NYSBA SPRING 2010 | VOL. 3 | NO. 1

New York Dispute Resolution Lawyer

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

Message from the Chair

Jonathan Honig

After a long period in which arbitration was seemingly in an unstoppable growth mode, aided by Supreme Court decisions which advanced the policy in favor of arbitration and brought it to a place of prominence by permitting securities, antitrust, RICO, statutory employment and punitive damages issues to be arbitrated, a counter revolution of sorts has now set in.

It is interesting to review this recent criticism with a historical perspective.

In earlier days, and particularly through the 1980s and 1990s, litigation costs began to accelerate in an unprecedented way. The result was a pushback by affected businesses. Part of this pushback was in the form of attacks on punitive damages that resulted in *BMW v. Gore*, 517 U.S. 559 (1996), limitations on punitive damages under a construction of the Due Process Clause of the 14th Amendment, and attacks on securities actions which resulted in passage of the PSLRA (Private Securities Litigation Reform Act of 1996, Pub. L. 104-67, 109 Stat. 737) and subsequent legislation, including the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332 (d), 1453 and 1711-1715. Attacks on pleading standards resulted in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), which imposed a plausibility standard of pleading, and pushback from deep-pocketed peripheral litigants led to *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), and subsequent rulings rejecting aiding and abetting liability and other attacks on secondary parties.

The other major attack of relevance to the ADR community was a push for arbitration clauses that sought to avoid litigation in general and, in particular, class actions.

If these efforts had been limited to business interests, they may well have been sustained over time because of the cost driver discussed above. However, this effort included consumers and individuals in its reach and, specifically, employment and credit card disputes. The pushback was partly driven by a view that FINRA did not provide for a proper determination of disputes in connection with securities industry participants. The pushback was, however, much more general and produced both proposed legislation and litigation results.

Initially, various requirements for arbitration of employment disputes that impinged on statutory protections were repudiated in a series of holdings that an arbitration provision had to allow for statutory protections such as an award of attorneys' fees.

Later came a more sustained attack. First, this resulted in employment issues in the securities industry being removed through Rule 13201 from the scope of FINRA arbitration in 2007.

(continued on page 5)

Inside

TO JOIN THE DISPUTE RESOLUTION SECTION, SEE PAGE 24 OR GO TO WWW.NYSBA.ORG/DRS

Message from the Editors

Edna Sussman

As we near the conclusion of our second year as a full-fledged Section of the New York State Bar Association we would like to thank our contributors and our readers for their support of this publication. As previously indicated, we would like to make our next issue a special issue on the many forms of ADR and include some of the less used techniques such as early neutral evaluation, mini-trials, dispute boards, settlement counsel, deal mediation, telephone mediation, online dispute resolution, and ombudsman. If you have experience with these or any other less frequently used ADR modality and might be interested in writing an article about it please contact us at lkaster@AppropriateDisputeSolutions.com. We continue to invite you to submit letters to the editor, articles and article proposals on all aspects of dispute resolution.

Section Activities

We report on the activities of our very active mediation committee, arbitration committee and alternative dispute resolution in the courts committees as well as a brief review of our other stellar committees which we cover in more detail on a rotating basis.

Our own Ethical Compass poses provocative questions: What is our path forward for ADR in New York? Will it be mandatory mediation or will we follow our current path of "let a thousand flowers bloom"?

Arbitration

We offer an intriguing history of arbitration and its development dating back to the settlement of North America. Recent legislation enacted in Congress granting the right to arbitrate to terminated automobile dealers and invalidating arbitration agreements with respect to specified employment related claims by certain government contractors is of interest and included along with a review of pending Congressional legislation. We alert our readers to the differences between New York State and federal arbitration law with a summary of the points which are important to keep in mind. We follow with a discussion of the Supreme Court's recent decision in *Union Pacific* and its application to step clauses which we see increasingly in contracts and which have led to a fairly significant number of court decisions. Finally, we discuss again the Second Circuit decision in *ReliaStar* on arbitrator-imposed sanctions and raise questions for further consideration which that decision prompts.

Mediation

Laura A. Kaster

We lead our discussion of mediation with a review of the recent S.D.N.Y. bankruptcy court decision on "good-faith" participation in court annexed mediation in which the court imposed sanctions finding that a party had not participated in "good faith." We follow with a thoughtful article about the end of the mediation with tips for graceful exit strategies. Since mediation has particular application and utility in different areas of practice for reasons related to the unique nature of each, we continue with our discussion of mediation in specific areas of practice. In this issue we review mediation of environmental disputes and mediation of co-guardianship disputes. While there is a vigorous ongoing debate as to whether substantive knowledge of an area of the law or mediation practice skills are more important for a mediator to be effective, we launch a series on substantive areas of the law which are frequently pursued through mediation to provide substantive law in a nutshell for our mediation practitioners. We launch the series with a discussion of employment law, an area in which mediation is frequently utilized.

International

While the International Subcommittee of the Arbitration Committee of the DR Section embarks on its examination of New York as a venue for the conduct of international arbitration, we continue our coverage of developments in international ADR. We start with an article which discusses the clash between discovery in arbitration and the EU data protection laws which can present significant issues in cross-border arbitrations which involve European countries. The re-examination of the 2004 U.S. Model Bilateral Investment Treaty by the Obama Administration occasions our précis of the report of the advisory committee established by the U.S. Department of State and the Office of the U.S. Trade Representative to provide guidance on the subject. Addressing another significant issue in the area of discovery in arbitration we include a discussion of the Fifth Circuit decision on the use of § 1782 in aid of international arbitration. We follow with an ICSID arbitral tribunal award which for the first time found that a judicial ruling was a violation of a bilateral investment treaty. We analyze a recent Fifth Circuit *en banc* decision which presented an interesting conflict between the New York Convention and the McCarran-Ferguson Act. Finally, we discuss the environment for

(continued on page 6)

Table of Contents

International

Book Reviews

Case Notes

Next came a scandal involving alleged conflicts of interest in connection with the National Arbitration Forum's handling of credit card disputes. This ultimately resulted in that forum exiting from that "business." Bank of America ceased to require arbitration of such disputes and some others in the banking industry followed.

Legislation was also introduced that was designed to restrict arbitration dramatically and, not surprisingly, it was called the Arbitration Fairness Act of 2007. While the drafting of this legislation involves what would be a substantial limitation on arbitration, the principal intent appears to be to constrain pre-dispute arbitration requirements in the employment and consumer areas; the legislation has encountered resistance.

Recently, the Federal Contracting Law was amended to disallow mandatory arbitration by federal contractors of civil rights, employment and other claims by individuals in connection with significant federal projects.

On the other hand, in connection with the debacle in the automobile industry, arbitration was chosen by Congress as the means to resolve claims for reinstatement by many terminated Chrysler and GM franchisees.

While there is a common thread of a sustained counterattack on pre-dispute arbitration, when looked at in more depth, it appears to be a more nuanced attack. It is not arbitration that is being challenged but, rather, pre-dispute arbitration clauses and, particularly, pre-dispute arbitration for parties with perceived or real unequal bargaining power. Thus, employment, consumer and franchise disputes have been principal points of contention.

Indeed, many other recent rulings have broadly supported arbitration, including *Argus Media v. Tradition Financial Services, Inc.*, 2009 U.S. Dist. LEXIS 120866 (S.D.N.Y. Dec. 29, 2009), where it was held that if a contract or arbitration rules give the arbitrators power to rule on their jurisdiction, then the Court is divested of the ability to rule on the scope of the arbitration; *Bridgepointe Master Fund v. Biometrx*, 2009 U.S. Dist. LEXIS 115678 (S.D.N.Y. Dec. 11, 2009), in which it was held that a lack of an adjournment was not a basis to vacate a default award as long as there was "barely colorable justification"; *Steel Corp. of Phillipines v. Int'l Steel Services*, 2009 U.S. App. LEXIS 25404 (3d Cir. Nov. 19, 2009), which limited the public policy issues that could be raised based on the New York Convention; *DMA Int'l Inc. v. Qwest Communications Int'l, Inc.*, 2009 U.S. App. LEXIS 24165 at *9 (10th Cir. Nov. 5, 2009), in which the Court imposed sanctions on a party seeking vacatur based on manifest disregard; and *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 2010 U.S. App. LEXIS 893 (Jan. 14, 2010), where it was held that a contractual or forum rule that allowed an arbitrator to determine the scope of his authority to amend the award is controlling.

In sum, perhaps a new equilibrium will be reached in which the established world of commercial arbitration will be supplemented by post-dispute agreements by individuals with personal claims to arbitrate in the realization that both parties have more to gain than to lose in terms of economy, convenience and confidentiality. Alternatively, perhaps the combined efforts of the arbitration providers, arbitrators, counsel and parties will effect changes that will re-establish the sense of arbitration as a preferred method of dispute resolution and will thus eliminate or tamp down the pushback that is currently being experienced.

Many of these arbitration issues were addressed at the recent Dispute Resolution Annual Meeting CLE program. The breadth and importance of issues relating to arbitration is reflected by the large number of recent Supreme Court decisions addressing arbitration issues, cases on the docket now and the frequent splits in the Circuits.

We look forward to continued dialogue about these issues, as well as the legislative developments that will bear on the continued development of the area.

Jonathan Honig

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

ADR and the prospects for the growth of mediation in Brazil and the issuance by the Chinese Supreme People's Court of Several Opinions on Establishing and Improving a Dispute Resolution System.

Book Reviews

In this issue we are fortunate to have a review of three very different but each captivating and useful books relating to ADR. First, we review *Nudge,* which focuses on the psychology of human behavior and discusses the subject of "framing" and its impact on decision-making. Second, we review *Mediating Legal Disputes: Effective Strategies for Neutrals and Advocates,* which contains a plethora of useful tips and concrete examples for the mediation practitioner. Third, we review *The American Influence on International Commercial Arbitration,* which explores the recent criticisms of the American influence and concludes that it is positive rather than negative.

Case Notes

With this issue of the *New York Dispute Resolution Lawyer* we launch what we hope will be a regular stream of student case note contributions. In this issue we cover the right to arbitrate child custody disputes, what happens when the neutral forum selected in the contract is not available (a situation that will come up with great frequency because the NAF, and in certain kinds of cases the AAA, has withdrawn from administering consumer arbitrations), sanctions for frivolous appeal of arbitration awards, the *res judicata* effect of arbitral decisions, and the application of the Foreign Sovereign Immunities Act to the attachment and execution of assets.

Section Meeting 2010

Thanks to a team of dedicated student reporters, we offer a comprehensive account of the Section's programming at the 2010 Annual Meeting. The sessions covered such diverse subjects as experience, trends and tips in international arbitration, mediation ethics, mediation certification and arbitration developments.

Photos

We have included a series of pictures from the Section's successful fall meeting at the Sagamore Hotel on Lake George held in collaboration with the Labor and Employment Law Section.

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 us with your input at esussman@SussmanADR.com or lkaster@AppropriateDisputeSolutions.com and help make this publication a success.

Edna Sussman

Laura A. Kaster

DRS Committee News

The Dispute Resolution Section has committees that are actively engaged in working on the many different facets of ADR. We report on the work of our committees on a rotating basis and invite you to visit the website to explore other committee offerings. If you are interested in the work being done by any of the committees, please do join and participate in the efforts.

ADR in the Courts Committee

The ADR in the Courts Committee, chaired by the Hon. Jacqueline W. Silbermann, has set an ambitious agenda, to wit, increasing the numbers of cases sent to Alternate Dispute Resolution from both the State and Federal Courts. In order to further this effort, the committee has met with representatives of the court systems in New York.

Dan Weitz, Director of ADR for the Office of Court Administration, reported to the committee on the New York State Courts. A letter was sent to Hon. Ann Pfau suggesting that the new form of RJI being proposed by the courts have a checkoff box with language asking counsel to consider if ADR would be appropriate in their case to limit or resolve issues. The committee is working on a proposal to put before the Administrative Board suggesting a Court Rule requiring that a "Notice of Mediation Alternative" be given to clients at the time of retention and that if an action is commenced that the "Notice of Mediation Alternative" be served upon defendant(s) with the summons.

The committee met first with Hon. Loretta A. Preska, Chief Judge of the United States District Court Southern District of New York, and Hon. Harold Baer, Jr., who serves as the Chair of the Southern District's committee on mediation, and later met with several interested judges and magistrates of the court to discuss mediation. The discussion was lively and informative; it provided fruitful ground for further exchanges of views and recommendations.

If you have an interest in any of these projects, please join the committee.

International Arbitration Subcommittee

Chaired by John Fellas, the International Subcommittee of the Arbitration Committee, chaired by John Wilkinson and Sherman Kahn, has embarked upon an exciting project to prepare a brochure setting forth the advantages of New York as the place of arbitration. As currently planned, the brochure will include sections on (i) New York's international arbitration culture; (ii) the law applicable to an international arbitration sited in New York; (iii) FAQs; and (iv) practical advice. It is hoped that the brochure will be published in multiple languages and distributed to arbitration users throughout the world.

Several forums were conducted to elicit the views of arbitrators and users on how the brochure should be organized and what should be included. The project is well under way and is in the drafting stage. If you are interested in participating in this project please join the Arbitration Committee.

Mediation Committee

In addition to serving as a forum for discussing new developments and practice issues at meetings, the Mediation Committee, chaired by Abigail Pessen and Margaret Shaw, is working actively on several projects. In conjunction with the New York City Bar Association ADR Committee, the committee is conducting a survey of more than 100 business and employment litigators in New York, to learn more about their experiences with and opinions of mediation. Committee member Rick Weil has worked tirelessly to organize the survey. The committee has also finalized its report on enhancing mediator quality; its recommendations were presented to the Section's Executive Committee this Spring. Finally, the committee is creating a mentoring program under Irene Warshauer's leadership, which will match up experienced and less experienced mediators.

If you are interested in any of these projects, or have others to recommend, please join the committee.

The Ethical Compass

Should There Be a Rule Compelling ADR? Follow the Road Where a Thousand Flowers May Grow

By Elayne E. Greenberg

"One day Alice came to a fork in the road and saw a Cheshire cat in a tree.' Which road do I take? 'she asked. 'Where do you want to go?' 'I don't know,' Alice answered. 'Then,' said the cat,' it doesn't matter.'"[1] So too, in 1994 NYS reached the proverbial fork in road as our state continued its foray into dispute resolution.[2] Which road should New York State proceed down to promote the development of ADR in our state? Should New York State adopt a mandatory rule compelling ADR or should New York State embrace a more voluntary approach to ADR use? Expectedly, an individual reader's initial preference for one approach or the other may be based on whether she is an ADR enthusiast or naysayer. Yet, New York State's decision to support a voluntary approach rather than a mandatory approach to ADR is actually a nuanced one that respects New York's court culture and adheres to conflict resolution system design principles.[3] First, I explore the rationale for, and gains made under, New York's chosen path, an evolutionary approach to ADR development. Then, I contemplate the lost opportunities on the road not taken, mandatory ADR. Finally, at our current fork in the road, I invite you to consider which path we should take as we continue to advance the responsible development of ADR use in New York State.

In 1996, New York's beloved former Chief Judge Judith Kaye decided that New York State should proceed down a voluntary, experimental ADR course. This decision was informed by the recommendations of Chief Judge Kaye's New York State Alternative Dispute Resolution Project Task Force that the Chief Judge had formed in 1994. This Task Force was aptly lead by co-chairs Fern Schair and Margaret Shaw who guided the Task Force through two rounds of statewide public hearings, a survey of existing New York ADR programs, an analysis of other States' incorporation of ADR, an Interim Report, a Proposed Final Report, all culminating in the Final Report of the Chief Judge's New York State Court Alternative Dispute Resolution Project.[4] In relevant part, the Final Report advised that New York should first embark on an experimental phase of ADR in which judicial districts throughout New York State would try out different forms of ADR for different types of cases. [5]

New York State's decision to proceed with a voluntary instead of mandatory approach was a well-reasoned determination. It recognized that the New York court culture is conservative, and that court reform proceeds at glacial speed. It respected that any discussion about ADR evoked a vibrancy of opinions and provoked the strength of personalities that make New Yorkers New Yorkers. And, it was consistent with the ADR's core values of voluntariness and self-determination.[6]

Our then Chief Administrative Judge Jonathan Lippman aptly characterized this evolutionary approach as one in which the New York State Office of Court Administration "let(s) a thousand flowers bloom."[7] Evidence abounds that this policy of encouragement, rather than coercion, has, in fact, led to the proliferation of successful ADR advancements, excited an increasing groundswell of ADR supporters, and shifted our legal culture from a litigation-centric to a settlement-focused culture. The New York Office of ADR, stewarded by the ever-positive Dan Weitz, serves as a stimulus and invaluable resource for ADR innovation and development in court-connected and community dispute resolution ADR programs and standards. During this time, some of our courts have shifted from tentative experimentation to a meaningful integration of ADR in their case management.[8] For example, our New York State Supreme Court Commercial Division has a mediation program.[9] In another noteworthy example, our New York State problem–solving courts have designed dispute resolution systems to address such challenging issues as mental health, domestic violence, and child permanency planning.[10] And, the "let a thousand flowers bloom" approach has encouraged mediation programs to selectively choose from a range of mediation ideologies including transformative, understanding-based, facilitative and evaluative, recognizing that each ideology has its own value and contribution.

Continuing, lawyer-initiated ADR activism plays a significant role in contributing to NYS ADR advancements. How different the legal community's reaction to ADR is today from fifteen years ago, when many New York lawyers were debating whether ADR was actually the death knell or the elixir to the practice of law. In 2010, increasing numbers of lawyers are seeking training in ADR, clamoring to get on ADR rosters, and more regularly using ADR in their case management. In another example, lawyers are actively experimenting with new

types of ADR lawyering such as collaborative law and encouraging other colleagues to jump on the bandwagon. One further illustration, the formation of our Dispute Resolution Section and the increasing numbers of New York State Bar Association Substantive Sections that also have ADR subcommittees, evidence the growing interest in ADR in New York.

Yet, many ADR enthusiasts still favor a mandatory approach. Some have remained hopeful that the Office of Court Administration would enact a mandatory ADR rule once courts and consumers of ADR realized its benefits. Hope springs eternal. Courts and consumers are increasingly realizing the benefits of ADR. However, there is still no mandatory rule. Supporters of a mandatory ADR rule point to states such as Florida, Texas and California who have mandatory ADR rules[11] and question if New York should follow suit. Yes, New York judges have discretion to order parties to mediation,[12] but discretion is not enough to sustain consistent use of ADR. Proponents of mandatory ADR point to the inconsistency and underutilization of ADR services in New York State that they believe would be remedied by a rule mandating ADR. A mandatory rule would serve as a proclamation that dispute resolution is how we resolve cases, rather than merely a good idea that might be considered at the discretion of the judges and lawyers.

And, dear reader, we have arrived at another crossroad in our travels. Looking back, we can be proud how far we've come and applaud the ADR evolution that many of you are a part of. Going forward, we need to decide whether New York should continue down its road where we "let a thousand flowers bloom," or take a different road and adopt a mandatory ADR Rule. As the Cheshire cat advised, "It depends where you want to go."

Where does New York want to go? For some, the answer is based on whether we value encouragement or compulsion, mandates or choices. Still others question whether a mandatory rule might stifle the richness of the New York ADR culture and encourage compliance at the expense of meaningful participation. For others, an alternative query to consider is whether New York has evolved into such an ADR receptive culture that a mandatory ADR rule would just be reinforcing what is already good practice. Ours answers will determine the road we should take. Any road, without making an informed determination, won't do. New York, unlike Alice in Wonderland, needs to be clear about where we want to go with the continued development of ADR in New York because ADR in New York State matters.

Endnotes

1. Lewis Carroll, Alice's Adventures in Wonderland (MacMillan and Co. 1865).
2. Kathryn C. Sammon, *Therapeutic Jurisprudence: An Examination of Problem-Solving Justice in New York*, 23 St. John's J. Legal Comment. 923 (Fall 2008). Chief Judge Judith Kaye appointed a task force, co-chaired by Margaret Shaw and Fern Schair, to review the state of ADR in NYS and the country and make recommendations about how to proceed. *See* Ctr. for Ct. Innovation, *A Decade of Change: The First 10 Years of the Center for Court Innovation* (2006), *available at* http://www.courtinnovation.org/_uploads/documents/10th_Anniversary1.pdf.
3. Amy J. Cohen, *Dispute System Design, Neoliberalism, and the Problem of Scale*, 14 Harv. Negot. L. Rev. 51 (2009).
4. Schair, Fern and Shaw, Margaret, "*Court–Referred ADR in New York State: Final Report of the Chief Judge's New York State Court Alternative Dispute Resolution Project*," (May, 1996).
5. *Id*. at 8.
6. Chief Administrative Judge Jonathan Lippman, *Remarks from the Inaugural Fordham Dispute Resolution Symposium, "ADR As A Tool for Achieving Social Justice": Achieving Better Outcomes of Litigants in New York State Courts*, 34 Fordham Urb. L. J. 813 (2007) [hereinafter Judge Lippman Lecture].
7. *Id.* This is a frequently heard response by Chief Judge Lippman when asked if ADR would be mandatory, including at the NYSBA Committee on ADR Annual Meeting, "Shall We Dance," on January 29, 2004. This is a common paraphrasing from Chairman Mao Zedong's quote, "Letting a hundred flowers bloom and a hundred schools of thought contend is the policy for promoting progress in the arts and the sciences and a flourishing socialist culture in our land."
8. *See* New York State Unified Court System, Alternative Dispute Resolution *available at* http://www.nycourts.gov/ip/adr/ (last visited Feb. 10, 2010).
9. *See* New York State Unified Court System, Commercial Division *available at* http://www.nycourts.gov/courts/comdiv/ (last visited Feb. 10, 2010) [hereinafter Commercial Division].
10. *See* Judge Lippman Lecture, *supra* note 6.
11. *See* Craig A. McEwen, Nancy H. Rogers & Richard Maiman, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 9 Minn. L. Rev. 1317 (1995); *see also* Alana Dunnigan, *Restoring Power to the Powerless: The Need to Reform California's Mandatory Mediation for Victims of Domestic Violence*, 7 U.S.F. L. Rev. 1031 (2003).
12. *See* Commercial Division, *supra* note 9.

Elayne E. Greenberg is Director of the Hugh L. Carey Center for Dispute Resolution at St. John's University School of Law and Chair of the Ethics Committee of the NYSBA Section of Dispute Resolution. She can be reached at greenbee@stjohns.edu.

A special thank you to Elizabeth Filardi 2010 for her assistance.

Throw Down the Muskets, Seek Out the Town Elders

This Is a Brief History of Arbitration in the United States

By Steven A. Certilman

While in the 20th Century it may no longer be typical for people to resort to weapons as a means of resolving their disputes, most will agree that litigation is, to a lesser degree, aggression played out in the dignified theater of the courts with words as the weapon of choice. Ideally, as a means of dispute resolution, ADR represents a choice of peace over aggression. Regrettably, though, as the process of arbitration is re-cast by some lawyers and parties who may have lost sight of arbitration's historic character and benefits, arbitration appears to be morphing in some cases into a private forum for litigation practices. With that in mind, it is hoped that a historical look at the origins of arbitration in North America will aid in reminding stakeholders in the arbitration process of arbitration's intended benefits: simpler, faster, cheaper.

"[L]itigation is, to a lesser degree, aggression played out in the dignified theater of the courts with words as the weapon of choice."

Colonial Times

Long before Europeans journeyed to America's Atlantic shores, Native Americans used arbitration as a means of resolving disputes within and between tribes.[1] The opportunity to learn from this experience may have initially been lost on the newcomers, however, and it appears that its benefits were first introduced to settlers here long before the Revolutionary War by early colonists who had had business experience in Europe. The use of arbitration in the ports of Europe was already commonplace at that time among maritime and trade businesses. The experience of arbitration as a means of dispute resolution which minimized conflict and allowed continuation of the business relationship was carried across the Atlantic by those coming to live and work in North America.

As early as 1632, Massachusetts became the first colony to adopt laws supporting arbitration as a means of dispute resolution. Historical documents dating to the 1640s tell of a case in New England involving the amount to be paid by a Mrs. Hibbens, "wife of a prominent Boston resident," to Mr. Crabtree, who provided carpentry services in her house. When the parties failed to agree on how much Mr. Crabtree was owed for his services, Mr. Hibbens suggested arbitration. He selected one carpenter and Crabtree selected another. The arbitrators determined a revised fee, but Mrs. Hibbens continued to refuse to pay, pronouncing Crabtree's work unsatisfactory and criticizing the skills of the two arbitrators, "which diminished their reputation in the community. Church elders approached Mrs. Hibbens, but she remained unmollified. After another arbitration attempt failed, the dispute moved into the First Church of Boston, where Reverend Cotton presided."[2]

It is quite remarkable that the Massachusetts Colony arbitration statute preceded that of Great Britain by more than sixty-five years, the latter having enacted in 1698 An Act for Determining Differences by Arbitration 1698 (9 & 10 Will. III c 15). One might assume that this statute, together with that of the Massachusetts Colony, became a model for those enacted by other colonies.

In 1705, the Pennsylvania colony became the second colony to adopt laws in support of arbitration. Despite the opportunity for more widespread use of arbitration created by the enactment of legislation supporting arbitration by two colonies, its use remained common only in maritime and trade disputes. Then, in 1768, the New York Chamber of Commerce broke ground by appointing what has been referred to as the oldest American tribunal for the resolution of commercial disputes. This organizational structure combined with the volume of trade passing through the colony of New York at that time brought more widespread understanding of the arbitral process and its benefits.

Arbitration came to play a role in the last efforts to avoid the American Revolution. The Olive Branch Petition of 1775 was the final attempt of moderate colonists to prevent further bloodshed and halt the seemingly unavoidable slide toward the Revolutionary War. Written by John Dickinson, the leader of the moderate party, the Olive Branch Petition expressed loyalty to the King, begging him to cease fire until an agreement could be reached. In November 1775, the colonists learned that King George III had refused even to read the petition and decided to continue fighting. This led, in June 1776, to the formation of a committee of the Continental Congress to formulate what we now know as the Declaration of Independence.

From the Revolution to Reconstruction

As the port of New York grew and New York expanded its role as the center of trade on the North American continent, so did the use of arbitration in its precincts and its use spread beyond the maritime and trade industries.

George Washington himself gave credence to arbitration through his decision to include an arbitration clause in his last will and testament. The 1799 will provided that "all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chosen by the disputants each having the choice of one and the third by the two of those. Which three men thus chosen, shall, unfettered by Law, or legal constructions, declare their intent of the Testators intention; and such decision is to all intents and purposes to be as binding on the Parties as if it had been given in the Supreme Court of the United States."[3]

In the aftermath of the Civil War, claims of people and nations came to be resolved by arbitration. Disputes between former slaves and former slave-owners were quite common following the war and three-arbitrator panels were often used to settle such disputes. The war left a number of outstanding subjects of dispute between the United States and Great Britain unresolved for six years. Then, upon the signing of the Treaty of Washington in 1871, the so-called *Alabama Claims* were submitted to arbitration before multi-national tribunals.

The controversy began when agents of the Confederate States contracted for warships from British boatyards. Disguised as merchant vessels during their construction in order to circumvent British neutrality laws, the ships were actually intended as commerce raiders. The most successful of these ships was the *Alabama*, which captured 58 Northern merchant ships before it was sunk in June 1864 by a U.S. warship off the coast of France. When the parties finally agreed to arbitrate, it was agreed that one panelist each would be selected by the President of the United States, the Queen of England, the King of Italy, the President of the Swiss Confederation and the Emperor of Brazil. The five arbitrators met at Geneva and the award, issued in 1872, required England to pay $15,500,000 in gold to the United States in full and final settlement of all claims.[4]

In 1871, the New Orleans Cotton Exchange adopted arbitration for the resolution of its disputes. Somewhat surprisingly, this seemed to bring about an awakening of the benefits of arbitration for many industries, most notably the securities industry. The New York Stock Exchange adopted arbitration for claims between members and their customers in 1872.

In 1874 the New York State legislature created within the City of New York the office of "Arbitrator of the Chamber of Commerce of the State of New York," and thereafter fixed the salary at ten thousand dollars a year.[5]

Voluntary, binding arbitration of labor disputes was enacted by Maryland in 1878. Over the next ten years similar laws were passed in other states. In 1886, New York and Massachusetts each created permanent arbitration boards with mediation and arbitration authority.

The first federal labor dispute law, the Arbitration Act of 1888, was enacted into law. It provided for both investigative authority and voluntary arbitration but as its arbitration provision was voluntary, it was infrequently used. This short-lived law was superseded in 1898.

Another instance of diplomatic arbitration took place in 1892 with the Fur Seal Arbitration Proceedings in Paris. This tribunal was constituted to determine issues which had arisen between the United States and Great Britain concerning the jurisdictional rights of the United States in the waters of the Bering Sea and, in particular, regarding the fur seals of the Pribilof Islands.[4]

The Erdman Act was enacted by Congress in 1898 to strengthen the Arbitration Act of 1888. It retained the original act's voluntary arbitration provision but eliminated the investigative authority and provided for mediation by the Commissioner of Labor and the Chairman of the Interstate Commerce Commission at the request of either party.[6]

A key event in the use of ADR in labor disputes occurred in 1902. To try to bring an end to a long and acrimonious strike, President Theodore Roosevelt used the weight of his office to bring the principals together to resolve the Philadelphia & Reading Coal & Iron Company miners' strike. The conduct of the mine owner at these proceedings caused the President to lean in favor of the striking minors. The resulting settlement was achieved, for the mine owner, with significant pressure. Nevertheless, this miner strike and the railroad strikes of the same era ushered in a large-scale trend in the use of mediation and arbitration to resolve labor disputes.

The 20th Century

Within the first decade of the 20th Century, major trade groups sought to apply arbitration's benefits of simplicity, speed and minimal enmity. When New York's The Association of Food Distributors, Inc. (originally known as the Dried Fruit Association of New York) was formed, its bylaws included an arbitration panel for the resolution of disputes. This was a choice which worked to minimize the risk that its disagreeing members would, after resolution of the dispute, find themselves unable to resume their business relationship.

The use of ADR in labor disputes was further refined by the creation in 1917 of the U.S. Conciliation Service as an agency of the Department of Labor, which had been created in 1913. The USCS was a mediation organization with no direct mandate for arbitration.

When the League of Nations was founded in 1919, its members committed themselves to the use of arbitration

through the Permanent Court of International Justice. Unfortunately, the United States Senate failed to approve the treaty creating the League of Nations so this early and inspired act of world support for the arbitration process did not include the United States.

Until the early 1920s, the only law governing arbitration proceedings in the United States came from court decisions, some dating back to the 17th and 18th Centuries. Lord Coke's opinion in Vynior's Case (Trinity Term, 7 Jac. 1), decided in 1609, formed the basis for the common law doctrine that "1) either party to an arbitration might withdraw at any time before an actual award; and 2) that an agreement to arbitrate a future dispute was against public policy and not enforceable." The precedent established in Vynior's case (from which it was extrapolated that the parties to a dispute "may not oust the court of its jurisdiction"-meaning that courts may not be deprived of their jurisdiction even by private agreement) became "the controlling decision in American arbitration law" until the New York State legislature abrogated the common law doctrine in 1920, and until a federal arbitration statute was passed in 1925. Other states soon followed suit, and for the first time in America, agreements to arbitrate future disputes were "legally binding and judicially enforceable." This was the pivotal moment for the widespread use of arbitration in America.[7]

In 1925, The Federal Arbitration Act (9 U.S.C. §§ 1 et seq.) was enacted. Its enactment was a recognition of the benefits of arbitration and the statute established a national policy favoring arbitration. Functionally, the Federal Arbitration Act was designed to overcome existing judicial hostility toward arbitration which appears to have evolved from the English courts. It has been written that English judges were paid fees based on the number of cases they decided. Arbitration, then, would infringe on their livelihood. English courts were also strongly reluctant to surrender their jurisdiction over various types of disputes.[8]

As the nation became more industrialized and the number of disputes increased, the resistance to arbitration diminished with the increased number of disputes. Where the agreement at issue concerns "a transaction involving commerce," (9 U.S.C. § 1), the FAA continues to form the framework for arbitration cases.

The founding of The American Arbitration Association in 1926 by Moses Grossman, a New York lawyer, and Charles Bernheimer, a New York businessman, ushered in the modern era of ADR. Each of these men had formed an organization to promote the use of arbitration and by combining their efforts in 1926, they created what remains the dominant provider and promoter of ADR in the United States.

With the rapid industrialization of the U.S. in the 1930s and the passage of the National Labor Relations Act during that era, a steep rise in the use of arbitration and mediation in labor contracts began. When the United States entered the Second World War, the resulting economic boom and the unacceptability of shortages in war materials due to labor strikes resulted in a government requirement that grievance-arbitration clauses be placed into collective bargaining agreements. Now, though they are not actually required, approximately 75% of all collective bargaining labor contracts continue to retain an arbitration clause.

"[I]t falls upon us as arbitrators and party advocates in arbitration to redouble our focus on securing for the parties the benefits of the arbitration process that they elected."

In a further effort to ensure the availability of war materials, President Franklin Roosevelt created in 1941 the National Defense Mediation Board to handle disputes not resolved by the U.S. Conciliation Service. This board was replaced one year later by the War Labor Board, which was empowered to employ arbitration, mediation and policymaking dispute processes. Following the War Labor Board, the Federal Mediation and Conciliation Service was created in 1947. An outgrowth of the U. S. Conciliation Service, the FMCS was created as an agency independent of the Department of Labor to address the concern of its management constituency that the agency had been inherently biased as the USCS because it was an agency within the Department of Labor.[9]

A major milestone in the use of arbitration in international agreements involving businesses of the United States was achieved in 1970 when the Uniform Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention) became law in the United States by the addition of Chapter 2 to the Federal Arbitration Act. To this day, the New York Convention provides a framework for enforcement of foreign arbitral awards in the United States which is more reliable and consistent than existing frameworks for enforcement of court judgments internationally. In 1990, the Federal Arbitration Act was expanded one step further by the enactment of Chapter 3 of the Act, the Inter-American Convention on International Commercial Arbitration.

Conclusion

Litigation is the eight-hundred pound gorilla in dispute resolution. It is predictable that as litigation practices shift, so will those of arbitration. The shift from disclosure to discovery and the advent of e-discovery have both had a great effect on arbitration. After all, the advocates representing arbitration clients are generally the same

ones who represent litigants. Their training and practice methods cannot be expected to be materially different in the differing fora. The same can be said for the standards of thoroughness ("*leave no stone unturned*") demanded by their firms on behalf of their clients. As many now recognize that arbitration's core values of simpler, faster, cheaper are becoming more elusive, it falls upon us as arbitrators and party advocates in arbitration to redouble our focus on securing for the parties the benefits of the arbitration process that they elected.

Endnotes

1. Massey, Jr., Robert V., "History of Arbitration and Grievance Arbitration in the United States," 2005 http://www.wvu.edu/~exten/depts/ilsr/arbitration_history.pdf.
2. Barrett, Jerome T. and Barrett, Joseph P., "A History of Alternate Dispute Resolution, The Story of a Political, Cultural and Social Movement," Jossey-Bass, a Wiley imprint, 2004.
3. Bales, Richard C., "Compulsory Arbitration: The Grand Experiment in Employment," Ithaca, NY: Cornell University Press, 1997.
4. A Brief History of the United States, by John Bach McMaster, http://www.fullbooks.com/A-Brief-History-of-the-United-States7.html.
5. L. 1874, c. 278. L. 1875, c. 495, f 6.
6. A Brief History of the United States, by John Bach McMaster, http://www.fullbooks.com/A-Brief-History-of-the-United-States7.html.
7. Barrett, Jerome T. and Barrett, Joseph P., "A History of Alternate Dispute Resolution, The Story of a Political, Cultural and Social Movement," Jossey-Bass, a Wiley imprint, 2004. "Stateless, Not Lawless," by Carl Watner (The Voluntaryist, Whole No. 84, February 1997).
8. Preston Douglas Wigner, "The United States Supreme Court's Expansive Approach to the Federal Arbitration Act: a Look at the Past, Present, and Future of Section 2," 29 U. Rich. L. Rev. 1499, 1502 (1995).
9. Barrett, Jerome T. and Barrett, Joseph P., "A History of Alternate Dispute Resolution, The Story of a Political, Cultural and Social Movement," Jossey-Bass, a Wiley imprint, 2004.

Steven A. Certilman, steven@certilman.com, is an Attorney, arbitrator and mediator with offices in Stamford, CT and New York. He is a Chartered Arbitrator and Fellow of the Chartered Institute of Arbitrators.

Congressional Developments on Arbitration: Update

By Edna Sussman

There has been no formal activity in the House of Representatives or in the Senate on the Arbitration Fairness Act which would invalidate, *inter alia*, pre-dispute arbitration agreements for consumers, employees and franchisees, and was the subject of this Section's report published in the last issue of the *New York Dispute Resolution Lawyer* and of resolutions passed in August of 2009 by the American Bar Association's House of Delegates. But Congress has been busy on other legislation relating to arbitration.

The House of Representatives passed comprehensive financial regulatory reform legislation, H.R. 4173, which contains a number of significant arbitration provisions. The reform bill, known as the Wall Street Reform and Consumer Protection Act, includes many different provisions relating to arbitration, including the following. The bill would authorize the director of a new consumer financial protection agency to issue regulations prohibiting or imposing conditions on the use of any pre-dispute arbitration agreement between consumers and providers of consumer financial products or services if the director finds that such a prohibition or imposition of conditions or limitations are in the public interest and for the protection of consumers. The bill would grant the Securities and Exchange Commission the authority to issue rules prohibiting or imposing conditions or limitations on the use of agreements that require customers or clients of any broker, dealer, municipal securities dealer, or investment advisor to arbitrate any future dispute between them arising under the federal securities laws or rules if it finds that such prohibition, imposition of conditions, or limitations are in the public interest and for the protection of investors. The bill would require the Comptroller General to conduct a study of FINRA arbitration. The bill would amend the Truth in Lending Act to prohibit predispute agreements to arbitrate any controversy involving residential mortgage loans or lines of credit. The Senate version of the financial reform package passed in May of 2010 contains many similar provisions.

While at the time of this writing these provisions have not yet been enacted into law, in December of 2009 two laws were enacted relating to arbitration.

Auto Dealer Arbitration

Congress passed legislation signed into law[1] to protect the automobile dealers who were terminated in the wake of the bankruptcies of GM and Chrysler by creating a right to a streamlined arbitration against the manufacturers at the election of the dealers. Ironically in 2002 Congress passed a law providing that automobile dealers have to consent to arbitration after the dispute arises before an arbitration can be conducted.[2]

The new statute is very specific and provides that arbitrations by the dealers who claim their termination was unlawful under state law are to take place pursuant to the American Arbitration Association's (AAA) Commercial Arbitration Rules. Arbitrators are to be selected by mutual agreement of the parties from a list of arbitrators provided by the AAA. In the event the parties are unable to agree, the AAA makes the appointment.

While not granted the authority to award damages, the arbitrator is authorized to order a dealer to be returned to the dealer network but must consider in the determination a balance of the economic interests of the dealer, the manufacturer and the public at large. In so doing, the arbitrator is specifically obligated to consider the dealer's profitability in 2006-09, the dealer's overall business plan, the dealer's economic viability, the demographic and geographic characteristics of the covered dealership's market territory, and the dealer's satisfaction performance.

All of the arbitrations are required to be completed by mid-June and the arbitrator is required to issue a written determination no later than 7 business days after the arbitrator determines that the case has been fully submitted. The AAA has received almost 1600 filings for arbitration by dealers. With the reinstatement by General Motors of approximately 600 of its dealers as its business improved, the number of cases has now been reduced to a number less than 1000, still a large number. The AAA has developed tools to streamline the process for the parties and create uniformity in the procedural mechanisms employed to comport with the statutory requirements.

Arbitration Agreements by Federal Contractors

On December 22, President Obama signed into law an amendment to the Department of Defense Appropriations Act[3] that was introduced by Senator Al Franken of Minnesota, prohibiting enforcement of arbitration for specified employment-related claims by certain government contractors. The amendment provides that defense contractors competing for contracts in excess of $1 million and other entities receiving funds pursuant to the DOD Appropriations Act must, as a condition of receiving such funds, refrain from entering into any agreement with their employees or independent contractors that contains a mandatory arbitration clause for claims under Title VII of the Civil Rights Act of 1964 or for certain torts related

to sexual assault or harassment. Such contractors must also refrain from enforcing such arbitration provisions in existing employment agreements.

Concerns have been raised as to the precise application of this legislation. Many companies have federal government contracts. Whether this law will impact arbitration agreements and contracts other than those with the Department of Defense funded with 2010 dollars remains to be seen.

This legislation is an outgrowth of the Jamie Leigh Jones case. Ms. Jones alleges she was gang raped in Iraq by fellow employees at Halliburton after she asked to be put in all-female housing and was refused. She said Halliburton kept her locked up and not allowed to call home the day after the incident and then tried to make her pursue her remedies in arbitration pursuant to her contract. The 5th Circuit Court of Appeals reversed a trial court decision that had prohibited her from bringing her claims in court (on the ground that the trial court had erred because her bedroom was not her place of employment even though provided by her employer). Ms. Jones has testified extensively in Congress about what happened to her and that she was not aware of the arbitration provision in her employment agreement. Her testimony was widely reported in the press and has undoubtedly affected the perception of arbitration by the public and members of Congress.

Conclusion

It is impossible to predict what measures relating to arbitration will ultimately be enacted by Congress. But it is clear that it is a subject that continues to attract attention and action in Congress.

Endnotes

1. Consolidated Appropriations Act 2010 (HR 3288) § 747.
2. 15 U.S.C.A. § 1226.
3. 2010 Department of Defense Appropriations Act, § 8116 of the Act (H.R. 3326).

Edna Sussman is a principal of SussmanADR LLC and is the Distinguished ADR Practitioner in Residence at Fordham University School of Law. She is the Chair-Elect of the Dispute Resolution Section of the New York State Bar Association and serves on the arbitration and mediation panels of the AAA, ICDR and CPR, 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.

Traps for the Unwary: Major Differences Between New York and Federal Arbitration Law

By Charles J. Moxley, Jr.

Parties who include an arbitration clause in their contract also typically include a choice of law clause, designating the law applicable to the contract. A typical clause might read, "This agreement shall be governed by and interpreted in accordance with the law of the State of New York."

In making this selection, parties often assume they are adopting the law that will apply not only to their rights and obligations under their contract but also to any arbitration that may ensue between them under the contract.

This is not necessarily the case. General choice of law clauses are generally understood to designate the substantive law applicable to the parties' dispute, the contract, tort, statutory or other such law, but not the law applicable to any arbitration between the parties under the contract.[1]

There will often be substantial differences between the various bodies of arbitration law that could apply to any potential arbitration. By only designating the substantive law, parties miss the valuable opportunity to designate the arbitration law that best suits their purposes. They also potentially subject themselves to expensive and time-consuming side disputes as to applicable arbitration law in any arbitration that may ensue between them and in collateral court cases.

This article will explore significant differences between New York and federal arbitration law and suggest the advisability of designating the applicable arbitration law in arbitration clauses.[2]

Areas of Conflict Between New York and Federal Arbitration Law

New York arbitration law is primarily set forth in New York CPLR Article 75 and case law, although there are rules of law in other statutes that apply to arbitration, typically within limited contexts.[3] Federal arbitration law is generally set forth in the Federal Arbitration Act[4] (FAA) and case law.

The central thrust of the FAA is Section 2, which establishes the enforceability of all arbitration agreements relating to interstate commerce, save upon such grounds as exist at law or in equity for the revocation of any contract.[5] Any state law that purports to restrict the arbitrability of a dispute affecting interstate commerce is preempted.

The FAA was enacted in 1925, five years after New York CPLR Article 75 (as originally enacted). The text of the FAA was largely based on Article 75. New York arbitration law and the FAA remain quite similar, although there are a number of significant areas where they diverge.

Challenges to the Validity of the Parties' Overall Agreement, Including Challenges Based on Alleged Fraud in the Inducement

Under New York arbitration law, a challenge to the parties' overall agreement on the ground that it is permeated with illegality is generally to be decided by the court.[6] Under the FAA, that is a question for the arbitrator.[7] Challenges to the validity of the arbitration clause itself are generally decided by the court under both New York arbitration law and the FAA.[8]

The Extent to Which a Party's Appearance in an Arbitration Waives Its Jurisdictional Objection

CPLR 7503(b) provides that, by participating in an arbitration, a party waives the right to apply to a court to stay the arbitration based on the invalidity of the arbitration agreement or statute of limitations. By participating in the arbitration, the party becomes subject to the decision of the arbitrator on such issues; if the party wants to contest arbitrability, it must make an application in court to stay the arbitration without first contesting the matter before the arbitrator. In contrast, the Second Circuit has held that the FAA imposes no such waiver: A party may oppose arbitrability in the arbitration (or even potentially participate more broadly in the arbitration) and thereafter dispute arbitrability in court.[9]

Statute of Limitations

CPLR 7502(b) provides that a party may submit to a court the question of whether an arbitration is barred by a statute of limitations.[10] The U.S. Supreme Court has reached the opposite result under the FAA, finding that such objections are generally to be decided by the arbitrator when the parties have agreed to submit their dispute to arbitration.[11]

There is a further conflict of state and federal case law as to whether a court or arbitrator should determine limitations issues in cases where the FAA is applicable but the parties' agreement includes a choice of law clause designating New York arbitration law.

The New York Court of Appeals has suggested in dictum that, even in cases where the FAA is applicable, limitations defenses should be heard by *the court* if the parties adopted New York arbitration law (which, in its view, they would do by providing that New York law would apply to the "enforcement" of their agreement).[12] The basis for

this conclusion is that, under the FAA, party autonomy in choosing arbitration is paramount: If the parties, through selecting New York arbitration law, chose to have the court determine limitations questions, that choice should be respected. In contrast there are local federal cases providing that, even in such circumstances, the FAA requires that arbitrators determine limitations questions.[13]

Punitive Damages

New York arbitration law generally prohibits arbitrators from awarding punitive damages, even if the parties agreed that the arbitrators would have such a power. The Supreme Court in *Mastrobuono* found that the FAA permits arbitrators to award punitive damages.[14] The New York state courts have been inconsistent after *Mastrobuono*, with some courts following the decision[15] and at least one not following it and sticking to the strong New York public policy against punitive damages.[16]

Attorneys' Fees

CPLR 7513 generally precludes arbitrators from awarding attorneys' fees, unless otherwise provided in the parties' agreement to arbitrate.[17] Federal law contains no such prohibition.[18]

Consolidation of Arbitrations

New York courts have held that they have the power to consolidate arbitrations upon the same general bases applicable to the consolidation of actions[19] and indeed have suggested that arbitrators have this same power to consolidate.[20] In contrast, the Second Circuit, along with most federal circuits, has held that the courts do not have the power under the FAA to consolidate arbitrations absent the parties' agreement.[21]

Pre-Award Removal of Arbitrator

There is authority to the effect that New York permits the pre-award removal of an arbitrator by a court, whereas the FAA does not.[22]

Unenforceability of New York's Heightened Burden of Proof Requirement to Establish That an Arbitration Clause Had Been Added to an Existing Contract

The Second Circuit, reviewing the New York 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, found the rule to be preempted as discriminating against arbitration.[23]

Whether Arbitrators Have Authority to Issue Subpoenas to Non-Parties for Production of Documents Pre-Hearing

CPLR 7505 provides that an arbitrator and any attorney of record in an arbitration proceeding have the power to issue subpoenas. While the case law is sparse and inconsistent,[24] there is some authority in New York that arbitrators can issue subpoenas to non-parties for discovery purposes.[25] While the issue of whether the FAA permits arbitrators to subpoena non-parties for discovery purposes, as opposed to for purposes of calling the witnesses to the hearing, has divided the Circuit Courts, the Second Circuit has found that arbitrators do not have such a power, *i.e.*, that they may only subpoena non-parties' documents to a hearing.[26]

Precluding Parties from Applying in Court to Stay Arbitrations

CPLR 7503(c) provides a procedure whereby a party, by its demand for arbitration or notice of intention to arbitrate, may notify another party that, unless the party applies to stay the arbitration within twenty days after such service, it shall thereafter be precluded from asserting that a valid agreement was not made or has not been complied with and from asserting in court the bar of a limitation of time. The FAA contains no such provision. The law is unsettled whether CPLR 7503(c) is applicable to proceedings in state and federal court in New York, respectively, with respect to arbitrations to which the FAA is applicable.[27]

Prerequisites to Having Judgment Entered Upon an Arbitral Award

FAA Section 9 requires that, for a party to obtain judgment on an arbitration award, the party's agreement must provide that a judgment shall be entered upon the award. CPLR 7510, the analogous New York provision, contains no such requirement. It appears to be questionable but unsettled whether this requirement of FAA Section 9 is applicable in New York state courts to cases to which the FAA is applicable or whether federal courts sitting in diversity in New York in such cases could issue judgment on an award under CPLR 7510 where Section 9 had not been complied with.[28]

Challenges to Arbitral Award Based on Arbitrators' Refusal to Grant Adjournment

Unlike FAA Section 10(a), CPLR 7511(b)(1) does not specify that an arbitrator's refusal to postpone a hearing upon sufficient cause is misconduct constituting a ground for vacating an award, instead relying on the general language of "misconduct" to address the issue. Interestingly, New York Civil Practice Act (CPA) 1461(3), the predecessor to CPLR 7511(b)(1), contained the same language as FAA Section 10(a).[29]

Time for Making an Application to Vacate an Award

Under CPLR 7511(a), an application by a party to vacate an award must be commenced within 90 days after the delivery of the award to him. Under FAA Section 12, notice of motion to vacate an award must be served on the adverse party within three months after the award is filed or delivered.[30]

Availability of Interim Appeals

Under the CPLR, a party may file an interlocutory appeal to the Appellate Division from any ruling of the Supreme Court. Under FAA Section 16 (b), the federal "final judgment rule" applies, *inter alia*, to foreclose an interlocutory appeal from a District Court order compelling arbitration.[31]

Beyond Preemption: Areas Where New York Courts Have Applied the FAA Where Ostensibly Not Constitutionally Required to Do So

Discussed above are respects in which New York and FAA arbitration law differ. There are also a number of areas where New York state courts, generally without elaboration, have applied FAA arbitration law where ostensibly federal courts would not have applied it, specifically with respect to various FAA provisions that appear by their terms to apply only in federal courts.[32]

Enforcing Agreements by Their Terms Without Adding New Terms, Even if the New Terms Are Supported by State Law and Not Inconsistent with the Parties' Agreement

CPLR 7506(b) empowers the New York courts to direct an arbitrator to proceed promptly with the hearing and determination of the controversy. The New York Court of Appeals has held that, absent a choice of law clause explicitly adopting this provision (or perhaps New York arbitration law generally), this provision of the CPLR does not apply to an arbitration to which the FAA is applicable, since it would involve the court in effectively adding to the parties' agreement something to which they had not agreed.[33]

New York State Courts' Application of FAA § 7 to Subpoenas Issued by Arbitrators in Cases Involving Interstate Commerce

As noted above, CPLR 7505 empowers arbitrators to issue subpoenas in arbitrations over which they preside. Correspondingly, FAA Section 7 empowers arbitrators, or a majority of them in a particular case, to issue subpoenas and provides for the enforcement of such subpoenas by the federal district court in which the arbitrators are sitting.

Since FAA Section 7 on its face provides only for enforcement in federal court, but disputes relating to arbitrations affecting interstate commerce may be litigated in state court, one might expect CPLR 7505 to apply to such disputes litigated in state court. Nonetheless, the First Department in at least one case has reflexively applied FAA Section 7 to issues relating to subpoenas in arbitrations to which the FAA is applicable.[34]

Application by New York State Courts of the Provisions of FAA §§ 9, 10, and 11 to Issues as to the Review of Awards Issued by Arbitrators in Cases Involving Interstate Commerce

CPLR 7510 and 7511 set forth standards for confirming, vacating, and modifying arbitration awards. FAA Sections 9, 10, and 11 set forth the corresponding federal standards for confirming, vacating, and modifying arbitration awards.

FAA Section 10 refers specifically to vacating arbitration awards in federal district courts, without reference to state courts. Section 9 refers to confirming awards in federal court, although it also refers to the possibility of the parties specifying the court in which judgment on an award shall be entered, without specifying what that court might be, or whether it might be a state court. Section 11 refers to modifying awards in federal district court.

Accordingly, one might expect that a New York state court hearing such a motion in an arbitration to which the FAA is applicable would apply the standards set forth in CPLR 7510 and 7511, as applicable, unless the parties' agreement provided otherwise.

Yet the New York courts, including the Court of Appeals, have often proceeded, seemingly automatically and reflexively, from the determination that the FAA is applicable to the application of the standards of FAA Sections 10 and 11 for modifying and vacating awards.[35]

Legal Determination of Arbitration Choice of Law

The FAA governs arbitration agreements that involve interstate or maritime commerce, preempting state law as to such matters. The Supreme Court has interpreted the term "commerce" as used in the FAA very broadly as extending as expansively as the Commerce Clause to any dispute affecting interstate commerce.[36] This means that most arbitrations affect interstate commerce and are therefore subject to the FAA.

Parties Who Want New York Arbitration Law to Apply

The fundamental rule of the FAA is that parties' arbitration agreements are to be enforced as written, except upon such grounds as exist at law or equity for the revocation of any contract. This includes parties' agreements that their arbitrations shall be governed by a particular arbitration law, as long as that law does not conflict with the FAA.[37]

The New York Court of Appeals has reached essentially the same conclusion, finding that, where the parties agreed that New York law would apply to the "enforcement" of their agreement, they thereby adopted New York arbitration law, including the rule that statute of limitations issues should be determined by the court, not the arbitrator.[38]

Accordingly, even though an arbitration involves interstate commerce, so that the FAA would otherwise be applicable to it, state arbitration law will generally be applicable if the parties by their arbitration agreement so provide. Therefore, parties who want New York or other state arbitration law to apply to potential arbitrations between them should so provide in their agreement. Where there appears to be a risk that the particular rule of New York arbitration law could be said to conflict with the FAA, the enforceability of the parties' selection of that rule of law might be more certain if the rule were explicitly adopted rather than through a general adoption of New York arbitration law.

In addition, as noted above, courts in New York have tended to apply the FAA in an overly preemptive way: they have tended to apply portions of the FAA that are not necessarily applicable in state courts. This is another reason why parties who want New York arbitration law to apply should so provide in their agreements.

Parties Who Want Federal Arbitration Law to Apply

Parties who want federal arbitration law to apply also need to be careful and should specify the FAA as the governing arbitration law. State arbitration law will generally apply if the arbitration does not involve interstate commerce. Even though interstate commerce is broadly defined in this respect, uncertainties can still arise as to whether a particular dispute involves interstate commerce, and courts in New York in cases ostensibly involving interstate commerce have applied New York arbitration law without consideration of the FAA.[39] At a minimum, there is a risk of expensive and time-consuming disputes between the parties in the arbitration and in court over choice of arbitration law if they do not provide for the matter in their agreement.

There is also the issue of the scope of the FAA even in cases affecting interstate commerce. As noted above, the Supreme Court has repeatedly noted that only certain provisions of the FAA are applicable in state courts. Accordingly, absent agreement by the parties to the contrary, New York arbitration law may be found to be applicable in some respects by New York courts with respect even to arbitrations subject to the FAA. Parties should be able to avoid this by providing in their agreement that the FAA shall apply to any arbitration between them under the agreement.

Conclusion

Given potentially significant differences between New York and federal arbitration law and the uncertainties as to how arbitrators and courts will determine which body of arbitration law is applicable to a particular arbitration, it is important for parties to provide in their contracts what arbitration law will be applicable to any arbitrations that arise between them.

Determining such matters by contract not only accords the parties the arbitration law they want but also presumably decreases the likelihood of expensive and time-consuming disputes between the parties as to such matters in any ensuing arbitration and in collateral litigation.

Endnotes

1. *See Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 62-64, 115 S. Ct. 1212, 1218-19, 131 L. Ed. 2d 76, 87-88 (1995); *see also*, 5 N.Y. Jur.2d Arbitration and Award § 64.
2. *See generally*, William T. Brown, *The Dark Before the Dawn: The Revised Uniform Arbitration Act*, 2 N.Y. Disp. Res. Lawyer 43 (Spring 2009); 13-75 New York Civil Practice: CPLR ¶ 7501.03, "The Federal Arbitration Act and Other Statutory Sources of Arbitration in New York"; T. Barry Kingham, 2 N.Y. Prac., Com. Litig. in New York State Courts, § 11:19, *Enforcement of Forum Selection and Arbitration Clauses* (2d ed. 2008); George K. Foster, *Confusion among Courts over the Interplay of State, Federal, and International Arbitration Law*, Nat. L. J. (Dechert on Choice of Law); 21 Williston on Contracts § 57:5 "Federal Arbitration Act—Preemption of State Law"; 5 N.Y. Jur. 2d Arbitration and Award § 64, *Effect of Federal Arbitration Act—Where Agreement Contains Provision Choosing New York Law* (2008).
3. *See*, *e.g.*, N.Y. General Business Law § 399(c) (consumer contracts); Gen. Bus. Law § 198-a(k) (New Car Lemon Law) and other laws described in 13-75 New York Civil Practice: CPLR ¶ 7501.03, "The Federal Arbitration Act and Other Statutory Sources of Arbitration in New York."
4. 9 USC §§ 1 *et seq*.
5. The Supreme Court has stated repeatedly that § 2 is the only section of the FAA that it has applied in state court. *See*, *e.g.*, Brown, *supra* n. 2 at 41, *citing Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006); *Volt Information Sciences v. Board of Trustees*, 489 U.S. 468, 477 n. 6, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989); *Southland Corp. v. Keating*, 465 U.S. 1, 16 n. 10, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984).

   However, the Supreme Court has stated in dictum that state courts, as much as federal courts, are obliged to grant stays of litigation under FAA § 3. The Court characterized it as less clear but an open question as to whether the same is true of an order to compel arbitration under FAA § 4. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26-27, 103 S. Ct. 927, 942-43, 74 L. Ed. 2d 765, 786-87 (1983). Responding to objections that FAA § 2 is the only section of the FAA that the Supreme Court has applied in state court and §§ 3 and 4 do not apply in state court, the Court, focusing on § 4, has also noted that that section "ultimately arises out of § 2." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447, 126 S. Ct. 1204, 1209, 163 L. Ed. 2d 1038, 1044 (2006).
6. *Utica Mut. Ins. Co. v. Gulf Ins. Co.*, 306 A.D.2d 877, 762 N.Y.S.2d 730 (4th Dep't 2003); *Teleserve Sys. v. MCI Telcoms. Corp.*, 230 A.D.2d 585, 659 N.Y.S.2d 659 (4th Dep't 1997); *see also,* David Elsberg, *Validity of Pacts with Arbitration Clauses: Courts Split*, N.Y.L.J., Dec. 18, 2006 (reporting that New York courts have been resistant to enforcing the FAA rule that arbitrators, not courts, should decide challenges to the parties' overall agreement).
7. *Buckeye Check Cashing*, 546 U.S. at 445-46; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-04, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967).
8. *Buckeye Check Cashing*, 546 U.S. at 445-46; *Utica Mut. Ins.*, 306 A.D.2d at 762.
9. *Penrod Mgmt. Group v. Stewart's Mobile Concepts, Ltd.*, 2008 U.S. Dist. LEXIS 11793 (S.D.N.Y. Feb. 16, 2008).
10. *See* 13-75 New York Civil Practice: CPLR ¶ 7502.14.
11. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002).

12. *Diamond Waterproofing Sys. v. 55 Liberty Owners Corp.*, 4 N.Y.3d 247, 826 N.E.2d 802, 793 N.Y.S.2d 831 (2005).

13. *See, e.g., Goldman, Sachs & Co. v. Griffin*, 2007 U.S. Dist. LEXIS 36674 (S.D.N.Y. May 17, 2007).

14. *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995); *Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 353 N.E.2d 793, N.Y.S.2d 831 (1976); *Matter of Mohawk Val. Community Coll. v. Mohawk Val. Community Coll. Professional Ass'n.*, 28 A.D.3d 1140, 814 N.Y.S.2d 428 (4th Dep't 2006); *Application of Dreyfus Service Corp. v. Kent*, 183 A.D.2d 446, 584 N.Y.S.2d 483 (1st Dep't 1992).

    The Court in *Mastrobuono* held that a general choice of law clause in the parties' contract providing that the contract shall be governed by New York law did not establish the parties' intent to incorporate the New York law allocating power between the courts and arbitrators—that a general choice of law clause adopting New York law does not adopt New York arbitration law.

15. *Prudential Sec. v. Pesce*, 168 Misc. 2d 699, 642 N.Y.S.2d 466, 1996 N.Y. Misc. LEXIS 141 (Sup. Ct. N.Y. Co. 1996).

16. *Dean Witter Reynolds, Inc. v. Trimble*, 166 Misc. 2d 40, 631 N.Y.S.2d 215 (Sup. Ct. N.Y. Co. 1995); *see also*, 5 N.Y. Jur. 2d Arbitration and Award § 64.

17. *See, e.g., Grossman v. Laurence Handprints-N.J., Inc.*, 90 A.D.2d 95, 455 N.Y.S.2d 852 (2d Dep't 1982); *CIT Project Fin., L.L.C. v. Credit Suisse First Boston LLC*, 5 Misc. 3d 1030A, 799 N.Y.S.2d 159 (Sup. Ct. N.Y. Co. 2004). New York courts have also held that arbitrators may award attorneys' fees when both sides have sought the recovery of such fees. *See, e.g., Bear Stearns & Co., Inc. v. Fulco*, 21 Misc. 3d 823, 2008 NY Slip Op. 28379 (N.Y. Co. 2008).

18. *See Merrill Lynch, Pierce, Fenner & Smith v. Adler*, 234 A.D.2d 139, 651 N.Y.S.2d 38 (1st Dep't 1996).

19. *See Matter of Cohen v. S.A.C. Capital Advisors LLC*, 11 Misc. 3d 1054A, 815 N.Y.S.2d 493 (2006); 13-75 New York Civil Practice: CPLR ¶ 7502.05.

20. *Avon Products, Inc. v. Solow*, 150 A.D.2d 236, 541 N.Y.S.2d 406 (1st Dep't 1989), *later proceeding at* 151 A.D.2d 342, 544 N.Y.S.2d 728 (1st Dep't 1989).

21. *See generally Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85 (2d Cir. 2008); *Hartford Accident & Indem. Co. v. Swiss Reinsurance Am. Corp.*, 246 F.3d 219 (2d Cir. 2001); *Home Ins. Co. v. New England Reinsurance Corp.*, 1999 U.S. Dist. LEXIS 13421 (S.D.N.Y. 1999); Robert W. DiUbaldo, *Evolving Issues in Reinsurance Disputes: The Power of Arbitrators*, 35 Fordham Urb. L. J. 83, 83-89 (2008).

22. *AIU Ins. Co. v. Am. Int'l Marine Agency*, 2006 N.Y. Misc. LEXIS 2352, 236 N.Y.L.J. 36 (2006).

23. *Progressive Casualty Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela*, 991 F.2d 42 (2d Cir. 1993).

24. *See generally*, Weinstein, Korn & Miller, 13-75 New York Civil Practice: CPLR § 7505.06; Dennis M. Rothman, Expert Analysis, 13-75 New York Civil Practice: CPLR § 7505.

25. *See, e.g., Schumacher v. Genesco, Inc.*, 82 A.D.2d 739, 440 N.Y.S.2d 4 (1st Dep't 1981); *Motor Vehicle Acci. Indemnification Corp. v. McCabe*, 19 A.D.2d 349, 353, 243 N.Y.S.2d 495, 499 (1st Dep't 1963); *Katz v. State Dep't of Corr. Serv's*, 64 A.D.2d 900, 407 N.Y.S.2d 967 (2d Dep't 1978). *But see, De Sapio v. Kohlmeyer*, 35 N.Y.2d 402, 321 N.E.2d 770, 362 N.Y.S.2d 843 (1974).

26. *See generally, Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210 (2d Cir. 2008).

27. *See Matter of Fiveco, Inc. v. Haber*, 11 N.Y.3d 140, 893 N.E.2d 807, 863 N.Y.S.2d 391 (2008); *I. K. Bery, Inc. v. Irving R. Boody & Co.*, 2000 U.S. Dist. LEXIS 1872, footnote 10 (S.D.N.Y. 2000).

28. *Franklin Hamilton, LLC v. Creative Ins. Underwriters, Inc.*, 1:08-cv-7449 (JFK), 2008 U.S. Dist. LEXIS 92980 (S.D.N.Y. November 6, 2008).

29. *See Matter of Ames v. Garfinkel*, 11 Misc. 3d 1051A, 814 N.Y.S.2d 889 (Sup. Ct. N.Y. Co. 2006).

30. *See id.*

31. *See id.*

32. *See* Brown, *supra* n. 2 at 42-3; Richard L. Barnes, *Prima Paint Pushed Compulsory Arbitration under the Erie Train*, 2 Brook. J. Corp. Fin. & Com. L. 1 (2007); Jill I. Gross, *Over-Preemption of State Vacatur Law: State Courts and the FAA*, 3 J. Am. Arb. 1 (2004).

33. *Salvano v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 85 N.Y.2d 173, 647 N.E.2d 1298, 623 N.Y.S.2d 790 (1995). The New York Court of Appeals in *Salvano* held that, for parties to adopt New York arbitration law, they must, under the United States Supreme Court's decision in *Volt*, do so with specificity. In the Court of Appeals' view, the key issue is the parties' expressed intent.

34. *Imclone Sys. v. Waksal*, 22 A.D.3d 387, 802 N.Y.S.2d 653 (1st Dep't 2005).

35. *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 846 N.E.2d 1201, 813 N.Y.S.2d 691 (2006). Indeed, even in *Roberts v. Finger*, 15 Misc. 3d 1118A, 839 N.Y.S.2d 436 (Sup. Ct. N.Y. Co. 2007), where Justice Moskowitz applied CPLR 7511 to the review of an arbitration decision to which the FAA applied, she only did so because of her conclusion that the parties, by their agreement, had adopted New York law and CPLR 7511 did not conflict with the FAA. However, the Court in *Matter of Ames v. Garfinkel*, 11 Misc. 3d 1051A, 814 N.Y.S.2d 889 (Sup. Ct. N.Y. Co. 2006), noted that the fact that the FAA is applicable to an arbitration does not necessarily mean that all provisions of the FAA are applicable. It focused, for instance, on CPLR 7511 and FAA § 10(a), relating to the grounds for vacating an award, but the First Department, in upholding the trial court's confirmation of the award, referred only to the FAA standards for vacatur. *See Uram v. Garfinkel*, 16 A.D.3d 347, 792 N.Y.S.2d 430 (1st Dep't 2005).

36. *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 123 S. Ct. 2037, 156 L. Ed. 2d 46 (2003); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995).

37. *See, e.g., Volt Information Sciences v. Board of Trustees*, 489 U.S. 468, 476, 109 S. Ct. 1248, 1254, 103 L. Ed. 2d 488, 498 (1989).

38. *Diamond Waterproofing Sys. v. 55 Liberty Owners Corp.*, 4 N.Y.3d 247, 252-53, 826 N.E.2d 802, 805-806, 793 N.Y.S.2d 831 834-35 (2005); *see also, Roberts v. Finger*, 15 Misc. 3d 1118A, 839 N.Y.S.2d 436 (Sup. Ct. N.Y. Co. 2007).

39. However, as noted, the New York state courts at times seem to ignore the scope of FAA and hence impliedly the scope of the Commerce Clause, essentially deciding cases as if the FAA did not exist, or referencing the FAA and essentially ignoring its scope as defined by the Supreme Court. *See, e.g., Ragucci v. Professional Constr. Servs.*, 25 A.D.3d 43, 803 N.Y.S.2d 139 (2d Dep't 2005); *Baronoff v. Kean Dev. Co., Inc.*, 12 Misc. 3d 627, 818 N.Y.S.2d 421 (Nas. Co. Sup. Ct. 2006).

Charles J. Moxley, Jr. is a litigator, arbitrator, and mediator, specializing in complex commercial disputes. Currently the Distinguished ADR Practitioner in Residence at Cardozo Law School, Mr. Moxley is a fellow of the College of Commercial Arbitrators and a member of arbitration and mediation panels of the American Arbitration Association, the International Institute for Conflict Prevention and Resolution (CPR), the U.S. Council of International Business (USCIB) for the ICC International Court of Arbitration, and Supreme Court, New York County, and is an ARIAS-U.S. Certified Arbitrator. He is Of Counsel to Kaplan Fox & Kilsheimer LLP, an Adjunct Professor at Fordham Law School, and Co-Chair of the Legislation Committee of the Dispute Resolution Section of the New York State Bar Association.

Arbitrator Correction of Awards: The Second Circuit Finds a Way

By Marc J. Goldstein

Most arbitration rules permit correction only for clerical, typographical and computational errors. But some in the arbitration community think broader rules permitting arbitrators to fix their non-clerical mistakes, and even to reconsider the merits, are a good idea. They may be surprised to find their wish has been granted and find solace in the Second Circuit's decision which accepted an arbitrator's issuance of an amended award reducing the damages recovery, through a judicial rule of deference to arbitrators' decisions.

On January 14, 2010, the United States Court of Appeals for the Second Circuit held that an arbitrator's post-award rulings on requests for correction of clerical errors are entitled to the same deference and limited judicial review as any other decision on an issue the parties have submitted to the arbitrator.[1] The Court reversed the district court, and held:

> [T]he district court erred in applying the *functus officio* doctrine to the arbitrator, as the arbitrator was acting on the parties' petitions for reconsideration, and he revised the award pursuant to his interpretation of the arbitral rules pursuant to which the parties had agreed the arbitration would be conducted.

Opinion at * 4.

The decision would permit typical provisions of arbitration rules for correction of clerical, typographical, and computational errors to be used liberally to change arbitral outcomes.

I. Factual and Procedural Background

T.Co and Dempsey contracted for the sale and purchase of steel pipe made in Chile. Dempsey discovered that most of the pipe was defective—out of tolerance for straightness. Dempsey withheld part of the purchase price, accepted most of the pipe, gave notice of the defects, and undertook to straighten the pipe and sell it for whatever the market would bring.

T.Co started the arbitration for the unpaid portion of the price. Dempsey counterclaimed for its economic losses, including the diminished value of the pipe, and its extra processing costs to straighten it.

The arbitrator made a final award on April 20, 2007. He awarded T.Co the unpaid balance of the price. He awarded Dempsey damages for the diminished value of the pipe, for its processing costs, and for storage, transportation and other incidental expenses. The net economic outcome was in Dempsey's favor by about $260,000.

A critical fact issue was the fair market value of pipe conforming to the requirements of the contract, as this is the point of departure under the Uniform Commercial Code Section 2-714(2) to determine diminished value. The arbitrator stated in the award that he considered factory price lists, numerous invoices, oral testimony from the parties, and written and oral expert testimony. He found the value of non-defective pipe to be $1000 per ton.

"[S]ome in the arbitration community think broader rules permitting arbitrators to fix their non-clerical mistakes, and even to reconsider the merits, are a good idea. They may be surprised to find their wish has been granted…"

Concerning Dempsey's costs to straighten the pipe, the arbitrator purported to accept Dempsey's figure for the cost per hour and the number of hours, and found those costs to be about $50,000.

Each side asked the arbitrator to correct what it contended were "clerical, typographical, or computational errors" under ICDR 30(1). Only T.Co's correction application led to changes in the award, and only that application was at issue in the Second Circuit.

T.Co, in its application to the arbitrator for corrections, argued that the arbitrator had misinterpreted evidence. T.Co said that one of the many invoices considered had been misread as to the unit of measurement, and that two other invoices had possibly been overvalued as evidence because the arbitrator might have overlooked certain distinctions (e.g., the invoices concerned sale of longer lengths of pipe than those at issue).

The arbitrator held that these were correctible errors. He further held that ICDR Rule 30(1) did not prohibit the arbitrator from making, and therefore should be understood to permit, a new evaluative assessment of the clerically corrected body of evidence. Upon such new assessment, the arbitrator reduced the fair market value of conforming pipe from $1000 per ton to $950, and correspondingly reduced Dempsey's diminished value damages from $420,000 to $340,000. The corrections to the

interpretation of evidence and the changed conclusions were memorialized in an amended final award issued in June 2007.

II. The Second Circuit's Decision

The District Court held that the arbitrator exceeded his powers, as the errors were not correctible under the *functus officio* doctrine as developed by the courts, which permits correction of errors apparent on the face of the award. The District Court stated that the arbitrator's power to make corrections is derived "in part" from ICDR Rule 30(1), and by implication held that that power was also derived, in part, from the judicially developed common law rules concerning the "inherent" power of an arbitrator to make corrections. Whether the District Court also meant to state that the arbitrator's power is related to the criteria for judicial correction of awards under Sections 9 and 11 of the FAA is less clear. Those sections provide that a Court must confirm an award unless it is modified or corrected as provided in Section 11.

The Second Circuit rejected this approach, reasoning that the parties by making applications to the arbitrator under ICDR 30(1) had clearly and unmistakably agreed to arbitrate the corrections issue, including interpretation of the scope of Rule 30(1). On this view, the arbitrator's "interpretation" of ICDR Rule 30(1) as permitting new subjective conclusions on the merits was entitled to the same limited and deferential review as any other issue submitted to the arbitrator.

Dempsey argued that no deference was due because the parties had not agreed to arbitrate over reconsideration of the merits. Further, Dempsey argued, the original award was still subject to confirmation—there being no ground under the FAA or the New York Convention to refuse to confirm it—and that only a court could reconcile the original and amended awards. Whereas the district court's power to correct the original award is constrained by Section 11 of the FAA, the same constraint must operate on the arbitrator unless he or she is empowered to withdraw and replace the original award.

The Court found this unpersuasive, reasoning that corrections rendered the original award "ambiguous," and that this would solve the conflicting awards issue in future cases by allowing the district court to remand to the arbitrator for clarification before confirmation.

III. Critique of the Second Circuit's Decision

It can be argued that neither the parties' agreement to arbitrate under the ICDR Rules nor their separate submissions of correction applications under Rule 30(1) constitutes clear and unmistakable evidence that the parties intended that primary power to decide whether to reconsider the merits would lie with the tribunal. Certainly the parties may agree to have the arbitrator retain jurisdiction to make corrections, to make corrections in the form of an amended final award, and to withdraw and nullify the uncorrected original award. But the mere adoption and use of arbitration rules such as ICDR Rule 30(1) is not an agreement for an arbitral reconsideration process.

The flaw in the Second Circuit's reasoning, I believe, is to have treated as "interpretation" of ICDR Rule 30(1) the arbitrator's determination that a power existed under the Rule simply because it was not expressly prohibited, i.e., to subjectively reconsider the merits after making technical corrections in the award's description of evidence. Certainly by embracing Rule 30(1) the parties had clearly and unmistakably agreed to arbitrate over whether a particular error was or was not clerical or typographical. But nothing in the text of Rule 30(1) even suggests the existence of a derivative power to change the outcome through subjective reconsideration. Rule 30(1) contains no language whatever allowing the arbitrator to amend an award based on perceived consequences of clerical or typographical corrections. Rule 30(1) is completely silent on the matter that the Second Circuit holds that the parties clearly and unmistakably submitted to the arbitrator. Given that court procedural rules do provide for merits reconsideration under certain circumstances whereas arbitration rules almost universally do not, the finality of the arbitrator's purportedly final award, immune from merits reconsideration by anyone including the arbitrator, is one of the hallmarks of arbitration. It does not seem right to say, as the Second Circuit does, that the parties clearly and unmistakably agreed to arbitrate over merits reconsideration.

Further, the Supreme Court's more recent decision in *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 2010 U.S. LEXIS 3672 (April 27, 2010) may encourage courts to draw a line more restrictively than did prior Second Circuit jurisprudence between arbitral interpretation, on the one hand, and arbitral determinations of sound policy in the absence of agreement. What the Supreme Court has said about interpretation of the arbitration agreement in *Stolt-Nielsen* has application to arbitral interpretation of applicable rules. The arbitrator in the *Dempsey* case made no pretense of attempting to divine the intention of the drafters of ICDR Rule 30(1) in regard to merits reconsideration. He simply drew a conclusion about how that Rule should be "understood" in light of the fact that the Rule does not expressly prohibit arbitrators from considering the merits consequences of what they have determined to be "clerical" corrections. Nor does it seem appropriate to defer to the arbitrator on the ground that this is a question of arbitral procedure that "'grow[s] out of the controversy and bear[s] on its final disposition.'" (*Stolt-Nielsen, supra,* 2010 U.S. LEXIS 3672 at *41, quoting from *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002)). Rather it is an issue of whether a final disposition by an arbitrator, which as a matter of law renders an arbitrator *functus officio*, may thereafter be held by the same arbitrator to

have been non-final, i.e., whether the arbitrator is entitled to deference when he or she redraws the *functus officio* boundary between the conclusion of the arbitral process and the beginning of judicial regulation of the award.

The underlying principle for which the Dempsey case will be cited is that the parties are free to make an agreement to arbitrate reconsideration of an award according to standards different from those identified in Section 11 of the FAA or under the common law "functus officio" doctrine. But the holding that such an agreement clearly and unmistakably exists when the parties merely adopt and make use of rules like ICDR 30(1), would seem to rest on a shaky foundation.[2]

"[I]t seems reasonable to expect that an arbitrator issuing awards likely to be presented for confirmation in U.S. courts will see an increased volume of reconsideration applications masquerading as requests for corrections of clerical errors."

IV. Consequences

It is unlikely that many arbitrators, particularly in international arbitrations, will take advantage of the Second Circuit's decision as a license to stretch ICDR Rule 30(1) or comparable clerical error rules to permit changes of the outcome or reinterpretations of the evidence. The decision goes against the grain of a transnational principle of arbitration law that arbitrators will not reconsider the merits of their decisions unless the parties have agreed that they may do so. Even in U.S. domestic arbitration, the common law version of the *functus officio* doctrine is deeply ingrained, and arbitrators who stretch the doctrine to change outcomes will risk criticism that may affect their attractiveness as appointees in future cases.

On the other hand, it seems reasonable to expect that an arbitrator issuing awards likely to be presented for confirmation in U.S. courts will see an increased volume of reconsideration applications masquerading as requests for corrections of clerical errors. This is not necessarily a bad development, if it succeeds in advancing the debate over whether arbitration institutions, or arbitration statutes, to maintain the attractiveness of arbitration as a litigation alternative, should offer a correction mechanism that embraces explicitly errors of interpretation and judgment and oversight.

The case brings to the fore questions for the future. How should the arbitration community respond? Should rules be modified to permit broader correction of errors, or reconsideration according to standards applied by courts? Should arbitrators issue more awards in draft form, obtain comments, and make adjustments before the final award? Should the case discussed here be regarded as an aberration, in a system that works effectively based on arbitrator self-discipline?

One would hope that debate will culminate in decisions by arbitration institutions and legislatures that bring clarity to the field. The case for broader arbitral power to correct awards can be made compellingly. But *ad hoc* expansion of that power through attenuated constructions of rules like ICDR 30(1) is not the desirable means to that end.

Endnotes

1. *T.Co Metals LLC v. Dempsey Pipe & Supply, Inc.*, 2010 U.S. App. LEXIS 893 (2d Cir. Jan. 14, 2010).
2. In support of its conclusion that the parties' intent was clear an unmistakable, the Court cites with fully quoting ICDR Rule 36, which provides: "The tribunal shall interpret and apply these rules insofar as they relate to its powers and duties. The administrator shall interpret and apply all other rules." Thus Rule 36 speaks to the allocation of power between the tribunal and the administrator, and not to this allocation of power between the tribunal and the courts.

Marc J. Goldstein (goldstein@lexmarc.us) founded Marc J. Goldstein Litigation & Arbitration Chambers in 2007. He participates in arbitrations as an advocate and arbitrator.

Escape the Fray

Battle of Munfordville, Kentucky, Sunday, Sept. 14th, 1862, c1863, by Harper's History of the Great Rebellion, Harper's Weekly

Enlist in the Dispute Resolution Section

Find out how you can:

- Employ Dispute Resolution in virtually every practice area
- Stay on top of ADR opportunities, techniques and procedures with our CLE courses and publications
- Network with dispute resolution practitioners and leaders in our field
- Develop skills in negotiating, representing your client and selecting good mediators and arbitrators

---

For more information visit www.nysba.org/drs and join today at drs@nysba.org or call 518-463-3200

Applicability of the Supreme Court's Decision in *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers and Trainmen* to Step Clauses

By Barbara Mentz

Where a contract requires that, before engaging in arbitration, the parties follow one or more dispute resolution steps in sequence, such as conferencing or mediation, does the court or the arbitrator have jurisdiction to determine issues relating to the required pre-arbitration steps? The question that most often arises is whether the court or the arbitrator has jurisdiction to determine such pre-arbitration step clause issues as: (i) whether the step is required; (ii) whether the step has been followed; (iii) whether the step is a condition precedent to arbitration and, if not followed, leaves the arbitrator without jurisdiction; and, (iv) whether the step, if not followed, is excused, waived or can be cured. Lower Federal courts are generally faced with these questions in the context of exercising jurisdiction under the Federal Arbitration Act ("FAA"),[1] either on a motion to stay an action pending arbitration under Section 3 or a petition for an order to compel arbitration under Section 4.

Sections 3 and 4 of the FAA

Section 3 of the FAA provides that: "[i]f any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."[2]

Section 4 provides in relevant part: "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court…for an order directing that such arbitration proceed in the manner provided for in such agreement…and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."[3]

Under Sections 3 and 4, the question whether the parties have submitted a particular dispute to arbitration has been referred to as a question of arbitrability, an issue for judicial determination, unless the parties have provided otherwise.[4] The question whether a procedural prerequisite has been met, such as a required pre-arbitration step that is a condition to arbitrate, has been referred to as procedural arbitrability, an issue for the arbitrator.

In earlier decisions, the Supreme Court addressed the arbitrability issue as it relates to step clauses in cases arising under the Labor Management Relations Act ("LMRA")[5] and the arbitration rules of the National Association of Securities Dealers ("NASD").[6]

"[D]oes the court or the arbitrator have jurisdiction to determine issues relating to the required pre-arbitration steps?"

The Supreme Court Decisions in *Wiley* and *Howsam*

John Wiley & Sons, Inc. v. Livingston[7] involved an action brought under LMRA in the context of a motion to compel arbitration under a collective bargaining agreement ("CBA"). In *Wiley*, the Supreme Court was presented with two questions: (i) whether a corporate employer was required to arbitrate with a union under a CBA between the union and a corporation with which the corporate employer had merged, and, if so, (ii) whether the court or the arbitrator was the appropriate body to decide whether procedural requisites which, under the CBA, conditioned the duty to arbitrate, had been met.[8] In affirming the Second Circuit's judgment directing arbitration, the Court held that the arbitrator, not the court, was the appropriate body to determine whether a party failed to follow the first two steps of a three-step grievance process that was a prerequisite to arbitration and whether a party failed timely to file notice of any required grievance.[9]

The Court drew a distinction between substantive arbitrability issues within the court's jurisdiction and procedural arbitrability questions within the arbitrator's jurisdiction. The Court defined substantive arbitrability as threshold questions of whether there is a valid enforceable agreement to arbitrate between the parties and, if so, whether the dispute falls within the scope of the agreement. In other words, the question of whether or not the corporation was bound to arbitrate and what issues it must arbitrate is for the court to decide based upon the contract. The Court defined procedural arbitrability as

issues such as whether pre-arbitration grievance procedures, or some part of them, applied to a particular dispute, whether such procedures had been followed or excused, or whether, if unexcused, the failure to follow them avoided the duty to arbitrate.[10] The Court noted that there will be cases in which the arbitrability of the subject matter is unquestioned but a dispute arises over the procedures to be followed. The Court found that, "[i]n all such cases, acceptance of Wiley's position [that issues relating to procedures to be followed were for the court] would produce the delay attendant upon judicial proceedings preliminary to arbitration."[11]

In *Howsam v. Dean Witter Reynolds, Inc.*[12] the Supreme Court addressed the arbitrability issue in the context of whether a dispute was time-barred under the rules of the NASD. The Court reversed the judgment of the Tenth Circuit and held that the issue of whether the action was time barred was for the arbitrator.[13] The operative language in NASD's "Code of Arbitration Procedure" was a provision that stated that no dispute "shall be eligible for submission…where six (6) years have elapsed from the occurrence or event giving rise to the…dispute."[14] In holding that the issue of whether the arbitration was time barred was for the arbitrator, the Court did not find that the use of the word "eligible" indicated that the parties intended that the court decide the time limitation issue prior to arbitration. Rather, the Court determined that parties to an arbitration agreement would normally expect a forum-based decision maker to decide a forum-specific procedural gateway matter. The Court also noted that the NASD rule provided that arbitrators shall be empowered to interpret and determine the applicability of all provisions under the code.[15] Citing to *Wiley*, the Court reiterated that procedural or gateway questions such as the one in issue, that grow out of the dispute and bear on its final disposition, as well as allegations of waiver, delay, or like defense to arbitration, are presumptively not for the court but for the arbitrator.[16] The Court also cited to Section 6(c) of the Revised Uniform Arbitration Act of 2000 ("RUAA") which states in part that an "arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled.…" The Court noted that Comment 2 of RUAA states in part that Sections 6(b) and 6(c) seek to "incorporate the holdings of the vast majority of state courts and the law that has developed under the [Federal Arbitration Act]" and that "in the absence of an agreement to the contrary, issues of substantive arbitrability…are for a court to decide and 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 arbitrator to decide."[17]

In spite of the language in Sections 3 and 4 and earlier Supreme Court decisions, there is still confusion over the distinction between the scope of the court's authority or jurisdiction under Sections 3 and 4 and the scope of the arbitrator's authority or jurisdiction to determine procedural gateway questions involving step clauses.[18]

In December 2009, the Supreme Court in *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers and Trainmen*[19] addressed the issue of an arbitration panel's dismissal of an arbitration proceeding for want of authority to exercise jurisdiction based upon the parties' failure to submit evidence that a required pre-arbitration step had been followed. Although Union Pacific did not involve an interpretation of the FAA, the decision is instructive on the Court's thinking as to an arbitrator's jurisdiction where required pre-arbitration steps are in issue.

The Supreme Court's Decision in *Union Pacific*

Union Pacific involved charges of disciplinary violations by Union Pacific against five union employees. Because the grievances involved railway employees, the Railway Labor Act ("RLA") governed the dispute. The RLA mandated arbitration of the type of dispute in issue which was considered a "minor dispute" under the RLA. Congress established the National Railroad Adjustment Board ("NRAB") to arbitrate such disputes.[20] In *Union Pacific*, the Supreme Court granted certiorari to determine whether a reviewing court could set aside an NRAB arbitration panel's orders, dismissing five arbitrations for want of jurisdiction, for failure to comply with due process even though that was not one of the limited grounds for review specified in the RLA.[21]

Although the Court determined that it did not need to reach that question, it stated that, "[i]n this case, however, our grant of certiorari enables us to address a matter of some importance: We can reduce confusion, clouding court as well as Board decisions, over matters properly typed 'jurisdictional.' Recognizing that the word 'jurisdiction' has been used by courts, including this Court, to convey 'many, too many meanings,'…we have cautioned, in recent decisions, against profligate use of the term. Not all mandatory 'prescriptions, however emphatic, are… properly typed jurisdictional.…'"[22]

Before resorting to NRAB arbitration, Union Pacific and the employees, represented by their union, were required to, and did, exhaust the grievance proceedings ("on-property" proceedings) required by their CBA. If one of the parties was dissatisfied with the result in the on-property proceedings, the parties had to attempt settlement in conference as a final pre-arbitration step. If the matter was not settled at the conferencing step, either party could refer the matter for review to the NRAB for arbitration. The employees' union sought such a review. Although the parties submitted the on-property proceedings record ("Record") to the arbitrators, it did not contain any evidence that the conferencing step had taken place, even though there was no dispute that it had, at least as

to two of the five grievance proceedings. The employees' union attempted to, and did, submit evidence of conferencing outside of the Record. However, the arbitration panel dismissed the cases for want of jurisdiction because the parties had not timely presented evidence that they had engaged in the pre-arbitration conference step.[23]

The employees' union filed a petition for review to the district court. The district court accepted the arbitration panel's description of the issue as "jurisdictional." It concluded that conferencing was required before parties could refer the dispute to arbitration and that refusing to consider evidence of conferencing outside of the Record did not violate due process. As a result, the district court held that the arbitration panel lacked jurisdiction and granted the motion to dismiss. On appeal, Seventh Circuit stated that the "essence of the conflict boils down to a single question: is written documentation of the conference in the on-property record a necessary prerequisite to arbitration before the NRAB?" The Seventh Circuit determined that there was nothing in the RLA or the rules of the NRAB that required written documentation that a pre-arbitration conference had been held. Instead of deciding the appeal on statutory grounds, however, the Seventh Circuit held that the arbitration panel's refusal to take jurisdiction was a constitutional violation of due process rights.[24]

The Court agreed that the Seventh Circuit correctly framed the question, but disagreed with the Seventh Circuit's resort to constitutional grounds when statutory grounds resolved the issue. Consequently, the Court affirmed the Seventh Circuit decision on statutory grounds. The Court found that nothing in the RLA or the NRAB rules elevated to jurisdictional status the obligation to conference minor disputes or to prove conferencing as a prerequisite to the NRAB arbitration panel's exercise of jurisdiction.[25]

The Court held that "[b]y refusing to adjudicate cases on the false premise that it lacked power [jurisdiction] to hear them, the NRAB [arbitration] panel failed 'to conform, or confine itself,' to the jurisdiction Congress gave it."[26]

In its decision, the Court addressed Union Pacific's defense of the NRAB's characterization of conferencing and proof thereof as "jurisdictional" on the basis that the NRAB's rules provide that no petition for review "shall be considered" unless the subject matter has been handled in accordance with the provisions of the RLA. The Court found that provision, as other prescriptions in the NRAB rules, to be a claims-processing rule for the arbitrators to handle, not a jurisdictional bar. The Court noted that, "[a]nd when the fact of conferencing is genuinely contested, we see no reason why the panel could not adjourn the proceeding pending cure of any lapse. Circular One [NRAB rule] does not exclude such a sensible solution."[27]

Conclusion

Where an agreement to arbitrate provides for procedural steps and compliance with those steps is in issue, even if those steps are phrased as mandatory "prescriptions, however emphatic," the *Union Pacific* decision underscores the significance to practitioners of considering a jurisdictional argument, labeled as such, when seeking to stay an action under Section 3 of the FAA or to compel arbitration under Section 4. The *Union Pacific* decision also provides further support for the Court decisions in *Wiley* and *Howsam*, the language of Sections 3 and 4 of the FAA and Section 6(c) of RUAA, that issues relating to the step procedures, such as: whether a step is required; whether it has been followed; whether it is a condition precedent, if not followed, which leaves the arbitrator without jurisdiction; and, whether, if not followed, has been waived, excused or can be cured, are for the arbitrator.

Endnotes

1. 9 U.S.C. §§ 1 *et seq*.
2. 9 U.S.C. § 3.
3. 9 U.S.C. § 4.
4. For cases involving situations where the parties incorporated the rules of an organization that provided for the arbitrator to decide issues of arbitrability, s*ee, e.g.*, *Contec Corp. v. Remote Solutions Co., Ltd.*, 398 F. 3d 205 (2d Cir. 2005) (The issue of arbitrability was referred to the arbitrator as incorporation of the American Arbitration Association Rules in the arbitration agreement provided clear and unmistakable evidence the parties intended the issue of arbitrability to be decided by the arbitrator.); *cf., T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc*., No. 08-3894-cv(L), 08-3897-cv(CON), 08-4379-cv(XAP) 2010 U.S. App. LEXIS 893, at *1, *37 (2d Cir. January 14, 2010) (Adoption of Articles of the ICDR is clear and unmistakable evidence of intent to allocate to arbitrator task of interpreting the scope of his powers and duties.).
5. 29 U.S.C. §§ 141 *et seq.*
6. NASD Code of Arbitration Procedure § 10304.
7. 376 U.S. 543 (1964).
8. *Id.* at 544.
9. *Id.* at 544, 555-557.
10. *Id.* at 555-557.
11. *Id.* at 558.
12. 537 U.S. 79 (2002).
13. *Id.* at 85-86.
14. *Id.* at 82 (quoting NASD Code of Arbitration Procedure § 10304).
15. *Id.* at 85-86.
16. *Id.* at 83-84.
17. *Id.* at 84-85 (emphasis in original) (citation omitted). With respect to the issue of waiver there is a generally recognized exception in the context of a party engaging in protracted litigation that prejudices the other side before moving to stay or compel under Sections 3 and 4 of the FAA. In those circumstances, courts have decided the issue of whether a party has waived it right to arbitration. *See, e.g., Memnon v. Clifford Chance US, LLP,* No. 08 Civ. 2874 (HB) 2009 U.S. Dist. LEXIS 99936, at *1, *30-31 (S.D.N.Y. October 27, 2009) (discussing Second Circuit authority).
18. *See, e.g., HIM Portland, LLC v. DeVito Builders, Inc.*, 317 F.3d 41, 44 (1st Cir. 2003) (First Circuit affirmed the district court's denial of

a motion to compel arbitration as neither party had requested mediation which in the contract was stated to be "a condition precedent" to arbitration or institution of an action. The Court held that arbitration had not been triggered and neither party could be compelled to submit to arbitration.); *Kemiron Atl., Inc. v. Aquakem Int'l, Inc.*, 290 F.3d 1287, 1291 (11th Cir. 2002) (The Eleventh Circuit affirmed the district court's denial of a petition to stay pending arbitration. The Court interpreted the language of the contract's multi-step clause provision to be a condition precedent to arbitration and determined that because neither party requested mediation, the arbitration provision had not been activated and the FAA did not apply.)

19. 558 U.S. __; 130 S. Ct. 584 (2009).
20. *Id*. 558 U.S. at __; 130 S.Ct. at 590-593.
21. *Id*. 558 U.S. at __; 130 S. Ct. at 595.
22. *Id*. 558 U.S. at __; 130 S.Ct at 596 (citation and internal quotation marks omitted).
23. *Id*. 558 U.S. at __; 130 S.Ct. at 591-593.
24. *Id*. 558 U.S. at __; 130 S.Ct. at 594-595.
25. *Id*. 558 U.S. at __; 130 S.Ct. at 595-596.
26. *Id*. 558 U.S. at __; 130 S.Ct. at 590, 599. Failure to conform or confine itself to the jurisdiction Congress placed within the scope of the NRAB's jurisdiction is one of the limited grounds for statutory appeal from an NRAB panel's order under the RLA, 29 U.S.C. § 153 First (q). The "failure" to which the Court referred was the panel's presuming that it had authority to declare procedural rules "jurisdictional" when Congress alone controls the NRAB's jurisdiction.
27. *Id*. 558 U.S. at __; 130 S.Ct. at 597-598. The Court commented that if the on-property step required by the CBA had not been completed, reference to a NRAB panel was ordinarily objectionable as premature. However, the Court did not address whether failure to fulfill the on-property step divested the NRAB panel of jurisdiction or whether the NRAB panel could order the parties to complete the step. *Id*. 558 U.S. __; 130 S.Ct. at 597.

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.

The Source and Limits of Arbitral Authority to Sanction: Questions Growing Out of *ReliaStar Life Insurance Company of New York v. EMC National Life Company, a/k/a National Travelers Life Company*

By Jennifer Peterson

Is an arbitrator's power to exercise control over the parties and the attorneys granted by the contract, the law governing sanctions in federal courts, state law, forum rules, or is there inherent authority flowing directly from the agreement to arbitrate? Where there is a monetary award of sanctions, who should pay? What standards should apply to identifying sanctionable conduct and assessing the sanction? This article is intended to raise questions that grow out of the recent Second Circuit case, *ReliaStar Life Insurance Company of New York v. EMC National Life Company, a/k/a National Travelers Life Company*[1] in which the Second Circuit held that arbitrators have the inherent authority to sanction parties for bad faith in the proceedings, and that the parties may limit that authority with express language in the agreement to arbitrate.

In *ReliaStar*, the majority and dissenting opinions focused on whether a clause in the parties' arbitration agreement that specified that each party was to bear its own attorney's fees and costs limited the arbitral panel's ability to award attorneys' fees as a sanction for bad faith conduct. The majority held that the broad grant of authority conferred upon the arbitrators by the arbitration agreement included the inherent authority to sanction bad faith conduct, and that although the parties could have foreclosed the award of fees by expressing that intent "explicitly and clearly," they had not done so by simply stating that the costs and fees would be borne by each party. The Dissent thought the language was clear and prohibitory, and also expressed unease with the notion of an arbitration panel possessing inherent authority uncircumscribed by the terms of the arbitration agreement.

What is the source of "inherent authority"? The federal courts—article III courts that have ongoing vitality beyond any given dispute—have struggled with this question. The question may be more difficult where the arbitral panel has no life independent of the contract to arbitrate. However, the parties have agreed to proceed in arbitration and there is logic to the notion that those presiding must have some authority to regulate conduct and the process itself. Given that any sanction that would deny the admission of evidence or dismiss part or all the claims might run afoul of the review provisions under the Federal Arbitration Act or the Uniform Arbitration Act, as a matter of practicality, monetary sanction, or the imposition of fees and costs, is a realistic alternative.

The Backdrop

ReliaStar involved a dispute between insurance companies, ReliaStar and National Travelers, which had entered into two coinsurance agreements containing identical broad arbitration provisions. The agreement to arbitrate included a choice-of-law clause that required the arbitration to take place in New York and provided that "the laws of the State of New York and to the extent applicable, the Federal Arbitration Act, shall govern interpretation and application of the Agreement," thus making it unclear what law applied to the arbitration process itself. The contract also provided that: "Each party shall bear the expense of its own arbitrator…and related outside attorneys' fees, and shall jointly and equally bear with the other party the expenses of the third arbitrator."[2]

After hearings, the arbitration panel issued an interim award directing, among other things, that National Travelers pay ReliaStar more than $21 million past due under the agreements. Additionally, without explanation, the panel awarded ReliaStar attorney's fees, arbitrator's fees, and costs. The parties agreed that National Travelers could submit the issue of fees and costs to the panel for reconsideration, which it did.

After additional briefing, the arbitrators issued a final award, including fees of, $3,169,496, and costs of $691,903.75, plus interest, explaining that it viewed the conduct of National Travelers in the arbitration "as lacking good faith."[3] ReliaStar then petitioned the district court to confirm the award and National Travelers counter-petitioned to vacate the fees and costs, arguing that the arbitration panel had exceeded its authority. The district court vacated the award of fees and costs but the Second Circuit reversed.

The Second Circuit held that a broad arbitration clause confers inherent authority on arbitrators to sanction a party that participates in the arbitration in bad faith and that such a sanction may include an award of attorney's or arbitrator's fees. In supporting its holding the majority relied on two previous circuit court cases which affirmed arbitral awards of attorney's fees, *Synergy Gas Co. v. Sasso*[4] and *Todd Shipyards Corp. v. Cunard Line, Ltd.*[5] Neither *Synergy* nor *Todd Shipyards* discussed the "inherent authority" of the panel nor did they raise any of the issues that relate to the exercise of such authority.

Synergy involved sanctions for ignoring an award in directing the employer Synergy to reinstate a discharged employee and pay a lump sum award representing lost wages. Although the award was confirmed by the New York Supreme Court and the Appellate Division, Synergy did not comply, but instead commenced a second arbitration seeking determination of how much money and what other relief were due pursuant to the previous arbitration.[6] The arbitrator in the second arbitration awarded lost wages and directed Synergy to pay a sum equal to the reasonable attorney's fees incurred as a result of the employer's refusal to comply with the previous arbitration. That award was ultimately affirmed.[7]

On appeal, Synergy asserted that the award of attorney's fees was punitive in nature, and therefore against public policy under still controlling New York case law that applies to the underlying substantive dispute in New York arbitrations. The 1976 case of *Garrity v. Lyle Stuart, Inc*. held that "the law does not and should not permit private persons to submit themselves to punitive sanctions of the order reserved to the State. The freedom of contract does not embrace the freedom to punish, even by contract," [8] and that therefore "an arbitrator has no power to award punitive damages *even if agreed upon by the parties*."[9] This does not apply where the Federal Arbitration Act, controls[10] but would apply to preclude the imposition of punitive damages for the underlying disputed conduct in a case where New York substantive law applied.

In *Synergy,* the Second Circuit made no reference to inherent powers of arbitrators but, instead, distinguished *Garrity,* holding that the award of attorney's fees for the vexatious arbitration was basically compensatory and not penal in nature.[11] The Court did not distinguish between an award of punitive damages for bad faith under the contract and bad faith in the conduct of the arbitration.

In *Todd Shipyards,* the Ninth Circuit, applying New York law pursuant to a New York choice-of-law clause, affirmed the arbitrator's award of both punitive damages for willful and wanton fraud, and of attorney's fees for improper conduct and bad faith exhibited during the course of the arbitration. The case makes no explicit or implied reference to inherent powers of arbitrators, but rather bases its holding on incorporation of Rule 43(a) of the American Arbitration Association's Commercial Rules which provides that "the arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate." In addition, explaining its holding on the issue of attorney's fees, the court acknowledged that the FAA does not provide for attorney's fees, but went on to hold that in light of the expansive view that federal law takes of the power of arbitrators to decide disputes and fashion remedies, and the incorporation of the rules of the American Arbitration Association, the arbitrators had not exceeded their authority under the manifest disregard standard by applying the bad faith exception to the "American Rule" that each side bears its own costs.[12]

Questions for the Future

ReliaStar's holding that the arbitrators have inherent authority to sanction finds limited support in the cases it relies upon, but it speaks to a larger practical concern in recognizing that arbitrators must police the process and need tools to prevent abuse. Even the dissenting judge recognized that arbitrators might have the need to regulate the process.[13] There were serious questions that, apparently, were not raised by the parties, and therefore, not addressed by the court in *ReliaStar* that should give arbitrators, organizations and courts pause. For example, the *ReliaStar* court did not discuss who should be sanctioned, the attorney or the party. Additionally, there was no reason given by the arbitrators for the interim award of attorney's fees, and the parties were only given the opportunity to address the fee award on rehearing. Nevertheless, the court did not discuss whether the arbitrators had correctly identified bad faith conduct or whether the amount of fees awarded was an appropriate sanction for that conduct.[14]

When the federal courts exercise inherent authority, i.e., the authority to control the proceedings that is necessary to all other powers, it must be exercised with restraint and discretion; the record or specific findings must support a finding of bad faith.[15] Since the decision in *Roadway Express, Inc. v. Piper*[16] sanctions for the improper conduct of litigation have only been imposed on a party—as opposed to the attorney—if there is evidence in the record suggesting that the party acted in bad faith or contributed in some way to the manner the case was handled.[17] Some courts have held that subjective bad faith must be established to impose sanctions against a party while objective bad faith suffices for sanctions against attorneys.[18] *Roadway Express* also established that sanctions should not be assessed lightly or without fair notice and an opportunity for a hearing so that the attorneys will have an opportunity to defend and explain questionable conduct and the judge will have time to consider the severity of the sanction.[19] These safeguards are even more important in arbitration, where there is no review for abuse of discretion.

If arbitrators are to exercise the power to regulate the proceeding as *ReliaStar* anticipates, the governing organizations and arbitrators faced with the issue should consider parameters to assure adequate process. The questions left open by the *ReliaStar* court should be examined.

Endnotes

1. 564 F.3d 81(2d Cir. April 9, 2009).
2. *Id* at 84.
3. *Id*. at 86.
4. 853 F.2d 59 (2d Cir. 1988).
5. 943 F.2d 1056 (9th Cir. 1991).
6. 853 F.2d 59, 61.
7. *Id.*
8. 40 N.Y.2d 354,360, 353 N.E.2d 793,797, 386 N.Y.S.2d 831, 834 (1976).
9. *Id*. at 353 N.E.2d 793, 386 N.Y.S.2d 831(1976) (emphasis added).
10. *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 115 S. Ct. 1212 (1995).
11. 853 F.2d 59 at 65-66, citing, *In re South East Atlantic Shipping Ltd*., 356 F.2d 189 (2d Cir. 1966) (even if an arbitrator expresses moral outrage at a party's behavior and considers questions of business morality in deciding upon the proper remedy, the award, even if it is very liberal, does not necessarily constitute the imposition of "unlawful" punitive damages); *General Drivers and Helpers Union, Local No. 554 v. Young and Hay Transportation Co.*, 522 F.2d 562, 568 (8th Cir. 1975) (concluding that a court's award of attorney's fees in a labor dispute is an appropriate item of damages and is compensatory, rather than punitive).
12. 943 F.2d 1056 at 1064-1065.
13. 564 F.3d 81at 94-5 and fn. 9.
14. *Id.* at 86 and fn. 3.
15. 447 U.S. 752, 764-766 (1980).
16. 447 U.S. 752 (1980).
17. *See In re Ruben*, 825 F. 2d 977, 986 (6th Cir. 1987).
18. *See U.S. Industries, Inc. v. Touche Ross & Co*., 854 F.2d 1223, 1244 (10th Cir 1988*); Badillo v. Central Steel & Wire Co*., 717 F. 2d 1160, 1165 (7th Cir 1983).
19. *Id.* at 767.

Jennifer Peterson is an attorney with Resolve Mediation Services in New York. She can be reached at jennejah@gmail.com.

"Good Faith" Participation in Court-Annexed Mediation Defined by Southern District of New York Bankruptcy Judge in Recent Sanctioning of Lawyers

By Ruth D. Raisfeld

Is it "good faith" for attorneys merely to attend a court-ordered mediation but fail to participate actively in the mediation process of risk-analysis, discussion, and exchange of information and legal arguments? Southern District of New York Bankruptcy Judge Cecilia G. Morris recently said "no," in a 32-page decision imposing sanctions on in-house and outside counsel of Wells Fargo Bank. *In re A.T. Reynolds & Sons, Inc.*, Case No. 08-37739 (Feb. 5, 2010).

Background

The case arose in the context of a Chapter XI proceeding when the Debtor, Boreal Water Collection ("Boreal"), which acquired the Debtor, Wells Fargo Bank ("Wells Fargo"), and the Committee of Unsecured Creditors ("Committee") were ordered to mediation of a dispute over allocation of responsibility for one week of wages for Debtor's employees. Judge Morris signed an Order of Reference to Mediation "to attempt to resolve disputes by and between the Mediation Parties…including but not limited to the payment of wages" for a given period. Among other standard features of the Mediation Order, it also provided: "[T]hat the Mediation Parties shall attend such mediation sessions as the Mediator shall deem appropriate and necessary at such times and place as the mediator shall determine."

The Mediator's Report

Approximately three months following the order to mediate, the Mediator reported to the Court that one of the parties had "failed to participate in good faith." Among the specific allegations, the Mediator reported that:

1. Wells Fargo claimed to be "at a loss to fully understand the issues at hand," insisting that a mediation statement "identify the issues to be addressed at the mediation." When supplied with such a statement, Wells Fargo objected to the language therein that included "any other issues anyone wants to discuss, of course."
2. Wells Fargo appeared at the mediation by a "junior" representative and a "junior" counsel, who attended the mediation "prepared only to repeat a pre-conceived mantra that indicated that Wells Fargo was not open to any compromise that would involve 'taking a single dollar out of their pocket.'"
3. When after several attempts to get through a joint session and several caucuses, at which Wells Fargo attorneys engaged in obstructionist behavior, the Mediator advised Wells Fargo that it must report bad faith to the Court. The Wells Fargo attorney responded to him in private that "[Mediator] could be assured that Wells Fargo would never agree to [his] acting as mediator in the future in which Wells Fargo might be a party."
4. Wells Fargo finally made an offer after the Court informed counsel of the consequences of "bad faith," but such offer came after "an extended period on the phone with an unidentified person, out of the presence of the mediator," and was rejected.

The Court held a hearing on an order to show cause whether Wells Fargo failed "to participate in the mediation in good faith." Affidavits, testimony of counsel and the mediator was taken.

In examining the Mediator, the Court learned that the Mediator practiced law for fifty years, and had served as a mediator for thirty years. He had been a Southern District mediator for nearly twenty years and a mediator in the bankruptcy courts for several years. He testified that he "has never reported a failure to participate in good faith in his years of mediating until" this case.

The Court's Description of the "Principles of Mediation"

The Court reviewed various sources, both from the popular legal press and scholarly articles, describing the essential elements of the process of mediation. By way of summary, she found that mediation requires analysis of risks, the mediator's efforts to change the parties' perceptions as to strengths and weaknesses of their cases, consideration of the uncertainty of proceeding to trials on the merits, and attendance of a party representative with full settlement authority. The Judge stated:

> Mediation entails a process, and requires parties to hear each others' point of view and proposed resolutions to the issue underlying the mediation. Passive attendance at mediation cannot be found to satisfy the meaning of participation in mediation, because mediation requires listening, discussion and analysis among

> parties and their counsel. Adherence to a predetermined resolution, without further discussion or other participation, is irreconcilable with risk analysis, a fundamental practice in mediation. While it goes without saying that a court may not order parties to settle, this Court has authority to order the parties to participate in the process of mediation, which entails discussion and risk analysis. Therefore, the Court holds that where a party is ordered to participate in the mediation, the party fails to comply with the order when it does not engage in the process of mediation, which entails consideration of the other parties' arguments.

Slip op. at p. 15.

Interesting Practice Points for Mediators and Mediation Advocates

Confidentiality

It is quite unusual for a mediator to testify about what went on and what was said during a mediation process. However, there is an exception to mediation confidentiality under General Order M-211, referred to by Judge Morris, which states that notwithstanding that the substance of the mediation is confidential nothing precludes "the mediator from complying with the obligation set forth in 3.2 to report failures to attend or to participate in good faith."

Most mediators view the right to report failures to participate in good faith as a tool to cajole parties and counsel to retreat from obstructionist tactics and engage in the negotiation process. However, in rare cases, like the instant one, mediators will need to advise the Court of such persistent failures to participate that threaten the integrity of the court-annexed mediation process. Whether the *Reynolds* decision will change the degree to which mediators will use this remedy for failed mediations remains to be seen.

"No Pay" Posture

The *Reynolds* decision also distinguishes the ability of a court to order parties to mediation from the absence of power to order parties to settle. The line is not easy to draw. However, Judge Morris distinguished the Second Circuit decision in *Negron v. Woodhull Hosp.*, No. 05-4147-CV, 2006 WL 759806 (Mar. 23, 2006), which dealt with the end of a mediation process, rather than obstructionist conduct throughout a mediation process:

> *Negron* is only relevant for the unremarkable proposition that a court cannot compel the parties to settle. *Negron* cannot be interpreted to mean that a party may decide in advance that it will not pay and send in an agent to sit through the mediation and parrot that it won't pay. If mere attendance were all that were required for good-faith participation, then the federal statutes that encourage mediation would be rendered meaningless.

Slip op. at p. 20.

Attendance by Representatives with "Full Settlement Authority"

Mediators struggle with their ability to get the right parties to the table. The *Reynolds* decision should be helpful in this regard. In *Negron*, *supra*, the Second Circuit affirmed an award of costs where the party did not produce a representative with settlement authority at the mediation. In *Reynolds,* Judge Morris found that "attending a mediation session without authority to settle or participate in the mediation process is tantamount to not attending." The Court found significant that the participants sent by Wells Fargo could not make an offer beyond a "predetermined amount" and did not make an offer of settlement "without resorting to a phone call.…[A]vailability by phone does not satisfy the requirement that a party attend with full settlement authority." Slip op. at 21.

Conclusion

Judge Morris is known for being a long-time advocate of mediation and an architect of the court-annexed mediation program. The mediator in this case was very experienced and highly qualified. The attendance of junior level attorneys, without full settlement authority, who adopt a "not a penny" stance from the outset and must confer by telephone frequently, is not an unfamiliar scenario to most mediators who participate in court-annexed mediation. All members of the bar who serve as mediators, or as advocates, should review the *Reynolds* decision which, if affirmed, will break new ground in the continuing discourse over strategy, tactics, and best practices in mediation.

Ruth D. Raisfeld, rdradr@optonline.net, is a mediator and arbitrator in the New York metropolitan area and a member of the Dispute Resolution Section of the New York State Bar Association.

Exit Strategies: Typology and Tips

By Joshua Jacks, Matt Schweisberg, Douglas Thompson, and Elissa Tonkin

Introduction

We are four mediator friends who, in life and in mediation, have seen each other through some memorable endings—and, inevitably, beginnings. As we have grown older, closer, and perhaps a little braver about confronting our own limitations, we began a deliberate conversation about endings. This typology of how mediations end, and "tip-ology" on how we might help them end well—or at least less wretchedly, grew out of our attempt to capture the essence of our discussions in a form that might be of use to others. Most of the cases upon which our collective musings are based arose in the context of environmental disputes which, for three of us, are the focus of our practice, but the ideas are applicable generally.

Typology: Any of These Situations Sound Familiar?

Happy Endings. Everyone's favorite. These endings are characterized by parties finding themselves to be better situated than before the process started. The engagement has produced an agreement, improved understanding, narrowed the issues in contention or some other measure of improvement. The sentiment may be joyous, bittersweet or a mixture of emotions but the parties generally feel better off by some measure for going through the process.

Bad Endings. Just as Tolstoy said each unhappy family is unhappy in its own way, so it can be with mediations. Bad endings will leave the parties feeling the process was of little value or, worse, detrimental to them. They leave feeling more frustrated, more estranged from one another and perhaps assuming positions more antagonistic and polarized than at the outset. Some bad endings are spectacular with parties storming away from a negotiation, eager to describe what a terrible mediator they had to endure. Others may end with quiet despair, with no ill-feelings expressed but the parties feeling that no progress occurred. Even worse, some bad endings result in a broadening of the dispute (e.g., filing of counterclaims, additional issues of contention, or demands for greater compensation).

Extra Innings. In some situations, mediators and parties may experience *faux* endings. An agreement might be reached and signed but the parties find there are more issues for discussion. Perhaps a monetary claim is settled with a signed agreement but parties continue a discussion about some aspect of their past or prospective relationship. What appears to be an end to the mediation actually proves to create the conditions for another, often more meaningful conversation.

Passages. The mediator may pack his or her briefcase, shake hands and leave but the work may continue for the parties. The parties may feel they have reached a point where neutral assistance is no longer needed (or the value added is no longer worth the cost). The neutral assisted phase of the negotiation ends but the negotiation continues in some fashion. The mediator may remain "on call" in case things become difficult or complicated.

Pause Button. Sometimes in order to save face, comply with an authority not at the table, or for some other reason, parties feel a need to bring a process to a close even though there may be potential gains by continuing. The language used by either the parties or the mediator ("at this juncture" or "suspending discussions" or "it may make sense to reconvene once this new report is available") explicitly or implicitly suggests a hiatus rather than a fully closed door. In other cases, parties may be reacting primarily from anger or frustration or fatigue and the mediator can "end" the process in a manner that could nevertheless allow an opportunity for graceful reengagement. Sometimes breakdown must precede breakthrough.

In other circumstances, the question is less one of what the ending looks like but an even more basic question—whether or not to draw things to a close.

Situations where timing is an issue include:

Parties Disagree with Each Other. By dint of temperament, strength of their best alternative to a negotiated agreement ("BATNA," in current negotiation lingo), and other factors, parties often differ on the usefulness of continuing a neutral-assisted process. Some might be conflict junkies who love the toxic intimacy; others prize efficiency or dislike protracted discussion and wish to withdraw. Some parties might be subject to external pressures, lending a feeling of greater or lesser urgency to the proceeding. How should the neutral approach a situation where some parties want a process brought to an end and others see value in continuing?

Neutral(s) and Parties Disagree. Sometimes parties agree that the process should end (or in some cases never begin) yet the neutral senses potential benefits in continuing. How does the neutral balance party autonomy against the knowledge that parties' feelings of hopelessness during a mediation may be a poor predictor of outcome? In the opposite circumstance parties wish to continue but the mediator believes it is time to bring things to a close. A group may fall in love with itself and find it difficult to end. Or parties communicating well may nevertheless develop separation anxiety when they contemplate moving ahead without mediator assistance. In some cases, party stamina for conflict and impasse may exceed that of the mediator.

Neutrals Disagree with Each Other. In cases where there is a team of neutrals, members of the team may have different proclivities and tolerances for ending vs. continu-

ing a process. What "diagnostics" should they look at to determine whether pressing on or finding a graceful exit would be in the better interest of the parties? How do you avoid giving up too soon/too easily versus how to avoid holding people in a process that is no longer serving their interests sufficiently?

In a strong co-mediating relationship, competing tendencies between neutrals about whether and when to end are likely to provide a helpful balance. Such neutrals might choose to handle their differences transparently, including the parties in a discussion of their divergent views. Alternatively, co-mediators might opt to resolve their differences in private consultation with the goal of offering the parties a unified message about the end game. Either way, parties are likely to get the benefit of a well-considered approach from such a partnership.

Tips: Ten Questions to Help You Help the Parties End Well

1. Are you the only one who needs more closure? (It's a mediation, not a hostage situation)

Sometimes, without fanfare, parties are clear that they're done and ready to go home. This happens regardless of whether they loved or hated the process or outcome. They've just reached their limit and their hearts and minds are out the door. Be open to the signs of this. Resist the impulse to drag them through a ritualized closing process to satisfy your notion of a good ending. Wrap things up, mercifully and quickly, before parties start to feel as if they're in mediation jail. You can always linger and do the closure thing with any remaining parties who feel the need. But beware of tacitly encouraging impatient parties to leave too early. Sometimes haste is not in their best interest and, if you can hold them a bit longer to be certain the substance is concluded, they and the others will be grateful that you did.

2. What does it mean when a party threatens to or actually storms out? (Anticipating the calamity)

Probably not, "Gee, this sure is a fabulous process!" But it could mean any number of things. Perhaps something was said that the party found terribly upsetting. Perhaps the party wants to intimidate others in the room. Perhaps the party wants attention. Perhaps, but not necessarily, the party is signaling the end of the process. In volatile situations, where parties might seem inclined to use stormy departures as a form of expression, it may be possible to negotiate a deal up front that will benefit the process. Recognizing that parties may choose to leave at any point, ask them in advance if they will agree to talk with you (in confidence) before walking out. "If you begin to feel this isn't working for you, like you want to leave, please ask for a break and let's talk." The purpose is not to talk them out of their inclination, but to understand what is on their mind and to see if there is a way to address their needs in the process. Apart from the value of such conversations, should they ever occur, legitimizing and reinforcing a party's right to leave may take the wind out of a potentially disruptive departure.

3. Are these parties capable of procrastinating until the end of time? (Have a plane to catch)

Top of Form 1

When you are dealing with parties who will fill whatever time they think is available and will only get serious five minutes before the end, establish a non-negotiable ending time.

4. Is this a nap or a funeral? (Calling it a nap might make it one)

If you can't tell whether an impasse, breakdown or other type of pause in the process is final, help the parties characterize it as a hiatus rather than an ending. The cease in negotiations may have a sobering effect on one or more parties and cause them to reassess their negotiation posture. If the time comes when they are ready to resume discussions, the hiatus characterization will allow them to come back to the table without losing face. It will also give them license to be in contact with you so that you can help them figure out whether and when to come back–without any party visibly taking the first step.

5. Have you reached the point where your greatest contribution to the parties' progress would be to leave? (Too much of a good thing)

The goal here is to give the parties no more and no less than what they need. The "no more" part is often harder than the "no less" part, especially when you are being paid by the hour. Don't shrink from a clear-eyed look at whether the parties are now positioned to do for themselves what they once could only do with your assistance. Helping the parties realize that they don't need you any more may be bad business but it's great mediating—and in the end it's probably good business as well.

6. Did anyone besides you notice how much was accomplished? (Offer a humble catalogue)

Some of the biggest achievements of a process are invisible to the parties immersed in it. Identify and draw attention to the less obvious benefits and accomplishments but do so with humility. Don't presume the value that parties attach to particular outcomes; take care in characterizing achievements, erring on the side of understatement, lest you be perceived (perhaps accurately) as touting your own mediative *tour de force* oblivious to how the parties experienced matters. Don't make a mole hill out of an ant hill, but be sure the ants know that they've made a hill.

7. Did the process unfold in such an unexpected way that no one knows what the ending is supposed to look like? (Shifts happens)

This is a corollary to questions 5 and 6 above. Sometimes the mediation carries the parties to a new place that

renders their initial goals irrelevant. Perhaps a greater level of understanding has created more tolerance for conflicting perspectives and what was once a burning issue no longer seems urgent, though it remains unresolved. Whatever the particulars, a once unbearable constellation of circumstances has shifted. In these cases, there may be no obvious endpoint. Rather, at any number of points you can help the parties take stock of where they are, bring their process to a close, and return their somewhat transformed situation to the unmediated world where it will continue to unfold.

8. Is it party time? (Love fest or vanishing act—only the parties know for sure)

At the successful conclusion of a long, arduous process, help the parties explore whether and how to celebrate their ending together. In a multi-party case, it is rare that everyone is both privately and publicly pleased enough with the outcome to pop the champagne cork together (one party's triumph is often another party's embarrassment). But what a kick when it happens. Be careful not to force the issue and recognize that the parties may need a breather between resolution and celebration (even if they don't recognize it, you may need to help them do so). They also might need you, the neutral, to toss the idea out to them, to help them sort out the pros and cons, and, if the pros prevail, to help them design an event that is true to their collaborative success.

9. What are the parties reading into their inability to reach agreement? (Addressing the "what does this say about me" question)

When a process concludes without a resolution, parties might feel a profound sense of failure—not only did they find themselves in a dispute for which they sought mediation (for some, a sign of failure in itself), but worse yet, they couldn't even succeed with a mediator's help. "What's *wrong* with me?" they may be asking themselves or fear being asked by others. You can provide a more positive—and arguably, more accurate—response to this unspoken, self-flagellating question than the one they are likely to give themselves. Your alternative response might include: acknowledging that it's a really hard situation; commending them for their courage in giving mediation a try despite the magnitude of the challenge; applauding their hard work and creativity during the process; and pointing out that, whatever happens going forward, they now have the satisfaction of knowing that they made an earnest attempt to resolve it and found no easy answer around the corner to meet them. Sincerity here is a plus (avoid referring to note-cards when making this speech).

10. Is a happy ending too good to be true? (Dare to burst the bubble)

When parties get swept up in the momentum of a resolution that appears to be coming together quickly, their longing for a swift and happy ending can cause lapses in judgment and attention to detail. They are prone to gloss over terms that they don't understand, overlook important implementation questions or not realize that different assumptions are at work. Are the parties rushing into a collaborative embrace that might be too good to be true? You are now face to face with perhaps the most challenging obstacle to impartiality that mediators must overcome—the intoxicating allure of an agreement—for it is hard to play mediator as killjoy. How far should you go to question whether the parties have considered all the angles? The answer, of course, is that it depends on countless questions of context. A guiding principle might be that you should go as far as you need to go to satisfy yourself that the parties know what they're doing. This encompasses the possibility that the parties are making an informed choice to forge ahead without regard to all of the details or potential problems. They may have good reasons for not worrying, but whether they do or not, you have done your job by probing. By the same token, if a deal falls apart as a result of your testing the parties' grasp of its implications, you have also done your job. In that case, a happy ending may have eluded the parties and you may become the repository for their disappointment. Those are the tough days when you need a mediator friend to buy you an ice cream cone and remind you that you did the right thing.

Joshua Jacks, Joshua.jacks@umb.edu, a mediator since 1981, is Director of Metropolitan Mediation Services, a community mediation center serving the Greater Boston area. He also serves on the clinic faculty of the Graduate Program in Dispute Resolution at the University of Massachusetts Boston.

Matt Schweisberg, schweisberg.matt@epa.gov, is a senior mediator with the U.S. Environmental Protection Agency New England Regional ADR Program. He is also chief of the Region's Wetland Protection Program.

Douglas Thompson, dthompson@keyston.org, is a senior mediator at the Keystone Center. He is also on the clinic faculty of the Graduate Program in Dispute Resolution at the University of Massachusetts Boston and a supervising court mediator for Metropolitan Mediation Services.

Elissa Tonkin, tonkin.elissa@epa.gov, an experienced mediator, facilitator, and trainer, is Director of the U.S., Environmental Protection Agency New England Regional ADR Program, which she helped to establish in 1993.

Note: This piece was excerpted and adapted from a longer article submitted in connection with the panel discussion "Exit Strategies: When and How to End a Process Well," 11th Annual ABA Section of Dispute Resolution Spring Conference, New York City, NY, April 2009. The views expressed in this piece are solely those of the authors and do not necessarily reflect the official position of the agency or organizations with which they are affiliated.

Environmental Disputes Mediation: Public Construction Projects

By James M. Rhodes

This article considers the success of mediation of conflicts among stakeholders representing environmental interests in connection with the planning and design phase of public construction projects. It is based on research and numerous interviews with persons in government and the private sector.[1]

Based on the findings summarized here, it is evident that alternative dispute resolution (ADR) tools, including mediation, are consistent with established government policy and have proven capabilities to deal with the environmental disputes among stakeholders that typically arise at the inception of the planning and design phase of a public construction project. The literature, including Reports to the President in 2000 and 2007 on the Federal Government's utilization of ADR, confirms that ADR can help manage costs by controlling the costs of conflict, producing quicker and more durable results, and preserving government resources, both human and monetary. ADR techniques have proven that they contribute to the strategic management of government resources by maximizing resources, promoting innovation, and fostering continuous improvement. A focused effort should be made to insure that they are utilized for the projects contemplated by the American Recovery and Reinvestment Act programs and the transportation projects planned in connection with the surface transportation re-authorization legislation.

This article summarizes the relevant legislative and regulatory background, and discusses the role of government agencies, private sector and academic resources, as well as the professionals in the field.

Legislative and Regulatory Overview

There are a variety of relevant federal statutes in the environmental area, including the National Environmental Policy Act of 1969 (NEPA) and other federal legislation, regulations and executive orders. In addition, there are key agencies, such as the Council on Environmental Quality (CEQ), the U.S. Environmental Protection Agency, the Army Corps of Engineers, the Department of Energy (DOE), and the Federal Highway Administration of the U.S. Department of Transportation (FHWA).

Federal Statutory Background for ADR

The use of ADR is a well-established policy and priority of the Federal Government. Congress enacted the first Administrative Dispute Resolution Act in 1990 ("Act").[2] It required every executive agency to adopt a policy that addresses the use of alternative means of dispute resolution, designate a senior official to be the dispute resolution specialist of the agency, provide for training on a regular basis, and review each of its standard agreements for contracts, grants and other assistance to encourage the use of alternative means of dispute resolution. Six years later, Congress amended and strengthened the Act, providing, among things, that if the government agrees to participate in binding arbitration the resulting award will be final in accordance with the Act, as amended, and that the Freedom of Information Act no longer provides access to documents that are exchanged privately between a party and a mediator.[3] In 1998, the Alternative Dispute Resolution Act of 1998 was passed, requiring the federal district courts to implement their own alternative dispute resolution programs, and to encourage and promote the use of ADR.[4]

For transportation matters, in 1998, Congress passed the Transportation Equity Act for the 21st Century (TEA-21, P.L. 105-178), and included certain "Environmental Streamlining" provisions, requiring transportation agencies to work together with natural, cultural, and historic resource agencies to establish realistic time frames for the environmental review of transportation projects. These agencies are meant to work cooperatively to adhere to those time frames, while they are protecting and enhancing the environment. There is an excellent summary of this program posted on the Federal Highway Administration website.[5]

Presidential Directives

There have been a number of Presidential directives promoting ADR in the government. In 1991, President Bush issued an Executive Order requiring that government attorneys be trained in ADR.[6] In 1996, President Clinton promulgated an Executive Order that required government attorneys to propose the use of ADR in appropriate cases.[7] This was followed by a Presidential Memorandum by President Clinton stating: "I have determined that each Federal agency must take steps to promote greater use of mediation, arbitration, early neutral evaluation, agency ombuds, and other alternative dispute resolution techniques.…"[8]

The Interagency Alternative Dispute Resolution Working Group (adr.gov/index.html) is an organization of chief legal officers from more than a dozen executive agencies, which issues guidance for the entire government on federal ADR policy.[9]

There have been two reports to the President on ADR in the federal government.[10]

Other Government Organizations

The most important federal agency for facilitating the resolution of environmental disputes is the U.S. Institute for Environmental Conflict Resolution[11] (the U.S. Institute), an independent and impartial federal program. Congress established the U.S. Institute in 1998 as a program of the Udall Foundation, an independent federal agency.[12] The U.S. Institute's mission is to help resolve environmental disputes that involve the federal government by providing mediation, training and related services. The U.S. Institute has worked on a wide range of federal issues, including federal highways, natural resources and public lands, ecosystem restoration, National Environmental Policy Act, water, energy, and government-to-government consultation with Indian tribes. Agencies involved in these projects have included the Federal Highway Administration, the Department of the Interior (and its bureaus), the Environmental Protection Agency, the Department of Defense (including the Army Corps of Engineers, Navy and Air Force), the U.S. Department of Agriculture Forest Service, and the National Oceanic and Atmospheric Administration. The process often utilized on projects in which the U.S. Institute is involved start with an "assessment" of the project to identify the issues and the key stakeholders, develop an assessment of whether a collaborative effort can lead to a successful resolution and prepare a preliminary design for the process to be employed. Following the assessment, if it seems promising to embark on a collaborative effort, the collaborative process is launched. The U.S. Institute hosts bi-annual conferences on environmental conflict resolution, and promotes collaborative dialogues within the federal government and across federal, tribal, state, and local governments. The U.S. Institute also maintains a roster of 300 qualified conflict resolution professionals located all across the country (including many of those at the firms noted below).[13]

A partial listing of examples of disputes in which the U.S. Institute has been involved is set forth in Appendix A to this paper, confirming the success of the process.

Environmental Conflict Resolution Cost-Effectiveness[14]

A very large, but often hidden, cost of federal, state, and local government in the environmental area is the failure to anticipate conflicts and to devise processes to address them before they become more intractable and costly. These problems are well understood by current and former government officials and have been documented extensively in the scientific literature and popular press. In fact, it would not be an overstatement to argue that the failure to anticipate environmental challenges and to devise effective collaborative processes to address them costs taxpayers hundreds of millions to billions of dollars each year. The propensity to attempt to solve problems through litigation, which is typically very time intensive and costly, is a particular problem.

The federal government spends tens of millions of dollars each year litigating thousands of cases. But resolving environmental issues through litigation is rarely cost-effective and typically does not solve all the issues or apply to all the affected interests. The U.S. Institute works to facilitate collaborative problem-solving involving all affected interests; this reduces litigation and other costs of conflict, including project delays and poorly informed decisions, and maximizes the benefits of collaboration, such as timely cost-effective solutions, innovation, improved working relationships, as well as commitment by the parties to shared solutions. The benefits to the taxpayer of using collaborative approaches to avoid or resolve even a small fraction of potential or actual litigation cases are very large.

The need for alternative dispute resolution and intergovernmental collaboration continues to increase. In U.S. District Courts nationally, annual filings of new cases rose from about 35,000 to more than 250,000 in the 60 years prior to 2004 (a sevenfold increase, though the population only doubled). In the appellate courts, annual case filings grew from 2,800 to more than 57,000 over a 50-year period, a twenty-fold increase. Federal agencies are parties in nearly one-third of these cases. When cases settle, the government not only saves the costs of litigation—it also saves the costs of courtrooms, judges, administrative hearing officers, and other court expenses.[15] Additionally, the government benefits from expedited work on projects, innovative solutions, cost-effective solutions, and improved working relationships among stakeholders that help solve issues now and manage issues in the future.

The U.S. Department of Justice has reported that the use of mediation saved the DOJ $6.4 million in out-of-pocket litigation and discovery expenses (including expert witnesses, depositions and investigation costs), plus more than 55,000 hours of attorney and staff time, in 2007 and 2008, compared with mediation costs of about $2.4 million. These figures do not include the savings of staff time and dollars by other federal agencies represented by DOJ in these cases, or the other parties involved in the lawsuits.[16]

Another important agency is the Center for Environmental Excellence by AASHTO, established by the American Association of State Highway and Transportation Officials (AASHTO) and developed in cooperation with the Federal Highway Administration to promote environmental stewardship and to encourage innovative ways to streamline the transportation delivery process. The Center is designed to serve as a resource for transportation professionals seeking technical assistance, training, information exchange, partnership-building opportuni-

ties, and quick and easy access to environmental tools (environment.transportation.org/).

Private Organizations

There is a whole universe of dispute resolution organizations that specialize in environmental ADR which are available as resources. A few are noted here, but there are a host of other capable organizations and, as noted below, individual ADR practitioners who are available to perform services in this area. The organizations include CDR Associates,[17] a nonprofit corporation headquartered in Boulder, CO, whose clients include several states and U.S. agencies, including the U.S. Army Corps of Engineers, the U.S. Department of Transportation, and the U.S. Federal Highway Administration. According to its website, CDR has achieved results through mediation in creative solutions to issues involving various areas, including natural resources, sustainable development and infrastructure.

The Consensus Building Institute is headquartered in Cambridge, MA.[18] In the area of land use and development, CBI helps public officials, developers, mediators, and other constituents balance social, political, economic, environmental, and health concerns in resolving land use disputes. In the area of natural resources and environment, CBI specializes in environmental planning, public land, air pollution, and water management.

Concur, Inc.,[19] headquartered in Northern California with an office in New York City, is a consulting firm specializing in combining environmental policy analysis with facilitation and mediation skills to resolve complex disputes involving scarce or limited natural resources. Its nearly 20-year practice spans a broad range of issues, from environmental planning, transportation infrastructure and marine resource protection, to public finance and water resource management.

Resolve[20] is a non-profit organization dedicated to advancing the effective use of consensus building in public decision making. Resolve specializes in mediating and facilitating complex issues in the areas of energy, drinking water, rivers and watersheds, health and biotechnology, environmental quality, natural resources, and community land use and transportation.

Academic Resources

The Kheel Center on the Resolution of Environmental Interest Disputes at Pace University School of Law [21] focuses on environmental interest disputes of critical importance to communities, states, and regions that require innovative resolution strategies and forums. Its mission is to train law students and lawyers in the skills that practicing attorneys need to address conflicts arising from climate change and other critical environmental and land use issues that may not be amenable to resolution by traditional means of adjudication.

Professionals

In the environmental arena, there exists a cadre of experienced mediators and facilitators across the country who have mediated, and in many cases facilitated, issues and disputes relating to major public projects. Examples include negotiating pollution issues, water resource policies, water codes, community impact, cultural values and claims in the context of project siting and development of major infrastructure projects. A roster of qualified neutrals is maintained by the U.S. Institute for Environmental Conflict Resolution.

Construction Project "Partnering"

In addition to collaborative efforts in the project planning stage, many large construction projects have incorporated a project-specific "Partnering" process to incorporate a collaborative team-building approach to the successful execution of the project with very positive results in terms of bringing projects to successful conclusion, on time, under budget and without claims. Critical to the process is an early issue identification and resolution process with the goal of resolving issues at the earliest time possible, as well as resolution at the lowest on-site level possible to prevent issues from growing into disputes.

Conclusion

ADR tools, including mediation, are consistent with established government policy and have proven capabilities to deal with the environmental disputes among stakeholders that typically arise at the inception of the planning and design phase of a public construction project. ADR techniques can help manage costs and have proven that they contribute to the strategic management of government resources. A focused effort should be made to insure that they are utilized for the projects contemplated by the American Recovery and Reinvestment Act as well as other major projects planned in the future.

Endnotes

1. The writer interviewed over thirty persons in government and the private sector in preparing this article, and is grateful to all for their time, contributions and interest. A partial list of many of those people is set forth in the Acknowledgements appendix to this article, with apologies to those whose names have inadvertently been omitted.
2. Administrative Dispute Resolution Act of 1990, 5 U.S.C. §§ 571-584 (1994) (amended 1996).
3. Administrative Dispute Resolution Act of 1996, 5 U.S.C. §§ 571-584 (1994 & Supp. 1998).
4. Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651-658 (Supp. IV 1998).
5. See environment.fhwa.dot.gov/strmlng/index.asp.
6. Exec. Order No. 12,778, 56 Fed. Reg. 55,195, 55,196 (Oct. 23, 1991).
7. Exec. Order No. 12,988, 61 Fed. Reg. 4729, 4729 (Feb. 5, 1996).

8. Memorandum from the President of the United States to the Heads of Executive Departments and Agencies, May 1, 1998 (govinfo.library.unt.edu/npr/library/direct/memos/disputre.html).
9. See, e.g., Core Principles for Federal Non-Binding Workplace ADR Programs; Developing Guidance for Binding Arbitration—a Handbook for Federal Agencies, 65 Fed. Reg. 50,005 (Aug. 16, 2000).
10. "Rep. of the Interagency Alternative Disp. Resol. Working Group to the President of the U.S." (2000), *available at* financenet.gov/financenet/fed/iadrwg/pres-report.htm; "Report for the President on the Use and Results of Alternative Dispute Resolution in the Executive Branch of the Federal Government," April 2007, *available at* adr.gov/pdf/iadrsc_press_report_final.pdf.
11. See www.ecr.gov.
12. Environmental Policy and Conflict Resolution Act of 1998, 20 U.S.C. §§ 5601 et seq.
13. Acknowledgement to Patricia Orr, Director of Program Development and Evaluation, U.S. Institute for Environmental Conflict Resolution.
14. With acknowledgement to Patricia Orr of the U.S. Institute for Environmental Conflict Resolution.
15. Senger, Jeffrey, Federal Dispute Resolution, San Francisco: Jossey-Bass 2004, 3-4.
16. Office of Dispute Resolution, U.S. Department of Justice, statistics posted at usdoj.gov/odr/doj-statistics.htm.
17. See www.mediate.org/practice-areas/.
18. See www.cbuilding.org/.
19. See www.concurinc.com/.
20. See www.resolv.org/.
21. See www.law.pace.edu/kheel.

James M. Rhodes is a commercial arbitrator and mediator in New York City. See www.jamesmrhodes.com. He may be reached at jamesmrhodes@me.com and invites comments on this article.

APPENDIX A

U.S. Insitute Case Examples

§ Nogales Wastewater Treatment Plant (International)

The U.S. Institute helped initiate a successful mediation of a controversy over the expansion and upgrading of the Nogales, Arizona, wastewater treatment plant, an international plant operated by the International Boundary Waters Commission (IBWC) and the City of Nogales. Other parties included EPA, Arizona Department of Environmental Quality (ADEQ), the North American Development Bank (NAD Bank), and the Boundary Environmental Coordinating Commission (BECC). Issues in contention included: responsibility and cost of operating the plant; to what extent the plant and the sewer system should be expanded to accommodate growth in Nogales, AZ, and Nogales, Sonora, and who would share the cost of construction; how to avoid chronic overflows and exceedances of water quality standards and who would shoulder responsibility if they continued to occur. U.S. Institute staff brought the parties together and initiated mediation, before turning it over to a pro bono neutral (working on a practicum with Arizona Department of Environmental Quality), who continued working on the case. Subsequently, the parties self-facilitated their continued negotiations. In late 2005, the group reached agreement on a design package and implementation schedule for this $59 million EPA-funded International Wastewater Treatment Project.

§ Pilot Program on Endangered Species Act Consultations (California)

In FY 2009, the U.S. Institute helped with the launch of an interagency pilot program in California that is working to create timely and effective consultations related to protected species issues and new transportation projects. The goal of the pilot is to streamline and improve the effectiveness of consultations under the federal Endangered Species Act Section 7 and Essential Fish Habitat regulations, and related California species protection laws. This interagency effort assisted by the U.S. Institute involves the Federal Highway Administration, the California Department of Transportation (Caltrans), the California Department of Fish and Game, and the National Marine Fisheries Service. With guidance from the U.S. Institute the pilot program participants developed operating guidelines for interagency consultations. The guidelines build on the successes of interagency consultation teams used by land management agencies in the Pacific Northwest. In the words of the participants, the interactions with each other and with U.S. Institute staff set the stage for productive interagency consultations that can "*help avoid permitting road blocks*," "*get past conflict to collaboration*," and "*achieve positive outcomes in challenging circumstances*." The pilot program goals of streamlining and improved effectiveness are squarely in line with the broad-scale goals needed to ensure the appropriate and timely progress of economic stimulus projects funded through the American Recovery and Reinvestment Act of 2009.

§ Highway Planning Effort (Colorado)

The I-70 Mountain Corridor connects Denver to mountain villages in the Rocky Mountain Front Range. It's the lifeblood of outdoor recreation throughout the region. In the late 1990s, the Colorado Department of Transportation (CDOT) began exploring alternatives to ease congestion and accommodate growth. Many stakeholders disagreed with what appeared to be CDOT's preferred alternative published in 2004. In response and with the urging of Colorado's governor (2007), CDOT decided to seek a consensus alternative among all stakeholders. At the request of the Federal Highway Administration in Colorado, the U.S. Institute helped initiate the collaborative stakeholder process. The U.S. Institute worked with a panel of representative stakeholders (including CDOT) to select a team of facilitators to guide the stakeholder process. This was the first time many of the stakeholders had worked together and reached consensus on any matter related to the I-70. This experience also helped the stakeholders understand basic principles of collaboration.

§ Everglades Water Management Planning (Florida)

Interagency conflicts among the U.S. Army Corps of Engineers, Everglades National Park, U.S. Fish and Wildlife Service, and the South Florida Water Management District threatened the successful implementation of a 35-year $7.8 billion restoration effort for Florida's Everglades ecosystem. Through a facilitated collaborative process, the U.S. Institute helped resolve highly technical disputes on two long-delayed projects.

§ Section 106 Tribal Consultation Workshop Series (Oklahoma Example)

Under Section 106 of the National Historic Preservation Act, federal agencies must consult directly with Indian Tribes when considering actions that may affect properties of traditional religious or cultural significance to them. The Tennessee Division of the Federal Highway Administration (FHWA) and the Tennessee Department of Transportation (TDOT) engaged the U.S. Institute to help them develop a framework for consultation on transportation projects in Tennessee. The two-day workshop brought together: 11 federally recognized Indian Tribes with cultural, historic and religious interests in Tennessee; Tennessee Historic Preservation Office; Tennessee Historical Commission; Tennessee Division of the Federal Highway Administration; and Tennessee Department of Transportation. Workshop participants developed a Memorandum of Understanding template to serve as the basis for Section 106 Consultation agreements between FHWA/TDOT and each tribe. Tribes endorsed the workshop as an effective prototype for building productive working relationships between agencies and tribes.

In addition to these projects in which the U.S. Institute has been involved, there are a host of other public construction projects where the tools of assessment, facilitation and mediation have been employed to resolve environmental issues in a satisfactory manner. See, e.g., the Alaskan Way Viaduct and Seawall Replacement,[1] and the Massachusetts Military Reservation Superfund cleanup.[2]

Acknowledgements

Valerie Anderson, General Manager, Nurture Nature Foundation; New York, NY; Rachael Barolsky, U.S. DOT Volpe Center; Cambridge, MA; David C. Batson, U.S. Environmental Protection Agency; Washington, DC; Bennett Brooks, CONCUR, Inc.; New York, NY; Lou Chang, ALC, Mediation, Arbitration, Neutral Services; Honolulu, HI; Rachel E. Deming, Scarola Ellis LLP; New York, NY; Kurt L. Dettman, Construction Dispute Resolutions; Hingham, MA; Pamela R. Esterman, Sive, Paget & Riesel, P.C.; New York, NY; Patrick Field, CBI; Cambridge, MA; Robert Fisher, Fisher Collaborative Services LC; Alexandria, VA; Don Greenstein; Natick, MA; Ridgeway M. Hall, Jr., Crowell & Moring; Washington, DC; Jessica Hillard, Safe Horizon Brooklyn Mediation Center; Brooklyn, NY; Joanna M. Jacobs, United States Department of Justice; Washington, DC; Theodore W. Kheel, Founder and Chairman, Nurture Nature Foundation; New York, NY; W. Steve Lee, Collaborative Strategies Group, LLC; Washington, DC; Prof. John R. Nolan, Director, Kheel Center on the Resolution of Environmental Interest Disputes; White Plains, NY; Sean Nolan, Vermont Law School; South Royalton, VT; Patricia Orr, U.S. Institute for Environmental Conflict Resolution; Tucson, AZ; Steven A. Shapiro, Certus Strategies; Rockville, MD; Jane Kheel Stanley, Secretary, Nurture Nature Foundation; Bethesda, MD;,Calliope Sudborough, ICC Dispute Resolution Services; Paris, France; Edna Sussman, SussmanADR LLC; New York, NY; Richard R. Volack, Peckar & Abramson P.C.; New York, NY; Cherie Shanteau-Wheeler, U.S. Institute for Environmental Conflict Resolution; Tucson, AZ; John Wofford; Cambridge, MA; Daniel Yamshon, Arbitration & Mediation; Sacramento, CA; Tiffany Zezula, Pace University School of Law; White Plains, NY.

Endnotes

1. See www.wsdot.wa.gov/projects/Viaduct/.
2. See www.epa.gov/NE/mmr/index.html.

Using Mediation to Address Co-Guardianship Disputes

By Leona Beane

In June 2009, the U.S. Census Bureau released data indicating a mind-numbing increase in the senior citizen population worldwide. In the U.S., over 14 million baby boomers are now age 60-64 and constitute 5 percent of the total population.[1] They will increase the senior ranks by 40 percent in five years and will help to cause the population over 65 to more than double by 2050, increasing from 39 million to 89 million. At the same time, life expectancy has increased. This shift in the balance of the population will cause pervasive change. Unfortunately, not all of the change will be good. More than one out of three of all the disabled in the U.S. are senior citizens. Over 15% of senior citizens have a severe disability leading to a need for assistance with daily living. There are more than 16 million people now who have difficulty with cognitive mental or emotional functioning.[2] This figure will necessarily increase exponentially.

A significant number of the cases involving the elderly may end up in a guardianship court proceeding. In New York, guardianship is an adversary proceeding[3] in which the court will determine whether the person is incapacitated and whether he or she is in need of a guardian to manage financial affairs—a guardian for property matters—and/or in need of a guardian for such personal needs as medical care, living care or other personal arrangements. The court may appoint one guardian for all functions or two or more co-guardians. Sometimes each guardian handles the separate functions. The court-appointed guardian need not be a relative, but the court must give preference to relatives. Courts often appoint a stranger to work in conjunction with one or more relatives.

After the courtroom battle, the Judge determines whether one or more guardians are necessary, the powers they will be granted and who they will be. Mediation, with its emphasis on creative and cooperative decision-making, may help all parties even during the litigation process in dealing with the extensive emotional, practical, financial and health care issues that necessarily arise. In other words, mediation can also be thought of as a helpful adjunct to the court proceeding.[4]

The focus of this article is the specific type of disputes that may arise between the family members, court-appointed guardians and other caretakers. During the appointment process, the court assigns specific powers to particular guardians. If additional or different powers are needed later, an application must be made to the court. One or more of the family members or other interested parties may make application for the comfort or well-being of the incapacitated person and conflicts may arise between co-guardians relating to the level of care that is appropriate or needed. These disagreements can delay needed care or impede improving the incapacitated person's well-being.

The initial appointment process and ongoing court applications may themselves cause antagonisms. Mediation could readily be used to improve communication among the co-guardians and the family.

If the co-guardians make applications before the court, they don't know how the court will decide. In mediation, they have the opportunity to craft and participate in the solution and to work with each other in a non-adversarial setting that may facilitate relationships and yield confidential, consensual results. Indeed, the benefits of mediation are well suited to this kind of situation where the people involved must continue to work with one another. Much more widespread use of mediation in guardianship matters is warranted. Mediation is currently being used in the Model Guardianship Part in Suffolk County presided over by Justice Leis.[5]

Here, a modest suggestion is made to use mediation to resolve disputes between the guardians or between the guardians and family members. Mediation could also be agreed upon where there is no guardianship, but caretakers or family members are having difficulty communicating about the care and finances of an elderly family member. A possible form agreement for use by co-guardians and adaptation by other caregivers follows.

Sample Mediation Provisions:

[1] The Co-Guardians of the person acknowledge that in exercising their fiduciary duties for _____, there may be situations and issues on which they disagree (which might include, without limitation, selection of a particular facility, selecting a professional to be utilized for an evaluation or particular treatment; issues and questions relating to medical devices, therapy services to be provided for the incapacitated person; issues relating to treatment, and numerous other issues of that type). The Co-Guardians agree that if any dispute arises between them, and if they are not able to resolve it between them within a reasonable period of time, they shall proceed to Mediation.

[2] The Co-Guardians have previously approved two Mediators for such Mediation(s) _____A_____ and _____B_____. The Co-Guardians agree they shall submit their dispute(s) for Mediation to A or B, or if neither of them can serve, they shall agree upon another Mediator.

[3] If they cannot agree on a specific Mediator, then either of the Co-Guardians may submit a written notice (via email plus letter) to the other, requesting an agreement as to the selection of a specific Mediator within the next five (5) days.

[4] If within 10 days thereafter, they have not been able to agree upon the selection of a particular Mediator (or there has been no response), then either Co-Guardian may request the appointment of a Mediator by the Court.

[5] Each Co-Guardian, once contacted by the Mediator, agrees to fully participate in Mediation in good faith in the attempt to resolve the dispute(s) between them.

[6] Once the matter is before the Mediator, both Co-Guardians agree to fully cooperate with the Mediator in scheduling, attending and participating in one or more Mediation sessions, and will cooperate in good faith in the Mediator's attempts to resolve the dispute(s), in the best interests of the incapacitated person and so as to provide the best possible treatment and care.

[7] The Co-Guardians are aware that Mediation is a confidential process, and that the Mediator is forbidden from breaching confidentiality regarding any matters discussed during the Mediation.

[8] Notwithstanding confidentiality, each of the Co-Guardians agrees that the Mediator is authorized to provide the following information to the Court: (i) that a Mediation has been requested; (ii) that a Mediation was held, and the dates of the Mediation session(s); (iii) whether any of the disputes were resolved, and if so, which dispute(s) were resolved; (iv) whether the dispute was not resolved; and (v) whether any agreement was executed between the signatories resolving any of the disputes in which situation, a copy of which may be provided to the Judge presiding over this matter. The Mediator shall be authorized to also provide the above information to the Court Examiner appointed by the Court to oversee the Guardianship. In all other respects, the Mediator shall be required to adhere to full confidentiality. [6]

[9] The Co-Guardians agree that the cost of the Mediator's services shall be paid for from the incapacitated person's Guardianship funds by the Guardian of the property.[7]

[10] At any time should either of the Co-Guardians contact the Court for a conference or submission of a motion or proceeding to the Court (other than relating to fees, compensation, or accountings), it shall be necessary that said signatory indicate under oath to the Court that the dispute has already been the subject of Mediation and that the dispute could not be resolved.

[11] The Co-Guardian contacting the Court shall be required to specifically confirm that said signatory has participated in good faith in the Mediation.[8]

The above suggested Model Mediation provisions may be modified for situations where there is no Guardianship, but there are two or more caretakers. It can also be modified to cover additional situations where there are disputes between the guardians and other family members.

I hope that these sample mediation provisions will be useful. Although the mediator does not make decisions for the parties and does not impose decisions, a trained experienced mediator assists the parties to craft an agreement that will be better for all than a court-imposed solution. There is a high compliance rate with mediated agreements —after all, the parties treat it as their own agreement.

The sample Mediation provision is only a beginning, intended to generate ideas for much more widespread use of mediation Elder Law/Elder Care. Mediation offers the elderly and/or disabled person better care, stability and harmony.

Endnotes

1. U.S. Census Bureau, Current Population Survey, Annual Social and Economic Supplement, 2008, Internet release date: June 2009, http://www.census.gov/ipc/www/idb/.
2. SeniorJournal.com, "More Than Half U.S. Senior Citizens Have a Disability; Over 70 Percent of Those Over 80."
3. Article 81 of the Mental Hygiene Law (M.H.L.).
4. See Beane, "Should Mediation Be Available as an Option to Reduce Litigation in Contested Guardianship Cases?" NYSBAJ, June 2002, p. 27 vol. 74, no. 5.
5. H. Patrick Leis, "The Model Guardianship Part," NYSBAJ, June 2006, p. 10, vol. 78, no. 5.
6. A Court Examiner is appointed by the Court to oversee the Guardianship and reviews the required Annual Reports of the Guardian(s). (See, M.H.L. § 81.32).
7. That provision would have to be included within the Co-Guardians powers, or if not in the powers, it should be submitted to the Court for approval. If the Mediator's fees were to be paid out of the IP's funds, the Court would generally review the Mediator's charges and qualifications, and the Court might approve Mediation fees only up to a certain amount, and if over a certain amount, further Court approval must be obtained in advance.
8. This places an additional obligation and burden on the individual to be sure that he/she has participated in Mediation in "good faith." This will be an additional deterrent, and only the important matters (containing legal issues) will be conferenced in Court. All the interpersonal related disputes will be handled and resolved in Mediation.

Leona Beane handles wills, probate, trusts, estate and guardianship matters. She is an Arbitrator and Mediator for several different forums. She is currently Vice-Chair of the Dispute Resolution Section of the NYSBA, and has written several articles on Mediation related topics; she is the Author of Chapter 26, *Mediation* in the New York Lawyers Deskbook (NYS Bar Assoc. 2008).

A prior version of this article entitled "Incorporating Mediation Within the Guardians Powers" appeared in the NYSBA *Elder Law Attorney*, Fall 2008 issue.

Employment Law for Mediators and Arbitrators

By Laura B. Hoguet

An employment litigation is a contested divorce. It carries with it all of the emotional baggage, the rationalization, the intensity and the anger that we associate with divorce court. The lawyers are partisan, too. Employment lawyers often specialize in representing either employers or employees; they identify fiercely with their clients, and they have a hard time looking at the case from the other end of their particular tunnel. Successful mediation of employment claims requires, first of all, letting the clients vent—not at each other, and not through their lawyers, but in their own words, to the mediator. Many people, once they have spoken their piece, will be ready to listen.

An arbitration, on the other hand, is a trial. Like judges in bench trials, arbitrators are reluctant to involve themselves in settlement discussions. Sometimes, however, a nudge towards settlement—or mediation—from an arbitrator can benefit the parties and their counsel.

"Successful mediation of employment claims requires…letting the clients vent—not at each other, and not through their lawyers, but in their own words, to the mediator. Many people, once they have spoken their piece, will be ready to listen."

The Parties' Choice of Forum

You are mediating or arbitrating this dispute because the parties agreed to mediation and/or arbitration. Employers frequently require employees to sign agreements to mediate and arbitrate workplace disputes (both contract and statutory claims, see below). Employees in the financial services industry are required in their application for registration with FINRA (formerly NASD) to agree to arbitrate any future dispute with a member firm.

Be sure to read the mediation/arbitration provision and watch out for clauses that may affect the proceeding. For example, agreements often require parties to share mediator and arbitrator fees, which can be a large investment for an employee. Some agreements have fee-shifting provisions, or a prohibition against punitive damages, that limit your options as well.

Disputes about whether a dispute is arbitrable are beyond the scope of this article. Speaking generally, courts tend to resolve these disputes in favor of arbitration.

Contract Claims

Employment in the U.S. is virtually always at will, which means that either side is free to end it, for any reason or no reason (provided, that is, the employer's decision is not tainted by unlawful discrimination). Claims for wrongful discharge (being fired unfairly) do not state a cause of action in New York or in most states (but state law varies, so if the law of another state applies, ask the parties to brief the law of that state for you). Very occasionally an employee may invoke a statute that bars termination of employment in retaliation for whistleblowing; again, if a party invokes such a statute, ask for briefing.

No "just cause" protection: Labor arbitrators who are accustomed to determining "just cause" under collective bargaining agreements need to keep in mind that employers in a non-union context are not subject to any such restriction on their freedom to end the employment relationship. Occasionally employees do not understand or accept that their employer had the right to fire them for reasons the employee thinks are wrongheaded or dishonest. Usually, however, the employer's wrong-headedness, unfairness and even dishonesty does not entitle an employee to damages.

Except as an agreement between the parties (oral or in writing) otherwise requires, the employer owes the employee nothing when the relationship ends. Pay in lieu of notice and severances are not required by law but are matters of convention, practice and agreement. Usually an employer requires employees to release claims in exchange for severance, and employee releases are usually enforced in court.

Oral v. written agreements: Historically, most people in this country went to work under oral contracts—after the interview an offer was extended, a salary was quoted and hands were shaken. Today employees typically receive an "offer letter" which recites the terms of the offer and the employee is asked to countersign the letter to indicate acceptance. Problems arise when oral assurances are given outside the letter or in subsequent years. The employer will argue it is bound only by what is in the letter; the employee will argue that other promises were made which should be enforced. These issues need briefs on the law and testimony on the facts.

Sometimes the parties' dispute will arise from a contract of employment for a fixed term (*e.g.*, three years). Classically the employee was entitled to be paid for the unexpired term if the employer terminated the relationship without cause. Today most contracts provide for

a payout or severance period if the employer lets the employee go without cause, that is, for reasons other than misconduct. Even where the contract has a fixed term, however, the employee is entitled to quit at any time, and he is also free to go to work elsewhere unless the contract contains a non-competition clause.

Bonus claims: The employer position is usually that the bonus or its amount was discretionary and the employee was not entitled to it unless he or she was in the company's employ on the date when bonuses were paid to employees generally. (To support this position the employer should produce a handbook or other policy statement provided to the employee and/or an employment letter or contract to the same effect.) The employee's position typically is that bonus is a large part of what he worked for and getting fired, especially at the end of the year, with no bonus is unfair. Most cases support the employer but a few have found in favor of employees on particular facts—and the particular facts are everything in these cases.

Terminations for cause: These are, and should be, uncommon. Usually, if employment is terminated without cause, the employee will be eligible for severance and, under his employment letter, contract or company policy, will receive at least some of his bonus, deferred compensation, stock options, etc. Most agreements provide that, if an employee is terminated for cause, he is paid his base salary and benefits through his last day worked and nothing more (and may, indeed, be subject to claims for recapture of compensation received after his misbehavior took place). "Cause" is usually a defined term in the parties' agreement and, consistent with case law, means, in essence, willful misconduct. Cause does *not* mean ordinary poor job performance as assessed by the employer. You may be asked to mediate or arbitrate the claim of an employee that he should not have been fired for cause because, if cause does not exist, the employee will be entitled to money and benefits that are forfeited in the event of termination for cause. Occasionally employers fire an employee for cause as the first step in a "negotiation" intended to persuade the employee to accept a lower bonus or lesser severance than he would otherwise receive. This tactic is abusive and you should not tolerate it.

Severance: Some employers offer employees who are let go for economic or other employer-based reasons a severance package but do not offer severance to employees terminated for poor performance (even though there was no "cause," *i.e.*, willful misconduct). Employees sometimes feel that their termination for poor performance was unwarranted and bring a proceeding in the hope of getting a "package." The employer probably has the right to decide whether performance was poor, so the employee has an uphill battle here, but you will want to focus on the facts of the particular case.

Securities industry issues: The termination of a registered employee triggers a U-5 filing with FINRA which requires the employer to disclose the reasons for its action. The courts have held the employer judicially immune for misstatements in these filings, which have huge consequences for employees. Many a FINRA arbitration or mediation leading to it has as its object getting a determination that the employee was not guilty of misconduct, which can be the predicate for a supplemental FINRA filing.

Restrictions on Competition and Solicitation

An arbitrator may be asked to enforce a non-competition agreement, or an agreement not to solicit or work for a former employer's clients, or not to solicit or hire a former employer's employees. Even in the absence of a written agreement, the parties may dispute whether the employee's actions in starting a new business or going to work for a competitor breached his common law duty of loyalty to his former employer.

What law applies? State law generally recognizes the employee's duty of loyalty but varies widely on the enforceability of non-competition agreements. In California, non-competition agreements are illegal by statute (but California does, vigorously, protect trade secrets and employer information generally). Many states, however, enforce such agreements as written. New York judges tend to pare them down to avoid restrictions that interfere with employee mobility except as necessary to protect employer confidential information and client relationships. Most judges take a dim view of employees who misappropriate employer property by, for example, downloading customer lists and price or cost data.

Case law used to say that restrictions were valid if they were appropriately limited in time and geographically. Geographic limitations have now largely gone by the wayside except for doctors, hair salons and other businesses where good will is associated with location. Time limitations range from 3 or 6 months to one year—occasionally an agreement will impose a two year restriction, though this may be hard for the employer to justify. In New York City's Commercial Division, judges have seemed willing to enforce agreements for up to six months, especially if the employee was being paid a salary to stay "on the beach," but these cases are very fact-specific: What is the real injury to the employer if the restriction is not complied with? What is the employee trying to accomplish by moving? Has (genuinely confidential) information been taken? Is this a group raid/move that will cost the former employer a whole line of business? Etc. Covenants associated with the sale of a business are broadly valid for a long period of time, and you may need to figure out in a particular case what the business basis for the covenant was.

Often the employer will go to court to get injunctive relief before starting an arbitration. One or the other of the parties will then move to compel arbitration. The parties may be sent to mediation early in the process, in the hope that their business issues can be ironed out—the employee and his new employer can be made to promise not to do certain things, or to pay some royalty, etc.

Statutory Claims

Employer agreements and policies may require employees to mediate and/or arbitrate claims that an employer has discriminated against the employee based on race, sex, age, disability or other protected characteristic, or has retaliated against the employee for complaining about such discrimination. A mediator or arbitrator may perceive these claims as an attempt to dress up a legally insufficient wrongful discharge claim in wolf's clothing. This may be the case—and it may also be the case that discrimination has occurred and the employee has no choice, because of the agreement the employer required him to sign, but to arbitrate the claim. Many statutory claims are mediated as a step on the road to arbitration, and the parties can benefit hugely from the mediation process.

Laura B. Hoguet, lhoguet@hnrklaw.com, is a partner of Hoguet, Newman, Regal & Kenney LLP in New York City and has decades of experience in employment law.

Balancing Discovery with EU Data Protection in International Arbitration Proceedings

By Karin Retzer and Sherman Kahn

As many organizations facing cross-border litigation know too well, U.S. discovery demands for evidence in the European Union ("EU") can create major conflicts with EU data protection requirements. In arbitration, where the proceedings do not have the imprimatur of a Court, this issue can be more difficult in some respects. However, the relative flexibility of the arbitration practice and the tradition of streamlined discovery makes the issue less difficult in other respects.

As might be expected, European data protection issues often arise in the international arbitration context. However, such issues may arise even in arbitrations under purely domestic United States rules if one of the parties is a European company or an affiliate of a European company. Indeed, as much international arbitration provides only for restricted discovery, it is in the United States domestic arbitration context that the most problematic privacy issues may arise.

This article first explains some of the conflicting obligations presented by EU and U.S. laws and summarizes the different approaches toward data protection in the United States and Europe. It then describes recent guidance from the EU data protection authorities to assist organizations with their compliance with U.S. requests for testimony and documentary evidence in a manner consistent with EU obligations. At the end, we provide some practical suggestions as to how to navigate these issues in the arbitration context.

I. Conflicting Obligations and Conflicting Expectations

Discovery problems tend to arise in cross-border litigation where the United States expectation of broad-ranging discovery is applied to persons or entities in European countries with significantly narrower approaches to discoverability of information in litigation. These problems are compounded when documents sought in discovery include information considered by European countries to be "personal information" relating to an individual – raising privacy concerns. The European view of what constitutes personal data is substantially different from that in the United States. Thus privacy law issues can create significant problems with cross-border discovery.

A. Different Approaches to Gathering Evidence

As has been widely discussed in international arbitration circles (and will not be repeated at length in this article), the civil law jurisdictions in the EU and the U.S. have fundamentally different methods of gathering evidence in civil litigation. Briefly put, civil law jurisdictions (such as those in continental Europe) generally limit disclosure of evidence to what is proffered by each party as evidence in support of the party's case. In contrast, pre-trial discovery obligations in common law countries, particularly in the United States, but also in the UK, are much broader.[1] In international arbitration involving parties from both sides of the Atlantic, the parties and the arbitrators may often wish to reach a middle ground between these approaches, providing some circumscribed discovery but not the type of wide-ranging discovery allowed by United States courts. Unfortunately, without care, even the provision of limited discovery can lead to privacy concerns and potential breaches of European law.

"The U.S. and the EU have different notions of what is considered 'personal data.'"

It is also important to keep in mind that European privacy laws are not just a tool used by parties unwilling to provide discovery. Rather, even if a European business entity involved in an arbitration is willing (or even eager) to provide discovery in an arbitration, it must still comply with applicable privacy and data protection laws. It is therefore important that an arbitration tribunal carefully manage the discovery process and carefully address privacy and data protection issues.

B. Different Approaches Toward Data Protection

The U.S. and the EU[2] have different notions of what is considered "personal data." To effectively manage discovery in an arbitration having participants from the United States and the European Union, it is critical to understand these differences.

The EU countries generally embrace a broader view of what constitutes "personal data" than that held in the United States. Indeed, some items, such as work related email, considered personal information in Europe would be considered quite the opposite in the United States. Protection of personal data under European law is generally governed by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ("The 1995 Data Protection Directive").[3] Article 2 of the 1995 Data Protection Directive defines "personal data" as "any information relating to an identified or identifi-

able natural person ("data individual"); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity."[4] This is a very broad conception of personal data, and as understood in Europe, under the 1995 Data Protection Directive personal information includes any information relating to an identified or identifiable individual, such as emails or documents created at the workplace (including lab notebooks, quality assurance documents, work-related memos or reports) that include the individual's name and contact information.

Under the 1995 Data Protection Directive, personal data may be collected only for a specific, explicit purpose, and may not be further processed in a manner incompatible with the original purpose unless the use meets a specified exception. The concept of "processing" is broadly defined as "*any operation or set of operations," whether manual or automated, including, but not limited to, "collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction*."[5] Clearly, the 1995 Data Protection Directive's broad definition of personal data in conjunction with its tight restriction on processing of such data can create issues regarding document discovery in arbitration—as typical discovery activities such as document review and production would constitute "processing."

The 1995 Data Protection Directive also requires that individuals must receive detailed notice regarding processing of their personal data.[6] Also, the 1995 Data Protection Directive requires that records containing personal data must be adequate, relevant, and not excessive to the purposes for which the data are processed as well as accurate and kept up-to-date.[7]

In the United States, by contrast, the concepts of "personal data" and "processing" are quite different. The idea that a business email is personal data of the sender or recipient, simply because it has the individual's name on it, would seem counter-intuitive to most U.S. lawyers and business people. Protection of "personal data" in the U.S. is generally restricted to specific types of sensitive information, such as personal medical information, social security information, information relating to children and financial information. The United States does not generally recognize any specific limits on processing of data for business purposes.

C. Guidance from EU Authorities

The Article 29 Working Party ("Working Party"), a consortium of data protection authorities from the various EU Member States established by Article 29 of the 1995 Data Protection Directive, has published a Working Document[8] ("Working Document") which provides useful guidance on the challenges that arise from discovery obligations for cross-border civil litigation. The Working Document does not address arbitration. Nonetheless, its non-binding guidance is very helpful in understanding how to approach the discovery issue in the arbitration context.

1. Processing Data

As outlined above, under the 1995 Data Protection Directive, data may only be processed where authorized by law. The Working Document analyzes three possible legal bases authorizing the processing of personal data that pertain to extraterritorial discovery:

- **Consent**: At first blush, it might appear that employers may legitimize their data processing regimes *ex ante* by obtaining the consent of employees who might potentially be relevant to discovery. However, the Working Document suggests that consent alone will not be sufficient to support processing of documents for litigation. Specifically, requirements that consent be both "specific" and "informed" seemingly would not support a general opt-out-type consent to data processing. Under the 2005 Data Protection Directive, consent is deemed to be valid only in cases where there is a "real opportunity" to withhold or withdraw consent without suffering any penalty.

  In earlier guidance, the Working Party has taken the position that a current employee cannot freely provide consent on account of the prejudice to the employee that might arise should consent be refused.[9] The Working Paper suggests that, with respect to certain employees, consent may be relied upon for discovery purposes. "The Working Party does recognize that there may be situations where the individual is aware of, or even involved in the litigation process and his consent may be properly relied upon as a ground for processing."[10]

  In commercial arbitration, because the issues typically revolve around a particular contract, many of the individuals who would potentially be providing relevant documents, *i.e.* current employees who participated in the negotiation of the contract or who are participating in its performance, may be in a position to give consent. However, even such individuals may subsequently withdraw their consent at any time. This possibility substantially lowers the utility of consent as a legal basis for complying with U.S. discovery requirements. It would be difficult, to say the least, to undo discovery in a situation where an individual has decided to withdraw consent. Moreover, complying with such a request as to relevant documents could leave a United States arbitration tribunal subject to

vacatur on the ground that it refused to hear evidence pertinent and material to the controversy.[11] In addition, if an employee refuses to consent, the company would not be excused from obligations to preserve and produce relevant information.

- **Legal Necessity**: Alternatively, an organization may establish the legitimacy of data processing where "necessary for compliance with a legal obligation." This legal basis is interpreted quite narrowly to include only those situations where there is an EU statutory requirement. This basis would not appear to apply directly to arbitration, which is a creature of contract, not legal obligation.

- **Necessary for purposes of a legitimate interest**: Arbitration discovery may well fall within this ground, which authorizes use of information where necessary for purposes of a legitimate interest pursued by the organization or by a third party to whom the data to be disclosed and not outweighed by the privacy rights of the individual.[12] Production of information in the context of a private confidential arbitration under the control of an arbitration tribunal in keeping with the arbitration goals of efficiency and justice would appear to be a legitimate interest. In order to rely on this ground, the Working Document stresses that issues of proportionality of the data, the relevance of the data, and possible consequences for the individuals concerned should be taken into account and adequate safeguards must be adopted to protect the individual's rights. This suggests that the arbitration tribunal should actively manage the arbitration process to ensure that any discovery allowed is reasonably circumscribed.

  The Working Document also suggests that, where possible, the organization should also anonymize or at least pseudonymize data, and apply filtering techniques to exclude or cull irrelevant data if possible by a "trusted" third party within the EU. Arbitration tribunals may wish to work with the parties to use these techniques where appropriate to further protect any privacy interests that may be implicated by needed discovery in the arbitration.

2. Transferring Data

In addition to determining whether data can be processed for use in an arbitration, EU privacy law places restrictions on the conditions under which the data can be transferred outside of the European Economic Area ("EEA").[13] Transferring records outside of the EEA requires compliance with the same general data protection principles that govern data retention. In addition, there must also be a legal basis to support transferring the data outside of the EEA. As a basic principle, the transferee country must meet the 1995 Data Protection Directive's "adequacy" requirements for data transfers or adequate safeguards, a global assessment of suitability to protect personal data based on the various provisions of the Directive. Under this standard, the United States has been deemed to have an inadequate data protection scheme.

To transmit data to a jurisdiction, such as the United States, which has not been deemed adequate, the party receiving the data must meet certain requirements. These are outlined below:

- **Safe Harbor Provisions**: The "Safe Harbor" established by the European Commission and the U.S. government allows U.S.-based organizations to self-certify that they will abide by Safe Harbor's principles of notice, choice, onward transfer, security, data integrity, access and enforcement and thus legitimizes transfers between an organization established in the EEA or Switzerland and the U.S. organization. However, Safe Harbor is not designed for the transfer of data in connection with a particularized proceeding such as an arbitration or litigation. Thus, while under certain circumstances, Safe Harbor may be useful for allowing document review, it will be quite difficult to use in an effort to legitimize the disclosure of documents to the other parties, witnesses or the arbitrators.

- **Model Contracts**: Article 26(2) of the 1995 Data Protection Directive provides that EU Member States may authorize transfers of data to organizations located in countries not deemed to be adequate if the data are safeguarded using appropriate contractual requirements. The European Commission has promulgated model contracts which it has deemed sufficient for this purpose.[14] Adopting model contractual language provides organizations located in a country that does not meet the EU's adequacy requirements with the necessary safeguards to engage in data transfers with EU parties.

  The model contracts may be a useful tool for transferring information in connection with arbitration discovery. The parties could include the EU Standard Contractual Clauses in an Arbitration Provision and/or agree, in the underlying agreement, that in the case of dispute they will enter into a model contract based on the EU Standard Contractual Clauses. Alternatively, the arbitration tribunal could incorporate the model contract requirements as a binding obligation in a procedural order governing discovery. The parties and the arbitrators would be required to sign such a model contract. Witnesses provided access to exchanged documents may also have to sign. We note, however, that the language of the model contracts cannot be varied and must be used exactly as published in order to be valid. Some terms of the model contract may be

unacceptable (for example, the EU entity would have to do due diligence on any of the receiving parties to ensure that they could adequately protect the personal information and the U.S. entities would have to agree to subject themselves to EU jurisdiction in the event of a breach of the agreement). In addition, some countries require model contractual language to be approved by data protection authorities—which can take significant time and reduce arbitration confidentiality.

The 1995 Data Protection Directive provides for certain exceptions from these standards for transferring data when the individual about whom the data relates unambiguously consents to the transfer, or when the transfer is necessary for the exercise or defense of a legal claim.

- **Consent of the Individual**: Whether consent is a valid basis for transfers of personal data outside the EEA follows the same standard as consent as a basis for processing personal data. Because of the limitations discussed above, consent is often an unreliable basis for cross-border data transfers, but in many cases it may be the only viable alternative.
- **Necessity for Legal Claim**: Article 26(1)(d) of the 1995 Data Protection Directive creates an exception for international transfers that are "necessary or legally required on important public interest grounds, or for the establishment, exercise, or defense of legal claims." Departing from earlier Member State interpretation,[15] the Working Document appears to apply the legal claims exception to "single" international transfers of data in compliance with foreign discovery obligations unless a "significant" amount of data are involved. There is no further guidance on what a "single" transfer or a "significant" amount of data would mean. However, according to the Working Party, the exception is subject to "strict interpretation."[16] It is not clear whether the Working Party would consider an arbitration to fall within the exception—although the way the exception is worded suggests it should—so it may be risky to rely on it. Moreover, the Working Document is non-binding and each Member State's interpretation of the Working Document may vary.

3. Data Security

The Working Document states that "[i]n accordance with Article 17 of the Directive, the [organization controlling the data] should take all reasonable technical and organizational precautions to preserve the security of the data to protect it from accidental or unlawful destruction or accidental loss and unauthorized disclosure or access."[17] The Working Document goes on to state that these requirements are also applicable to the law firms, litigation support services and experts who are involved with the litigation. Arbitration tribunals should work with the parties to include data security requirements in procedural orders in order to ensure the security of any documents produced during the arbitration.

Appropriate security standards must ensure the data are kept confidential and secure. Where service providers are used, they should be bound by contract to ascertain compliance with purpose limitation obligations, retention policies, and security standards. The Working Document states that expert witnesses, for example, should be treated as service providers.[18]

4. Access and Rectification

Article 12 of the 1995 Data Protection Directive gives an individual the right to access data held about himself or herself in order to rectify inaccuracies. The Working Document affirms that there is no waiver of the rights of access and correction for the discovery process and suggests that the obligation be placed on the receiver of the data.[19] Again, this is an issue that the arbitration tribunal can cover in an initial procedural order as this would need to cover any party that receives the data, including parties, witnesses and the arbitrators.

II. Practical Approaches to Minimizing Privacy Issues in International Arbitration

A. The Use of Procedural Orders to Impose Meaningful Restrictions

Prior to conducting any information transfers, arbitration tribunals should work with parties to negotiate terms to restrict who may access information to be transferred in an arbitration, as well as the purposes for which it may be used, in accordance with the security, transparency and finality principles of the Directive. One way to accomplish this may be to incorporate language from the model contracts into a discovery procedural order governing the arbitration.

Arbitration tribunals should also discuss with the parties how the disclosure of personal information could be limited consistent with the parties' needs in the arbitration process. The tribunal may wish to explore whether any personal data that is sufficiently relevant that it should be disclosed may be anonymized, or redacted to preserve the individual's privacy interest without causing substantial prejudice to the receiving party.

B. Address Data Protection in Dispute Resolution Clauses

In agreements among parties where European data protection issues may arise, it would be helpful to address data protection concerns in the dispute resolution clause of the underlying agreement. If the parties address these issues in the underlying agreement, many potential privacy and data protection issues can be avoided in the event the parties later have a dispute.

C. Keep Employees Apprised

We recommend that companies inform employees about the possibility that data possessed by the company may need to be retained and shared for discovery purposes. This could be accomplished using a technology use policy. Then, where appropriate, employees should be informed about the details of discovery requests, including possible recipients, third party service providers and the right to access and modify information. Some countries require notice to or consultation with works council, employee representatives or public authorities. While this may reduce arbitration confidentiality, where the law requires it may be necessary.

III. Conclusion

European data protection and privacy laws can add considerable complexity to the discovery process when a European party is involved in an arbitration. Those problems can be even more significant if the arbitration is subject to broad United States discovery principles. Ultimately the U.S. and the EU will need to reach some type of political solution to resolve these conflicts. No solution is perfect and there is no magic bullet. Nonetheless, in the meantime, some problems can be mitigated through careful case management by the arbitration tribunal and cooperation among the parties.

Endnotes

1. In court litigation, the conflict between civil law and common law discovery approaches can cause major problems. For example, some countries in continental Europe, notably France, have responded to American Courts' attempts to enforce discovery orders against their citizens by enacting "blocking statutes" which can subject parties voluntarily providing discovery in U.S. Court proceedings outside of Hague Convention procedures to fines and even criminal liability. These statutes do not, by their terms, apply to arbitration, and they are thus beyond the scope of this article.
2. The 27 Member States of the European Union (EU) currently are: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, the Netherlands and the United Kingdom (collectively, the "Member States").
3. Official Journal L 281, 31. The 1995 Data Protection Directive is not itself a law directly applicable to private individuals and organizations. Rather, it is a directive to member states to adopt national laws consistent with the directive. It is these national laws that are directly applicable to private parties. There is variation among the implementing legislation in the various member states and it is important to understand the applicable legislation in preparing a discovery plan for arbitration.
4. *Id.*
5. See Article 2(b) of the 1995 Data Protection Directive.
6. See Articles 10, 11 of the 1995 Data Protection Directive.
7. See Article 6 of the 1995 Data Protection Directive.
8. Article 29 Working Party, "Working Document 1/2009 on pre-trial discovery for cross-border civil litigation," WP 158, Adopted on 11 February, 2009, available at http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2009/wp158_en.pdf.
9. Article 29 Working Party, "Opinion 8/2001 on the processing of personal data in the employment context," WP 48, Adopted on 13 September, 2001, available at http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2001/wp48en.pdf.
10. Working Document, p. 9.
11. See, Federal Arbitration Act, 9 U.S.C. § 10(a)(3).
12. Working Document, p. 11.
13. The EEA consists of the 27 EU Member States plus Iceland, Liechtenstein and Norway.
14. Commission Decision of 15 June 2001 on standard contractual clauses for the transfer of personal data to third countries, under Directive 95/46/EC, 2001/497/EC; Commission Decision of 27 December 2004 amending Decision 2001/497/EC as regards the introduction of an alternative set of standard contractual clauses for the transfer of data to third countries (2004/915/EC).
15. For example, the Düsseldorfer Kreis, the assembly of the German federal state data protection authority, has taken the (informal) position that transfers of data outside the EU cannot be based on the necessity for legal claim exception.
16. Working Document on a Common Interpretation of Article 26(1) of Directive 95/46/EC of 24 October 1995, adopted on 25 November 2005, page 13.
17. Article 29 Working Party, "Working Document 1/2009 on pre-trial discovery for cross-border civil litigation," WP 158, Adopted on 11 February, 2009, page 12.
18. Article 29 Working Party, "Working Document 1/2009 on pre-trial discovery for cross-border civil litigation," WP 158, Adopted on 11 February, 2009, page 13.
19. *Id.*

Karin Retzer, kretzer@mofo.com, is Of Counsel in Morrison & Foerster's Brussels office. Her practice focuses on the legal aspects of privacy and data protection, e-commerce, technology licensing, and intellectual property law. Karin has provided strategic advice on worldwide privacy and data security compliance projects.

Sherman W. Kahn, SKahn@mofo.com, is Of Counsel with Morrison and Foerster, resident in the New York office and is Co-Chair of the NYSBA Dispute Resolution Section Arbitration Committee. He represents clients in international arbitration proceedings presenting complex technical and commercial issues and has arbitrated under the AAA, JCAA , ICC and other arbitration and dispute resolution rules.

The Administration Reviews the U.S. Model Bilateral Investment Treaty

By Mark Kantor

In June 2009, the U.S. Department of State ("State") and the Office of the U.S. Trade Representative ("USTR") publicly announced a review of the 2004 U.S. model bilateral investment treaty, the template document from which the United States starts the process of negotiating bilateral investment treaties (BITs). The announcement of the Model BIT review was no surprise; many interest groups supporting Candidate Barack Obama in the 2008 U.S. presidential election continued to press the Administration of newly elected President Obama to review NAFTA and other investment and trade treaties as the Administration took its first post-election look at the international economic law landscape.

"The difference in viewpoints is well illustrated by the unbridgeable gap over the issue of investor-State arbitration as a forum to enforce the investment protections afforded by the BIT."

The portion of the review process involving public outreach ended in September 2009, as explained below. As this article goes to press, the inter-agency process is continuing, but "inside-the-Beltway" observers expect the Administration to reach its decisions very shortly. If those decisions become public before this issue of *New York Dispute Resolution Lawyer* hits the presses, we will add an addendum reporting on the final product of the Model BIT review.

State and USTR took several initial steps to commence the review process. The agencies requested the State Department's Advisory Committee on International Economic Policy (ACIEP) to establish a subcommittee on Investment to review the Model BIT. As part of that review, State and USTR asked that the subcommittee devote attention, in particular, to three topics: (a) dispute settlement provisions; (b) State-owned enterprises (SOEs); and (c) financial services issues. The State Department and USTR further requested that the Subcommittee's report be submitted by the Fall of 2009.

In addition, State and USTR sought public submissions on the Model BIT and held a public meeting in July 2009.[1] The State and USTR representatives were careful to listen during the meeting, but not to express their own views.

State and USTR also convened an ongoing coordinated inter-agency process, seeking input from other interested agencies throughout the U.S. Government. Engaged agencies included the Commerce, Labor and Treasury Departments. The inter-agency consultations have not been limited to matters raised in the public submissions or the eventual Advisory Report from the ACIEP.

The ACIEP established the requested advisory subcommittee under the co-chairmanship of Ms. Thea Lee, Policy Director of the AFL-CIO, and Mr. Alan Larson, Senior International Policy Advisor at Covington & Burling, LLP. The members of the Investment Subcommittee included both representatives from ACIEP and other members of the private sector, with representation from business, academia, labor, environmental NGOs and the legal profession. That membership encompassed representatives from organizations staunchly supporting investment treaties (such as the U.S. Council for International Business, the National Association of Manufacturers, the U.S. Chamber of Commerce, Exxon Mobil, Citigroup, the Emergency Committee for American Trade, Procter & Gamble, United Technologies Corporation and the National Foreign Trade Council) and organizations equally staunchly opposing investment treaties (such as the Institute for Policy Studies, United Steelworkers, the International Association of Machinists and Aerospace Workers, the Harrison Institute for Public Law—Georgetown Law, the Sierra Club and EarthJustice).

The difference in viewpoints is well illustrated by the unbridgeable gap over the issue of investor-State arbitration as a forum to enforce the investment protections afforded by the BIT. Advocacy groups supporting investment treaties sought to reinforce the effectiveness of investment treaty arbitration.

> We and other Subcommittee members made several concrete proposals to strengthen the Model BIT, including:
>
> - Eliminating the use of customary international law as a limitation on the obligations of "fair and equitable treatment," "full protection and security" and expropriation without compensation;
> - Clarifying that investor-state rights are guaranteed in the Model BIT for all claims of non-discrimination regardless of sector;
> - Clarifying and/or modifying the Model BIT to ensure that, like under

U.S. law, the protection against uncompensated expropriation covers, among other things, all types of financial instruments;

- Restoring the so-called umbrella clause in the Model BIT (i.e., the clause which provides that "each Party shall observe any obligation it may have entered into with regard to investments"); and
- Narrowing and/or eliminating the self-judging nature of the essential security exception.[2]

In distinct contrast, advocates opposing investment treaties sought the elimination entirely of investor-State arbitration and its replacement by State-State dispute resolution along lines of the procedures found in WTO agreements and the trade provisions of U.S. free trade agreements.

> Investor-state claims often involve matters of vital importance to the public welfare, the environment, and national security. However, international arbitrators are not ordinarily well-versed in human rights, environmental law, or the social impact of legal rulings. Allowing private foreign investors to bring claims over such sensitive matters to international commercial arbitration tribunals is particularly disturbing when the disputes raise constitutional questions. For these reasons, we feel strongly that the Model BIT should provide only for state-to-state dispute settlement, which guarantees the crucial role of governments in determining and protecting the public interest.[3]

Unsurprisingly, the ultimate Advisory Report from the Subcommittee did not fundamentally overcome that divergence of views.

> The Subcommittee conducted extensive discussions on dispute settlement, especially investor-state dispute settlement. Though the deliberations did not converge upon a recommendation, they provided valuable insight into the issues involved.[4]

The Advisory Report itself contained the consensus views of the Subcommittee members, consisting of 24 pages and 23 recommendations.[5] As demonstrated below, however, many of the "recommendations" carefully described, but did not choose among, the competing views of the members. In addition, 34 pages of "separate statements" were also appended to the Advisory Report, in which members set out their own individual perspectives.[6]

The Subcommittee considered a wide range of issues related to BITs, including the scope of substantive investment protections, coverage of SOEs, important exceptions for essential security, prudential regulation of financial services and balance of payments crises, environmental and labor protections, investor-State arbitration, transparency, amicus submissions and protections for freedom of speech and the press. The prospect of BIT negotiations between the U.S. and the People's Republic of China was a significant parameter for the discussions.

"[M]any of the 'recommendations' carefully described, but did not choose among, the competing views of the members."

The Subcommittee did reach consensus on the following specific proposals, including recommendations to highlight the availability of BIT protections to non-profit organizations, enhancing transparency and amicus submissions, linking the "essential security" exception to OECD standards, requiring SOEs to provide National Treatment and Most Favored Nation Treatment in the provision of their goods and/or services to covered investments and to undertake a legal review of the prudential measures exception for financial services. Numbering below follows the numbering in the Advisory Report.

> **1. Recognizing that certain types of non-profit acquisitions abroad have the character of an "investment" as that term is defined in the current Model BIT, we recommend that the Administration consider confirming (in the Model BIT or elsewhere) the understanding that the Model BIT does accord BIT protections to such acquisitions. As an example, we highlight that the acquisition of property abroad for environmental purposes (e.g., acquiring property in a trust for environmental or ecological preservation) should enjoy BIT protections regardless of whether the acquirer had an expectation of profit.**
>
> **2. Recognizing that certain U.S. non-profit enterprises, such as labor unions and environmental NGOs, can be "investors" when they make acquisitions that meet the definition of "investment" as those terms are defined in the current Model BIT, we recommend that**

the Administration review whether the current Model BIT language makes this sufficiently clear. Should the Administration's review prove it necessary, the Administration should take steps necessary to clarify the understanding that U.S. nonprofit enterprises can indeed be "investors" when they make or seek to make "investments."

****

6. Recognizing that words such as "to the extent possible" in Article 11(2), "wherever possible" from Article 11(4)(a) and words "when time, the nature of the proceeding, and the public interest permit" from Article 11(4)(b) could be abused in order to prevent the transparency that is important for investment, we recommend that the Administration consider the creation of a Transparency Council that could help the Parties to a BIT make continuing progress in this area.

7. We recommend the Administration consider the insertion of the following provision into Article 11:

> **"Each Party shall allow persons of the other Party to participate in the development of standards, technical regulations, and conformity assessment procedures that affect investors and to do so on terms no less favorable than those it accords to its own persons. When non-governmental bodies carry out the foregoing activity, each Party shall recommend that such non-governmental bodies in its territory observe this obligation in developing standards and voluntary conformity assessment procedures."**

8. We recommend that the Administration consider, with respect to amicus curiae submissions, following the example of the ICSID Arbitration Rules. To this end, Article 28(3) could be replaced with the following language:

> **"A person or entity that is not a party to the dispute (an "*amicus curiae*") that brings to the attention of the Tribunal relevant matters not already brought to its attention by the parties may be of considerable help to the Tribunal. After consulting with the Parties, the Tribunal may permit such persons or entities to file a written submission with the Tribunal regarding a matter within the scope of the dispute.**
>
> **In determining whether to allow a filing, the Tribunal shall consider, among other things, the extent to which:**
>
> **(a) the *amicus curiae* submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;**
>
> **(b) the *amicus curiae* submission would address a matter within the scope of the dispute;**
>
> **(c) the *amicus curiae* has a significant interest in the proceeding.**
>
> **The Tribunal shall ensure that the *amicus curiae* submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the *amicus curiae* submission."**

13. We recommend the Administration consider amending Article 18 [essential security] to provide that a Party should not apply measures otherwise inconsistent with its BIT obligations to advance predominantly economic objectives and that in having recourse to measures to protect its essential security interests a Party will be guided by principles of nondiscrimination for entities in like circumstances, transparency and predictability, regulatory proportionality and accountability, as the United States has agreed in the OECD.

****

15. We recommend that the Administration undertake a legal review of the second sentence in Article 20.1 [the prudential measures exception for financial services] and weigh the costs and benefits of clarifying or deleting it.

****

20. We recommend that the Administration consider whether the Model BIT should include a provision requiring that Parties ensure that their respective state enterprises, in the provision of their goods and/or services, accord National Treatment, in accordance with Article 3, and Most Favored Nation Treatment, in accordance with Article 4, to covered investments.

****

23. Recognizing that the protection of commercial investment made by radio and television enterprises, Internet service providers, news organizations and other media can have the effect of protecting free expression, we believe that the goals of free expression can be more fully realized when investors in these sectors are aware of the availability of BIT protections for such investments.

However, as the many pages of separate statements demonstrate, the Subcommittee members did not make much progress narrowing the gap on numerous core investment treaty issues. The Subcommittee failed to reach consensus on the scope of the international minimum standard of treatment in the Model BIT, the role of customary international law in determining the substantive protections in the BIT, exceptions for balance of payments crises, coverage of sovereign debt restructurings, protection for labor and environmental measures, expansion of the limitations on performance requirements, and the entire subject of investor-State arbitration. The following recommendations in the Advisory Report illustrate the inability to achieve compromise on those issues and more (again, numbering follows the numbering in the Advisory Report).

3. Various members of the Subcommittee expressed a range of views on the minimum standard of treatment provision in the current Model BIT. Some members recommend codifying the current understanding of the content of the customary international law of the minimum standard of treatment. Other members recommend that the provision provide for fair and equitable treatment and full protection and security without reference to customary international law.

4. In its review of financial services issues, the Subcommittee conducted extensive discussions on the Administration's free transfers policy and whether future BITs should include exceptions for balance of payments crises. The Subcommittee stands ready to continue to consult with the Administration on these issues, but was not able to reach consensus as to whether future BITs should include exceptions for balance of payments crises.

5. The Subcommittee considered the appropriateness of broadening the prohibition against performance requirements to encompass requirements that (a) research, development, testing, innovation, systems integration or other activity aimed at generating intellectual property be performed in the territory of a host Party; or (b) that technology developed in the territory of a host Party be required to be used by an investor as a condition for any investment or investment approval. Other members proposed a further broadening that would prohibit requirements that preference be given to services of a host Party.

****

9. The investment and environment provision introduced by the 2004 U.S. Model BIT contains aspirational language. The Subcommittee supports efforts to promote improvement in environmental standards and protections in potential BIT partners, and extensive discussions were held as to the appropriate approaches by which to accomplish these goals.

10. Some Subcommittee members recommend that the Administration consider the creation of a bilateral Environmental Council that would offer advice on BIT-related environmental issues.

11. The investment and labor provision introduced by the 2004 U.S. Model BIT contains aspirational language. The Subcommittee supports efforts to promote improvement in labor standards and protections in potential BIT partners, and extensive discussions were held as to the appropriate approaches by which to accomplish these goals.

12. Some Subcommittee members recommend that the Administration consider the creation of a bilateral Labor Council that would offer advice on BIT-related labor issues.

****

14. Some members of the Subcommittee recommend that the Administration in future investment negotiations seek to ensure that U.S. financial institutions and investors of a Party, or covered investments, in financial institutions are not denied access to investor state dispute settlement provisions with respect to alleged breaches of the national treatment and most-favored nation treatment obligations of the BIT. Others recommend that the government conduct an internal risk assessment with respect to these provisions to ensure that the review the government previously conducted on this issue still stands in light of the financial crisis. That review reached the conclusion that a claimant should be permitted to submit to investor-state dispute settlement claims of breach of the national treatment and MFN obligations with respect to financial services.

****

16. The Subcommittee conducted extensive discussions on dispute settlement, especially investor-state dispute settlement. Though the deliberations did not converge upon a recommendation, they provided valuable insight into the issues involved.

17. Subcommittee members held discussions on the provisions on customary international law that were added to the 2004 Model BIT, including in Annex A.

18. The Subcommittee discussed the definition of investment and the impact of paragraph 2 of Annex B of the 2004 Model BIT.

19. Some Subcommittee members recommend that the Administration consider whether it needs to clarify that in determining whether an enterprise is subject to BIT obligations (i.e., by virtue of a State Party's delegation to the enterprise of regulatory, administrative, or other governmental authority) the totality of the circumstances must be taken into account, including whether any delegation of authority was formal or informal.

****

21. Some Subcommittee members recommend that the Administration consider whether the Model BIT should clarify that the fact of being owned by a government does not defeat the quality of an enterprise's being "in like circumstances" with another enterprise for purposes of the National Treatment or Most Favored Nation Treatment obligations.

22. The Subcommittee held discussions on ways to address access of SOEs to financing at below-market interest rates and other such anticompetitive subsidization.

****

24. We recommend that the Administration weigh the appropriateness of including an annex in future BITs on restructuring public debt.

Reflecting the split within the Subcommittee, in late September 2009 the ACIEP itself accepted and forwarded the Advisory Report on to the Secretary of State for consideration, but without endorsing or rejecting its contents.

With the Advisory Report and the submissions from the public meeting in hand, the Administration has continued the inter-agency process led by State and USTR. That process has moved forward beyond the level of the working staff into the realm of political appointees, occupying conversation in at least two meetings of the Trade Policy Review Group (an assistant secretary-level platform) by January 2010. Moreover, interested groups have continued their battle for the hearts and minds of Administration officials in typical "inside-the-Beltway" fashion, with meetings, memos, e-mails, instant messages, public statements, articles in the specialist press and the customary paraphernalia of Washington lobbying.

No public statements have been forthcoming from the Administration since the Advisory Report was submitted. Knowledgeable observers, though, are predicting possible crystallization of the Administration's position "within several weeks." Among the topics for which serious discussions appear to be ongoing are increased protections for labor and environmental issues, coverage of SOEs, enhanced transparency for investor-State arbitration, and the substantive test for the international minimum standard of treatment. What will happen, however, only time will tell.

Endnotes

1. The notice of the meeting can be found at 74 Fed. Reg. 34071 (July 14, 2009). Fifty eight written comments were submitted in response. The full text of those comments is available at http://www.regulations.gov/search/Regs/home.html#docketDetail?R=USTR-2009-0019.
2. Collective statement from Stephen Canner, Vice President of Investment and Financial Services, U.S. Council for International Business, Jennifer Haworth McCandless, Partner, Sidley Austin LLP, and Linda Menghetti, Vice President, Emergency Committee for American Trade, contained in Annex B to the Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty, available at http://www.state.gov/e/eeb/rls/othr/2009/131118.htm#2.
3. Collective statement from Sarah Anderson, Institute for Policy Studies, Linda Andros, United Steelworkers, Marcos Orellana Cruz, Center for International Environmental Law, Elizabeth Drake, Stewart and Stewart, Kevin P. Gallagher, Boston University and Global Development and Environment Institute, Owen Herrnstadt, International Association of Machinists and Aerospace Workers, Matthew C. Porterfield, Harrison Institute for Public Law—Georgetown Law, Margrete Strand Rangnes, Sierra Club and Martin Wagner, Earthjustice, contained in Annex B to the Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty, available at http://www.state.gov/e/eeb/rls/othr/2009/131118.htm#2.
4. Recommendation 16, Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty, available at http://www.state.gov/e/eeb/rls/othr/2009/131098.htm.
5. The Advisory Report, Separate Statements and List of Subcommittee Members, along with the letter of transmittal from the ACIEP to the Secretary of State, can be found at http://www.state.gov/e/eeb/rls/othr/2009/131098.htm.
6. The Co-Chairs initially established a requirement that separate statements not exceed 2 pages. In the last days before finalization of the Advisory Report, that limit was relaxed a bit and some participants collectively submitted 3-page statements. However, a group of 8 organizations comprising the "anti" side of the debate submitted a joint 17-page separate submission to the surprise of the other Subcommittee members. The author submitted a 2-page separate statement.

Mark Kantor is an independent arbitrator and the Editor-in-Chief of *Transnational Dispute Management*. He teaches as an Adjunct Professor at Georgetown University Law Center and is also a Senior Research Fellow at the Vale Columbia Center for Sustainable International Investment. He participated as an outside member of the Investment Subcommittee of the State Department's Advisory Committee on International Economic Policy (ACIEP) reviewing the U.S. Model BIT discussed in this article. He can be reached by email at mkantor@mark-kantor.com or through the web at www.mark-kantor.com.

Use of Section 1782 in Aid of International Arbitration: The View from the Fifth Circuit

By David Zaslowsky

Section 1782 of Title 28 of the U.S. Code is a powerful weapon in the arsenal of those who practice in the international litigation arena. Over the past few years, there has been much written about whether Section 1782 may be used in connection with an international arbitration proceeding. In a decision this past summer in *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*,[1] the Fifth Circuit became the first circuit court to weigh in on the matter since the Supreme Court addressed Section 1782 in its *Intel*[2] decision in 2004. It was not good news for those who want to see the use of Section 1782 expanded to international arbitration.

History

In a very general sense, if discovery is sought for use "in a proceeding in a foreign or international tribunal," Section 1782 authorizes a federal district court to order production of documents, as well as depositions of witnesses, located within that district. The Section 1782 application can be brought by "an interested person" (which includes a party to the foreign proceeding), is typically brought by way of an *ex parte* application, and does not require that the foreign proceeding even be pending at the time of application.

About ten years ago, the question arose as to whether an "arbitral tribunal" qualified as an "international tribunal" for purposes of Section 1782. In *Nat'l Broad. Co., Inc. v. Bear Stearns & Co., Inc.*,[3] the Second Circuit answered the question in the negative. That case involved a commercial arbitration conducted in Mexico under the auspices of the International Chamber of Commerce ("ICC"). One reason given by the Second Circuit for not applying Section 1782 to an arbitration was that allowing the use of 1782 would mean that parties to the arbitration would themselves be able to seek discovery, which was inconsistent with the provision in the Federal Arbitration Act (9 U.S.C. § 7) that limits to the arbitrators the right to order discovery. In addition, the Second Circuit reasoned that the legislative history of the statute demonstrated that the statute was intended to apply to intergovernmental tribunals not involving the United States but that there was no indication that Congress intended for the statute to reach private international tribunals (such as a tribunal created under the auspices of the ICC).

In *Republic of Kazahkstan v. Beidermann*,[4] the Fifth Circuit likewise held that Section 1782 was drafted to facilitate discovery for international government-sanctioned tribunals, not private arbitral tribunals. Further, the court referred to the commonly understood belief that arbitration is intended as a speedy, economical, and effective means of dispute resolution—an advantage that, according to the Fifth Circuit, could be destroyed if the parties succumbed to fighting over burdensome discovery requests far from the place of arbitration. After these decisions in 1999, there was little if any effort to try to use Section 1782 in aid of international arbitration.

"[The Fifth Circuit's decision] was not good news for those who want to see the use of Section 1782 expanded to international arbitration."

The *Intel* Decision

By its terms, Section 1782 applies to discovery sought for use "in a proceeding in a foreign or international tribunal." In 2004, the Supreme Court addressed Section 1782 for the first time. In its opinion, the Supreme Court stated, in dictum, as follows:

> [T]he term "tribunal"…includes investigating magistrates, administrative *and arbitral tribunals*, and quasi-judicial agencies, as well as conventional…courts. [5]

This language was a quotation from a 1965 article by Professor Hans Smit of Columbia Law School, the primary drafter of the current version of the statute.[6] This quotation led numerous commentators to predict that the lower courts would revisit the issue of the applicability of Section 1782 to international arbitration proceedings.

In fact, subsequent to *Intel*, a number of courts rejected the earlier views of the Second and Fifth Circuits, holding that, in light of *Intel,* Section 1782 discovery was available in connection with foreign arbitrations.[7] But those who followed the issue closely realized that the real test would come in cases brought before the Second or Fifth Circuit. In August, the Fifth Circuit was the first to weigh in.

The Fifth Circuit Decision

La Comision Ejecutiva Hidroelectrica Del Rio Lempa v. El Paso Corp.[8] related to an ad hoc arbitration in Switzerland between La Comision Ejecutiva Hidroelectrica Del Rio Lempa (CEL) and Nejapa Power Company (NPC). The arbitration was conducted under the UNCITRAL rules and arose out of a contract dispute concerning the construction of a power plant.

The Swiss arbitral tribunal rejected CEL's request for broad discovery and issued an order limiting document production to those papers that were "relevant and material to the outcome of the case." The arbitral tribunal also established a time line for serving document requests and issuing rulings on any objections. At the same time, CEL filed *ex parte* Section 1782 applications in two federal districts (the District of Delaware and the Southern District of Texas) to obtain production of documents and depositions. The Texas application sought depositions from El Paso Corp., a company related to NPC.

Both district courts granted the ex parte applications. El Paso moved for reconsideration in the Texas district court, which granted the motion and, then, relying on *Biedermann,* held that Section 1782 did not apply to discovery for use in a private international arbitration. The court also held that, even if it did have the authority under Section 1782, "it would not [grant the application], out of respect for the efficient administration of the Swiss arbitration."[9]

On appeal, CEL argued that *Biedermann* was no longer controlling in light of *Intel*. The court disagreed. The Fifth Circuit explained that the question of whether a private international arbitration tribunal also qualifies as a "tribunal" under § 1782 was not before the Supreme Court. The Fifth Circuit acknowledged the above-quoted excerpt from Professor Smit but noted that it was "in a parenthetical" and that "nothing in the context of the quote suggests that the Court was adopting Smit's definition of 'tribunal' in whole."[10] The court further reasoned that none of the concerns raised in *Biedermann* regarding the application of Section 1782 to private international arbitrations were at issue or considered in *Intel*.

Finally, the court explained that one panel of the court could not overrule the decision of a prior panel "unless such overruling is *unequivocally* directed by controlling Supreme Court precedent."[11] Since this panel did not believe that the *Intel* decision met that strict standard, it did not really have a choice but to continue the *Beidermann* holding in the Fifth Circuit.

The Future

Thus, today, the question of whether one will be able use Section 1782 to obtain discovery in aid of international arbitration will be answered first and foremost by geography. In the Fifth Circuit, unless the Fifth Circuit were to reconsider *Beidermann* en banc (or the issue were to reach the Supreme Court), Section 1782 discovery is not available. In the Second Circuit, *NBC* has not yet been reversed. Thus, the question in the Second Circuit will be whether any district court judge will be prepared to rule that *Intel* overruled *NBC*. Perhaps judges there will simply conclude they are bound by *NBC* and wait until the Second Circuit weighs in on the issue.

It is outside these two Circuits that Section 1782 applicants might have the most success. In that regard, litigants might want to refer to a report published by the International Commercial Disputes Committee of the City Bar Association, which analyzed the issue of using Section 1782 in aid of private international arbitration.[12] The Committee traced the history of the statute, discussed the relevant case law, analyzed the policy arguments and ultimately concluded that Section 1782 should be interpreted to include a private international arbitral tribunal as an "international tribunal."

"The most important best practice is that Section 1782 discovery in aid of arbitration should be granted only if the request is made by the arbitrators, or with the consent of the arbitrators."

The Committee also recommended a number of best practices, informed in part by the recognition that there were reasonable arguments in support of a more limited interpretation of Section 1782. The most important best practice is that Section 1782 discovery in aid of arbitration should be granted only if the request is made by the arbitrators, or with the consent of the arbitrators. If this practice is followed, it would nullify the criticism concerning the asymmetry between Section 1782 and Section 7 of the Federal Arbitration Act as to who, the arbitrators or the parties, may issue subpoenas. The exercise by courts of their discretion in this way would also address the concern that allowing discovery under Section 1782 would be contrary to the efficient conduct of the arbitration.

Another important recommended practice concerns the issue of whether Section 1782 should apply to an arbitration that, for example, is seated in New York and is "international" or "foreign" in the sense that it involves foreign parties or a project or contract performed abroad. There is jurisprudence that has already developed in the context of the New York Convention's treatment of foreign and "non-domestic" awards rendered in the United States that suggests that the award in such a situation could be considered "foreign" and thus subject to the New York Convention.[13] Should this body of decisional law be used as a framework for applying Section 1782? The view of a majority of the Committee was that this jurisprudence under the New York Convention should not be extended to Section 1782 and that discovery in aid of foreign arbitration should be available only if the seat of the arbitration is outside the United States. This conclusion was informed in large part by a desire to have a bright-line rule and thus help avoid the potential for protracted litigation over the "international" or "foreign" character of the arbitration in question.

* * *

The Supreme Court's decision in *Intel* gave new impetus to the issue of whether Section 1782 should be used in aid of international arbitration The law is still developing. A decision by the Second Circuit will likely go a long way to determining the shape of further development.

Endnotes

1. 2009 U.S. App. LEXIS 17596, (5th Cir. Aug. 6, 2009).
2. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).
3. 165 F.3d 184 (2d. Cir. 1999).
4. 168 F.3d 880 (5th Cir. 1999).
5. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. at 258 (2004) (emphasis added).
6. Smit, H., *Int'l Lit. Under the United States Code*, 65 Colum. L. Rev. at 1026-27 (1965).
7. *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221 (N.D. Ga. 2006); *In re Application of Hallmark Capital Corporation*, 2007 U.S. Dist. LEXIS 96405 *2 (D. Ind. June 1, 2007); *In re Babcok Borsig AG*, 2008 WL 4748208 (D. Mass October 30, 2008).
8. 2009 U. S. App. LEXIS 17596 (5th Cir. Aug. 6, 2009).
9. *Id.* at * 4.
10. *Id*. at * 8.
11. *Id*. at * 9.
12. The Report can be found at http://www.nycbar.org/pdf/report/1782_Report.pdf.
13. *See, e.g.*, 9 U.S.C. § 202 (2007); *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983).

David Zaslowsky is a partner in the Litigation Department of the New York office of Baker & McKenzie LLP. He was the chairman of the New York City Bar Association subcommittee that drafted the report about Section 1782 and is co-author of *Litigating International Commercial Disputes* (West Group). He can be reached at dpz@bakernet.com.

Saipem S.p.A. v. The People's Republic of Bangladesh: ICSID Restrains a Judiciary Run Amok

By Joseph E. Neuhaus and Ian E. Browning

Most judges try to find the easiest and narrowest way to decide a case. That approach was not followed in a recent decision by an ICSID arbitral tribunal in *Saipem S.p.A. v. The People's Republic of Bangladesh*.[1] There, the tribunal bypassed numerous easier paths to resolution to reach a hard question: were decisions by national courts exercising supervisory jurisdiction over an arbitration located in Bangladesh so baseless and "illegal" as to constitute a "taking" of the right to arbitrate? The tribunal said, "Yes," and awarded the claimant damages equivalent to the amount of its previously invalidated arbitral award.

The decision, by a tribunal constituted under the auspices of the World Bank's treaty-based International Centre for Settlement of Investment Disputes ("ICSID"), is significant on a number of counts: this is apparently the first ICSID panel to hold that a party's right to arbitration had been expropriated, and one of relatively few decisions to find judicial action alone so baseless as to constitute expropriation. In reaching these conclusions, the tribunal also determined that the claimant was not barred from recovery by the fact that it had not appealed key rulings by a court of first instance in Bangladesh.

Factual Background to the ICSID Dispute

The Pipeline Contract

In 1990, Saipem contracted with the Bangladesh Oil, Gas and Mineral Corporation, known as Petrobangla, to build 409 km of gas pipelines across northeastern Bangladesh. Although scheduled for completion in April 1991, the project was not finished until June 1992—significantly increasing the cost of the project. Petrobangla paid roughly $40 million of the agreed contract price, but a disagreement arose as to which party was responsible for the increased costs attributable to the delay in the project's completion.[2]

The ICC Arbitration

In June 1993, Saipem initiated an ICC arbitration against Petrobangla in Dhaka, the Bangladeshi capital, as specified by the contract. At a June 1997 hearing, the ICC tribunal, comprised of Dr. Werner Melis, Prof. Riccardo Luzzatto and Prof. Ian Brownlie, QC, denied a number of Petrobangla's procedural requests. One ruling, for example, denied a request to strike a witness statement of a witness who declined to travel to Dhaka to be examined on grounds that he feared arrest.[3] Under the Bangladesh Arbitration Act of 1940, the Bangladeshi courts have a limited supervisory role over arbitrations conducted within the country.[4] The courts intervened in the *Saipem* arbitration at this early stage when, dissatisfied with these preliminary rulings, and allegedly fearing that "the ICC tribunal had or would commit a substantial miscarriage of justice," Petrobangla sought and obtained a series of court orders, including one from the Supreme Court of Bangladesh, that purported to restrain Saipem from further participation in the pending ICC arbitration.[5] Ultimately, on April 5, 2000, the First Court of the Subordinate Judge of Dhaka issued an order revoking the ICC tribunal's authority (the "Revocation Decision).[6]

"The tribunal held that the Bangladeshi courts…had effectively expropriated the intangible assets deriving from Saipem's right to arbitration."

The ICSID tribunal later observed that, although the Revocation Decision was premised on a finding of arbitral misconduct, the ruling lacked any reference to the law that was allegedly "manifestly disregarded," and that the procedural orders complained of did not bear "the slightest trace of error or wrongdoing."[7] The ICSID tribunal also noted that Bangladesh never argued during the ICSID proceedings that the ICC tribunal's actual conduct was "inappropriate, illegitimate or unfair," resting instead on the courts' broad power to "extrapolate that the arbitrators may be likely to commit a miscarriage of justice."[8] The ICC arbitrators ignored the Revocation Decision and on May 9, 2003 awarded Saipem damages in excess of $6 million.[9]

Thereafter, on April 21, 2004, the High Court Division of the Supreme Court of Bangladesh declared that the ICC award was "non-existent" in light of the previous decision revoking the ICC tribunal's authority, and that the ICC award was therefore incapable of being either set aside or enforced (the "Final Decision").[10] Significantly, Saipem did not appeal either of these two key decisions; instead, on October 5, 2004, Saipem initiated ICSID arbitration proceedings against the Bangladeshi State, alleging an unlawful expropriation in violation of the Italy-Bangladesh bilateral investment treaty or "BIT."[11]

The Tribunal's Core Holdings and Analytic Approach

The ICSID tribunal consisted of Prof. Gabrielle Kauffmann-Kohler (President of the tribunal), Sir Philip Otton and Prof. Christoph H. Schreuer. The tribunal held

that the Bangladeshi courts, through their extensive and illegal interference with the ICC proceedings, had effectively expropriated the intangible assets deriving from Saipem's right to arbitration.

Core Holding No. 1: The Intangible Arbitral Assets

First, expanding on the conclusions set forth in its Decision on Jurisdiction,[12] the ICSID tribunal held that both the contractual right to arbitration and the rights arising from an arbitral award are assets capable of being expropriated. While the concept that intangible assets are expropriable is not revolutionary,[13] *Saipem* may very well be the first treaty-based tribunal to find that a party's "arbitral assets" were actually expropriated. In the Award, the tribunal refers, somewhat interchangeably, to at least three different conceptions of the expropriated asset: (1) "the right to arbitrate"; (2) "the residual contractual rights arising from the investments as crystallized in the ICC award"; and (3) "the benefit of the ICC award."[14] These differing descriptions reflect that multiple intangible assets may derive from a party's contractual right to arbitration. A State may, independently, deprive a party of (1) its right to an effective arbitral process and (2) its right to benefit from an arbitral award "crystallizing" its contractual obligations and entitlements. Indeed, here the tribunal held that the Bangladeshi courts separately infringed the former right in the Revocation Decision and the latter in the Final Decision.

Core Holding No. 2: De facto Expropriation by Local Courts

Having concluded that Saipem's arbitral rights were expropriable assets, the ICSID tribunal held that the illegal intervention of the Bangladeshi courts had "substantially deprived" Saipem of these assets, thereby producing effects tantamount to expropriation.[15] The tribunal found that under the "peculiar circumstances" of the case, only *illegal* judicial acts could amount to an expropriation, noting that had they held otherwise, "any setting aside of an award [by a local court] could then found a claim for expropriation, even if the setting aside was ordered by the competent state court upon legitimate grounds."[16]

The ICSID tribunal found the Bangladeshi courts' "grossly unfair" treatment of Saipem and the ICC tribunal to be illegal because: (1) it constituted an abuse of the Bangladeshi courts' limited right of arbitral supervision provided by Bangladeshi law; and (2) it violated the obligation imposed on Bangladesh by Art. II(1) of the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards to "recognize" arbitration agreements.[17] Although the ICSID tribunal declined to enter an official finding of conspiracy or collusion, it obliquely remarked that the local courts had "exercised their supervisory jurisdiction for an end which was different from that for which it was instituted."[18] Little imagination is required to read between the tribunal's rather conspicuous lines.

Core Holding No. 3: No Need to Exhaust Local Remedies

The ICSID tribunal also rejected the Bangladeshi argument that Saipem's failure to appeal the Revocation and Final Decisions was fatal to its claim. The tribunal first stated that it "tend[ed] to consider" that a claim premised on the abusive conduct of local courts alleging an *expropriation* (as opposed to a "denial of justice") does not require the claimant to first exhaust its local remedies.[19]

Claims premised on the misconduct of local courts are not new to the world of investment arbitration; however, when international investors assert judicial misconduct, they typically claim a violation of "fair and equitable treatment" or "minimum standards" treaty provisions and rely primarily on a "denial of justice" theoretical framework.[20] As the ICSID tribunal observed, the prior exhaustion of local remedies is a substantive requirement of a denial of justice claim.[21] Saipem was foreclosed from pursuing this more traditional avenue to recovery, however, due to the narrow scope of the Italy-Bangladesh BIT, which guarantees protection only from illegitimate expropriation.[22] Bangladesh argued by analogy that because the expropriation was allegedly perpetrated by the courts, the ICSID tribunal should import the exhaustion requirement from the "denial of justice" theoretical framework. The tribunal found that even though "expropriation by the courts presupposes that the courts' intervention was illegal, this does not mean that expropriation by a court necessarily presupposes a denial of justice."[23]

The tribunal declined to rest its holding on this somewhat theoretical proposition, however, holding that if the requirement of exhaustion of local remedies applied, the requirement was met here because Saipem was not required to pursue "improbable remedies."[24] The tribunal stated that this test was met because Saipem had "already litigated the issue of the arbitral misconduct for more than two and a half years," "the allegation of misconduct was clearly ill-founded," and Saipem's "case was precisely that the local courts should never have become involved in the dispute, since the parties had entrusted the ICC Court of Arbitration with the power to revoke the arbitrators' authority."[25]

This holding could have far-reaching impact. It is certainly not beyond imagining that a litigant in the U.S. courts could be caught up for years litigating jurisdictional objections where, at least in its view, "the allegation[s] [of the other side were] clearly ill-founded."[26] In the end, the ICSID tribunal's holding must be seen as resting entirely on the view that the Bangladeshi courts' conclusions were really, really wrong and on a more general distrust of the Bangladeshi judiciary as a whole.

The Rejected Analytic "Escape Hatches"

The ICSID tribunal's treatment of these issues is notable not only for its ultimate holdings but also for its approach. Before reaching the above conclusions, it bypassed at least five distinct analytic "escape hatches" that would have obviated the need to impugn the Bangladeshi courts' conduct:

(1) The ICSID tribunal rejected the argument that the Bangladeshi courts had no power to revoke the arbitrators' authority because the parties, in agreeing to the ICC Rules, agreed to resort to the ICC for matters of revocation. The tribunal found this argument—which was, as noted above, a primary contention of Saipem before the Bangladeshi courts—meritless because "while binding on the parties, the ICC Rules are not binding upon national courts."[27] Maybe so, but some courts would have found that the agreement to the rules barred a party from appealing to another authority than the forum to which they had agreed to resolve the question.

(2) The ICSID tribunal also refused to rule, on the basis that the Revocation Decision merely revoked the authority of a particular ICC tribunal and did not permanently destroy Saipem's right to ICC arbitration, that Saipem could have initiated a second ICC arbitration with a new panel of arbitrators.[28] The tribunal concluded that while theoretically available, there was no reason to believe that a second ICC arbitration would have faced a different fate than the initial proceedings.[29] Here, too, this conclusion is hardly self-evident, except based on a fundamental distrust of the Bangladeshi courts.

(3) The ICSID tribunal also rejected an argument that, even though the ICC award was unenforceable in Bangladesh, Saipem had not been deprived of the benefit of the award because it could theoretically still seek enforcement in any other State party to the New York Convention.[30] The tribunal rejected this argument on the ground that any such right was illusory because Petrobangla had no assets outside of Bangladesh. This was certainly a realistic appraisal of the situation, but a similarly realistic view of things might have led to the conclusion that *any* award against Petrobangla was worth relatively little so the value "taken" was minimal. On this reasoning, an "upgrade" to an ICSID award against the State of Bangladesh was a windfall.

(4) As noted, the tribunal could easily have rejected the claim on the ground that Saipem had failed to exhaust its local remedies, and indeed the tribunal in the *Loewen* case rejected a claim on this ground in not wholly dissimilar circumstances.[31]

(5) Also as noted, the bilateral investment treaty on which the ICSID tribunal's jurisdiction was based in fact provides jurisdiction only to determine "compensation" for expropriation, yet the tribunal did not hesitate to consider whether an expropriation had occurred in the first place.[32]

Conclusion

The ICSID tribunal's unflinching approach to tackling unsettled issues of international law is admirable, and, on the facts presented in the Award, it seems clear that the Bangladeshi courts badly overreached. But did the *Saipem* tribunal push the envelope too far? The Award provides few analytic tools to distinguish the conduct here from the kind of thing that happens every day in trial courts around the world. Ultimately, the decision may best be explained as driven by a profound distrust of the Bangladeshi courts. Whether the result presages similar attacks upon court control of arbitration elsewhere remains to be seen.

"The ICSID tribunal's unflinching approach to tackling unsettled issues of international law is admirable…"

Endnotes

1. *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, 30 June 2009, *available at* <http://ita.law.uvic.ca>.
2. *See id.* at para. 23.
3. *Id*. at paras. 30-31.
4. *See id*. at paras. 139, 143. Pursuant to Art. 5 of the Bangladesh Arbitration Act of 1940, a party to an arbitration seated in Bangladesh who believes an arbitrator to be biased or otherwise guilty of misconduct may ask the Bangladeshi courts to intervene and revoke the authority of the offending arbitrator (or arbitrators). *See id*.
5. *See id.* at paras. 34-41.
6. *Id*. at para. 40.
7. *Id*. at para. 155.
8. *Id*. at para. 156.
9. *Id*. at paras. 45-48.
10. *Id.* at paras. 49-50.
11. *See id*. at paras. 41-43, 51-52. The relevant BIT is the 1990 "Agreement Between the Government of the Republic of Italy and the Government of the People's Republic of Bangladesh on the Promotion and Protection of Investments" of March 20, 1990 (entered into force September 20, 1994). *Id*. at para. 95.
12. *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, paras. 125-128, *available at* <http://icsid.worldbank.org>.
13. *See id*. at para. 130.
14. *See Saipem S.p.A. v. The People's Republic of Bangladesh*, Award, paras. 129, 204. *See also* Andrew Newcombe, *When is Court*

Interference in Arbitration Proceedings Expropriatory, July 7, 2009, *available at* http://kluwerarbitrationblog.com/blog/2009/07/07/when-is-court-interference-in-arbitration-proceedings-expropriatory. In this article, Prof. Newcombe points out the multiple descriptions of the expropriated asset and criticizes the ICSID tribunal for failing to clearly define the arbitral rights that were expropriated. In fact, however, the differing language used points to differing rights subsidiary to the "right to arbitration" that the tribunal held were taken.

15. *Saipem S.p.A. v. The People's Republic of Bangladesh*, Award, paras. 128-134, 161.
16. *Id*. at para. 133.
17. *Id*. at paras. 155, 161, 166-170.
18. *Id*. at paras. 148, 161.
19. *Id*. at para. 181.
20. *See, e.g., Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, *available at* <http://www.state.gov/documents/organization/22094.pdf> (a NAFTA case brought under ICSID's Additional Facility Rules).
21. *Saipem S.p.A. v. The People's Republic of Bangladesh*, Award, para. 176.
22. The Italy-Bangladesh BIT actually permits international arbitration only for claims "relating to *compensation* for expropriation, nationalization, requisition or similar measures." *Saipem S.p.A. v. The People's Republic of Bangladesh*, Decision on Jurisdiction, para. 116 (emphasis added). Given the narrow scope of this BIT, the ICSID tribunal had to determine whether it had jurisdiction to examine the antecedent question of whether in fact an expropriation had taken place. As have other recent ICSID tribunals faced with similarly restrictive BITs, the *Saipem* tribunal proceeded to consider whether the conduct of the Bangladeshi courts amounted to an expropriation; the *Saipem* tribunal did not explain why it had jurisdiction to consider the issue. *See id.* at paras. 116-133. *See also Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009, paras. 134, 145-188, *available at* <http://ita.law.uvic.ca> (China-Peru BIT) (analyzing jurisdictional question at some length); *Telenor Mobile Comms. A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, paras. 25, 63-80, *available at* <http://icsid.worldbank.org> (Spain-Russia BIT) (no analysis).
23. *Saipem S.p.A. v. The People's Republic of Bangladesh*, Award, para. 181. Other tribunals have disagreed. In *Loewen Group, Inc. v. United States of America*, the tribunal rejected a claim of expropriation arising out of alleged biased conduct of the Mississippi state courts on the ground that the claimant had not pursued an appeal to the United States Supreme Court. ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, para. 141. It held that the claim could only be maintained under the standards for a denial of justice, which require exhaustion of local remedies. *Id*. at paras. 141, 153-157, 165-171. In *Generation Ukraine, Inc. v. Ukraine*, the tribunal held that an expropriation claim requires "a reasonable—not necessarily exhaustive—effort by the investor to obtain correction." ICSID Case No. ARB/00/9, Award, 16 September 2003, para. 20.30, *available at* <http://ita.law.uvic.ca> (unofficial translation).
24. *Saipem S.p.A. v. The People's Republic of Bangladesh*, Award, para. 182. *See also Loewen Group, Inc. v. United States of America*, Award, paras. 165-171 (stating that within the "denial of justice" framework, a claimant only needs to exhaust local remedies "which are effective and adequate and are reasonably available").
25. *Saipem S.p.A. v. The People's Republic of Bangladesh*, Award, para. 183.
26. *Id*.
27. *Id*. at paras. 37 n.7, 138. The tribunal noted, for example, that Dutch law provides the local courts with "mandatory jurisdiction" over challenge and removal of arbitrators, "and no one would think of claiming that the courts of the Netherlands breach international law by asserting jurisdiction over a request to challenge or revoke an ICC arbitrator." *Id*. at para. 138.
28. *Id*. at paras. 167-169.
29. *Id*. at para. 169.
30. *Id*. at para. 130. The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") provides in Article V(1)(e) only that recognition and enforcement of an award "may" be refused if "the award…has been set aside or suspended by a competent authority of the country in which…that award was made." June 10, 1958, 21 U.S.T. 2517. It does not require a State to refuse recognition. Moreover, Article VII(1) provides that the Convention does not deprive parties of any more favorable enforcement regime provided under the national law of the State where enforcement is sought.
31. *See Loewen Group Inc. v. United States of America,* Award, *supra* note 20, paras 141, 217.
32. *See Saipem S.p.A. v. The People's Republic of Bangladesh,* Award, *supra* note 21, paras. 116-133.

Joseph E. Neuhaus, neuhausj@sullcrom.com, is a partner in the New York office of Sullivan & Cromwell LLP practicing international arbitration and litigation, and has served as an arbitrator on ICC and ICDR panels. Ian E. Browning, browningi@sullcrom.com, is an associate in the firm's London office practicing international arbitration and U.S. litigation for overseas clients. Both are members of the firm's International Arbitration Group.

Clash of the New York Convention with the McCarran-Ferguson Act: Can State Insurance Law Ban Arbitration of International Insurance Disputes?

By William J.T. Brown

The McCarran-Ferguson Act, adopted in 1946, expresses the intent of Congress to leave regulation of the insurance business to the states. While the Constitution's Interstate Commerce clause gives Congress power to regulate the insurance business, McCarran-Ferguson provides that "no Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance…unless such Act specifically relates to the business of insurance." A provision of the Louisiana insurance statute provides that "[n]o insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state…[shall deprive]…the courts of this state of the jurisdiction of the action against the insurer." This provision is interpreted by the Louisiana courts as invalidating any agreement to arbitrate a dispute arising under such a Louisiana insurance contract. Where London underwriters agreed to reinsure losses arising under such a contract and stipulated that any dispute would be resolved in international arbitration, does the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention" or the "Convention"), ratified by the United States in 1970 and implemented that same year through enactment of Chapter 2 of the Federal Arbitration Act ("FAA"), preempt the Louisiana statute, or does the Louisiana statute by way of McCarran-Ferguson in fact "reverse-preempt" the treaty's implementing legislation? The federal district court in Louisiana held that the Louisiana statute should be enforced to forbid arbitration, but in a divided *en banc* decision the Fifth Circuit late last year reversed the district court in *Safety National Casualty Corporation v. Louisiana Safety Association of Timbermen-Self Insurers Fund,* holding that the treaty prevails and the dispute must be arbitrated rather than decided by the courts.[1]

McCarran-Ferguson of course reverse-preempts "Acts of Congress," not treaties like the New York Convention. Treaties are concluded by the United States through action of the President and two-thirds of the Senate. Acts of Congress require the assent of both houses of Congress, subject to veto power of the President. Treaties and Acts of Congress are said to be of equal force and dignity; in the event of conflict between a treaty and an Act of Congress, the latter in time prevails.[2] The Supreme Court has held that an executive agreement of the President alone, affecting insurance claims asserted by holocaust victims and in conflict with state insurance law is not reverse-preempted by McCarran-Ferguson.[3] Thus, it seems clear *a fortiori* that a treaty in and of itself would prevail over state insurance law, despite McCarran-Ferguson. But it is well established that, while some treaties by their terms are self-executing and take immediate effect so as to require application by the courts, other treaties constitute the promise of the United States to adopt implementing legislation and require an Act of Congress to be carried into effect. An example of the latter type of treaty is the consular convention at issue in *Medellin v. Texas*,[4] where the United States promised to implement consular arrangements to lend assistance to Mexican nationals accused of crimes, but failed to follow through on its promise, with the result that there was no legislative framework to prevent execution by the State of Texas of a convicted Mexican citizen who had been denied such assistance.

The New York Convention expresses in its article 2 the obligation of United States courts to "refer the parties to arbitration" in cases where the parties have agreed to arbitrate in an international context,[5] but it sets forth little or no procedural framework for implementation of this obligation. Clearly our national authorities believed that an Act of Congress was necessary to implement the treaty, as Chapter 2 of the FAA was enacted by Congress within months of treaty ratification. Its section 201 states that the Convention "shall be enforced in United States courts in accordance with this *Chapter*." Sections 202 to 207 of this enactment go on to lay down rules for the enforcement of international arbitration, and section 208 then provides that the domestic arbitration rules of FAA *Chapter* 1 shall also be applied to implement international arbitration to the extent those rules are not in conflict with the rules of *Chapter* 2 or the Convention itself.

Applying McCarran-Ferguson in an earlier case, the Fifth Circuit had already held that Chapter 1 of the FAA is reverse-preempted in domestic arbitration cases arising in the context of interstate commerce by the provision of Mississippi state insurance law that forbids arbitration of disputes related to insurance coverage under Mississippi's uninsured motorist statute.[6] In a similar McCarran-Ferguson context, why shouldn't Chapter 2 of the FAA share the same fate as Chapter 1, preemption in the name of state insurance law? One point of distinction might be that, if Chapter 2 were subjected to preemption by state insurance law, it would mean that the United States had failed *pro tanto* to fulfill its treaty obligations toward the other 143 nations that are signatories of the New York Convention.

In addressing the conflict between Louisiana law forbidding arbitration and the New York Convention requiring arbitration, eighteen of the Fifth Circuit judges held that a treaty, although implemented by an Act of Congress, was still a treaty, and the implementing Act of Congress was somehow subsumed into the treaty, leaving it not entirely clear whether the provisions of the implementing legislation were to escape the reverse-preemption commanded by the literal language of McCarran-Ferguson. Three dissenters followed an inexorable logic and held that the treaty was well and good but a dead letter in the case at hand since the Act of Congress that implemented it had to be disregarded under McCarran-Ferguson. Judge Edith Brown Clement was a single voice in concurrence with the majority, arguing that provisions of the treaty calling on courts to refer international matters to arbitration were self executing—an approach that would require arbitration in some fashion to be worked out by the courts but leave in limbo the fate of the implementing provisions of Chapters 1 and 2 of the FAA in cases of international arbitration.

While seeming to offer a highly unsatisfactory and uncertain result, this last approach could in fact be compared to the approach presently in effect in state courts for arbitration of disputes linked to interstate commerce. In such cases the Supreme Court has repeatedly held that section 2 of Chapter 1 of the FAA, the substantive command that arbitration agreements must be held "valid, irrevocable, and enforceable," is applicable in state courts to command that the agreement to arbitrate be implemented,[7] while leaving the state courts free to use procedures of state arbitration law to enforce the agreement to arbitrate. In similar fashion, it could be held that the New York Convention requires American judges to refer international insurance disputes to arbitration where the parties have so agreed, but leaves to state arbitration law the procedures to be used for enforcement of arbitration, to the extent those procedures are not in conflict with the Convention.

In remanding to the district court for further proceedings not inconsistent with their *en banc* opinion, the eighteen judges of the *Safety National* majority may thus have left open for future resolution questions of the procedure applicable in international insurance arbitration. A more immediate development, however, could be Supreme Court review, as the decision in *Safety National* creates a split in the circuits. In 1995 the Second Circuit reached the opposite result in an international insurance dispute involving a Kentucky insurance statute forbidding arbitration, *Stephens v. American International Ins. Co*.[8] In that case the Second Circuit had no difficulty in holding that McCarran-Ferguson had the effect of allowing the Kentucky statute to reverse-preempt Chapter 1 of the FAA as it related to arbitration of disputes between American parties and the Kentucky Commissioner of Insurance, but the Second Circuit then went on to sweep aside Chapter 2 of the FAA as it related to arbitration demands of foreign insurance companies. The result was to allow state law to preclude application of the New York Convention, as the court held that "the Convention is not self executing, and therefore, relies upon an Act of Congress for its implementation."[9] Thus, the Second Circuit held that due to application of the McCarran-Ferguson Act, Congress had failed to implement the Convention as it related to arbitration of international insurance disputes.

A petition for certiorari has been filed with the Supreme Court. If these issues are taken up by the Court, the Court will have an opportunity to choose among at least three paths: no arbitration of international insurance disputes where state law rejects such arbitration; arbitration of such disputes under standard provisions of Chapters 1 and 2 of the FAA; or arbitration under rules to be developed by the courts from state arbitration law or other sources. The best policy choice would no doubt be to extend standard procedures of international arbitration to these cases, in a manner that would fulfill America's treaty commitment to other nations. But deference may have to be paid to the literal language and perceived purposes of the McCarran-Ferguson Act. The writer can hazard no prediction of the course to be followed.

Endnotes

1. *Safety National Casualty Corporation v. Louisiana Safety Association of Timbermen-Self Insurers Fund*, 587 F. 3d 714 (5th Cir. 2009).
2. *Whitney v. Robinson*, 124 U.S. 190 (1888).
3. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003).
4. *Medellin v. Texas* , 552 U.S. 491 (2008). *See Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall C.J.).
5. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. II (3), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.
6. *Am. Bankers Insurance Co. of Florida v. Inman*, 436 F. 3d 490 (2006). To the same effect is *Munich American Reinsurance Co. v. Crawford*, 141 F. 3d 585 (5th Cir. 1998) (Oklahoma insurance law).
7. *E.g., Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447 (2006) (§ 2 "the only provision we have held applicable in state courts").
8. *Stephens v. American International Ins. Co.*, 66 F.3d 41 (2d Cir. 1995).
9. *Id*. at 45.

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 and Donovan Leisure Newton & Irvine.

Recent Developments in Commercial Mediation in China

By F. Peter Phillips

Commentators have noted the peculiarities of commercial mediation as practiced in the People's Republic of China.[1] Among them has been the status of agreements that are reached through mediation. By operation of Chinese Civil Procedure, only agreements that were arrived at through mediations conducted either within the context of the courts or CIETAC arbitration proceedings were enforceable as contracts.[2]

Things seem to have changed, bringing Chinese mediation practices closer in line with Western practices.

On July 24, 2009, the Chinese Supreme People's Court issued *Several Opinions on Establishing and Improving of a Dispute Resolution System and the Linking of Litigation and Alternative Dispute Resolution Mechanism*. Andrew Aglionby of Baker & McKenzie's China office has provided an unofficial translation of this document,[3] which seems to promise an entirely new day in Chinese commercial mediation.

Until this document was issued, agreements to mediate, and agreements reached as a result of mediation, were legally cognizable only if the mediation was conducted either by arbitrators pursuant to CIETAC rules or by judges pursuant to Chinese civil procedure rules. This restriction had a serious dampening effect on the spread of mediation practice conducted ad hoc or through a private commercial mediation service.

For example, in 2004, when the U.S.-China Business Mediation Center was established between the CPR Institute and the China Council for Promotion of International Trade, it was necessary to place in the mediation rules of the Center a provision that the parties could apply to CIETAC to transform the mediated agreement into a CIETAC award, thus making it enforceable under Chinese law.[4] This new document, however, changes matters entirely.

The newly issued Opinions profess that their purpose is to better link the official workings of the court system with the activities of "social organizations, enterprises and institutions" that engage in mediation. And the effect of the Opinions will be to bring China in line with Europe and the United States in granting contractual status to agreements reached through mediation, even if the mediation is conducted by private institutions or on an ad hoc basis.

After encouraging the continued observance of existing mediation provisions in arbitration and court proceedings, and encouraging administrative bodies to use mediation "to settle [ ] disputes according to the law," the Opinions go further. Paragraph 10 "encourages and supports the establishment of a sound dispute mediation function and mechanism by and within industry associations, social organizations, enterprises and institutions." Moreover, any agreement reached in a mediation conducted through such non-state offices "shall have the legal force of a contract."

At paragraph 12 and 13 the Opinions set forth the jurisdictional groundwork for this promise: Parties may apply to the People's Court to seek performance of any mediation agreement that is "reached as a result of mediation carried out by administrative organs, people's mediation organizations, business and commercial organizations, industry mediation organization, or other organization with mediation functions."

At paragraph 15 the Opinions also empower courts to assign cases to be mediated by "commercial mediation organizations, industry mediation organizations or other" bodies.

There is a troublesome provision at paragraph 18, empowering a mediator to report to the court the behavior of an uncooperative or deceptive party. So confidentiality of court-annexed mediation schemes remains a "live issue." At the same time, however, paragraph 16 provides that in the event of a court-supervised mediation, "the judge who has participated in the mediation shall not be the trial judge in the same proceeding unless it is agreeable to all parties"—a clear departure from prior practice.

All in all, this document is a huge step forward in introducing globally accepted commercial mediation practices to the vast Chinese market. The Secretary General of the Conciliation Centers of the China Council for Promotion of International Trade, Yang Hua Zhong, and his talented Vice-Chairman Cheng Hui, have labored mightily for this change for many years. They are to be congratulated on this success.

Endnotes

1. See generally James M. Zimmerman, China Law Deskbook (ABA 2004, 2d ed.) at 834-37.
2. Mediation proceedings conducted by arbitral tribunals, though common in China, have been the source of consternation to Americans, some even calling the practice "perverse." See F. Peter. Phillips, Commercial Mediation in China, in Arthur Rovine, ed., Contemporary Issues in International Arbitration and Mediation (Nijhof 2009) at 326 n. 29.
3. The full text of this translation may be viewed at http://businessconflictmanagement.com/blog/2009/09/important-development-in-chinese-business-mediation/.
4. See www.ChinaMediation.org.

F. Peter Phillips, peter.phillips@businessconflictmanagement.com, is an arbitrator, mediator and consultant practicing through Business Conflict Management LLC in Montclair, New Jersey (www.BusinessConflictManagement.com). He is listed on Panels at CPR Institute, AAA, FINRA, Beijing Arbitration Center, the Administrative Office of the Courts of New Jersey and other bodies.

Receptivity of ADR in Brazil for Commercial Disputes

By Pedro Alberto Costa Braga de Oliveira

There is a general dissatisfaction with the speed, quality, and cost of commercial litigation in Brazil, whether in Federal or State courts. The outcome of commercial litigation in Brazil is, in general, unsuitable to prevailing parties. Under the rules of the Brazilian Civil Procedure Code,[1] most interlocutory decisions of lower courts are subject to several types (and layers of) appeals. In most cases, appeals can easily go all the way up to the Brazilian Supreme Court.[2] As a consequence, litigation of commercial disputes in Brazil (i) creates significant burdens to litigants (or at least to the party actually seeking resolution of the dispute, generally the plaintiff) and (ii) allows recalcitrant parties (generally defendants) to avoid or postpone an outcome of the dispute for years, so that justice is not achieved. It usually takes a few years for Federal and State lower courts to issue their decisions. Thus commercial disputes in Brazilian courts can easily take 10 or more years, with the different appeal levels.[3] At the end of the day, the parties that "win cases" in Brazilian court litigation are not necessarily those who, in fact, have won the cases.

Given this scenario, foreign practitioners doing business in Brazil are often surprised when they learn that the Brazilian business and legal communities although disenchanted with the extremely slow, cumbersome and costly Brazilian court system have not yet woken up to the benefits of ADR. With a few exceptions, basically, a small number of businesspeople and lawyers in the more sophisticated commercial centers of Rio de Janeiro and São Paulo, Brazilian businesspeople and lawyers do not yet rely on ADR to resolve their business disputes. Indeed most businesspeople and lawyers in Brazil are not very familiar with what ADR is. Consequently, notwithstanding all inconveniences of traditional court litigation, ADR is not habitually considered for resolution of commercial disputes in Brazil.

The future growth of use of ADR in Brazil will depend on certain developments. This article will discuss such developments. Before turning to that discussion, however, this article will examine the growth of commercial arbitration in Brazil, and see how this may somehow pave the way to a wider acceptance of ADR for commercial disputes.

The Growth of Arbitration

Until a few years ago, arbitration was as "foreign" to Brazilian businesspeople, and the average Brazilian lawyers and judges, as ADR is today. Back then arbitration was almost completely unknown in Brazil, mostly due to the lack of a supportive arbitration legislative framework. Deficiencies in the previous legislation made arbitration distrusted by lawyers and businesspeople alike, and resulted in a complete lack of a pro-arbitration culture in Brazil.

Before the enactment of the Brazilian Arbitration Act in 1996,[4] the arbitration law then in force had two imperfections that made the use of arbitration impossible.

First, arbitration clauses were unenforceable in Brazilian courts, whether those came inserted in domestic or international contracts.[5] Only post-dispute submission agreements were given validity and enforceability under the previous law. A party signatory to a contract with an arbitral clause (i) saying no to the other party's request for arbitration and (ii) refusing to sign the post-dispute submission agreement could be (at most) sued for damages but not forced to arbitration by a court of law.

Second, arbitral awards were subject to confirmation by local courts. This procedure, known as "homologação" in Portuguese, consisted of the "legalization" or "exequatur" of the award prior to its enforcement by the courts (the latter which, incidentally, would take place in a separate legal proceeding, doubling the risk of the award being set aside).

The flaws in the legislative framework of arbitration, in Brazil, prevented interested parties from using arbitration in practice. A party inserting an arbitral clause in its contract would not be able to enforce it in a court if (and when) necessary. Consequently, there was a lack of confidence and trust in arbitration, and the court system was thought to be the only source of protection in cases of injury and damages, even though the court system was extremely inefficient, slow-moving, and (at times) corrupt.

Not much has changed with the civil litigation before State and Federal courts in Brazil during the last decade. But during the mid-1990s, in an attempt to further encourage the growth of inward foreign direct investment in Brazil, a law was drafted and, in 1996, passed into law as the Brazilian Arbitration Act.[6] The passing of the Brazilian Arbitration Act into law did not initially change the situation drastically. The lack of general knowledge by lawyers and businesspeople in relation to arbitration made them continue to distrust arbitration.

To make things worse, just before the entry of effect of the Brazilian Arbitration Act, a former Justice of the Brazilian Supreme Court, Sepúlveda Pertence—now retired—, presented an *ex officio* challenge against the sections of the Brazilian Arbitration Act concerning the binding nature of arbitral clauses. In Justice Pertence's view,

an arbitral clause forcing the parties to surrender their constitutional right to have their case heard in a court of law was unconstitutional. It was not until December 12, 2001 that a split 7-to-4 Brazilian Supreme Court decision upheld the constitutionality of the main provision of the Brazilian Arbitration Act.

Further to (i) the enactment of the Brazilian Arbitration Act and (ii) the 2001 Brazilian Supreme Court's landmark decision holding the constitutionality of arbitration, there was another event to give further encouragement to arbitration in Brazil: Brazil's accession and ratification of the New York Convention in mid-2002. These events together have paved the way for the practice of both domestic and international commercial arbitration in Brazil. Since then, there has been an unprecedented growth of arbitration in Brazil, which has become a widely accepted practice.

Today, there is a growing awareness of the advantages of arbitration over litigation in Brazil. Big businesses in Brazil no longer litigate their significant commercial disputes, but seek arbitration to the maximum extent. In the international arbitration setting, Brazil is rapidly achieving an important position. Although none of the world class international arbitral institutions have offices in Brazil, Brazilian parties are among the most frequent users of the ICC's International Court of Arbitration.[7] Foreign practitioners now publish articles in the two influential law journals dedicated to arbitration in Brazil.[8] There is a "committee" dedicated to promote the use of arbitration—where foreign practitioners are members—,[9] and several domestic and international arbitration seminars take place in Brazil yearly.[10]

Both the leading legal and business communities in Brazil have embraced arbitration, to the extent that it is fair to say that arbitration has become the default means of dispute resolution for big businesses' commercial disputes.

ADR for Commercial Disputes in Brazil: What Needs to be Done until ADR Gets Used and Generally Known by Lawyers and Businesspeople?

The warm welcome and increasing popularity that arbitration has received in Brazil has yet to reach ADR. It is now time to persuade businesspeople and lawyers —especially corporate counsel from the big Brazilian and multinational corporations— about the advantages of using ADR mechanisms for commercial dispute resolution. It is necessary that both businesspeople and lawyers (i) learn about ADR and (ii) understand how different ADR mechanisms operate. Before they start using it, however, businesspeople and legal practitioners must be convinced that ADR is good for them and for those whom they represent.

Lack of awareness and education about ADR and its various mechanisms are the main causes of the non-use of ADR in Brazil. To reverse this situation and create trust in ADR processes, Brazilian lawyers should be educated about the benefits of ADR for their clients. It is important that Brazilian lawyers understand that ADR is not a threat to their litigation practices.[11] Both corporate counsel and private practitioners must understand how ADR works and how it could positively affect the way their companies handle disputes.

Accordingly, ADR centers should be created, and businesspeople and lawyers should receive formal training at those centers. This way ADR awareness will be spread out, and ADR processes would be conducted by well-trained professionals. Poorly trained neutrals will not help the development of ADR in Brazil. ADR centers could also support and promote the use of ADR mechanisms in Brazil.

As a final point, law schools should start training their students in "solving problems." Legal education in Brazil not only is deficient in this respect, but only aimed at training students for litigation. No practical training is given to future lawyers on how to solve problems. Law schools do not train law students for "deal making" in Brazil, and this definitely needs to change. Besides training young soon-to-be lawyers, law schools could liaise with the State Chapters of the Brazilian Bar Association to provide some education to lawyers who are established in the market already.

Unlike arbitration, lack of a legislative framework is not a motive for the current standing of ADR in Brazil. There is no need to pass any law on ADR to enable its growth.[12] Brazilian law allows the parties to settle their disputes outside the court system and sign binding settlement agreements—called "transação" in Portuguese—, which are enforceable under Brazilian law, provided that the dispute settled by ADR relates to "patrimonial rights of private nature," those to be understood as the rights that the parties may freely dispose of.[13]

Conclusion

It will take some time until ADR mechanisms become trusted and effectively used in Brazil. However, if there are no efforts to inform businesspeople, the potential end-users, on how their business disputes could be better managed and handled with ADR processes, and if these efforts do not start now, things may never change.

Brazilian lawyers should be the messengers to businesspeople and must learn about ADR and become aware of ADR processes and their effectiveness just as they needed to learn about arbitration fourteen years ago to promote the enactment of the Brazilian Arbitration Act. Perhaps corporate counsel could help by leading this

process, as corporations would be the main users of ADR and it is becoming increasingly common for corporate counsel to handle commercial disputes, or at least part of them, in-house.

To conclude, I strongly believe that the obstacles to the effective use of ADR in Brazil are mainly of an educational nature. Educational training would certainly result in a *de facto* awareness of ADR, as well as put an end to today's resistance to ADR, just as it happened with the prior resistance to arbitration. Those seeking faster and less expensive ways to resolve their commercial disputes would certainly engage in ADR if they learned and were educated about it. On the other hand, those who do not intend to leave behind the Brazilian court system, where they have plenty of means to maneuver and slow down a final court judgment, would not adopt ADR. It should be noted that the Brazilian court system, and in particular the Brazilian Civil Procedure Code, are both targeted for reform by Brazilian legislators, perhaps in 2010. The expansion of mediation, acceptance of arbitration and reform of the court system together would create an optimal dispute resolution environment in Brazil.

Endnotes

1. Law nº 5869, of January 11, 1973.
2. In Portuguese, the *Supremo Tribunal Federal*, the highest court of appeals in Brazil for constitutional matters. Different from its U.S. counterpart, the Brazilian Supreme Court is not vested with powers to choose to hear only those cases presenting questions that are genuinely important. As a result, the number of cases heard by the Justices of the Brazilian Supreme Court has reached an absurd figure. For instance, in 2009 the Brazilian Supreme Court decided 121,316 cases, including not only decisions on appeals but also unpretentious interlocutory orders (*despachos interlocutórios*) and information requests made to the Court. *See*, SUPREMO TRIBUNAL FEDERAL, *Movimento Processual nos anos de 1940 a 2009*, available at http://www.stf.jus.br/portal/cms/verTexto.asp?servico=estatistica&pagina=movimentoProcessual (last visited May 26, 2009).
3. A Brazilian business newspaper has recently reported a commercial dispute that has been litigated in court for over 20 years in Brazil. The dispute refers to the construction of a hydroelectric power plant in the 1970s. *See*, DIÁRIO COMÉRCIO, INDÚSTRIA E SERVIÇOS, *Mendes Júnior e Chesf têm briga há 20 anos*, Caderno de Legislação, May 12, 2009, at A7.
4. Law nº 9307, of Setember 23, 1996.
5. The shift of paradigm started with a 1990 decision where the Superior Court of Justice enforced an arbitral clause in an international contract under the Geneva Protocol on Arbitration Clauses of 1923. *See*, STJ, EDcl no REsp. No. 616-RJ, Relator: Min. Claudio Santos, April 24, 1990.
6. Arbitration would have died completely if not for a small group of aficionados who pushed for arbitration bills—the latter which became the Brazilian Arbitration Act.
7. The ICC statistics show the influential position of Brazil in Latin America.
8. Respectively, the REVISTA DE ARBITRAGEM E MEDIAÇÃO and the REVISTA BRASILEIRA DE ARBITRAGEM.
9. The Comitê Brasileiro de Arbitragem, named after France's Comité Français de l'Arbitrage.
10. The next ICCA Congress will take place in Rio de Janeiro, Brazil, in May 2010.
11. Lawyers in Brazil have the monopoly of court representation but would not have the monopoly of representation in ADR processes. They do not have the monopoly of representation in arbitration, and although this was a concern when the Brazilian Arbitration Act was passed into law, it was not too long until uninformed lawyers realized that they would control parties' representation in arbitration proceedings.
12. There are mediation bills currently under discussion on both the Brazilian House of Representatives (*Câmara dos Deputados*) and the Federal Senate.
13. *See*, Section 841 of the Brazilian Civil Code (Law nº 10406, of January 10, 2002).

Pedro Costa Braga is General Counsel of ENEL BRASIL PARTICIPAÇÕES LTDA. in Rio de Janeiro, Brazil. Mr. Costa Braga can be contacted by e-mail at pedro.costa@enel.com.br.

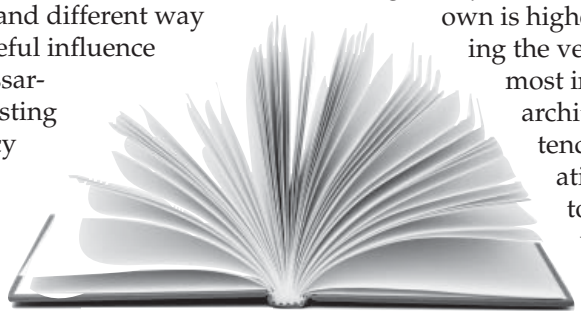
Book Reviews

Nudge

By Richard H. Thaler and Cass Sunstein

Reviewed by Laura A Kaster

Nudge by Richard H. Thaler and Cass Sunstein (Yale 2008) is a provocative book for mediators. That is not because it is about mediation; it is not. It is provocative because it discusses framing in a new and different way and because it confronts the purposeful influence on private choice that framing necessarily entails. Of course, it is also interesting because it addresses the public policy justification for the gentle push or "nudge" in the right direction—not to be confused with the Yiddish noodge (which means nag).That is of particular interest now because Cass Sunstein, a University of Law Professor and a colleague of Economics Professor Thaler at the time he wrote the book, is currently involved in counseling President Obama on just such policy as Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget.



Most of the current ADR textbooks used in law schools today have a section on the cognitive impediments to good decision-making and accurate evaluation of the Best Alternative to a Negotiated Agreement (BATNA—a term coined by Roger Fisher and William Ury in *Getting to Yes*). *Nudge* begins with a discussion of some of these cognitive problems—biases and blunders—and how they influence private choice. The authors discuss three commonly used heuristics (problem solving techniques) described by Amos Tversky and Daniel Kahneman.

The first is anchoring, an initial reference point that in the absence of clear knowledge influences your conclusion. For example, an experiment in which students add 200 to the last three digits of their phone number and then answer the question in what year did Attila the Hun sack Europe yielded answers more than 300 years later from students who started with high anchors rather than low ones—even though they clearly know that their phone numbers have nothing whatever to do with the question.

Another cognitive impediment the authors discuss is availability—the likelihood of risk judged by how readily examples come to mind. For example, people buy insurance for natural disasters in the aftermath of an earthquake but purchases decline as memory recedes. This cognitive bias also influences people to buy high and sell low.

The third heuristic is representativeness—incorrectly detecting patterns in random events, assuming that the coincidence of two events is more likely than one, or that a basketball player who is doing well will make his next shot.

To these, the authors add optimism and overconfidence—leading over 90 percent of lawyers to think they are in the top 10 percent; loss aversion—the aversion to losing an object means the price we place on things we own is higher than the value we assign to buying the very same object. Finally, and perhaps most influential to the authors' choice architecture, is status quo bias. This is a tendency to stick with your current situation that, for example, leads people to fail to make a selection and end up with the default option. Thus, Thaler and Sunstein would pick better defaults to nudge people into better choices. Their primary example is the default retirement choices for a 401(k) account.

Nudge justifies small, transparent defaults or influences—such as placing vegetables and fruits in the first display case in the school cafeteria to influence healthy eating—based in part on the biases that will encourage poor choices or poor defaults to the detriment of all. The authors basically argue that the model of an all-knowing economic person who will make the right choice deserves some revision in light of current brain science. But they also acknowledge that this is a form of paternalism. They call it libertarian paternalism because they are not eliminating the choice, just giving a nudge in a healthier or more economically sound direction and they are doing it transparently.

And it is in the discussion of libertarian paternalism and the recognition that framing most certainly is a nudge that the book may generate an interesting new analysis of the role of mediator. The Riskin categories of evaluative and facilitative mediation have influenced a generation of mediators. But the confrontation with the impact of framing as a form of choice architecture and a nudge to resolution that may or may not be transparent is an interesting and important contribution to the discussion of the work of mediators, even though that was not the intent of *Nudge.* The use of framing has an impact on neutrality. Thaler and Sunstein justify nudges when the outside agent is likely to be able to help an individual make a better choice. In their view this depends upon how hard the choices are. They believe the nudge is most justified for decisions that are difficult, complex, and infrequent and when the parties have few opportunities for learning. It would be hard to give a better definition of litigation. Read *Nudge* and join a dialogue on framing, transparency and the contribution of the mediator.

Laura A. Kaster, lkaster@AppropriateDisputeSolutions.com, is an arbitrator and mediator in Princeton, New Jersey, with over thirty years of experience in complex civil litigation as a partner at Jenner & Block and Chief Litigation Counsel at AT&T. She teaches Dispute Resolution Processes at Seton Hall Law School and she is co-editor of this *Journal*. More information about her is available at www.AppropriateDisputeSolutions.com.

* * *

Mediating Legal Disputes: Effective Strategies for Neutrals and Advocates

By Dwight Golann

Reviewed by Nancy Kramer

Dwight Golann, a prominent mediator and professor at Suffolk University (Boston), has authored and edited this very practical how-to book for experienced mediators who handle commercial, employment and other "legal" disputes. He defines legal disputes as cases involving lawyers and present or potential lawsuits. However, his use of the term seems to exclude most community and all matrimonial/family disputes. Golann's own practice focuses on commercial cases, but he has included several chapters written by other mediators who specialize in other types of cases, including employment, environmental and intellectual property.

The book has an interesting format—about two-thirds of the text is written by Golann, with stand-alone chapters on Psychological Issues (by his wife, Helaine Scarlett Golann), Employment Disputes (Carol A. Wittenberg, Susan Mackenzie, and Margaret Shaw), Insured Claims and Other Monetary Disputes (J. Anderson Little), Intellectual Property Cases (David W. Plant), Environmental Contamination Disputes (Carmin C. Reiss) and Mega-Disputes and Class Actions (Eric D. Green). The use of experts to broaden the book's scope by writing different chapters works well. Few mediators are likely to be very familiar with more than a couple of these types of mediation. Because it is easy to become insular, it is worthwhile to look beyond one's own practice and understand, for example, how an environmental contamination case differs in time frame and cast of characters from a more bread-and-butter commercial case. The book intrigues us by demonstrating that mega-case mediators often involve the judges assigned to the cases and why. Because the book is so clearly divided, you can skip any chapters that don't hold any interest for you without losing any context.

The bottom line is that this book is extremely useful and recommended for the practicing mediator who wants to understand how highly skilled and experienced mediators go about their work on complex and sophisticated cases. It provides an opportunity for self-reflection on what the reader does and what else s/he could do in mediating. Each chapter, whether written by Golann or one of his co-authors, begins with a preview, which is followed by the text and then summarized with key points. This makes for easy reading and reference, although it imparts a predictable and plodding feel to the book. And, in fact, the book reflects Professor Golann's deliberate approach to mediation. He moves forward based on a careful plan and long-established practices, not relying much on spontaneity. The collection of his techniques and practices provides a fine basis for practically any mediation style.

Dwight Golann writes clearly, intelligently and with supreme confidence in the techniques and practices that have worked for him. His co-authors mainly follow suit. Their credentials are solid and the methods and practices are excellent, although generally not novel. This is an in-depth practice manual, not a new look at mediation and its future nor any sort of challenge to established practice.

There are two very meaningful quotes that are worth presenting now so that you will have them even if you do not finish this review. First: "Remember that you are the guardian of optimism about the process" (p 194). We all know how important it is to stay positive and that it is the basis for the tenacity that keeps a mediation moving toward resolution, but isn't that a lovely way of putting it? A major lesson Golann provides is the wisdom of revisiting issues or suggestions that were brushed off by a party earlier, particularly in relation to non-monetary interests. The climate changes over the course of a mediation and it may prove fruitful to suggest again something that still seems wise to the mediator. The second quote comes after a long discussion about sharing evaluations of the case, with the parties separately, including making a mediator's proposal. The discussion of such proposals, in chapter 8, is a lengthy and thoughtful one. His conclusion is that evaluation should be used sparingly and carefully and that a little can go a long way. A mediator's view of a case, even if only alluded to, can help a litigant understand something that his/her own attorney has said about having realistic expectations. An evaluation can also give a kind of cover to litigants who know that they will have to move from an entrenched position and need a way of explaining that to their company or family or others involved. But Golann makes the interesting point that "A mediator evaluation can also satisfy a litigant's emotional desire for 'my day in court'" (p 147).

Mediating Legal Disputes includes a section on Representing Clients in Mediation: Advice for Lawyers. This should be helpful to non-mediator counsel and also offers insights into the litigators' minds that are of value to mediators. There are some points that Golann makes in the main sections of the book directed to mediators which he recasts and reiterates here. For example, he tells litigators that, for strategic purposes, they may want to allow opposing counsel to select the mediator. (In an earlier section he observed that "savvy lawyers sometimes want

their opponent to feel a connection to a mediator, thinking that this will make the party more receptive to advice from the neutral") (p 37).

The book is accompanied by a DVD which is referred to at various points in Golann's text. It contains snippets of a commercial mediation session—simulated but very realistic. Watching the DVD was intriguing and comforting.... Mediating is often a lonely business despite all the time spent talking and establishing relationships with people. The loneliness comes from there being no one with whom to debrief meaningfully. There are no colleagues present when you need them most—in the midst of a mediation when you would appreciate someone with whom to reflect. (No wonder there so many seminars and articles that talk about "impasses.") There are also few opportunities to observe other mediators. Even when co-mediating, one is more absorbed in the business at hand and listening to the parties and counsel than in observing the co-mediator.

Many mediators wonder how colleagues whom they respect go about their business. What is their pace like? How much reframing do they do? Do they use humor? If so, when and how? What do they project? The DVD allows you to see how Dwight Golann and Marjorie Aaron mediate (separately) a hypothetical case.

It is difficult to imagine a mediator who would not find something to learn from Golann and company. He is somewhat formulaic about his methods but an attentive reader cannot help but learn a good deal from reading this book. It certainly convinces the reader that Golann is a master mediator.

Nancy Kramer is a mediator, teacher and writer in the Greater New York Metropolitan area who handles many types of cases in many different forums. You can learn more at www.nancykramermediation.com and can contact Nancy at nancykramermediation@yahoo.com.

* * *

The American Influence on International Commercial Arbitration: Doctrinal Developments and Discovery Methods

By Pedro J. Martinez-Fraga

Reviewed by Stefan B. Kalina

This single volume treatise aptly opens with a depiction of the DeGoya painting *Duelo a Garrotazos* ("Duel with Clubs") in which two combatants, armed only with clubs, fight while buried knee deep. The battle reflects competing viewpoints on arbitration. Initially, arbitration was viewed with "historical prejudice" as a "blunt and imprecise methodology" unworthy of resolving complex commercial disputes. Eventually, arbitration became accepted by courts and commerce for the opportunity it affords parties mired in litigation. More than historical metaphor, the opening image chosen by author Pedro J. Martinez-Fraga, Esq., both lawyer and academic, also signals the current conflict among national expectations of how arbitration can continue providing effective dispute resolution across diverse legal, political, and economic boundaries of transnational commerce. Mr. Martinez-Fraga's book mines the doctrinal evolution of arbitration in the United States to unearth the elements needed to form a "coherent paradigm" of arbitration out of "different juridic and cultural backgrounds."

Mr. Martinez-Fraga observes that despite economic globalization, the "absence of civil and commercial transnational courts is glaring." While arbitration has "mitigated the fissure," its success has created only a "temporal bridge" that has "spawned new issues that must be addressed if the cross-fertilization of legal systems is to be incorporated into international commercial arbitration." The desired coherent paradigm, he contends, must reflect key characteristics: uniformity, party autonomy, certainty, predictability and transparency. Mr. Martinez-Fraga offers the provocative view that American discovery embodies and effectuates these ideals and should be emulated instead of shunned. Rather than wield the American style as club, Mr. Martinez-Fraga recounts how reliance on these methods delivered arbitration out of the judicial wilderness in the United States, positively impacted international arbitration, and can (and should) form the basis of universally accepted procedures.

Mr. Martinez-Fraga begins by taking his readers through the story of arbitration's own "transformation" in American jurisprudence. He outlines the badges of "historical prejudice" against arbitration stemming from the Supreme Court's decision in *Wilko v. Swan*.[1] With methodical prose structured in well demarcated paragraphs, he progresses through the subsequent decisions that debased *Wilko's* initial distrust of arbitration's ability to resolve complex commercial disputes. This story of acceptance culminates in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*[2] in which the Supreme Court recognized arbitration as a vital, arm's-length negotiated aspect of international contracts. More than history, this rigorous analysis provides the touchstone for Mr. Martinez-Fraga's premise that American methods indeed reflect, protect, and promote party autonomy and other essential principles of international arbitration. He argues that these qualities ultimately encouraged judicial deference to arbitration in the United States and should likewise "cross-fertilize" international practice as well.

In support of his argument, Mr. Martinez-Fraga offers several concrete illustrations, each selected to demonstrate how the adversarial style of American litigation practiced under the Federal Rules of Civil Procedure with judicial *laissez-faire* reflects respect for party autonomy.

For example, Fed. R. Civ. P. 3 and 27 vests litigants with the discretion and power to commence lawsuits and seek pre-action discovery to exercise that discretion. In contrast, the counterpart rules in code jurisdictions grant courts with the exclusive power to accept cases and to deny discovery until they have accepted a case. As another example, he cites how express standards of relevancy under the Federal Rules of Civil Procedure limit available discovery in American proceedings to a greater extent than the international rubric of "gathering" or "taking" of evidence, which fails to define such key terms as relevancy or materiality. He draws the comparison that unlike American proceedings, international arbitration lacks a decisional framework for evidentiary disputes, thereby inviting confusion and necessarily arming arbitrators with greater discretion to resolve evidentiary matters at the expense of party autonomy as well as such other goals as predictability, transparency of standards, uniformity, and certainty.

From this vantage point, Mr. Martinez-Fraga argues that American discovery methods are neither doctrinally nor conceptually opposed to arbitration.

> Remarkably, common perception promotes the proposition that "the taking of evidence" so often referenced in the context of arbitration proceedings and juxtaposed to discovery to highlight virtuosity of this methodology, perhaps in itself is also the victim of mere unchallenged perception and, therefore, actual misconception.

Mr. Martinez-Fraga thus proposes a "new unorthodox conception of common law discovery in international arbitration." This idea looks past the oft-cited abuses and expense of American discovery and acknowledges its close conceptual link with arbitration's goals. He suggests hopefully that this fruitful relationship should counter the view that American discovery departs from arbitration's accepted precepts.

Here, the historical framework provides analytical support for the premise. He posits that the current prejudice towards American discovery is tantamount to the United States' own early prejudice towards arbitration altogether. He further sees a parallel that both forms of prejudice unfairly delegitimize arbitration and concludes that arguments against American methods should yield to including them in any cohesive paradigm in like fashion as the historical prejudice towards arbitration in America eventually "transformed" into accepting the process *in pari materia* with litigation.

In addition to exploring this "new unorthodox concept" as a means to promote party autonomy in arbitration, Mr. Martinez-Fraga also examines other doctrinal developments that raise questions over the scope of a court's authority to review and determine particular issues which, when resolved, lead to potential judicial control of the arbitration itself. Such issues include punishing perjury and deciding the validity of contracts with arbitration clauses. His analysis highlights the challenges facing arbitration's continued effort to offer a valid, independent alternative to judicial resolution of cases while judicial power cannot be severed from the process entirely. On this score, he suggests further developments premised on judicial cooperation and assistance in contrast to intervention that would contribute meaningfully to the elevation of arbitration and judicial proceedings, and thus actualize the concepts of party autonomy.

Lastly, Mr. Martinez-Fraga also explores areas of American common law development in the field of arbitration that justify amending the New York Convention to further promote the aforementioned principles. They include exercising jurisdiction over arbitral award debtors and dismissals on *forum non conveniens* grounds. He challenges the view that such changes may be viewed as progressing towards an inclusive model of arbitration rather than tinkering with a system that, albeit imperfect, has been successful in providing a widely accepted forum to resolve transnational commercial disputes.

In sum, this well-crafted book provides cogent commentary on the future of international arbitration. Mr. Martinez-Fraga seamlessly blends theory and practice to the anticipated appreciation of academics and practitioners alike. His well-supported positions will certainly provide readers at all levels of arbitration experience with an enhanced understanding of the critical issues necessary to participate in the evolving debate about how arbitration can or should provide meaningful tools for resolving disputes in an increasingly flat economic and legal world.

Endnotes

1. 346 U.S. 427 (1953).
2. 473 U.S. 614 (1985).

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.

The Right to Arbitrate: A New Standard for Child Custody Decisions in New Jersey: *Fawzy v. Fawzy*

By Colleen J. Hibbert

The New Jersey Supreme Court's recent decision in *Fawzy v. Fawzy*[1] marks a landmark shift from requiring that judicial custody and visitation decisions be made by judges to permitting divorcing parents in New Jersey to elect arbitration of those issues. The ruling changes both the law governing custodial decisions and the rules governing arbitrations of those issues. The decision is an interesting weighing of competing policies. On the one hand the Court recognized that under the law, the interests of the child have to be protected and on the other, that in the absence of harm to the child, parents have the right—without court intervention—to determine custodial, living, and visitation arrangements.[2] The compromise the Court reached was to permit arbitration but to subject it to more searching review, requiring a record and an evaluation of whether the arbitral decision threatens harm to the child.

Background of the Case

Christine Fawzy filed a complaint to divorce Samih Fawzy and the parties notified the judge they intended to arbitrate all divorce issues. Two months later, Mr. Fawzy sought to prevent the arbitrator from deciding child-custody issues, but the court denied his application. The arbitrator issued an award granting joint legal custody with primary physical custody and residency to Mrs. Fawzy. Over Mr. Fawzy's objections, the trial judge confirmed the award. The Appellate Division reversed on the issue of arbitrability of the custody issues and the case proceeded to the New Jersey Supreme Court.

Prior to *Fawzy*, it was believed to be settled law in New Jersey that custody and parental visitation issues could not be arbitrated because the courts were required to independently determine what was in the best interest of the child. Arbitration of monetary and other rights arising out of a divorce were arbitrable after the decision in *Faherty v. Faherty*.[3]

Balancing State and Parental Interests

The Court examined the broad rights of parents to raise their children free from outside influence in the absence of harm to the child and concluded that the decision of the parents to allow an arbitrator to decide the custodial issues fell within that broad authority. Without addressing the best interest of the child standard, the Court recognized the competing duty of the courts to protect children from harm.[4] To meet that duty, the *Fawzy* Court imposed new requirements on the arbitrator and a new standard of review for arbitral decisions governing custodial issues. First, it required greater specificity in the agreement to arbitrate. To agree to arbitrate custodial issues, the arbitration agreement must be in writing and show the parties are aware of and consent to all the implications of arbitration, including the possible waiver of parental autonomy and the scope of review. Second, the process has to be altered. The proceeding must include a verbatim written record of all testimony, a record of evidence and a written decision by the arbitrator with findings of fact and law. In addition, the reviewing court is not limited to the statutory review provisions but must in addition determine whether the award has the potential to subject the child to harm.[5]

This decision promotes the freedom of parents to contract and to employ arbitration. It remains to be seen whether arbitration will in fact be chosen in custody disputes and whether this new standard of review will be compatible with ongoing custodial authority of courts dealing with custodial decisions based on a different standard, the best interest of the child.

Endnotes

1. 973 A.2d 347 (N.J. 2009).
2. *Fawzy*, 973 A.2d at 359 ("'interference with parental autonomy will be tolerated only to avoid harm to the health or welfare of a child.' *Moriarty*, 177 N.J. at 115, 827 A.2d 203.").
3. 477 A.2d 1257 (N.J. 1984).
4. *Fawzy*, 973 A.2d at 357-59.
5. *Fawzy*, 973 A.2d at 355-56 (citing *N.J.S.A.* 2A:23B-23(a)).

Colleen J. Hibbert is a law student at Fordham University School of Law.

When the Selected Arbitral Forum Is Unavailable: *New Port Richey Medical Investors, LLC v. Stern*

By Steven Hsu

The Florida Second District Court of Appeal in *New Port Richey Medical Investors, LLC v. Stern*[1] held that an arbitration agreement is enforceable despite the unavailability of the designated forum for the conduct of arbitration. Its decision is consistent with Florida's Arbitration Code which provides that if the agreed arbitration method cannot be followed for any reason, the court shall appoint an arbitrator upon a party's request. In so holding, the court applied an available statute to remedy the situation where the parties' selected arbitrator is or becomes unavailable to conduct the arbitration.

Background

Ms. Dorothy Stern was a nursing home resident. She filed a complaint against her nursing home for allegedly violating her rights as a resident. The nursing home moved to dismiss the complaint and compel arbitration based upon the parties' arbitration agreement which stipulated that any disputes would be submitted to the American Arbitration Association ("AAA"), for resolution in accord with its rules. Ms. Stern opposed, arguing that the agreement was unenforceable because AAA had stopped (as a matter of policy) accepting cases involving individual patients without a post-dispute agreement to arbitrate.[2] The parties had no such additional agreement. The trial court held that, given the unavailability of AAA to arbitrate the dispute, the parties' arbitration agreement was invalid and unenforceable. Accordingly, it denied the nursing home's motion to compel arbitration. The appeals court reversed.

Preserving or Substituting the Selected Arbitral Forum

The court received the parties' arbitration agreement into evidence. It stated, in pertinent part, that: (1) their dispute would be submitted to the AAA for administration and (2) the arbitrators shall apply the applicable AAA rules of procedure. AAA's policy position to decline accepting Ms. Stern's case negated the parties' selected arbitrator and arbitration rules. The court was asked to consider whether a valid arbitration agreement still existed because, as Ms. Stern argued, it could no longer be performed as intended. The court rejected her argument and upheld the parties' agreement to arbitrate.

It did so under the following circumstances. First, Florida Arbitration Code Section 682.04 specifically addressed the eventuality of the unavailability of the parties' chosen arbitral forum. It provides that if the agreed arbitration method fails or for any reason cannot be followed, the court can appoint an arbitrator who would then have like powers as if initially named in the original arbitration agreement.

Second, Ms. Stern failed to prove that the parties' selection of AAA was an integral part of their agreement to arbitrate. In the absence of such proof, the court declined to void arbitration altogether as the method for resolving the parties' dispute.

Third, and last, the parties' agreement contained a severability clause. This supported the court's finding that the naming of AAA was not an essential term. Accordingly, the court was able to appoint a substitute arbitrator under the above-referenced statute.

In conclusion, the court ruled that arbitration agreements may remain enforceable even if the designated arbitral forum is no longer available when the parties' dispute arises. The remedy fashioned in this case is based upon the presence of a statute dealing directly with this contingency as well as the absence of proof of the integral nature of the selected arbitrator. This decision signals the importance of jurisdictional rules that may supply a default arbitrator. Moreover, it instructs parties at the drafting stage to memorialize whether their intent to arbitrate is dependent or independent of the availability of the particular arbitral forum named in their agreement.

Endnotes

1. 14 So. 3d 1084 (Fla. 2d DCA 2009).
2. American Arbitration Ass'n, Healthcare Policy Statement, http://www.adr.org/sp.asp?id=32192 (last visited Jan. 17, 2010).

Steven Hsu is a law student at Fordham University School of Law.

Sanctions for Frivolous Appeal of Arbitral Award: *DMA International, Inc. v. Qwest Communications International*

By Matthew Jossen

In *DMA International, Inc. v. Qwest Communications International*,[1] the United States Court of Appeals for the Tenth Circuit affirmed a Colorado district court's confirmation of an arbitral award which DMA, the petitioner, argued was rendered in manifest disregard of the law and in violation of public policy. In addition to rejecting DMA's arguments, the court also concluded that DMA's appeal was frivolous, warranting sanctions.

The case originally derives from a contract dispute between DMA and Qwest over fees Qwest owed to DMA. In April 2004, DMA contracted to provide Qwest database research services. The dispute in the case is the result of an ambiguous fee provision in the DMA-Qwest contract which the two parties each interpreted differently in their calculations of payments owed for services rendered. When the contract between the parties expired, DMA claimed that Qwest had an outstanding bill of $5.4 million on top of fees which Qwest had already paid. Qwest, however, argued that it had already satisfied its contractual payment obligations in exchange for DMA's services. When Qwest refused DMA's payment demand, DMA submitted the dispute to arbitration.

The arbitrator determined that the payment section of the contract was ambiguous, and that extrinsic evidence showed that Qwest's payment fully satisfied its obligation under the contract and dismissed DMA's breach claim. In response to the arbitrator's ruling, DMA filed a motion in the district court of Colorado to vacate the award under the Federal Arbitration Act. DMA's primary contention was that the arbitrator acted in manifest disregard of the law when he looked to extrinsic evidence to define the payment section.[2] DMA further argued that the court should vacate the award as a violation of public policy because the award did not give effect to the parties' written contract. Responding to DMA's motion, Qwest argued that DMA's claims were foreclosed by the Supreme Court's holding in *Hall St. Assocs., LLC v. Mattel, Inc.*[3] that the Federal Arbitration Act 9 U.S.C. § 10 provides exclusive grounds for vacatur of an arbitral award.

The district court rejected DMA's claims and confirmed the arbitration award. In its holding, the district court relied primarily on the deferential standard applicable to arbitration awards as the basis for its decision. On appeal, DMA reiterated its primary contention that the award was in manifest disregard of the law.

In its decision affirming the district court's confirmation of the arbitral award, the Tenth Circuit found that DMA's claims failed to meet the circuit standard for manifest disregard of the law. The court highlighted the standard stating that "[T]he record must show the arbitrator knew the law and explicitly disregarded it." In contrast with this standard, the court emphasized that the arbitrator in the case correctly stated and applied relevant contract law when formulating the award.

After dispensing with DMA's claim, the court turned to the question of whether DMA's appeal of the arbitral award warranted sanctions. The court cited 28 U.S.C. § 1927 and Federal Rule of Appellate Procedure 38, both of which empower courts to assign litigants and their counsel liability for attorney fees and court costs resulting from appeals that are frivolous or unreasonable. With this framework in mind, the court emphasized that DMA's motion to vacate the arbitration award essentially amounted to an attempt to re-litigate the issues submitted to the arbitrator. Furthermore, the court asserted that based on the restrictive standard of review for arbitration awards "[n]o reasonable interpretation of our case law could have justified DMA's apparent belief that it would prevail.…" DMA's appeal of the award without any reasonable likelihood of success was, according to the court, precisely the type of "never-say-die" litigation tactic that destroys the "promise of arbitration.…'" Although it recognized the seriousness of imposing sanctions, the court nonetheless decided sanctions were appropriate if not necessary in this case as part of the "national policy favoring arbitration[,]" and in order to ensure that arbitration remains a "meaningful alternative to litigation."

Endnotes

1. 585 F.3d 1341 (10th Cir. Nov. 4, 2009).
2. In addition to its argument that the arbitrator acted in manifest disregard of the law, DMA also argued before the district court that vacatur was warranted because: (1) the arbitrator was partial or corrupt; (2) the award violated public policy; (3) the arbitrator exceeded his powers; and (4) Qwest did not dispute the invoice in a timely manner.
3. 128 S.Ct. 1396 (2008).

Matthew Jossen is a law student at Fordham University School of Law.

Courts Have Put the "Judicata" in *Res Judicata* with Respect to Whether the Doctrine Applies to Prior Arbitration Awards

By Elena Poleganova

Case law is in agreement that a prior arbitration ruling estops a court from litigating the same issue again. The decisions on the matter, however, differ in whether it is up to the courts to decide whether an issue is precluded from further litigation or whether the pronouncement should be left for the arbitrators.

Courts have generally been reluctant to interfere with the jurisdiction of arbitrators in order to preserve the purpose of arbitration. Deference is given to arbitrators to rule on their own jurisdiction. However, some courts preserve the court's right to decide issues of equitable estoppel. Two approaches have emerged to the issue of *res judicata* in arbitration: a procedural approach and a substantive approach.

On the one hand, judges have decided to leave jurisdiction, as a matter of procedure, with the arbitrators in deciding whether *res judicata* estops further review of an issue. In *Merryman Excavating Inc. v. Int'l Union of Operating Engineers et al.*, the judge reasoned that a failure to present all available arguments during an arbitration constitutes a waiver of these arguments for purposes of any later litigation.[1] Allowing a party to keep silent during an arbitration only to bring arguments to federal court after losing an arbitration would counteract the purposes of arbitration.[2] Arbitrators must hear all available arguments at the time of arbitration. As such, arbitrators are uniquely positioned to determine whether an issue is precluded from arbitration due to *res judicata* so long as the issue of the dispute is within the scope of the arbitration clause. The arbitration clause gives the arbitrators jurisdiction over procedural aspects such as estoppel due to a prior arbitration award on the issue.

Similarly, in *Storey Const. Inc. v. Hank*, the court held that issues of procedural arbitrability, such as whether the issue at hand is precluded from further arbitration as a result of *res judicata*, are for the arbitrators to decide.[3] In other words, *res judicata* is a matter of procedural arbitrability, which raises the question of whether the arbitration tribunal has jurisdiction to proceed. Arbitrators have the power to decide whether they have jurisdiction to proceed. Therefore, it should be left to the discretion of the arbitrators whether *res judicata* precludes a case from further arbitration proceedings.

On the other side of the spectrum, some courts treat the doctrine of *res judicata* as a substantive issue uniquely within the realm of the court system. In *Nachum v. Ezagui*, the judge treats a Beth Din, a ruling by a Rabbinical Court, as an arbitration and discusses the effect of the ruling on the present litigation.[4] The holding of the case agrees with the ruling in *Dimacopoulos v. Consort Development Corp.*[5] that a prior arbitration award on an issue estops that issue from subsequent litigation in the court system. However, the court has jurisdiction to decide the effect of *res judicata*. The doctrine of *res judicata* is treated as a substantive issue of equity to be determined by the court. The Beth Din case is interesting in that Rabbinical Court does not recognize the doctrine of collateral estoppel and therefore the court has to treat the issue as a substantive issue of equity, which necessarily vests jurisdiction within the courts as the only means of enforcing the doctrine. Perhaps the decision would have come out differently if the Rabbinical Court recognized the doctrine of *res judicata*.

Courts have put the "judicata" in *res judicata* with respect to whether the doctrine applies to prior arbitration awards. However, uncertainty still exists in state common law as to whether the issue is one of procedure or substance, and whether the issue is one for arbitrators or for the courts to decide. The issue still remains to be decided.

Endnotes

1. 2009 WL 515828 (ND IL Aug. 17, 2009).
2. *Id.*
3. 2009 WL 3110811 (Idaho 2009).
4. 2009 WL 2997904 (NY Supp).
5. 158.A.D.2d 658, 659 (2d Dept. 1990).

Elena Poleganova is a law student at Fordham University School of Law.

In *Aurelius Capital Partners* the Second Circuit Applies the Foreign Sovereign Immunities Act to Prevent Judgment Creditors of the Republic of Argentina from Attaching and Executing Against Assets in New York

By Osato Tonia Tongo

In October 2009, the Second Circuit decided *Aurelius Capital Partners, LP v. The Republic of Argentina*,[1] a case that has significant implications for judgment creditors of a foreign sovereign seeking to obtain attachments of funds and execution of judgments entered in New York. In 2001, the Republic of Argentina ("Republic") defaulted on payments on debt instruments issued to bondholders. In connection with the issuance of the Argentine bonds, the Republic consented to a waiver of sovereign immunity. After the default, many of the bondholders obtained default judgments in New York and attempted to execute on the judgments.[2]

The district court had issued orders of attachment and execution against the Republic and two non-parties, holding, among other things, that the assets were assets of the Republic and were not immune from attachment and execution under the Foreign Sovereign Immunities Act.[3] The Second Circuit reversed the district court's judgment, vacated its orders and its opinion confirming those orders. The Court held that under the facts presented, the Foreign Sovereign Immunities Act precluded judgment creditors from attaching and executing on $200 million in assets held in institutions in New York even though the Republic had waived sovereign immunity.[4]

Background

The Argentine constitution requires the government to provide social security benefits to its citizens. From 1993 to October 2008, the Republic permitted the Argentine workers and pensioners to choose between a system known as the "Distribution System" administered by the Administración Nacional de Seguridad Social ("Administration") and a private plan, known as the "Capitalization System" under which workers made contributions to the individual accounts managed for a fee by private corporations. According to Argentine law, the assets from the contributions in the private corporations ("Funds") were only to be used to provide for social security benefits, and the private corporations did not have property rights in the Funds. Some of the Funds were held in New York where the private corporations invested the Funds.

On December 9, 2008, Republic enacted legislation (that had been proposed on October 21, 2008),which required the reunification of the Distribution and the Capitalization Systems, thereby requiring all of the Funds of the Capitalization System managed by private corporations to be transferred to a previously established Guarantee Fund administered by the Administration in Argentina.[5] The legislation also required that the assets of the Funds had to be invested "by applying criteria of sufficient security and profitability while contributing to the sustainable development of the real economy."[6] In addition, the total amount of the Funds could only be used to make payments under the Republic's integrated pension system and the Funds could be invested only in Argentine securities.[7]

The District Court's Decision

On October 29, 2008, after the legislation was proposed, but before it was enacted, the district court authorized the plaintiffs to serve restraining notices on the Republic, a party to the litigation, as well as on the Administration and the private corporations although they were not named as parties. The restraining notices prevented removal of the Funds from the United States, but did not prohibit the parties from engaging in daily trading activity. The basis for the order was that once the proposed legislation became law and the property transferred to the Administration, it was essentially the property of the Republic. Because the Republic had waived sovereign immunity with respect to the bondholders' judgments, the district court determined that the judgment could be executed against the Funds.[8]

On November 12, 2008, the Republic moved to vacate the Orders, arguing that: (i) it had no interest in the Funds in the private corporations or the Administration; (ii) the Administration was an "agency or instrumentality" separate from the Republic for purposes of the FSIA, and therefore, its Funds were not available to creditors; and, (iii) the Funds managed by the private corporations and the Administration were used for non-commercial purposes—payment of pension benefits—, and, therefore, the Republic's creditors were precluded from executing upon the property under the FSIA. The district court denied the motion.[9]

On December 11, two days after the proposed legislation became law, the district court confirmed its prior orders and granted plaintiffs' motions for writs of execution. The district court held that the Administration was a political subdivision of the Republic and, as such, was subject to the court's jurisdiction and that its Funds were subject to attachment and execution to the same degree

as the Republic's assets. The district court also held that the Funds were being used for commercial activity in the United States as required under FSIA 28 U.S.C. § 1610(a), because they were being invested in the hope of gaining a profit and the transfer of Funds was not for the benefit of the Funds, but for the Republic's non-pension governmental use. Finally, the district court concluded that the Funds were not immune from attachment and execution under the FSIA and that the restraining orders were valid as they had been filed before the legislation took effect.[10]

On March 4, the district court issued orders authorizing service of writs of execution but ordering the Funds to be frozen rather than seized. The Republic, private corporations, and the Administration appealed the district court's orders.[11]

The Second Circuit's Decision

The Second Circuit framed the primary issue on appeal as: "whether the funds administered by the Administration are subject to attachment." In other words, whether the district court's legal conclusions denying the FSIA's immunity to a foreign state or its property was an abuse of discretion. Under Section 1609 of the FSIA, property in the United States of a foreign sovereign is immune from attachment or execution unless the property fits within one of the limited exceptions in Sections 1610 or 1611 (the provisions of which the Court determined were not applicable to this case).[12]

The Second Circuit found that under the clear language of Section 1610(a) "the property subject to attachment and execution must be 'property in the United States of a foreign state' *and* it must have been 'used for a commercial activity' [in the United States] *at the time* the writ of attachment or execution is issued."[13] The Court also found that these two criteria must be met even if the foreign sovereign waives its immunity from execution. In addition, "the property in the United States of a foreign state must be used for a commercial activity in the United States 'upon a judgment entered by a court of the United States or of a State.'"[14]

The Court concluded, therefore, that the commercial activities of the private corporations who managed the Funds before the effective date of the Republic's legislation transferring the Funds to the control of the Administration [December 9, 2008] were irrelevant. The Court found that even if the Administration was considered an "agency or instrumentality" of the Republic (a determination that it did not need to reach) before the Funds at issue could be subject to attachment, "the funds *in the hands of the Republic*" had to have been "used for commercial purposes."[15] The Court concluded that the order attaching the Funds of the Administration became effective immediately upon the passage of the legislation transferring the Funds from the private corporations. The Court reasoned that neither the Administration nor the Republic had the opportunity to use the Funds for any commercial purposes. Rather, the only activity that the Republic had engaged in with regard to the Funds at the time the district court confirmed the Orders was the adoption of the law transferring the legal control of the Funds. The Second Circuit held that a sovereign's mere transfer to a governmental entity of legal control over an asset does not qualify the property as being "used for a commercial activity."[16]

Conclusion

The Second Circuit's decision instructs that a waiver of sovereign immunity does not override the strict limitations imposed by the Foreign Sovereign Immunities Act on attachment and execution of assets of a foreign sovereign in the United States. This case reiterates the limited exceptions in which property of a foreign sovereign located within the United States can be subject to attachment or execution and highlights the difficulties that can be encountered in collecting on an award issued to an investor in bilateral investment treaty arbitration. Gaining a favorable award may only be the first step to compensation.

Endnotes

1. *Aurelius Capital Partner*s, *LP v. The Republic of Argentina*, 584 F. 3d 120 (2d Cir. 2009), petition for cert. filed, 78 USLW 337 (U.S. Dec 21, 2009) (NO. 09-723).
2. As the Court noted, there had been earlier unsuccessful attempts to collect on the judgments. However, most of these attempts failed because they concerned property that was either immune from execution under the Foreign Sovereign Immunities Act (28 U.S.C. §§ 1602 *et seq*.) or property that did not belong to the Republic. *Id*. at 124.
3. *Id*. at 125-127. The non-parties who sought to appeal were the Administration and the private corporations. See note 12 *infra*.
4. *Id*. at 131-132.
5. *Id*. at 124-126.
6. *Id*. at 125-126.
7. *Id*.
8. *Id*. at 125.
9. *Id*.
10. *Id*. at 126-127.
11. *Id*. at 127.
12. *Id*. at 129-130. The Second Circuit also considered the threshold question whether the Administration, non-party appellant, had standing to challenge the district court's orders. The Second Circuit noted that the general rule is that only party of record in a lawsuit has standing to appeal from a judgment of the district court. However, it also noted that there is an exception that gives a non-party standing if it has an interest which is affected by the trial court's judgment. The court found that the Administration clearly had an interest that was affected by the district court's orders. *Id*. at 128.
13. *Id*. at 130 (emphasis in original), citing 28 U.S.C. § 1610(a).
14. *Id*. at 130, citing 28 U.S.C. § 1610(a).
15. *Id*. at 130-31 (emphasis in original).
16. *Id*. at 131.

Osato Tonia Tongo is a law student at Florida A & M University College of Law.

Annual Meeting 2010

The Section's Annual Meeting was held on January 28, 2010. The program was co-chaired by Abigail Pessen and John Wilkinson, with valuable assistance from Jonathan Honig and Rona Shamoon. It consisted of three panels. The first panel, chaired by Margaret Shaw, featured a thoughtful dialogue among statewide ADR coordinator Dan Weitz, Cardozo Law School Professor Lela Love (who participated as a representative of the International Section), and New York City Bar Association ADR Committee Chair Peter Woodin, and many members of the audience, about how best to promote mediator quality in New York State and whether the Section should recommend regulation of any sort. The second panel, chaired by Ruth Raisfeld, consisted of a lively discussion of ADR ethical conundrums by ethics experts Stephen Gillers, Eugene Farber, and Vivian Berger. The final panel, chaired by Irene Warshauer, updated the attendees on recent case law and legislative and practice developments relating to domestic and international arbitration; the speakers were arbitration experts Hagit Elul (participating courtesy of the International Section), Lawrence Newman, Florence Peterson, and Eric Tuchmann. We were fortunate to have student reporters to have provided the more detailed discussion of the program content found in this issue.

The programs were followed by a luncheon featuring the U.S. Special Master for Executive Compensation, Kenneth R. Feinberg. The Meeting was well-attended and well-received, and thanks are in order to all who contributed to its success.

This year the Section was able to form a productive collaboration with the International Section and organized joint programming for the International Section's meeting. Our student reporter discusses the content of those sessions in this issue.

Annual Meeting Panel Reports

ADR Ethics: The Tip of the Ethics Iceberg
By Philip J. Tucker

A duty to disclose or a duty of confidentiality? Mere puffery or factual misstatement? "Should" or "Shall"?

These were just a few of the ethical quandaries explored during the Dispute Resolution Section's vibrant and interactive panel discussion on "ADR Ethics: The Tip of the Ethics Iceberg," at the NYSBA's Annual Meeting, January 27-28, 2010.

The distinguished panel included Vivian Berger, Nash Professor of Law Emerita at Columbia University School of Law, a prolific author and speaker and an advanced practitioner of employment mediation. Veteran arbitrator, neutral, and advocate Eugene I. Farber, a partner of Farber, Pappalardo & Carbonari, engaged the audience and his fellow panelists with his own on-the-spot hypotheticals accumulated over twenty-five years in the field. Providing a scholar's perspective on attorney conduct was Stephen Gillers, Emily Kempin Professor of Law at New York University School of Law, and author of the widely used casebook *Regulation of Lawyers: Problems of Law and Ethics*. And leading the panel through a series of ethical "what-ifs" and "what-nows" was Ruth D. Raisfeld, an accomplished neutral and founder of Alternative Dispute Resolution Services of Scarsdale, New York. Below you'll find some highlights of this lively exchange.

Conflict by Association?

The morning's first dilemma asked the panelists: as a mediator, how should a past, professional relationship between a party and your spouse impact your role and responsibilities?

Vivian Berger was quick to state she hoped, even without model standards in place, that thoughtful neutrals would recognize such a conflict of interest. But if there was doubt in anyone's mind, she directed the audience's attention to the Model Standards of Conduct for Mediators, Standard III: "A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during a mediation,"[1] and "shall disclose" such issues reasonably known, as soon as practicable.[2] Berger stressed the important distinction here, and throughout the many model codes and rules, between the use of "shall" (meaning "must") and "should" (indicating a strong presumption toward following the outlined practice).

"Is there an affirmative duty to reach out to one's spouse, to adult children, to identify all possible conflicts?" Ruth Raisfeld asked, and then answered, "if the potential for conflict crosses your mind" the best practice is to disclose. "It's always better in writing," Berger added. "Even where ninety-nine percent of the time parties may not seem to care, they may care later on!"

Eugene Farber then polled the audience: "What if disclosure is not made, and there's a settlement or agreement, and now someone's unhappy, and now you're in court." Could "a motion to upset settlement on grounds of nondisclosure" lead to vacating the agreement? Mirroring the uncertainty of the audience, Farber conceded: "I don't know." "The point is," Berger chimed in, "you don't want to find out."

Professor Gillers outlined what he saw to be a principal difference on how the fields may approach the issue, noting how a judge may elect to recuse herself under similar circumstances, whereas in mediation the parties have a right to know of any possible conflicts so as to make their own judgments.

When Parties Yell "Fire" and Cry Wolf

What is a mediator to do when faced with a party privately claiming possession of damning evidence about the other side, where such evidence has zero relation to the conflict at hand?

Such conduct, Professor Gillers noted, was extortion-like, a Rule violation, where one side employs irrelevant information to embarrass and harass their counterparts.[3] Even so, Professor Berger cautioned that the Model Standards required mediators to maintain confidentiality where operating without express permission by the offending party to share the info.[4]

Speaking as an arbitrator, Mr. Farber warned that such threats by a party were probably more harmful than helpful in presenting a client's case.

Under opposites facts, the panel was asked what might result when damning evidence of party misconduct, this time germane to the dispute, was uncovered by the party's *own* attorney. As to the attorney's obligation of disclosure in mediation, Mr. Farber got a rise from the audience by inquiring—why not discuss everything openly if you're serious about mediation? After all, he continued, this bombshell is bound to come out in any subsequent discovery. A few audience members rose to answer the challenge—as advocates, even in a collaborative setting, there was no obligation to disclose your own strategy, they asserted, nor reason to hand over a cheaper settlement. Mr. Farber assured the crowd he was only playing devil's advocate.

The conversation next turned to ethical concerns over statements by advocates and clients that could test the boundaries of conduct. For example, where a lawyer makes outsized demands during negotiation even though the client has previously confided a willingness to settle for far less.

If such grandstanding was conducted during a press conference, it would raise the trial publicity rule,[5] accord to Professor Gillers. However, a distinction is generally made between prospective threats not grounded in reality and retrospective misstatements about historical facts. Where an attorney is bluffing about settlements, it is unlikely she will be found to have made false statements of fact because, Gillers continued, no one views them as truthful anyway. The application of the rule is informed by the context, and under the circumstances, such statements are understood to be puffery.

Ms. Raisfeld then posed a hypothetical concerning a party lying to a mediator in private caucus—for example, asserting how a high settlement figure would bankrupt their company, even as they've quietly stashed away a small fortune.

From the mediator's perspective, Professor Berger indicated that, whatever its factual merit, she would seek to get permission to share that info with the opposing party "who can do with the claim as they wish."

Mr. Farber suggested an alternate scenario, where the parties, a contractor and subcontractor, discuss structural issues with a covered bridge that the neutral knows, from his own professional experience as an architect or engineer, poses danger to life and limb.

Professor Gillers replied that attorneys were permitted to break confidentiality where there was a reasonable belief of substantial danger of harm or death to the client or to someone else.[6] He also believed that a neutral violating his contractual obligations of confidentiality would likely be forgiven under the circumstances.

An audience member inquired of the panel whether parties could have selected mediation as a means to prevent public disclosure and subvert public policy—and if so, what should a mediator ethically do if this is suspected? Section IV of the Model Standards identifies the risk of furthering criminal conduct as grounds to "take appropriate steps…including withdrawing from or terminating the session."[7] The panel submitted that the Standard was straightforward in ways to limit mediator involvement in this, and other scenarios that undermined the integrity of the process, but was not entirely satisfactory in addressing the underlying problem. Professor Gillers suggested that a mediator could advise the client's attorney of the issue and potential ramifications.

Just the Tip of the Iceberg

Finally, the question was posed whether, at the conclusion of a good faith mediation session that ended without agreement, a mediator could transition into the role of an arbitrator.

NYSBA Dispute Resolution Section Chair-Elect Edna Sussman rose from the audience to respond in the affirmative. Provided informed consent has been requested and granted, transitioning from mediator to arbitrator may benefit the process, saving the parties time and money while harnessing the trust and confidence established during the mediation session. She directed the audience to the Spring 2009 issue of *New York Dispute Resolution Lawyer*[8] for an exploration of reflections on med-arb and arb-med practice from jurisdictions around the world.

Moderator Raisfeld concluded with a few choice words of advice: "Know the rules, exercise good judgment." And, while navigating the rocky shores of ethical quandaries, "Remember the Titanic!—don't go full steam ahead. Take a break. Call a colleague," lest you risk becoming the subject of next year's ethical hypos.

A national clearing-house for attorney ethics questions and answers can be found at http://www.abanet.org/cpr/pubs/ethicopinions.html.

Endnotes

1. Model Standards of Conduct for Mediators Standard III (i) (2005) [hereinafter Model Standards].
2. *Id.* at III (iii).
3. 22 N.Y.C.R.R. Part 1200 R. 4.4 (2009).
4. Model Standards, *supra* note 1, at Standard V.
5. 22 N.Y.C.R.R. Part 1200 R. 3.6.
6. *Id.* at R. 1.6 (b).
7. Model Standards, *supra* note 1, at VI (A)(9).
8. *See generally* N.Y. Disp. Resol. Law., Spring 2009, 71-119, *available at* http://www.nysba.org/AM/Template.cfm?Section=New_York_Dispute_Resolution_Lawyer&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=26825.

Philip J. Tucker is a law student at Brooklyn Law School.

* * *

Arbitration Update: How Will Recent Court Decisions and Practice Developments Affect Domestic and International Arbitrations?

By Katharina Borchert

The workshop entitled "Arbitration Update: How Will Recent Court Decisions and Practice Developments Affect Domestic and International Arbitrations?" was moderated by Irene C. Warschauer, Esq. (Law Office of Irene C. Warschauer, Attorney-Mediator-Arbitrator, New York City). The panelists in this discussion were Hagil Elul, Esq. (Hughes Hubbarb & Reed LLP, New York City), Lawrence W. Newman, Esq. (Baker & McKenzie, New York City), Eric Tuchman, Esq. (General Counsel and Corp. Secretary, American Arbitration Association, New York City), Florence M. Peterson, Esq. (Attorney at law, Adjunct professor—arbitration, Fordham Law School, New York City).

Ms. Elul talked about the process of judicial review of arbitral awards. She pointed out that Chapter 2 of the Federal Arbitration Act and the New York Convention provide for judicial review of an arbitral award under limited circumstances such as the "manifest disregard of the law." Such review requires that three elements must be met: the law in the arbitration must have been clear, the law must have been applied improperly, and the arbitrators must have known the law and decided not to apply it. She pointed out that vacating an award on this basis is extremely rare.

Mr. Newman followed with a discussion of third party discovery in arbitral proceedings. First he discussed the use of 28 U.S.C § 1782 for discovery in foreign arbitration proceedings and concluded that the courts have no uniform standard regarding whether an arbitral tribunal is a "foreign or international tribunal" under this Section. Then, Mr. Newman discussed the subject of pre-hearing discovery in arbitration. Although Section 7 of the Federal Arbitration Act (FAA) authorizes the arbitrator to summon witnesses and issue subpoenas for documents, he noted that the section does not permit arbitrators to issue pre-hearing subpoenas to third party witnesses. However, there may exist other techniques to remedy such difficulty in that the tribunal may hold a hearing before the main hearing on the merits and move to the location of the witness to hold that hearing if necessary in order to enable the document production to proceed.

Thereafter, Mr. Tuchman discussed the pending Supreme Court case *Stolt-Nielsen S.A. v. Animal Feeds International Corp.* and the related amicus brief filed by the American Arbitration Association. The main question concerns whether a class action may proceed pursuant to an arbitration clause which omits any language relating to class actions. Although the amicus brief takes no position regarding the legal question, it describes the American Arbitration Association's experience with the over 300 class actions that the institution has administered.

As the final speaker, Ms. Peterson reviewed the status and history of arbitration usage since the 1929 Federal Arbitration Act. There have been virtually no changes in the FAA and the Courts have been supportive of arbitration and have encouraged its use as suitable for all kinds of disputes. Recently, however, there have been efforts by some to restrict arbitration usage in specific fields such as the 2002 Motor Vehicle Franchise Act and the Arbitration Fairness Act.

Katharina Borchert is a law student at Cardozo Law School.

* * *

Ensuring Mediator Quality: Assessing the Options

By Jennifer Peterson

The program entitled "Ensuring Mediator Quality: Assessing the Options" addressed the question, among others, of whether mediators should be required to possess a license or other credential. The panelists were: Moderator, Margaret L. Shaw, JAMS mediator, lecturer, and author; Daniel M. Weitz, Esq., Deputy Director, Division of Court Operations and Coordinator, Office of ADR and Court Improvement Programs; Professor Lela Porter Love, director of the Kukin Program for Conflict Resolution at Cardozo Law School and mediator, trainer and author; and Peter W. Woodin, Esq., mediator and arbitrator with JAMS.

Mr. Weitz opened the discussion and provided the framework by describing New York State Court efforts to promote mediation and to ensure mediator quality in Court programs and the Community Dispute Resolution Centers with which the Court contracts. According to Mr. Weitz, the plan has been to proceed through a "front door/ back door" approach. The "front door" requires qualifications of 24 hours of basic mediation training and an additional 16 hours of training in a specific practice area prior to acceptance to any of the Court rosters of mediators overseen by his office. The Community Dispute Resolution Centers require 30 hours of basic mediation training plus an apprenticeship as well as further specialty training as may be specified. The "back door" consists of continuing educational training and promulgating ethical standards and advisory decisions, which can be accessed at www.nycourts.gov/ip/adr/MEAC.

Professor Love focused her comments on the status of mediator credentialing on the international scene. As immediate past chair of the American Bar Association Section of Dispute Resolution, Professor Love initiated the first International Mediation Leadership Summit, which met in the Hague in 2009 during which the question of whether or not there should be an international credentialing institution was debated hotly. Professor Love reported that there was no consensus reached. Also, she noted that she was not aware of any study that says that the best mediators are those with the most training but she supported the importance of training in quoting the well-known statement attributed to former Harvard Law School Dean Derek Bok, "if you think education is expensive, then try ignorance."

Mr. Woodin, current Chair of the ADR Committee of the New York City Bar, discussed that committee's comprehensive 2006 Report on Mediator Quality, which presented a detailed discussion of the various considerations and options for assuring mediator quality. The full Report, as well as other resources, can be accessed online at www.abcny.org/Publications/reports.

In conclusion, Ms. Shaw reported that the NYSBA Dispute Resolution Section has commenced a study regarding the question of how best to enhance mediator quality including the option of mediator credentialing. Ms. Shaw stated that the committee invites participation and comments by interested persons. The committee is also involved in other projects including implementing a survey of attorneys who utilize mediation to determine their needs and concerns, working to create a shadowing program, and developing a series of guest speakers and trainings.

Jennifer Peterson is with Resolve Mediation Services, Inc., New York, NY.

* * *

Annual Meeting Panel Reports on Programs in Conjunction with the International Section

International Dispute Resolution in Practice, Experiences, Trends, Tips

By Elizabeth Vaz

The New York State Bar Association held its Annual Meeting at the New York Hilton in Manhattan January 25-30, 2010. The Dispute Resolution Section and the International Section jointly presented three workshops on January 27 involving issues in the field of International Arbitration, namely: "International Dispute Resolution in Practice: Experiences, Trends, Tips," which gave a basic overview of the arbitration process and the implementation of specific conventions designed to deal with this complex and emerging issue; "Managing International Arbitration" which dealt with how to conduct an efficient and productive arbitration; and "Discovery v. Privacy in International Arbitration" which examined the differences in privacy laws and cultures from across the world and how these affect the process of discovery in the arbitral setting.

Howard Fischer (Schindler Cohen & Hochman LLP, New York City) moderated the first workshop which included the panelists Charles J. Moxley (Kaplan Fox & Kilsheimer LLP, New York City), Gerard Meijer (Nauta Dutilh N.V., Rotterdam, The Netherlands), Jessica Bannon Vanto (Freshfields Bruckhaus Deringer US LLP, New York City) and William J.T. Brown (Law Offices of William J.T. Brown, New York City). Mr. Moxley began by stressing that the two main purposes of any arbitration are neutrality and enforceability. Mr. Meijer continued by discussing the value of drafting as simple an arbitration agreement as possible while making sure to include the provisions required by the applicable law. Ms. Vanto then stressed that the parties to an arbitration should carefully consider the parts of the process that remain within their control, i.e., choosing the arbitrators who make up the tribunal and the importance of choosing the seat of the arbitration since its law controls the procedural aspects of the process. Finally, Mr. Brown spoke about enforcing an international award. Using New York as an example, he stated that if there is jurisdiction, such as a non-resident's New York bank account located within the jurisdiction, a federal court can freeze such assets even pre-award determination, making enforcement more likely.

The second workshop was moderated by Axel Heck (Heck Law Offices, Berlin) and the panel consisted of Dana Freyer (Skadden, Arps, Slate, Meagher & Flom LLP, New York City), Joseph Neuhaus (Sullivan & Cromwell LLP, New York City), Paul D. Friedland (White & Case LLP, New York City), Daniel Rothstein (Law Offices of Daniel Rothstein, P.C., New York City) and Fabien Gelinas (former General Counsel of the International Court of Arbitration of the International Chamber of Commerce, Montreal, Quebec). Ms. Freyer focused on the selection of either a sole arbitrator or an arbitral panel and the importance of choosing highly qualified individual(s) for the job. Mr. Neuhaus continued by discussing the challenges associated with discovery in the arbitration setting, mentioning that one area of concern not addressed in most international arbitration guidelines is the issue of expert testimony and what information relating to an expert's testimony and opinion will be disclosed. Mr. Friedland spoke on the third topic of fast track arbitration. He pointed out that while an accelerated process may be more timely and cost effective, in complex commercial matters, disclosure, party control and the quality of the process may be negatively affected by speed. Mr. Gelinas then reviewed international arbitration case management and the new ideas and proposals being considered by a panel tasked with updating and revising the ICC Rules of Arbitration. In conclusion, Mr. Rothstein discussed evidence production in an arbitration context and the limitation of having no uniform standard of compelling evidence in an international arbitration.

The third and final workshop was moderated by Edna Sussman (SussmanADR LLC, New York City) and the panelists included Jonathan P. Armstrong (Duane Mor-

ris LLP, London), Philip M. Berkowitz (Nixon Peabody LLP, New York City), Mitchell F. Borger (Group Vice President, Associate General Counsel, Macy's, Inc., New York City), and Sherman W. Kahn (Morrison & Foerster LLP, New York City). Mr. Armstrong began by focusing on the historical aspects of privacy laws, highlighting the historical and cultural differences between the United States and Europe. Mr. Berkowitz then spoke about the differing notions of privacy and the issues that arise from the EU privacy and data protection laws when discovery is sought from those countries. Mr. Borger continued by discussing arbitration from an in-house counsel perspective, noting that while companies generally like arbitration, they may have concerns with confidentiality issues regarding trade secrets, etc. Mr. Kahn concluded by discussing privacy concerns that many have when it comes to transferring sensitive documents, stressing that parties should attend to this issue when drafting the agreement to arbitrate clause and that any concerns about EU privacy laws and their impact on production should be addressed early in the process such as at the initial meeting of the lawyers, parties and arbitrators which establishes guidelines and procedures.

As is evident in this brief overview, there are numerous issues which arise in the context of international arbitration which are being addressed by various individuals and organizations. Although much work remains in order to facilitate, improve and refine the international arbitration process, hopefully representatives of varying states, cultures and legal structures throughout the global community will continue to work cooperatively to formulate uniform standards and procedures for the future development of the field.

Elizabeth Vaz is a law student at Hofstra Law School.

Section Committees and Chairs

The Dispute Resolution Section encourages members to participate in its programs and to contact the Section Officers or Committee Chairs for information

ADR in the Courts
Jacqueline W. Silbermann
Blank Rome LLP
405 Lexington Avenue
New York, NY 10174-0208
JSilbermann@BlankRome.com

ADR within Governmental Agencies
Charles E. Miller
Dickstein Shapiro LLP
1177 Avenue of the Americas
New York, NY 10036-2714
millercharles@dicksteinshapiro.com

Arbitration
John Wilkinson
JAMS
620 Eighth Avenue, 34th Floor
New York, NY 10018
johnhwilkinson@msn.com

Sherman W. Kahn
Morrison & Foerster LLP
1290 Avenue of the Americas
New York, NY 10104-0101
skahn@mofo.com

Collaborative Law
Chaim Steinberger
Chaim Steinberger PC
331 Madison Avenue, 2nd Floor
New York, NY 10017
csteinberger@mindspring.com

Norman Solovay
McLaughlin & Stern, LLP
260 Madison Avenue
New York, NY 10016
nsolovay@mclaughlinstern.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
Barbara Antonello Mentz
140 West 86th Street
New York, NY 10024
bmentz@mentz.org

Irene C. Warshauer
60 East 42nd St., Suite 3403
New York, NY 10165
iwarshauer@aol.com

Legislation
William J.T. Brown
204 Ashokan Road
Kingston, NY 12401
williamjtbrown@gmail.com

Charles J. Moxley Jr.
Kaplan Fox & Kilsheimer LLP
850 Third Avenue
New York, NY 10022
cmoxley@kaplanfox.com

Mediation
Abigail J. Pessen
Mediation Services
80 Broad Street, 30th Floor
New York, NY 10004
abigail@pessenadr.com

Margaret L. Shaw
JAMS
620 Eighth Avenue, 34th Floor
New York, NY 10018
mshaw@jamsadr.com

Membership
Geraldine Reed Brown
The Reed-Brown Consulting Group
180 Union Street
Montclair, NJ 07042-2125
RBCG1@aol.com

Gail R. Davis
Resolutions NY Inc.
120 East 30th Street
New York, NY 10016-7303
gdavis@resolutionsny.com

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

Laura A. Kaster
Laura A Kaster LLC
84 Heather Lane
Princeton, NJ 08540
laura.kaster@gmail.com

Nominating
Stephen A. Hochman
600 Lexington Avenue, 15th Floor
New York, NY 10022-6018
shochman@prodigy.net

Dispute Resolution Section
FALL MEETING

October 1–4, 2009 • The Sagamore • Bolton Landing, NY

The Section held a highly successful fall meeting at the Sagamore Hotel on Lake George in collaboration with the Labor and Employment Law Section. The conference was capably chaired by Leona Beane, Evan Spelfogel and Elizabeth Shampnoi working with the Section's CLE Chair Rona Shamoon. All of the sessions were well attended and many of our members participated as speakers. All participants learned a lot and enjoyed the beautiful setting and opportunity to mix in the relaxed environment.
















New York Dispute Resolution Lawyer

Editor-in-Chief
Edna Sussman
SussmanADR
20 Oak Lane
Scarsdale, NY 10583
esussman@sussmanadr.com

Co-Editor-in-Chief
Laura A. Kaster
Laura A Kaster LLC
84 Heather Lane
Princeton, NJ 08540
laura.kaster@gmail.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

Gail R. Davis
Resolutions NY Inc.
120 East 30th Street
New York, NY 10016-7303
gdavis@resolutionsny.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

Student Editors
Colleen J. Hibbert
Steven Hsu
Matthew Jossen
Elena Poleganova

The *New York Dispute Resolution Lawyer* is distributed to members of the New York State Bar Association's Dispute Resolution Section without charge. The views expressed in articles in this publication represent only the author's viewpoint and not necessarily the views of the Association, the Section or its Officers.

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

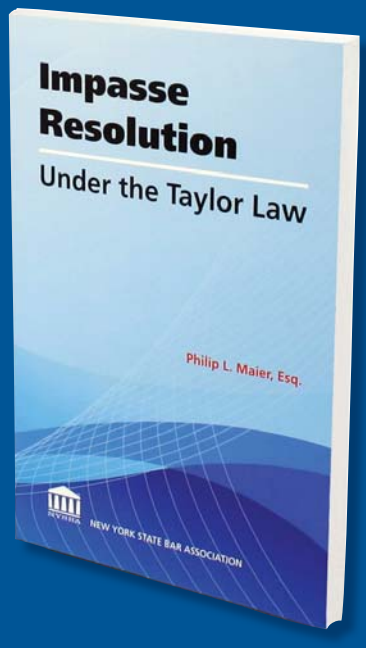
Impasse Resolution

Under the Taylor Law

This publication provides both an overview and in-depth discussion of the impasse resolution procedures under the Public Employees' Fair Employment Act, commonly known as the Taylor Law. It will assist practitioners at all levels of experience by promoting a greater understanding of this aspect of public sector labor relations.

Impasse Resolution provides a detailed review of the statutory framework and relevant case law, making this a useful resource tool for those active in this field. It will also assist attorneys who represent union officers, public employees, governmental officials and interested members of the public in gaining a greater insight into labor relations.

Contents



AUTHOR
Philip L. Maier, Esq.
Brooklyn, NY

PRODUCT INFO AND PRICES

2008 • 124 pp., softbound
PN: 4122

NYSBA Members	**$30**
Non-members	$40

** Free shipping and handling within the continental U.S. The cost for shipping and handling outside the continental U.S. will be added to your order. Prices do not include applicable sales tax.

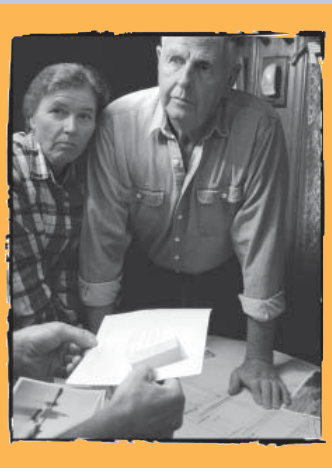
NEW YORK STATE BAR ASSOCIATION
DISPUTE RESOLUTION SECTION
One Elk Street, Albany, New York 12207-1002

ADDRESS SERVICE REQUESTED

NON PROFIT ORG.
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155

There are millions of reasons to do Pro Bono.

(Here are some.)



Each year in communities across New York State, indigent people face literally millions of civil legal matters without assistance. Women seek protection from an abusive spouse. Children are denied public benefits. Families lose their homes. All without benefit of legal counsel. They need your help.

If every attorney volunteered at least 20 hours a year and made a financial contribution to a legal aid or pro bono program, we could make a difference. Please give your time and share your talent.

DO THE PUBLIC GOOD
VOLUNTEER FOR PRO BONO

Call the New York State Bar Association today at **518-487-5640** or go to **www.nysba.org/probono** to learn about pro bono opportunities.