the Commercial Arbitration Act (NSW) 1984 provides that parties to an arbitration agreement may authorize an arbitrator to act as a mediator between them before or after proceeding to arbitration. Under subsection (3), unless the parties otherwise agree in writing, an arbitrator is bound by the rules of natural justice when seeking a settlement by mediation. If the dispute is not settled in the mediation, no objection shall be taken to the conduct by the arbitrator of the subsequent arbitration proceedings solely on the ground that the arbitrator had previously acted as mediator in the dispute. The section is reproduced in full at the end of this paper.

One of the fundamental principles of natural justice (nowadays called procedural fairness) is that a party has a right to know the case it has to meet and to be given an opportunity to respond to it. Yet one of the greatest advantages of mediation is that the parties may make private disclosures to the mediator which might enable the mediator to see opportunities to make progress when everyone else is stuck. Sub-section 27(3) allows the parties to waive their right to procedural fairness in the mediation phase, thereby allowing private sessions. Sub-section 27(4) requires procedural fairness to be observed in the subsequent arbitration phase, but under sub-section 27(2), where the parties agree that private sessions may be held during the mediation, no objection may be taken in the arbitration that the parties were not informed as to what occurred privately in the mediation.

Likewise, where the parties consent to private meetings in the mediation, sub-section 27(2) also precludes objection to the conduct of the arbitration or the content of the award on the ground of bias and the appearance of bias merely because the arbitrator held private meetings as mediator. However, the parties are always free to object that the conduct of the arbitration or the content of the award reveal apparent or actual bias—for example, reliance by the arbitrator on extraneous information, such as information gained privately during the mediation.

Accordingly, during the mediation phase it is important for the mediator to be circumspect:

An arbitrator when acting as mediator must therefore be careful not to express any definite opinion as to an appropriate outcome as that might create an impression of bias in a subsequent arbitration.⁶

Likewise, during the arbitration phase the arbitrator must be careful to avoid any reliance of information not provided openly to all parties.

Although the mere holding of private sessions in the mediation phase creates the appearance of bias in the arbitrator, an objection on that ground may be waived.⁷ Procedural fairness creates more difficult problems in the U.K. because the Human Rights Act 1998 may preclude waiver of the right to procedural fairness. In contrast, our s.27 of the Commercial Arbitration Act expressly permits waiver of that right.

It seems to me that the following approach could work, in the sense that mediation followed by arbitration by the same person will not be objectionable unless apparent or actual bias is shown in the arbitration phase:

- (i) the parties should enter into an arbitration agreement at the outset, in order to attract the operation of s.27;
- (ii) that agreement should provide *inter alia* that:
 - (a) the arbitrator may mediate before conducting any arbitration;
 - (b) during the mediation, the arbitrator may hold private sessions with the parties. Both during the mediation and thereafter the arbitrator must keep confidential all information imparted in confidence during the mediation;
 - (c) upon the conclusion of the mediation, the arbitrator must tell the parties whether he or she feels able to conduct the arbitration impartially including, in formulating the award, putting out of consideration all such confidential information. If the arbitrator informs the parties that he or she does not feel able to do so, the arbitration must be conducted by another arbitrator;
 - (d) whether or not the arbitrator feels able to conduct the arbitration impartially, the parties may object to the arbitrator conducting the arbitration, in which case the arbitration must be conducted by another arbitrator;
 - (e) should no party object to the arbitrator conducting the arbitration after having mediated, each party must expressly waive in writing any right to be informed of what was disclosed confidentially in the mediation.

This builds in the opportunity for the parties and the arbitrator to opt out of having the arbitration conducted by the person who mediated, once the parties have considered how the mediation went. It nevertheless still commits them to an arbitrated outcome within the previously agreed or any extended time, at the cost of bringing the new arbitrator up to speed.

As mentioned, if any arbitrator manifests bias during the arbitration phase or in the content of the award, the court will set aside the award and/or disqualify the arbitrator. Accordingly, the arbitrator will need to ensure that no reliance is placed on anything learned in confidence during the mediation. This could be assisted if the arbitrator provides at the outset of the arbitration phase a written statement of what the arbitrator apprehends to be the issues to be determined and the facts as then understood, and invites the parties to comment on it.

Choosing the kind of dispute in which the interests of the parties may be accommodated without resolving who is right and who is wrong may be the key to the successful use of med-arb. For example, in a trademark infringement dispute that was mediated, the parties spent the day seeking to negotiate a trading arrangement that would be profitable to them both. There was no discussion of whether the trademark had been infringed or of the defense alleging violation of Australia's competition laws. It seems to me that med-arb is well suited to such a dispute since the issues to be arbitrated would not feature prominently, or at all, in the mediation phase.

This, in turn, emphasizes the need to examine both the nature of the dispute and the personalities and interests of the decision-makers before deciding upon a suitable process.

Commercial Arbitration Act (NSW) 1984

27. Settlement of disputes otherwise than by arbitration

- (1) Parties to an arbitration agreement—
 - (a) may seek settlement of a dispute between them by mediation, conciliation or similar means; or
 - (b) may authorize an arbitrator or umpire to act as a mediator, conciliator or other non-arbitral intermediary between them (whether or not involving a conference to be conducted by the arbitrator or umpire),

whether before or after proceeding to arbitration, and whether or not continuing with the arbitration.

(2) Where—

- (a) an arbitrator or umpire acts as a mediator, conciliator or intermediary (with or without a conference) under subsection (1); and
- (b) that action fails to produce a settlement of the dispute acceptable to the parties to the dispute,

no objection shall be taken to the conduct by the arbitrator or umpire of the subsequent arbitration proceedings solely on the ground that the arbitrator or umpire had previously taken that action in relation to the dispute.

- (3) Unless the parties otherwise agree in writing, an arbitrator or umpire is bound by the rules of natural justice when seeking a settlement under subsection (1).
- (4) Nothing in subsection (3) affects the application of the rules of natural justice to an arbitrator or umpire in other circumstances.
- (5) The time appointed by or under this Act or fixed by an arbitration agreement or by an order under section 48 for doing any act or taking any proceeding in or in relation to an arbitration is not affected by any action taken by an arbitrator or umpire under subsection (1).
- (6) Nothing in subsection (5) shall be construed as preventing the making of an application to the Court for the making of an order under section 48.

Endnotes

1. Roebuck D., *The Myth of Modern Mediation*, (2007) 73 Arbitration 1, 105 at 106.
2. Redfern & Hunter, *Law and Practice of International Commercial Arbitration* 4th Ed. 1–82.
3. Jones D., Chartered Institute of Arbitrators (Australian Branch) Entry Course Materials on Australian Domestic Commercial Arbitration, 2002 p.32; *The Duke Group Ltd (In Liq.) v. Alamain Investments Ltd & Ors*, [2003] SASC 272.
4. For discussion of the term “misconduct,” see, e.g., *London Export Corp. Limited v. Jubilee Coffee Roasting Co. Limited* [1958] 1 WLR 27 and *Sea Containers Ltd. v. ICI Pty. Ltd.* [2002] NSWCA 84.
5. UNCITRAL Model Law, Articles 34(2)(a)(iii) and 36(a)(iv) and New York Convention, Article V(1)(d).
6. Astor, H. & Chinkin, C.H., *Dispute Resolution in Australia*, 1992 pp.145–6.
7. *Glencot Development & Design Ltd v Ben Barrett & Son (Contractors) Ltd* [2001] EWHC Technology 15 (13 Feb., 2001).

Alan L. Limbury, expert@strategic-resolution.com, MA (Oxon), MDR (UTS), MIAMA, FCIArb. (Mediation and Arbitration), QDR, Chartered Arbitrator and Specialist Accredited Mediator, Managing Director, Strategic Resolution: www.strategic-resolution.com.

Arb-Med: A Reflection à Propos of a Bolivian Experience

By Mercedes Tarrazón

For some years now, more and more attention has been given to combinations of arbitration and mediation in the same proceeding, as a way to make arbitration more efficient.

It may be considered something of an innovation in North America, but it has been the customary practice in many jurisdictions throughout the world, including Latin America.

Latin America adopted the tradition of the arbitrator as *amiable compositeur* and arbitration *ex aequo et bono* became dominant over the arbitration according to the law. This was often reflected in legislation that combined arbitration and conciliation, where, as an *ex lege* duty, arbitrators were required to do their best during the proceedings to assist the parties to settle their disputes. In the language of today, those acts expected the arbitrators to change their hat into that of mediators during the proceedings and expressly allowed them to do so.

Combining the role of arbitrator with that of mediator requires that the parties are fully aware of the differences between one role and the other, and they must know for certain which hat the dispute resolver is wearing at all times. It also requires that the dispute resolver knows how to apply both sticks and carrots. The dispute resolver must bear in mind not only the legal framework within which he or she is acting but also the culture of the parties and the circumstances of the case. Consequently, there is no standard procedure that would suit all situations.

There is, however, a practice¹ that has proven to be very effective for me in different Latin American ad hoc cases. Once I have been appointed as the arbitrator, I hold a meeting where the parties are asked to come both in person—the affected business people and their representatives—the lawyers.

At this meeting I explain what arbitration is and what their role and my role will be in the proceedings. But I also explain two other dispute resolution mechanisms. In the case of mediation, my role would be that of a facilitator and, to be most effective, it would be important to have the business people participate to share their thorough knowledge of their business's needs. Another option is that of conciliation, where my role, after listening to the parties, preferably attended by the business people, would be to propose a possible solution that would not be binding on the parties. I show the parties how and to what degree the three different mechanisms can be combined.

I warn that if I am asked to act as a conciliator and propose a possible solution, I will not change my hat again to sit as mediator or arbitrator, for the perception of my neutrality and independence in the eyes of the parties will have been compromised. This golden rule helps to psychologically minimize the cultural preference for conciliation that one often finds in Latin America and to encourage parties into mediation, which as a mechanism is richer and more flexible than conciliation.

“Combining the role of arbitrator with that of mediator requires that the parties are fully aware of the differences . . . and . . . which hat the dispute resolver is wearing.”

I further explain how I would handle confidential information, if any, shared in the private sessions of mediation should I later have to don my arbitrator's hat again. For instance, I will write notes on sheets of paper of different colors according to the different hats, which allows me to keep a record of what I have learned and when.

The fundamentals of negotiation are explained to assist parties to become familiar with the difference between positions and interests and the concept of the best alternative to a negotiated agreement.

Then, if parties elect to do so, they appoint me both as possible mediator and conciliator should the need arise.

This enables me to change roles during the proceedings should the parties ask me to do so and if I consider it to be an appropriate moment, or if I should propose it to the parties and they give their consent.

The minutes of this preliminary meeting are signed by the parties and become a step in the arbitral proceedings. Afterwards, the procedural calendar is established and then the parties' submissions are received.

In adversarial proceedings such as arbitrations it is most often during the evidence period that one gets a sound grasp of the case and can appreciate its strengths and weaknesses. Arbitrators who have studied the case since the beginning have by then a clear idea of what the parties are requesting and of the evidence they have to support those requests. If, at this stage, the dispute resolver considers that there is a reasonable balance in the bargaining power of the parties, he or she may conclude that this is the moment to give mediation a chance. At this

juncture I will have written all my notes on sheets of the same color. Should the parties not reach a settlement, the award would then be drafted according to those notes.

In September 2007, a bill² was issued in Bolivia that aimed to repeal the Arbitration and Conciliation Act of 1997, and to establish the local courts as the only dispute resolution fora for civil and commercial disputes.

As a consequence, in on-going arbitrations, the arbitrators were obliged to bear in mind that by the time their awards would be rendered the bill might have become law, thereby invalidating arbitration in Bolivia. And even if their awards were valid at the time they were rendered they might not be upon adoption of the bill, in which case the winning party would no longer have the legal power to have the award executed by the local courts if the losing party did not comply voluntarily.

Given this situation, Article 31.3 of the Bolivian Arbitration and Conciliation Act, which obliges the arbitrators to assist the parties to reach a settlement, acquired great importance. Settlement agreements reached by the parties were the most solid, and therefore efficient, solutions that dispute resolvers could try to offer.

The incentives for both parties to settle were enhanced by the legal instability, notwithstanding the possible advantage for the legally weaker party to find itself, in the end, with an award against it which nobody would be able to execute. There was a general feeling in the business community that settling the dispute in a mutually satisfactory way provided a common front against the politically disadvantageous climate.

It is worth noting that Article 51 of the Bolivian Arbitration and Conciliation Act allows for awards by consent, which is an excellent ending for settlement agreement reached in arb-med proceedings. The question of enforceability is not important here because when parties settle through a well-conducted mediation they voluntarily comply with the terms of the agreements. However, an award by consent allows the arbitration to be completed and reinforces the didactic role of the preliminary meeting: arbitration and mediation are two different mechanisms that can be combined in a well-structured process that fully guarantees the rights of the parties.

The practice explained above has proven to be effective. It enables dispute resolvers to do their job in a way that offers more added value and therefore better serves the parties' interests.

Endnotes

1. Michael McIlwrath gave the title of "Becoming Your Own Amiable Compositeur" to this practice when I explained it to him in the interview he made me for his CEDR Award-winning podcasts. <http://www.cpradr.org/tabid/45/articleType/ArticleView/articleId/430/Default.aspx>.
2. This bill was later abandoned and the Arbitration and Conciliation Act of 1997 is still in force. However, the approval of the new Bolivian constitution on Jan. 26, 2009 has reopened the debate over the possible annulment of the Act.

Mercedes Tarrazón, mmtr@dispmanag.com, FCIArb Arbitration / FCIArb Mediation, is an Independent Arbitrator and Accredited Mediator. She serves as the Spanish Member of the ICC International Court of Arbitration.

Designing Effective Med-Arb and Arb-Med Processes in Brazil

By Pedro Alberto Costa Braga de Oliveira

Introduction

During the mid-1990s Brazil modernized its legislative framework for arbitration with the passing of the Brazilian Arbitration Act.¹ It was not until the early 2000s, however, that Brazil's longstanding aversion to arbitration started to change, following two events: (i) the December 2001 Brazilian Supreme Court's landmark decision in *MBV v. Resil*,² upholding the constitutionality of arbitration;³ and (ii) the accession and ratification of the New York Convention in mid-2002.⁴

Now that Brazil has finally embraced arbitration, some innovative lawyers and arbitration practitioners are slowly expanding their practices to include other forms of Alternative Dispute Resolution (ADR). This expansion is due mostly to the perception that arbitration, as developed in Brazil, fails to live up to its often-said advantages: being speedy and cheaper than litigation. The most used ADR mechanisms in Brazil, to date, are arbitration hybrids, mediation/arbitration (med-arb) and arbitration/mediation (arb-med). This article presents the author's view on how to best design effective med-arb and arb-med processes in Brazil

Preliminary Remarks

Proceedings similar to med-arb are not entirely foreign to the Brazilian legal system. Section 448 of the Brazilian Civil Procedure Code,⁵ for instance, provides for obligatory (preliminary) conciliation of the litigant parties when their dispute, taken to the court system, is related to patrimonial rights over which the parties may freely dispose. Brazilian judges, however, very seldom assist the parties to reach a settlement. The majority of Brazilian lawyers and judges were—and to a great extent are still—completely unfamiliar with “real” conciliation, and, therefore, skeptical of its practical results.⁶ There is another significant reason for the lack of conciliations in Brazil: a great many Brazilians, including lawyers, still believe that the Brazilian State has a monopoly in the provision of justice.⁷ As one scholar put it,

The Brazilian culture had converted the [Brazilian] State in the father and the mother of all [Brazilians] . . . and, as a consequence, as it is up to the [Brazilian] State the task of resolving all of the problems [of Brazilians], it is only the [Brazilian] State's obligation of resolving the disputes [of Brazilians] (author's free translation).⁸

The same idea of obligatory (preliminary) conciliation is found in arbitration, as Section 21(4) of the Brazilian Arbitration Act provides that “the arbitrators or the arbitral tribunal shall, at the beginning of the arbitral procedure, try to conciliate the parties, applying, to the extent possible, Section 28 of this Law.”⁹ This means that when Brazilian law is the *lex arbitri*, arbitrators must attempt to conciliate the parties at the beginning of the arbitral proceedings. In practice in Brazil, however, the arbitral tribunal's attempt to conciliate the parties is nothing more than asking the parties to the dispute if they are open to a negotiated settlement to terminate their dispute. Regularly, the parties' answer is “no.” The truth is that most Brazilian arbitration practitioners are quite reticent to attempt conciliation of the parties.

“Proceedings similar to med-arb are not entirely foreign to the Brazilian legal system. Section 448 of the Brazilian Civil Procedure Code, for instance, provides for obligatory (preliminary) conciliation of the litigant parties when their dispute, taken to the court system, is related to patrimonial rights over which the parties may freely dispose.”

Arb-med is less trendy in Brazil and court processes similar to arb-med are unknown under Brazilian law and practice.

Designing Effective Med-Arb Processes in Brazil

Some say that med-arb is an integral part of arbitration *vis-à-vis* the obligatory (preliminary) conciliation found in Brazilian arbitration.¹⁰ However, there are some concerns with the “original med-arb” process, where the same person functions first as a mediator and subsequently—upon the failure of the mediation—as an arbitrator, issuing a final and binding decision. This is because of the principles of (i) impartiality and (ii) *equidistância* of the arbitrator: the rule that the arbitrator must maintain equal distance from the parties. The effective med-arb process in Brazil, therefore, calls for the appointment of a separate mediator. This way the mediator can hold separate meetings (caucuses) with the parties to find more interest-based solutions without concerns of being challenged later by one of the parties for lack of impartiality.

If the dispute is settled during the mediation part, the parties need to sign a binding settlement agreement, called in Portuguese *transação*.¹¹ If the mediator does not resolve all issues, the parties may still sign a partial settlement agreement, and the unresolved part of the dispute will be left for the arbitral tribunal. It is important to point out that, under Brazilian law, the parties cannot convert their partial or full settlement during the mediation into an agreed or consent award, because the arbitration did not start before the parties' settlement was achieved. Therefore, any settlement recorded during the mediation part of the med-arb process cannot be enforceable as an arbitral award.¹² An arbitral award recorded under such circumstances would be null and void under Brazilian law.

Designing Effective Arb-Med Processes in Brazil

Arb-med processes are less known and used in Brazil than med-arb ones. Only the original arb-med process is found in Brazil. The arb-med form, where a med-arbitrator conducts the arbitration to an arbitral award sealed in an envelope, followed by mediation without disclosing the award to the parties, is completely unknown in Brazilian practice. The perception is that this sealed arb-med brings more inconveniences than reward. First, it is costly and time-consuming, as the arbitration will occur anyway, even if the parties settled after the arbitral award was rendered by the arbitral tribunal. In such case, would the parties be willing to expend even more money and spend additional time? Second, will the parties really engage in mediation after a broad and lengthy arbitration proceeding? For instance, if the arbitration is time-consuming and complex, would a worn-out party still be up to mediation? Third, would a non-exhausted or worn-out party be willing to mediate if such party had a strong perception that it would prevail in the arbitration award?

Nevertheless, arb-med may work when the mediation takes place during the arbitration proceedings. Recently, a leading Brazilian arbitrator has mentioned, on a no-name basis, a successful process taking place in Brazil where a particular arbitration ended up in a settlement upon a conciliation encouraged by the arbitral tribunal.¹³ In this arbitration, during the examination of the CEO of one of the parties to the dispute, the arbitrators noticed that he was willing to settle. The arbitral tribunal, therefore, asked him whether he would consider reaching a settlement and the CEO indicated his willingness to do so. The tribunal then asked if the representative of the other party would agree to at least attempt to reach a negotiated settlement. As his answer was positive, the tribunal let the parties negotiate directly, and assisted them in reaching an agreement on the dispute. Their settlement was recorded by the arbitral tribunal as an agreed award.

Following the conclusion of the report of this leading arbitrator, a roundtable discussion took place among

the practitioners present. The conclusion was that Brazilian arbitrators—whose background and legal practices are related to transactional work and business law—are more likely to attempt to conciliate the parties than those arbitrators who are litigators. Brazilian arbitrators with a deal-making background may not be mediators, as they lack the training and mediation is still incipient in Brazil, but their background as deal-makers makes them willing to have or allow the parties in their tribunals to make a deal, settling the matter at last.

The Future of Med-Arb and Arb-Med in Brazil

The convenience and efficacy of med-arb and arb-med processes for settling disputes involving property in Brazil are undervalued. However, some practitioners already see those processes playing an important role in Brazil in the future, in conjunction with other ADR mechanisms, in the context of both domestic and international commercial arbitration.

Effective med-arb and arb-med processes in Brazil—especially the second form—depend heavily on those who will serve as arbitrators/conciliators and, eventually, the mediators called by the arbitrators to mediate the dispute either *ex ante* or *ex post*. Therefore, the first and foremost issue in designing a setting where an effective med-arb or arb-med could take place in Brazil is appointing the right person for the job.

Endnotes

1. Law n° 9307, of September 23, 1996.
2. STF, SE. No. 5.206-7, Relator: Min. Sepúlveda Pertence, Dec. 12, 2001.
3. On Dec. 12, 2001, a split 7-to-4 Brazilian Supreme Court decision upheld the constitutionality of the Brazilian Arbitration Act. The Arbitration Act had been challenged by Brazilian Supreme Court's Justice Sepúlveda Pertence, who retired in August 2007. During an exequatur proceeding in 1996, Justice Pertence considered that arbitral clauses forced the parties to surrender their constitutional right to have their cases heard in Brazilian courts, and were in his view, therefore, deemed unconstitutional. Justice Pertence himself has presented an *ex officio* challenge against the sections of the Brazilian Arbitration Act concerning the binding nature of arbitral clauses.
4. The warm welcome and increasing popularity that arbitration has received in Brazil has yet to reach ADR.
5. Law n° 5869, of Jan. 11, 1973.
6. Under a new—but yet to be widely adopted—conciliation trend, Brazilian Courts have been holding yearly sessions of the *Movimento pela Conciliação*, a program where state and federal courts attempt to have litigant parties settle their disputes under the courts' supervision. For more information about the program, see generally <http://www.conciliar.cnj.gov.br/> (last visited Jan. 10, 2009).
7. See Maristela Basso, *Lei nova revitaliza a arbitragem no Brasil como método alternativo-extrajudicial de solução de conflitos de interesses*, 733 *Revista dos Tribunais* 15 (1996).
8. See César Fiúza, *Teoria Geral da Arbitragem*, 217 (1995).

9. Section 28 of the Brazilian Arbitration Act sets forth the grounds for agreed awards, as it lays down that “if the parties settle the dispute by joint agreement, in the course of the arbitral proceedings, the arbitrator or the arbitral tribunal, at the parties’ request, may make an arbitral award declaring such fact, containing the requirements provided for in Article 26 of this Law.” A free translation of the Brazilian Arbitration Act can be found online at <http://www.jus.uio.no/lm/brazil.arbitration.law.no.9.307.1996/landscape.pdf> (last visited Jan. 26, 2009).
10. Different people have different notions of mediation and conciliation. While some say that the Brazilian legal practice does not differentiate “conciliation” from “mediation,” conciliation, as written in this article, is not meant to be what is generally understood in the United States as mediation.
11. See sections 840 to 850 of the Brazilian Civil Code (Law n° 10406, of Jan. 10, 2002). Said sections 840 to 850 establish the general conditions for the signature of settlement agreements subject to Brazilian law. It is important to point out that: (i) “settlement is only allowed when related to patrimonial rights of private nature”—those over which the parties may freely dispose (section 841); (ii) if any of the clauses of the settlement agreement are void, the agreement as a whole will be null and void (section 848); and

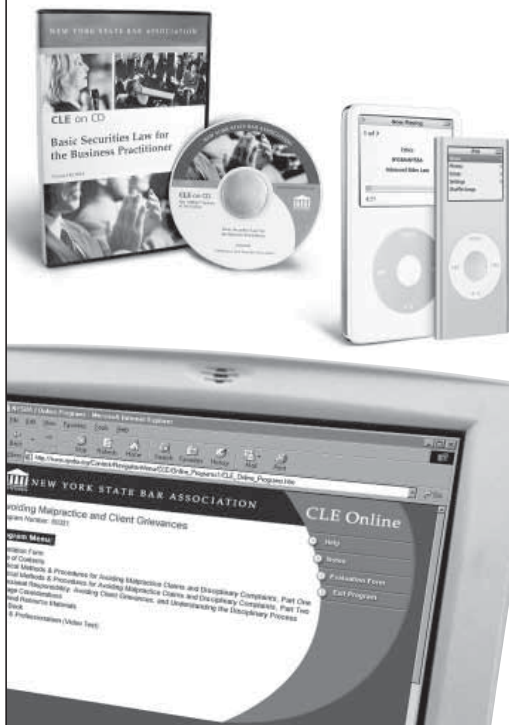
(iii) “a settlement is only voidable in cases of willful misconduct, coercion or essential error of right in relation to the concerned person or subject-matter of the controversy, as a settlement cannot be void because of error of law vis-à-vis the questions subject-matter of the parties’ controversy” (section 849).

12. Settlement agreements after the arbitration process has already started might be recorded as an agreed award under Section 28 of the Brazilian Arbitration Act.
13. José Emílio Nunes Pinto, Address at Barretto Ferreira, Kujawski, Brancher e Gonçalves’ roundtable, *Escolhendo os Tomadores de Decisões* (Nov. 12, 2008).

Pedro Alberto Costa Braga de Oliveira is general counsel of ENEL BRASIL PARTICIPAÇÕES LTDA. in Rio de Janeiro, Brazil. Mr. Costa Braga has acted as counsel in a number of domestic and international arbitrations, both as private practitioner and corporate counsel. He can be contacted on the Web at <http://arbitrationlaw.blogspot.com/> and by e-mail at pedro.costa@latinamerica.enel.it.

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Med-Arb in Ontario: Enforceability of Med-Arb Agreement Confirmed by Court of Appeal

By Barry Leon and Alexandra Peterson

A 2007 Ontario appeal court decision confirmed that courts in Ontario will enforce an agreement to engage in a combined mediation/arbitration process (“med-arb”), despite natural justice and other concerns that are often raised about med-arb, particularly in common-law jurisdictions.

In *Marchese v. Marchese*,¹ the Court of Appeal for Ontario held that an agreement between parties to submit to med-arb² was enforceable despite a provision in the province’s domestic arbitration statute that prohibits arbitrators from conducting any part of an arbitration as a mediation.³

The Court reasoned that if the prohibition applied to med-arb (a point that the Court held it did not need to decide), the prohibition could be waived and the parties’ mutual decision to engage in med-arb would be considered a waiver.⁴

The decision is a welcome one for those in the dispute resolution world who believe that today’s businesses are looking for greater innovation and flexibility in the methods used to resolve commercial disputes. They consider that in many situations neither the court system nor arbitration provides the efficient and cost-effective resolution they want, and that mediation alone is not always capable of achieving a resolution. Med-arb provides another option that in the right circumstances, and conducted by a skilled mediator-arbitrator, can achieve results that neither mediation nor arbitration alone could achieve.

Med-arb is a dispute resolution process that involves two steps: a mediation in which the parties attempt to resolve their dispute themselves with the assistance of a mediator and, if necessary, a subsequent arbitration stage in which any unresolved issues are subjected to binding adjudication by the same person, at that point acting as an arbitrator. The hybrid process can have many advantages over mediation or arbitration alone. Med-arb is often less costly and more efficient than arbitration because the procedural requirements are generally not as stringent. Because it keeps the adjudicative elements limited to the issues not resolved by the parties themselves, it is especially desirable where preserving an ongoing relationship is important. At the same time, the arbitration aspect provides a final resolution to a dispute, a conclusion that is not assured in mediation. Just the looming prospect of a binding arbitral decision may encourage parties to settle their disputes themselves for fear of an adverse decision. Using the same neutral party also provides considerable savings in cost and time, because he or she will already be

familiar with the case and will not need to be briefed on the issues in dispute at the second stage.

Med-arb, however, raises concerns, in particular about natural justice and impartiality. The mediation stage of med-arb often involves private caucusing between the mediator-arbitrator and each party. Normally the right to know and have a reasonable opportunity to respond to the other side’s case is considered essential to our notions of fairness and due process in an adjudicative process. With med-arb, there is a danger that in the adjudicative stage of the proceedings, the mediator-arbitrator may consider and weigh information, obtained from one party during private caucusing in the mediation phase, to which the other party has not had a chance to respond. This information might be incomplete or even false, as well as prejudicial to the opposite party. Obviously the opposite party would not want this information to influence the arbitrator’s decision. But even if procedural and ethical rules do not permit the mediator-arbitrator to consider or weigh information obtained during private caucus in the arbitration stage of the process, the parties may not be convinced that such information could be completely discounted in the adjudication. For these reasons, med-arb has been contentious among practitioners and commentators, particularly in common-law jurisdictions.

There is also a practical concern about med-arb: it may be difficult to find someone who is capable of effectively handling the dual roles of the neutral third party in a med-arb.⁵ Med-arb requires a neutral third party who is adept at both mediation and arbitration, and who can gain the parties’ confidence and trust that he or she will provide fairness and due process in the arbitration stage.

The *Marchese* decision makes it clear that contracting parties in Ontario can expressly opt for med-arb, in which case the prohibition in the domestic arbitration statute against conducting any part of an arbitration as a mediation is waived.

The Court recognized and confirmed that med-arb is “a well recognized legal term of art referring to a hybrid dispute resolution process in which the named individual acts first as a mediator and, failing agreement, then proceeds to conduct an arbitration.” The fact that it is a hybrid process means, however, that the process, once agreed upon, must be followed. The Court distinguished a 2001 trial court decision, *Hercus v. Hercus*,⁶ in which the decision of a mediator-arbitrator was set aside because he had proceeded directly to arbitration, bypassing the me-

diation step entirely. In *Marchese*, the parties did not skip mediation—they had an initial meeting that indicated that mediation would be unsuccessful.

Med-arb has been considered in a couple of subsequent lower court decisions in Ontario. In a case involving child access, the parties had provided for mandatory med-arb in their agreement dealing with support, custody and access to the child. While determining that the agreement did not bar an urgent temporary child access order by the court after one of the parties unilaterally changed the access arrangements, the court (without referring to *Marchese*) made its temporary access order “pending mediation or further order by the arbitrator” and ordered the parties “forthwith to attend mandatory mediation/arbitration pursuant to the provisions of the agreement.”⁷

Ontario’s international arbitration statute, a Model Law statute, adds to the Model Law by expressly permitting the use of mediation during the arbitration proceedings for the purpose of encouraging settlement. The Act states:

For the purpose of encouraging settlement of a dispute, an arbitral tribunal may, with the agreement of the parties, use mediation, conciliation or other procedures at any time during the arbitration proceedings and, with the agreement of the parties, the members of the arbitral tribunal are not disqualified from resuming their roles as arbitrators by reason of the mediation, conciliation or other procedure.⁸

The use of private caucusing, as discussed above, is a fundamental concern about med-arb. Even though the Court held that parties may agree to a med-arb process, Ontario courts have not determined the extent to which the mediation stage of a med-arb may involve private caucusing. This was not discussed in the *Marchese* decision. The extent to which private caucusing may be used also is an open question when mediation is used in an arbitration under Ontario’s international arbitration statute.

In *Marchese*, the parties had agreed to submit to med-arb but there is no indication that they had sought to, or could, waive their entitlement to procedural fairness. It had become evident after only an initial meeting with the mediator-arbitrator that mediation would be unsuccessful, and the appellant then tried, unsuccessfully, to deny the existence of an agreement to arbitrate in the event of failed mediation. So there was no need for the Court to consider the use of private caucusing or its potential compromise of the mediator-arbitrator’s neutrality.

Ontario’s domestic arbitration statute expressly provides, in section 19, that in an arbitration “the par-

ties shall be treated equally and fairly” and that “[e]ach party shall be given an opportunity to present a case and to respond to the other parties’ cases.” Section 19 is one of the six provisions of the Act that the parties cannot agree to vary or exclude. Likewise, Ontario’s international arbitration statute (as noted above, a Model Law statute) contains the fundamental mandatory provision in article 18 that “the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case” and in article 34 that an award can be set aside if a party was “unable to present his case.”

It remains an open question whether these procedural fairness requirements may tie the hands of the mediator-arbitrator in the mediation phase and impede (or even preclude) the use of private caucusing, an important aspect of the mediation process.

Given the recognition by the Court of med-arb as a “well recognized legal . . . hybrid dispute resolution process,” and the fact that private caucusing is fundamental to mediation, it seems likely that an Ontario court would find that the required procedural fairness can be achieved if the mediator-arbitrator, when acting as arbitrator, takes no account of material information obtained in private caucusing about which the other party has not been informed and to which it has not had an opportunity to respond.

In Canadian courts, most commercial (and other civil) cases are tried by a judge alone (that is, without a jury). Judges are called upon regularly to exclude evidence that they have heard already and to rule on the admissibility of evidence (including alleged settlement discussions, privileged communications, and the like) that they must hear before they can rule.

However, the med-arb process presents greater challenges. Only the mediator-arbitrator (not the party that may be affected) can know what information has come to the mediator-arbitrator from a private caucus, and only the mediator-arbitrator can ensure that such information is not considered unless the opposite party is told about it and has an opportunity to respond to it. This concern is exacerbated when there is no appeal process, as often is the case, to review the mediator-arbitrator’s actions.

As a practical matter, these concerns point to the importance of any med-arb process being conducted by a mediator-arbitrator who is skilled in the process and who is accepted and trusted by the parties as a person of integrity, fairness and sound judgment.

Given that parties in Ontario are free to agree to med-arb, it is likely that courts in Ontario will enforce the result unless persuasive and cogent evidence shows that the mediator-arbitrator relied on material information obtained in a private caucus of which the opposite party was not aware and to which it had no opportunity to respond. Arbitral awards in Ontario receive a high

degree of judicial deference. Cases such as *Corporacion Transnacional de Inversiones S.A. de C.V. v. STET International S.p.A.*⁹ have demonstrated that there is a powerful presumption in favor of an arbitral tribunal and a high bar for setting aside an arbitral award. In that case, for example, the Ontario Superior Court held that “broad deference and respect” (para. 22) should be accorded to arbitral tribunals under the Model Law and that “the grounds for refusal of enforcement should be construed narrowly” (para. 26).

It also is likely that Ontario courts will assess equality and fairness complaints arising from a med-arb in a flexible and pragmatic manner. That is, it is likely that a court will look at the whole picture to determine whether the complaining party knew the particular material information that had been provided to the mediator-arbitrator in a private caucus and had a reasonable opportunity to respond to it, rather than the court focusing on the particular manner in which the knowledge was obtained or whether the opportunity to respond was provided. The opportunity to respond would probably not need to be provided in the same manner as would be required under the court’s rules of evidence and procedure. In a med-arb process, and even in an arbitration conducted under more innovative procedures (which the Ontario domestic arbitration statute permits), what should count is substance, not form.

Marchese is important because it recognizes med-arb as a distinct process and confirms that Ontario courts will enforce parties’ agreements to utilize it.

Everywhere one goes in the world of international dispute resolution, one hears concerns, particularly from corporate counsel, about a growing lack of efficiency and cost-effectiveness in international arbitration. Arbitral institutions and arbitration organizations are looking for ways to deal with these concerns. Recent initiatives include these:

- the International Chamber of Commerce Commission on Arbitration’s *Techniques for Controlling Time and Costs in Arbitration* (ICC Publication No. 843) arising from its Task Force on Reducing Time and Costs in Arbitration;
- the International Centre for Dispute Resolution’s *ICDR Guidelines for Arbitrators Concerning Exchanges of Information* (effective after May 2008 in all cases, unless the parties agree otherwise) that confirm that arbitrators have the authority and responsibility to manage arbitration proceedings so as to provide a simpler, less expensive and more expeditious process;
- the Centre for Effective Dispute Resolution (CEDR) constituting a Commission on Settlement in International Arbitration (composed of international

arbitrators, corporate counsel, mediators and academics, and chaired by Lord Woolf and Professor Gabrielle Kaufmann-Kohler) to consider current approaches to promoting settlement in international arbitration and make recommendations on how arbitral institutions and tribunals could give parties greater assistance in finding ways to settle their disputes; and

- arbitral institutions becoming increasingly active in promoting and providing mediation for international disputes, including in the context of arbitrations.

As the users of dispute resolution services—that is, the parties and corporate counsel managing their disputes—and dispute resolution practitioners look for innovative ways to resolve commercial disputes more efficiently and cost-effectively, the recognition and acceptance of med-arb may be an important step forward.

Endnotes

1. (2007), 219 O.A.C. 257 (C.A.), MacPherson, Sharpe and Juriansz, J.J.A.
2. The clause, which was in an agreement for an alternative means of resolving a court proceeding, simply provided, “The parties shall attend for mediation/arbitration with Phil Epstein regarding all issues in the action.”
3. “The members of an arbitral tribunal shall not conduct any part of the arbitration as a mediation or conciliation process or other similar process that might compromise or appear to compromise the arbitral tribunal’s ability to decide the dispute impartially” (Arbitration Act, S.O. 1991, c. 17, § 35).
4. Section 3 of the Arbitration Act provides that “parties to an arbitration agreement may agree, expressly or by implication, to vary or exclude any provision of this Act except” for six specified provisions, of which § 35 is not one.
5. See Claude R. Thomson, *Med-Arb—A Fresh Look*, Newsletter of the Mediation Committee of the Legal Practice Division of the International Bar Association, July 2007, vol. 3, no. 1, page 27. This excellent article more fully discusses med-arb.
6. [2001] O.T.C. 108, [2001] O.J. No. 534 (Ont. Sup. Ct. J.), Templeton J.
7. *E. (E.) v. F. (F) and G. (G.)*, 2007 ONCJ 456.
8. *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9, § 3.
9. (1999), 45 O.R. (3d) 183 (Ont. Sup. Ct. J.), Lax J., *aff’d* (2000) 49 O.R. (3d) 414 (C.A.) Catzman, Abella and Rosenberg J.J.A., leave to appeal to S.C.C. dismissed, S.C.C. Bulletin of Proceedings, May 4, 2001, 821.

Barry Leon (bleon@torys.com) practices international and domestic commercial arbitration, litigation and mediation at Torys LLP (www.torys.com). He also serves as an arbitrator and mediator in international and domestic disputes. His bio can be found at <http://www.torys.com/OurTeam/Pages/LeonBarry.aspx>.

Alexandra Peterson (apeterson@torys.com) is a student-at-law at Torys LLP.

Some Limits to Applying Chinese Med-Arb Internationally

By Tai-Heng Cheng and Anthony Kohtio

This short essay identifies some reasons for the use of med-arb in China, and examines whether these reasons support the use of med-arb to resolve large international commercial disputes. It concludes that considerations favoring med-arb in China might not apply in some international commercial settings.

Med-arb is a dispute resolution method that combines both mediation and arbitration. Parties typically try to resolve their dispute before a mediator. In one variant of med-arb, if no settlement is reached, the mediator then becomes an arbitrator and issues a binding decision. In another variant of med-arb, a settlement is reached, and the mediator becomes an arbitrator for the limited purpose of issuing an arbitral award in accord with the settlement terms.¹ This essay is primarily concerned with the first variant of med-arb in which mediation fails to reach settlement and compulsory dispute resolution by arbitration is mandated.

By combining mediation and arbitration, med-arb could offer disputing parties advantages of both forms of dispute resolution. The mediation phase offers parties the opportunity to resolve their dispute relatively swiftly and at potentially lower costs than a full-blown arbitration or litigation. Unlike a “pure” mediation, however, should the parties fail to reach an amicable solution, they may still resolve their dispute through arbitration,² but potentially with cost and time savings. As compared to the situation where the parties commenced arbitration without first attempting mediation, in a med-arb, the mediation process may have brought the parties “closer together through offers and counteroffers, so that if an issue does proceed to arbitration, the differences between the positions are often minimal.”³ As compared to the situation where the parties were unsuccessful in mediation and then commenced arbitration before a new neutral, in med-arb, the arbitrator would already be familiar with the dispute through his antecedent involvement as a mediator. The parties might accordingly avoid the cost and expense of educating the neutral about the dispute from scratch.⁴

Although med-arb might potentially be attractive to disputing parties, critics have raised concerns about the internal contradictions within med-arb that could create practical difficulties. Edward Dauer has identified an apparent paradox: “While mediation requires candor between a party and the neutral, arbitration requires advocacy.”⁵ According to James Peters, the parties may consequently not be fully honest in the mediation out of a concern that exposing their positions will weaken them

in the arbitration.⁶ These practical limitations on candor reduce the chances of a successful mediation.⁷

In the authors’ view, however, this criticism might be a little naïve. Even in mediations, as in litigation or arbitration, counsel are expected to be advocates for their clients. They organize the facts to their greatest advantage. They may not fully disclose information, within the limits of ethics and applicable rules of professional responsibility, that they believe would weaken their position if revealed. Accordingly, the criticism that counsel may be less candid in a med-arb than a pure mediation seems to lack a sense of reality.

“Since its inception, the CIETAC has encouraged the integration of mediation into its arbitration procedures.”

A more legitimate criticism of med-arb is that “the med-arbiter cannot successfully block out information learned through mediation when determining an award as an arbitrator and thus he cannot be impartial if the situation results in arbitration.”⁸ Disputing parties and their counsel may, for good reasons, prefer to have a different neutral arbitrate the dispute in order to benefit from the opportunity to shape the neutral’s view on the dispute afresh. Depending on the business interests at stake in a dispute, the costs incurred to educate a new arbitrator or panel of arbitrators may well be worth it.⁹

In spite of this drawback of med-arb, med-arb has been used in China to resolve disputes. Since its inception, the China International Economic and Trade Arbitration Commission (“CIETAC”) has encouraged the integration of mediation into its arbitration procedures.¹⁰ Article 40(2) of the CIETAC Rules of Arbitration provides for conciliation by the arbitrator. It states:

Where both parties have the desire for conciliation or one party so desires and the other party agrees when approached by the arbitral tribunal, the arbitral tribunal may conciliate the case during the course of the arbitration proceeding.

This Rule is in accord with Article 51 of the Arbitration Law of the People’s Republic of China, which states in relevant part:

The arbitration tribunal may reconcile a case before passing the award. Whereas

the parties concerned accept the reconciliation effort on their own accord, the arbitration tribunal may conduct the reconciliation. [. . .]

Could the Chinese experience with med-arb offer lessons for international commercial dispute resolution?

The reception of med-arb into China might in part be due to a cultural preference for conciliation over adjudication. It is often perilous to generalize about culture, especially when generalizing about a nation with over a billion citizens and an associated global diaspora. It is equally dangerous to claim that a cultural norm is unique to any one race or nation. Subject to these caveats, however, scholars have observed that Chinese culture tends to emphasize harmony in interpersonal relationships.¹¹ Xin Ren has suggested that in Chinese culture, greater importance is placed on dispute dissolution rather than dispute resolution.¹² Consequently, in Chinese society, disputes are generally shunned, in order to avoid disturbing social harmony.¹³

Although Chinese intellectual thought extends beyond Confucian tenets to many other schools of philosophy across the span of Chinese history, Confucius's teachings might help explain the disinclination for dispute resolution by courts or arbitrators. Confucian scholars have explained the distinction between *li*, or social norms of propriety, and *fa*, or formal legal rules. If people are ruled by *li*, then *fa* is not necessary.¹⁴ With the *li-fa* dichotomy, there is a "general aversion to third-party adjudication and a predilection for conciliation."¹⁵ Formal legal rules and their associated processes of dispute resolution have played a secondary role to social norms and informal means of avoiding disputes.¹⁶ One could hypothesize that the strong preference for informal means of conciliation over formal methods of adjudication have resulted in the incorporation of mediation even when the parties accept that arbitration may be necessary, thereby resulting in the hybrid med-arb.¹⁷

Leaving aside considerations of culture, there may also be a practical reason for favoring conciliation in China: a perception that judicial and arbitral processes are highly imperfect in that country. Recently, in order to achieve economic development and greater contact with foreigners, China has aggressively established laws, rules and regulations that govern arbitration and litigation. However, due to continuing perceived links among the judiciary, the legislator, and the ruling party,¹⁸ Chinese nationals and foreign investors may attempt to resolve their disagreements through negotiation or mediation if at all possible, rather than to subject themselves directly to Chinese courts or CIETAC arbitration. Where a dispute resolution clause providing for CIETAC arbitration is invoked by one party in a transaction, the other party might propose CIETAC med-arb in an effort to resolve the dispute before full-blown CIETAC arbitration becomes necessary.

The reasons for the use of med-arb in China may not apply with equal vigor to international commercial disputes. To the extent that commercial parties believe they will have a fair arbitration with arbitral institutions with which they are familiar, such as ICDR, ICC, or LCIA, there may be less pressure to avoid arbitration by turning to med-arb. To the extent that international commercial parties and their counsel come from more adversarial legal cultures, such as the United States, England, and other common-law jurisdictions, the pull towards conciliation and med-arb may be weaker than with Chinese parties that might shun direct confrontation.

Of equal concern is fundamental differences between Chinese and American conceptions of mediation. For U.S. counsel and their U.S. clients, mediation often involves identifying the interests of disputing parties and reaching a settlement that satisfies both parties' non-negotiable interests, and, where possible, unlocking value for each party through creative compromises.¹⁹

For Chinese lawyers and their corporations, mediation might involve something quite different. Peter Philips, who was formerly Senior Vice President of the International Institute for Conflict Prevention and Resolution (CPR), is familiar with CPR mediation training sessions for Chinese mediators. Philips reported that at one of these sessions, "a very prominent" judge of the Chinese Supreme Court explained that when he mediated disputes, he would simply dictate a proposed settlement and threaten to issue a judgment to enforce his proposal should the parties reject it.²⁰ While U.S. attorneys may have "war stories" of a state or federal judge who indicated strongly his view of a case to encourage settlement, it is quite another battle to enter into a mediation knowing that a mediator could coerce settlement on wholly unfavorable terms by threatening to rule in a certain way should the mediation fail.

The different conceptions of and cultural attitudes toward med-arb between the United States and China do not definitively mean, however, that med-arb should never be used in international commercial disputes. The brevity of this essay has necessarily constrained the discussion here to generalities. Further research in this developing field of dispute resolution might reveal compelling reasons for the use of med-arb in certain international commercial disputes. For the moment, however, many ADR practitioners and their corporate clients remain unfamiliar with, and therefore understandably skeptical about, med-arb. In a recent contentious dispute in the United States, opposing counsel said to one of the authors in response to the commencement of arbitration: "I'm a federal litigator. The idea of arbitration sends shivers down my spine." Imagine if the author had suggested med-arb instead.

Endnotes

1. See, e.g., China International Economic and Trade Arbitration Commission Arbitration Rules, Article 40(1); Arbitration Law of

the People's Republic of China, Article 51 (both providing for arbitral awards to give effect to a mediated settlement).

2. See, e.g., Arbitration Law of the People's Republic of China, Art. 51 ("... should the reconciliation fail, the tribunal shall pass the ruling in time").
3. Karen L. Henry, Note, *Med-Arb: An Alternative to Interest Arbitration in the Resolution of Contract Negotiation Disputes*, 3 OHIO ST. J. ON DISP. RESOL. 385, 388 (1988).
4. Carlos De Vera, *Arbitrating Harmony: 'Med-Arb' and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China*, 18 COLUM. J. ASIAN L. 149, 156-57 (2004). ("To find an adequate resolution in the arbitration phase of the process, the Med-Arbitor will use his understanding of the relationship between the parties during the mediation phase, or use his prior knowledge of their respected underlying interests.").
5. EDWARD A. DAUER, ADR LAW & PRACTICE § 8.4(f)(5) (2000).
6. James T. Peters, *Med-Arb in International Arbitration*, 8 AM. REV. INT'L ARB. 83, 97 (1997).
7. See Henry, *supra* note 5, at 397.
8. *Id.*
9. For further criticisms of med-arb, see generally Peters *supra* note 8, at 91-98.
10. *Id.* at 83.
11. Urs Martin Lauchli, *Cross-Cultural Negotiations, With a Special Focus on ADR with the Chinese*, 26 WM. MITCHELL L. REV. 1045, 1062 (2000); Amanda Stallard, *Joining the Culture Club: Examining Cultural Context When Implementing International Dispute Resolution*, 17 OHIO ST. J. ON DISP. RESOL. 463, 476 (2002) ("Asian cultures typically do not share Western values of privacy, favoring instead to handle conflict diplomatically and

within the community.".) *But cf.*, F Peter Philips, *Commercial Mediation in China: The Challenge of Shifting Paradigms*, draft at 11, n.27 (publication forthcoming in the Proceedings of the Third Annual Conference on International Arbitration and Mediation at Fordham Law School (Martinus Nijhoff, forthcoming 2009) (quoting Jerome Cohen's observation that the Chinese are also "fiercely individualistic").

12. De Vera, *supra* note 6, at 164.
13. Goh Bee Chen, LAW WITHOUT LAWYERS, JUSTICE WITHOUT COURTS: ON TRADITIONAL CHINESE MEDIATION 1 (2002).
14. Xin Ren, TRADITION OF THE LAW AND LAW OF THE TRADITION: LAW, STATE, AND SOCIAL CONTROL IN CHINA 20 (1997).
15. Peters, *supra* note 8, at 106.
16. *Id.*
17. *Id.* at 107.
18. Stanley Lubman, *Introduction: The Future of Chinese Law*, 141 THE CHINA Q., 1-3 (1995) (noting concerns about Chinese courts).
19. See generally ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 40-80 (2d ed. 1991).
20. Philips, *supra* note 11, at 3-4.

Tai-Heng Cheng is Associate Professor of Law & Associate Director, Center for International Law, New York Law School, and Of Counsel, Hoguet Newman Regal & Kenney LLP.

Anthony Kohtio is a J.D. Candidate at New York Law School.

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Med-Arb—An English Perspective

By Jon Lang

Med-arb is one of those hybrid processes that is often talked about in England but little practised. Given the issues raised, its lack of use is perhaps not surprising. This paper looks at some of these issues from a legal and practical perspective.

“Med-arb is one of those hybrid processes that is often talked about in England but little practised. Given the issues raised, its lack of use is perhaps not surprising.”

A Brief Outline

Broadly speaking, a judge or arbitrator must be seen to be unbiased and each party to a dispute must be given a fair opportunity to present his or her case and answer that of his or her opponent. In *Glencot Development and Design Co. Limited v. Ben Barrett & Son Limited*,¹ a case referred to throughout this paper, Judge Humphrey Lloyd QC, in contrasting the mediation process with that of adjudication and pointing out the dangers of one person wearing both hats, said:

The process [mediation] will also be concerned with the commercial interests of the parties which may not be synonymous with their legal rights and obligations. Thus such a person [the adjudicator/mediator] will or may have to listen to arguments and hear things which may be completely irrelevant to the dispute in the adjudication but which might be prejudicial to its determination. Discussions or a mediation of the kind which apparently took place on 29 September are or may be at variance with adjudication. Thus Mr Talbot was correct in making it clear to parties that what he might be doing was a departure from adjudication and in getting their agreement to it. Such agreement was essential. Of course an agreement in advance, even if a formal written agreement, may not be effective in depriving a party of its right to question a later decision on the grounds of apparent or actual bias. There are clearly risks to all when an adjudicator steps down from that role and enters a different arena and is to perform a different function. If a binding settlement of the

whole or part of the dispute results, then the risk will prove to be worth taking.

Can Med-Arb Always Be Relied on to Deliver Its Key Perceived Benefit of Finality?

An obvious risk that parties face in allowing their mediator to render an award following a failed mediation is that the losing party may challenge the award alleging actual or apparent bias. As mentioned later, actual bias is rarely alleged. When it is, the court will need to establish whether there is in fact bias. Usually, however, the allegation is one of apparent bias. In other words, circumstances exist which raise a suspicion or suggestion that bias could exist. The person making the challenge does not need to go on to allege that the person being challenged is in fact biased. But a successful challenge based on apparent bias is enough!

Section 1 of The Arbitration Act 1996 provides that the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal. It also provides that the parties should be free to agree how their disputes are to be resolved (subject only to public interest safeguards). Section 24(1) of the Act provides that a party may apply to the court to remove any arbitrator if “(a) ... circumstances exist that gives rise to justifiable doubts as to his impartiality.” Section 33 of the Act (general duty of the tribunal) provides that the tribunal should act fairly and impartially and give each party a reasonable opportunity of putting his case and dealing with that of his opponent. Section 73 provides that a party can lose its right to object to an irregularity if he or she doesn’t object straight away or within such other time as may be allowed.

In *Glencot Development and Design*, Judge Humphrey Lloyd QC set out a test for determining whether an adjudicator should continue to act as such having, halfway through the adjudication, donned a mediator hat to try and broker a settlement. The mediation phase of the process failed to produce a settlement and the adjudication resumed. However, the defendant indicated to the adjudicator that he should withdraw. The adjudicator took counsel’s advice and decided not to. The defendant then sent a formal notice saying,

Having considered the matter of impartiality extremely carefully and taken appropriate legal advice, we regret to inform you that we consider your capacity to make an impartial decision in the Adjudication has indeed been compromised by your presence at the partners settlement negotiations.

The claimant wanted the adjudicator to continue and he did so, ultimately giving a decision in its favor. The claimant sought to enforce the award by way of summary judgment but the application was successfully resisted on grounds of impartiality on the part of the adjudicator. Much of Judge Humphrey Lloyd QC's decision was given over to a discussion of impartiality and the test for apparent bias. The judge referred extensively to the House of Lords decision in *R v Gough*² and, in particular, to the judgment of Lord Goff who, at the end of his (Lord Goff's) judgment summarized his understanding of the law in this area:

In conclusion, I wish to express my understanding of the law as follows. I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators.

Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him;

Earlier in his judgment, it was noted by Lord Goff that "bias is such an insidious thing that, even though a person may in good faith believe that he was acting impartially, his mind may unconsciously be affected by bias. . . ." This is a point also made by Lord Woolf (in *R v Gough*). Judge Humphrey Lloyd, in *Glencot*, in referring to these comments of Lords Goff and Woolf, stated that this is why it is necessary for there to be an objective test for apparent bias, the views of the person involved

(the med-arbitrator) being either irrelevant or not determinative. He went on to say that the test is whether the "circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility or a real danger, the two being the same, that the tribunal was biased."

It is important to appreciate that in *Glencot* the court was dealing with a case of apparent rather than actual bias, Lord Woolf commenting (in *R v. Gough*) that ". . . except in the rare case where actual bias is alleged, the court is not concerned to investigate whether or not bias has been established."

"Bias is such an insidious thing that, even though a person may in good faith believe that he was acting impartially, his mind may unconsciously be affected by bias. . . ."

No Absolute Prohibition

In *Specialist Ceiling Services Northern Limited v. ZVI Constuction (UK) Limited*,³ a case in which an adjudicator had knowledge of without prejudice negotiations, the Judge appeared to have had little difficulty in finding that there was "no objective indication of bias or unfairness in this adjudication." However, this was a case where the adjudicator merely had knowledge of negotiations; he had not actively participated in such negotiations. Nevertheless, it cannot be said that *Glencot* lays down any absolute prohibition on med-arb but perhaps more a "marker" for the risks that exist and an illustration of how it can all go wrong.

There is no shortage of English cases arising out of arbitral awards where the losing party takes the view that the decision should be challenged. Such challenges have included cases of alleged apparent bias, e.g., *ASM Shipping Ltd of India v. TTMI Ltd of England*⁴ referred to below. While the court has generally been supportive of the arbitral process and upheld awards, where parties are looking for a speedy conclusion to their dispute, who needs the distraction?

Given the risks involved in a med-arb process, two questions arise. First, can those risks be mitigated? And second, are the risks, whether or not mitigated to extinction, worth running? Before considering these two questions, perhaps we should consider the nature of the risk in a little more detail.

The Nature of the Risk

The discussion can perhaps best be put in context by again quoting from Judge Humphrey Lloyd QC's judg-

ment in *Glencot*: “. . . such a person [the adjudicator/mediator] will or may have to listen to arguments and hear things which may be completely irrelevant to the dispute in the adjudication but which might be prejudicial to its determination.”

Mediators work in secret. We hear things from one party, sometimes designed to prejudice us against the other party, which that other party is blissfully unaware of. “They have done this before, you know?” “They are in dispute with XYZ limited who they also tried to rip-off.” “They have had several judgments against them all arising in similar circumstances.” “They are serial copyists.” This isn’t particularly exceptional behavior. It’s all part of the rough and tumble of mediation. Gone are the days (if they ever existed) of parties suffering outbreaks of common sense, reasonableness and benevolence on hearing folksy stories from the mediator about the last orange in the fruit bowl, increasing the pie and win-win situations. It gets nasty sometimes. People are bad-tempered. Mediators soak up a lot of anger, bile and vitriol directed against the “other party”—some of it real, some of it for “the gallery.” Who knows, who cares because, at the end of the day, we are not (usually) going to be making a decision that permanently affects the parties’ rights. Unless, of course, it is a med-arb!

So, to cut to the chase, can I say, hand on heart, that what I have been told in private about the “other side” or their case during the mediation phase of a med-arb, which they (the “other side” have not had an opportunity to respond to (indeed they are likely to be unaware of what I have been told), would not or could not influence my views as to either party’s case and, ultimately, my decision when it comes to the arbitration phase of the process? I think it would be arrogant of me in the extreme to suggest that there isn’t a chance that I could be so influenced. And it is that chance, however remote, that has always led me to say “No” when asked if I would be willing to undertake a med-arb.

And for all those mediators out there who feel able to brush off whatever irrelevancies they might be told in private and remain totally unbiased in rendering their decision, I would remind them of the words of Lord Goff in *R v. Gough*, that “bias is such an insidious thing that, even though a person may in good faith believe that he was acting impartially, his mind may unconsciously be affected by bias. . . .”

The mediator who goes on to act as arbitrator really shouldn’t be the one deciding if there is or isn’t a danger of bias.

Mitigation of Risk (Waiver)

How can the winning party prevent the losing party challenging the award arising from a med-arb? By agreement perhaps?

Before exploring this further, I should mention in the interests of balance that some jurisdictions and institutional rules expressly provide for med-arb, with the parties’ consent. And generally, shouldn’t consenting adults be free to choose how their own disputes are to be resolved? If they sign a med-arb agreement, surely that’s enough to waive their rights to later object to an award based on apparent bias. After all, they know broadly the way the mediation will work—private meetings, fluidity of process, etc.

In *Glencot*, although a waiver argument was run against the defendant and failed (the judge, noting that a challenge to an adjudicator on the grounds of apparent bias was such a serious matter that it would be “extreme” to elevate a failure to comply with a request of the adjudicator—to notify him immediately if it was thought his position was compromised—to an affirmation of jurisdiction), it seems clear that in some circumstances parties can be held to have waived their right to challenge on grounds of apparent bias.

Waiver

In *Smith v. Kvaerner Cementation*,⁵ the Court of Appeal, in a case arising out of a judge who had acted for a group of companies of which one was a party in a case he was deciding, Lord Phillips CJ said:

The basic principle is that waiver requires that the person who is said to have waived “has acted freely and in full knowledge of the facts”—per Lord Browne-Wilkinson in *R v Bow Street Magistrate, ex parte Pinochet (No 2)* [2000] 1 AC 119 at 137. In *Locabail (UK) Ltd v. Bayfield Properties Ltd* [2000] QB 431 at p. 475 this court commented:

a party with an irresistible right to object to a judge hearing or continuing to hear a case may . . . waive his right to object. It is however clear that any waiver must be clear and unequivocal, and made with full knowledge of all the facts relevant to the decision whether to waive or not.

In *Millar v. Dickson* [2001] 1 WLR 1615 at 1629 Lord Bingham of Cornhill observed:

In most litigious situations the expression “waiver” is used to describe voluntary, informed and unequivocal election by a party not to claim a right or raise an objection which it is open to that party to claim or raise. In the context of entitlement to a fair hearing by an independent and impartial tribunal, such is in my

opinion the meaning to be given to the expression.

So any waiver must be informed and clear.

But, a party is not permitted to hedge, to hang on to a possible challenge on grounds of bias pending the award, only to complain if they lose but not if they win.

Thus in *ASM Shipping Ltd of India v. TTMI Ltd of England*,⁶ Morison J. said:

In my judgment, by taking up the award, at the very least, the owners had lost any right they may have had to object to X QC's continued involvement in that part of the arbitral process. It is unacceptable to write making further objections after the hearing was concluded. X QC had made his decision not to recuse himself, rightly or wrongly, at the beginning of the third day. Owners were faced with a straight choice: come to the court and complain and seek his removal as a decision maker or let the matter drop. They could not get themselves into a position whereby if the award was in their favour they would drop their objection but make it in the event that the award went against them. A 'heads we win and tails you lose' position is not permissible in law as section 73 makes clear. The threat of objection cannot be held over the head of the tribunal until they make their decision and could be seen as an attempt to put unfair and undue pressure upon them.

Would a med-arb agreement constitute an informed waiver to object on grounds of apparent bias? The court will apply an objective test. Are there circumstances that "would lead a fair-minded and informed observer to conclude that there was a real possibility or a real danger . . . that the tribunal was biased"?

A judge, considering an allegation of apparent bias, might consider what the challenging party could tell him of the mediation process that raises a suggestion of impartiality at the arbitration stage. Thus, he might be told that the mediator continually stopped him from interrupting the other side when in joint session even though his opponent was talking absolute nonsense. He might be told that, in private session, the mediator embarked on some strenuous reality testing which, despite the usual health warnings, gave the challenging party the distinct impression that the mediator believed everything he was being told by the other side. He might be told that the mediator expressed concern that the challenging party was making such a low (or high) offer, which

indicated an unhealthy attraction to the other side's case. He might be told that the challenging party's overall impression was that the mediator was pushing him (the challenging party) more than the other side. He might be told that the mediator always appeared more relaxed with the other party, often chatting to them by the coffee machine. He might be told that the mediator spent far too much time with the other side. He might be told that the other side had a key witness on its team who the mediator would have spoken to at length, even though there was no opportunity to challenge what that witness was saying. The possibilities are endless.

Even if the mediator, at the point of switching roles and becoming an arbitrator, asks the parties to re-confirm their willingness for him to act as arbitrator, any waiver will only bind the parties if it is on a fully informed basis. If something emerges during the course of the arbitration stage that raises fresh doubt as to bias, it might be that such re-confirmation of the waiver becomes ineffective. For instance, one party may know something about the mediation stage of the process which it shares subsequently with the other party, which makes them wonder about the impartiality of the mediator-turned-arbitrator. Or it may come out that the mediator, in private session, took part in a conference call to certain employees of a party who the other side assumed would not be involved in the mediation.

Is the Risk Worth Running?

Despite the risks, as Judge Humphrey Lloyd QC said in *Glencot*, "If a binding settlement of the whole or part of the dispute results, then the risk will prove to be worth taking." I would substitute "might" for "will" in that sentence.

Maybe some will say the risk is worth taking. But before they do they should consider a few other more practical issues, the most important of which is the possibility of reducing the chances of the mediation working by having agreed a med-arb process.

Self-Fulfilling Prophecies

Two issues arise. First, will the parties really be as open with the mediator if they know he or she may go on to render a decision based on the merits? Won't they be a little more guarded in their dealings with him? Might they be concerned not to be seen to be too keen to settle, not wishing to give away any possible sign of lack of faith in their own case? Knowing the mediator may soon wear another hat could affect that all-important dialogue and rapport that needs to be established quickly if he is to be effective. Secondly, if the parties know there is an easy and available alternative option of achieving finality, namely have the mediator (as arbitrator) make a decision for them, they may not work as hard at the mediation phase as they otherwise might.

Other Considerations

There are of course several other considerations in this debate, but let me mention one or two of the most important. When I was in private practice, I used to appoint both arbitrators and mediators. But the considerations would be very different. For instance, in a mediator I might want someone who I thought could engage on a human level with my clients or, just as importantly, those on the other side. Could he bend elbows at the bar? Would he be robust enough to deal with stroppy clients in a commercial (as opposed to a more formal) setting? These are not considerations that would be at the forefront of my mind in the appointment of an arbitrator.

Moreover, I would prepare very differently for the two processes. I would prepare clients very differently. Everything about the two processes is so different that parties really should think twice, particularly given the inherent risks of challenge to any award, about giving over absolute primacy to efficiency and having the same person do both jobs.

Conclusion

I am not a fan of med-arb, but that doesn't mean that the two processes should not be used together. Very recently I spoke to an arbitrator about having one aspect of the dispute he was arbitrating mediated. Indeed, I think mediation should be used much more in international arbitration cases. But I also believe that one person should not do both jobs!

Endnotes

1. [2001] All ER (D) 384 (Feb).
2. [1993] UKHL 1 (20 May 1993).
3. [200]4 BLR 403.
4. [2005] EWHC 2238 (Comm).
5. [2006] EWCA Civ 242.
6. [2005] EWHC 2238 (Comm).

Based in London, Jon Lang has been mediating for a number of years. In April 2005, Jon left White & Case, where he had been a litigation partner, to become a full-time mediator. He can be reached at www.jonlang.com.

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Arb-Med and Med-Arb Are Well-Suited to Meeting India's ADR Needs

By Sriram Panchu

Using both arbitration and mediation processes to resolve a single dispute should gain broad acceptance in India as they provide a dispute-resolution mechanism that is particularly well suited to the history and needs of parties in India. India has a long village med-arb tradition which should make parties comfortable with such a process. The courts in India frequently engage in lengthy proceedings to review arbitral awards. This makes an arbitral award that reflects a mediated settlement, and which is therefore much less likely to be challenged in court, extremely attractive. Finally, many businesses in India are family-owned. Thus, the maintenance of family relationships and the ability to craft a consensual resolution of business differences are often as important as obtaining the resolution of the dispute.

The Panchayat

In times gone by, there was in India a well-known form of dispute resolution called the Panchayat. It consisted of five elders of the village. They sat to hear local disputes. Usually the parties themselves brought these disputes to the forum, so they appeared willingly. Even otherwise, it was not prudent to ignore a summons to appear. The five elders heard both sides, mainly the parties concerned and sometimes also their families. Evidence, always oral, was heard on the spot. They tried to forge a consensus, failing which they handed down a decision.

So the Panchayat is one of the earliest historical forms of med-arb. Elements of mediation were present since voluntary participation and party decision-making existed, though not absolutely. The Panchas tried to get a settlement that all agreed to. However, if that failed, arbitration kicked in. They would issue verdicts, which had social sanctions including excommunication. These verdicts were also respected by the community. While the immediate individual dispute had to be sorted out, the Panchayat was also aware and concerned that unaddressed disputes would simmer into community conflict, especially given the small area of the village. Their main aim was to find a solution and end the conflict in as just a manner as possible. So adjudication followed on the heels of the failure of consensuality.

Structured Mediation

Structured mediation, as we know it, is new in India. You may wonder why this is so, given this history mentioned above. The answer is that the Anglo-Saxon system of adversarial litigation exercised, and still exercises, a powerful hold in this country. Going to court is vindica-

tion, pastime, revenge, entitlement and face-saving. And a lot less expensive than elsewhere; the loser pays hardly any portion of the winner's costs. But all this is for another paper on reform.

In India we have an Act called the Legal Services Authorities Act, 1987. It was enacted in response to the huge burden of cases clogging our courts. It provides for a forum called Lok Adalat (roughly translated as People's Court). Headed by a judge and manned by other members including lawyers and social workers, it tries to bring about quick settlements applying rule-of-thumb determinations. In certain cases it can use consensual *cum* adjudicatory process. This is for disputes involving public utilities, typically consumer claims against transport, power, postal and telephone services. The Adalat's first attempt to get the parties to reach an amicable settlement; if that doesn't happen, it will decide the dispute. These Adalats are not bound by the strict rules of evidence and have flexibility in their functioning, and thus are closer to arbitration than to court-based adjudication. So we have a statutory med-arb here.

It was only in 1996 that India's Parliament legislated for private mediation (the Arbitration and Conciliation Act, 1996) and court-annexed mediation (Sec. 89 of the Code of Civil Procedure, amended in 1996). The former follows the UNCITRAL Model Law. The latter provides for referral by judges of pending cases to the processes of arbitration, conciliation or mediation. Mediation is thus new in this land. However, it is moving at a fast clip. The country's first court-annexed mediation centre was established in the Madras High Court in April, 2005. Its success showed that the time had come for this concept, and that it was both necessary and feasible. Following this start, most other High Courts have set up their mediation centres. Private mediation is beginning to be utilized now that litigants and the public are satisfied that the court has embraced the process. It is going to take time before hybrids like med-arb and arb-med come into vogue; we are just about winning the war against confusing mediation with meditation.

The Arbitration Act has a specific provision (Sec. 30) which says that it is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute, and that with the agreement of the parties the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitration proceedings to encourage settlement. A settlement so achieved can be recorded in the form of an arbitral award on agreed terms. So here we have the possibility of an

arb-med, or perhaps one could call it an arb-med-arb. It's rarely used, though. In India, arbitrations have become clones of the court adjudicatory process—as procedural and technical, nearly as lengthy and sometimes more expensive. In the words of one judge of the Indian Supreme Court, “the way in which the proceedings under the Act are conducted and without an exception challenged in the courts, has made lawyers laugh and legal philosophers weep.” One hopes that with the onset of mediation this will change and that arbitrators will use and encourage mediation processes.

Suitability of Arbitration and Mediation Combinations to India

Properly done, arb-med and med-arb will be welcomed by the parties and be viewed as accomplishing the most favorable result. A settlement incorporated into an award is enforceable in court, but as it results from a mediated settlement it is much less likely to be disputed, a result that creates a strong advantage for this hybrid process. India's courts seem averse to forgoing scrutiny of arbitrator's awards and the court-review process can be quite lengthy. Amendments limiting challenges to violations of public policy have been overcome by generous interpretative expansion of the meaning of that term, which has been characterized as an “unruly horse.” If a party has spent a great deal of time and money in the arbitration process, and is looking at the road ahead with more such pitfalls, closure is an attractive proposition. All the more so in a situation where it can take several years to reach the end of the road in a court proceeding following the arbitration.

“Properly done, arb-med and med-arb will be welcomed by the parties and be viewed as accomplishing the most favorable result.”

One other good reason is that you can get a workable solution in a mediation agreement, rather than a detailed award which scans the evidence minutely and applies the law with deliberative care. And if relationships are important, which is usually the case, then squaring off at the arbitration table is not as good as sitting around the mediation one. This applies especially for family and business disputes. The Indian business scene is dominated by family-owned enterprises; there is a multiplied reason here for using mediation. So there is much to be said for commencing the mediation as early as possible in the course of the arbitration.

Another advantage of the hybrid process is that the parties would have invariably chosen their neutral and can be expected to repose faith in his integrity and capability, although this may not hold universally when the arbitration panel consists of three persons, only one of

whom is selected by a party. However, to be effective the arbitrator should *have* knowledge and experience in the skills of mediation. Making parties uncover their long-term interests and helping them to come up with creative options is not something which your standard arbitrator does. Devoid of such training and experience, a mediator-arbitrator may well end up just guiding the parties to splitting the difference, a euphemism for distributing the pain of losing.

Managing the Process

Mediator-arbitrators will have their work cut out for them; they will also have lots of work. Parties want to get results as quickly and with less expense as possible; they are satisfied with approximations of what they see as justice, and will be delighted to find that before a decision is handed down by a third party, they have a chance to fashion their own decision with the help of that third party. So, despite cavils by purists of our trade, most parties will welcome this joinder of ADR processes.

The well-known confidentiality problem with the med and arb linkage should be manageable by not having private sessions at all, or advising the parties that if the mediation does not succeed then confidential information will have to be shared with the other. However, confidentiality may not be a major obstacle if an arbitration hearing takes place, and then a mediation is attempted before pronouncing the award. Facts are out in the open. Arguments have been heard. The parties can be told that nothing said in any separate session will be treated as confidential. By this time each side will have a fair idea of its strengths and weaknesses, and this knowledge, coupled with a “let's get it over and done with” weariness, could make them receptive to exploring settlement avenues with someone who by now knows what it's all about. It's also hard to be unreasonable in such circumstances.

Speaking of weariness, there is a good case to be made for trying mediation even well after the arbitration is over; that's the stage where the case challenging the award is languishing in court or the winner is having difficulty in implementation. When a party has traversed the ladder of the judiciary to be told at the top rung that the arbitrator had no jurisdiction or that the choice of law was bad, or some such reason unrelated to what brought them to dispute in the first place, that would be an excellent time to try mediation. Arb-delay-med.

One important aspect is that the choice of whether to engage in arb-med or the reverse is not only to be left to the parties, but should be exercised by them closest to when the second process can commence. What I mean is that if mediation is attempted and has not succeeded, then the mediator converts to an arbitrator only if both parties are willing *at that stage*. Similarly, in the case of arb-med, each party must be willing for the consensual try *at the time when the arbitration process has concluded its*

hearings. This will ensure party autonomy and choice. If parties are bound at the commencement of the arbitration or mediation to enter into the second process on the failure of the first, that will be neither just nor effective.

Conclusion

I don't think one can enter a preference for med-arb or arb-med in the abstract. It depends, to use a phrase we have heard a great many times, on the facts and circumstances of each case. The relationship which the parties bear to each other, the stands they take, the prognosis of the dispute, the factual and legal matrix, indeed the weariness and apprehensions of the parties have a great deal

more to do than the syllogism in providing the answers to the questions as to which, when and whether at all these processes should be used.

Sriram Panchu, Senior Advocate and Mediator, India, sriram2001@vsnl.in, has mediated commercial and public disputes since the 1990s and was instrumental in creating India's court-annexed mediation scheme. He has authored the book *Settle for More—the Why, How and When of Mediation*. In 2009 he founded IMEDIATE India Pvt. Ltd, which focuses on the resolution of commercial disputes.

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The Use of Med-Arb-Like Mechanisms in Italy and Other European Countries

By Renzo Maria Morresi

Well-established long-standing precedents of dispute resolution mechanisms very similar to what is now known as med-arb exist in Italy and in a number of other European countries and may offer valuable insight into both the possibilities and the limitations of med-arb.

Italy—“*Arbitrato Irrituale*” or “Contractual” Arbitration

The fact that arbitration was addressed in a section of the Italian Code of Civil Procedure of 1865 entitled *Of Conciliation and Compromise*, suggests just how closely related mediation and arbitration have always been considered in Italy.

Since then, two distinct forms of arbitration have developed in Italy: “procedural” or “*rituale*” arbitration, which is virtually identical to litigation except that the neutral decision-maker is not a judge, and “non-procedural” or “*irrituale*” arbitration, also referred to as “contractual” arbitration, the principal goal of which is to identify a solution acceptable to both disputing parties. This second type of arbitration, which is not conducted in accordance with the rules of civil procedure, often closely resembles med-arb in that (i) the neutral decision-maker first tries to facilitate a settlement of the dispute and only resorts to a finding if settlement proves impossible, and (ii) the finding itself has the value of a settlement, rather than that of a judgment, and is not subject to judicial review as to the manner in which the arbitrator reached the finding, except in certain cases described in greater detail below (e.g., failure of the arbitrator to abide by the instructions given to him by the parties as a condition for the validity of the arbitral award, mistake or fraud).

Contractual arbitration first developed in Italy as a practice, essentially unregulated by legislation and, according to most scholars, was a reaction to the very restrictive set of rules governing arbitration in the Italian Code of Civil Procedure. It is likely, however, that contractual arbitration was also greatly encouraged by the fact that, until 2006, a mandatory registration tax was payable on both court judgments and procedural arbitral awards (which were and still are considered equivalent to court judgments). Contractual arbitration avoided this tax.

In contractual arbitration, the disputing parties would submit their controversy to a third party (the contractual arbitrator) who had agreed with them to try to facilitate a settlement between them, by means of a joint power of attorney supplemented by a blank sheet of paper signed by the parties. In this case, the contractual arbitration agree-

ment often contained binding instructions from the disputing parties to the contractual arbitrator as to how he or she should carry out the task and write the contractual award (actually the settlement agreement written by the contractual arbitrator on behalf of the parties in dispute) on the blank sheet of paper. Moreover, the joint power of attorney often contained the express written undertaking of the parties to abide by the settlement agreement written by the contractual arbitrator as if it were a settlement agreement entered into by the parties themselves without recourse to an arbitrator.

In the first Italian Supreme Court of Cassation case concerning arbitration conducted outside the scope of codified arbitration rules, the court stated that “[t]wo or more businessmen may validly undertake to entrust their controversies to one or more third parties and to follow their determinations. Such an obligation does not amount to a judicial arbitration in accordance with the rules of civil procedure. The party that refuses to abide by the determinations of the third party is liable for breach of contract.”¹

Legislation concerning contractual arbitration was enacted only recently,² first in the context of company law (2003)³ and then Article 808-*ter* of the Italian Code of Civil Procedure (2006), providing that “the parties may, by means of a written agreement, agree that . . . the controversy be settled by arbitrators through a contractual determination.”⁴

There are court decisions concerning how the joint power of attorney should be conferred upon the contractual arbitrator, which decisions clarify that, in order to qualify the arbitration as contractual with all ensuing consequences, the power of attorney must expressly empower the contractual arbitrator to write an equitable settlement agreement in the interest of both parties. If the contractual arbitrator succeeds in helping the parties reach a settlement agreement (which necessarily requires consultations with both sides, making the process comparable either to a form of modern day mediation, or to med-arb or to arb-med, depending on which course is followed and its outcome), he or she then writes up that agreement on behalf of and in the interest of the parties. If no agreement can be reached, the contractual arbitrator writes an equitable settlement decision resolving the dispute in the manner he or she deems most appropriate in accordance with the mandate given to him or her by the parties.

Such a contractual determination, unlike the arbitral award resulting from procedural (*rituale*) arbitration,⁵ does not have the same effects as a court judgment and cannot be enforced as such. It is binding on the parties the same way that a settlement agreement would be but it can be the subject of further arbitration or litigation in certain cases (e.g., in the event of breach of the settlement agreement). Pursuant to Article 808-ter of the Italian Code of Civil Procedure, the contractual arbitral award may be set aside in certain circumstances, many of which overlap with those for the setting aside of procedural arbitral awards (e.g., where the arbitrators have exceeded the powers delegated to them by the parties or have failed to abide by the instructions given to them by the parties as a condition for the validity of the award or where the right of both parties to be heard has been violated). However, unlike procedural arbitral awards, contractual arbitral awards may also be set aside for many of the same reasons that contracts may be voided (e.g., mistake, duress, fraud). Aside from the above-mentioned limitations, or rules to which the contractual arbitrator is subject, he or she is free to decide a case as he or she deems appropriate, in his or her discretion, and his or her decision will not be subject to judicial review.

The Netherlands—*Bindend Advies*

Bindend advies (binding advice) developed at Dutch law along with arbitration in the second half of the 19th century in the construction industry, and was seldom used in practice until the 1970s when Dutch citizens and consumers in particular became increasingly dissatisfied with the operation of the court system. A trend of settling disputes through so-called *Geschillencommissies* (Dispute Committees) developed.⁶ These *Geschillencommissies* are generally composed of an independent lawyer as a chair person, assisted by a representative of a consumer organization and a representative of the relevant trade association. If a business's general conditions of contract, signed by the consumer for acceptance, state that the business is a member of a trade association bound to accept the decision of an institution for the out-of-court settlement of consumer disputes (a "commission for conflict settlement"), then any such dispute is so settled out of court and can only be taken to court on very limited grounds (such as violation of the right to be heard). In practice, these disputes are seldom taken to court.

The only practical difference between arbitration and *bindend advies* is that, while arbitration and court proceedings are alternative to one another, *bindend advies* and court proceedings are not in theory, although they almost always are in practice.

Like the Italian contractual arbitral award, the *bindend advies* is not enforceable as a court judgment. If a party fails to comply with the *bindend advies*, the

non-compliance may be the basis for a lawsuit, much like breach of contract. The *bindend advies* would therefore appear to be very similar to a settlement agreement written by the Dispute Committee rather than by the parties.

Germany and Switzerland—*Schiedsgutachten*

Pursuant to article 317 of the German Civil Code (BGB), the parties to a contract may entrust a third party with the equitable or free determination of issues of fact concerning contract performance. Where free determination is chosen and the parties agree not to have recourse to the courts in connection with the third party's determination, that determination (called *Schiedsgutachten*) plays a role very similar to that of a contractual arbitral award under Italian law.⁷

German court judgments have distinguished different types of such third-party determinations: to fill gaps in contracts, to adapt contracts to changes, to clarify ambiguities in contracts, and to ascertain relevant issues of fact such as costs, values and measured quantities. Although these mechanisms are not structured as mediation, they would appear to serve a very similar function. In practice, the appointed third party tries to find a solution acceptable to both parties, rather than deciding which party is right and which is wrong. *Schiedsgutachten* may seem closer to the expert determination or technical expertise common in international practice,⁸ but where such expert determinations are carried out in an adversarial context, it is almost inevitable, in practice, that the expert will seek a solution acceptable to both parties, rather than decreeing a winner and a loser (such is the case under the International Chamber of Commerce Contract Adaptation Rules). In all these cases, it is clear from German law that these awards are contractual and not judicial in nature.

Swiss *Schiedsgutachten* are very similar to German ones and the Swiss courts carefully distinguish them from arbitration. The Swiss Federal Court has explicitly stated that *Schiedsgutachten* are not enforceable as court judgments.

Problems Arising in Connection with Contractual Arbitration

The Italian experience with contractual arbitration has revealed some of the limitations of this med-arb-like mechanism. In particular, there may be problems with the enforcement of the agreements reached with the help of contractual arbitrators or with the "equitable settlement decisions" written by them. Moreover, the role of the contractual arbitrator, who acts first as a sort of mediator promoting a settlement between the parties and then, if that is unsuccessful, as an arbitrator/decision maker, may not be entirely compatible with the principles of impartiality and confidentiality central to procedural arbitration.

Applicability of the New York Convention of 1958 to Contractual Arbitral Awards

There are differing opinions as to whether contractual arbitral awards should be able to benefit from the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In 1981, Germany's highest court denied enforcement of an Italian contractual arbitral award on the ground that the award did not entitle the holder to the same rights to levy and execution on the award as those enjoyed by the holder of a court judgment.⁹ However, the Italian Supreme Court of Cassation has ruled that contractual arbitration is just a form of arbitration and could therefore benefit from the New York Convention.¹⁰ Moreover, Piero Bernardini, a leading Italian arbitration expert, very persuasively argues that Articles I and V(1)(e) of the New York Convention do not require that the award, in order to be enforceable abroad, be jurisdictional in nature in the legal system in which it was rendered, but rather that it be binding on the parties, which the contractual arbitral award clearly is. In the U.S., the Second Circuit considered the arguments for and against enforcement of an Italian contractual arbitral award under the New York Convention, concluding that there were compelling arguments on both sides but leaving decision on the matter for another day since resolution of this issue was not necessary to the disposition of the case.¹¹

Issues of Impartiality and Confidentiality in Contractual Arbitration

As the Italian Supreme Court of Cassation has expressly acknowledged, the protections built into the Italian legal system with a view to ensuring the impartiality of judges and procedural arbitrators do not apply to contractual arbitrators.¹² Whereas a judge or procedural arbitrator who has a personal interest in the matter in dispute or who was previously involved in the case in some capacity (e.g., as an attorney, witness, consultant or as a judge/arbitrator in an earlier phase of the case) may be disqualified,¹³ a contractual arbitrator who has acted, unsuccessfully, to promote a settlement between parties, then goes on to draft an "equitable settlement decision" without any risk of disqualification. According to the Court, the contractual arbitrator must carry out the mandate given to him by the parties and if he does so in an inequitable manner, he will be liable to the damaged party.¹⁴ In other words, the contractual arbitrator, whose relationship with the parties to the dispute is essentially contractual, is subject to the obligation of good faith and fair dealing inherent in any contract,¹⁵ and it is on this obligation, rather than procedural rules such as those intended to ensure the impartiality of the decision-maker, that the parties must rely for protection.

In the context of contractual arbitration, good faith and fair dealing are the principles obliging the arbitrator

fully and scrupulously to carry out the mandate given to him or her by the parties.

So far there do not appear to have been any cases in which Italian courts actually set aside contractual arbitration awards on the ground of bad faith, although many court decisions refer expressly to the theoretical application of this principle to contractual arbitration.¹⁶ The difficulty of proving bad faith may explain the scarcity of challenges to contractual arbitration awards on this ground of violation of the arbitrator's obligation of good faith and fair dealing.

According to at least one scholar, the contractual arbitrator's obligation of good faith entails a specific obligation to avoid *ex parte* communications concerning the case.¹⁷

In France, in a much discussed case concerning a med-arb in which the same people had served as mediators and as arbitrators, the Court of Cassation also emphasized the importance of ensuring confidentiality in such proceedings.¹⁸ The party that lost the med-arb alleged that the arbitrators had not been impartial, essentially because they had previously served as mediators in the same case, but did not offer evidence of specific acts or conduct by the arbitrators showing bias. In upholding the arbitral award, the Court underscored the fact that the plaintiff had claimed a violation of the arbitrators' obligation of impartiality but not the violation of a confidentiality obligation,¹⁹ suggesting that if the plaintiff had proved a violation of a confidentiality obligation by the arbitrators, the arbitral award may have been set aside.

Neither the French court nor the Italian scholar seems to consider that, in the initial mediation-like phase of the contractual arbitration (or the mediation phase of a med-arb as the case may be), such an obligation may unduly hamper the contractual arbitrator's or mediator's efforts to promote a settlement between the parties. In his role as mediator, a certain amount of flexibility may be required in deciding when to discuss the case and possible settlement proposals with both parties together and when to address the parties separately. Further, it should be noted that the fact that the parties' conduct in the mediation phase could then be evaluated in the arbitration (or judicial) phase by the arbitrators (or by the judge) is very likely to negatively affect their freedom to state their positions in the mediation phase in order to reach a settlement.²⁰

In France, again, the Centre de Médiation et d'Arbitrage de Paris has identified a clever solution to the problem of confidentiality and the duty to avoid *ex parte* communications in the context of med-arb by providing for simultaneous and parallel but independent mediation and arbitration proceedings in the same case, using different individuals as mediators and as arbitrators.

Conclusion

Practitioners active in the field of med-arb may not be aware of the existence of these similar dispute-resolution mechanisms that have been used in Italy and other European countries for decades. Those practitioners may be well served by familiarizing themselves with these mechanisms and with their evolution over time as the European experience may provide insight into some of the problems med-arb practitioners may encounter as well as possible solutions to those problems.

Endnotes

1. *Ruschetti v. Butet Frères*, Cass. Torino Dec. 27, 1904, in Riv. Dir. Comm. 1905, 2. This translation and all other translations contained in this article are those of the author.
2. However, related legislation already existed, namely article 1349 of the Italian Civil Code concerning *arbitraggio* in Italian (as opposed to *arbitrato*, or arbitration). Article 1349 provides that:

[i]f it is agreed that the determination of the content of the performance of a contract is to be made by a third party and it does not appear that the parties wanted him to decide of his own free will [literally: “arbitrarily,” *i.e.* in a wholly discretionary manner, by use of *arbitrium merum*] the third party must proceed with an equitable evaluation” [*arbitrium boni viri*, or “judgment of a good man”]. If the third party does not reach a decision and/or if the decision is manifestly inequitable or made in error, the determination will be made by the court.

If, instead, the parties agreed that the determination should be made by the third party of his own free will [literally: “arbitrarily”] “said determination cannot be appealed unless the appeal is based on evidence of bad faith by the third party. In this case, if the third party does not reach a decision and the parties cannot agree on a substitute [for the third party], then the contract is null and void [...]”.

Article 1349 *arbitraggio* clearly refers to the filling of pre-determined gaps in a contract, rather than to the resolution of a controversy. Aside from this underlying difference in purpose, however, contractual arbitration and *arbitraggio* based on article 1349 of the Italian Civil Code are substantially identical and neither is subject to judicial review as to the discretion of the third party decision-maker.
3. Art. 34, paragraph 1 of Legislative Decree no. 5 of January 17, 2003, which amended Italian Company Law, provides that the articles of incorporation of companies the shares of which are not publicly traded pursuant to art. 2325-*bis* of the Italian Civil Code, may include arbitration clauses providing for the arbitration of disputes regarding the relations between shareholders and those between shareholders and the company. Art. 35 of the Legislative Decree makes it clear that said clauses may provide for either procedural or contractual arbitration.
4. If the arbitration clause or agreement of the parties does not expressly state that controversies will be settled by arbitrators through a contractual determination, then the rules applicable to procedural arbitration will apply.
5. An award rendered by arbitrators in compliance with the rules of civil procedure is perfectly equivalent to a court judgment from the time of the signature of the award by the sole arbitrator or by the last of a panel of arbitrators (Italian Code of Civil Procedure, Art. 824-*bis*).
6. In 2002 there were 28 such Dispute Committees. A. de Roo and Rob Jagtenberg, *Mediation in the Netherlands: Past—Present—Future*, 6.4 ELECTRONIC JOURNAL OF COMPARATIVE LAW (December 2002).
7. However, Giorgio Bernini, the former president of the ICCA, very carefully distinguishes between the two. See Bernini, *The Enforcement of Foreign Arbitral Awards by National Judiciaries: A Trial of the New York Convention’s Ambit and Workability*, THE ART OF ARBITRATION (1982).
8. The International Chamber of Commerce has Rules for Expertise providing that the expert may make findings which are not binding on the parties *per se* but which the parties may agree will be binding, in which case they are binding as a contractual undertaking.
9. *Compagnia Italiana di Assicurazioni v. Schwarzmeer und Ostsee Versicherungsaktien gesellschaft*, BGH, 08-10-1981—III ZR 42/80, in NJW 1982 V. 22, 1224.
10. Judgment No. 4167 of Sept. 18, 1978.
11. *Europcar Italia SpA v. Maiellano Tours, Inc.* 156 F.3d 310 (2nd Cir. 1998). The Second Circuit ultimately remanded to the District Court for reconsideration of the question of whether enforcement should have been adjourned pending a decision on an application to set aside the award filed in Italy.
12. Cassazione Civile, sec. II, case no. 13701 of June 25, 2005 in Giust. Civ. Mass. 2005, 6. See also Cassazione Civile, sec. I, case no. 7045 of May 29, 2000 in Giust. Civ. Mass. 2000, 1133.
13. Italian Code of Civil Procedure, Arts. 51, 52 and 815.
14. Cassazione Civile, sec. II, case no. 13701 of June 25, 2005 in Giust. Civ. Mass. 2005.
15. F. Benatti, *Arbitrato irritale: deontologia ed etica*, I RIV. TRIM. DIR. PROC. CIV. 131 (1999).
16. Cassazione civile, sec I, case no. 7654 of May 16, 2003; Cassazione civile, sec. I, case no. 3463 of March 9, 2001.
17. Benatti at 132.
18. Cass. Civ 2e, case no. 01-16.628 of July 10, 2003, D. 2004 no. 44, p. 3180.
19. *Id.* at note 16: “ Mais attendu que les conclusions du CMNF avaient invoqué une atteinte à l’impartialité objective du tribunal arbitral du fait de la mission de conciliation qu’il avait préalablement exercée, mais non la transgression par lui d’une obligation de confidentialité à l’égard des informations recueillies dans la phase de conciliation (...)”.
20. This was noted with reference to Art. 40, paragraph 5 of Legislative Decree no. 5 of Jan. 17, 2003, which provides that the positions taken by the parties before the mediator shall be taken into account by the judge in the possible subsequent judicial proceeding for the purpose of his decision concerning legal fees, see Luca Negrini, *Della conciliazione stragiudiziale*, in *Il nuovo processo societario, commentario diretto da Sergio Chiarloni*, Bologna, Zanichelli, 2004.

Renzo Maria Morresi is an Italian lawyer and the founder of Studio Legale Morresi with offices in Milan, Bologna, Treviso and Brussels. His practice focuses on international commercial transactions and disputes. Since 2003 he has also been a professor under contract with the Polytecnico di Milano, where he teaches courses on international contracts. He also teaches at the MBA and courses of the MIP, the postgraduate school of the Milan Politechnic. He can be reached at morlex.bologna@morresi.com.

Perspectives from Japan: A New Concept in Dispute Resolution—the Mediation-Arbitration Hybrid

By Haig Oghigian

Introduction

As formal dispute resolution (i.e., arbitration) is beginning to mirror litigation in both time and expense, lawyers practicing in the international marketplace should examine other ADR options to better serve parties in a dispute. One alternative (often described as mediation/arbitration) involves, in essence, the same individual acting in the capacity of both mediator and arbitrator.¹ While a devoted convert to ADR, I must confess that I am still enough of a barrister that I twinge at the notion of the same person wearing one hat, taking it off for another and, perhaps later, going back to the first hat. Some of the discomfort is, of course, based on a sense of propriety of one's own ability to juggle these roles while feeling skeptical about another's ability to do so. When sitting as mediator I have no doubt of my own impartiality and ability to not let what I may have learned in, say, a break-out session, influence my impartiality should I then find myself as the adjudicator in the same matter. On the other hand, if I am acting as counsel I would be, depending on the situation, somewhat to extremely concerned about the appropriateness of such structure. It's a bit like one of those irregular verbs: *I* . . . am impartial; *you* . . . are; I'm sure capable of being impartial; *he* . . . is likely biased.

"Many have commented on the dispute resolution practices of the Japanese people, their aversion to conflicts and their reluctance to use formal dispute resolution methods that subjected their disputes to third-party determinations."

Nevertheless, if we are to make ADR a flexible, forward-looking and useful tool for our clients and the commercial process in general, it is important, I believe, to examine new ideas and consider better solutions. One of the most important factors underlying the consideration of using the med/arb hybrid is that it will speed up the process and save time and cost. In turn, I believe, the underlying logic behind that reasoning is that if the same person becomes immersed in the dispute between (as well as the respective positions of) the parties, he or she will be better able to resolve, in a more time- and cost-efficient way, the problem and accord a mutually agreeable settlement.

I have recently experimented with a variation of the traditional med-arb model. I admit that it has been suc-

cessful (in the six instances I have employed it), in a particular situation with a particular background. Given the particular situations involved, some will observe that the variation has limited application to full-blown disputes. Others may also say that it is culture-bound. Both these observations may well be accurate, but I put the idea forward less to suggest it is as a panacea or that it may have application to everyone's situation than to encourage dialogue and further refinement.

Conventional Mediation/Arbitration

To qualify the phrase Mediation-Arbitration with the word conventional is a bit of a misnomer. It would be difficult, indeed, to come up with a single acceptable definition of what is involved in a "typical" med-arb process. There is, for example,

Mediate first and if mediation fails, arbitrate; start arbitration proceedings and allow for mediation at some point during the arbitration; mediate some issues and arbitrate others; mediate, then arbitrate some unresolved issues, then return to mediation; mediate, if unsuccessful ask for an "advisory opinion" by the mediator which is binding as an award unless either party vetoes the opinion within a limited period of time. Another med/arb variation growing in popularity is mediation, if unsuccessful, followed by a final offer by each side, coupled with limited argument, following which the mediator turned arbitrator must choose one or other of the offers.

Med-arb's advantage, fluidity, appears to also be its greatest disadvantage: lack of structure. This lack of structure runs headlong into the hybrid's Achilles' heel when the mediator removes his or her mediator cap and changes roles to arbitrator. Nevertheless, in many jurisdictions, including Japan where I practice, this is not seen to be as serious an issue as in many jurisdictions that are based on the common law.

Mediation/Conciliation in Japan and Its Implications on Arbitration

Throughout the years, many scholars and practitioners alike have commented on the dispute resolution practices of the Japanese people, their aversion to conflicts and their reluctance to use formal dispute resolution methods that subjected their disputes to third-party deter-

minations; hence, the preference for the use of mediation/conciliation. Indeed, Japan has a long history of mediation/conciliation approaches, be they the court-annexed mediation system (“chotei”), amicable settlement suggested by judges, mediation or conciliation sponsored by the government administrative agencies, or those organized by private institutions or organizations such as the Bar Association Arbitration Center (while it is named the Arbitration Center, the process is really more mediation than arbitration). More recently, the Law Concerning the Promotion of the Use of Alternative Dispute Resolution Procedures (the “ADR Law”) was promulgated in 2004 to facilitate citizens’ selection of private means for the resolution of their disputes.

The use of mediation/conciliation has led to what some commentators believed to be a “unique feature” of arbitration in Japan—that is, combining conciliation with arbitration. Both Japan’s Arbitration Law (Article 38) and JCAA’s Arbitration Rules (Rule 47) allow an arbitrator to act as a mediator, provided that the parties consent to it. While Rule 47 allows such consent to be made orally, the Arbitration Law attempts to place a stricter safeguard to the parties’ interest and prevent future disputes by stating that such consent and its withdrawal shall be made in writing.

The attempts to safeguard the parties’ interests through party consent notwithstanding, as a practical matter, at least in my practice (since typically one of the parties will be from an Anglo-American based system), the idea of the same individual shifting from mediator to arbitrator or, even worse back again, is an anathema.

Med-Arb’s Achilles’ Heel

The problem might be better expressed as: the mediator who has now become an arbitrator may have developed a skewed view of a position which my client may not have an opportunity (or ability) to set right. It’s a variation of the classic tautology: I can’t tell you what you don’t know because I don’t know what you don’t know. Likewise, I (i.e., counsel) can’t correct a misrepresentation which may have been made to you (i.e., the mediator/arbitrator) in a break-out session because I don’t know what may have been said, nor can I gauge what evidentiary weight you’ve already given it in your mind. It’s not so much, as has been said, that you are no longer impartial as that I have no effective method of determining if there has been a “bias” formed. Like most risk-averse people, and employing a quick risk analysis, I’d rather not take a chance if my sense is that I might lose, so it is easier to not take a chance.

A Possible Alternative

As suggested at the end of the introduction to this article, I have experimented with a structure of the traditional hybrid formats involving mediation and

arbitration which, in my experience, does a good job of protecting from the Achilles’ heel exposure. It is too facile to dismiss it out of hand and I ask the reader to bear with me as I attempt to give a full accounting and not be tempted to engage in the equivalent of a philosophical “drive by shooting.”

I admit, at the outset, that in the six instances where I have employed this concept, the parties, though in a significant commercial dispute, expressly stated their intent to continue their business relationship and had (at least so they said to me and to each other) no intention of terminating their relationship. In addition, in all three cases, one party was Japanese and the other American. I draw no particular conclusion or inference from that fact but simply state it as a common feature for the record.

It dawned on me that the most effective way to disarm a possible challenge to my ability to maintain my impartiality in both the role of an arbitrator as well as mediator was to switch the order of my functions; that is, arb-med rather than med-arb. Therefore, the meetings began much the same way as a full-blown arbitration hearing begins with briefs prepared in advance of the hearing date and full formal presentations by the parties to the single arbitrator.

After free and full questions, answers and dialogue (the shortest period was one day, the longest, three) in the context of a hearing, I, in all cases, adjourned and went off to prepare a formal arbitral award advising the parties that I wished to meet with them the next (or in one instance the following) morning to provide them with my award.

At the meeting, I placed an envelope on the table which contained two copies of my full arbitral award, signed and sealed. I informed the parties that I was now fully discharged, and vacated, of my duties and office as an arbitrator.

I then suggested to the parties that if they both wished and both agreed, I would be prepared to attempt to mediate the dispute between them. The rules were that they had to agree to this in writing and all of us (each party as well as myself) would, at any time, be free to stop the proceedings and call for a termination of the process.

In all three cases, the parties eagerly accepted the suggestion for mediation because neither party wanted to see what the envelope contained. Of course, the envelope, to one degree or another, proclaimed a winner and loser. Particularly where the parties apparently expected to continue a business relationship, this all-or-nothing solution was judged to be better avoided if possible. In all three cases, the matter was successfully mediated and settled.

I might say that the parties were much more focused during the mediation part of the process. Because they felt that they had been given a full chance, in the adversarial sense, to put forth their case in its best possible light, this

resulted in less grandstanding and belligerency during the post-arbitral mediation. There was a clear atmosphere, motivated much more purely to avoid a win/lose situation and to focus on compromise to achieve settlement. At the same time, my role as a mediator became liberated and empowered. Liberated because I could be assertive (in a positive sense) and somewhat opinionated without ruffling feathers or risking the possibility that someone could claim bias. My arbitral award was already on the table and, after all, at any point either party could end the mediation. Empowered because I now knew the soft spots of each party's case and could "move" them toward seeing a possible compromise solution with a free hand and foreknowledge. In essence, I was able to avoid the risk of bias.

In short, I was able to play a much more effective role as a mediator where I was vacated of my responsibilities and duties as an arbitrator and could (importantly), by agreement and voluntarily, bring out the interests and weaknesses of the parties in order to expand the dialogue and achieve settlement.

A final advantage of the *modus operandi* above is that it avoids another common problem of med-arb wherein, if it is understood that the mediator will become the arbitrator in due course, the parties may well use the process to present their position not with a genuine view to achieving a settlement but rather, tactically, to lay the groundwork for the subsequent adjudicatory phase of the process.

Conclusion

The suggestions put forward have not been made to provide a panacea for all the problems associated with the mediation-arbitration hybrid raised by commentators. Nor are they meant to be viewed as being applicable to all situations where the hybrid may be effectively employed. Rather, they are meant to stimulate dialogue and attract comments from other practitioners and academics who may have innovative suggestions on how to better make the med-arb hybrid an effective tool for alternative dispute resolution.

Endnote

1. David C. Elliott, *Med/Arb: Fraught with Danger or Ripe with Opportunity?*, 62 *The Journal of the Chartered Institute of Arbitrators*, 175 (1996).

Haig Oghigian, F.C.I. Arb., Haig.Oghigian@BAKERNET.com, is a partner and co-chair of the Litigation & Arbitration group of the Tokyo office of Baker & McKenzie. Mr. Oghigian has represented Japanese and international clients in the fields of international dispute resolution and commercial arbitration. He has appeared both as Counsel and Arbitrator before the International Chamber of Commerce (ICC), the Japan Commercial Arbitration Association (JCAA), the American Arbitration Association and many other arbitral institutions.

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Muslims' and Arabs' Practice of ADR

By Nabil N. Antaki

All Muslims are not Arabs and all Arabs are not Muslims, and it is difficult to compare the legal environment and political structure of countries as different as Egypt, Syria, Sudan, the Emirates and Saudi Arabia. However, Arabs and Muslims of the Middle East speak the same language and share a great deal of history, culture and aspirations. They approach disputes and their settlement in the same way. This approach is tinted by Islam and the fact that Arabs and Muslims are of a communitarian culture as opposed to North Americans, who are of an individualistic culture.

Arabs and Muslims traditionally do not distinguish arbitration and mediation. They have an integrated approach to disputes. This approach is shared by many other traditions and may be more appropriate in some cases than the Western distinction of the two processes.

The Western Approach to the Settlement of Disputes

The world is indebted to Western European and North American practitioners and academics for the development of a nearly homogeneous culture of international arbitration rooted in civil and common law. These systems focus more on the proper application of the principles of due process than on safeguarding interpersonal relationships.

Mediation is very different from arbitration. It is an attempt at negotiation between parties who, assisted by a third party, communicate, interact, explain themselves, control their emotions, put forward solutions and agree to concessions with the aim of reaching a settlement. The act of negotiation requires very specific skills that fall essentially within the field of communication rather than law, because what is needed is an ability to seize and interpret perceptions and to read between the lines. In order to fulfill their obligations under the process of mediation in an international context, the parties and the neutral must be in a state favorable to constructive exchanges, i.e., capable of interacting culturally.¹

Western dispute-settlement specialists developed mediation and arbitration as two processes hermetically separated by a high and thick Chinese wall. They recommend that the neutral who tries settling a case be different from the one who decides it. They argue that mediation and arbitration are very different in nature, that they need different qualifications and abilities. They believe that the complete separation of the two processes is needed to preserve the integrity of both mediation and arbitration, confidentiality and the impartiality of the neutral. "Real mediation" is said to be a "structured negotiation

conducted by a specially trained expert, a mediator. The mediation process is a separate and self-contained process that has a beginning, middle and end."²

Western settlement-disputes specialists recognize, of course, that the parties may agree to a hybrid or integrated procedure. The famous *IBM and Fujitsu* arbitration in the 80s was a good example of how imaginative arbitrators can structure innovative approach to complex disputes.

The face of ADR is going through a fast-rejuvenating process. Even the concepts of confidentiality and neutrality, deemed to be of the essence of ADR and arbitration, are revisited by seasoned practitioners.³ Moreover, ADR has to face the pressure of an integrated world economy and the expectations of new business partners from different cultural backgrounds. New environments trigger new approaches. It is well known, for instance, that in China and other Asian countries arbitration and mediation are fully integrated. Accordingly, one should not be surprised that California and British Columbia adopted similar legislation allowing arbitrators to mediate disputes.⁴

The Social Structure of the Arab and Muslim Societies

Ethnologists and sociologists distinguish two types of societies: "communitarian societies" and "individualistic societies."⁵ Middle Eastern Muslims and Arabs are "mainly communitarian," while Western societies are "mainly individualistic."

Generally speaking, communitarians are less "rational," less "legalistic" and by far less "litigious" than Europeans and North Americans.

In the Arab and Muslim predominantly communitarian societies, individuals have a natural feeling of belonging to their family and social group. Every member of the group owes respect to those above him or her on the social ladder and protection to those below. More importantly, everyone takes care not to lose face and to let others save theirs. The art of implying, of significant silences, of indirect messages and deliberately unclear arguments has been refined to a point of paroxysm. People have recourse to it in order to communicate messages without hurting others' self-respect or encountering refusals.

Arabs and Muslims rely heavily on oral communications. They are outspoken and their discourse is open ended. Business persons keep much less written evidence than in the West, take into consideration all the pre-contractual negotiations, and are always keen to renegotiate unpredicted conditions. They rely more on oral commit-

ments and permanent accommodations than on written and signed documents. Time is less a value in the Arab world than it is in the West, so the fast settlement of the dispute is often less important than preserving, as much as possible, social harmony.

The communitarian tradition of Arabs and Muslims reflects on the judicial organization and the practice of mediation.

The Muslim judge's approach to justice is more suitable to a communitarian society than the approach of his Western colleague of a more individualistic tradition. The Muslim judge, the *qadi*, enjoys great procedural freedom. He is not subject to the same constraints as his modern Western equivalent. The judge and the parties are partners who owe the truth to God. In today's language it could be said that the parties themselves are also "officers of justice." They have a moral obligation to strive, together and with the judge, to clarify the facts, establish the truth and find the appropriate principles of *Shari'a* to be applied. In order to accomplish his mission, the judge—like the Muslim arbitrator in fact—has a duty of conciliation and powers similar to that of the *amiable compositeur*. Thus, Muslim tradition knows measures akin to case management, pre-trial conference, judicial mediation and even compulsory mediation, all of which were recently introduced in Western jurisdictions.⁶

The Muslim judicial model protects reputations and limits the social cost of disputes in a communitarian society. The Muslim judge is naturally more of a conciliator and mediator than his Western colleague and the Muslim party is encouraged to be less vindictive and aggressive than its Western equivalent.

We can distinguish two main ADR cultures. The first, intuitive, informal and traditional is widely practiced in the communitarian Arab and Muslim societies. The other, mostly based on scientific premises, is more cognitive and formal and is followed in the Western predominantly individualistic societies.

Safeguarding the harmony within the social or professional group to which the parties belong constitutes an important objective of the informal process. The traditional and informal mediation is practiced by a third party well-known to the disputants, who is personally involved in the process and who offers a solution that the parties will be morally bound to honor.

The Arab and Muslim ADR Process

In the Muslim and Arab traditions the mediator presents guarantees comparable to those imposed by modern ethical codes but, in the absence of normative texts, the sanctions for professional misconduct are socially based.⁷

The parties do not ask themselves whether they are in the presence of a mediator or of an arbitrator. They place themselves entirely in the hands of a person whom they know, respect and believe to be capable of helping them out of the deadlock.⁸ Therefore, unlike in the scientific practice of mediation, the parties to intuitive mediation do not wish to control the process. This possibility is not even suggested to them. Moreover, the status and the prestige of the intermediary oblige the parties, morally and socially, to accept "his solution." The parties cannot allow themselves to breach the tradition.

The traditional mediator intuitively follows the various stages of scientific mediation. In particular, he establishes his legitimacy from the beginning, as his colleague in Manhattan does, but he counts, above all, on his gut feeling, his sense of justice, and his experience of life as well as his close knowledge of the persons and their environment, rather than on knowledge-based norms.

At the beginning, he will undoubtedly be sure to make the equivalent of what is usually called an "opening declaration," but the content of the message is different. For example, he may say that he has the interests of the community at heart and that he wants the two parties to come to an understanding because he loves them "like his own children!" This language would be considered inappropriate by most ADR professionals. He will not feel the need to "set out his road map" in order to establish his credentials.

The mediator will listen to the parties and their witnesses, if any. He will ask them the questions that he considers to be useful to supplement the information he has and to verify the feasibility of various options. He will, however, end up morally compelling the parties to abide by the solution he considers best. The Arab and Muslim mediator thus practices an extreme form of the evaluative approach, rejected by American doctrine.

The Muslim mediator will use all the means available to him to bring the parties together. His arguments are usually of a personal and subjective nature. He will remind them of their obligations to their families, their community or their business partners and even to him. He may say to a party, for example, "Do not make us the laughing stock of the community," or "Do not bring shame upon my old beard," or even order one to "kiss the other party's moustache for forgiveness."

He could call on the adversaries to be reconciled for the sake of their dead parents' memory. It may even be that the parties will play the game and accept the proposed solution 'just to please' the mediator! Everyone has his or her own reason to take part in this role-play. The parties will remember that the mediator has done them a service, and he will not forget that they have strengthened his social position.

The Arab and Muslim Approach Works

Contemporary Arab and Muslim societies, even the richest, most Westernized or most economically developed ones, are still closely knit traditional societies where family, community and business ties are significant and important. They remain much more traditional in their way of thinking than a foreign observer could hardly imagine. Social conventions dictate behavior and everyday language is loaded with ancient values.⁹

In these societies it is, indeed, extremely rare, almost inconceivable even today, for a legal action to be taken against a business partner, a family member, a neighbor, an employer or an employee without it having been preceded by a long period of negotiations and many amicable interventions on the part of friends, business partners or other people close to the parties involved.¹⁰ The mediator is rarely a professional mediator or arbitrator and his services are usually free.

Arabs and Muslims of the Middle East are also successful traders. They have always been involved in international negotiations and structured dispute settlements but they still follow, as often as possible, their ancestral traditions of recourse to trusted “semi-arbitrators.”¹¹ They are today very present in international *ad hoc* and institutional arbitrations and their particular communitarian approach to disputes is perceivable and sometimes misunderstood.

An international arbitration where Arab and Western arbitrators and counsels successfully adapted the arbitration rules to the local situation and mediated the disputes with the tacit consent of the Western party is a good example:

An Arab State, the owner, intended to build a highway across the desert. The contractor was a well-known German engineering firm that had long experience in the country. At a certain point the State stopped paying the contractor. Both parties claimed to have terminated the contract for cause. The parties could not reach an amicable settlement and the dispute resulted in an UNCITRAL arbitration commenced by the German contractor against the Arab State owner.

The State was represented by the head of its legal department, who nominated his predecessor as arbitrator. The claimant did not object.

The claimant was represented by a German law firm who designated an Italian lawyer as arbitrator. The parties asked an Arab arbitrator who lives and practices abroad to chair the proceedings.

The three members of the Tribunal were experienced and culturally connected to the region.

The relationship between the members of the Tribunal was excellent. However, the owner’s representatives,

counsels and their arbitrator were openly and permanently communicating with one another. The owner was very ingenious in trying to delay and block the arbitration and his arguments were relayed by “his” arbitrator. The claimant’s counsel and claimant’s nominated arbitrator did not object to this behavior.

At the end of a very serious deliberation, when the award was ready to be signed, the owner’s arbitrator asked that the meeting be adjourned until next morning. In the morning he reported to his colleagues that the owner would be ready to pay the contractor if the amount allowed for damages was 20% less than the Tribunal’s evaluation and no interest was awarded as such. The two remaining arbitrators were not the least surprised.

The contractor’s arbitrator suggested that the amount awarded as interest be qualified differently and negotiated an increase of the total amount offered. Finally, after a few phone calls to unidentified persons, the two co-arbitrators agreed on the amount. It was obvious that the co-arbitrators obtained the parties’ approval. The Chair remained neutral and played a rather facilitative role.

For understandable reasons, the parties needed a regular award and not an award by consent. The Tribunal was glad to sign a unanimous award, both parties were satisfied and the contractor was immediately paid in hard currency.

This model of arbitration is frequent when all the parties and arbitrators are Arabs.

Some experienced and respected international arbitrators did not agree with this way of proceeding, and one of them even suggested that the award should have been rendered with the Chairman’s dissent or by him alone without consideration to the result.

This traditional and conservative argument may be legally sound, but the Chairman or Tribunal’s decision would have been unfortunate and contrary to the parties’ clearly expressed desire.

Endnotes

1. Important aspects of this article are reproduced with some modifications from Nabil N. Antaki, *Cultural Diversity and ADR Practices in the World*, in J. C. Goldsmith, G.H. Pointon and A. Ingen-Housz (eds.), *ADR in Business* (The Hague: Kluwer Law International, 2006), at Chapter 11.
2. Harold I. Abramson, *Protocols for International Arbitrators Who Dare to Settle Cases*, 10 Am. Rev. of Intl. Arb. 1-17, 6 (1999).
3. Bernard S. Mayer, *Beyond Neutrality: Confronting the Crisis in Conflict Resolution* (CA, Jossey-Bass, 2004).
4. Section 1297.301 of the California Code of Civil Procedure (under Part 3—Title 9.3 Arbitration and Conciliation of International Commercial Disputes) and Section 30(1) of the British Columbia International Commercial Arbitration Act, RSBC 1996, c. 233, are identical, as follows:

It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.

5. Ferdinand Tönnies, *Community and Society* (East Lansing: Michigan State University Press, 1957). Many other classifications have been suggested. For example, a study of the results of several field surveys allowed Geert Hofstede to identify five elements that characterize cultural differences: power distance, individualism versus collectivism, masculinity versus femininity, uncertainty avoidance and long-term versus short-term orientation. Geert Hofstede, *Culture's Consequences: Comparing Values, Behaviors, Institutions and Organization Across Nations*, 2nd ed. (Newbury Park, CA: Sage, 2003).
6. H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (New York: Oxford University Press, 2000) at 163-164.
7. Salah Al-Hejailan, *Mediation as a Means for Amicable Settlement of Disputes in Arab Countries*, WIPO Conference on Mediation, Geneva, 29 March 1996; online: WIPO Arbitration and Mediation Center, <http://arbitrator.wipo.int/events/conferences/1996/hejailan.html>.

8. George E. Irani and Nathan C. Funk, *Rituals of Reconciliation: Arab-Islamic Perspectives*, 20:4 *Arab Studies Quarterly* 1, at 4 (1998).
9. Raymond Cohen, *Language and Conflict Resolution: The Limits of English*, 3:1 *International Studies Review* 25, at 37 (2001).
10. Fathi Kemicha, *The Approach to Mediation in the Arab World*, WIPO Conference on Mediation, Geneva, March 29, 1996; online: WIPO Arbitration and Mediation Center, <http://www.wipo.int/amc/en/events/conferences/1996/kemicha.html>.
11. Ahmed Sadek El-Kosheri, *Is There a Growing International Arbitration Culture in the Arab-Islamic Judicial Culture?*, in Albert Jan van den Berg (ed.), *International Dispute Resolution: Towards an International Arbitration Culture* (The Hague: Kluwer Law International, 1998) 47.

Nabil N. Antaki, an Emeritus Professor of Law (Université Laval, Québec) and Member of the Royal Society of Canada, regularly acts as counsel, arbitrator and mediator in national and international commercial disputes. He is currently a Visiting Professor at the Centre for the Law of Business and International Trade (Université de Montréal). He can be reached at nnantaki@videotron.ca.

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Hybrid ADR Processes in South Africa

By Barney Jordaan

Both were happy over the result, and both rose in the public estimation. My joy was boundless. I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter men's hearts. I realized that the true function of the lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby—not even money, certainly not my soul—Mahatma Gandhi, after persuading two litigants to settle their differences

Despite the fact that several statutes provide for it, ADR processes in general are not well established or widely used in South Africa. The exceptions are disputes involving employment law, labor relations and family law. Much the same can be said of other countries forming part of the Southern African region (including Namibia, Botswana, Swaziland, Lesotho, Zambia and Zimbabwe).

In South Africa, there has of late been renewed interest among members of the legal fraternity in the use of mediation in commercial disputes. A number of private and tertiary institutions¹ have been established with the aim of promoting the use of mediation. There is also talk of government possibly lending its weight to this movement as part of its effort to improve the functioning of the judicial system in general. Exactly what form this might take is difficult to predict at this stage, but the most likely avenue is an amendment to the rules of court to provide for court-annexed mediation.

Currently, however, with the exception of employment law, labor relations and family law disputes (for which specific statutory regimes exist), ADR processes in civil and commercial disputes are conducted almost exclusively in terms of private agreements between disputants. Logistics and case management are also generally taken care of by private dispute resolution service providers.²

Aside from family law disputes, where arbitration is statutorily excluded as an option, there is no legal impediment to the use of hybrid processes such as med-arb and arb-med. Yet, as is stated below, these processes are hardly ever used outside of employment law disputes. In the latter, a variant of med-arb was in 2002 established as the default process for certain types of rights disputes in those cases where the dispute is formally in terms of the Labour Relations Act.³ As is shown below, arb-med (or, rather, arb-med-arb) is also provided for in the Act.

Unpopularity of Hybrid Processes

Mediation remains by far the process that is most used in cases where parties do agree to submit their disputes to a third party neutral. The use of hybrid processes such as med-arb and arb-med in civil and commercial disputes, generally, is virtually non-existent.⁴ The most fundamental criticism against med-arb remains that it fails

to adhere to the rules of natural justice. This is because the arbitrator, in his or her role as mediator, would have been involved in confidential discussions with one party, during which key issues could have been raised, without the other party having had an opportunity to hear and respond to what was said.

It can, of course, be argued that by submitting to the process the parties must be taken to have waived their right to object on this ground, but this does not entirely resolve the dilemma, for the parties may simply become more circumspect both in what they disclose to the mediator and in their conduct during the mediation phase, thereby inhibiting the mediation phase of the process itself.⁵

Arb-med, in turn, suffers from the criticism that, although it has the potential of leading to an outcome more acceptable to the opposing parties, it is not really more economical in terms of time and money than a conventional arbitration.⁶

The one area where hybrid processes are in regular use, as a result of an amendment to the Labour Relations Act in 2002, is in the area of employment law disputes.

Statutory Support for Hybrid Processes in Employment Law Disputes

The South African Labour Relations Act makes provision for so-called disputes of right to be resolved through conciliation first and, if that fails, through either arbitration or adjudication. Conciliation, in terms of the Act, includes mediation, fact-finding and the making of an advisory award. In practice, conciliation is a fairly robust form of mediation, with commissioners not afraid to express their views about the merits of a matter to the parties in private, and sometimes even in open session. Because of its cost-saving and case-load-reducing potential, commissioners are under pressure to settle as many disputes as possible through conciliation.⁷

Whether a dispute has to be arbitrated or adjudicated depends on the nature of the issue in dispute.⁸ The Labour Court adjudicates disputes over which it has jurisdiction, whereas conciliation and arbitration are mainly (although not exclusively) the preserve of the Commission for Conciliation Mediation and Arbitration (or CCMA).⁹ The overwhelming majority of cases that are

referred for arbitration involve dismissal for misconduct or incapacity.

Two hybrid processes are available to commissioners of the CCMA, arb/med (possibly better characterized as arb-med-arb) and con-arb.

Arb-Med and Arb-Med-Arb

The Act provides that a commissioner who has been appointed to arbitrate a dispute of right may, with the **consent** of the parties, attempt to conciliate the dispute. This can happen at any stage of the arbitration process, i.e., prior to arbitration or in the course thereof. Failing settlement, the arbitration continues. In the latter event the processes may appropriately be referred to as arb-med-arb.

Con-Arb

Con-arb is compulsory in disputes concerning the dismissal of employees on probation and alleged unfair labour practices relating to probation.¹⁰ In all other dismissal and unfair labor practice disputes, con-arb is the default process. However, any party to the dispute may object in writing prior to the event to the arbitration proceeding immediately after conciliation. In the latter event, the CCMA is obliged to split the processes and to conduct the arbitration at a later date.

It has become standard practice for lawyers acting for clients in those cases where legal representation is allowed at the CCMA to lodge an objection to con-arb as a matter of course. This is partly due to the fact that such processes are normally scheduled to take place fairly soon after the dispute had been lodged, in some cases as soon as 15 days of a referral. This obviously places an enormous amount of pressure on legal representatives in terms of preparation time. Employer advisors, in particular, also often advise clients against opting for the combined process because of a fear of possible bias on the part of the conciliating commissioner.¹¹

Where con-arb does take place, it is the norm for the same commissioner to conduct both processes, with arbitration following immediately if conciliation has failed to produce a settlement.

Although there has been an upswing in the use of private conciliation/mediation in labor disputes rather than through the CCMA,¹² particularly where disputes involve the dismissal of white collar employees and executives, anecdotal evidence suggests that hybrid processes, including con-arb, are hardly ever used in private processes. In approximately 24 years of involvement in dispute settlement, I have personally conducted only one private arb-med process in a dispute over job grading and wage levels.

The Future

The South African Law Reform Commission in 2001 recommended a complete overhaul of the Arbitration Act, 1965.¹³ Its recommendations include two separate statutes, one covering domestic and the other international arbitration. It also recommended that the UNCITRAL Model Law should not be adopted for domestic arbitrations (as opposed to international arbitrations) and, significantly for our current purposes, that parties to arbitration should also have access to med-arb or arb-med, provided they agree to it. Two policy arguments were relied on for this proposal:

First, it is notorious that commercial arbitrations are often protracted and very expensive. Therefore disputants who are interested in resolving their dispute as opposed to delaying payment should logically consider mediation as a first option. The inclusion of some provisions on mediation would indicate an official policy supportive of cost-effective and expeditious resolution of commercial disputes through mediation. Secondly, mediation as a method of dispute resolution is apparently more in keeping with traditional African methods of dispute resolution than the adversarial procedure of the (English) common law.¹⁴

Recognizing the pitfalls inherent in these processes, the Commission recommended certain safeguards in a draft bill published as part of its report. Those safeguards are contained in sections 13 to 15 of the draft bill, the essence of which is the following:

- parties must expressly agree to med-arb or arb-med;
- if the parties fail to appoint a mediator, one can be appointed for them by a court or other body with the necessary authority;
- where an arbitration agreement provides for med-arb or arb-med, a party to the agreement may not object to the appointment of the mediator as arbitrator, or to that person's conduct of the arbitral proceedings, solely on the ground that such person has previously acted as a mediator in connection with some or all of the matters referred to arbitration;
- the mediator must, where a party has chosen to disclose confidential information to the him or her during mediation proceedings, and before proceeding to act as arbitrator, disclose to all other parties to the arbitral proceedings as much of that information as the mediator considers material to the arbitral proceedings;¹⁵

- to counteract delaying tactics, if the mediation proceedings fail to produce a settlement acceptable to the parties within 28 days from the date the mediation proceedings started, or such other period agreed to by the parties, the mediation proceedings must terminate; the parties may agree otherwise;
- where an agreement provides for the arbitrator to act as mediator, he or she may communicate with the parties collectively or separately;
- settlement agreements arrived at through mediation are enforceable by the courts as an award on agreed terms; and
- arbitrators enjoy certain indemnities, also when acting as mediators.

The Commission's report also includes a draft Bill for international arbitrations which, in §§ 13–15, contain arb-med and med-arb provisions that are broadly similar to those set out above. One key exception is that parties to an international arbitration who have consented to mediation may withdraw their consent at any time. Where mediation (conciliation) is provided for in an arbitration agreement, the parties may opt for the UNCITRAL conciliation rules to apply.

Passage of the bills has been delayed and there is as yet no indication if and when they will be put before parliament.

Conclusion

In South Africa, while there is no statutory prohibition on the use of med-arb and arb-med (except in family law disputes), these processes are not generally encountered in commercial civil and disputes. However, both processes are specifically provided for in labor relations legislation. Recommendations of the SA Law Reform Commission regarding arbitration reforms, if adopted by parliament at some point in the future, will make these processes part of the standard legal landscape.

Endnotes

1. The Africa Centre for Dispute Settlement was established at the Graduate School of Business of Stellenbosch University in February 2008, with the aim of promoting the use of dialogue and mediation to resolve disputes at all levels, including civil and commercial disputes. Its patron is Archbishop Emeritus Desmond Tutu (www.usb.ac.za/disputesettlement).
2. The two leading private dispute resolution service providers are Equillore Ltd (www.equillore.com) and Tokiso Dispute Settlement (www.tokiso.com).
3. 1995, as amended. Employers, employees and trade unions are not compelled to rely on the provisions of the Act for the resolution of their disputes and may instead opt for private processes. Two of the drawbacks of the statutory process are, first, that the parties have little control over set down dates and, second, no choice of presiding officer.
4. As confirmed to the author by the private agencies referred to in *supra* note 2, with the exception of disputes in employment. Arb-

med has been used on a few occasions, but then in wage disputes, not rights disputes.

5. One option, of course, is to provide that the entire mediation process should take place in open session. See Alan L Limbury, Med-Arb, Arb-Med, Neg-Arb and ODR, <http://www.strategic-resolution.com/documents/Paper%20for%20IAMA%20Forum%203%20August%202005.doc>. Another option is to use different neutrals for the different phases, but this again inhibits the economy and efficiency of the process.
6. D. Butler & E. Finsen, *Arbitration in South Africa*, 203 (1993). The Chartered Institute of Arbitrators' policy is that it is unethical for a mediator to act as an arbitrator. It has also been suggested that irregularities in connection with the med-arb process could lead to an award being unenforceable as a result of a potential challenge under Article V of the 1958 New York Convention. See the Chartered Institute of Arbitrator News Watch, Monday June 5, 2006. But see A. Marriot, *Arbitrators and Settlement*, in 70(4) *Arbitration International* 297 (2004), who argues that too much is sometimes made of the downsides of the process.
7. For the year 2007–2008, 63% of all disputes referred to the CCMA were reportedly settled at conciliation—Tokiso Dispute Settlement, *Annual report on the state of labour dispute resolution in South Africa*, 15, Tokiso Review ('Tokiso' is an indigenous term meaning 'to settle'). At 38 the authors of the report express doubt over the accuracy of this figure, suggesting that the rate is perhaps a little optimistic. They are also "unconvinced" that the settlement rate alone is an appropriate measure of success.
8. *E.g.*, disputes over dismissals for misconduct or incapacity, as well as unfair labor practice disputes, are resolved through arbitration where conciliation fails. Disputes involving the dismissal of strikers and redundancies involving more than one person are resolved through adjudication, if conciliation has failed.
9. It should be noted that nothing in the Act prevents parties from opting for private mediation or arbitration, instead of the statutory process. While the statutory processes are used most frequently, a sizable number of employment disputes end up in private mediation and arbitration. The reasons for this are varied and sometimes include concern over the quality of commissioners, coupled with the fact that parties are not free to choose the commissioner if they opt for the statutory system.
10. *E.g.*, an arbitrary and unilateral extension of a probationary period.
11. See, *e.g.* Con-arb—good idea or bad mistake?, http://www.manufacturinghub.co.za/20081128_0001.htm and <http://www.labourlawadvice.co.za/Snippet%20-%2012%20May%202008.htm>.
12. Tokiso Review, 15.
13. In broad terms, the Act applies to all arbitrations conducted in terms of a written arbitration agreement, save where the arbitration provisions of the Labour Relations Act apply.
14. http://www.doj.gov.za/salrc/reports/r_prj94_dom2001.pdf—at paragraph 3.90 of the Commission's report.
15. The mediator is not disclosing privileged information without the relevant party's consent because that party is taken to have consented to disclosure when agreeing to the same person acting as mediator and arbitrator.

Barney Jordaan (LLB, PhD) barney@masconsulting.co.za has been extraordinary professor at the University of Stellenbosch Business School since 1998, where he teaches negotiation, mediation and aspects of management law in the MBA and executive education programs. He is also director of its Africa Centre for Dispute Settlement. Barney is a senior arbitrator and mediator, having been involved in dispute resolution in both commerce and labor since the 1980s.

BOOK REVIEW:

Full Access Passport: The Principles and Practice of International Commercial Arbitration

By Margaret L. Moses

Reviewed by Stefan B. Kalina

All those venturing into the world of international commercial arbitration will encounter strategic cross-roads. These must be navigated successfully in order to obtain or defend against an award. This single volume field survey enables students and specialists alike to see the road ahead more clearly and choose their path wisely.

Professor Moses lends a guiding hand from the very first step. Chapter 1 promptly explains that decision making in the context of international arbitration requires a full understanding of several authorities. They include the arbitration agreement itself, the rules of the chosen arbitral body, the national laws involved, methods of international arbitration practice, and applicable international treaties such as the New York Convention. Using the helpful icon of an inverted pyramid, she moves readers from the specific components of this regulatory framework to the more general. In the process, she creates a solid foundation for learning the basic principles of arbitration generally and international commercial arbitration specifically.

Professor Moses then proceeds to treat each step of the process in separate chapters that follow the sequence of arbitration itself. She begins with the threshold choice to arbitrate and ends with post-judgment enforcement. Within each chapter, the reader meets a succinct introduction outlining the key issues an arbitrator or participant would face in the order they would likely and logically encounter them in the course of arbitration. Therefore, the bulk of the discussion is broken into small groups of text under subheadings that concisely refer back to the introduction. This method of organization allows a reader of any level to immediately locate the discussion of those issues most pertinent to them. Consequently, a practitioner in the heat of arbitration can access points of this book as easily as any lawyer or student with the luxury of time at their desks.

As the arbitration process unfolds in this manner, Professor Moses breaks down dense subjects in a direct and conversational tone. She also engages her readers to participate in the analytical process by prompting them to think two steps down the chessboard. Readers aren't left to digest the text on their own. For example, in discussing often vexing choice of law issues, she presents:

Suppose, for example, that State A is the place of arbitration. Assume that under

State A's law, the arbitration agreement is not valid. But the parties have chosen the law of State B as the substantive law governing the contract. Under the law of State B, the arbitration agreement is valid. If the arbitrators proceed to an award, will the losing party be able to vacate the award on the ground that the arbitration agreement is invalid under the law of State A, which is the seat of the arbitration? Does the law of State A or State B govern the substantive validity of the arbitration agreement? Additionally, how will State C, the enforcing jurisdiction, decide a challenge to enforcement on the ground that the arbitration agreement was not valid under the law of the seat of arbitration? (pp. 65-66).

To resolve such questions, Professor Moses deftly compares and contrasts the competing authorities that may hold the key to the answer. Where possible, she identifies common ground across the borders of differing rules to explain how they may affect the outcome of an arbitration. This assists both newcomers and veterans to better spot issues and anticipate their own responses. This is equally true for those coming to this book, and the process itself, as either participants or panel members. For example, after discussing the differing standards of an arbitrator's duty to disclose, she pragmatically concludes that arbitrators should follow the rule "contained in the IBA Guidelines, the AAA-ABA Code of Ethics, and a number of institutional rules" that "when in doubt, disclose." (p. 138).

These rules, as well as interpretive case law, are amply referenced in footnotes that complement rather than bog down the presentation. Notably absent are unending string cites or block quotes. This allows the discussion to move with great alacrity and further greatly enhances the volume's usefulness as an explanatory text and practice guide. Yet, it still has the heft needed of an academic treatise. While some more experienced readers may require greater density, they can refer to the full texts of many authorities that are set forth in a handy appendix located at the back of the book. Indeed, when even greater exposition is desired, the appendix also includes a useful set of model clauses and a comprehensive listing of Internet

links to various international treaties, national laws, and arbitral rules that should round out most inquiries.

Uniquely, where the rules themselves leave a reader at the water's edge of full comprehension, Professor Moses offers the perspectives of several experienced arbitrators she has interviewed for this book. This device is well suited for those elements of arbitration practice most affected by individual style and approach. For example, the "rules and procedures regarding the taking of evidence tend to be within the discretion of the tribunal." (p. 164). Professor Moses competently fleshes out this and other similar topics with a global array of opinions from various tribunal members. Their helpful views provide needed insight into the unwritten rules of practice.

In sum, this single volume is required packing for new and intrepid travelers of international commercial arbitration. Like a good travel guide, it lays out the

landmarks of your journey, helps plan your desired route, interprets the signposts along the way, and instructs you how to correct or change course as the need arises. Even better, its small size stows neatly on your desk or briefcase.

Stefan B. Kalina is Counsel in the Litigation Department of Lowenstein Sandler PC in New York City where he handles commercial disputes through litigation and ADR. He is also a member of the Roster of Neutrals for the Commercial Division of the Supreme Court of the State of New York for New York County. He may be reached at skalina@lowenstein.com.

Margaret L. Moses is Professor of Law at Loyola University Chicago School of Law (Cambridge University Press 2008).

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BOOK REVIEW:

Challenging Conflict: Mediation Through Understanding

By Gary Friedman and Jack Himmelstein

Reviewed by Leona Beane

This 2008 book published by the American Bar Association explains the understanding-based approach to mediation, developed and utilized at the Center for Mediation in Law, where the authors are the co-directors. Their mediation technique involves a “no caucus” model, because their training philosophy does not include use of a caucus at all.

Throughout the book, the authors emphasize the importance of the parties understanding the other parties’ interests and concerns, as relating to the dispute. The book provides concrete examples that give life to the methodology discussed. Included are vignettes of actual conversations between the mediator and the parties extracted from several different mediations. The reader almost feels as though he or she is right there in the room while the mediation is being conducted. The wide range of disputes included in the book cover: dispute between two siblings regarding substantial land inherited from their parents which each want to use for entirely different purposes; a series of disputes between two corporations (extending over 30 years), where the mediator insisted that the top executive at both corporations agree to be present and participate during the mediation (originally the attorneys believed there was so much animosity between the executives of the corporations they doubted they could be in the same room together); disputes among and between the employees at the San Francisco Orchestra; a dispute between an author and the publishing company; a dispute between a family member and the partner who was in a gay relationship with the decedent; disputes between neighbors in a small beach community regarding utilization of the land and removal of trees where the mediator was also a resident, was familiar with both neighbors and one of the attorneys, as well as details and conversations relating to several other disputes.

The authors explain their understanding-based model, a model based on developing an understanding between the parties. It is not important that the parties agree but it is critical that they understand each other. The mediator explains to the parties how the process works and that it is crucial to gain a deep understanding of the other party’s reality, needs and interests. Through developing this true understanding the parties come to appreciate the other’s position and ultimately achieve a solution that maximizes the realization of all needs and interests.

The authors explain why they do not include a caucus, stating that if a mediator caucuses with both sides separately, in effect the mediator has all the extra information, but the question is, what should the mediator do with this extra information?; The mediator doesn’t make decisions; the parties make the decisions. Thus, it’s important for the participants themselves to receive the additional information, so as to assist them in making their decisions regarding the dispute.

The authors describe specific techniques used as part of the process, including “looping,” which assists the parties in trying to understand and to feel understood. Looping is the repetition in reframed phraseology by the mediator of what has been said so that the party feels understood and can clarify any mistaken perception of what he or she said. This process also serves the purpose of having the sentiment repeated for the other party so he or she can also better understand.

The book explains an approach that is different from other approaches and is well worth reading. An additional tool in the tool box is always of benefit to all mediators. Some readers may be persuaded that this model is the best technique to utilize in all mediations and be converted to the “understanding- based” model.

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AUTHOR'S SUMMARY:

The New Lawyer: Moving from Warrior to Conflict Resolver

By Julie Macfarlane

Since my book—*The New Lawyer: How Settlement Is Transforming the Practice of Law* (University of British Columbia Press www.ubcpres.ca)—was published in the summer of 2008, I have received e-mails from lawyers all over the world, not only lawyers in the U.S. and Canada, but also practitioners from Europe, Australia, and South Africa, who want to tell me that the ideas in the book resonate with their own sense of change. They recognize my description of the “New Lawyer,” who is adapting his art and modifying his craft to meet the new conditions of the 21st Century. They are eager to share their own experiences of changes in legal practice, especially in the civil and family courts, as well as changes in the way that their clients—both personal and commercial—expect business to be done on their behalf.

This response to the ideas of “new lawyering” underscores the need for a more vigorous debate about the renewal of the profession. The profession needs to reflect on how to meet expectations of legal services that are effective, pragmatic and cost-efficient in achieving results, and in which clients are active participants and decision-makers.

How the Disputing Landscape and the Public Culture Has Changed

Legal practice is showing signs of the evolution of a new professional identity for lawyers. The “New Lawyer” is first and foremost a conflict resolver who works with dispute resolution processes, both new and old, to advance the possibility of just and practicable settlement. In an era of “vanishing trials”—we know that between 95%-98% of civil claims end in a negotiated outcome short of a full trial—and sweeping civil justice reforms in civil and family matters, effective negotiation and settlement skills are increasingly central to the practice of law. There are innovations in the private sector as well, most notably the development of collaborative and co-operative law, reflecting a distaste among some sectors of the Bar for litigious processes and a desire for settlement-oriented processes that better serve the needs of their clients. Public and private developments that maximize the potential for early settlement both reflect and reinforce a public culture that is more interested in problem-solving at a reasonable price, and less interested in protracted disputing and Pyrrhic victory.

Because clients are changing, too. The litigators’ mantra of “last man standing” looks increasingly unappealing to both private clients and institutions looking for results

on a limited budget. Clients now expect to be able to access legal information via the Internet—however dubious the source and reliability, this changes their sense of knowledge empowerment. Our courts are witnessing a phenomenal rise in the number of self-represented litigants. Part of the explanation for this is the rising cost of legal services, but another element is the growing belief among the public that lawyers have become “unnecessary,” or even antithetical to achieving the goals of practical problem-solving in a timely manner.

How the “New Lawyer” Is Adapting to Change

For the past 12 years I have conducted empirical research on the changing role of lawyers in dispute resolution and in my book I present the first evidence of the ways in which these changes translate into new and modified approaches to file management, client relationships, and dispute resolution strategies. There has been a great deal of talk about so-called “paradigm change”—instead the evidence suggests that the “New Lawyer” does not reject but rather builds on her traditional expertise as a legal technician and an advocate. Instead of utilizing her specialist knowledge to advance a winner-takes-all argument (traditionally rejected by the other side until the eve of trial), she uses this to frame a more nuanced argument that explores all the opportunities for the best possible settlement for her client.

The increasing use of negotiation, mediation, and collaboration in resolving lawsuits belies the traditional conception of the lawyer as a “rights warrior,” focused only on expensive legal argument and arcane procedures. “New lawyering” moves away from the provision of narrow technical advice and adversarial strategies, instead engaging in a constant search for a practical, just and efficient conflict resolution. Sometimes—but by no means always—this means utilizing traditional adversarial methods. More often, in order to be effective in the pursuit of effective, timely and just resolution, lawyers need to know when to set aside assumptions of adversarial behavior, when to strategize about accommodation and trade-offs, and when to focus on problem-solving. This means developing new skills of communication and persuasion and solution-creation that do not focus solely on entitlement and positionality, and avoiding the conflation of strength with inflexibility and unyielding argument.

New Skills for the “New Lawyer”

My book draws from more than 700 interviews I have conducted with lawyers and their clients using newer forms of dispute resolution (court-connected and private mediation, collaborative law, restorative justice, and settlement conferences) as well as traditional lawyer-to-lawyer negotiations. This data tell us a great deal about the types of “strengths” that the “New Lawyer” needs, both from the perspective of counsel themselves and from the perspective of their clients. Lawyers have told me consistently that in order to be effective in this changed environment they need to be intentional and strategic about working toward settlement, and not simply wait for a last-minute exchange of offers between counsel. Instead they need to think about how to bring the sides together in negotiation as soon as they feel they have sufficient information, and to seek ways to speed up that exchange of information.

Their clients increasingly expect value-for-money in contracting with legal professionals and are far less deferential to the lawyer’s opinion—especially an opinion that proposes spending a lot of money without much in the way of tangible results. We are witnessing a general decline in professional deference. This is a challenge for many professional relationships, not only law. Clients expect their lawyers to involve them in strategic planning and decision-making in ways that previous generations did not. They are interested in practical problem-solving and they expect more than technical legal advice from their lawyer in order to get this result. Otherwise clients are increasingly likely to “vote with their feet”—for example, to represent themselves, or to seek limited advice to get them started or assist them at a particular point in the case (“unbundling legal services”), or—in the case of corporate or institutional clients—to turn the matter over to in-house counsel (now more than 10% of the profession) who commits to a budget and a timeline.

The “New Lawyer” needs new skills in order to work with clients in this new environment. The client will be far more hands-on in strategizing and decision-making than in the traditional model. The goal of working toward settlement by consensus immediately transforms the use of information and facts. It requires lawyers to broaden the scope of client goals to include but go beyond legal remedies, prioritize these goals with the client, and then relate them to long-term objectives. This is a different discussion than one that focuses only on obtaining facts relevant to making the legal argument. Further, it means placing this information on the table in order that the other side knows what is important to their opponent, while simultaneously seeking reciprocal information from them. In consensus-building counsel needs to be asking not, “What information about our legal theory and bottom line must I hide from the other side in order to be powerful?” but rather, “What information about my client and our case does the other side need in order to be persuaded to settle on

our best possible terms?” An evaluation of the legal issues in the case is still critically important in order to assess BATNA (“Best Alternative to a Negotiated Agreement”) but counsel needs other tools and techniques, including building trust and rapport with the other side, and providing opportunities for both sides to listen to each other.

This is an essentially different approach to advocacy, which I describe as “conflict resolution advocacy.” It is still strong and assertive but relies on relationship-building and information exchange rather than posturing and secrecy. Lawyers have told me over and over again that this new approach to advocacy requires them to put themselves “in the shoes” of the other side, in order to imagine what would encourage this party to settle on their clients’ best possible terms. This is a significant adjustment from the traditional approach where “(Y)ou don’t worry about the other side as much at a trial because . . . well, they’re the other side. When you’re working towards a consensus—then it matters.”

The “New Lawyer” understands that not every conflict is about rights and entitlements and that these are conventional disguises for anger, hurt feelings, and struggles over scarce resources. If the “New Lawyer” is to act as an effective ally on behalf of her client, she must look at the whole problem and not simply the legal issues.

The “New Lawyer” Works with Third Parties

The “New Lawyer” may need to bring in other specialist resources to contribute to the solving of the clients’ unique problem. Conflicts often require the input of third parties who can assist in the resolution of the conflict or with the provision of critical additional expertise toward this end.

This means that the “New Lawyer” needs to be able to work with mediators and other advisors who can assist in the building of settlement. These third parties will offer a range of skills and qualifications, and new lawyers will be expected to assess what would be appropriate in any one given case, as well as how to get the best result from mandatory requirements in a court program. Sometimes these third parties are judges, playing a somewhat different role—as a facilitator of settlement—than their traditional one. Sometimes they are lawyer-mediators, assigned by court programs.

But these third parties are always not lawyers or judges. They may be third parties with other skills and specialties that they can bring to the process of conflict resolution, when we understand this as inclusive of but broader than legal adjudication or prediction. They may be highly effective non-lawyer mediators, or they may be child welfare specialists or tax specialists or others acting in a variety of roles, including evaluator, facilitator or simply advisor.

The Future of “New Lawyering”

New Lawyers face many challenges as they evolve their role. They will encounter ethical issues in informal dispute resolution processes that force deeper reflection about appropriate professional behaviors in these hitherto unregulated environments. They will need to consider and set appropriate client expectations for boundaries in a professional relationship where lawyer and client are working together more closely than ever before. They need to understand how to wear “two hats”—one that promotes consensus-building and settlement and another that on occasion must press litigation to its conclusion to obtain a good result. They need to assess what each case needs, in light of what the client wants and prioritizes. They need a more coherent, grounded, theory with which to confront

the dilemma of when to advise a client to accept a settlement offer, and when to press on.

All these issues—in the context of lawyers’ and clients’ own experiences—are discussed in greater detail in my book. The result is an emergent professional identity that moves counsel beyond the narrow articulation of partisan interests toward the realization of a new, practical, conflict specialist role. It does not reject but rather builds on the traditional role of the lawyer as technical advisor. In fact, this convergence between the old and the new is taking place before our eyes.

Julie Macfarlane is Professor of Law at the University of Windsor.

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ADR in the Courts

S. Robert Schrager
Hodgson Russ LLP
60 East 42nd Street
37th Floor
New York, NY 10165
rschrager@hodgsonruss.com

ADR within Governmental Agencies

Robert E. Curry Jr.
2 Thorne Lane
Locust Valley, NY 11560-2609
recurry@gmail.com

Jeffrey E. Stockholm
New York State Public Service
Commission
3 Empire State Plaza
Albany, NY 12223-1000
jes@dps.state.ny.us

Arbitration

Sherman W. Kahn
Morrison & Foerster LLP
1290 Avenue of The Americas
New York, NY 10104-0101
skahn@mofo.com

Carroll E. Neesemann
Morrison & Foerster LLP
1290 Avenue of the Americas
New York, NY 10104-0012
cneesemann@mofo.com

Collaborative Law

Norman Solovay
McLaughlin & Stern, LLP
260 Madison Avenue
New York, NY 10016
nsolovay@mclaughlinstern.com

Chaim Steinberger
Chaim Steinberger PC
160 Broadway, Suite 1100
New York, NY 10038
csteinberger@mindspring.com

Continuing Legal Education

Rona G. Shamoon
Skadden Arps Slate Meagher
& Flom LLP
4 Times Square
New York, NY 10036-6522
rona.shamoon@skadden.com

Diversity

Irene C. Warshauer
60 East 42nd St., Suite 3403
New York, NY 10165
icw@irenewarshauer.com

Barbara Antonello Mentz
140 West 86th Street
New York, NY 10024
bmentz@mentz.org

Ethical Issues and Ethical Standards

Elayne E. Greenberg
St. John's University School of Law
25 Potters Lane
Great Neck, NY 11024
elayneegreenberg@juno.com

Legislation

Charles J. Moxley Jr.
Kaplan Fox & Kilsheimer LLP
850 Third Avenue, 14th Floor
New York, NY 10022-7513
cmoxley@kaplanfox.com

William J.T. Brown
Dewey & LeBoeuf LLP
125 West 55th Street
New York, NY 10019
williamjtbrown@gmail.com

Mediation

John Wilkinson
Fulton Rowe & Hart LLP
1 Rockefeller Plaza, Suite 301
New York, NY 10020
johnhwilkinson@msn.com

Abigail J. Pessen
Mediation Services, Inc.
80 Broad Street, 30th Floor
New York, NY 10004
abigail@pessenadr.com

Membership

Louis B. Bernstein
Louis B. Bernstein, Attorney-Mediator
50 East 89th Street, Apt. 8D
New York, NY 10128-1225
louisbernsteinatty@gmail.com

Gail R. Davis
Resolutions NY Inc.
120 East 30th St.
New York, NY 10016-7303
gdavis@resolutionsny.com

Nominating

Stephen A. Hochman
600 Lexington Avenue, 15th Floor
New York, NY 10022-6018
shochman@prodigy.net

Public Relations

Cynthia T. Lowney
110 Wall Street
11th Floor - PMB 3499
New York, NY 10005-3817
ctlesq@msn.com

Publications

Edna Sussman
SussmanADR
20 Oak Lane
Scarsdale, NY 10583
esussman@sussmanadr.com



ADDRESS SERVICE REQUESTED

Section Officers

Chair

Simeon H. Baum
Resolve Mediation Services, Inc.
575 Lexington Avenue, 10th Floor
New York, NY 10022 • simeonhb@disputeresolve.com

Chair-Elect

Jonathan Honig
Feder Kaszovitz Isaacson Weber Skala Bass and Rhine LLP
750 Lexington Avenue
New York, NY 10022 • jhonig@fkiwsb.com

Vice-Chair

Leona Beane
11 Park Place, Suite 1100
New York, NY 10007 • lbmediateadr@aol.com

Secretary

Elizabeth Jean Shampnoi
Storch Amini & Munves PC
140 East 45th Street, 25th Floor
New York, NY 10017 • eshampnoi@samlegal.com

Treasurer

Jon David Giacomelli
Ross & McBride LLP
25 King Street West, Suite 1445
Toronto, ON M5L 1A1
Canada • jgiacomelli@rossmcbride.com

Members-at-Large

Geraldine Reed Brown
The Reed-Brown Consulting Group
180 Union Street
Montclair, NJ 07042 • RBCG1@aol.com

Irwin Kahn
Kahn and Horwitz, PC
299 Broadway, Suite 704
New York, NY 10007 • kahnadr@aol.com

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New York Dispute Resolution Lawyer

Editor-in-Chief

Edna Sussman
Arbitrator & Mediator
SussmanADR
20 Oak Lane
Scarsdale, NY 10583 • esussman@sussmanadr.com

Board of Editors

Leona Beane
11 Park Place, Suite 1100
New York, NY 10007 • lbeanelaw@aol.com

Geraldine Reed Brown

The Reed-Brown Consulting Group
180 Union Street
Montclair, NJ 07042 • RBCG1@aol.com

Erin M. Hickey

Fish & Richardson PC
Citigroup Center, 52nd Floor
153 East 53rd Street
New York, NY 10022 • hickey@fr.com

Jae Soog Lee

26 Sutton Terrace
Jericho, NY 11753 • jaesooglee@yahoo.com

Barbara Antonello Mentz

140 West 86th Street
New York, NY 10024 • bmentz@mentz.org

Stefan Kalina

Lowenstein Sandler PC
1251 Avenue of the Americas, 18th Floor
New York, NY 10020 • skalina@lowenstein.com

Paul B. Marrow

11 Hunting Ridge Place
Chappaqua, NY 10514 • pbmarrow@optonline.net

Norman Solovay

McLaughlin & Stern, LLP
260 Madison Avenue
New York, NY 10016 • nsolovay@mclaughlinstern.com