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Message from the Chair

The Hope of International Peace Mediation

Edna Sussman

By the time you read this hopefully some of the current international upheavals will be resolved. In addition to the many crises the world was facing, a political maelstrom has overtaken several Middle Eastern and African countries. I find myself thinking about the application of ADR to the world's struggles. Can the Middle Eastern and African countries employ negotiation processes to settle into a new political order that is equitable and long lasting? Can the tools of the ADR community be employed to coalesce differing political views and goals in order to achieve a peaceful and satisfactory resolution of the conflicts as has been achieved in other crises around the world?

The promise of mediation for the resolution of conflicts within and between states is not being ignored. Congress funds the United States Institute of Peace ("USIP"), an independent, nonpartisan, national institution established in 1984 which provides analysis, training and tools that prevent and end conflicts, promotes stability and professionalizes the field of peace building. As the USIP states "while conflict is part of the human condition, there are proven ways to prevent and manage violence and stabilize societies."

In just the last few months Qatar and United Nations representatives conducted intensive talks to end the long standing civil war in Darfur that have taken so many lives. Secretary of State Clinton visited Haiti in an effort to resolve the political crisis in the wake of the contested election results. Pakistan asked the U.S. to mediate the perpetual conflict with India over Kashmir. African Union representatives arrived in the Ivory Coast to resolve the standoff between the incumbent president and the winner of the last election. Saudi Arabia and Turkey tried to mediate the political crisis in Lebanon caused by Hezbollah's withdrawal from the unity government. The U.S. continued in its efforts to resolve the Israeli-Palestinian standoff. That "international peace mediation" is being employed in so many parts of the world demonstrates belief in the monumental potential power of ADR processes for resolving conflict.

In the face of all the strife in the world today, however, we must ask is international peace mediation working? Are we seeing enough success to urge that mediation be utilized in the numerous trouble spots around the globe? The answer appears to be yes; utilizing negotiation and mediation seems to have had significant success in stemming bloodshed and forging a peace among those engaged in state-based conflict. The Human Security Report Project 2007 reported that from the 1950s to the

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Inside

Message from the Co-Editor

Laura A. Kaster

Edna's Chairmanship has been jam packed with programs, meetings, and productive projects for the Dispute Resolution Section. The various DRS committees have been truly engaged in the ongoing transformation of New York's ADR practice, in promoting New York as a venue for advanced ADR services, and in creating within the DRS a community for all who are interested and want to be engaged with the development of ADR. In line with that commitment, this *New York Dispute Resolution Lawyer* brings you information from New York, the U.S. and around the globe, and from our members on ADR developments and thinking. We have set out reports from the Committees at the outset, with short descriptions of some of our meetings. At the end we have a detailed description of our 2011 annual meeting and photos (including some of you) from the 2010-2011 meetings. We will have a separate special issue later this year to provide you with the white papers and reports that have been the result of the Section's very productive efforts.

Ethics

This issue's Ethical Compass opinion column by Elayne Greenberg addresses multicultural knowledge as an ethical issue. Do the ethics rules require that you know about the varied perspectives that may be part and parcel of your client's cultural, communal, ethnic or national culture? What are the possible impacts?

We also have an opinion article by Cara Raich that begins a dialog with last issue's Ethical Compass article on the question of the mediator as scrivener or drafter of the settlement agreement in divorce mediation and the ABA Ethics opinion that was addressed in the Ethical Compass.

Arbitration

We start with an article examining the potential impact of the Supreme Court's decision in *Stolt-Nielsen* on consumer, employment, and franchise disputes and the response by some courts to strike the arbitration clause altogether. Another article focuses exclusively on the benefits of establishing an ADR program that includes arbitration. We explore the growth of investing in commercial claims in New York and the pertinent legal principles. We examine the continuing vitality of the doctrine of *functus officio* for setting the boundaries of arbitral power. Finally, we reflect on the use of dispositive motions in arbitration. In addition, for our readers' convenience, we offer a summary of the College of Commercial Arbitrators Protocols for all arbitration stakeholders. The extensive work undertaken by the CCA is aimed at rejuvenating commercial arbitration by restoring its role as an efficient and cost-effective method of dispute resolution and by providing specific best practices for achieving that end.

Mediation

Our mediation articles include a preview of the promise of brain science for mediators—will the new neuroscience provide clues for better solutions? Our second mediation article reflects on the use of proactive early intervention techniques to prevent the blossoming of differences into disputes. Finally, from the international world we have an article on Italy's new mandatory mediation law.

International Arbitration

We have a rich series of articles on a wide variety of international issues, including the possibility of using arbitration to resolve cross-border bankruptcy disputes for which there is now no adequate process, developments in transparency in investment treaty arbitration, and the division of authority between national courts and arbitrators on the question of who decides whether the parties have agreed to arbitrate. We also provide you with an article on new research tools for investment treaty arbitration. Our final article in the international arena is on the discovery and cross-examination challenges in international arbitration and it links directly to our book review on a book devoted to methodically examining cross-examination in international arbitration. Finally, we reprint here for your convenience the DR Section's new Guidelines for the Conduct of the Pre-hearing Phase of International Arbitrations.

Mixed ADR Processes

Mediation and Arbitration are, as our last issue noted, part of the spectrum of dispute resolution resources that thoughtful practitioners can apply in differing permutations. Our article on outsourcing notes the practicality of using a variety of ADR processes in that context.

Book Reviews

The books reviewed in this issue reinforce the breadth of our subject matter and range from negotiation in *Bargaining With The Devil: When to Negotiate, When to Fight,* by Robert Mnookin, to cross-examination techniques in *Take the Witness: Cross-Examination in International Arbitration* by Lawrence W. Newman and Ben H. Sheppard, Jr., Editors. We also review a mediation introduction and teach-

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1980s many more conflicts ended with one side prevailing by force than were resolved through negotiated settlements. But, remarkably, that pattern reversed in the 1990's and continued into the new millennium with three times as many state-based conflicts resolving by negotiated settlements than victories won by force. Not only has the trend continued into this new millennium but the negotiated settlements seem to be increasingly stable and long lasting.

So before any of us abandons hope and concludes that today's issues are just too intractable or that the conflicts have simmered for too long and are too deep-seated, we should consider the possibility that negotiated settlements can achieve the desired results. Our world leaders should remember the words of the great United Nations statesman Dag Hammarskjold, "Never look down to test the ground before taking your next step; only he who keeps his eye fixed on the far horizon will find his right road." Achieving a true government of the people attained through citizen engagement is the gold standard of our society. While the exact form of government or distribution of land, property and power that emerges from a negotiated settlement will vary with the individual history, topography, culture and people of nations, as in any mediation, self-determination is crucial because only if those who must live with the outcome buy into it can there be a lasting and harmonious long-term solution.

ADR Developments

A far cry from world peace, but the world of ADR is as active as ever. In the past year, new arbitration laws have been enacted in France, Hong Kong and Ireland (all of which we will report on in our fall issue) and modernizing amendments have been made to others, as in Australia. The EU Mediation Directive, as it comes into force, has led to the enactment of new laws in Italy (discussed in this issue), Greece and other countries. New institutional and ad hoc arbitration rules have been and are in the process of being drafted. Calls for an ethics code for counsel in international arbitration have been issued.

In the United States, in the summer of 2010 Congress enacted the Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. § 1028 (the "Dodd-Frank Act") and directed a newly formed Consumer Financial Protection Bureau to conduct a study and provide a report to Congress on the use of agreements providing for arbitration with consumers in connection with consumer financial products or services; the Act further authorized the Director of the Bureau to prohibit or impose conditions on arbitration agreements if it would be in the public interest and for the protection of consumers and consistent with the study performed. The Dodd-Frank Act also authorized the Securities and Exchange Commission to conduct a rulemaking to reaffirm or prohibit, or impose or not impose conditions or limitations on the use of pre-dispute arbitration agreements with any customers or clients of any broker, dealer, or municipal securities dealer or investment adviser, that arises under the securities laws or the rules of a self-regulatory organization, if the Commission finds it to be in the public interest and for the protection of investors. How these governmental agencies will discharge these Congressional directives remains to be seen.

Following several significant arbitration decisions last term, the Supreme Court continues to have a strong interest in the subject and has granted certiorari in several additional arbitration cases this term; the court's decisions this year may shed light on much debated issues relating to consumer class actions and arbitration. The new Uniform Collaborative Law Act has been enacted in several states, and work on the Uniform Mediation Act and the Revised Uniform Arbitration Act continues around the country. Substantial progress has been made on a new Restatement on U.S. Law of International Commercial Arbitration.

Closer to home, the NYSBA and our DR Section have been busy. Participating with others, the DR Section has been in the thick of the project to promote New York and help it maintain its position as a leading venue for arbitrations. White papers have been prepared and distributed explaining the benefits of mediation and arbitration as they pertain specifically to many substantive areas of the law. A special issue of this publication will bring those papers to you. A very successful effort to partner with others has resulted in several joint programs with other Sections and organizations and expanded the Section's ability to inform others about ADR. Our committees have met to discuss important developments and have issued several useful new reports.

We invite you to read the comprehensive review of the work of our committees contained in this issue, to join a committee and get involved. We welcome your participation in our existing projects and your ideas for new activities for the Section.

Edna Sussman

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

ing manual, *The Middle Voice* by Joseph B. Stulberg and Lela P. Love.

Case Notes

In this issue, we examine the power of the arbitrator to order pre-hearing expert depositions as discussed in an arbitral ruling. We have a case note that addresses whether the court that has ordered arbitration may sanction conduct within the arbitration as explored in the Fifth Circuit's decision in *Positive Software Solutions, Inc. v. New Century Mortgage Corp.* Closer to home we discuss a New York Court of Appeals decision in *Brady v. Williams Capital Grp.* that elaborates on the Supreme Court's ruling in *Green Tree Fin. Corp.-Ala. v. Randolph,* giving drafters and courts guidance on how to determine whether cost-sharing provisions are fatal to the arbitration agreement. *In re Mary Lynn Mabray*, is a Texas court ruling that cooperative law agreement between divorcing spouses was not foreclosed by the Texas version of the Uniform Collaborative Law Act, which takes on significance as more states, including New York, consider the uniform law. Our final case note is on *Nachmani v. By Design,* in which a New York Appellate Court ruling held that language providing that "…A hearing shall be held by the arbitrator or arbitrators in the City of New York, and a decision of the matter so submitted shall be rendered promptly in accordance with the commercial rules of the [AAA]…" did not call for administration by the American Arbitration Association.

Section Meetings 2010-2011

For those of you who could not attend and for those who would like to reminisce, we provide a report of the sessions at our annual meeting.

Photos

We hope to communicate the liveliness and interest you displayed at our various meetings in these snapshots of events.

Laura A. Kaster

Dispute Resolution Section News

Annual Meeting

The Section's annual meeting, chaired by Sherman Kahn and Jim Rhodes, was held on January 27, 2011 at the New York Hilton. Despite the huge snowstorm that hit that morning, over 110 committed members attended the meeting. Sessions on mediation, international arbitration and settlement in arbitration captured the audience's attention. A well-attended networking lunch was hosted at the offices of Morrison & Foerster around the corner, followed by committee meetings and an executive committee meeting. All reported that it was a wonderful event that solidified bonds among members and expanded their knowledge base. A comprehensive report on each of the programs and pictures of the event appear on p. 90 in this issue.

Arbitration Committee

On November 6, 2010, the NYSBA's House of Delegates adopted the "New York State Bar Association Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of International Arbitrations" ("Guidelines"). The purpose of the Guidelines is to address the concern that foreign parties and practitioners are often reluctant to arbitrate in New York for fear they will be subjected to U.S. style discovery and procedures which one finds when litigating in a U.S. court. The Guidelines provide assurance that international arbitrations in New York are conducted in accordance with internationally accepted practices.

Specifically, the Guidelines provide, among other things, in international arbitrations, documents on which parties intend to rely are exchanged. However, beyond that exchange, "there is a strong presumption against pre-hearing disclosure which in any way approaches the scope of discovery which one might expect in a case which is litigated in a U.S. Court; "if further disclosure is permitted, there will be realistic, significant limits on document discovery and e-discovery and the "prevailing practice is that depositions are not permitted."

The Guidelines have already been most favorably received, and it is very much hoped and expected that they will greatly increase the selection of New York as a site for international arbitration. The Guidelines are included on p. 62 in this issue.

Mediation Committee

The results of the Mediation Committee's survey of more than 400 New York litigators' views on mediation have now been tabulated and the resulting report has been adopted by the Dispute Resolution Section Executive Committee at its meeting on February 17, 2011. Overall, responders had positive views of mediation, though they had particular likes and dislikes. The factor that was deemed most important was the quality of the mediator. Disliked were passivity, dismissal of concerns, and failure to follow up. Among favorable qualities cited were subject-matter knowledge, human skills, preparation, maintenance of confidentiality, and dealing with factual and legal merits of the dispute.

Responders said they liked mediation because it resolved disputes, saved money, and encouraged the parties to have more realistic expectations. Notably, 80% of the respondents said mediation had benefits even if it did not result in settlement. Among the dislikes: the lack of a formal structure, tendency in some cases to "split the baby," pressure to give dollars to "undeserving" plaintiffs, and participation that is not in good faith. The survey subcommittee headed by Rick Weil will make recommendations about wider distribution of the survey and follow-up projects. The report will be published in the next issue of this publication.

Collaborative Law Committee

The National Conference of Commissioners on Uniform State Laws ("NCCUSL") recently enacted the Uniform Collaborative Law Act ("UCLA") to standardize the increasingly utilized form of dispute resolution known as Collaborative Law. The Collaborative Law and Legislative Committees of the Dispute Resolution Section were jointly tasked with evaluating its merits and, after considerable study, issued a joint Report approving the UCLA. That Report was approved and adopted at the January 27, 2011 annual meeting of the Dispute Resolution Section.

Collaborative Law employs cooperative negotiations by counsel and parties to achieve settlement of disputes in the most mutually beneficial manner possible.

The Section's Report concludes that Collaborative Law is potentially a useful process for people in certain kinds of legal disputes where maintaining an ongoing good relationship can be important and that the UCLA is a useful vehicle for making Collaborative Law practice more uniform from state to state. It further recommended that the NYSBA delegates to the ABA House of Delegates support resolution for endorsement of the UCLA at the next upcoming meeting of that body. The resolution was withdrawn before a vote at the ABA meeting to be reintroduced at a later date following further refinement. The Section's Report will be published in the next issue of this publication.

Fall Meeting—Passing the "Baton"

The Fall Meeting, chaired by Charlie Moxley and Bill Brown, was held on October 12, 2010 at Fordham Law School. It was co-sponsored by and organized in cooperation with the Entertainment, Arts and Sports Law Section. The program content was developed to maximize audience participation and provide rich educational content. Mock mediations and arbitrations were utilized to illustrate best practices for addressing major issues that typically arise in mediations and arbitrations, from the perspectives of mediators, arbitrators and counsel. The fact patterns were drawn for the entertainment and arts area and were, accordingly, especially interesting. The program was a great success with approximately 100 people in attendance. Pictures of the event are included above and below.

The Ethical Compass: It's A Small World After All:[1] Cultural Competence for Advocates in Dispute Resolution Processes

By Elayne E. Greenberg

Cultural competence has become an ethical mandate for all neutrals and advocates who use dispute resolution. Even though conflict is a universal phenomenon, our expression and choice of how to resolve conflict is culture specific. As our world becomes increasingly smaller, and flatter,[2] and our law practices become globalized, ethically responsible attorneys are recalibrating their ethical compass and replacing their ethnocentric lens with a culturally relative lens. Yes, even if you are a New York attorney who disavows any international practice and remains steadfastly tethered to the N.Y. Rules of Professional Conduct, you still need to be culturally competent. After all, one out of three New Yorkers is foreign-born,[3] increasing the likelihood that your client-base will include clients from other cultures. And, even if your clients are not from a different culture, it is likely that your commercial clients will be engaging in our globalized business world with individuals and corporations from other cultures, extending your practice to global markets. Let's not forget that as the attorney, you bring your own cultural values to the table.[4]

Culture shapes our values, our beliefs, our communication, and our responses to conflict. Attorneys must understand how a client's culture influences the dynamics of the attorney-client relationship[5] and conflict resolution choices[6] if we are to provide competent legal representation and fulfill our ethical obligations in attorney-client communication,[7] allocation of attorney-client responsibility,[8] and attorney client counseling.[9] This is a two part series. In Part One, I will address cultural competence as an ethical mandate. Specifically, I will address how attorneys should consider a client's culture as one determining factor when communicating, counseling and making strategic decisions about dispute resolution. Then, in Part Two which will appear in a subsequent edition of this journal, I will discuss how international ethical practice and codes interface with and challenge the N.Y. Rules of Professional Conduct.

Clients may belong to many cultures and subcultures that impact how they interpret conflict, communicate about the conflict, relate to their lawyers, and engage in conflict resolution processes. It is likely that your client concomitantly belongs to several cultures, including: his or her country of birth, gender, religion, the community of residence, professional or business community, and any other affiliations that have their own distinct culture. One challenging task is to figure out the culture or cultures that influence your client. Moreover, your client may have different cultures of influence in the different contexts of the attorney/client dynamics.

Adding to the challenge of understanding our clients' culture, lawyers interpret their clients' behavior through their own cultural lens.[10] After all, lawyers, too, are members of different cultures. According to Milton J. Bennett, a noted scholar on culture, individuals will interpret the different cultural behavior of others based on where the interpreter himself is in his own development of intercultural sensitivity.[11] Bennett offers that an individual's evolution of cultural tolerance evolves on a spectrum from ethnocentric to ethnorelative stages. Beginning with the ethnocentric stage of denial, continuing on to the stages of defense, minimization, acceptance, and adaptation, the most interculturally sensitive finally reach the ethnorelative stage of integration.[12] In the stage of integration, the individual is able to respectfully interpret the meaning of differences among cultures, suspending judgment of whether the difference is good or bad.[13]

In his "Wheel of Culture Map," Chris Moore illustrates how the dynamics of culture influence the problem-solving behavior of all participants.[14] According to Moore, in any negotiations, there is a dynamic interplay between culturally specific attitudes and behavior and the broader social context in which the negotiation takes place.[15] Culturally specific attitudes that are influenced by a culture's broader environment and social context include: *views of relationship, cooperation; competition and conflict; communication's basic approach to negotiation; use of third parties; roles and participation; time and space; and outcomes.* These culturally specific attitudes are shaped, in part, by *the history, the natural environment* and *social structures* of a culture that comprise the broader environment and social context if any given culture. Additionally, the broader environment and social context that influence culture specific attitudes and problem-solving behavior also include: a culture's *needs and interests; sources and forms of power; and situations, problems and issues*. Thus, in Moore's framework, we see how an understanding of a given culture's broader environment and social context may influence aspects of negotiating behavior.

John Barkai offers another analytical framework[16] to help discern your client's cultural influences. Barkai has synthesized the work of cross-cultural scholars such as Hall and Hofstede and identifies cultural dimensions that

practitioners might consider when communicating with clients: *high or low context; power-distance; individual vs. collectivism; masculinity vs. femininity; ambiguity tolerance; short-term vs. long-term orientation.*

Is your client communicating from a high context or low context culture?

People from low context cultures such as the U.S., Northern and Western Europe, Canada and Australia often communicate in a direct and explicit manner, saying what they mean.[17] Consequently, the listener is less likely to listen beyond the spoken words to understand what is actually being communicated. In direct contrast, communication with individuals from high context cultures such as those from China, India, Mexico and Japan requires the attorney to listen beyond the spoken word and understand the non-verbal importance of history, symbolism, group participation, principles and hierarchy.[18] Therefore, when your client says, "yes" or "no," the utterance may mean what is actually said or may mean something else, in part, determined by whether your client is from a high or low context culture.

How are hierarchical relationships or power valued in that culture?

High distance power cultures like Latin and South America, Arab countries and the Philippines conduct themselves in a way that respects leadership and hierarchy in decision making.[19] Low distance power cultures such as the U.S., Great Britain, Australia and Israel are about mutuality and equality.[20] Your client's perception of hierarchical relationships may influence the lawyer-client relationship, shaping how the client treats you and how they would like to be treated.

Does your client place greater value on the self or the group?

Individuals from an individualistic culture like the U.S. are likely to place greater value on the individual when contemplating options to resolve conflict.[21] Individuals belonging to collectivist societies tend to place greater value on options that will benefit their group or society, rather than the individual. This cultural dimension may influence who are the appropriate people to participate in the conflict resolution forum and which remedies might be acceptable.

Is your client from a culture that values masculinity or femininity?

For some of you, the terms masculinity and femininity may evoke other meanings beyond the intended distinction in this context between assertiveness and cooperativeness.[22] Masculine cultures, such as those in Japan, Germany, the United States, Mexico and Arab countries, reinforce qualities such as competition, achievement, power, and accumulation of wealth.[23] In direct contrast, feminine cultures, such as those found in Scandinavian countries, Thailand and South Korea, characteristically focus more on cooperation, relationships and security.[24] Again, this cultural dimension might shape the choice of conflict resolution forum, the way your client engages in conflict resolution and the favored options to be considered.

Does your client come from a culture that favors specificity or ambiguity?

Cultures have different tolerance for structure and ambiguity. High uncertainty avoidance cultures such as Japan, Spain, Greece, South Korea and Portugal all have rule-oriented cultures that respect laws, rules and control.[25] Characteristic of such cultures that favor specificity and avoid ambiguity, people prefer structure and predictable ritual in dispute resolution processes.[26] In fact, unfamiliar behavior is likely to breed mistrust.[27] Cultures such as those in India, the U.S., China and Denmark are more comfortable with engaging in free-flowing exchange without adhering to clearly defined rules.[28] Astute attorneys will understand that dispute resolution processes such as negotiation or mediation should be tailored to accommodate your client's preference for degree of structure.

Is your client from a culture that has a long-term or short-term orientation?

Cultures with long-term orientation, such as many Asian countries, revere tradition, a strong work ethic, and lifelong personal networks.[29] Such cultures are buoyed by the belief that if you sacrifice now, you will be rewarded in the future.[30] On the other end of the spectrum, cultures with short-term orientation, like many Western countries, believe their efforts should produce immediate results.[31] More rapid change is sought, not rules or traditions which would stall progress.[32] Expectedly, those from long-term and short-term cultures may have antagonistic interactions, with short-term countries viewing those from long-term cultures as stodgy and old world, while those from long-term cultures viewing those from short-term cultures as irresponsible.[33]

Integrating these discrete cultural dimensions into our legal practice, we appreciate that our client's culture and our own culture have practical ethical implications. For example, attorneys who are complying with Rule 1.2(a), the Scope of Representation and Allocation of Authority Between Client and Lawyer,[34] may find that the objectives and means of client representation may also be culturally influenced by a client's preference for relationships that are egalitarian or hierarchial; allegiance to outcomes that favor the interests of the individual or the group; conduct that is predominantly assertive or cooperative; and outcomes that promote immediate or long term gains.

In another example, Rule 1.4 B,[35] addressing attorney/client communication, implicitly requires attorneys to discern the cultural nuances of their clients' communications to fully understand a client's objectives and to ensure that a client has given informed consent to their representa-

tion choices. One critical determinant in ensuring effective communication is whether your client is from a high context or low context culture. Moreover, when complying with Rule 1.4B(a)(2),[36] which requires attorneys to consult with their clients about the means by which the client objectives are to be accomplished, culturally sensitive attorneys might also want to discuss which are their client's preferred dispute resolution forums given their client's cultural preferences for structure or ambiguity.

By way of a third illustration, when an attorney is acting as advisor according to Rule 2.1,[37] the attorney must also be cognizant of how not only of the law, but how the moral, economic, social, psychological and political factors are all culturally infused considerations. The history and other value-laden cultural determinants might shape the advice an attorney gives the client.

Conclusion

Cultural heterogeneity is a practice reality. In order to comport with the true spirit and intent of the ethical mandates, advocates must consider how a client's culture, as well that of the advocate, might shape the attorney-client relationship. Culture is more than one item to consider on the attorney to-do-list. Rather, culturally sensitive lawyers need to assess on an ongoing basis how cultural influences are impacting the ever-changing dynamics of the attorney/ client relationship. As our world gets increasingly smaller, cultural competency has become an ethical requisite for attorneys who use dispute resolutions.

Endnotes

1. Richard M. Sherman and Robert M. Sherman, It's A Small World (After All) (1964).
2. *See generally* Thomas L. Friedman, The World is Flat: A Brief History of the Twenty-First Century (Farrar, Straus and Giroux 2005).
3. *The Newest New Yorkers 2000*, New York City Department of City Planning Population Division (charting the distribution population by nativity for the year 2000).
4. *See* Milton J. Bennett, *A Developmental Approach to Training for Intercultural Sensitivity*, 10 Int'l J. Intercultural Rel. 179 (1986).
5. *See, e.g.,* Model Rules of Prof'l Conduct R. 1.4 (1983) (requiring that lawyers explain a matter to the client in such a way that the client understands and in a way that permits the client to make informed decisions regarding the representation).
6. *See id.* (requiring the lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished").
7. *See id.* (discussing the lawyer's ethical obligations regarding client communications).
8. *See id.*
9. *See* Model Rules of Prof'l Conduct R. 2.1 (1983) (discussing the lawyer's ethical obligations regarding her role as counselor).
10. *See* Bennett, *supra* note 4.
11. *Id*. at 182.
12. *Id.*
13. *See id.* at 186
14. Chris Moore and Peter Woodrow, Handbook of Global and Multicultural Negotiation, p. 23 (2010).
15. *See id.*
16. *See* John Barkai, *Cultural Dimension Interests, the Dance of Negotiation, and Weather Forecasting: A Perspective on Cross-Cultural Negotiation and Dispute Resolution*, 8 Pepp. Disp. Resol. L.J. 403 (2007–2008).
17. *See id.* at 408.
18. *See id.* at 408–09.
19. *See id.* at 412.
20. *See id.*
21. *See id.* at 413.
22. *See id.* at 415.
23. *See id.* at 415–16.
24. *See id.*
25. *See id.* at 417.
26. *See id.*
27. *See id.*
28. *See id.*
29. *See id.* at 418.
30. *Id.*
31. *See id.* at 418–19.
32. *See id.*
33. *See id.* at 419.
34. *See* Model Rules of Prof'l Conduct R. 1.2(a) (1983) ("Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the cient as to the means by which they are pursued. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify."); *see also* Model Rules of Prof'l Conduct R. 1.2(b) (1983) ("A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."); *see also* Model Rules of Prof'l Conduct R. 1.2(c) (1983) ("A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent."); *see also* Model Rules of Prof'l Conduct R. 1.2(d) (1983) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.").
35. *See* Model Rules of Prof'l Conduct R. 1.4(b) (1983) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").
36. *See* Model Rules of Prof'l Conduct R. 1.4(a)(2) (1983) ("A lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished.").
37. *See* Model Rules of Prof'l Conduct R. 2.1 (1983) ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, psychological and political factors that may be relevant to the client's situation.").

Elayne E. Greenberg is Director of the Hugh L. Carey Center at St. John's University School of Law and co-chair of the New York State Bar Association's Dispute Resolution Section Committee on Ethics. **A special thank you to Joshua Samples (2011) and Stephanie Y. Yeh (2012) for assistance in the formatting of this article.**

Draft Dodging? An Ethical Analysis of Mediator-Attorney Drafting

By Cara M. Raich

In the Fall edition of this *Journal*, following the release of an ABA ethics opinion on the subject, Professor Elayne Greenberg's Ethical Compass column raised the important question "is it permissible for mediator-lawyers to draft Separation Agreements for their unrepresented clients?"[1] This article will continue the dialogue that Professor Greenberg began.

There are at least three pertinent questions: (1) Is it permissible for mediator-lawyers to draft separation agreements? (2) If it is permissible, what are best practices for mediator-lawyers engaged in drafting? and (3) Are parties competent to ignore the recommendation to seek the advice and counsel of a consulting attorney?

To explore these questions fully, each needs to be examined from two perspectives, through the mediator's lens and through the lawyer's lens. The mediator's perspective requires understanding the applicable sections of the Model Standards of Family and Divorce Mediators, ("Model Standards") which have been adopted by most if not all the major family and divorce mediation organizations. The mediator-lawyer's perspective must include the ethics guidelines and case law that govern standards of practice for attorneys because mediators who are lawyers are subject to these rules as well.

Because both sets of ethics apply to mediator-lawyers concurrently, each must be examined to answer these questions thoughtfully and completely.

Before beginning this analysis, it is important to acknowledge that in a perfect world all parties would have consulting attorneys. Many of the concerns raised by Professor Greenberg are resolved when there are attorneys supporting each of the parties, advising them and reviewing—or drafting—the final divorce agreement. Further, the Model Standards require parties to be informed of the benefits of consulting attorneys.[2]

The presence of consulting attorneys is valuable and the preferred standard because their presence ensures the parties are fully informed of the law from their own perspective, they are protected from future challenges to the agreement and all of the conflicts of interest that Professor Greenberg raises as concerns are no longer present.

That being said, the question here, and the question posed by the ABA Ethics Committee opinion on which Professor Greenberg opined, is whether mediator lawyers are *permitted* to draft separation agreements for parties who choose to waive the right to separate counsel and elect instead to proceed solely with a mediator-lawyer.

Question 1: Is It Legally and Ethically Permissible for Mediator-Lawyers to Draft Separation Agreements?

Mediation Ethics

Many experienced mediators will act as a mediator and will draft the resulting agreement for parties who waive consulting attorneys, believing that drafting is an integral part, a continuation, of the mediative process. Because the mediator-lawyer has been present throughout, the mediator has the best knowledge of the terms, tone, motivations and context of the agreement made by the parties. The Model Standards and the ABA Section of the Dispute Resolution Committee on Mediator Ethical Guidance both support this practice.

First, Standard VI, Par. E, of the Model Standards states that "with the agreement of the participants, the mediator may document the participants' resolution of their dispute. The mediator should inform the participants that any agreement should be reviewed by an independent attorney **before it is signed**." (Emphasis added.)

This section apparently refers to a legal agreement that has been drafted by the mediator and that it will be signed. It does not refer only to a Memorandum of Understanding ("MOU"), which is a summary of issues mediated, since a "resolution," as contemplated in the Model Standards, can be interpreted to include a Separation Agreement, and that document, once signed, is the resolution of a divorce action.

Furthermore, in June of 2010, the ABA Section of the Dispute Resolution Committee on Mediator Ethical Guidance issued Opinion SODR-2010-1 ("Opinion").[3] This Opinion, which prompted Professor Greenberg's article, contemplated the question of the permissibility of mediator-lawyers drafting agreements. The Opinion provides that the Model Standards contemplate and permit the practice, so long as certain ethical considerations are met. The Opinion states, "the Committee sees no ethical impediment under the Model Standards to the mediator performing a drafting function that he or she is competent to perform by experience or training."

Legal Ethics/Case Law

In January of 2001, the New York State Bar Association Committee on Professional Ethics addressed the question "May an attorney engaged in matrimonial mediation draft and file a separation agreement and divorce papers that incorporate terms agreed upon by the parties in the

course of the mediation?" The question was answered in the affirmative by Opinion 736.[4] Opinion 736 confirms that mediators may draft agreements (and actually file the divorce papers as well) subject to certain important restrictions.

Opinion 736 examined the problem of mediator drafting as if it presented a problem of dual representation by a single lawyer, rather than a neutral provider of a legal service. Even from this perspective, the Committee provides: "in short, under the disinterested lawyer test of DR 5-105(C),[5] the lawyer may not represent both spouses unless the lawyer objectively concludes that, in the particular case, the parties are firmly committed to the terms arrived at in mediation, the terms are faithful to both spouses' objectives and consistent with their legal rights, there are no remaining points of contention, and the lawyer can competently fashion the settlement agreement and divorce documents.…"[6] In other words, a divorce mediator may draft a Separation Agreement for parties subject to these express conditions (the issues between the parties must be specifically and completely resolved).

Another relevant ethics provision applies to any lawyer acting as a third party neutral, including mediator-attorneys. New York Rules of Professional Conduct Rule 2.4[7] (Rule 2.4) defines what "third party neutral" means and states: "Service as a third party neutral may include service as an arbitrator, a mediator, or in such other capacity as will enable the lawyer to assist the parties to **resolve** the matter." (Emphasis added.) Rule 2.4 also instructs attorneys acting as third party neutrals that they must inform, and ensure their clients understand, that the lawyer is not representing them individually.

Professor Greenberg suggests that implicit in Rule 2.4 is a third-party neutral's obligation to refrain from conduct that might be misconstrued to be lawyering, such as giving "legal advice, providing legal representation and legal drafting." While it is clear that the rule prohibits a third party neutral lawyer from representing or advising *one* of the parties, it is not clear at all that the rule prohibits disseminating neutral legal information in the mediation or legal drafting for both parties once they have agreed to such an arrangement.

In fact, the language that permits the neutral lawyer to act in such "other capacity as will enable the lawyer to assist the parties to resolve the matter" implies that drafting is permissible because the resolution of a divorce action is a Separation Agreement. A third party neutral acting in the context of a divorce mediation cannot assist the parties to completely resolve their dispute without discussing some legal issues in the context of the mediation itself and without memorializing the parties' intentions in the document that represents their agreements, the Separation Agreement.

The question that merits further consideration is the definition of representation. Opinion 736 recognizes that the neutral legal service provider "does not 'represent' either party as a client for purposes of the conflict-of-interest rules and other rules governing the lawyer-client relationship." This recognition applies to matrimonial and family mediation by the express terms of Opinion 736. However, the Opinion reasons that there is a transformation in roles at the point in time at which the Separation Agreement and divorce papers must be filed. At this point, the Opinion states that the lawyer neutral is "representing two clients who expect to become facial adversaries in a matrimonial litigation, and the representation would be subject to DR 5-105(A) and (C), which address the joint representation of clients with differing interests." It is, perhaps, this characterization that causes a logical problem—why is the neutral no longer a "neutral legal service provider?" Presumably if all matters between the parties have been resolved and an agreement was drafted, the parties do not expect to become "facial adversaries" but rather expect to file an uncontested divorce.

Case Law

In *Levine v. Levine*[8] New York's highest court discussed the propriety of joint representation. In that case, the wife brought an action to set aside a separation agreement as inequitable and unconscionable. The attorney who drafted the agreement had been an acquaintance of the husband and wife for a number of years and agreed to draft it after the parties had reached an agreement on the terms. The trial court found that the attorney remained neutral throughout his involvement with the parties. In its unanimous decision, the Court of Appeals stated "while the potential conflict of interest inherent in such joint representation suggests that the husband and wife should retain separate counsel, the parties have an **absolute right** to be represented by the same attorney provided there has been full disclosure between the parties, not only of all relevant facts but also of their contextual significance, and there has been an absence of inequitable conduct or other infirmity which might vitiate the execution of the agreement." (Emphasis added.)

In other words, in New York, divorcing couples have the right to elect to use one divorce representative provided they have entered into the relationship with informed consent. It cannot be inferred from *Levine* that the Court of Appeals meant "joint representation" in a divorce proceeding is joint representation in reaching agreement but only up to the drafting of the Separation Agreement.

In permitting the lawyer to act as a neutral and to mediate divorces, the ethics committees and the Courts have entrusted the mediator-lawyer with getting informed consent to help the parties address, and possibly resolve, the matters between them. It is clear the mediator-lawyer must meet the *Levine* requirements to be neutral and honest in advising the parties regarding the choice they are making to hire their mediator-lawyer to draft their Separation Agreement and also to ensure that as the drafter,

the mediator-lawyer has met the disinterested lawyer test. Once done, however, it is not clear why drafting the agreement should be treated differently than helping parties reach the terms of the agreement in mediation.

Together, the Model Standards, legal ethics, and case law plainly permit a mediator-attorney to draft Separation Agreements.

Professor Greenberg also uses for support of her argument that drafting should be avoided by referring to particular practice in New York that should be corrected. Professor Greenberg comments on mediator-lawyers creating a "fiction in which they draft the agreement and pretend to represent one party, while the other party is *pro se*. Wink! Wink!"[9]

This comment refers to the practice connected with the filing of divorce petitions in court to which Separation Agreements are appended. Parties are asked to sign a waiver stating that the mediator-lawyer, only for the purposes of *filing* the paperwork, is acting as a representative of one of the parties, the plaintiff. But the waiver makes it clear that the mediator-lawyer was not acting as anyone's specific representative during the course of the mediation or during the course of drafting the Separation Agreement. Further, the waiver is ethically permissible. Rule 1.2 of the New York Rules of Professional Conduct states: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel."

This practice is not necessary; it undermines the good work that mediator-attorneys do for families. The forms and the law still view divorce cases, even uncontested ones, as adversarial matters that must be filed by a "plaintiff." There is no box on the form for one who prepares such documents to file them as a "neutral" or "mediator-lawyer." The lack of this option sullies a process that was conducted with thought and care at the very last stage. It flies directly in the face of the Court of Appeals ruling in *Levine*.

To properly honor both the letter and spirit of the relevant case law, ethics and best practices in the realm of divorce mediation, mediator-lawyers should have the ability to submit uncontested divorce papers as neutral representatives of the parties. The forms and practice should change. But because the forms are inconsistent with the law and the ethics rules, they do not provide a justification for denying consenting divorcing adults the ability to select a process that they, by all other measures, have a right to choose.

Question Two: What Are Best Practices for Mediator-Lawyers Engaged in Drafting?

Given the ethics opinions and case law, the question is not *if* the mediator-lawyer can draft the parties' agreement, but rather, *how* can s/he do it responsibly, ethically and competently?

Professor Greenberg's article raises a valid concern that terms could be added to a Separation Agreement when transmuting an MOU into the form of a legally binding document or contract. Are there terms that are routinely put into a legal agreement which are not explicitly discussed during divorce mediation sessions? Are there drafting choices that implicate the final resolution but are not apparent to the parties? There are two ways to address this concern; both intrinsic to mediation best practices.

The first is competence. It is clear that before a mediator-lawyer puts a pen to paper to draft a separation agreement, s/he must be competent to do so. Standard II of the Model Standards states "A family mediator **shall** be qualified by education and training to undertake the mediation". (Emphasis added.) Further, the parties must be in total and complete agreement on all matters and the lawyer mediator must also comply with Rule 1.7[10] by obtaining a written waiver confirming the parties' understanding of the role of the mediator-lawyer as drafter.

Drafting these agreements is complex and nuanced. It cannot be overstated that mediator-lawyers who do not have the requisite drafting skills and legal experience in family law should not be offering this service. Lawyers and mediators have a positive obligation to be knowledgeable about the law and mediative skills; work that falls under the auspices of Rules 1.7 and 2.4 is clearly not exempt from these requirements. A task is not impossible because it is challenging and requires conscious attention; drafting these agreements included.

The second way to address the concerns expressed in Professor Greenberg's article is that all terms of the agreement, whether "boiler plate" or "legalese"; whether the choice of a "should" or a "shall" or a "must" or a "may"; the number of days in a default provision, etc. *must* be reviewed by, understood by, and agreed to by each party to a mediation. If there is a decision to be made, mediators must allow the parties to make it. Parties must be made aware of the implications of each section and clause of their Separation Agreement. This is true whether the parties have separate counsel or not, but the practice takes on a greater significance if the parties are not seeking the guidance of separate consulting attorneys.

Question Three: Are Clients Competent to Waive Their Right to Seek Counsel from a Consulting Attorney?

At the core of Professor Greenberg's concern is a question of judgment; just because the parties are allowed to select their mediator-lawyer for drafting purposes, should those of us concerned with best practices comply? Professor Greenberg's position is that we should not, the conflict of interest is too great, the danger is too high and

the potential damage to mediation as a profession is too profound.

At base, Professor Greenberg does not believe that parties who are in the midst of the trauma of divorce are competent to waive their right to separate counsel. Given that self-determination is a foundation of mediation and is at the root of the Court's holding in *Levine,* the mediation profession must allow parties to make decisions that feel right to them. Certainly, from the perspective of the Model Standards, parties must be told of the benefits of consulting attorneys, but parties are not required to hire them to work in the mediative process.

From a legal ethics perspective, so long as the potential conflict of interest is waived in writing, parties are permitted to hire the attorney of their choosing. In addition to *Levine*, there are many different cases in which the Court of Appeals clearly suggests that consenting adults may choose to hire the same attorney for drafting agreements.[11]

Divorcing couples have the right to select one representative in a divorce mediation context and Rules 1.7 and 2.4 explicitly address how the parties must waive the right to separate advisors. The parties' right to autonomy includes the right to craft their own process. If we respect that right to choose as a profession, we cannot mandate the use of additional representatives in the face of informed consent.

If we ignore the parties' ability and right to make this decision, we are mandating increased costs and lack of autonomy. In essence, by disallowing mediators to draft agreements we'd be requiring parties to pay twice for drafting, as the mediator would have to draft an MOU and lawyers would have to transmute it into a Separation Agreement.

If we believe that the mediative process belongs to the parties, and that they are the best experts in their own lives, it is paternalistic to take the position that parties cannot understand what they are giving up by electing to have one person mediate their divorce and draft the resulting Separation Agreement.

Furthermore, if we believe that parties are not competent to make a decision about consulting attorneys, how are they then competent to make decisions about parenting and finances? Surely these decisions are just as significant and parties make these decisions competently while in conflict.

Is it really a more ethical position for the profession to take to eliminate choice, to suggest the parties are incapable of understanding their own interests? Can we have a professional rule that makes it impossible for parties to avail themselves of rights provided in ethics opinions, case law (and the Constitution)?

Whether or not to provide the service of drafting Separation Agreements for unrepresented parties is ultimately up to individual practitioners. Professor Greenberg is correct that drafting for unrepresented parties is a complex question that requires thoughtful attention. The choice to do so should be considered carefully, as described here. But the final analysis should include a careful assessment of party self-determination and the profession's responsibility to respect the foundations upon which it is built.

Endnotes

1. Elayne E. Greenberg, Two for the Price of One: The Ethical Issues for Lawyer-Mediators Who Consider Drafting Agreements, 3 NY Dispute Resolution Lawyer 8 (Fall 2010).
2. Model Standards, §§ III A. 4 and VI Part E.
3. See ABA Dispute Resolution Committee on Mediator Ethical Guidance, Formal Op. SODR-2010-1 (2010).
4. NY Ethics Opinion No. 736 (1/3/01).
5. Meeting the disinterested lawyer test requires determining that the parties are firmly committed to the terms; that the terms are faithful to both spouses' objectives and consistent with their legal rights; confirming the mediator-lawyer's own neutrality and ensuring there is informed consent for the process by the parties.
6. In 2009, § 1.7 of the Rules of Professional Conduct replaced the previous Disciplinary Rules of the Code of Professional Responsibility. Rule 1.7 is substantially similar to DR 5-105 except for a new requirement that the clients' informed consent of the conflict of interest shall be confirmed in writing.
7. See N.Y. Rules of Professional Conduct (2009).
8. 56 N.Y.2d 42, 436 N.E.2d 476 (1982).
9. See Greenberg, 3 NY Dispute Resolution Lawyer at 10.
10. See N.Y. Rules of Professional Conduct, Rule 1.7.
11. See Perry v. Perry, 64 AD2d 625, 406 NYS2d 551 (2 Dept., 1978) and Freimour v. Freimour, 78 AD2d 869, 433 NYS2d 219 (2 Dept. 1980) (use of a single attorney to draft an agreement does not serve as proof, in and of itself, of overreaching sufficient to rescind an agreement); see also Matter of Abrams, 62 NY2d 183 (1984), (although an individual possesses no absolute right to representation by an attorney of his choice…any restriction imposed on that right would be carefully scrutinized…an individual's right to select an attorney who he believes is most capable of providing competent representation implicates both the First Amendment guarantees of freedom of association…and the Sixth Amendment right to counsel...and will not yield unless confronted with some overriding competing public interest).

Cara M. Raich is President of the Family and Divorce Mediation Council of Greater New York and she is also a mediator-lawyer in private practice. She can be reached at cararaich@yahoo.com.

Will *Stolt-Nielsen* Push Consumer, Employment and Franchise Disputes Back Into the Courts?

By Lea Haber Kuck and Gregory A. Litt

Author's Note: *As this publication went to press, the Supreme Court issued its decision in* AT&T Mobility LLC v. Concepcion*, No. 09-893, 563 U.S. __ (Apr. 29, 2011). In the decision, the Court addressed the question raised by this article. For more information on the decision, see the postscript on page 18.*

While the Supreme Court's decision last term in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*[1] has been widely heralded as a death knell for class arbitration, recent decisions indicate that its ramifications could in fact be felt well beyond the issue of class arbitration. If these decisions stand, *Stolt-Nielsen* may effectively preclude arbitration, class or otherwise, in a variety of cases. Indeed, while the Arbitration Fairness Act has been widely debated in Congress over the course of the past three years since the legislation was first introduced,[2] *Stolt-Nielsen* may have gone a long way in achieving its objective of barring arbitration clauses in consumer, employment and franchise agreements—at least until the Supreme Court issues its next pronouncement in this area, which could come later this term.

The History of Class Action Arbitration

While the rise of class arbitration is often attributed to the Supreme Court's 2003 decision in *Green Tree Financial Corp. v. Bazzle*,[3] the origins of class arbitration in fact date back almost thirty years when a handful of courts in California and other states refused to grant motions to compel individual arbitration when the plaintiff filed litigation on behalf of a class. These courts took the view that, in certain circumstances, it was unconscionable to require a plaintiff to relinquish his or her right to bring a class action simply by signing a form contract that contained an arbitration clause. Faced with a choice between permitting class actions to take place in arbitration and ordering that cases proceed in litigation in order to preserve the plaintiffs' class action rights, the courts opted to permit class arbitration in an effort to give force to the parties' arbitration agreements.[4] Likewise, when parties began to insert explicit class action waivers in their agreements, courts in California and elsewhere ruled that they were unconscionable in certain circumstances—particularly where the waivers appeared in consumer contracts of adhesion.[5]

The federal courts, however, diverged sharply from these state court decisions and disallowed class arbitration unless it was expressly permitted by the parties' arbitration agreement.[6] In contrast to the state courts, which viewed the right to proceed as a class action as virtually unwaivable in certain circumstances, the federal courts viewed the class action devise as a "procedural nicet[y]" and compelled arbitration without class treatment.[7]

The Supreme Court's decision in *Green Tree* seemingly permitted arbitrators to proceed with class arbitrations even if the parties' arbitration agreement was silent with respect to class actions. In the years that followed, scores of class action arbitrations were filed in cases where the parties' arbitration agreements made no provision for class procedures, and the American Arbitration Association ("AAA") promulgated its Supplementary Rules for Class Arbitrations setting forth a detailed set of procedures for class arbitrations. Between 2003, when the Supplementary Rules were adopted, and September 2009, the AAA had administered 283 cases filed as class arbitrations.[8]

> "Stolt-Nielsen *may effectively preclude arbitration, class or otherwise, in a variety of cases.*"

The Supreme Court's Decision in *Stolt-Nielsen*

Finally, in 2009, the Supreme Court agreed in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*[9] to address the question of "whether imposing class arbitration on parties whose arbitration clauses are 'silent' on that issue is consistent with the Federal Arbitration Act (FAA)."[10] Proceeding from the premise that "the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion,'" and that the "'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms,'"[11] the Court held that no agreement to submit to class arbitration could be inferred where the parties had expressly stipulated that they had not reached an agreement on this issue.[12]

In the circumstances, the Court held that the parties' silence on this issue indicated that no such agreement existed. Arbitration, it observed, is a creature of contractual consent, under which "parties may specify *with whom* they choose to arbitrate their disputes."[13] To infer—in the absence of express language or any other contractual basis—that parties had agreed to class arbitration was "fundamentally at war with the foundational FAA principle that arbitration is a matter of consent."[14]

Although the Supreme Court in *Stolt-Nielsen* stopped short of stating categorically that class arbitration can never be inferred where a contract is facially silent on the point, it made clear that an arbitration agreement must evince some form of consent to class arbitration in order for class arbitration to be permitted.[15] The Supreme Court based its decision on a view that class arbitration is fundamentally different from individual or "traditional" two-party (or even multiparty) arbitration.[16] Because very few arbitration agreements demonstrate actual consent to class arbitration, the Supreme Court may have closed the door to class arbitration in a wide variety of circumstances.[17]

Stolt-Nielsen Leads Courts to Strike Out Arbitration Clauses Entirely

Recent decisions indicate that the consequences of the Court's decision in *Stolt-Nielsen* may be far greater than simply barring courts from ordering class arbitration in most instances. In fact, the decision has already led several courts to refuse to compel arbitration at all, rather than require putative class plaintiffs to bring their claims in arbitration on an individual basis.

One of the first decisions to interpret and apply *Stolt-Nielsen* was the Second Circuit's decision in July 2010 in *Fensterstock v. Education Finance Partners*.[18] In *Fensterstock*, the Second Circuit affirmed the district court's order denying the defendants' motion to compel arbitration. The parties' loan agreement—which contained an arbitration clause with a class action waiver—was governed by California law.[19] The Second Circuit found that the agreement was a contract of adhesion and concluded that under California law, the class action waiver was unconscionable.[20]

The arbitration clause also contained a severability provision, which expressly permitted enforcement of the clause if one of its provisions was stricken, and the defendants argued that even if the class action waiver was unconscionable, the court still should compel arbitration.[21] Rejecting this argument, the Second Circuit observed that in light of *Stolt-Nielsen*, striking down the class action waiver alone would have no real effect—the parties would have a silent arbitration clause, and the court lacked the power to compel class arbitration in the face of a silent clause.[22] Indeed, the court explained:

> [T]he parties plainly did not agree that arbitration may be conducted on a classwide basis, and we do not see that an order for classwide arbitration can be premised on the Note's severability provision: Our conclusion that a given agreement is invalid and unenforceable does not mean that the parties in fact reached the opposite agreement. Thus, excising the Note's class action and class arbitration waiver clause leaves the Note silent as to the permissibility of class-based arbitration, and under *Stolt-Nielsen* we have no authority to order class-based arbitration.[23]

The Second Circuit went on to affirm the district court's refusal to compel arbitration, "[b]ecause the agreement forbidding Fensterstock to pursue his present claims on a classwide basis is unconscionable under California law, and because the parties did not agree that arbitration could proceed on such a basis."[24] Faced with an unconscionable waiver of the right to proceed on behalf of a class, and unable to order class-wide arbitration as it likely would have done prior to *Stolt-Nielsen*, the Second Circuit ruled that it was constrained by *Stolt-Nielsen* to strike the arbitration clause in its entirety and return the parties to the courts.

In the months that followed, other federal and state courts reached the same conclusion under the laws of various states and struck down arbitration clauses entirely rather than directing the parties to arbitration on an individual basis.[25] Interpreting North Carolina law, the United States District Court for the Southern District of Florida in *In re Checking Account Overdraft Litigation*[26] went a step further than *Fensterstock*. Unlike *Fensterstock*, the agreement at issue did not contain an explicit class action waiver, but the court held that because the clause was silent, it implicitly contained a class action waiver which rendered the entire arbitration clause unconscionable.[27]

And so the law has come full circle. Faced with the problem of arbitration clauses that foreclose the possibility of class actions in contexts where the courts believe class actions may be necessary for plaintiffs with small claims to vindicate their rights, and with a decision of the Supreme Court stating that they may not order the parties to proceed with a class action in arbitration unless the parties have explicitly agreed to do so, the courts have given priority to the right to proceed as a class action over the right of the parties to contract to have their disputes decided by arbitration. As a practical matter, as demonstrated by the decisions discussed above, it may be nearly impossible under the laws of many states for companies using form contracts to impose arbitration because these parties can circumvent arbitration agreements simply by filing their claims as class actions where there are other potential plaintiffs similarly situated. On the other hand, in states with less strict unconscionability laws, such as Utah where the legislature has expressly permitted class action waivers, enforcing arbitration of claims on an individual basis, even if brought by consumers seeking to represent a class, will remain possible.

Conclusion

The continuing evolution of the law in this area will depend on how courts answer such questions as: How fundamental is the right to proceed as a class action? And is a contract that effectively forces a plaintiff to give up that right inherently unconscionable? The Supreme Court may provide the answers to these questions this term. Just weeks after issuing its decision in *Stolt-Nielsen*, the Supreme Court granted certiorari in *AT&T Mobility LLC v. Concepcion*[28] to review a decision by the Ninth Circuit affirming a district court's refusal to enforce a class action waiver and compel individual arbitration.[29] The defendant's petition for certiorari presented the following question: "Whether the Federal Arbitration Act preempts States from conditioning the enforcement of an arbitration agreement on the availability of particular procedures—here, class-wide arbitration—when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims."[30]

The Supreme Court heard oral argument in the *AT&T Mobility* case on November 9, 2010, and its decision later this term will impact not only the future of class arbitration but may also have broader ramifications if the Supreme Court addresses the general authority of states to protect consumers and other designated classes through legislative restrictions on arbitration in light of the broad sweep of Federal Arbitration Act preemption jurisprudence. Of course, in the meantime, legislative and regulatory action may also ban entirely arbitration clauses in these types of agreements. Such action would conclusively end this ongoing debate.

Postscript: *On April 29, 2011, a divided Supreme Court issued its decision in* AT&T Mobility LLC v. Concepcion, *No. 09-893, 563 U.S. __ (Apr. 29, 2011), ruling 5-4 that "California's* Discover Bank *rule," which bars class action waivers as unconscionable in some arbitration agreements, is preempted by the Federal Arbitration Act.* Id., *slip op. at 18. The Court found this rule—the same one applied by the Second Circuit in* Fensterstock*—"stands as an obstacle to the full purposes and objectives of Congress" to promote arbitration, a primary purpose of which, the Court reasoned, is "efficient and speedy dispute resolution."* Id. *Nevertheless, several open questions remain and the scope of* AT&T Mobility *and the viability of class arbitration will continue to be debated both in the courts and in Congress.*

Endnotes

1. 130 S. Ct. 1758 (2010).
2. Several versions of the Act have been introduced in Congress, including the versions introduced in the last Congress. *See* Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009) (discharged by H. Subcomm. on Commercial and Admin. Law of H. Comm. on the Judiciary June 21, 2010); Arbitration Fairness Act of 2009, S. 931, 111th Cong. (2009) (referred to S. Comm. on the Judiciary Apr. 29, 2009). In addition to the restrictions that could be imposed by the Arbitration Fairness Act if it is passed, the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank"), "provides the newly created Bureau of Consumer Financial Protection with the authority to regulate mandatory pre-dispute arbitration agreements between consumer and financial product or service providers." Christopher J. Keller & Michael W. Stocker, *Is the Shield Beginning to Crack?*, N.Y.L.J., Nov. 15, 2010, at S8. The Act requires the Bureau to complete a "formal study of the use of binding arbitration agreements in the consumer financial services industry" after which it "may use its regulatory powers to limit or fully prohibit arbitration agreements in financial services [contracts]." *Id.*; *see also* 12 U.S.C. § 5518 (enacted by Dodd-Frank § 1028, 124 Stat. at 2003-04) (authorizing study and regulation of arbitration agreements by Bureau of Consumer Financial Protection); 15 U.S.C. § 78*o*(o) (added by Dodd-Frank § 921(a), 124 Stat. at 1841) (authorizing SEC to "prohibit, or impose conditions or limitations on the use of, [arbitration] agreements" between brokers and securities dealers and their clients); 15 U.S.C. § 80b-5(f) (added by Dodd-Frank § 921(b), 124 Stat. at 1841) (authorizing SEC to "prohibit, or impose conditions or limitations on the use of, [arbitration] agreements" between investment advisers and their clients).
3. 539 U.S. 444 (2003).
4. *See Keating v. Superior Court*, 645 P.2d 1192, 1206-10 (Cal. 1982), *rev'd in part on other grounds sub nom. Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 864-67 (Pa. Super. Ct. 1991).
5. *See, e.g.*, *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005).
6. *See, e.g.*, *Champ v. Siegel Trading Co.*, 55 F.3d 269, 275-77 (7th Cir. 1995); *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720, 728-29 (8th Cir. 2001); *Johnson v. West Suburban Bank*, 225 F.3d 366, 374-79 (3d Cir. 2000).
7. *Champ*, 55 F.3d at 276; *see also id.* at 271, 276-77.
8. *See* Amicus Curiae Brief of American Arbitration Association In Support of Neither Party at 22, *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, No. 08-1198 (United States Supreme Court, Dated September 4, 2009).
9. 130 S. Ct. 1758 (2010).
10. *Id.* at 1764.
11. *Id.* at 1773 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford, Jr. Univ.*, 489 U.S. 468, 479 (1989)).
12. *See id.* at 1775-76.
13. *Id.* at 1774.
14. *Id.* at 1775.
15. *See id.* at 1775-76.
16. *See id.*
17. In an apparent attempt to salvage class arbitrations in certain circumstances, the dissent in *Stolt-Nielsen* (Justice Ginsburg, joined by Justice Stevens and Justice Breyer) interpreted the Court's ruling as being narrow in scope. Specifically, Justice Ginsburg suggested some purported "stopping points in the Court's decision," including (1) that the Court did "not insist on express consent to class arbitration," but rather just the existence of a "'contractual basis'" for agreeing to such a procedure; and (2) the Court's observation that the parties were sophisticated entities in an industry with established customs "apparently spares from its affirmative-authorization requirement contracts of adhesion presented on a take-it-or-leave it basis." *Stolt-Nielsen*, 130 S. Ct. at 1783 (Ginsburg, J., dissenting). In a recent decision, however, a federal district court in New York rejected Justice Ginsburg's proposed limitations on the *Stolt-Nielsen* majority's ruling. *See Jock v. Sterling Jewelers, Inc.*, 725 F. Supp. 2d 444, 450 (S.D.N.Y. 2010) (Rakoff, J.) ("While contextual factors such as the sophistication of the parties, their relative bargaining position with respect to the arbitration clauses, and any pertinent tradition of dispute resolution might aid in construing ambiguous manifestations

of the parties' intentions, they cannot establish assent to class arbitration where, as here, the contract itself provides no reason to believe the parties reached any agreement on that issue."); *but see Anwar v. Fairfield Greenwich Ltd., 2010 U.S. Dist. LEXIS 87449* (S.D.N.Y. August 20, 2010) (Marrero, J.) (holding that plaintiffs were unlikely to prevail on a claim that an arbitral tribunal had exceeded its authority when it ruled, after *Stolt-Nielsen*, that arbitrations could be *consolidated* applying principles of contract construction even though the arbitration clause was silent on consolidation).

18. 611 F.3d 124 (2d Cir. 2010).
19. *See id.* at 128-30.
20. *Id.* at 140.
21. *Id.*
22. *Id.* at 141.
23. *Id.*
24. *Id*.
25. *See, e.g., In re Checking Account Overdraft Litig.*, No. 09-MD-02036-JLK, 2010 WL 3361127, at *2-3 (S.D. Fla. Aug. 23, 2010) (North Carolina law); *Brewer v. Missouri Title Loans, Inc.*, 323 S.W.3d 18, 20-24 (Mo. 2010) (Missouri law); *Ruhl v. Lee's Summit Honda*, 322 S.W.3d 136, 139-40 (Mo. 2010) (Missouri law), *petition for cert. filed* (U.S. Jan. 24, 2011) (No. 10-969); *Mansker v. Farmers Ins. Co.*, No. C10-0511JLR, 2010 WL 3699847, at *2-3 (W.D. Wash. Sept. 14, 2010) (Washington law). In *Mansker*, the court denied the motion to compel arbitration without prejudice to the defendant's right to move to compel arbitration again if class certification is denied. *See Mansker*, 2010 WL 3699847, at *4.
26. No. 09-MD-02036-JLK, 2010 WL 3361127 (S.D. Fla. Aug. 23, 2010).
27. *See id.* at *2-3. *See also Mansker*, 2010 WL 3699847, at *2-4 (under Washington law, interpreting clause to contain an implicit waiver and therefore denying motion to compel arbitration without prejudice to the defendant's right to move to compel arbitration again if class certification was denied); *Quilloin v. Tenet Healthsystem Philadelphia, Inc.*, No. 09-5781, 2011 WL 227631, at ** 14-15 (E.D. Pa. Jan. 20, 2011) (under Pennsylvania law, denying motion to compel arbitration without prejudice and ordering discovery into various issues for the purpose of making a determination as to whether the clause was unconscionable because it would effectively prohibit consumers from obtaining relief). *But see Winn v. Tenet Healthcare Corp.*, No. 2:10-cv-2140-JPM-cgc, 2011 WL 294407, at ** 9-10 (W.D. Tenn. Jan. 27, 2011) (granting motion to compel arbitration and rejecting plaintiff's argument that clause would be rendered unconscionable in the event the arbitrator concluded it did not provide for class arbitration).
28. 130 S. Ct. 3322 (2010).
29. *See Laster v. AT&T Mobility LLC*, 584 F.3d 849, 852-53 (9th Cir. 2009), *cert. granted*, 130 S. Ct. 3322 (2010).
30. Petition for a Writ of Certiorari at i, *AT&T Mobility LLC v. Concepcion* (U.S. Jan. 25, 2010) (No. 09-893).

Lea Haber Kuck and Gregory A. Litt are partner and counsel, respectively, in the international litigation and arbitration group at Skadden, Arps, Slate, Meagher & Flom LLP, where they represent clients in a wide range of disputes arising out of international business transactions. They can be reached at Lea.Kuck@Skadden.com and Greg.Litt@Skadden.com. The views expressed are those of the authors and not necessarily those of the firm or its clients.

Investing in Commercial Claims; New York Perspectives

By Selvyn Seidel

Introduction, Summary, and Purpose

Investing in Commercial Claims—most frequently referred to as "Litigation Funding," "Litigation Financing," and "Alternative Litigation Financing"—is today becoming an almost fashionable topic of discussion and debate in some circles.[1] The potential is significant.[2] The sums involved are at least in the hundreds of billions.[3]

Given New York's center stage role as a commercial and dispute leader, what happens here carries weight. That is true as to New York alone, since the potential for funding activity in New York is substantial without more. That is true elsewhere as well, since New York is a leader and to an extent a Petri dish for other States across the country (and indeed for jurisdictions abroad). While technically each State governs the industry within its own borders, there is no question but that the experience and approach as it develops in New York will have far-flung implications.

This article explores what is going on in New York, in the context of more general developments. The article has four basic parts. First it summarizes the industry basics. Next it identifies some of the industry's most pressing issues and challenges, as well as some of its most compelling asserted benefits. Third, the article summarizes how the emerging industry is faring in, and the perspective from, New York.

Last, it looks to the future in New York. The conclusion here is that New York holds a promising future for the industry, and for the market which seeks it. The reasons are not complex. New York is, first and as noted above, the nation's preeminent center for asserting and defending against litigation and arbitration claims. Second, New York couples this strength with a general willingness and understanding through its courts, its legislature, its lawyers, its Ethics Committee, and its policy, to be, on the whole, more than prepared to listen, analyze, and then proceed as to the best way to treat the market and the industry.

With this New York approach, the industry and market have what they should want. They can tell their story. It is this article's premise that this story—if fully and accurately told, studied and managed—can and will contribute to the industry's taking root in New York and to the market here flowering.[4]

Overview of Industry and Market

Claims are assets. Like other assets, claims can be valued, bought and sold, financed, and otherwise treated for investment like a share of stock, an antique rug, or a plot of real estate. Claims are thus becoming, although slowly at the moment, an acknowledged discrete asset class.

Specialists have developed in valuing these assets, and financially supporting the prosecution of deserving ones. They consist in good part of institutions which have become known as, most frequently and as noted above, "Litigation Funders" or "Litigation Financers" or "Investors in Litigation." (There are other Funders and investors, such as hedge funds, investing in claims on a one-off basis) This article refers to them, for the most part, as "Investors in Commercial Claims."

"The potential [of investments in commercial claims] is significant. The sums involved are at least in the hundreds of billions."

If a claim has good prospects for success, the investor will pay for the legal and other costs of prosecution (and perhaps more, such as arrears the law firm has run up, or financial needs of the claimant's business). In return, the investor acquires some interest in the claim. If the claim is successful, the investor receives a portion of the recovery or a multiple of capital advanced or some other measure such as a combination of the two. If the claim is unsuccessful, the investor takes the hit, alone. This illustration gives a decent (although quite oversimplified) picture of how the industry generally works. There are endless variations on (and variances from) this theme.

To date and for the most part, the market consists of claimants who cannot afford to prosecute their claim, however worthy it may be. The size of this market is impossible to gauge at this time. Far too little data is available. But for discussion purposes it is defensible to project, as indicated above, that globally the market size runs, at a minimum, into the hundreds of billions of dollars. It also seems fair to say that the institutional capital available to serve the need is but a tiny sliver of the market demand.

The gaping divide between demand and supply is growing, and for several reasons. The market size for claimants in financial distress continues to grow rapidly during these troubled times. The market is also expanding to embrace (i) defendants being confronted with meritless claims who, themselves facing troubled times, are beginning to consider funding of their defense, plus (ii) a group of claimants and defendants that is starting to form who can well afford to pay the litigation bills, but who prefer, as an economic choice, to hedge their bets and transfer the cash outlay and risk of loss monkey to a third party.[5]

Issues, Challenges, Benefits

Not surprisingly, especially in an emerging industry such as this one, the industry has generated issues, challenges, and even attacks.[6] Among the most frequently raised general issues (many of which are overlapping) are these: Do industry operations violate the laws of champerty and maintenance? In this connection and in particular: does it give unacceptable control of the case to a third party, such as decision-making authority over the case strategy and direction, including choice of counsel, and decision-making authority during settlement discussions? Does it create unmanageable conflicts between the lawyer and the client, causing problems such as unacceptable compromises in the lawyer's professional independence? Does it charge abusive or otherwise intolerable returns? Do the contracts amount to "unconscionable" contracts that should not be enforced? How is the industry treated by the doctrines of confidentiality, attorney-client and work product protections?[7] Does the industry stir up litigations, especially baseless litigations? How does this all stack up to somewhat comparable situations, such as the contingency fee arrangement for law firms in New York, and the insurance claims situation where the insurance company steps into the shoes of the insured (both in the subrogation and the defense sides of insurance)?

Many of these issues are valid to raise. For example, a recurring question relates to the size of the returns. Should there be a cap in some situations, imposed on the market in some way, such as through rules or regulations? Do the extensive experience with and consequences of lawyer's contingency fee arrangements have relevance here? Does the individual situation require close examination on a case-by-case basis, rather than trying to address the issue in general terms—e.g., how does the fact that one claimant may be a commercial claimant with extensive business experience and with experienced professionals differ from the person without means or business experience or advisers who is run down by a drunken driver?

Another recurring question relates to the actual and/or potential conflicts of interest between the claimant and its lawyers, arising, some say, as a result of the funding provided. As indicated above, these can occur at any stage of the funding process, such as at the evaluation stage or the settlement stage. A host of different factors and possible responses are possible, each to be taken into the mix (e.g., the point that in some circumstances the appointment or other insertion of an independent objective third party—such as an independent qualified mediator—to address and decide a conflicted issue, can be helpful).

On the other side of the coin, the industry, operating properly, delivers undeniable benefits. Important benefits include:

- It gives voice to merit-based claims which otherwise would be lost or devalued.
- It provides tools to make the legal system and judicial system more cost-efficient and more effective.
- It equalizes bargaining power.
- It promotes civil justice and commercial soundness.[8]
- It establishes a new, integrated, comprehensive product and service, combining law, business, finance, technology and other areas, that a changing economic and professional environment is pushing for and requiring.
- It provides new economic products and services that the market is asking for.

Valid positions, points, arguments, questions and criticism deserve attention and management—indeed, require attention and analysis and management for the good of the industry and the good of the market.[9] That is what this article is intended to discuss briefly, with some conclusions and predictions. While the scope of this article does not allow for a detailed drilling down in its analysis, it should be remembered that the details are critical, where, as here, the cases, the claimants, and the funders, each differ one from the next like fingerprints.

Nonetheless, at this early stage of the industry's development in the United States, responses to general points, questions, answers and approaches are useful to foster an understanding of the field.

New York Perspectives

In brief and on the whole, New York is greeting the industry with positive interest, with some support, and, most importantly, with an open mind and willingness to inspect and analyze the industry objectively.

New York has laws and rules in crucial areas that litigation funding depends on, in varying degrees, for success. The most important legal concerns that have been raised are those under the umbrella doctrines of "champerty and maintenance." These doctrines historically restricted a third party from investing in someone else's claim. Over the years, this has changed dramatically across the country as these ancient doctrines were reassessed in light of contemporary realities.[10]

In New York, there is a statute which reflects that the doctrine of champerty has outlived its usefulness in most respects. Sections 488 and 489 of the Judiciary Law curb its application severely.[11] The New York Court of Appeals has strictly interpreted the law of champerty in New York stating "The prohibition of champerty [by Section 489] has always been limited in scope and largely directed toward preventing attorneys from filing suit merely as a

vehicle for obtaining costs."[12] The Court sharply distinguished "the difference between one who acquires a right in order to make money from litigating it," which was barred, from acquiring a right "in order to enforce it," which was permitted.[13] This recent New York Court of Appeals opinion has pulled together a good deal of what has been said in various other New York Courts, and today is likely the most important New York decision to have been reached. Subsequent New York cases have confirmed LOVE's prouncements, distinctions, and importance.[14]

Indeed, in various mortgage related cases, where assignments have been made of the claims, the Courts have emphasized the legitimacy of the assignments against champerty challenges.[15] In *US Bank NA v. Crutch,* the court declined to find champerty where there was no evidence that the mortgage was acquired for the sole purpose of enforcement and stated that even if it were, the champerty statute does not apply if the purpose of the assignment is to collect a legitimate debt.[16] New York Courts which have otherwise addressed the issue have made an effort to understand and accommodate the industry. For example, in *Echeverria v. the Estate of Lindner*[17] the court noted that "LawCash's loan or investment, (whatever you may call it) to Mr. Echeverria can be viewed as a purchase of a chose in action; however, this advancement is still not considered Champerty."[18]

It should be noted some cases in New York (as elsewhere) involving investing in commercial claims, are hard to track; they fly under the radar. One good example is *In re Parmalat Securities Litigation*.[19] In that federal district court case in the Southern District, the plaintiff was funded by Deutsche Bank and the defendant was Bank of America. The funding arrangement never became an issue under the champerty law. It seems the Court and parties just assumed that no legal principle was violated in that complicated commercial case. (The Court did ask for a copy of the agreement; following a debate as to whether the agreement should be produced, it was produced.) Much of this is revealed in the Court transcripts, not in the decisions themselves.[20]

While such hard-to-track cases may not be making "law" in the commercial investment area, it is important to try to identify and follow them. They provide some insights into the Court's thinking on the issues that may arise.

There is another aspect of New York law and policy that bears importantly on litigation funding. New York, as a commercial center, recognizes a distinction between consumer or retail claims (such as personal injury) and commercial claims. There has been a long-standing effort to support business in the State of New York and respect contracts freely entered into by commercial parties. As noted above, in the funding industry, this distinction between consumer and commercial parties makes a real difference.

In addition, the New York State Bar Association's Committee on Professional Ethics has studied some of the pertinent issues. It has concluded that an attorney's referral of a client to a funder and representation of a client in dealings with a funder are not unethical (although reserving decision on whether a Court might question the arrangement under legal restrictions).[21]

Today New York's respected New York City Bar Association Ethics Committee is studying and reporting on various related areas. That study is enhancing awareness of the market and industry and is expected to produce guidelines for future activity. This is another important factor marking New York as a State that is interested in learning about, and providing rules and guidelines for, the market and the industry.

It should be mentioned that New York now has an important project afoot likely to encourage Investors in Commercial Dispute to invest in New York. Several Bar Association committees of New York State and New York City are working together to enhance New York's attractiveness to business. One key aspect is maintaining New York as a leading center in the world for international arbitration. Litigation Funding supports and promotes international arbitration.[22] One might expect that this goal of New York will align New York's interests and Funders' interests in various additional ways.

New York is also developing the infrastructure needed to support the industry. The three established major institutional Funders in the United States are operating with active New York offices: Burford Group Ltd, Juridica Management, and Credit Suisse. Fulbrook Management is just entering the industry, and with an active New York office. A number of prominent New York-based law firms act, as public records indicate, in funded cases. Public information shows these to include firms such as Patton Boggs; Simpson Thacher & Bartlett; Cadwalader, Wickersham & Taft; and Orrick Herrington & Sutcliffe. The presence of investors based in New York coupled with New York's vibrant legal community suggests a potential for significant investment activity in New York.

In short, by dint of its commercial and litigation prominence, New York is active compared to most other States relating to Litigation Funding. New York is paving a legal, ethical and commercial pathway that should be useful for New York and for others to follow into the future.

And, the Future?

In brief, New York presents an opportunity for the industry. New York is paying attention, and taking objective and analytical strides forward. New York is sensitive to the consumer/commercial distinction. The industry cannot ask for more.

Nonetheless the industry is in the early stages of development in New York and indeed in the United States. The industry has its work cut out for it. It needs to demonstrate the benefits it maintains it can and does provide. It needs to address—indeed welcome the chance to address—any legitimate issues raised.

Will the industry rise to the occasion and prove itself? It seems to be doing so to date. The prediction in this article is that this will continue, and that in essential aspects the achievement will take place within the next three to five years. If that occurs, the consequences for the industry and for the market will be positively felt in New York, in States across the country, and beyond.

Endnotes

1. An emerging industry in the United States, the industry has been around for years in other countries. It started about 30 years ago in Australia. It migrated to Europe about 15 years ago, principally in the United Kingdom. For a discussion of the growth and spread of the practice overseas, *see Dr. Maya Steinitz, Whose Claim is This Anyway? Third Party Litigation Funding, 95 Minn. L. Rev. (forthcoming 2011)* S. Garber, *Alternative Litigation Finance in the U.S., Issues, Knowns and Unknowns,* a publication of the Rand Institute of Civil Justice (May 2010); available at http://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP306.pdf; Heather A. Miller, *Don't Just Check Yes or No: The Need for Broader Consideration of Outside Investment in the Law,* 2010 U. Ill. L. Rev. 311.

   For a summary of the status of the industry in the U.S. and its development in 2009, see S. Seidel, *Stars and Strides,* the Litigation Funding Magazine, April 2010. For a general discussion of the market and industry, see S. Seidel, *Investing in Commercial Claims*, NUTSHELL PRIMER (February 2011) (Fulbrook Management LLC); *See also* Lord Justice Rupert Jackson, *Review of Civil Litigation*, chapter 11, at p. 117 (December 2009) (concluding that "third party funding is beneficial and should be supported"), available at http://www.judiciary.gov.uk/Resources/JCO/Documents/jackson-final-report-140110.pdf; the Litigation Funding Magazine, edited by Neil Rose; and Legal Futures, also edited by Neil Rose; Report of the U.S. Chamber Institute for Legal Reform, *Selling Lawsuits, Buying Trouble: Third-Party Litigation Funding in the United States,* October 2009, http://www.Instituteforlegalreform.com/images/stories/documents/pdf/research/thirdpartylitigationfinancing.pdf. (2010) (criticizing the industry, especially when combined with class actions, and calling for its prohibition); Comments of the American Tort Reform Association Concerning Alternative Litigation Financing, submitted by the Association Co-Chairs on February 15, 2011 (urging the prohibition of litigation financing), available at http://www.atra.org/files.cgi/8551_Alt-Litigation-FinanceLTR.pdf; *Rancman v. Interim Settlement Funding Corp.*, 789 N.E. 2d 217 (Ohio 2003), a personal injury case, and effectively reversed five years later by the Ohio legislature but setting out various criticisms of litigation financing that have been referred to subsequently, such as in *Echeverria v. Estate of Lindner et al.*, 801 N.Y.S. 2d 233 (Sup. Ct. Nassau 2002) which discussed but ultimately did not follow *Rancman*'s analysis and conclusions.

2. Although most people in the United States are still not familiar with the industry, more and more people are learning and talking about it. Others are starting to use or become interested in the industry's products and services, thus forming a market. While still fairly early days in the United Sates, the industry has gained serious ground in 2009 and 2010 on a number of fronts, including capturing the attention of the media and some of the market. It promises an even quicker pace for 2011.

   It is particularly important to note that the American Bar Association's Commission on Ethics 20/20 has established an eight-member Working Group on Alternative Litigation Financing to study and report on the impact of legal ethics on industry of "ALF" (Alternative Litigation Funding, or what the commission refers to as "third-party litigation financing.") It issued a request for comment on November 23, 2010, and has received comments such as the one by the ATRA referred to above. The Request itself is useful reading, at www.abanet.org/ethics2020, and the comments in response, so far, are informative. The study and report is expected to be thorough, and the time needed is expected to be substantial.

   The entire area will be affected to some degree by developments in the United Kingdom, which should have overflow impact on other countries, including the United States. There, under legislation enacted in 2007, third parties can invest in law firms, starting in October of 2011, and also, under the legislation, law firms can amalgamate with certain non-law firms. Apart from all else, this development should support those contend that champerty as a doctrine should not restrict litigation financing.

3. Estimates of the market are, with serious lack of information and analysis at this early time, not possible to make with confidence or reliability. But estimates into at least the hundreds of millions on the market side, and a number of million on the supply side, provide satisfactory enough discussion points. For a description of some of the institutional investors in the market and the sums they have available *see* Leigh Jones, *Litigation Funding Begins to Take Off*, The National Law Journal, at p. 1, November 30, 2009 (identifying at that time over $400 million publicly committed by just three of the funders for investment in large commercial disputes. Since that publication in November 2009, that sum has increased by at least $200 million, with Burford's recent raise on the public market of about $175 million, and the Calunius announcement and some other announcements of others entering the industry. By way of further information and illustration, other investors, such as hedge funds, add at least hundreds of millions more.

4. As the Rand study, *supra* note 1, reflects, different segments of the industry should be analyzed separately. The study identifies at least three segments: non-recourse loans to individual consumer plaintiffs, lending or extending credit to plaintiff's law firms, and investing in commercial (business to business) lawsuits.

   Throughout, it is pivotal to keep a single point in mind that is so important that it deserves headlines: Commercial claims, the subject of this article, are thoroughly different from and must never be confused with personal injury and other individual or consumer-type claims. Commercial claims typically have claimants with business and financial experience, often coupled with professional and other advisors, as opposed to personal claims which often have neither, nor other protections that commercial claims have. Further, the commercial claims often have integral emotional and motivational differences in nature than personal ones. In brief: the analysis of one cannot be confused with the analysis of the other; the mixing of the two has all too frequently occurred so that while analysis of one can sometimes inform the other, on the whole the confusion has to date worked a disservice for both.

5. The investment is, in truth, double barreled. The third-party investor makes one investment, as noted. The claimant or defendant also makes his or her own investment: the amount that party agrees to pay to the third party on success.

6. A frequently cited report containing significant criticism of the industry, especially when coupled with class actions, is the report issued by the U.S. Chamber, *Selling Lawsuits, Buying Trouble, supra* note 1.

7. This topic is currently a discussion point by many. See, *e.g.*, the recent prominent coverage given to it by the National Law Journal, February 21, 2011, p 1.

8. *See*, Jason Lyon, *Revolution in Progress: Third-Party Funding of American Litigation,* 58 UCLA L. Rev. 571 (2010); Miller, *supra* note 1; Jonathan Molto, Litigation Finance: *A Market Solution to a Procedural Problem*, 99 Geo. L.J. 65 (2010). One party put this poignantly, as quoted in a recent New York Times article concerning the advance the party received: "It's given me hope.… I don't view it as a loan; I view it as an investment in my future. They are helping me to get what is rightfully mine." Binyamin Appelbaum, *Taking Sides in a Divorce, Chasing Profit*, The New York Times, December 4, 2010, at nytimes.com/2010/12/…/05divorce.html.

9. The American Bar Association and the New York City Bar Association have, as noted elsewhere, undertaken an analysis and report in this area.

10. For a discussion of jurisdictions across the country, *see generally*, Anthony J. Sebok, *The Inauthentic Claim*, forthcoming *Vand. L. Rev.* Vol. 64 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1593329.

11. One important restriction is to exempt claims exceeding $500,000. Indeed, the legislative history of Section 489 (2) states that the intention of New York in passing the amendment in 2004 was to promote the "market…for the purchase and sale of claims…by [protecting] the ability to collect on these claims without fear of champerty litigation." 2 McKinney's 2004 Session Laws of New York 18905 (2005).

12. *See also, Bluebird Partners LP v. First Fidelity Bank,* 94 N.Y. 2d 726, 709 N.Y.S. 2d 865 (2000) (reviewing the development of the doctrine of champerty from medieval times and declining to find champerty where the court could not conclude that the certificates were purchased with the intent and for *the* purpose of bringing a suit anthem.

13. *Trust for the Certificate Holders of the Merrill Lynch Mortg. Investors, Inc. Mortgage Pass Through Certificates, Series 1999- C1 v. Love Funding Corporation,* 13 N.Y. 3d 190, 199, 890 N.Y.S. 2d 377 (2009).

14. *E.g., Richbell Information Services, Inc. et al v. Jupiter Partners L.P. et al,* 280. A.D. 2d 208 (1st Dept. 2010) (when company needed money, an offering circular was sent around seeking investments to raise money to prosecute claims for fraud and tortious conduct to misappropriate interests in a joint venture); *In re IMAX Sec. Lit.*, No. 06 Civ. 6128 (NRB), 2011 U.S. Dis. LEXIS 41709 (S.D.N.Y. Apr. 15, 2011); *In re Arkady Malakhov,* Case No. 05-4708, 2011 Bankr. LEXIS 96 (Bankr. S.D.N.Y. Jan. 7. 2011); *SB Schwartz & Co. v. Levine*, 2011 N.Y. Slip Op. 1642, 918 N.Y.S. 2d (171) (2d Dept. 2011); *Fragrancenet v. Fragrancex.com.* 679 F. Supp. 2d 312 (E.D.N.Y. 2010); *Rozen v. Russ & Russ et al,* 76 A.D. 3d 965 (1st Department 2010) (in a suit alleging fraudulent transfer of property, Court concluded no champerty when attorneys acquired a person's rights "'in order to enforce them; and not 'in order to make money from litigating [them]'"); *Carbon Capital Management v. American Express Company, Corporate Solutions Group, and Salinger,* 2010 N.Y. Misc. Lexis 2512 (N.Y. Sup. Ct. Nassau 2010); *Carbon Capital Management vv. American Express Company, Corporate Solutions Group, and Salinger,* 2010 N.Y. Misc. LEXIS 3816 (N.Y. Sup. Ct. Nassau 2010) ("[assignor] assigned the cause of action [for breach of fiduciary duty and fraud] to Carbon Capital for the purpose of enforcing his pre-existing claim" and therefore not champerty); *D.T. Funding Inc. v. Radhika Ramlakhan,* 2010 N.Y. Misc. Lexis 2287 (N.Y. Sup. Ct. Queens 2010); *Seomi v. Sotheby's, Inc.*, 910 N.Y.S. 2d 765 (N.Y. Sup. Ct. New York 2010); *MVB Collision D/B /A Mid Island Collision v. Allstate Insurance,* 900 N.Y.S. 2d 631 (D. Ct. N.Y. 2d District Nassau 2010); *PS Finance LLC v. Parker, Waichman Alonso LLP et al,* 2010 N.Y. Misc. Lexis 2991 (N.Y. Sup. Ct. New York 2010); *U.S. Bank National Association, as Trustee of Lehman Brothers v. Crutch,* et al, 2010 U.S. Dist. Lexis 75481 (E.D.N.Y. 2010); *see also Lehman Brothers Holding v. Cornerstone Mortgage Company*, 2011 U.S. Dist. LEXIS 13306 (S.D. of Texas 2011), citing the LOVE case and N.Y. law.

15. *E.g., U.S. Bank National Association, as Trustee of Lehman Brothers v. Crutch et al,* (2010 U.S. Dist. Lexis 75481 (E.D.N.Y. 2010).

16. *US Bank NA v. Crutch,* 210 Lexis 75481 (E.D.N.Y. July 26, 2010). See also, *e.g., D.T. Funding Inc. v. Radhika Ramlakhan et al,* 2010 N.Y. Slip Op. 31244U (Sup. Ct. Queens, 2010), another illustrative mortgage case.

17. *Echeverria v. the Estate of Lindner et al,* 801 N.Y.S. 2d 233 (Sup. Ct. NY 2005).

18. That Court discussed an Ohio case which presented similar facts, *Rancman v. Interim Settlement Funding*, 99 Ohio St 3d 121, 789 N. E. 217 (2003), where an Ohio Court found, in a personal injury case, that there was champerty. The *Echeverria* court questioned the correctness of the Ohio decision which it concluded was based on the different governing Ohio law. The *Rancman* decision has been criticized as one of the worst decisions in the country, *see* Stephen Gillers, "*Waiting for Good Dough: Litigation Funding Comes to Law,*" 3 Akron L. Rev. 677 (2010) and the Ohio legislature reversed *Rancman* with the enactment of Ohio Rev. Code Ann. § 1349.55 (2008).The *Echeverria* Court discussed various aspects of the issues presented and concluded that more study is needed of the issues raised.

19. 04 M.D. 1653.

20. Other cases might deal with or impact commercial litigation funding somewhat, but are not commercial cases nor are they obviously identifiable. For example, a highly visible personal injury case in the Southern District of New York involved a class action for personal injuries arising from the bombing of the Twin Towers in New York. The plaintiff's attorneys received loans to prosecute the case and, on settlement of the cases recently, it was disclosed that the loans existed, and also that the plaintiff's attorneys wanted to have the loan's high interest rate covered. Judge Hellerstein, raised objections to this effort to recover interest that the court thought indefensible under the circumstances. The interest claims were withdrawn.

21. New York State Bar Association, Committee on Professional Ethics, Opinions 666 (73-93), June 3, 1994, states that a "lawyer may refer a client to a financial institution that will lend the client money for living expenses, where the repayment is contingent on the successful resolution of the client's claim for personal injuries"; Ethics Opinion 769, November 4, 2003, states that an "attorney who represents a client in a personal injury matter may undertake to represent the client in a transaction with a litigation financing company that advances cash in return for a portion of any eventual settlement or judgment received by the client" and may charge for such additional representation.

22. *See* S. Seidel, *Investing in International Arbitration Claims*, Iberian Lawyer (December 2010 edition), for a discussion of the industry and market as they relate to international arbitration claims.

Selvyn Seidel, SSeidel@FulbrookCapital.com, is the Co-founder and Chairman of Fulbrook Management, LLC, a recent entrant into the industry which invests in commercial claims. Previously he co-founded Burford Group Ltd. He has been an expert advisor, a lecturer, and writer in the industry for a number of years. A former litigator, he chaired at different times Latham & Watkins' International Litigation and Arbitration Dispute Practice, its International Practice Group, and its New York Litigation Department.

The Boundaries of Arbitral Power—A Doctrine Revisited

By Laura A. Kaster and Judith A. Archer

The private judges known as arbitrators are the creatures not of Articles I or III of the U.S. Constitution, nor of public election or appointment by federal or state authority, but of private agreements between parties whose contracts have blossomed into dispute. Arbitrators have no established tenure unless the contract so provides, and certainly no permanent assignment. Therefore, the temporal life of the arbitrator must somehow be delineated so that the arbitrators, the parties who arbitrate and any institution or court that administers or oversees their work may know the boundaries of the arbitral authority, the length of time to maintain submitted evidentiary materials, and the period during which the arbitrators may be called upon to deal with a particular matter, including supplementing an award or reexamining it for errors of any kind. For centuries—according to Blackstone, since 1265—the boundaries of arbitral authority have been delineated by a doctrine that goes by the Latin phrase *functus officio*, meaning the task or the office completed.[1]

"[T]he temporal life of the arbitrator must somehow be delineated so that the arbitrators, the parties who arbitrate and any institution or court that administers or oversees their work may know the boundaries of the arbitral authority…"

Essentially, *functus officio* prevents an arbitrator from revising or reconsidering a final award. That is, the arbitrator, like Cincinnatus, returns to the farm or the law office once a complete ruling on the matter at hand has been delivered to the parties and then is without any further arbitral authority.

The notion that arbitration should be expeditious is at the core of this dispute resolution method; expedition cannot be achieved without both prompt hearing and finality at some point. Indeed, commentators and arbitral organizations are mindful of ever greater pressures to improve speed and reduce the costs of this practical alternative to litigation.[2] Moreover, as one court noted, questions about whether and how long an arbitrator has the power to clarify an award, to alter or undo it, to fill in details not addressed, and how these issues interact with the judicial review process would exist (unless the agreement by the parties resolved them) even if we abolished the doctrine of *functus officio*.[3]

Over fifteen years ago, Judge Posner examined the doctrine in the context of a labor arbitration and declared it was "hanging on by its fingernails."[4] But his report of the impending death of this doctrine as applied in commercial arbitration was greatly exaggerated. In fact, the doctrine—whatever its faults and exceptions—has been incorporated (and sometimes modified) in arbitral rules, the Revised Uniform Arbitration Act (RUAA), in governing international law, and it can be said to be implicit in the Federal Arbitration Act (FAA). The reason that this tenacious patient holds on to life is that it is needed to maintain the economy of arbitration and to define the boundaries of arbitral power. Although the original rationale may be subject to criticism, the old doctrine continues to fill a current need and, seen in that light, deserves to survive.

Under the FAA, there is no specific provision that permits the arbitrator(s) to correct an award, even when there are arguably computing or other facial errors.[5] Of course, if both parties move for reconsideration by the arbitrator or if the governing arbitral body's rules so provide, that may constitute the requisite authority for the arbitrator to revisit even a final order.[6] Without such an agreement or incorporation of a rule, Section 10 of the FAA provides that a court may review an award and vacate for very limited reasons, and that it may only remand to the arbitrator or panel: "Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators."[7] Section 11 of the FAA permits *a court* to modify or correct an award under very limited circumstances constituting evident material miscalculation or misdescription or where the arbitrators ruled on a matter not submitted. Thus, the strictures of the parties' agreement establish the temporal boundaries of the arbitrators' authority and limit even the courts' ability to extend the authority granted by the contract.[8]

Section 20 of the RUAA specifically addresses the FAA omission. It permits the arbitrator or panel to correct an award under limited circumstances and within a specified time.[9] The comments to the section specify that under the doctrine of *functus officio*, "when arbitrators finalize an award and deliver it to the parties, they can no longer act on the matter.… Indeed, because of the *functus officio* doctrine, there is some question whether, in the absence of an authorizing statute, a court can remand an arbitration decision to the arbitrators who initially heard the matter."[10] Comment 4 to Section 20 of the RUAA notes that the RUAA provision enhances efficiency by providing authority for remand and clarification that the FAA lacks.

Rule 46 of the American Arbitration Association permits limited modification of an award within 20 days

after its transmittal, but only "to correct any clerical, typographical, or computational errors in the award." It expressly provides, however, that"[t]he arbitrator is not empowered to redetermine the merits of any claim already decided." Under this rule, even an interim award that is expressly final with respect to specified issues may preclude future arbitral authority over that issue, as was specifically determined in *Bosack v. Soward*.[11]

The doctrine of *functus officio* is also reflected in international law. For example, the UNCITRAL Model Law of 1985 with amendments as adopted in 2006[12] provides in Article 32 that the arbitral proceedings are terminated by the final award. Article 33 permits the parties to request a correction within a limited time and "if the parties so agree" to request an interpretation of the final award." In addition, Article 33(c) provides that unless otherwise agreed by the parties, the tribunal may make an additional award dealing with claims submitted to the tribunal but omitted from the final award. Similarly, the ICDR Rules governing international commercial arbitration permit a party to request within 30 days that the tribunal "interpret the award or correct any clerical, typographical or computation errors or make an additional award as to claims presented but omitted from the award."[13]

Given that the doctrine of *functus officio* has worldwide recognition, what led Judge Posner to characterize it as imperiled? Judge Posner listed several considerations: (1) the doctrine limits the parties' ability to seek reconsideration; (2) the doctrine assumes arbitrator infallibility; (3) the doctrine treats arbitrators as having less authority than courts to reconsider and revise decisions; (4) the exceptions to the doctrine undermine its purpose; and (5) the doctrine is a remnant of judicial hostility to arbitration. At bottom, however, these considerations all seem to ignore the fundamental differences in nature between arbitration and litigation.

Putting aside some internal inconsistencies in these criticisms, it is nonetheless useful to examine them. The fundamental reason arbitration was developed was to expeditiously resolve disputes; a voluntarily assumed limitation on the ability of parties to seek reconsideration and review—at many levels—assures a faster, less expensive way to resolve disputes. The parties are seeking to avoid litigation, not replicate it. These factors provide the most important distinctions between arbitration and litigation and have traditionally been the reasons many parties have turned to arbitration for domestic disputes rather than litigation. This distinction addresses Judge Posner's second point as well. The limitations on revisiting the arbitral decision are not so much a reflection on the arbitrator as on a process choice by the parties, who elected a prompt decision without the same expansive discovery and multi-level reviews expected in litigation. Sometimes resolution is as important as perfection, something only a few would assert the judicial system provides. Point three, that the doctrine gives arbitrators too little authority is part and parcel of the process choice. The parties have the power to extend to the arbitrators the power to reconsider in their agreement if they deem that important. It is critical to remember that the doctrine of *functus officio* is a rule that operates only in default of specific agreement by the parties. Point five looks at the historical reasons for the doctrine, including the potential for *ex parte* importuning of the arbitrators. That concern may not persuade, but here, we are hoping to develop a modern justification.

"The limitations reflected in the doctrine of functus officio *have legitimacy and fulfill a clear need to mark the boundaries arbitral authority."*

Point four seems to be the crux of the problem. There are exceptions to the doctrine, and sometimes the line drawing is difficult. Judge Posner's view was that, since there was justification for the exceptions, perhaps it was time to abandon the rule.[14] Exceptions may undermine any rule, but the need for the rule may remain. Here, the exceptions have been limited. The rule continues to serve a critical function, bringing the proceedings to an end and discouraging repeated attempts by losing parties to change the result. As a practical matter, an arbitrator must be able to "close the book" on a proceeding at some point. As time passes, arbitrators should be able to dispose of materials that would be necessary to revisit any award. Unlike courts with sufficient record keeping ability, arbitrators would be burdened by the possibility of parties seeking to reconsider an award long after it is issued.

Permitting expansive review and revision by arbitrators of their decisions without drawing lines would lengthen the time and increase the potential expense of arbitration, thereby undermining its effectiveness as an alternative to the judicial process. But the potential for remand that now exists demonstrates a need to consider a means for notifying arbitrators whenever parties challenge an award or seek modification—so that necessary materials may be maintained, along the lines of a "hold" notice in litigation. This would avoid situations where arbitrators and parties are disadvantaged because the arbitrators are unaware of subsequent proceedings that may call for their further intervention. A neutral notification of further activity sent to the arbitral authority would not impose a burden on the parties. This is especially true in light of court holdings that require parties to promptly seek judicial review of an award that they contend is outside the arbitrators' authority in order to avail themselves of the *functus officio* defense.[15]

The limitations reflected in the doctrine of *functus officio* have legitimacy and fulfill a clear need to mark the boundaries of arbitral authority. *Functus officio* has hung on, whether by its fingernails or otherwise, because it is needed.

Endnotes

1. 3 Blackstone Commentaries 409 (1765).
2. The College of Commercial Arbitrators, Protocols for Expeditious, Cost-Effective Commercial Arbitration, Revision March 24, 2010. In fact, the reasons most often given by parties for preferring domestic arbitration over litigation is that it is more expeditious and less expensive than litigation. *See* Fulbright & Jaworski L.L.P. Litigation Trends Survey 2009 and 2010, www.fulbright.com/litigationtrends.
3. *Local 2322 Intern'l Brotherhood of Electrical Workers v. Verizon New England, Inc.*, 464 F.3d 93, 97 (1st Cir. 2006).
4. *Glass, Molders, Pottery, Plastics and Allied Workers Int'l Union, AFl-CIO,CLC, Local 182B v. Excelsior Foundry Co.*, 56 F.3d 884, 847 (7th Cir. 1995). It should be noted that in labor law, in which this case arises, the system of arbitration was viewed as a system of governance and a substitute for the right to strike and labor strife. *See United Steel Workers of America v. Warrior & Gulf Navigation, Co.*, 363 U.S. 574, 579-80 (1960) (distinguishing labor arbitration from commercial arbitration). *See also* Kaster, The Consequences of a Broad Arbitration Clause Under The Federal Arbitration Act, 52 B.U.L.Rev. 571, 592 (1972). In this labor context, there is a far better argument for the continuity of the arbitral panel or sole arbitrator. The blurring of some legal lines between labor arbitration and commercial arbitration, as noted by Judge Posner, should not serve to undermine some of the very distinct demands of commercial arbitration.
5. Nevertheless, case law recognizes a right to revise, under limited circumstances, to: (1) correct a mistake apparent on the face of the award; (2) where the award does not adjudicate a submitted issue (in which case it may be said it is not final as required for the operation of the doctrine); (3) where the award leaves doubt that the submission has been fully executed and therefore requires clarification. *E.g.*, *Transtech Ind. Inc. v. A&Z Septic Clean*, 2008 WL 762100 at 10 (3d Cir. 2008), *citing Colonial Penn Ins.C. v. Omaha Indem. Co.*, 934 F.2d 327, 332 (3d Cir. 1991). *See also Cuna Mutual Ins. Soc. v. Office and Professional Employees Int'l Union, Local 39*, 443 F.3d 556 (7th Cir. 2006) (affirming Rule 11 sanctions for frivolous challenge to arbitrator's retention of damages issue following partial ruling given the clear "clarification-completion exception" to the *functus officio* doctrine); *Williams v. Richey*, 948 A.2d 564, 567 (D.C. App 2008).
6. *See* T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc., 592 F.3d 329, 342-43 (2d Cir. 2010).
7. Stuart M. Widman and Donald Lee Rome, Judicial Remands of Challenged Awards: Legal and Procedural Issues After Hall street, 63 Jan-Disp. Resol. J. 50 (2009), conclude that after the Supreme Court's decision in *Hall Street Associates v. Mattel*, 128 S.Ct. 1396(2008), remand is likely now improper because Section 10 of the FAA grounds for vacatur do not authorize remand, and noting that the time for permitting remand under Section 10(a)(5), will have likely expired.
8. Where the parties' agreement specifies that the arbitrator may reconsider a prior agreement, construction of that provision is for the arbitrator. *Veliz v Cintas Corp.*, 2008 WL 1696949 (9th Cir. 2007).
9. Section 20. Change of Award by Arbitrator.

   (a) On [motion] to an arbitrator by a party to an arbitration proceeding, the arbitrator may modify or correct an award:

   (1) upon a ground stated in Section 24(a)(1) or (3) [there was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award; the award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.];

   (2) because the arbitrator has not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

   (3) to clarify the award…

   (d) If a [motion] to the court [within 90 days] is pending under Section 22, 23, or 24, the court may submit the claim to the arbitrator to consider whether to modify or correct the award:

   (1) upon a ground stated in Section 24(a)(1) or (3);

   (2) because the arbitrator has not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

   (3) to clarify the award.
10. RUAA Section 20 Comment 2. (Citations omitted.)
11. 586 F.3d 1096, 1103 (9th Cir. 2009).
12. For Countries that have adopted the Model Law, see www.uncitral.org.
13. AAA ICDR International Dispute Resolution Procedures Article 30.
14. 56 F.3d at 847.
15. *Local 2322 Intern'l Brotherhood of Electrical Workers v. Verizon New England, Inc.*, 464 F.3d at 97. In Local 2322, the arbitrator clarified the original award, which Verizon failed to comply with and claimed was a nullity. Verizon did not seek judicial review of the clarification, and was held to have forfeited its *functus officio* defense. Requiring the objecting party to challenge the clarification serves the same policy goal as the defense itself, swiftness of resolution.

Laura A. Kaster, co-editor of this Journal, is an arbitrator and mediator working in Princeton, NJ. She serves as an arbitrator and mediator for the AAA and FINRA, and is an adjunct professor teaching dispute resolution processes at Seton Hall Law School. She can be reached at lkaster@AppropriateDisputeSolutions.com. She has over thirty years of experience in complex litigation as chief litigation counsel for AT&T and is a partner at the law firm Jenner & Block.

Judith A. Archer is a partner in the New York office of the international law firm of Fulbright & Jaworski, L.L.P. She specializes in commercial litigation and arbitration in a variety of subject matter areas. She can be reached at jarcher@fulbright.com.

Reflections on the Use of Dispositive Motions in Arbitration

By Edna Sussman and Solomon Ebere

Responding to the perception that arbitration is not sufficiently time and cost-effective, the use of all of the tools at the arbitrator's disposal to streamline the process is being urged. Summary disposition is increasingly being suggested by arbitration practitioners as such a tool.[1] Corporate arbitration users too are urging the greater use of early resolution of issues, noting that "early resolution of…issues could streamline the proceedings and eliminate the necessity for much evidence, briefing and pleading of factual detail and therefore reduce the cost of arbitration. At the very least, early resolution of such issues could conceivably push the parties to an early settlement."[2] While allowing the kind of motion practice in arbitration that prevails in court would lead to the delays and costs incurred in court and is to be assiduously avoided, an examination of the desirability of the greater use of summary adjudication in appropriate cases is warranted.

For purposes of this article, dispositive motions are motions that resemble the type of motions filed in U.S. civil litigation and that a court would consider dispositive of a case or of parts of a case, such as motions for summary judgment or motions to dismiss or strike claims or defenses. In U.S. civil litigation, these mechanisms are frequently used to set aside unmeritorious claims or defenses, and promote a faster resolution of disputes. Proponents of the greater use of dispositive motions in arbitration argue that, for similar reasons, arbitrators ought to use similar procedural tools to resolve disputes at an early stage of the arbitration proceeding where appropriate.

In practice, however, it is generally believed that arbitrators have been reluctant to hear and grant dispositive motions.[3] This hesitation can be caused by several concerns: many major arbitration rules lack explicit rules authorizing arbitrators to entertain dispositive motions; summary disposition of a case may render the resulting award vulnerable to challenges before courts; the absence of the right of appeal in arbitration creates a hesitation to abbreviate the process and raises concerns about the appearance of justice, or lack thereof, in a truncated proceeding. While the latter concerns cannot be ignored, users are resoundingly asking for a more muscular process. Since arbitration is a creature of party choice, the users' stated preferences should be given serious consideration.

This article reviews the arbitrator's authority to decide dispositive motions and the cases in the U.S. which have dealt with petitions to vacate an arbitrator's award on a dispositive motion. In brief, U.S. courts accord a summary adjudication the same deference as an adjudication after a full blown hearing, as long as the parties have been afforded a fundamentally fair proceeding.

The Arbitrator's Authority

Neither the Federal Arbitration Act ("FAA"), nor the Uniform Arbitration Act ("UAA") expressly provide for dispositive motions. However, based on the flexibility and discretion granted to arbitrators,[4] courts have found that arbitrators have the authority to grant such motions even when the arbitral rules governing the arbitration, such as the American Arbitration Association's ("AAA") Commercial Arbitration Rules, do not expressly grant such authority.[5] As the Third Circuit said in *Sherrock Brothers, Inc. v. Daimler Chrysler Motors Company, LLC:*

> Granting summary judgment surely falls within this standard [of broad discretion to the arbitrator] and fundamental fairness is not implicated by an arbitration panel's decision to forego an evidentiary hearing because of its conclusion that there were no genuine issues of material fact in dispute. An evidentiary hearing will not be required just to find out whether real issues surface in a case.[6]

Moreover, many institutional arbitration rules do provide arbitrators with express authority to entertain dispositive motions. These include Rule 32(c) of the AAA's Construction Industry Rules, Rule 27 of the AAA's Employment Arbitration Rules, and Rule 18 of the JAMS Comprehensive Arbitration Rules.[7] The utility of enabling the arbitrator to decide dispositive motions was recognized and arbitral authority to decide such motions was expressly incorporated into Section 15(b) of the 2000 Revised Uniform Arbitration Act ("RUAA") which provides: "[a]n arbitrator may decide a request for summary disposition of a claim or particular issue."[8]

In international arbitration, as in domestic arbitration, the general grant of discretion to the arbitrator under institutional rules supports the authority of the arbitrator to make summary adjudications. See, ICDR Rules Article 16:3, ICC Rules Article 20: LCIA Rules Article 14:2: UNCITRAL Rules Article 15.2. In 2006 ICSID revised its Arbitration Rules and included Article 41(5), which expressly provided arbitrators with the power to summarily dispose of a case.[9]

The view of the international arbitration bar as to the arbitrator's authority is also reflected in the International Bar Association Rules on the Taking of Evidence in Inter-

national Arbitration, Article 2, which states, in relevant part: "3. The Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues (…) for which a preliminary determination may be appropriate." The Commentary on the Rules further states: "While the Working Party did not want to encourage litigation-style motion practice, the Working Party recognized that in some cases certain issues may resolve all or part of a case. In such circumstances, the IBA Rules of Evidence make clear that the arbitral tribunal has the authority to address such matters first, so as to avoid potentially unnecessary work."[10]

Judicial Review of Summary Adjudications

Summary dispositions by arbitrators have been sanctioned by the courts. Generally, parties challenging an arbitration panel's decision to grant a dispositive motion have contended either that the arbitrators had "exceeded their power," and/or that they engaged in "misconduct in…refusing to hear evidence pertinent and material to the controversy," two of the grounds for vacatur stated in Section 10(a) of the Federal Arbitration Act.[11] In addition to these statutory grounds, parties have raised challenges based on manifest disregard of the law and violation of public policy.

A court's review of challenges to summary adjudications is grounded in the same premise as that applicable to all other arbitral awards. The court's "scope of… review is narrow" and the analysis is not an "occasion for a de novo review of an award." Arbitration awards, including summary adjudications, are to be "be enforced despite a court's disagreement with the merits, if there is a barely colorable justification for the outcome reached."[12] But the courts do review arbitration awards, including summary adjudications, to ensure that parties to arbitration are not deprived of a "fundamentally fair proceeding" which requires that a party receive "notice, opportunity to be heard and to present relevant and material evidence and argument before the decision makers."[13]

In *Global Int'l Reinsurance Co. Ltd. v. TIG Ins. Co.*, Judge Rakoff of the Federal Court in the Southern District of New York was not persuaded to vacate an award based on claims that the arbitrator had resolved factual disputes without discovery or an evidentiary hearing. The court stated that "arbitrators have great latitude to determine the procedures governing their proceedings and to restrict or control evidentiary proceedings" and "need not compromise the speed and efficiency goals of arbitration by allowing the parties to present every piece of relevant evidence."[14] The court concluded that the arbitrator was well within his discretion when he determined that the contracts were clear on their face and that further evidence or testimony was not necessary to resolve the issue of contract interpretation before him. The court found that by permitting the losing party to fully brief the issue and submit all evidence it believed to be relevant, conducting a four-hour oral argument and reviewing all of the relevant contracts, the arbitrator had afforded the losing party an adequate opportunity to present its evidence and argument.

Other courts have similarly stated that a refusal to hear all evidence is not enough to vacate an award. "The law only requires that the parties be given *an* opportunity to present their evidence, not that they be given every opportunity" (emphasis in original).[15] Those seeking to vacate an award must show that the excluded evidence was material to the panel's determination and that the refusal to hear the evidence was so prejudicial that the party was denied fundamental fairness.[16] If complaining about a denial of discovery, in order to prevail on a vacatur, a party must show that the evidence that would have been obtained in discovery would overcome the panel's decisions.[17] Parties are not entitled to full discovery that would not change the outcome when the matter can be decided on a pre-hearing motion.

Parties are not entitled in every case to a full-blown evidentiary hearing. In *Schlessinger v. Rosenfeld, Meyer & Susman*, the court (applying California law) stated that a party is entitled to cross-examine if a witness appears at a hearing, but the law does not give a party an absolute right to present oral testimony in every case. The court recognized that a legal issue or defense could possibly be resolved on undisputed facts, and the purpose of arbitration to deliver a speedy and inexpensive means of dispute resolution would be defeated by precluding summary adjudications and requiring a full scale evidentiary hearing in all cases.[18] At least one court has even said that self-serving conclusory statements rejected by the arbitrator as insufficient to create a genuine issue of material fact to defeat the summary judgment motion need not block the granting of a motion.[19]

There are many fact patterns in which a summary adjudication of all or part of the claims and defenses asserted in an arbitration may be appropriate.[20] To illustrate, summary adjudications by arbitrators were granted and confirmed by the courts on the following grounds: res judicata and collateral estoppel,[21] plain meaning of the contract,[22] statute of limitations,[23] standing and preemption,[24] waiver and estoppel,[25] employment at will,[26] failure to comply with a contractual claims or notice procedure,[27] evidence insufficient to permit a rational inference by a trier of fact,[28] and failure to state a claim because no duty was owing.[29] The availability of summary adjudication and its enforcement for international arbitrations under the New York Convention has also been confirmed.[30] While there have been cases in which a summary adjudication has been vacated,[31] those cases are few, and they present facts in which the arbitrator failed to allow for the presentation of material non-cumulative evidence.

A Cautionary Note

As the cases instruct us, while arbitrators have the authority to consider motions for summary disposition and courts have generally affirmed summary adjudications, arbitrators must take great care in exercising this power.

First, the avoidance of increasing the costs of the proceedings and/or delaying its conclusion must be paramount. How sound is the motion and what is its likelihood of success? Are there issues of fact that would preclude ruling in favor of the motion? Will the motion, if granted, really reduce costs and expedite the arbitration, or will it lead to just the opposite result?

In many cases, striking a few unmeritorious claims or defenses of several asserted would not serve to abbreviate the proceedings. Consideration of a motion not likely to succeed will waste time and money. The cost and dilatory impact of court-style motion practice, where the making of dispositive motions is the norm, is precisely what arbitration should avoid. In order to deflect inappropriate motions, arbitrators often discuss the issue of motions in the first preliminary conference to determine the parties' plans in this regard and consider with the parties whether there are appropriate motions to be made. Arbitrators also often require that a letter application for leave to file motions (other than discovery motions) be submitted before a motion is made and afford the opposing party an opportunity to respond to the application.

Second, arbitrators must ensure that they apply the appropriate standard for summary disposition, *i.e.,* that the facts upon which the dispositive motion is made are not in dispute. If there are genuine issues of fact material to the decision, granting a dispositive motion would likely be viewed as depriving the party of a fair proceeding. Arbitrators must also ensure that they have carefully considered any discovery requests by the opposing party. If a party is denied requested discovery that is material to the motion and could alter the result, there would likely be a finding that the party was denied its right to a fundamentally fair proceeding. Issuing an award that is vacated for failure to provide a fundamentally fair proceeding thus requiring the parties to relitigate the matter is the worst result an arbitrator can deliver.

Accordingly, arbitrators must carefully balance the possible benefits to be derived from allowing a dispositive motion to be made against the costs and potential delays occasioned by the motion before allowing the motion to be made. Arbitrators should be confident that the movant is entitled to the relief sought based on undisputed facts and the opponent has had the benefit of any relevant and material discovery sought before granting a dispositive motion.

If a summary adjudication is granted, the arbitrator would serve the parties well and diminish the likelihood of vacatur by writing a reasoned award explaining the basis for the decision and why any evidence that was not considered or discovery not permitted was not material and would not have changed the result.

Conclusion

As in so many aspects of the arbitrator's role, the exercise of good judgment is crucial. Each case must be reviewed in light of its particular facts. An ill-advised consideration of a dispositive motion or a grant of a dispositive motion later vacated by a court will occasion even more cost and delay and deny the parties the benefits arbitration is intended to provide. But dispositive motions are a powerful tool available to streamline proceedings, and arbitrators should not shy away from meritorious dispositive motions that will reduce time and cost. If arbitration is to deliver on its promise of offering a faster and cheaper dispute resolution mechanism, arbitrators should be proactive in considering with the parties the possible advantages of addressing claims or defenses that are legally insufficient at the earliest opportunity.

The College of Commercial Arbitrators protocol for arbitrators with respect to dispositive motions strikes just the right balance in urging arbitrators to "discourage the filing of unproductive motions; limit motions for summary judgment to those that hold reasonable promise for streamlining or focusing the arbitration process, but act aggressively on those."[32]

Endnotes

1. *See* Catherine M. Amirfar, Claudia D. Salas, *How Summary Adjudication Can Promote Fairness and Efficiency in International Arbitration*, International Bar Association, Arbitration Newsletter (2010); *see also* Alfred G. Ferris and Biddle W. Lee, *The Use of Dispositive Motions in Arbitration*, 62 Disp. Resol. J. 17, 24 (2007); Mark Friedman and Steven Michaels, *Is It Summary Judgment Time?*, Global Arbitration Review, Vol. 1 Issue 2 (2008), *available at* http://www.globalarbitrationreview.com/journal/issues/issue/173/volume-1-issue-2/
2. *See* Lisa Davis George, *The Case for User Feedback in Arbitrator Selection,* 65 Disp. Resol. J. 18 (2011).
3. *See* D. Brian King and Jeffery P. Commission, *Summary Judgment in International Arbitration: The "Nay" Case*, ABA International Law Spring 2010 Meeting, at 1 (Spring 2010), *available at* http://apps.americanbar.org/intlaw/spring2010/materials/Common%20Law%20Summary%20Judgment%20in%20International%20Arbitration/King%20-%20Commission.pdf (observing that "there is little empirical evidence of use of such a mechanism in the practice of arbitral tribunals.").
4. *See e.g.*, American Arbitration Association, Commercial Arbitration Rules, Rule R-30(b).
5. Of course, if summary adjudication is precluded in the contract's arbitration clause, it is not available.
6. *Sherrock Brothers, Inc. v. DaimlerChrysler Motors Co., LLC,* 260 Fed. Appx. 497, 502 (3rd Cir. 2008).

7. *But see* Rule 12504 of the Financial Industry Regulatory Authoity's Code of Arbitration Procedure for Customer Disputes, which allows dispositive motions but only with respect to very limited specified issues.
8. 2000 Revised Uniform Arbitration Act ("RUAA"), Section 15(b), *available at* http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.htm. As of 2007, it has been enacted in 12 states.
9. For a discussion of these rules, *see* Judith Gill, *Applications for Early Disposition of Claims in Arbitration Proceedings*, ICCA Congress Series No. 14, Proceedings of June 2008 Dublin Conference (2009).
10. International Bar Association Rules on the Taking of Evidence in International Arbitration, *available at* http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Default.aspx.
11. Federal Arbitration Act, 9 U.S.C. 10(a).
12. *Global Int'l Reinsurance Co. Ltd. v. TIG Ins. Co.*, No. 08 civ. 7338, 2009 U.S. Dist. LEXIS 7697, *3 (S.D.N.Y. January 20, 2009).
13. *Dave Sheldon v. Jay Vermonty*, 269 F.3d 1202, 1207 (10th Cir. 2001).
14. *Global Int'l Reinsurance Co. Ltd. v. TIG Ins. Co.*, *supra* note 12, at *4.
15. *See Max Marx Color & Chem. Co. Employees' Profit Sharing Plan v. Barnes*, 37 F. Supp. 2d 248, 252 n. 23 (S.D.N.Y 1999).
16. *See Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.,* No. 01 C 5226, 2004 U.S. Dist. LEXIS 3494 (N.D. Ill. March 8, 2004); *Warren v. Thacher,* 114 F. Supp. 2d 600 (W.D. Ky. 2000).
17. *See The Louisiana Brown 1992 Irrevocable Trust v. Peabody Coal Co.,* No. 99-3322, 2000 U.S. App. LEXIS 1909 (6th Cir. 2000); *Warren v. Thacher, supra* note 16.
18. *See Schlessinger v. Rosenfeld, Meyer & Susman*, 40 Cal. App. 4th 1096 (Cal. Ct. App. 1995); *accord*, *Warren v. Thacher, supra* note 16.
19. *See LaPine v. Kyocera Corp.,* No. 07-06132, 2008 U.S. LEXIS 41172 (N.D. Cal., May 22, 2008).
20. For a discussion of additional cases *see* David Raim and Nancy Monarch, *Summary Disposition in Arbitration Proceedings,* 11 Arias-US Quarterly, 12 (2004); David E. Robbins, *Calling All Arbitrators: Reclaim Control of the Arbitration Process—The Courts Let You*, 60 Disp. Res J. Vol. 9 (2005).
21. *See Sherrock Brothers, Inc. v. DaimlerChrysler Motors Co., LLC*, *supra* note 6.
22. *See Global Int'l Reinsurance Co. Ltd. v. TIG Ins. Co., supra* note 12*; Intercarbon Bermuda Ltd, v. Caltex Trading and Transp. Corp.,* 146 F.R.D. 64 (S.D.N.Y. 1993).
23. *See Ozormoor v. T- Mobile USA Inc.,* 2010 U.S. Dist. LEXIS 85248 (E.D.Mich. August 19, 2010); *see also Stifler v. Weiner*, 488 A.2d 192 (Ct Spec. App. Md. 1985).
24. *See Max Marx Color & Chem. Co. Employees' Profit Sharing Plan v. Barnes, supra* note 15.
25. *See LaPine v. Kyocera Corp., supra* note 19.
26. *See Goldman Sachs & Co. v. Patel QDS:224S164*, 222 N.Y.L.J. 35 (S. Ct., N.Y. Cty. 1999).
27. *See Pegasus Constr. Corp. v. Turner Constr. Co.,* 929 P.2d 1200 (Ct App Wash. 1997); *The Louisiana Brown 1992 Irrevocable Trust v. Peabody Coal Co., supra* note 17.
28. *See Hamilton v. Sirius Radio,* 375 F. Supp. 2d 269 (S.D.N.Y. 2005).
29. *See Warren v. Thacher, supra* note 16.
30. *See LaPine v. Kyocera Corp., supra* note 19.
31. *See e.g. Int'l Union, United Mine Workers v. Marrowbone,* 232 F.3d 383 (4th Cir. 2000) (arbitrator in a labor dispute where the parties had acknowledged that there were factual disputes refused evidence which he had not determined was cumulative, irrelevant or immaterial); *Prudential Secs. v. Dalton*, 929 F. Supp. 1411, 1417 (N.D. Okla. 1996) (arbitrators dismissed facially sufficient claim and failed to allow claimant to present evidence pertinent and material to the controversy); *Thomas Neary v. The Prudential Ins. Co. of Am.,* 63 F. Supp. 2d 208 (D. Conn. 1999) (arbitrators manifestly disregarded standard for summary judgment); *Andrew v. CUNA Brokerage Serv. Inc.*, 976 A. 2d 496 (Sup. Ct. Pa. 2009) (arbitrators granted summary judgment on statute of limitations ground on a fraud claim where the losing party claimed he did not know and could not have reasonably been expected to know about his investment losses until a later date and that accordingly an evidentiary hearing was required to determine the validity of the limitations defense).
32. College of Commercial Arbitrators, *Protocols for Expeditious, Cost Effective Commercial Arbitration,* at 73 (2010), *available at* http://www.thecca.net/CCA_Protocols.pdf.

Edna Sussman is a full-time arbitrator and mediator and the Distinguished ADR Practitioner in Residence, Fordham University School of Law, focusing on international and domestic business disputes. She serves on the arbitration and mediation panels of many of the leading dispute resolution institutions and chairs the Dispute Resolution Section of the New York State Bar Association. She can be reached at esussman@sussmanADR.com or through her website www.SussmanADR.com.

Solomon Ebere, se85@law.georgetown.edu, holds an L.L.M. from the University of Paris-La Sorbonne and a Juris Doctor from Georgetown University Law Center.

Summary of Recommendations in the College of Commercial Arbitrators: Protocols for Expeditious and Cost-Effective Arbitration

In August of 2010 the College of Commercial Arbitrators produced the results of its year-long study of how to reduce time and cost in arbitration in a 95-page paper titled "Protocols for Expeditious, Cost-Effective Commercial Arbitration." Significantly the Protocols provide guidance to all of the stakeholders in the arbitration process: arbitrators, arbitration providers, in-house lawyers and outside counsel, because all have a critical role to play if those goals are to be achieved.

A summary of the Protocols, drawing heavily on the specific language of the Protocols, follows. The Protocols include extensive commentary to assist in their implementation. Readers should consult the text of the protocols, available at http://www.thecca.net/CCA_Protocols.pdf, to gain the full benefit of the discussion and guidance.

I. A Protocol for Business Users and In-House Counsel: 12 possible steps

A. Be deliberate about choosing between "one-size fits-all" arbitration procedures with lots of "wiggle room" and more streamlined or bounded procedures

- Balance the pros and cons of a standard-form arbitration provision, and consider adopting an arbitration agreement curtailed to business needs and priorities. Incorporating appropriate procedures of a well regarded provider organization is usually of mutual benefit to the parties.

B. Limit discovery to what is essential: do not simply replicate court discovery

- Tailor the scope of discovery in the arbitration agreement, or, when a dispute arises discuss the cost and benefit of discovery with outside counsel and limit discovery, or convince the arbitrator(s) to do so.

C. Set specific time limits on arbitration and make sure they are enforced

- Craft, or incorporate, provider rules pertaining to the length of arbitration;
- Set different deadlines or timetables corresponding to different total amounts in controversy; and
- Advocate for the enforcement of the deadlines.

D. Use "fast-track arbitration" in appropriate cases

- In the arbitration agreement, specify or incorporate provider rules establishing fast-track procedures and the circumstances under which they will be used; and
- Utilize, in cases of certain types or certain dollar amounts, a highly truncated approach in which discovery and motions are not permitted.

E. Stay actively involved throughout the dispute resolution process

- Conduct an early case assessment to determine the likely effect of the dispute on the business's important interests, the prospects for a successful outcome, the budget for arbitration, and what resolution approach is likely to be effective;
- Set a realistic budget for the arbitration and require outside counsel not to exceed that budget for arbitration without express approval; and
- Attend the first case management conference as well as all important subsequent conferences and hearings, and actively partner in the management of the arbitration.

F. Select outside counsel for arbitration (not litigation) expertise, and commitment to business goals

- Explore alternative fee arrangements with incentives for outside counsel to further the client's objectives

G. Select arbitrators with strong case management skills

- Stay actively involved in selecting arbitrators;
- Supplement information from service provider institutions with intra-firm communications and discrete queries to listservs and social networking programs;
- Pre-screen arbitrators by means of a questionnaire or joint or separate interviews (within ethical boundaries); and
- Be forthright in asking prospective arbitrators about their philosophy and style of case management.

H. Establish guidelines for early "fleshing out" of issues, claims, defenses, and parameters for arbitration

- Consider agreeing to provide, before the preliminary conference, preliminary statements of legal and factual issues, key facts to be proven, estimated damages broken down by category, and likely witnesses and types of experts; and
- Request an early comprehensive case management order.

I. Control motion practice

- Limit the filing of motions to the ones likely to promote cost and time saving in arbitration.

J. Use a single arbitrator in appropriate circumstances

- Weigh the complexity of the issues, the stakes involved, including potential damages, or other factors to determine whether they warrant the use of more than one arbitrator.

K. Specify the form of the award. Do not provide for judicial review for errors of law or fact

- Include the desired length of the award where appropriate but avoid provisions authorizing courts to review arbitral awards for errors of fact or law.

L. Conduct a post-process "lessons learned" review and make appropriate adjustments furthering efficiency and economy

II. A Protocol for Arbitration Providers: 14 possible steps

A. Offer business users clear options to fit their priorities

- Publish and promote a variety of templates to give users real choices that fit their priorities; and
- Make the websites more user-friendly.

B. Promote arbitration in the context of a range of process choices, including "stepped" dispute resolution processes

- Introduce arbitration clauses and procedures that promote negotiation and mediation as the starting point of the process.

C. Develop and publish rules that provide effective ways of limiting discovery to essential information

- Limit document production to documents or categories for which there is a specific, demonstrable need;
- Encourage party representatives to confer regarding stipulations of facts;
- Prohibit form interrogatories or limit number;
- Limit the number and length of depositions and limit arbitrator discretion to authorize additional depositions;
- Direct parties to cooperate on voluntary information exchange/discovery;
- Direct arbitrators to manage discovery disputes as expeditiously as possible;
- Give arbitrators the authority to award fees and costs for failure to cooperate or comply with orders; and
- Manage electronic records and handle e-discovery much more efficiently than domestic courts do.

D. Offer rules that set presumptive deadlines for each phase of the arbitration; train arbitrators in the importance of enforcing stipulated deadlines

E. Publish and promote "fast-track" arbitration rules

- Offer a variety of procedural choices with varying degrees of emphasis on expedition and economy; and
- Include a "fast-track arbitration" option with relatively short presumptive deadlines, limits on the number of arbitrators, an expedited arbitrator appointment procedure, early disclosure of information, heavily curtailed discovery and motion practice, and limits on the length of the award.

F. Develop procedures that promote restrained, effective motion practice

- Publish guidelines for effective and efficient resolution of motions in arbitration that address concerns raised.

G. Require arbitrators to have training in process management skills and commitment to cost and time saving

- Conduct training in managing hearings fairly but expeditiously, with particular emphasis on time and cost savings;
- Require arbitrators to complete such training before being included on the provider's roster, and to update their knowledge and skills annually; and
- Consider having arbitrators pledge to promote cost and time saving consistent with the agreement of the parties and fundamental fairness.

H. Offer users a rule option that requires fact pleadings and early disclosure of documents and witnesses

- Provide users with the option to elect to have fact pleadings in both demands and answers, and to serve with their initial pleadings a detailed statement of all material facts, the legal authorities relied upon, copies of all documents supporting each claim or defense, and a list of witnesses expected to be called.

I. Provide for electronic service of submissions and orders

- Introduce e-service as the default rule for all service of documents to arbitrators and parties.

J. Obtain and make available information on arbitrator effectiveness

- Seek feedback from users about the arbitrators' management skills; and
- Maintain the effective arbitrators on the rosters and remove the inefficient ones.

K. Provide for expedited appointment of arbitrators

- Appoint the arbitrators if parties do not do so within a specific time limit; and
- Impose stringent time limits for all communications by parties and prospective arbitrators during the appointment process.

L. Require arbitrators for expedited proceedings to confirm availability to manage and hear the case within the specified time limit

M. Afford users an effective mechanism for raising and addressing concerns about arbitrator case management

N. Offer process orientation for inexperienced users

- Educate inexperienced users by making available online or in-person orientation programs that outline the principal differences between arbitration and litigation, and how to use arbitration to further the parties' goals.

III. A Protocol for Outside Counsels: 12 possible steps

A. Be sure you can pursue the client's goals expeditiously

- Accept representation only after having determined the client's goals, and that you have the ability to pursue them effectively and expeditiously.

B. Memorialize early assessment and client understandings

- Memorialize an early assessment of the case, including a realistic estimate of the time and cost involved;
- Reach an understanding with the client concerning the approach to be followed, the extent and nature of any discovery to be initiated, the possibility and desirability of a negotiated settlement, the desired overall timetable and budget for arbitration; and
- Memorialize any significant changes in the client's instructions.

C. Select arbitrators with proven management ability

- Do a thorough "due diligence" of all potential arbitrators under consideration, interview them about their philosophy and style of case management (within ethical boundaries), and be candid about the client's expectations regarding the length of the arbitration.

D. Cooperate with opposing counsel on procedural matters

- Obtain the client's consent to cooperate fully and freely with opposing counsel and with the arbitrator; and
- Meet and confer early and continuously with opposing counsel to reach as many agreements as possible concerning matters taken up at the preliminary conference and beyond.

E. Seek to limit discovery in a manner consistent with client goals

- Educate the client concerning the more limited reach of discovery mechanisms in arbitration; and
- Cooperate with opposing counsel and the arbitrator to limit discovery in a manner consistent with the client's goals.

F. Periodically, and where appropriate, discuss settlement opportunities with your client

G. Offer clients alternative billing models, including ones that provide incentives for reducing costs and saving time

H. Recognize and exploit the differences between arbitration and litigation

- Acknowledge that decision-makers are sophisticated and experienced professionals;

- Only employ dispositive motions when they offer a clear net benefit to save time and costs; and
- Arbitrators tend to employ more relaxed evidentiary standards, thus repeated objections are not tolerated.

I. Keep the arbitrators informed and enlist their help promptly; rely on the chair as much as possible

- Work with opposing counsel to keep the arbitrators informed of developments which occurred between the preliminary conference and the hearing; and
- Have the chairperson resolve the pre-hearing issues the parties were unable to solve by themselves (e.g., discovery, scheduling, and other procedural issues).

J. Help your client make appropriate changes based on lessons learned

- Memorialize the client's feedback regarding the process to improve dispute resolution provisions, the firm's arbitration training, procedures and policies.

K. Work with providers in creating alternative process techniques, rules and clauses to improve arbitration processes

L. Encourage better arbitration education and training

IV. A Protocol for Arbitrators: 10 possible steps

A. Get training in managing commercial arbitrations

- Secure special training in how to manage large and complex arbitrations expeditiously and efficiently, without sacrificing essential fairness;
- Identify that training in biographical materials; and
- Pledge to conduct the arbitration within the time limits in the arbitration agreement or governing rules.

B. Insist on cooperation and professionalism

- Communicate expectations that counsel will cooperate with each other and with the arbitrator in all procedural aspects of the arbitration;
- Establish a professionally cordial atmosphere that reinforces expectations of cooperation and reasonableness, and affords counsel the fullest opportunity to contribute to shaping the process; and
- Lead by example: be prepared and punctual, fix and meet deadlines for your own actions.

C. Actively manage and shape the arbitration process; enforce contractual deadlines and timetables

- Actively manage and conduct the arbitration fairly and thoughtfully, but also expeditiously, from start to finish;
- Encourage and guide efforts to streamline the process;
- Make a serious effort to avoid unnecessary discovery or motions;
- Routinely enforce contractual deadlines for arbitration; and
- Encourage parties to "tee up" particular issues for early resolution where appropriate.

D. Conduct a thorough preliminary conference and issue comprehensive case management orders

- Emphasize importance of senior client representative participation in the preliminary conference; and
- Issue a comprehensive case management order setting forth the procedures and schedule that will govern the arbitration.

E. Schedule consecutive hearing days

F. Streamline discovery; supervise pre-hearing activities

- Educate the users and counsels as to the limited scope of discovery in arbitration;
- Work with counsel to limit discovery appropriately;
- Actively supervise the pre-hearing process; and
- Promptly resolve any problems that might disrupt the case schedule.

G. Discourage the filing of unproductive motions; limit motions for summary disposition to those that hold reasonable promise for streamlining or focusing the arbitration process, but act aggressively on those

- Explain to users and clients that arbitrators are less prone to grant dispositive motions than courts but are willing to entertain and rule on those which will likely reduce costs and save time;
- Generally require that leave to file be required prior to the filing of a motion,

H. Be readily available to counsel

I. Conduct fair but expeditious hearings

J. Issue timely and careful awards

This Is Your Brain on Mediation: What Neuroscience Can Add to the Practice of Mediation

By Daniel Weitz

Introduction

A group of undergraduate students at New York University were chosen for the experiment.[1] Everyone was given a list of five word sets and asked to make a grammatically correct four word sentence out of each set. These are called scrambled sentence tests. For example, students are presented with the following: "feels weather the hot patience." This five word set could be unscrambled to read "the weather feels hot." However, students in this experiment were actually given one of two different lists containing words meant to "prime" them to behave in a specific way. Mixed into one list were words associated with being polite; mixed through the other list were words associated with being rude. When the students were soon placed in an experimental situation to measure the degree to which they would act polite or rude, their behavior correlated with the words with which they were primed.

After completing twenty variations of the scrambled sentences the students were instructed to take the completed lists down the hall to the Professor's office where they were to be collected and scored. When the students arrived at the Professor's office, there was another student standing in the doorway asking the Professor a series of questions. The real test was to see how quickly the students would interrupt or how long the students would wait before interrupting to hand in the completed test. The students who were primed with polite words waited longer on average than the students who were primed to be rude. In fact, the overwhelming majority of the students primed to be polite never interrupted at all.[2] Simply priming them with words associated with being polite made them wait longer than those students who were primed with words associated with being rude.

Advances in neuroscience have given us an unprecedented look at the human brain and human behavior. Discoveries have followed in disciplines ranging from cognitive-behavioral psychology to molecular biology. To what extent these discoveries impact other fields, including the dispute resolution profession, is now a hotly pursued topic. While a quick survey of recent studies of the brain opens a flood of connections to the practice of mediation, even neuroscientists caution against the certainty of their findings. There is still more research to be done and many of these studies provide evidence of correlation but not necessarily causation. Perhaps we too should resist the temptation to champion a long sought after scientific basis for all that we do. However, there is no denying the fascination with what we are learning about the human brain and how it guides our behaviors and impacts the way we make decisions. At a minimum, it is cause for great reflection.

Our Negative View of Conflict

Mediation training programs often begin with a conflict word association exercise to explore the nature of conflict. Trainees typically produce a list of similarly negative words including argue, fight and disagreement. This list propels a lively discussion of why we tend to view conflict as something negative. We point to television, our past experiences and even our parents. After encouraging reflection, sometimes through small group exercises, mediation trainers ask if anything positive ever comes from conflict. Trainees list a number of positives including clarity, recognition, understanding and improved relationships. The trainer then hopes the group will come to appreciate that conflict is not inherently good or bad but that the nature of conflict is instead a function of how it is handled.

Recent discoveries in neuroscience shed even greater light on our negative associations with conflict. For example, significant research has been done on the importance of sleep.[3] This research supports the position that we consolidate learning and store memory during sleep. In *Nurture Shock*, Po Bronson and Ashley Merryman report that negative memories are stored in the Amygdala (an area of the brain associated with strong emotions such as fear) while neutral and positive memories are stored in the Hippocampus (an area of the brain not only associated with storage of memory but conversion of short-term to long-term memory as well). Furthermore, lack of sleep is harder on the Hippocampus than it is on the Amygdala. So, when sleep deprived, we have a harder time remembering neutral or positive feelings and events since our Hippocampus is adversely affected by the lack of sleep. Meanwhile, the less-affected Amygdala has little trouble helping us to recall negative feelings and events. Therefore, since people often lose sleep during periods of conflict or crisis, could this explain why we so often judge people with whom we are in conflict by their most negative potential? How often have you heard people in conflict say "I can't think of one good thing to say about him!" Other studies have shown that stress can cause a similar effect on the Hippocampus. During situations of stress, hormones called glucocorticoids are released in the brain.[4] Glucocorticoids are known to cause damage to the Hippocampus. In fact, under extreme conditions, glucocorticoids can kill brain cells in the Hippocampus. This

suggests that stress, and the brain chemistry connected with it, is not only related to our negative view of conflict but perhaps our negative view of those with whom we have conflict. Furthermore, it is not a far stretch to connect our negative view of conflict with our propensity toward competitive approaches to conflict. Is it possible that our negative view of conflict not only impacts how we approach it but also increases the likelihood that we will adopt a competitive style when a collaborative style would be optimal? The perception that conflict is inherently negative quite possibly precludes many disputing parties from even trying mediation when it would otherwise be helpful to them.

We Can Change

During much of the twentieth century, the prevailing theory was that our brains were pretty much completely formed and unchanging after childhood. However, recent discoveries have provided evidence of neuroplasticity, which challenges the assumption that our brains are done developing once we reach adulthood.[5] For example, studies have shown that physical exercise can improve cognitive function and even brain physiology.[6] Exercise also appears to stimulate a protein known as BDNF or Brain Derived Neurotrophic Factor, which aids in the development of healthy tissue. In *Brain Rules,* molecular biologist John Medina refers to BDNF as having a powerful fertilizer-like growth effect on certain neurons in the brain. According to Medina, BDNF not only keeps neurons young and healthy, which enables them to better connect with one another but it also encourages the formation of new cells in the brain.

If our negative view of conflict is indeed largely a conditioned response, perhaps we can change it. Mediation not only provides help with resolving the conflict at hand, it provides an opportunity to develop constructive conflict resolution skills that can be used well into the future.

Application of Neuroscience to Mediator Skills

Discoveries in neuroscience can be associated with a variety of mediator skills including the delivery of an opening statement and framing negotiable issues. The application of these skills relate to a number of discoveries including the psychological phenomenon of "priming" and the "framing effect."

The Psychological Phenomena of Priming and the Utility of Mediator Opening Statements

Most mediators begin the initial meeting with an opening statement. This is particularly true of mediators who deal with interpersonal conflict including divorce or community or workplace mediation. The goals of an opening statement include educating the parties about the process, developing rapport and trust, and setting the tone for a collaborative negotiation. Despite the apparent benefits of providing an opening statement, some mediators question its utility. Critics of a mediator opening statement say it takes too long and much of it is a waste of time as the parties are too distracted to absorb the content. While some openings may go on longer than necessary, the phenomenon of priming lends support for the use of mediator opening statements.

Recall the priming experiment, discussed above, conducted by Professor John Bargh and colleagues at New York University. There is an enormous body of research demonstrating the ability to prime subjects with subtle words to act in a seemingly limitless variety of ways. Research has shown that priming can make us slow or fast or even good or bad at math.[7] But before I tell you about math, let us finish the discussion of opening statements.

Think about the words mediators emphasize in their opening statements. Most give meaningful emphasis to words such as listen, understand, comfortable, confidential, freely, and informal. Mediation trainers and teachers often discuss the benefits of a good opening statement in order to set the tone for mediation. We want to establish an atmosphere of cooperation and open dialogue and in doing so distinguish mediation from its adversarial alternatives. While most mediators have always appreciated the power of a good opening statement, we now have reason to believe there is a scientific explanation for its effectiveness as well. According to the phenomenon of priming, we are a lot more susceptible to outside influences and our unconscious than we realize.[8] When we deliver opening statements, we have the potential to prime the parties to act in a manner consistent with the words we use. Furthermore, given our tendency to associate conflict with that which is negative, parties are likely primed to behave poorly in conflict. At a minimum, they are primed to adopt a competitive and adversarial approach to conflict. Therefore, a mediator's opening statement is not only an important aspect of establishing a collaborative atmosphere but perhaps it plays a role in neutralizing the way in which parties are negatively primed as they enter the process.

The Framing Effect and the Utility of Framing Negotiable Issues

The research that shows we can be made to perform better or worse in math ties the priming phenomenon with another psychological phenomenon known as the Framing Effect. In a study conducted by Sian L. Beilock from the University of Chicago,[9] a group of female undergraduates were given a series of relatively simple math problems known as modular arithmetic. Students were given horizontal math problems, represented by a left-to-

right linear equation as well as vertical math problems represented by numbers above and below one another forming the equation. Then, half of the female students were reminded of a negative stereotype, for example, that "women do not do as well as men on math." This form of priming is called the "stereotype threat condition" in which simply reminding people of a stereotype can induce anxiety which in turn decreases performance. This allowed Beilock and her colleagues to explore how a high-stress situation creates worries that compete for the working memory normally available for performance. After all, if we are stressed out and anxious, there is going to be less working memory available to deal with solving the math problems.

Jonah Lehrer, a frequent writer in the field of Neuroscience, described the results of Beilock's study on his blog *The Frontal Cortex.* As it turned out, the activation of the stereotype led to decreased performance, but only on the horizontal problems. The reason has to do with the local processing differences of the brain. The horizontal problems depended more on the same area of the brain (the left prefrontal cortex) associated with anxiety and would likely be preoccupied worrying about our math performance. In contrast, performance on vertical problems was unaffected. The vertical math problems are perceived primarily as visual spatial problems which are associated with a different area of the brain (the right prefrontal cortex) which is not distracted by our anxieties or threatened by stereotypes. In other words, according to Lehrer, "merely changing the presentation of the problem can dramatically alter how the brain processes the information."[10]

Beilock's study should also remind mediators of a classic skill we call framing negotiable issues. Mediators are trained to frame issues in neutral language to invite interest-based discussion rather than adversarial positional bargaining. This is done in order to avoid adopting the position of one side or the other and to create an inviting agenda that encourages meaningful dialogue. We frame issues neutrally to take the sting out of the topic. Thanks to Sian Beilock, we now know it also changes the way in which the brain actually processes the information. Perhaps it even mitigates the anxiety produced by conflict.

Conclusion

> It is the rule of thumb among cognitive scientists that unconscious thought is 95% of all thought.… Moreover, the 95% below the surface of conscious awareness shapes and structures all conscious thought.
>
> **George Lackoff**[11]

We have only seen the tip of the iceberg when it comes to the application of Neuroscience to the world of dispute resolution. We have seen how the psychological phenomenon of "priming" and the "framing" effect can be correlated with mediator skills including the delivery of opening statements and framing negotiable issues. However, there is much more to learn. But unlike 95% of our unconscious thoughts, advances in neuroscience make it possible for us to consciously appreciate that which we continue to learn about the brain and to think and reflect about how it applies to the field of mediation.

Prolific author Malcolm Gladwell wrote in *Outliers* that "Plane crashes are much more likely to be the result of an accumulation of minor difficulties and seemingly trivial malfunctions." This serves as a useful metaphor for any discussion of mediator skills. Focus on or use of any one skill will not by itself change the nature of the dialogue between the parties in mediation. In order to help the parties land their conflict safely, we need to use an accumulation of skills that may seem trivial when viewed in isolation. When explored in the context of Neuroscience, we can begin to see how these individual skills, utilized in conjunction with many others, can have a dramatic impact on conflict resolution and human behavior.

Endnotes

1. See Malcolm Gladwell, *Blink*, Paperback ed. (New York: Back Bay Books/ Little, Brown and Company, 2007), 55 (describing a study conducted by John Bargh, Mark Chen and Lara Burrows at New York University).
2. *Id.*
3. Po Bronson and Ashley Merryman, *Nurture Shock* (New York, Boston: Hatchett Book Group, First Edition 2009), 35.
4. John Medina, *Brain Rules* (Seattle: Pear Press, 2009), 179.
5. See Norman Doidge, Md., *The Brain that Changes Itself* (London: Penguin, 2007).
6. John Medina, *Brain Rules* (Seattle: Pear Press, 2009), 14.
7. See Iain McGilchrist, *The Master and His Emissary* (New Haven, London: Yale University Press 2009).
8. Malcolm Gladwell, *Blink*, Paperback ed. (New York: Back Bay Books/ Little, Brown and Company, 2007), 58.
9. Sian Beilock, *Math Performance in Stressful Situations*, Current Directions in Psychological Science, Volume 17-Number 5 (Association for Psychological Science).
10. Jonah Lehrer—The Frontal Cortex http://scienceblogs.com/cortex/2010/04/dont_choke.php (posted April 13, 2010).
11. G. Lackoff and M. Johnson, Philosophy in the Flesh (New York: Basic Books, 1999), 13.

Dan Weitz is the Statewide ADR Coordinator for the NYS Unified Court System. The views expressed in this article are his alone and do not reflect those of the Unified Court System. Amy Sheridan, Senior Counsel in the UCS ADR Office, assisted with the preparation of this article.

A Stitch in Time: Preventing the Escalation of Conflict

By Patrick Green

Mediation is evolving and flourishing. It is not a panacea, but a process which is apt both to resolve disputes and to prevent them. This article looks at innovations in the application of mediation and related tools to prevent the escalation of inevitable differences into unnecessary conflict. I hope that readers will forgive a brief *tour d'horizon* through some preliminary observations against the background of which some recent innovations may make more sense.

What Is Mediation?

When people confuse mediation and arbitration, my heart sinks. This is not because of some messianic devotion to mediation or some false comparison between two essential dispute resolution processes; rather, it is for the lack of understanding of mediation and its potential. As a process, mediation is uniquely solutions focused, as opposed to rights limited. Through the integration of interests (as opposed to the determination of rights), it also offers the possibility of creating value in the making of deals and the resolution of differences or disputes.

This, however, is not universally understood. I recently heard a respected arbitrator describing what he had done in an arbitration (recommending that a settlement of claims be considered), as mediation. Whilst the recommendation may have been wise or insightful, it was certainly not the product of a process which would be recognised as mediation, nor could it have harnessed the opportunities presented by the without prejudice arena of mediation, in which an expert third party facilitates the design of a creative solution. It betrayed a striking poverty of understanding of the process of mediation. It is difficult to convey, to those who have not seen it for themselves, the power of a solution designed from information or options which would fall well outside the field of enquiry in litigation or arbitration, and which, in some cases, the parties may not have previously acknowledged even to themselves.

Fans and Foes

Among fans of mediation, litigation and arbitration are often used as totems of expense, delay and bitterness. This is simply not fair. 'Vanilla' mediation (resolving mature disputes before trial) relies heavily, for its teeth, on developed systems of litigation or arbitration, by which the parties can properly assess their alternative to a mediated settlement.

Among the foes of mediation, there is the old joke, tellingly made by lawyers not clients, that ADR stands for Alarming Drop in Revenue. Behind every joke, however, there is a kernel of truth. For lawyers, a mediation which prevents a case going to trial does result in a huge drop in revenue, from that case—but maybe not, in the medium term or longer term, from that client.

Contracted Mediation

Contracted Mediation was born of work which began in 2000,[1] when Stephen Woodward, a project manager, and I began trying to design a process to prevent contract differences escalating into disputes in the first place. The process had to work both in theory and on the ground and it had to make sense to users.

If prevention of escalation could be achieved by using mediation much earlier, that ought to be welcomed. We thought that where there was an ongoing commercial relationship, the benefits of this approach would be even more important. An obvious testing ground was the field of construction projects (frequently late, over budget and plagued with disputes). The idea was to support project delivery and reduce project risk. This process became Contracted Mediation, by which a commitment to the use of mediation was made by those on the ground, in the contract, in the culture on the project and through the confidence of those people (not their lawyers) in the safety and sense of the mediation process. Instead of mediation being a process of last resort to resolve cases in the lead-up to trial, it becomes a business tool, as to the use of which the parties look to their lawyers for advice, but nonetheless feel that they retain some control (unlike litigation). Businesses like this. And they like their lawyers for putting it in place and helping them to use it effectively.

Jersey Airport was one of the early adopters of Contracted Mediation and allowed the experience there to be used as a case study. In short, Contracted Mediation worked. After a dispute arose in the middle of the project, mediation was used quickly to resolve the dispute and a host of other issues, in one day of face-to-face meetings. The parties went on to finish this publicly funded project one day early; £850,000 under budget; and with no claims. As Mike Lanyon, Director, Jersey Airport, said: *"I always had faith in this process. It introduces a team approach to resolving differences for the common good of the project and enables the parties to continue to work in the spirit of partnership… it's much quicker and less costly and allows all parties to stay in control…it should be standard practice."*

In parallel, Dispute Review Boards (and developments from them) were also being used successfully on projects around the world, which clearly reflected common thinking that there was a real demand for more efficient and effective dispute resolution options. Initially, many DRBs in the US proposed non-binding recommendations to resolve disputes. In 2004, the ICC created the Combined Dispute Board (CDB), which is a hybrid of Dispute Review Boards and Dispute Adjudication Boards and may make either a recommendation or a decision, depending on party wishes and the circumstances. Some Dispute Board processes were designed with tiered stages of mediation and adjudication.

What seemed clear was that the commercial world valued such processes, which had a clear role to play both in more effective management of venture risk. Perhaps uniquely, mediation could add the dimension of actively supporting venture or project relationships.

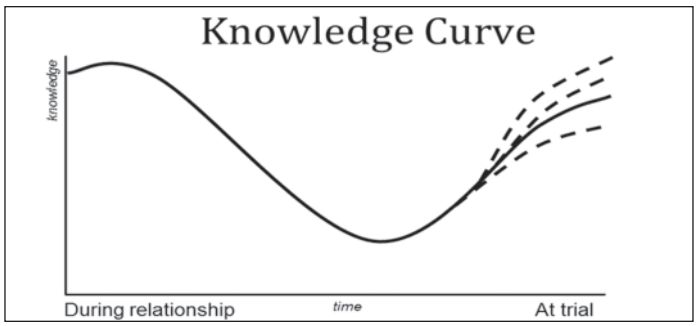
The Need for a Bird's Eye View

Not content with Contracted Mediation, back in London, the thinking moved on as a result of requests made by the National Health Service. A tool for harvesting information in contractual relationships was needed if identifying the opportunity to use mediation was to be brought any earlier along the timeline. A process was necessary that would watch the project like a hawk, so that the benefits of Contracted Mediation would not solely rely on the parties themselves realising that there were issues which needed addressing. To work, this would have to be cost-effective.

A software system was developed to meet this need.[2] It uses apparently simple information, including regular intuitive feedback, harvested from project participants via a web-based interface. Importantly, the parties agree in advance that this information is confidential and without prejudice; and the parties may neither use it nor seek to use any litigation, arbitration or adjudication. This allows real candour from the project participants and gives the neutral mediation and risk experts a unique bird's eye view of the project.

The information is analysed with the aid of proprietary software, to spot emerging risks on the horizon and to help to facilitate their early resolution, thereby providing a uniquely effective additional risk mitigation tool. In short, this system builds elasticity into otherwise brittle contractual relationships by providing the opportunity to make more minor adjustments at a much earlier stage, with greater insight, thereby flexing rather than breaking the contractual framework. The effective use of this technology allows this to be done at that (crucially) early stage.

Even when designing Contracted Mediation, it was clear that there was real value to capturing the platform of information necessary to resolve a dispute early and before the knowledge base had decayed through the lapse of time and changes of personnel. The diagram below shows how that decay happens over time and is then repaired by the industry of lawyers and clients working together (at considerable expense) to recreate the knowledge base.



The valley of the Knowledge Curve shows the area where the potential for resolution is significantly impeded by the uncertainties which result from the decay of the knowledge base. From an economic perspective, there is a perfectly reasonable case for arguing that, if it costs $500,000 to rebuild the knowledge base towards trial and it would only have cost $100,000 to analyse and complete it at the time, the knowledge base at the time is worth $400,000.

"The intelligent and creative use of mediation offers us the chance to prevent the unnecessary escalation of differences and to welcome honest disagreement…"

Wider Application

This technology has now been further developed for new applications, such as employee and community engagement, and consultation for the engagement of large numbers of diverse stakeholders in the community context, for example, in the context of planning and development. These and other applications are, of course, free-standing tools; but they have been designed to allow the use of the process of mediation, to best advantage, early and in a way which is tailored to the particular context in which they are deployed. It is absolutely central to understanding the link between these applications and mediation to appreciate the advantage of the open range of enquiry which is at the core of these processes—modelled on the unlimited but structured enquiry and exploration which takes place in a really good mediation, uncovering pieces of the puzzle, from which the ultimate resolution takes its shape. For lawyers, innovations such as these provide an opportunity to integrate the provision of valuable advice to clients more directly and effectively into the client's business and, often, at a much earlier stage.

Ghandi said, "Honest disagreement is often a good sign of progress." The intelligent and creative use of mediation offers us the chance to prevent the unnecessary escalation of differences and to welcome honest disagreement, without inviting its sometime but unwelcome bedfellow, bitter conflict.

Endnotes

1. For a mediation organisation called ResoLex, based at the International Dispute Resolution Centre in London.
2. The X-Tracker™ system was originally designed for construction projects but has since been adapted and applied more widely, in other ongoing commercial joint ventures.

Patrick Green, PGreen@hendersonchambers.co.uk, is a barrister and mediator at Henderson Chambers in London. He is a founder of ResoLex, www.resolex.com, and a Visiting Fellow at the London School of Economics and Political Science.

Italy Responds to the EU Mediation Directive and Confronts Court Backlog: The New Civil Courts Mandatory Mediation Law

By Francesca De Paolis

Introduction

Legislative Decree No. 28 on Mediation in Commercial and Civil Matter (thereafter, "the Decree") was enacted in Italy on March 4, 2010 and entered into force on March 20, 2010. This legislation introduced in Italy the first comprehensive mandatory approach to mediation. Following several limited legislative actions, this Decree has completely overhauled the approach to mediation in commercial matters.

This article will provide international practitioners with an understanding of the Italian system's new approach to mediation and will review the reasons for the Decree, previous legislative contributions to mediation in Italy, the main provisions of the Decree and their impact on the justice system overall.

"Justice in Italy today points to a chronic inefficiency of the State, with facts and figures demonstrating delay and poor performance in that field."

Why the Decree: EU Directive or an Ineffective Justice System?

Justice in Italy today points to a chronic inefficiency of the State, with facts and figures demonstrating delay and poor performance in that field. As has been pointed out,[1] the latest World Bank report on Doing Business ranked most European Countries in the top-50 tier. However, Italy ranked as 80th for ease of doing business, a ranking behind Namibia, Kazakhstan and Samoa, and 157th for enforcing contracts, an appallingly poor ranking.[2] As we can easily picture, delays in justice not only affect the parties directly, but also the country's system as a whole, especially in those sectors related to economy and security. Indeed, according to the World Bank report, which compares 181 economic systems worldwide, in 2008 the average duration of a debt collection proceeding in a commercial dispute (*procedimento di recupero di un credito originato da una disputa di carattere commerciale*) was 1,210 days in Italy, 331 in France, 394 in Germany, 316 in Japan, and 515 in Spain.[3]

Several authors have reported that the introduction of mediation-related laws is a response to this condition of the Italian court system,[4] in which the average duration of a civil case before a trial court has reached such unprecedented highs. This has prompted many dissatisfied litigants to sue the Italian government before the European Court of Human Rights, which has, on the basis of Article 6 of the European Convention on Human Rights, found that the Italian Government violated the requirement that civil and criminal proceedings before national courts be completed within a "reasonable time" and ordered it to compensate individuals for excessive delays.[5]

However the Decree may be Italy's implementation of the European Directive 2008/52/EC on Certain Aspects of Mediation in Civil and Commercial matters dated 21 May 2008 (hereafter, the "Directive").[6] The Directive is part of a broader initiative[7] to promote and regulate the development of mediation throughout the EU. Its main goals are set out in Article 1 of the Directive and include (i) facilitating access to alternative dispute resolution (ADR); and (ii) promoting the amicable settlement of disputes by encouraging the use of mediation and ensuring a balanced relationship between mediation and judicial proceedings. The Directive relates to cross-border disputes in civil or commercial matters and gives Member States three years to effect it in their national legislation.[8] The Directive is the result of a series of efforts over the past few years, which started with the Commission's Green Paper, to consult ADR institutions and associations, mediators and professionals on how to improve and implement mediation and in general ADR systems in the EU.

While it is unclear whether the Italian Government's move was prompted by the EU legislative initiatives or by the volume of protracted cases that are a feature of Italy's judicial system, Italy has now decided to make it mandatory for litigants to use mediation to resolve disputes before resorting to litigation in courts in Italy.

An Overview of the Italian Background on Mediation

While the Italian Government has introduced numerous mediation bills of general applicability, few of these have previously been enacted into law. Beginning in the early 1990s, mediation in Italy has been introduced and regulated for various sectors. Thus since the enactment in 1993 of Law n. 580/1993 (about the reorganization of the Italian Chambers of Commerce), ADR methods have been increasingly perceived as a real alternative to court proceedings.[9] Following that enactment various provisions have been adopted in Italy regarding mediation, includ-

ing the Code of Civil Procedure's provisions, which offer a version of mediation as a possible step in the ordinary litigation process.[10] Mediation[11] has also been introduced in labor disputes as an ordinary process. Indeed, Section 410 of the Code of Civil Procedure requires the parties in a labor dispute to first appear before a conciliation panel. This phase represents a compulsory condition precedent to starting proceedings before a labor tribunal. If conciliation is successful a report is drafted and signed by the parties and the members of the panel. If not, parties can proceed before the court.

In early January 2003 the Government issued a number of legislative decrees implementing long-awaited and hotly debated reforms of corporate law. Decree No. 5 of 2003 regulates mediation in company disputes, the so-called "corporate mediation" (*conciliazione societaria*).[12] This decree, which went into effect on January 1, 2004, attempts to promote mediation in corporate and financial matters, and can be viewed as the antecedent for the 2010 Decree.

Along with these legislative developments and Court-annexed conciliation, a number of non-judicial compulsory attempts at conciliation before authorized conciliation bodies exist in Italy.[13]

The New Italian Mediation Decree

The mediation procedures introduced by the Decree, covers both cross-border and domestic disputes, and only apply to claims (rights) which can be freely disposed of by the relevant parties ("*Diritti Disponibili*"). The Decree has introduced a mandatory preliminary mediation procedure, which applies before any litigation in relation to insurance, banking and financial agreements as well as other matters such as joint ownership, property rights, division of assets, leases in general, gratuitous loans, compensation for damages due to car accidents, medical liability or defamation.

The mandatory mediation procedure will become effective as of 20 March 2011. After that date, parties to civil and commercial disputes that involve alienable rights will be required to attempt mediation before commencing a court action.[14] Should they proceed directly to court, Articles 2, 5, and 6 of the Decree, read together, require the court to stay the proceeding for a period not longer than four months so that the parties can attempt to mediate. If no settlement is reached, the mediator may propose an agreement which the parties may accept or refuse. If the parties refuse the proposal, either party is entitled to sue the opposing party before a court. In this case, if the court's judgment is aligned with the mediator's proposal, the court may take this into account when allocating costs between parties, and award costs against the party who refused the mediator's proposal. Mandatory mediation and its potential impact on the allocation of costs constitute the most novel and noteworthy features of the Decree.

The Decree provides, for the first time, a definition of "mediation" as a "proceeding" in which a third-party neutral assists two or more parties in resolving their dispute. Moreover, it specifies that a mediator can actively facilitate an amicable settlement, and even formulate proposals to resolve the conflict. The term "conciliation" is not considered to be synonymous with mediation; it is defined as the positive outcome of the mediation proceeding.[15]

The Decree requires mediators to be accredited by professional dispute resolution institutions that will be listed in a special registry created by the Ministry of Justice. It is anticipated that local Chambers of Commerce, which have specialized in administering private mediation proceedings, will play an important role. The mediation procedures established under the Decree may be brought before any of the mediation organizations mentioned in Article 16 of the Decree and the applicable procedure will follow the rules applied by the body chosen by the parties.

The Decree imposes a "confidentiality" obligation on the mediator, the parties, and all participants in the mediation meeting(s). Articles 9 and 10 provide that they shall not disclose to third parties any fact or other information obtained in the mediation proceeding. Moreover, the Decree makes such information inadmissible in any subsequent legal proceedings related to the same dispute, unless the parties agree otherwise.

The Decree provides also some tax relief for parties who use mediation to partially offset the mediator's compensation. This tax relief will be provided either by an exemption from the payment of certain taxes or via a tax credit.

In order to promote the use of this extrajudicial tool, and provide comprehensive information to the parties about the mediation requirement and the process itself, the Decree imposes on counsel a duty to not only inform, but to fully inform their clients about mandatory mediation, its process, advantages, the consequences associated with going to court before attempting mediation[16] (*condizione di procedibilitá*), and the related tax relief.

In order to ensure that counsel fulfill their obligations in this regard, the Decree provides that counsel's advice must be in writing in a form that is admissible in court in case it is necessary to prove that such advice was given. If an attorney fails to advise the client about mediation, the Decree provides that the attorney-client agreement is voidable.[17]

Conclusion

Many believe that encouraging parties to engage in mediation rather than forcing it upon them via legislation is the preferable option. Mediation is indeed intended to be a voluntary process entered into by the disputing parties, not one which they are compelled to follow.[18] And as "the beginning is the most important part of any work"[19] coercing people may simply lead parties attending a mediation to "tick a box" instead of really understanding and trusting the process. However, as in many jurisdictions around the world, including Italy, mediation is not well known to parties and practitioners. It may be that the only way to get parties to the mediation table in the first place is through some type of "forcing" mechanism, such as a requirement to mediate as a precondition to filing suit or costs and sanctions for failing or refusing to do so.

"[T]he Decree represents a strong motivator for serious discussions in Italy about mediation as an extrajudicial tool for solving commercial and civil disputes."

The Decree has been heralded as a turning point in the administration of justice in Italy.[20] However, whether the Decree will be effective in reducing the caseload of an overburdened judicial system, and will therefore represent an audacious step forward, or if those with vested interests will find a way to diminish it to a small step that preserves the *status quo* of inefficiencies remains to be seen. But the Decree represents a strong motivator for serious discussions in Italy about mediation as an extrajudicial tool for solving commercial and civil disputes.

Endnotes

1. *See, e.g.,* Marco Marinaro, *La mediazione delle liti civili e commerciali un nuovo strumento al servizio delle imprese*, Inserto a CostoZero, Apr. 3, 2010, at 1.
2. World Bank and the International Finance Corporation, *Economy Rankings,* available at http://www.doingbusiness.org/economy rankings/?direction=Asc&sort=10For the complete report see World Bank and the International Finance Corporation, *Doing Business 2011 Making a Difference for Entrepreneurs,* at page 4, 171 available at http://www.doingbusiness.org/reports/doing-business/doing-business-2011.
3. Id. See also the statistics published in Le Monde, Comparaison des systèmes judiciaires en Europe, available at http://www.lemonde.fr/europe/infographie/2006/10/05/comparaison-des-systemes-judiciaires-en-europe_820472_3214.html#ens_id=820387.
4. *See, e.g.,* Aldo Stesuri, *Conciliazione e mediazione: attualita' legislative e profili operativi, I Quaderni*, No. 26, 2009, at 7.
5. See *Scordino v. Italy* - 36813/97 [2004] ECHR 7 (29 July 2004). The States' primary defense was that their backlog of cases prevented them from speedily resolving the applicant's case. The ECHR has mostly rejected this argument, finding that States, as members to the council of Europe, have an obligation to structure their legal systems to ensure that cases are handled without unreasonable delay. The ECHR will allow a temporary backlog provided States take prompt steps to remedy the backlog. *Baggetta v. Italy* - 10256/83 [1987] ECHR 9 (25 June 1987).
6. Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF. For a discussion of the EU Directive see, F. Peter Phillips, The European Directive on Commercial Mediation, New York Dispute Resolution Lawyers, Vol 1, No. 1 at 45 (Fall 2008).
7. The Directive applies in all EU member states, except Denmark, which opted out.
8. Further endorsement of the use of ADR in Italy was given by the European Court of Justice in a preliminary ruling issued on 18 March 2010 (in joined cases C-317/08, C-318/08, C-319/08, and C-320/08). There the ECJ held that EU Directives and general principles do not prevent national law from providing for mandatory mediation procedures.
9. The Chambers of Commerce have become ADR providers for disputes between businesses or businesses and consumers.
10. *See* Article 185 of the Code of Civil Procedure. Upon request of the parties, the judge may set up a meeting of the parties in order to work with all sides of the dispute in an informal discussion and help resolve the dispute through a mediation process.
11. Regarding the semantic definition of "mediation" vs. "conciliation," please see *infra* footnote 15.
12. This set of rules established a national register of private and public mediation organizations maintained by the Ministry of Justice. The mediation settlements reached according to those rules are characterized by some features absent from private mediations, including: (1) the enforceability of the settlement agreement through an expedited procedure; (2) exemptions from taxes on documents; and (3) if mediation is provided for by a contractual clause of a company by-laws, and the parties ask for mediation, the judge must order a stay of litigation proceedings. For further information about "corporate mediation" (*concilaizione societaria*) see G. Miccolis, *La conciliazione e la disciplina del nuovo processo introdotto con il d.legisl. n. 5 del 2003*, in Riv. dir. civ. 2004, 97 ss.; E. Minervini, *La conciliazione stragiudiziale delle controversie in materia societaria*, in Società, 2003, 657 ss.; L. Negrini, *Della conciliazione stragiudiziale*, in *Il nuovo processo societario*, by S. Chiarloni, Bologna, 2004, 1043 ss.
13. *See, e.g.,* a) in sub-contracting disputes by Law n. 192/1998; b) in disputes between telecommunication bodies and customers by Law n. 481/1995; c) in disputes regarding tourism services by Law n. 135/2001; d) in franchising disputes by Law n. 129/2004; e) in disputes regarding the so called "*patti di famiglia*" regulated by Law n. 55/2006 and Article 768 of the Civil Code (in order to facilitate the transfer of enterprises, succession rules have been reformed, introducing family agreements. A "*family agreement*" is a contract through which, compatibly with the rules governing family firms and in obedience to the different company types, the entrepreneur transfers the firm, wholly or partially, and the stakeholder transfers, wholly or partially, his stakes to one or more descendants. It must be acknowledged before a public notary). In all those matters, attempts at conciliation are mandatory since the parties cannot start proceedings before an ordinary court without having first attempted conciliation.

    The Justices of the Peace (*Giudice di Pace*), a judicial position created in the early '90s, have jurisdiction over small claims matters and have the authority to mediate civil disputes at a request of one of the parties.

    In 1991, Telecom Italia (the Italian former telecommunication monopolist) introduced a conciliation commission to deal with small consumers claims.

Furthermore, the Legislative Decree n. 179/2007 instituted within the *Consob* ("*Commissione Nazionale per le Società e la Borsa*," i.e., the public authority responsible for regulating the Italian securities market, a Conciliation and Arbitration Chamber responsible for resolving disputes between investors and financial brokers for asserted violations of the brokers' duties of information, transparency and fairness.

Finally, the Milan Chamber of Arbitration, a Special Agency of the Milan Chamber of Commerce, set up in 2002 an online dispute resolution service (*RisolviOnLine*) for low-value dispute. Mediation is carried out by discussing the issue in real time through a chat line or by a discussion forum using a private area of a web site accessible only to the parties, the mediator, and the chamber officer in charge of the service. In their own private chat room space, the parties are able to communicate with the help of the mediator, setting out their own cases in full, expressing their demand and assessing their reciprocal positions in an attempt to find a satisfactory solution for all parties. For further information, please visit http://www.risolvionline.com/index.php?sez_id=30&lng_id=14.

14. In one of my previous contributions ("*Italy implements Mandatory Pre-Trial Mediation in Civil and Commercial Matters*," Dispute Resolution Journal, AAA, May-October 2010, Vol. 65, No. 2-3), I stated that the Decree introduced also pre-arbitration mediation. At that time the draft of the Decree contemplated mandatory mediation for arbitrations as well as court proceedings. However, the Decree, as enacted, does not include the arbitration procedures, therefore the compulsory mediation involves court cases only. Regarding the relation between arbitration and the new mediation law, see Alessandro Bossi, *Rapporto Arbitrato/nuova mediazione*, available at http://blogconciliazione.com/2010/11/rapporto-arbitrato-nuova-mediazione/.

15. Many authors had written, before the implementation of the new decree, regarding the differences between the term "Conciliation" and the term "Mediation" in the Italian system. The majority thought that there was more than a semantic difference between "conciliation" and "mediation." Conciliation was viewed as being used in the commercial and civil matters, whereas mediation was viewed as used for family, penal, and cultural issues. We currently consider the definition of "Conciliation" pursuant to Article 1, paragraph 3, of the UNCITRAL Model Law on International Commercial Conciliation of 2002 available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html, which states that: "conciliation" means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ("the conciliator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.

16. In the event a party first brings a Mandatory Mediation Dispute before a judicial court (without first having going through the mediation process) a judge in such court proceeding would not permit the case to proceed.

17. Article 4, paragraph 3 of the Decree.

18. This may be aligned with the view expressed by Lord Justice Dyson in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 that it is wrong to compel unwilling parties to mediate. The Court of Appeal expressed the view that such compulsion would likely be a breach of the right of access to the court required by Article 6 of the European Convention on Human Rights (ECHR), since compelling mediation would probably be regarded as an unacceptable constraint on the right of access. This has been much criticized on the basis that compelling mediation does not fetter the right of the parties to access the court; it simply delays it or demands that the two processes run in parallel. The European approach to ADR indicates that compulsory ADR does not in and of itself give rise to a violation of Article 6 and doubtless the Court of Appeal will have regard to the ECJ's ruling in *Rosalba* when and if it revisits *Halsey* in the future.

19. Full citation: "*You know that the beginning is the most important part of any work…for that is the time at which the character is being formed and the desired impression is more readily taken*." Plato, The Republic (Book II).

20. G. De Palo & L. D'Urso, *Explosion or Bust? Italy's New Mediation Model Targets Backlogs to 'Eliminate' One Million Disputes, Annually*, Alternatives, Vol. 28 No. 4, Apr. 2010, at 93-5. Giuliano Scarselli, *La nuova mediazione e conciliazione: le cose che non vanno, Il Foro Italiano*, Vol. No. 47, 2010, at 146-9. Francesca Cuomo *Ulloa, La mediazione sollecitata dal giudice*, Inserto a CostoZero, No.3, Apr. 2010, at 6.

Francesca De Paolis, francescadepa@gmail.com, is admitted to the Italian Bar, and is a Case Manager at the International Centre for Dispute Resolution in New York City. Previously she was in charge of the International Projects Department of the Chamber of Arbitration of Milan. She is an LL.M. Candidate in the International Business and Trade Law program at Fordham Law School.

Arbitration to Improve and Expedite Cross-Border Bankruptcies

By Allan L. Gropper

Arbitration has had an uneasy relationship with bankruptcy, for well-known reasons. Arbitration is based on consent: the agreement to arbitrate an actual or potential dispute in a private forum subject to relatively little judicial control. Bankruptcy, on the other hand, is premised on a court's control over all of the assets of an estate, and, in domestic proceedings, the benefit of having one forum liquidate all of the claims against an estate.[1] Arbitration is designed to produce a final, unappealable conclusion to a discrete dispute, whereas bankruptcy proceedings are designed to produce a global resolution of all of the claims against a debtor and either liquidate the assets and distribute them to the creditors and shareholders in accordance with their priority rights or to reorganize the debtor and distribute ownership interests in the reorganized entity.

"[T]here has…been increasing interest within the insolvency community in the use of arbitration as a means of resolving cross-border disputes in insolvency cases."

Despite the inherent tensions, courts have been increasingly willing to enforce prepetition arbitration clauses notwithstanding the subsequent bankruptcy filing of one of the parties.[2] With the recognition that arbitration is not necessarily incompatible with the administration of a bankruptcy case, even for some core bankruptcy matters,[3] there has also been increasing interest within the insolvency community in the use of arbitration as a means of resolving cross-border disputes in insolvency cases.

Most decisions concerning arbitration in the context of a bankruptcy involve the liquidation of a bankruptcy claim—that is, a pending or agreed-to arbitration as a means to resolve a dispute and, in most cases, liquidate a claim that then receives treatment and distribution in accordance with bankruptcy principles. Arbitration as a means of resolving issues that arise in cross-border insolvency cases could be used to address other concerns. These result from two facts of modern economic life. First, the bankruptcy of a large company is likely to have cross-border implications, and second, alternative mechanisms developed to date for resolving cross-border issues have had only limited success.

The Globalization of Business

In today's economy almost all large companies are part of the global economy, and, therefore, the failure of a large enterprise almost invariably has cross-border implications. Most Fortune 500 companies, for example, have assets and/or business operations in multiple jurisdictions, and an insolvency filing raises questions as to which court should have control over a company's assets and whether a debtor will be able to collect foreign receivables.[4]

Moreover, a company with foreign subsidiaries is often administered centrally, with a global cash management system that funds its operating companies from one centralized source. The fact that separate and distinct legal entities may operate as a unified whole for purposes of their business operations has created difficulties for various insolvency regimes because those regimes are generally based on a national, market-symmetric premise and there is no universal court to administer all parts of a global business concern.[5] On the contrary, bankruptcy has traditionally been based on *in rem* principles, the control over property within a particular jurisdiction.[6] This has often required the opening of insolvency proceedings in every jurisdiction in which the debtor has property, with the attendant costs of multiple proceedings and usually multiple trustees or other estate administrators.

In the absence of a global court with the ability to take control of all the assets of a multinational enterprise or even to coordinate the efforts of multiple local insolvency courts, there has been little cooperation among the estates and a perception of local favoritism has emerged. The failure to cooperate and the financial burdens of multiple administrations may make it impossible to reorganize businesses operating in many jurisdictions or to sell such businesses as a going concern. The inevitable losers are the creditors of such entities and the many employees left without jobs when the company's operations are terminated.

Efforts to Create Universal Insolvency Principles

There are significant ongoing efforts to create universal principles to govern cross-border insolvency cases.[7] These efforts include the Model Law on Cross-Border Insolvency completed in 1997 by the United Nations Commission on International Trade Law ("UNCITRAL"), which has been adopted by many of the world's principal commercial nations, including the United States (as chapter 15 of the Bankruptcy Code), the United Kingdom, Japan and Canada. The Model Law—and chapter 15 of the U.S. Bankruptcy Code—attempt to achieve many of the benefits of a global insolvency court without actually creating such a court by designating the case brought in

an entity's "center of main interests" ("COMI") as the main case and providing that entity with certain priority status.[8] Another attempt was made by the countries of the European Union (with the exception of Denmark) in adopting the European Union Insolvency Regulation which pioneered the concept of a COMI.[9] However, the identification of the COMI has itself engendered substantial litigation and uncertainty.[10] Even more significantly, the Model Law and chapter 15 apply only to single entities that have property or operations in more than one country. They do not provide for the coordination of proceedings for companies that operate in different countries through subsidiaries or affiliates. Since it is a salient principle of bankruptcy law that separate companies with separate assets and creditors are treated as distinct entities for bankruptcy purposes, there is no mechanism whereby a global enterprise with subsidiaries in many different countries can file in one jurisdiction and effectively administer assets in many different subsidiaries throughout the world.

It is suggested that arbitration can play a meaningful role in solving some of the problems inherent in our system of adjudicating cross-border insolvency cases. Three of the most promising areas are: (i) foreign claims; (ii) intercompany claims; and (iii) arbitration of certain central insolvency issues that can facilitate a reorganization.

Resolution of Foreign Claims

As discussed above, arbitration has increasingly been recognized as an appropriate mechanism for the liquidation of claims notwithstanding the bankruptcy filing of one of the parties. International arbitration ought to be just as useful in connection with the liquidation and resolution of foreign claims. Chapter 15 of the Bankruptcy Code recognizes the globalization of business in several provisions designed to assure that foreign creditors receive adequate notice of a bankruptcy case and the requirement to file a proof of claim.[11] Since foreign creditors play an increasingly important role in U.S. bankruptcy cases,[12] the role of arbitration in liquidating claims and resolving disputes is likely to become more important.

Arbitration of Intercompany Claims

As noted above, the Model Law and chapter 15 apply principally in cross-border cases brought by a single entity. There are no provisions that provide explicitly for the filing of petitions by affiliated entities in one central jurisdiction, and the general rule is that separate proceedings will be opened in each jurisdiction in which the individual subsidiary is located. UNCITRAL and other organizations are attempting to create rules that would permit joint filings at the COMI of the group, but such provisions are still on the drawing board.

Accordingly, if the parent does not have the desire—or sufficient funding—to keep a foreign subsidiary out of an insolvency proceeding altogether, separate proceedings will ordinarily be opened in each jurisdiction in which its subsidiaries operated. The complexities created by these often competing proceedings can be daunting. In the insolvency of Lehman Bros., for example, insolvency proceedings have been commenced in 19 countries in which subsidiaries or affiliates of the U.S. parent operated. There are intercompany claims exceeding $130 billion.[13] The representatives of the parent and the insolvency administrators of 18 of the subsidiaries have been able to work out an agreement, called a protocol, containing general principles providing for some degree of cooperation among the group.[14] Nevertheless, the resolution of the intercompany claims will doubtless prove a daunting task. The U.K. administrator, for example, publicly threatened a $100 billion lawsuit against the U.S. parent on account of funds sent from the U.K. to the U.S. on the eve of the U.S. filing.[15]

Arbitration might provide a means for the resolution of intercompany claims in this type of case. International arbitration is designed to provide a forum for the final and non-appealable determination of economic disputes. It provides neutral decision makers who may be experts in the subject matter of the dispute. The arbitration of cross-border intercompany disputes would likely proceed more quickly than litigation in one or more courts, with the accompanying possibility of recourse to anti-suit injunctions, and it could obviate concern about home court advantage by placing the issues before arbitrators from countries with no involvement in the dispute.

The cross-border cases involving the failure of Nortel provide another example of the role that international arbitration could play. The Nortel companies encompassed a huge telecommunications business, with headquarters in Canada and operations in 140 countries. Insolvency proceedings were filed in Canada for the Canadian companies, in Delaware for the U.S. companies, and in London for most of the European subsidiaries. The Delaware Bankruptcy Court recognized the Canadian and the U.K. proceedings, respectively, as foreign main proceedings under chapter 15 of the Bankruptcy Code. The administrators in the three proceedings were highly successful in managing a cross-border sale of assets, and the three groups were able to sell much of their property worldwide on a going-concern basis, with the proceeds of sale escrowed pending further proceedings. A subsequent decision of the U.S. Bankruptcy Court noted that the proceeds of the sales were to be held in escrow "until the parties either agree on a consensual allocation, or, in the absence of such an agreement, obtain a binding determination on the allocation pursuant to an agreed upon allocation protocol…to be determined (absent a consensual agreement) in a single cross-jurisdictional forum."[16] The parties also agreed to "negotiate in good faith to attempt to reach agreement on the terms that would govern the allocation protocol process," with the allocation to be based

in part on "the respective contributions of the various Nortel entities to the value of the assets sold."

Nevertheless, it remains to be seen how the parties will be able to resolve the serious intercompany disputes that have arisen. An initial dispute involved the effort of the official pension administrator in the U.K. to assert extraterritorial pension claims; the courts in Canada and the United States both held that proceedings taken in the U.K. were in violation of their respective bankruptcy stays.[17] Most recently, the administrators of the U.K. estates brought motions in the U.S. and Canadian courts for permission to file lawsuits against the U.S. and Canadian estates and their officers and directors for having allegedly engaged in "a general pattern" in which they "transferred value away from" the European debtors "to the benefit of other entities within the Nortel Group."[18] The transfers, it is alleged, led to a pension funding deficit of up to 2.1 billion English pounds.[19] It is suggested here that arbitration might provide a means to adjust the intercompany claims and distribute the funds in escrow without years of cross-border litigation.[20]

Arbitration of Central Bankruptcy Issues to Facilitate Reorganization

International arbitration could also supply a new approach to the resolution of core bankruptcy issues in a manner consistent with the goals espoused by the Model Law. Any insolvency, business failure, or effort to restructure debt raises questions such as the viability of the underlying economic terms of the proposed restructuring, whether a debt restructuring proposal is feasible or reasonable, and whether it treats groups of creditors fairly, avoiding discrimination. Debtors and their principal creditors routinely "work out" these issues and agree to restructuring terms without commencing formal court proceedings. Yet workouts tend to be lengthy, drawn out and difficult to bring to a conclusion. Minority creditors may seek an advantage by "holding out" and demanding better treatment than the majority is willing to provide. A further obstacle is the absence in some jurisdictions of an effective court system and laws that provide a meaningful possibility of reorganization, which can force creditors in those jurisdictions into a ruinous liquidation.[21] In cross-border insolvencies in those parts of the world where the court system for enforcing creditor claims is weak or perceived as inimical to the interests of foreign creditors, the debtor may have an undue advantage.

Arbitration would provide the debtor in economic distress and its principal creditors with a neutral forum in which the parties' negotiations could be brought to a conclusion and a workout made binding. All relevant subsidiaries and affiliates could be brought into one proceeding. The arbitration would involve such questions as the ability of a debtor to repay debt over time and the feasibility of a plan. Yet the resulting arbitral award should be enforceable in all 144 nations that have signed the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Since arbitration is based on consent, only the debtor and creditors who had agreed to arbitrate would be bound by an award. Ordinarily, the consenting parties would be the borrower (debtor) and the principal providers of financing (lenders). All other creditors would have to be left unimpaired by the arbitration process, but in appropriate cases the benefits of arbitration should be sufficiently great to cause the debtor and lenders to accept the principle of non-impairment of trade and other non-consenting creditors. This is always the case in successful out-of-court workouts. Even in chapter 11 cases in the United States, lenders often permit trade and other "non-adjusting" creditors to be paid in order to gain the benefits of a faster consensual restructuring and a stronger restructured debtor.

Conclusion

The dramatic growth of the global economy requires the utilization of innovative mechanisms for resolution of cross-border insolvencies. The legal mechanisms developed to date have not proven to be effective in avoiding some of the most intractable issues that cross-border insolvencies present. Arbitration offers the possibility of providing better results for both creditors and debtors on a more expedited and equitable basis. Given that the arbitration of disputes related to a bankruptcy has become more widely accepted, the use of arbitration to address cross-border insolvency disputes should be more closely considered. The community of bankruptcy practitioners and courts should consider recommending and using arbitration in appropriate cases for resolving cross-border creditor and intercompany claims and for the effectuation of workouts and the restructuring of enterprise debt.[22]

Endnotes

1. Jay Lawrence Westbrook, *The Coming Encounter: International Arbitration and Bankruptcy*, 67 Minn. L. Rev. 595, 598, 605-06 (1983).
2. See generally, Alan N. Resnick, *The Enforceability of Arbitration Clauses in Bankruptcy*, 15 Am. Bankr. Inst. L. Rev. 183 (2007). See also, Edna Sussman, *Arbitration Agreements and Bankruptcy—Which Law Trumps When?*, New York Dispute Resolution Lawyer Vol. 2, No. 2 Fall 2009, reprinted in NAB Talk, Journal of the National Association of Bankruptcy Trustees, Summer 2010. There is an important exception in circumstances where there is a need for a "centralized proceeding…augmented by [a] complex factual scenario, involving multiple claims…." *In re United States Lines, Inc.*, 197 F.3d 631, 641 (2d Cir. 1999). A further caveat is that the non-debtor party to the arbitration must obtain relief from the automatic stay in order to proceed with an arbitration. The appropriate time for seeking such relief may be debated, but it should not be presumed that the arbitration can proceed without court authorization.

3. See, e.g., *Goldman Sachs Execution & Clearing L.P. (f/k/a Spear Leeds & Kellogg, L.P.) v. Official Unsecured Creditors' Committee of Bayou Group, LLC*, 2010 U.S.Dist. LEXIS 125950 (S.D.N.Y. Nov. 30, 2010).

4. See, e.g., Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 Mich. L. Rev. 2276, 2313-4 (2000) (hereinafter "*Global Solution*").

5. See *Id.* at 2281.

6. See, e.g., *Central Va. Community College v. Katz*, 546 U.S. 356 (2006), and *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004).

7. For a further discussion of the "wave of bankruptcy reform that is sweeping the world," *see* Westbrook, supra note 4, *Global Solution*, at 2278 (discussing various reform initiatives occurring at the close of the 20th century). The ideal of having "a single bankruptcy in which all creditors are entitled and required to prove," so that no particular creditor has "an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated" has been championed by many universalist bankruptcy scholars and judges. *See Cambridge Gas Transp. Corp. v. Official Comm. of Unsecured Creditors of Navigator Holdings PLC,* [2006] UKPC 26, 2006 WL 1546603 (P.C. 2006) at ¶ 16. *See, e.g.,* Jay Lawrence Westbrook, *Chapter 15 at Last*, 79 Am. Bankr. L.J. 713 (2005).

8. The Model Law endorses the principle of a single distribution of the worldwide assets of the enterprise by designating the proceeding commenced in the bankrupt's "center of main interests" ("COMI") as the main proceeding, and insolvency proceedings in all other jurisdictions in which the entity has an establishment as a nonmain proceeding. In most cases, any estate representative can seek an order of recognition in another nation, thereby opening what is called an "ancillary proceeding," whose purpose is to act as an aid to the foreign proceeding. Upon recognition, certain relief is automatic, such as a stay of litigation against the estate and suspension of the rights of any other party to deal with the debtor's assets. Additional, permissive relief can also be sought, such as taking discovery and collecting and administering the assets of the debtor; however, if the foreign representative seeks to distribute the assets in the foreign proceeding, the local court must be satisfied that the interests of creditors in the recognizing State are protected. The Model Law also sets out broad principles of cooperation and coordination among plenary (full) proceedings involving a debtor. Such principles have not been particularly effective in many cases. For examples of recent cases in which the result has been territorial despite the fact that both relevant jurisdictions have adopted the Model Law, and despite adherence to principles of cooperation or comity, see *Lehman Bros. Special Fin. Inc. v. BNY Corporate Tr. Services (In re Lehman Bros. Holdings Inc.),* 422 B.R. 407 (Bankr. S.D.N.Y. 2010); *Harms Offshore AHT v. Bloom*, [2009] WECA Civ 632, [2010] W.L.R. 349 (Ct. App. 2009).

9. (EC) No. 1346/2000 of 29 May 2000, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000R1346:EN:HTML. The Regulation embodies the concept of a main proceeding and a proceeding that is "ancillary" or secondary to the main proceeding. Under the Regulation, a main proceeding takes place in the debtor's COMI, and a non-main proceeding takes place anywhere else the debtor has an "establishment," defined as a place of operations where the debtor carries out non-transitory economic activity. Implementation challenges are presented by the system established under that regime. For a comprehensive history of the effort to develop a cross-border insolvency law, *see* Bob Wessels, International Insolvency Law (Kluwer 2d ed. 2006) ¶10095, ¶¶10435-39.

10. See, e.g., *In re Ran*, 607 F.3d 1017 (5th Cir. 2010); *In re Bear Stearns High-Grade Strategies Master Fund, Ltd,* 389 B.R. 325 (S.D.N.Y. 2008); *In re Betcorp. Ltd.*, 400 B.R. 266 (Bankr. D. Nev. 2009).

11. See, e.g., §1513, entitled "Access of foreign creditors to a case under this title" (title 11, the Bankruptcy Code); § 1514, entitled "Notification to foreign creditors concerning a case under this title."

12. In several recent cases before the author, foreign suppliers have been the principal unsecured creditors in the case and in some cases have dominated the unsecured creditors committee. See, e.g., *In re Sitnal, Inc.*, No. 04-13589 (ALG) (Bankr. S.D.N.Y.*); In re Stone Barn Inc.* (formerly Steve & Barry's), No. 08-12579 (ALG) (Bankr. S.D.N.Y.); *In re Jennifer Convertibles*, No. 10-13779 (ALG) (Bankr. S.D.N.Y.).

13. *See* Disclosure Statement (Dkt. No. 8332), Exhibit 9, in *In re Lehman Bros. Holdings Inc.*, No. 08-13555 (JMP) (Bankr. S.D.N.Y.).

14. Cross-border Insolvency Protocol for the Lehman Brothers Group of Companies, attached to Motion dated May 26, 2009 in *In re Lehman Bros. Holdings Inc.*, No. 08-13555 (JMP) (Bankr. S.D.N.Y.).

15. Danny Fortson, *Lehman UK Arm to Sue for $100 billion,* The Sunday Times Online, Aug. 30, 2009.

16. *In re Nortel Networks Corp.*, 426 B.R. 84, 95 (Bankr. D. Del. 2010). aff'd.

17. *In re Nortel Networks Corp.,* 2010 Carswell Ont. 1597, 2010 ONSC 1304, 65 C.B.R. (5th) 231 (Ont.Sup.Ct. Mar. 18, 2010); *In re Nortel Networks Corp.*, 426 B.R. 84 (Bankr. D. Del. 2010), aff'd, __ B.R. __, 2011 WL 1154225 (D. Del. March 29, 2011).

18. Motion for Relief from the Automatic Stay, ¶ 7, in *In re Nortel Networks Inc.*, No. 09-10138 (KG) (Bankr. D. Del. Dec. 13, 2010).

19. Declaration of John Haydn Whiteoak in Support of Motion for Relief from Stay, ¶ 32, dated December 13, 2010.

20. The parties in the *Nortel* U.S. case have taken a small but possibly significant step toward recognizing the utility of arbitration by agreeing to arbitrate a discrete dispute involving the sale of certain Metro Ethernet Networks Business Assets. See Order in *In re Nortel Networks Corp.,* No. 09-10138 (KG) (Bankr. D. Del. Apr. 12, 2010).

21. Bob Wessels, Bruce A. Markell, and Jason Kilborn, International cooperation in Bankruptcy and Insolvency Matters 13-38 (2009).

22. Arbitration has been proposed as a means of restructuring sovereign debt defaults. Christoph C. Paulus and Steven T. Kargman, *Reforming the Process of Debt Restructuring – A Proposal for a Sovereign Debt Tribunal,* Preliminary Draft Presentation to the United Nations Workshop on "Debt, Finance and Emerging Issues in Financial Integration," April 8-9, 2008. The authors envision an "international arbitral tribunal for resolving disputes arising in sovereign debt restructurings."

Allan L. Gropper is a Bankruptcy Judge serving in the United States Bankruptcy Court for the Southern District of New York.

Transparency in Investment Arbitration: A Creeping Reality?

By Joe Matthews

Investment arbitration differs from commercial arbitration in many ways, but the most fundamental is that a sovereign government is always involved. Thus, the public's business is the subject matter of every dispute that is subjected to resolution by investment arbitration.[1] Whether and to what extent a particular government guarantees—or even values—transparency in the conduct of government affairs differs greatly among nations. However, the end of the 20th century undoubtedly witnessed an inexorable growth in the number of democratically elected governments and a concomitant growth in the commitment of governments generally, and democratic governments specifically, to increased citizen access to information about the workings of government. In fact, good government is almost universally associated with transparent government and the most prominent organization dedicated to government free of corruption is called Transparency International.

"[T]he public's business is the subject matter of every dispute that is subjected to resolution by investment arbitration."

The end of the 20th century also witnessed the growth of treaty-based investor-State arbitration as part of the effort to encourage foreign direct investment in developing countries and promote global growth, through adoption of bilateral and multilateral investment treaties.[2]

Investment arbitration generally takes one of two forms: Treaties sometimes prescribe arbitration under the rules of the International Centre for Settlement of Investment Disputes (ICSID) and sometimes offer investors the option to arbitrate *ad hoc* under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).[3]

The Evolution of ICSID's Approach to Transparency

After many years during which ICSID tribunals were faced with attempts by non-parties (primarily non-governmental organizations) to gain access to and obtain information about pending investment treaty arbitrations, ICSID revised its rules in 2006 and adopted or modified three of its rules,[4] the effect of which has been to open up the investment arbitration process conducted under the auspices of ICSID substantially.

These three rules adopted in 2006, in combination with the enormous interest in investment arbitration and the impact of the Internet, insure that there is far greater transparency in the ICSID process than other types of international arbitration. Nonetheless, there are still limits to non-party access even in the ICSID process and the parameters of non-party involvement remain subject to the discretion of tribunals.

The first Tribunal to publicly address non-disputing party ("NDP") participation following adoption of the 2006 amendments was the Tribunal in *Biwater Gauff and United Republic of Tanzania*.[5] Four separate NGOs—The Lawyers' Environmental Action Team (LEAT), The Legal and Human Rights Centre (LHRC), The Tanzania Gender Networking Programme (TGNP) and The Center for International Environmental Law (CIEL), sought status as NDPs. The petitioners argued that under Rule 37(2) it is now explicit not only that a tribunal has jurisdiction to accept *amicus curiae* submissions, but also that it may do so over the objection of one or both of the arbitrating parties. Claimant objected. The Tribunal permitted the petitioners to make a written submission but denied the petitioners' request for access to the parties' submissions and other materials covered by a prior confidentiality order and denied petitioners' request to be present at the Final Hearing. The Tribunal agreed to revisit the issue of petitioners' access to the parties' submissions at the close of the Final Hearing, but the Final Award noted that at the conclusion of the merits hearing, both parties agreed that no further access to information or participation by the NDP petitioners was needed.[6]

The *amici* petitioners' requests for greater access to information and greater participation in *Biwater Gauff* were hindered by the existence of a prior confidentiality order and also by the advanced stage of the proceedings when the petitions were submitted to the Tribunal.

Another significant application of the ICSID rules relating to NDP participation was presented in *Foresti and others v. The Republic of South Africa*.[7] In *Foresti,* four NGOs, led by the Centre for Applied Legal Studies and a fifth NGO, the International Commission of Jurists, filed petitions for limited participation in the proceedings as NDPs. After soliciting and considering the positions of the parties, the Tribunal decided that the NDPs would be allowed to file submissions and the Tribunal asked the Parties to agree on and file with the Centre redacted versions of the Parties' Memorial and Counter-Memorial, redacted versions of legal opinions, and a list of witnesses and experts that had provided evidence on facts and quantum (without any description of the content of the report or statement). The schedule was set in order to give the NDPs adequate opportunity to prepare and

deliver their submissions in sufficient time before the Final Hearing for the Parties to be able to respond to those submissions.[8]

The NDP procedures established by the Tribunal in *Foresti* were not implemented because the case on the merits was resolved prior to the Final Hearing and the only matters submitted to the Tribunal were related to the allocation of costs, but the procedures summarized above are described in the Award that was entered.[9]

Other Tribunals are already placing meat on the bones created by the 2006 ICSID procedural rules for NDP participation.

UNCITRAL Proceedings

Transparency in arbitration proceedings conducted under UNCITRAL Rules presents a much more difficult and slow development process. The UNCITRAL Rules were developed more than thirty years ago (adopted in 1976) and their primary purpose has been to facilitate the conduct of arbitration for resolution of disputes between private parties of differing nationalities and thereby "contribute to the development of harmonious international economic relations."[10] By every fair measure they have succeeded in accomplishing that purpose. However, they are now routinely used in *ad hoc* investment treaty arbitration proceedings. Nonetheless, the historical obligation of confidentiality embodied in the rules (*e.g.*, former Rule 32(5) provides that an award may only be made public with the consent of the parties or to enforce it) retains its support among various constituencies within the world of international commercial arbitration.[11]

In 2005-06 the United Nations commissioned a report as part of an initiative to spur discussion on revision of the UNCITRAL Rules. A Working Group (WGII) of UNCITRAL was created and tasked with revising the 1976 Arbitration Rules. WGII commenced its work in the fall of 2006 and its work continues, even after the Rules were formally amended effective August 15, 2010. One of the on-going tasks of WGII is the preparation of a legal standard on the topic of transparency in treaty-based investor-State arbitration.[12] Pursuant to this mandate, on December 9, 2010, the Secretariat released a draft Note in preparation for the Fifty-fourth session of WGII.[13] The Note outlines issues for the WGII as it considers whether and how to adopt a legal standard on transparency in treaty-based investor-State arbitration.

The Note includes discussion of the potential scope of any legal standard WGII might adopt and most significantly, the Note outlines several possible forms such a legal standard might take. These forms range from a model statement of principle that States may choose to adopt by unilateral declarations, to model clauses that States might choose to include in investment treaties, to guidelines, to the adoption of stand-alone rules. The Note highlights some of the difficult issues stemming from the fact that investment arbitration arises out of treaties and such treaties are subject to a plethora of international and domestic legal requirements as to adoption and modification.

In short, the process of adopting and implementing changes that will increase transparency in treaty-based investment arbitration proceedings governed by UNCITRAL rules is complicated and difficult. Almost immediately after WGII commenced its work on development and potential implementation of a legal standard for transparency, the Government of Germany expressed its view that the rules relating to transparency should be drafted only as non-binding guidelines.[14] However, the U.S. and Canadian delegations submitted extensive Comments strongly supportive of increased transparency rules.[15]

Whether or not WGII will recommend adoption of some form of legal standard for transparency in treaty-based investment arbitration is impossible to predict.

Conclusion

Approximately 330 investor-state disputes have been registered with ICSID.[16] As tribunals grapple with the transparency rules, procedures to afford access to non-disputing parties are developing. It is not possible to determine how many investor-State disputes are conducted *ad hoc* pursuant to UNCITRAL Rules for the obvious reason that such proceedings are presumed to be confidential. However, given the proliferation of such disputes generally, the continued pressure to provide access to information about matters that may affect the public interest, and the existence of publications dedicated entirely to reporting on investor-state arbitrations, the pressure to open up all such proceedings will undoubtedly continue. There are countervailing arguments keyed not only to confidentiality but also to time and cost impacts on the proceedings. The precise scope of and limits on transparency that will be developed in response to these pressures remain to be seen.

Endnotes

1. Indeed, some of the most essential policy decisions affecting nations and the rights of their citizens have become the subject of investment arbitration disputes. For example, claimants have directly challenged environmental laws and regulations, affirmative action laws and regulations and more recently, public health laws regulating the marketing and distribution of tobacco products under investment treaties, asserting in each case that the domestic laws and regulations violated bilateral investment treaties between the respondent host nations and other nations.
2. There is only mixed empirical evidence about the impact the thousands of investment treaties and the arbitration provisions contained therein have on foreign direct investment but there was a significant increase in the total amount of foreign direct investment that coincided with the increase in the number of investment treaties. *See, e.g.*, Franck, Susan, *Foreign Direct Investment, Investment Treaty Arbitration and the Rule of Law*, 19 Global Business & Development Law Journal 337 (2007). There have been numerous studies in recent years attempting to determine whether there is a link between FDI and the

availability of investor-State arbitration. These studies were recently analyzed by the United Nations Conference on Trade and Development (UNCTAD), which found that there are many factors that dictate whether investments will be made in particular countries, including "(a) the general policy framework for foreign investment, including economic, political and social stability…; (b) economic determinants, such as the market size, cost of resources and other inputs (e.g., costs of labour) or the availability of natural resources; and (c) business facilitation, such as…investment incentives." But the UNCTAD report concluded that bilateral investment treaties (and even more so treaties with broader economic cooperation that include an investment chapter) "do have some influence on FDI [foreign direct investment] inflows from developed countries into developing countries." This conclusion was based not only on the more recent studies of the subject credited by UNCTAD but also on an investor survey that confirmed that seventy percent of the surveyed transnational corporations reported that international investment agreements "played a role in making an investment decision." *See* UNCTAD, *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries*, xi, UNCTAD/DIAE/IA/2009/5 (Sept. 2009), available at http://www.unctad.org/en/docs/diaeia20095_en.pdf.

3. Some treaties provide investors with the option to choose among these two primary options and some provide other dispute resolution options. However, the majority permit one or both of these two options.

4. Rule 32(2) provides as follows with respect to open hearings:

> (2) Unless either party objects, the Tribunal, after consultations with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearing, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.

Rule 37(2) provides as follows with respect to *amicus curiae* proceedings:

> (2) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:
>
> > (a) the non-disputing party 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 non-disputing party submission would address a matter within the scope of the dispute;
> >
> > (c) the non-disputing party has a significant interest in the proceeding.
>
> The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that the both parties are given an opportunity to present their observations on the non-disputing party submission.

Rule 48(4) provides:

> (4) The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal.

5. ICSID Case No. ARB/05/22. Procedural Order No. 5, February 2, 2007 (Hanotiau, Born, Landau).

6. ICSID Case No. ARB/05/22, Award (July 24, 2008) paras 363-69.

7. ICSID Case No. ARB (AF) 07/1.

8. ICSID Case No. ARB (AF) 07/1, Award and Concurring Statement of Arbitrator Matthews (August 3, 2010) para 28.

9. The Tribunal had decided that in view of the novelty of the NDP procedures adopted, after all submissions written and oral had been made the Tribunal would invite the parties and the NDPs to offer brief comments on the fairness and effectiveness of the procedures adopted. *See* Award at para 29. Unfortunately, for this purpose, the termination of the proceedings prevented this from happening.

10. *See* General Assembly Resolution 31/98 (15 December 1976), UN Doc A/RES/31/98 (1976).

11. The author wrote an article published in the online journal Transnational Dispute Management that advocated greater access in international commercial arbitration rules as well as in investment treaty arbitration. *See* Matthews, J.M., *The Case for Arbitration Rules that Presumptively Grant Public Access to All Arbitration Proceedings,* 3 Transnational Dispute Management Issue 5 (December 2006).

12. Forty-third session (New York, 21 June-9 July 2010), *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 190.

13. UN Doc. A/CH.9/WG.II/WP.162 (9 December 2010).

14. UN Doc A/CN.9/WG.II/WP.164 (20 December 2010).

15. UN Doc A/CN.9/WGII/WP.163 (7 December 2010).

16. The ICSID Caseload Statistics, available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics.

Joe Matthews is of counsel with the Law Firm of Colson, Hicks, Eidson, P.A., with offices in Miami, Florida and Washington, D.C. He has been a trial lawyer and serves as a neutral arbitrator and mediator as Joseph M. Matthews, P.A. He is a fellow of the College of Commercial Arbitrators and a member of the Board of Directors of the American Arbitration Association. He was a member of the Tribunal in *Foresti*. He can be reached at joseph@colson.com.

The Arbitral Tribunal or the National Court—Who Decides Whether There Is an Agreement to Arbitrate?

By Emma Lindsay

On November 3, 2010, the United Kingdom Supreme Court issued its decision in *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan*.[1] The case raises several important issues for the international arbitration community, including the scope of court review of arbitral awards under Article V(1)(a) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention), the doctrine of *compétence-compétence* and the application of arbitration agreements to non-signatories.

"[T]he enforcing court is 'entitled (and indeed bound)' to revisit the issue of jurisdiction where a party resisting enforcement claims that it was not bound by the arbitration agreement."

The central issue on appeal to the Supreme Court was whether the Government of Pakistan was a party to and bound by an arbitration agreement so that an award made under that agreement could be enforced against the Government of Pakistan in the United Kingdom. The UK's highest court affirmed the decisions of the two lower courts (the Commercial Court and the Court of Appeal), holding that there was no common intention to consider the Government a party to the agreement and, in the absence of a valid arbitration agreement between the parties, the award was unenforceable.

Analyzing numerous doctrinal writings and cases from France, Germany and the United States, the Supreme Court's unanimous decision accords with the comparative law approach of English courts to international arbitration issues. Given the composition of the bench for this case, this is unsurprising. Two law lords well versed in international legal issues gave the leading judgments. Lord Mance currently chairs the International Law Association and the Lord Chancellor's Advisory Committee on Private International Law; Lord Collins is the general editor of the leading English treatise on the conflict of laws, *Dicey, Morris and Collins*.[2]

The Facts

Dallah Real Estate and Tourism Holding Company ("Dallah") was awarded a final $20 million award in its favor against the Government of Pakistan (the "Government") by an International Chamber of Commerce (ICC) arbitral tribunal sitting in Paris. Dallah sought to enforce the award in London. The Government sought to resist enforcement under Article V(1)(a) of the New York Convention on the ground that "the arbitration agreement was not valid…under the law of the country where the award was made" because the Government was not a party to it.

In its first partial award on jurisdiction, the tribunal had concluded that the Government was a party to the arbitration agreement, which was contained in an underlying agreement expressed to be made and signed on behalf of Dallah and the Awami Hajj Trust (the "Trust"), a Pakistani legal entity existing pursuant to a government ordinance which lapsed before Dallah commenced arbitration against the Government.

The Government maintained its objection to the tribunal's jurisdiction throughout the arbitral proceedings, arguing that it was not bound by the arbitration agreement. The Government did not seek to challenge the award in the French courts (the courts of the seat of the arbitration), choosing instead to resist enforcement when Dallah sought it in England.

The Supreme Court's Reasoning

The Court's Power to Review the Arbitral Tribunal's Jurisdictional Ruling

While recognizing the well-established principle that an arbitral tribunal is authorized to determine its own jurisdiction (the doctrine of *compétence-compétence*), the Supreme Court held that the plain language of Article V(1)(a) of the New York Convention, as incorporated into English law by section 103(2)(b) of the 1996 English Arbitration Act, makes clear that an arbitral tribunal's determination of its jurisdiction does not bind a subsequent court, either at the seat or in another jurisdiction where enforcement is sought. Consequently, in the words of Lord Collins, despite the "trend" to limit reconsideration of findings of arbitral tribunals and the "pro-enforcement policy" of the New York Convention,[3] the enforcing court is "entitled (and indeed bound)" to revisit the issue of jurisdiction where a party resisting enforcement claims that it was not bound by the arbitration agreement.[4] Article V of the New York Convention "safeguards fundamental rights including the right of a party which has not agreed to arbitration to object to the jurisdiction of the tribunal."[5] Accordingly, a party contesting jurisdiction is entitled to

a "full judicial determination on evidence of an issue of jurisdiction before the English court."[6]

The Supreme Court held that no deference need be given to the arbitral tribunal's jurisdictional determination as to whether there is a valid and enforceable agreement to arbitrate between the parties. Both Lord Collins and Lord Mance quoted as a correct statement of English law the Government's submission that "the court may have regard to the reasoning and findings of the alleged arbitral tribunal, if they are helpful, but it is neither bound nor restricted by them."[7] Lord Mance elsewhere put it more emphatically, stating that the tribunal's own view of its jurisdiction has "no legal or evidential value."[8]

Of particular interest to readers of this publication will be the Supreme Court's review of U.S. jurisprudence on the issues before it. In considering the doctrine of *compétence-compétence* and the scope of court review of arbitrators' determinations of their jurisdiction, the UK Supreme Court found U.S. case law to be "illuminating,"[9] examining the U.S. Supreme Court's decision in *First Options of Chicago, Inc. v. Kaplan*[10] and its application by the Third Circuit in the international context in *China Minmetals Materials Import & Export Co. v. Chi Mei Corp*.[11]

No Common Intention Among the Parties to Be Bound by the Arbitration Agreement

Having argued before the arbitral tribunal that the Trust was the alter ego of the Government or the Government was the successor to the rights and obligations which the Trust had under the agreement between Dallah and the Trust prior to the latter's demise, Dallah changed course before the English courts to argue that it was the common intention of the parties that the Government should be a party to the agreement.

It was common ground between the parties that French law, as the law of the country where the award was made, applied to the question of whether there was a valid arbitration agreement between the Dallah and the Government.[12] On the basis of expert evidence from two leading French international arbitration lawyers, the Supreme Court held that in determining whether a party was or was not a signatory to the agreement, a French court would examine whether all of the parties had a common intention to be bound by the agreement and by its arbitration clause.[13] According to Lord Collins, there was no such common intention in view of five "essential points":

- Throughout the transaction, Dallah was advised by counsel who must have understood the difference between an agreement with a state entity and an agreement with the state itself;
- There was a clear change in the proposed transaction from an agreement with the Government (the Government was a party to an initial memorandum of understanding with Dallah) to an agreement with the Trust;
- The Trust was established as a separate and independent legal entity;
- The agreement (including the arbitration agreement) was deliberately structured to be between Dallah and the Trust, and the Government's only role under the agreement was to guarantee the Trust's loan obligations and to receive a counter-guarantee from the Trust; and
- It was the Trust that commenced proceedings against Dallah in Pakistan for a declaration that the Trust had validly accepted the repudiation by Dallah of its agreement with the Trust.[14]

Comments

Recognized by Lord Collins as being of "international importance,"[15] the Supreme Court's decision emphasizes the independent role of national courts, both at the seat and in enforcement proceedings elsewhere, in determining threshold jurisdictional issues in international arbitration. In the absence of a party's consent, that party cannot be required to accept an arbitral award on jurisdiction—at least as far as it determines that party's initial consent to arbitrate—without full judicial review. The decision also confirms that there is no requirement for a party to challenge an award in the courts of the seat of an arbitration before resisting enforcement elsewhere. While the courts of other jurisdictions might tout a less interventionist approach to international arbitration in response to *Dallah*, the Supreme Court's comparative analysis suggests that the position should be similar worldwide.

The Supreme Court's affirmation of independent court review no doubt will provide comfort to some commercial parties, but it may entail more protracted proceedings in which a threshold issue of jurisdiction is relitigated in the courts of the country where enforcement is sought after the conclusion of the arbitration. As a practical matter, the decision may make more attractive the option of challenging jurisdiction in court before an arbitration commences or, less likely, the option of not participating in arbitral proceedings and later challenging the arbitral tribunal's jurisdictional ruling at the enforcement stage.

The decision has clear takeaways for contracting parties at the time of contracting. First, commercial parties should ensure that all parties with which they are negotiating are considered to be contracting parties—where possible all such parties should be signatories. In addition, it is worth noting the consequences of not specifying the law governing the arbitration agreement, as the agreement between Dallah and the Trust omitted to do. Such consequences are not limited merely to the supervisory powers of the courts, as in the absence of an indica-

tion as to the law governing the arbitration agreement the existence of a valid arbitration clause (including whether it is binding on the relevant parties) will be addressed under the law of the place where the award was made under Article V(1)(a).

Finally, caution is advisable when contracting with state entities. The result in *Dallah* could have been avoided by making the foreign state a party to the contract or by ensuring that the state guaranteed all of the obligations of the state entity (not merely the loan obligations). Commercial parties also might consider structuring their transactions for investment treaty protection—for example, by incorporating the contracting company in a jurisdiction that has a bilateral or multilateral investment treaty with the state concerned or by ensuring that the owner of the company is a national of such a jurisdiction—so as to provide a direct right of action against the foreign state under the applicable investment treaty for violations of its protections, including obligations against unlawful expropriation or of fair and equitable treatment.

Postscript

The author notes that shortly before this edition of *New York Dispute Resolution Lawyer* went to press the Paris Court of Appeal issued its February 17, 2011 decision in an action commenced by the Government of Pakistan to set aside the ICC arbitral award in Dallah's favor. Having regard to transnational principles applicable in international cases, the Paris Court of Appeal disagreed with the UK Supreme Court on the facts before it, finding that the Government of Pakistan was a true party to the agreement between Dallah and the Trust based on the Government's role in the negotiation, implementation and termination of the agreement. Accordingly, the Paris Court of Appeal held that the arbitral tribunal properly assumed jurisdiction and dismissed the Government's action to set aside the award. The Court of Appeal's comparatively brief decision makes no mention of the lengthier consideration given to the issues before it by its sister court across the Channel, but it is clear that their Lordships' reasoning was not found persuasive in Paris.

Endnotes

1. [2010] UKSC 46.
2. Lord Mance and Lord Collins were joined by Lord Hope, Deputy President of the Supreme Court, Lord Saville and Lord Clarke.
3. Collins LJ, para. 101.
4. Collins LJ, para. 104.
5. Collins LJ, para. 102. In the context of a challenge to the initial consent to arbitration, Lord Collins declined to consider cases concerning the scope of a binding agreement to arbitrate, thereby distinguishing between the issue of the existence of the consent to arbitrate and issues regarding the scope of an otherwise clear consent to arbitrate. Collins LJ, paras. 100–01.
6. Mance LJ, para. 26.
7. Mance LJ, para. 31; Collins LJ, para. 160.
8. Mance LJ, para. 30. Yet the enforcing court should still consider "carefully and with interest" the decision of an arbitral tribunal which has ruled on its own jurisdiction. Mance LJ, para. 31. In this regard, the Supreme Court noted the hesitation, reflected in the award, of two of the three arbitrators in concluding that the Government was a party to the agreement. Mance LJ, paras. 38–39; Collins LJ, para. 146.
9. Collins, LJ, paras. 90–92; Mance LJ, para. 24.
10. 514 U.S. 938 (1995).
11. 334 F.3d 274 (3d Cir. 2003).
12. It is curious that the Government should have accepted the application of French law to the question of the relationship between it, another Pakistani entity (the Trust) and a Saudi corporation (Dallah) when this choice of law resulted from the specification of Paris as the seat of the arbitration in the very arbitration agreement that the Government sought to challenge.
13. Lord Mance and Lord Collins held that the "transnational law" rules applied by the French courts in international cases are in fact rules of French law. As explained by Lord Collins, "[w]hat French law does is to draw a distinction between domestic arbitrations in France, and international arbitrations in France. It applies certain rules to the former, and what it describes as transnational law or rules to the latter." Collins LJ, para. 124.
14. Collins LJ, paras. 132–37; *see also* Mance LJ, paras. 41–66.
15. Collins LJ, para. 71.

Emma Lindsay is a senior associate with the New York office of Simpson Thacher & Bartlett LLP. She can be reached at elindsay@stblaw.com. The views expressed in this article are the author's own.

Building a New Way of Researching

By Morgan D. Maguire

Investor State Law Guide (ISLG) is an online database that became available by subscription in early 2011. It knits together the treaties, arbitral rules and case law used in international investment treaty arbitration[1] using a new software platform that is specifically designed to integrate legal data and present it in a variety of ways.

International investment treaty arbitration has grown dramatically over the past 15 years. What began as a handful of cases in the 1990s has grown into a distinct and rapidly growing area of law and practice. As of the end of 2009 there were 357 known treaty based cases involving 81 countries; of those 57 per cent were initiated since 2005.[2] Over 200 cases were registered under the ICSID Convention and ICSID Additional Facility Rules between 2003 and 2010 alone.[3] International investment treaty arbitration combines other areas of law and practice, including conventional investment protection law, international trade law, public international law and international commercial arbitration. Investment treaty arbitration crosses national jurisdictions and applies hundreds of varied international treaties, arbitral rules and other instruments. Although international investment treaty arbitration does not operate on the basis of the doctrine of *stare decisis*, counsel and tribunals routinely examine prior decisions. Given the maturation of investment treaty arbitration and the complex and disparate nature of its law and practice, the ISLG development team determined that the area was ripe for a comprehensive online research tool.

ISLG starts first by coding the treaties such as the ICSID Convention, bilateral investment treaties (BITs) and free trade agreements (FTAs) that have been the subject of investor-State arbitration, the relevant arbitral rules and the publicly available decisions and awards of tribunals. The software then captures the interrelationships between those materials and presents them through various search tools. It is designed to allow users to see how a specific case, treaty provision or arbitral rule has been dealt with by a tribunal and then quickly determine how that tribunal's treatment of the issue has been considered by subsequent tribunals.

ISLG's Conceptual Framework

As stated, although the doctrine of *stare decisis* does not apply to investment arbitration, counsel and tribunals routinely examine the decisions of past tribunals. In some areas, tribunals have acted consistently in their treatment of specific issues; in others, they have varied—in sometimes contradictory ways—in their analysis of the same or similar treaty provisions. ISLG is designed to allow users to see how different tribunals address the same or similar issues.

As our team began to examine the demands of presenting international investment treaty law using our search tools, it was necessary to confront the law's fragmented nature. This point is illustrated by contrasting international investment treaty law to the WTO's legal system.[4]

The WTO legal system is self-contained in that it is concerned with the interpretation of a set of agreements to which all WTO Members are party.[5] WTO dispute settlement panels, although *ad hoc*, can be appealed to the Appellate Body on questions of law and this introduces a hierarchy of legal authority into the WTO system which leads to relatively consistent treatment of recurring legal issues. While it is not unknown for WTO panels and the Appellate Body to refer to non-WTO and non-GATT legal sources (such as judgments of the International Court of Justice), this does not occur as frequently in WTO proceedings as it does in investment treaty arbitration. There is instead a pronounced tendency to cite prior panel reports and decisions of the Appellate Body.

International investment treaty arbitration is very different. First, rather than a single overarching multilateral treaty that sets out common obligations, investment treaty arbitration takes place under BITs, FTAs (*e.g.*, the *North American Free Trade Agreement* (NAFTA)) and sectoral agreements (*e.g.*, the *Energy Charter Treaty*).[6] There are some 3,000 treaties in effect that contain investment protection provisions (although only a handful of them have been invoked to date). The content and expressions of the obligations contained in such treaties can vary substantially. Treaties differ by the obligations contained therein (although many contain the same or similar obligations such as the prohibition against uncompensated expropriations) and by drafting technique. Differences will also reflect the dynamics of each specific treaty negotiation and changing views about model treaties, and therefore even a single State such as the United States will be party to a variety of different investment treaty texts. NAFTA's Chapter 11, for example, is a lengthy and complex investment protection chapter which stands in contrast to the structure of many bilateral investment treaties, foreign investment protection agreements, and indeed other FTAs to which the United States, Canada and Mexico are party.

The second distinguishing feature of investment treaty arbitration is that while investment treaty arbitral tribunals, like WTO panels, are *ad hoc*, they are not subject to appeal for error of law as is the case in the WTO. Arbitral awards issued by tribunals formed pursuant to the ICSID Convention are subject to an *ad hoc* annulment proceeding (but not for error of law) and likewise awards rendered by tribunals established under other arbitral

rules are subject to the curial jurisdiction of the courts of the place of arbitration, but only under the limited grounds typical to review of international arbitral awards (as set out, for example, in Article 34 of the *UNCITRAL Model Law on International Commercial Arbitration*). The corrective role played by the WTO Appellate Body finds no correlative body in investment treaty arbitration, and decisions can vary (widely in some cases) in how they treat common issues.

In short, the international investment treaty "system" is fragmented and variable, and this required a significant adjustment in the organisation and structure of the software needed to present the legal data in a comprehensive and readily understandable way. From the software design and presentation perspective, it took a considerable amount of planning to decide how to present the law.

Distinguishing Characteristics of ISLG

What most differentiates ISLG from other legal database offerings is the software and data capture process. By running the cases and treaty materials through a coding process, the software allows the team to link various search tools to the primary sources. Most databases rely on full text search techniques that require users to search a set of documents by word or phrase, which can in turn be narrowed through filters. The problem with this is that it inevitably produces a large body of results that then requires the researcher to weed out the irrelevant results. This is particularly the case for international investment arbitration decisions and awards. Decisions and awards can be lengthy and filled with long recitals and summaries of party submissions. As a result, traditional full text search techniques produce a particularly high frequency of irrelevant results (*i.e.*, what one party or the other argued rather than what the tribunal found). ISLG employs a pinpoint reference system that allows users to go directly to the relevant passage(s) of decisions and awards where a specific issue of interest is discussed by the tribunal.

ISLG essentially mines the data yielded from decisions and awards of tribunals and links them together. The result is a complex web of law which can be searched from many different points of entry. For example, the well known case of *Salini v. Morocco* examined the term "investment" in the context of Article 25 of the ICSID Convention.[7] Determining whether an "investment" has been made as that term is understood by the ICSID Convention is a question that arises regularly in ICSID cases. The *Salini* tribunal found that the term "investment" implies criteria of: (i) contribution, (ii) a certain duration of performance of the contract, (iii) a participation in the risks of the transactions, and (iv) a contribution to the economic development of the host State on the investment. This finding, expressed in paragraph 52 of the tribunal's Decision on Jurisdiction, has been subject to much discussion in subsequent cases. ISLG has several methods for finding information relevant to the issue discussed in this passage.

The Jurisprudence Citator allows users to quickly trace the evolution of a particular finding in subsequent cases. In addition to providing a list of decisions and awards that refer to the *Salini* decision generally, the Jurisprudence Citator allows users to find all instances where subsequent tribunals consider specific paragraphs of the decision. Using the *Salini* example above, users can "note up" paragraph 52: users are presented with a list of paragraph(s) or footnote(s) within subsequent tribunal decisions and awards that refer to paragraph 52 (*e.g., Saba Fakes v. Turkey*, Award, paragraph 103), and selecting the icon for each paragraph or footnote links users directly to the passage in the text of the decision or award containing the reference to paragraph 52.[8]

"[T]he international investment treaty 'system' is fragmented and variable, and this required a significant adjustment in the organisation and structure of the software needed…"

The Article Citator has the same kind of search function enabling users to determine how a specific treaty provision or arbitral rule was applied by successive tribunals. For example, paragraph 52 of the *Salini* decision considers Article 25 of the ICSID Convention. The Article Citator allows users to note up Article 25 (and/or its subparagraphs) and links them directly to the paragraph(s) or footnote(s) of tribunal decisions and awards that considers the provision. Users can also see which tribunal findings are cited most frequently by other tribunals (this function effectively cross references the Article Citator to the Jurisprudence Citator).

Another feature of the database is the Subject Navigator. This is a regularly updated electronic encyclopaedia that aggregates tribunals' discussions of different issues. To take the *Salini* example, users can open up the subject-matter of "investment" or "jurisdiction" in the Subject Navigator, which leads to a discussion on the issue of determining the existence of an "investment" under the ICSID Convention. This leads to the cases that address the issue, and links users directly to the relevant paragraph(s) or footnote(s) in the decisions or awards. This encyclopaedia is updated as new decisions and awards are made public, thus allowing users to keep current and trace the evolution of the law.

Finally, ISLG provides a full text search tool that allows users to perform a traditional search of all documents on the database. Various filters can be employed by the users when using this tool in order to limit the search

to a specific set of documents, including by document type, applicable treaty or arbitration rules, documents with references to a specific treaty provision (*e.g.*, only those decisions and awards that refer to Article 25 of the ICSID Convention) and decisions and awards with a particular arbitrator(s) sitting as a member of the tribunal.

ISLG's objective was first to bring together the publicly available materials of investment treaty arbitration and then introduce research redundancy into this area of law.[9] Each research tool provides a different entry point into this sprawling, fragmented area of law, and every entry in the database is connected to the specific text of the treaties and arbitral decisions. This allows users to tackle an issue from a variety of starting points and reduces the need for resorting to less efficient traditional full text search techniques. This process provides quick and comprehensive results, intended to get users the answers they need without necessarily having expertise in database search techniques.

Endnotes

1. International investment treaty arbitration is a form of dispute resolution where sovereign States give consent in a treaty or convention to allow investors of a State to bring a claim against another State.
2. United Nations Conference on Trade and Development, Latest Developments in Investor–State Dispute Settlement, IIA Issues Note No. 1 at 2 (2010).
3. See ICSID, *The ICSID Caseload—Statistics*, available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics, which provides an overview of cases established pursuant to the *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 18 March 1965 (entered into force 14 October 1966) (ICSID Convention) and the ICSID Additional Facility Rules (rules of procedure that can be adopted by non-ICSID member States). With over 140 member States, cases established pursuant to the ICSID Convention make up the majority of international investment treaty arbitrations.
4. An earlier generation of the software used to build ISLG was employed to build www.TradeLawGuide.com, an online research tool for *General Agreement on Tariffs and Trade* (GATT) and *World Trade Organization* (WTO) law.
5. The exception being the "plurilateral agreements" to which Members decide whether or not to accede.
6. Many such cases take place under the the ICSID Convention but it does not purport to set out the substantive legal obligations that govern legal disputes that are put before ICSID tribunals. The obligations are found separately in the BIT or other treaty.
7. *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001.
8. *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010.
9. ISLG's valued added research tools (*i.e.*, Subject Navigator, Article Citator and Jurisprudence Citator) currently incorporate all publicly available NAFTA and ICSID decisions and awards (decisions and awards of *ad hoc* tribunals will be added in mid-2011). However, all publicly available decisions and awards, including *ad hoc* tribunals, are available for full text search.

Morgan D. Maguire is a lawyer, called to the Bar of the Province of British Columbia in 2009.

Discovery and Cross-Examination Challenges in International Arbitrations: A Singapore Perspective

By Andre Yeap SC and Adrian Wong

Singapore, with its reputation for integrity and impartiality, is increasingly becoming an important venue for those who choose to conduct an international arbitration in Asia. As a result, the arbitration scene in Singapore has flourished over the past few years. The effort to promote arbitration was further boosted with the recent opening of Maxwell Chambers, a one-stop integrated dispute resolution complex housing both hearing facilities as well as top international alternative dispute resolution institutions.

Over the years, practitioners in Singapore have been involved in a wide variety of international arbitrations involving complex issues of foreign law, and accordingly have had the opportunity to work with a variety of legal experts, both with common law and civil law backgrounds.

"Singapore…is increasingly becoming an important venue for those who choose to conduct an international arbitration in Asia."

Discovery in Singapore

Critics of the recent trend in some arbitrations to permit extensive discovery have objected to the intrusive nature of such discovery and to its potential to be expensive, time-consuming and susceptible to abuse by the parties. Worse still, it may even distract parties from the substantive issues. Limiting discovery, which is usually more efficient and less costly, may however cause some practitioners concern that important documents would not be produced. To compensate for more limited discovery, practitioners should be aware that focused discovery may be available not only prior to the arbitration, but even after the hearing has begun.

In the context of international arbitrations in Singapore, the applicable discovery obligations on the part of parties to an international arbitration may vary, depending on:

(1) the law and arbitral rules governing the arbitration procedure;

(2) the proper law applicable to the substantive issues in dispute between the parties in arbitration; and

(3) the background of the arbitral tribunal,

For international arbitrations in Singapore, the duty of discovery is usually pegged somewhere in between the two extremes of extensive discovery and discovery of documents relied upon by each arbitrating party.

In Singapore, the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration was largely adopted wholesale as the arbitration law for international arbitrations with their seat in Singapore through the Singapore International Arbitration Act (Cap 143A) ("the Act").

As a matter of international practice, documentary discovery is generally regarded as a procedural issue for the arbitral tribunal. Therefore, the scope of discovery is almost invariably left to the discretion of the tribunal. This also appears to be the philosophy endorsed by section 12(1)(b) of the Act:

> 12.—(1) Without prejudice to the powers set out in any other provision of this Act and in the Model Law, an arbitral tribunal shall have powers to make orders or give directions to any party for…(b) discovery of documents and interrogatories…

Section 12(1)(b) does not contain any specific guidelines on discovery or any mechanism that the arbitral tribunal might adopt. This is intentional. The Singapore position is to rely on the ability of the arbitral tribunal to make the appropriate procedural orders relating to discovery depending on the facts as well as the background, expectations and demands of the parties. The preference of the Act is not to enact prescribed and regimented rules in order to encourage flexibility. The scope of discovery to be ordered would ultimately depend on whether the dispute between the parties is substantially factual in nature (when more extensive discovery may be required) or legal in nature (where limited or no discovery is directed).

However, given the primacy of the principle of party autonomy in the arbitration process, parties may also agree to some discovery mechanism that the arbitral tribunal will invariably confirm by way of a procedural order reflecting the parties' agreement.

Presently, the issuance of directions for discovery is the rule in international arbitrations in Singapore rather than the exception. The general trend over the last few years has, however, been to limit discovery to those documents both relevant to the issues in dispute and necessary for the proper resolution of those issues. Necessity is often evaluated by a consideration of the materiality of the documents sought to be disclosed.[1]

In Singapore, discovery in international arbitration is often done in a two-stage process. First, each party will generally produce documents it intends to rely upon. Second, opposing parties are then offered the opportunity of requesting additional discovery. Implied in this process is the assumption that documents that are not disclosed cannot be relied upon during the substantive hearing (whether for impeachment purposes or otherwise) without the consent of the arbitral tribunal.

Where there are issues as regards the extent or degree of additional discovery, it has become an increasing trend for parties to be directed to submit, for the tribunal's decision, a *Redfern* schedule setting out the basis for the request for additional discovery and the reasons cited by the opponent as to why further discovery ought not be given.

The *Redfern* schedule commonly used in international arbitrations, usually in tabular form, can be adapted to suit the circumstances of the case but will generally have in the first column the document or category of documents sought. In the second, the justification for the request is often stated. The reasons for refusing the request for additional discovery will be stated in the third column. A final column in the schedule is usually provided for the tribunal to record its decision. The tribunal will, after considering the *Redfern* schedule, generally limit discovery to that which it considers relevant and necessary in the context of the issues in dispute.

Application of Institutional Rules to Disclosure

The parties to an arbitration can also nominate a set of standard rules (whether the UNCITRAL Arbitration Rules, the International Centre for Dispute Resolution, the International Chamber of Commerce, the London Court of International Arbitration ("LCIA") Arbitration Rules or some other rules) to govern the arbitral process, including the issue of discovery. If no such rules are agreed upon, the law of the seat of the arbitration will generally govern the arbitral proceedings.

The aforementioned rules will almost invariably permit the arbitral tribunal to exercise its discretion as to how to address the issue of discovery. The most commonly encountered rules in Singapore international arbitrations are as follows:

- Arbitration Rules of the Singapore International Arbitration Centre (4th Ed, 2010, Rule 24.1(g) provides:

  > [i]n addition to the powers specified in these Rules and not in derogation of the mandatory rules of law applicable to the arbitration, the Tribunal shall have the power to:…g. order any party to produce to the Tribunal and to the other parties for inspection, and to supply copies of any document in their possession or control which the Tribunal considers relevant to the case and material to its outcome…

- International Centre for Dispute Resolution Guidelines for Arbitrators Concerning Exchanges of Information, Section 2 provides:

  > Parties shall exchange, in advance of the hearing, all documents upon which each intends to rely"; and section 3 (a) provides: "In addition to any disclosure pursuant to paragraph 2, the tribunal may, upon application, require one party to make available to another party documents in the party's possession, not otherwise available to the party seeking the documents, that are reasonably believed to exist and to be relevant and material to the outcome of the case. Requests for documents shall contain a description of specific documents or classes of documents, along with an explanation of their relevance and materiality to the outcome of the case.

- LCIA Arbitration Rules, Article 22(1)(e) provides that the arbitral tribunal may:

  > order any party to produce to the Arbitral Tribunal, and to the other parties for inspection, and to supply copies of, any documents or classes of documents in their possession, custody or power which the Arbitral Tribunal determines to be relevant….

- UNCITRAL Arbitration Rules (2010),[2] Article 27(3) provides:

  > [a]t any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine.

As illustrated by each of the rules cited above, the touchstone for when discovery should be ordered by the arbitral tribunal is entirely different. As may be seen from what is set out above, the test under the Arbitration Rules of the Singapore International Arbitration Centre and the International Centre for Dispute Resolution Guidelines (relevance and materiality) are the most stringent while nothing is prescribed in UNCITRAL Arbitration Rules as to when discovery ought to be ordered. The importance of choosing the right set of rules cannot be over-emphasised as they provide the basic guidelines for the arbitration binding on the parties and the arbitrators.

Application of Governing Law to Disclosure

Often, the scope of permissible discovery may also depend on the proper law governing the dispute between the parties. This point may be illustrated by considering the law on the admissibility of pre-contractual and post-contractual communications to interpret a contract under Singapore law and the position under English law.

By way of background, Singapore law generally tracks the position under English law given its legal heritage as a former British colony. From time to time, guidance on legal issues may also be sought from other Commonwealth jurisdictions and even from U.S. cases. Where appropriate, Singapore law may depart from the English position or the position espoused by other Commonwealth jurisdictions if the societal demands and public policy of Singapore so require. One area of departure from the English position is where contractual interpretation principles are concerned. It is now clear that both pre-contractual and post-contractual communications are admissible to assist in the interpretation of the contract between the parties under Singapore law: *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd*.[3] In contrast, the position under English law remains that recently affirmed in *Chartbrook Ltd v Persimmon Homes Ltd*,[4] i.e., that prior negotiations before contract formation are inadmissible for the purposes of interpreting a contract. By virtue of this difference, in a contractual dispute governed by English law, a request for discovery of documents relating to pre-contractual negotiations may be opposed on the basis of inadmissibility or irrelevance whilst a similar request made in the context of a dispute governed by Singapore law would most likely be considered favourably if opposed on that basis.

Choice of Tribunal

Choosing the right arbitrator is also important and the parties should carefully consider the arbitrator's practice with respect to discovery. If it is contemplated that substantial discovery would be required for the purposes of the main hearing, an arbitrator known to permit broader discovery should be selected. Conversely, if minimal discovery is intended, the selection of an arbitrator known to limit discovery would be advisable.

Of course, any fetters to be imposed by the tribunal on access by an arbitrating party to documentary evidence held by the opposing party must be carefully imposed in order to ensure that the rules of natural justice and due process are both given effect as well as seen to be implemented.

Disclosure at the Hearing Stage

It should, however, be borne in mind that most directions made for discovery before the main hearing are necessarily directions made by the tribunal without the benefit of hearing substantial evidence. At the substantive hearing of the arbitration, further discovery is still available. Therefore, it is important at the time of such directions to reserve the right to seek documents at a later stage or at the main hearing itself:

(a) for which no order has been made for disclosure; and

(b) that did not appear relevant to the tribunal at the particular interlocutory stage.

In order for counsel to avail themselves of this opportunity, it is important for questions to be asked during cross-examination that will demonstrate the relevance and necessity of further discovery before a request for disclosure of further documents from the opposing party is made. By eliciting answers from the witness under cross-examination which demonstrate the existence of relevant documents which have not been previously disclosed, it should be possible to obtain a direction from the tribunal for the witness or the party for whom he is giving evidence to produce any documents not previously disclosed.

Take, for example, an arbitration in which a bank is alleged to have offered negligent advice at a meeting attended by the claimant who is the customer. If what is at issue is what exactly was said at this meeting by the bank officer to the customer, any notes or minutes recording what was discussed with the customer by the bank would obviously be highly relevant. In the event that the bank has not disclosed any such notes or minutes, the existence and relevance of these documents ought to be demonstrated during the cross-examination of a representative of the bank. In such a situation, one should first establish that as part of good corporate practice, important documents should either be properly maintained or are required by law to be so maintained by the bank. Next, the witness should be asked whether it is part of the corporate practice of the bank to keep notes or minutes for discussions or meetings for important issues. The answer from the witness is likely to be positive. The witness should then be asked whether the bank considers any advice given to its customers to be important. The witness is unlikely to be able to say "no," in which case it should then be put to him that the necessary inference must be that notes or minutes for the meeting in issue would have been kept. After this series of questions, it is unlikely for the witness to be able to dispute the existence and relevance of the notes or minutes sought and it would not be difficult to persuade an arbitral tribunal to make an order for the notes or minutes in question to be produced.

The approach suggested above would, to some extent, ameliorate any concern that may exist on the part of counsel that he would not be able to effectively cross-examine with the more limited discovery of documents given at the interlocutory stage of an international arbitration in Singapore or elsewhere.

Conclusion

International commercial arbitration produces unique challenges for documentary discovery. Usually, regard will be given in Singapore arbitrations to the principle of party autonomy so that there will be considerable freedom for the parties to agree upon whether discovery is necessary and if so, the scope of the discovery required. In default of agreement, it will be for the arbitral tribunal to make directions consistent in accordance with the *lex arbitri*, the applicable arbitration rules agreed upon by the parties and the law applicable to the substantive merits of the dispute between the parties.

Endnotes

1. This is largely due to international trends. For example, the discovery regime under Article 3(7) of the IBA Rules on the Taking of Evidence in International Arbitrations (2010) limits documents that are discoverable for the purposes of additional or further discovery to those which are both relevant and material. This is similar to the test laid down by the English Court of Appeal in *O Co v M Co* [1996] 2 Lloyd's Rep 347 at 350-351. See also Rule 24.1(g) of the Arbitration Rules of the Singapore International Arbitration Centre (4th Ed, 2010) and Sections 2 and 3 of the International Centre for Dispute Resolution Guidelines for Arbitrators Concerning Exchanges of Information.
2. Adopted by the Kuala Lumpur Regional Centre for Arbitration as part of its institutional arbitral rules.
3. [2008] 3 SLR(R) 1029. See also VK Rajah JA, "Redrawing the Boundaries of Contractual Interpretation: From Text to Context to Pretext and Beyond" (2010) 22 SAcLJ 513; *Goh Guan Chong v AspenTech, Inc* [2009] 3 SLR(R) 590; *Straits Advisors Pte Ltd v Behringer Holdings (Pte) Ltd and another and another application* [2010] 1 SLR 760.
4. [2009] 1 AC 1101.

Mr. Yeap is Senior Counsel, Supreme Court of Singapore; Senior Partner, Rajah & Tann LLP. He has handled many international arbitration cases, including, a billion dollar dispute involving a steel plant, and disputes involving hotel ownership and management, power plants, telecommunication systems, and underwater channels. Mr. Yeap may be contacted at andre.yeap@rajahtann.com.

Mr. Wong is Advocate and Solicitor, Supreme Court of Singapore; Partner, Rajah & Tann LLP. His main practice areas are estate disputes, trust law, fiduciary obligations, civil fraud, joint venture and shareholders' disputes, minority oppression, banking law, real property and construction law. Mr. Wong may be contacted at adrian.wong@rajahtann.com.

Report by Arbitration Committee of Dispute Resolution Section:

Unanimously Approved by NYSBA Executive Committee and House of Delegates, November 2010

New York State Bar Association Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of International Arbitrations

International Arbitration is a substantial practice in New York. Many international contracts provide for applicability of New York law, and such contracts often specify New York as a venue for international arbitration. However, there has been concern in recent years that the choice of New York as the site of an international arbitration might prompt the arbitral tribunal to depart from normal international practice by imposing American style discovery on the parties. It is the view of the international arbitration bar in New York that these concerns are not justified. Rather, unless the parties agree otherwise, international arbitration in New York is conducted in accordance with internationally accepted practices. The Arbitration Committee of the New York State Bar Association's Dispute Resolution Section has prepared the following Guidelines regarding pre-hearing proceedings in international arbitration to provide guidance to arbitrators as to how best to conduct arbitrations consistent with international arbitration practice and to provide a better understanding to the international arbitration community of the prevailing practices in international arbitration proceedings which are sited in New York.[1]

The Key Element—An Arbitrator's Sound Judgment Informed by an International Perspective

- While some international cases may have similarities, for the most part each case involves unique facts and circumstances. As a result, pre-hearing arbitration proceedings including whether any pre-hearing exchange of information or taking of evidence will be allowed and, if so, how much, must be adapted to meet the unique characteristics of the particular case. There is no set of objective rules which, if followed, would result in one "correct" approach for all international cases.
- Pre-hearing exchange of information and taking of evidence are collectively referred to in these Guidelines as "Pre-Hearing Disclosure."
- In international arbitrations, documents on which parties intend to rely are exchanged. However, beyond that exchange, there is a strong presumption against Pre-Hearing Disclosure which in any way approaches the scope of discovery which one might expect in a case which is litigated in a U.S. court. The same presumption applies in international arbitration proceedings pending in New York subject to the considerations discussed in these Guidelines.
- The experience, talent and preferences brought to arbitration will vary with the arbitrator. It follows that once the arbitrator is chosen, the framework of pre-hearing procedures will always be based on the judgment of the arbitrator, brought to bear in the context of variables such as the arbitrator's background, applicable rules, the custom and practice for arbitrations in the industry in question, and the expectations and preferences of the parties and their counsel. To the extent that the parties seek Pre-Hearing Disclosure, arbitrators must exercise that judgment wisely, to produce a protocol for such disclosure that is specific and appropriate to the given case and is consistent with the accepted norms of international arbitration practice. The arbitrator's exercise of judgment should be directed to ensure there has been enough Pre-Hearing Disclosure to permit a fair result consistent with the expectations and legal traditions of the parties, balanced against the need for a less expensive and more efficient process than would have occurred if the case had been submitted to a U.S. court.
- Attached as Exhibit A is a list of factors which, if taken into consideration by an arbitrator when addressing the type and breadth of Pre-Hearing Disclosure, should assist the arbitrator in exercising judgment in a way that will limit such disclosure to the extent possible while taking into account all relevant factors.

Early Attention to the Pre-Hearing Process by the Arbitrator

- It is important that the ground rules governing an arbitration are clearly established in the period immediately following the initiation of the arbitration. Therefore, following appointment, the arbitrator

should promptly study the facts and the issues and be fully prepared to preside effectively over the early, formative stages of the case in a way that will ultimately lead to an expeditious, cost-effective and fair process.

- It is imperative for the arbitrator to avoid uncertainty and surprise by ensuring that the parties understand at an early stage what the basic ground rules for Pre-Hearing Disclosure, if any, are going to be. Early attention to the scope of such disclosure increases the chance that parties will adopt joint principles of fairness and efficiency before partisan positions arise in specific procedural disputes.
- The type and breadth of Pre-Hearing Disclosure should be high on the agenda for the first pre-hearing conference at the start of the case. If at all possible, an early, formative discussion about Pre-Hearing Disclosure should be attended by in-house counsel or other party representatives with budget responsibilities, as well as by outside counsel. If practicable, it may also increase the likelihood of an early, meaningful understanding of the implications of Pre-Hearing Disclosure if the first pre-hearing conference is an in-person meeting, as opposed to a conference call.
- The arbitrator will enhance the chances for limited, efficient Pre-Hearing Disclosure if, at the first pre-hearing conference, he/she sets achievable but ambitious hearing dates and aggressive interim deadlines. The arbitrator should inform the parties at the time that the deadlines will be strictly enforced and, in fact, the deadlines should thereafter be strictly enforced except in the case of clear good cause.
- Where appropriate, the arbitrator should explain at the first pre-hearing conference that document requests:
  - should be limited in number.
  - should be limited to requests for documents which are directly relevant to significant issues in the case or to the case's outcome.
  - should be restricted in terms of time frame, subject matter and persons or entities to which the requests pertain, and
  - should not include broad phraseology such as "all documents directly or indirectly related to."
- In international arbitration, the prevailing practice is that depositions are not permitted. Provision of written direct testimony in advance of the witness' appearance at an arbitration hearing can go far in substituting for the deposition procedure.
- In international arbitration, there is a strong presumption against use of the American discovery devices of interrogatories and requests to admit.
- In international arbitration, when the parties, their counsel or their documents would be subject to different rules or other obligations with respect to things such as privilege, privacy or professional ethics, the arbitrator should apply the same rule to both sides where possible, giving preference to the rule that provides the highest level of protection.

Party Preferences

- Overly broad Pre-Hearing Disclosure can result when all of the parties seek such disclosure beyond what is needed to prepare the case for an evidentiary hearing. This unfortunate circumstance may be caused by parties and/or advocates who are inexperienced in international arbitration and simply conduct themselves in a fashion which is commonly accepted in United States court litigation. In any event, where all the party participants truly desire unlimited Pre-Hearing Disclosure, the arbitrator must respect that decision, since arbitration is governed by the agreement of the parties. In such circumstances, however, the arbitrator should ensure that the parties have knowingly agreed to such broad disclosure and that they have intentionally withheld from the arbitrator the power to limit Pre-Hearing Disclosure in any fashion. The arbitrator should also make sure that the parties understand the impact of an agreement for broad Pre-Hearing Disclosure by discussing the cost of the course on which the parties propose to embark and the benefit or negative consequences likely to be derived therefrom. The arbitrator should endeavor to have these communications with in-house counsel or other party representatives, as well as with outside counsel, to ensure that the party principals fully understand the decision taken with respect to Pre-Hearing Disclosure.
- Where one side wants broad Pre-Hearing Disclosure in an international arbitration and the other wants such disclosure to be narrow, the setting is ideal for the arbitrator to set meaningful limitations since the arbitrator has far more latitude in such circumstances than when all parties have agreed on broad, encompassing Pre-Hearing Disclosure.

Arbitrator Tools

- While arbitrators are expected to act in a deliberate and judicious fashion, always affording the parties due process, it is also essential for the arbitrator to maintain control of the proceedings and to move the case forward to an orderly and timely conclu-

sion. The arbitrator has many tools that can be used both to ensure the fairness of the proceedings and to prevent disruption in the rare case where one side may withhold its cooperation. Those tools may include, for example, sanctions such as the making of adverse factual inferences against a party that has refused to come forward with required evidentiary materials on an important issue.

Written Witness Statements

- In international arbitrations, the use of written witness statements in lieu of direct testimony ("Witness Statements") is a normal, broadly accepted practice. Arbitrators should be receptive to the use of Witness Statements in international arbitrations and should take full advantage of the efficiencies that can often be achieved through effective use of such statements. Arbitrators should, however, require that Witness Statements be furnished to opposing counsel and the arbitrators sufficiently in advance of the witness' appearance for cross-examination at the arbitration hearing to permit proper preparation.

"E-Discovery"

- "E-discovery" is the Pre-Hearing Disclosure of documentary evidence that is stored in electronic form. The use of electronic media for the creation, storage and transmission of information has substantially increased the volume and cost of discovery in cases litigated in U.S. courts.
- To be consistent with the prevailing standards governing practice in international arbitration, Pre-Hearing Disclosure of information in electronic form must be narrowly circumscribed in order to protect the efficiency and economy of the proceedings while allowing parties to obtain necessary and pertinent evidence. Narrowing the time fields, search terms and files to be searched, as well as testing for burden are some of the tools for controlling e-discovery that should be considered.
- To be able appropriately to address issues pertaining to Pre-Hearing Disclosure of electronically stored documentation, arbitrators should at least familiarize themselves generally with the technological issues that arise in connection with electronic data. Such issues include the format in which documents are produced, and the availability and need (or lack thereof) for production of "metadata." A basic understanding by the arbitrator of the pertinent technology and terminology can place the arbitrator in a better position to assist the parties in containing the attendant costs and potential delays associated with the retrieval and exchange of electronic data.
- While there can be no objective standard in all cases for the appropriate scope of Pre-Hearing Disclosure of electronic information, an early order along the following lines can be an important first step in limiting such disclosure in a large number of cases:
  - There shall be production of electronic documents only from sources used in the ordinary course of business. Absent a showing of compelling need, no such documents are required to be produced from back-up servers, tapes or other media.
  - Absent a showing of compelling need, disclosure of electronic documents shall normally be made at the option of the producing party either (a) in native form; or (b) on the basis of generally available technology in a searchable format which is usable by the party receiving the e-documents and convenient and economical for the producing party. Absent a particularized showing of compelling need, the parties need not produce metadata.
  - Where the costs and burdens of e-discovery are disproportionate to the nature and gravity of the dispute or to the relevance of the materials requested, the arbitrator will either deny such requests or order disclosure on condition that the requesting party advance the reasonable cost of production to the other side, subject to further allocation of costs in the final award.

Disputes Regarding Pre-Hearing Disclosure

- It is essential that disputes as to Pre-Hearing Disclosure be resolved promptly and efficiently since exhaustive objections and related applications to the arbitrator can unduly extend the pre-hearing period and significantly add to the cost of the arbitration. In addressing such disputes, the arbitrator should consider the following practices which can increase the speed and cost-effectiveness of the arbitration:
  - Where there is a panel of three arbitrators, the parties may agree, by rule or otherwise, that the Chair or another member of the panel, acting alone, is authorized to resolve disputes as to Pre-Hearing Disclosure. While the designated panel member may still wish to consult the other arbitrators on matters of importance, the choice of a single arbitrator to decide such issues can nonetheless avert scheduling difficulties and avoid the expense and delay of three people separately engaging in the laborious tasks related to resolving such pre-hearing disputes.
  - Lengthy briefs on Pre-Hearing Disclosure matters should be avoided. In most cases, a prompt discussion or submission of brief letters will suf-

ficiently inform the arbitrator with regard to the issues to be decided.

- The parties should be required to negotiate Pre-Hearing Disclosure differences in good faith before presenting any remaining issues for the arbitrator's decision.
- The existence of Pre-Hearing Disclosure issues should not impede the progress of Pre-Hearing Disclosure in other areas where there is no dispute.

Requests for Adjournments

- Adjournments of the hearing dates can cause inordinate delay and detract from the cost effectiveness of the proceeding. While the arbitrator may not ultimately reject a joint application of all parties to adjourn the hearing, the arbitrator should nonetheless ensure that the parties understand the implications of the adjournment they seek and, if possible and except for exceptional circumstances, the arbitrator should try to dissuade them from the adjournment in a way that would still accommodate their perceived needs. The arbitrator may request that the represented parties attend any conference to discuss these subjects if, in the arbitrator's judgment, the presence of clients may facilitate the adoption of a practical solution.
- If one party seeks a continuance and another opposes it, the arbitrator then has discretion to grant or deny the request. In international arbitrations, a party seeking an adjournment should be required to establish clear good cause for the delay. In general, courts are well aware that a core goal of arbitration is speed and cost-effectiveness and will not disturb an arbitrator's rejection of an unpersuasive request for an adjournment.

Dispositive Motions

- In international arbitration, "dispositive" motions can cause significant delay and unduly prolong the proceeding. Such motions are commonly based on lengthy briefs and recitals of facts and, after much time, labor and expense, are generally denied on the ground that they raise issues of fact and are inconsistent with the spirit of arbitration. On the other hand, dispositive motions can sometimes enhance the efficiency of the arbitration process if directed to discrete legal issues such as statutes of limitations or defenses based on clear contractual provisions. In such circumstances an appropriately framed dispositive motion can eliminate the need for expensive and time consuming discovery. On balance, the arbitrator should consider the following procedure with regard to dispositive motions:
  - Any party wishing to make a dispositive motion must first submit a brief letter (not exceeding five pages) explaining why the motion has merit and why it would speed the proceeding and make it more cost-effective. The other side would have a brief period within which to respond.
  - Based on the letters, the arbitrator would decide whether to proceed with more comprehensive briefing and argument on the proposed motion.
  - If the arbitrator decides to go forward with the motion, he/she would place page limits on the briefs and set an accelerated schedule for the disposition of the motion.
  - Under ordinary circumstances, the pendency of such a motion should not serve to stay any aspect of the arbitration or adjourn any pending deadlines.

Conclusion

Arbitrators who serve in international cases sited in New York should continue to employ the best of the ever-developing international case management techniques so as to keep faith with New York's traditional respect for international norms and to preserve the essential nature of the arbitral process as a balanced, fair, cost-effective and highly distinctive alternative to litigation.

Endnote

1. A number of arbitration tribunals and organizations have in recent years developed proposed rules and protocols regarding the collection, disclosure and examination of evidence in international arbitrations. Parties arbitrating in New York are free to be guided by any of these rules. The New York State Bar Association ("NYSBA") has relied on some of this prior work in drafting these Guidelines. Among the best known of these prior contributions are the Rules on the Taking of Evidence in International Arbitration ("IBA Rules") which were adopted by the Council of the International Bar Association on May 29, 2010 and which are used in many international arbitrations around the world. These NYSBA Guidelines complement and in some cases supplement the IBA Rules that deal with pre-hearing disclosure. Among the areas in which these NYSBA Guidelines supplement the provisions of the IBA Rules regarding pre-hearing disclosure are: the first preliminary conference, electronic discovery, disputes regarding pre-hearing disclosure, adjournments, dispositive motions and the factors to be considered in determining the appropriate scope of pre-hearing disclosure.

EXHIBIT A

Relevant Factors in Determining the Appropriate Scope of Pre-Hearing Disclosure in International Arbitration

Agreement of the Parties

- Agreement of the parties, if any, with respect to the scope of Pre-Hearing Disclosure.
- Agreement, if any, by the parties with respect to duration of the arbitration from the filing of the arbitration demand to the issuance of the final award.
- The parties' choice of substantive and procedural law and the expectations under that legal regime with respect to Pre-Hearing Disclosure.

Characteristics and Needs of the Parties

- The nationalities of the parties, the legal tradition of the parties' home states, and the parties' expectations with respect to the arbitration process.
- The financial and human resources the parties have at their disposal to support Pre-Hearing Disclosure, viewed both in absolute terms and relative to one another.
- The financial burden that would be imposed by Pre-Hearing Disclosure and whether the extent of the burden outweighs the likely benefit.
- Whether injunctive relief is requested or whether one or more of the parties has some other particular interest in obtaining a prompt resolution of all or some of the controversy.
- The extent to which the resolution of the controversy might have an impact on the continued viability of one or more of the parties.

Nature of the Dispute

- The factual context of the arbitration and of the issues in question with which the arbitrator should become conversant before making a decision about Pre-Hearing Disclosure.
- The amount in controversy.
- The complexity of the factual issues.
- The number of parties and diversity of their interests.
- Whether any or all of the claims appear, on the basis of the pleadings, to have sufficient merit to justify the time and expense associated with the requested Pre-Hearing Disclosure.
- Whether there are public policy or ethical issues that give rise to the need for particularized Pre-Hearing Disclosure.
- Whether it might be productive to initially address a potentially dispositive issue which does not require Pre-Hearing Disclosure.

Relevance and Reasonable Need for Pre-Hearing Disclosure

- Whether the requested information is directly relevant to significant issues in dispute or to the outcome of the case.
- Whether the requested Pre-Hearing Disclosure appears to be sought in an excess of caution, or is duplicative or redundant.

- Whether there are necessary witnesses and/or documents that are beyond the tribunal's subpoena power.
- Whether denial of the requested Pre-Hearing Disclosure would, in the arbitrator's judgment (after appropriate scrutinizing of the issues), deprive the requesting party of what is reasonably necessary to allow that party a fair opportunity to prepare and present its case.
- Whether the requested information could be obtained from another source more conveniently and with less expense or other burden on the party from whom the Pre-Hearing Disclosure is requested.
- To what extent the requested Pre-Hearing Disclosure is likely to lead, as a practical matter, to a case-changing "smoking gun" or to a fairer result.
- Whether broad Pre-Hearing Disclosure is being sought as part of a litigation tactic to put the other side to great expense and thus coerce some sort of result on grounds other than the merits.
- Whether all or most of the information relevant to the determination of the merits is in the possession of one side.
- Whether the party seeking Pre-Hearing Disclosure is willing to advance the other side's reasonable costs and attorneys' fees in connection with furnishing the requested materials and information.

Privilege and Confidentiality

- Whether the requested information is likely to lead to privilege disputes as to documents not likely to assist in the determination of the merits.
- Whether there are genuine confidentiality concerns with respect to documents of marginal relevance. Whether cumbersome, time-consuming procedures (attorneys' eyes only, and the like) would be necessary to protect confidentiality in such circumstances.

Practical Uses of ADR in Outsourcing Relationships

By Julian Millstein and Sherman Kahn

Outsourcing relationships are guaranteed to produce disputes. Often complicated by business and technology change, these long-term agreements are never performed without disagreements over scope, price, adequacy of performance, reasons for delay, and changed requirements. Handling these disputes is one aspect of the day-to-day governance of outsourcing relationships. Therefore, in most cases, outsourcing relationships can benefit from planned use of alternative dispute resolution (ADR).

In outsourcing, a business process or technology process is transferred from one organization (the "customer") to another organization (the "service provider") so that the customer can focus on its "core competencies." But the transfer does not mean the process is unimportant to the customer. In fact the process that has been transferred is often very important to the customer's continued business success, even its survival. Failure to deliver the services in a timely and accurate manner, and at expected cost savings, can have serious repercussions to the customer's business.

"[I]n most cases, outsourcing relationships can benefit from planned use of alternative dispute resolution."

And when problems arise, the customer has good reason to try to resolve the dispute short of litigating. Contractual damage remedies are usually restricted by limitation of liability provisions. Other remedies such as self-help, rights to injunctive relief, and termination, may not ease the customer's burden all that much. Litigation, an expensive and time-consuming last resort in most commercial relationships, cannot usually address the customer's business risks associated with a failing outsourcing relationship. Litigation is especially unsuited for resolving problems that are not threatening to the overall outsourcing relationship. Also, by its nature, litigation creates a public record of strong adversarial dispute, and it may not be in the interest of the customer to publicize its difficulties with the provider of key services in such a manner.

The outsourcing provider likewise has reasons to settle its disputes outside of court. Its business success depends very much on its reputation as a professional, competent supplier of services. Consequently, most service providers prefer to settle disputes without public airing, and will work very hard to retain relationships which were expensive to obtain, and may have required substantial up-front investments which cannot be recovered unless the agreement continues for several years.

Disputes come in all shapes and sizes in outsourcing relationships. They frequently arise during the initial transfer to the provider's process, often as a result of delay by one or both parties. Disputes over scope and price ("scope creep") are typical, with the customer concerned about paying extra for services which it determines should be included in the provider's services, while the provider determines that such services are extras, and were never intended to be delivered at the initial pricing.

Parties also dispute the cause of performance failures, or indeed whether such failures were correctly measured. Agreements contain various pricing mechanisms which often call for "equitable" price adjustments or benchmarking to market price, and the parties may not be able to come to mutual agreement about such forward pricing. In all of these situations, the parties managing the outsourcing attempt to resolve their differences, and frequently they are able to do so. What should they do when, as often happens, they reach an impasse?

Creative use of Alternative Dispute Resolution is one answer. ADR is a continuum of techniques and processes used to help parties resolve disputes without resorting to public litigation. It is considered more efficient and effective than litigation, although this is not always the case. At the low end of the spectrum, ADR can refer to conflict escalation to different levels within the disputing entities, perhaps involving executives from other business units who have no "skin in the game" (so-called "distant executives") regarding the issues in dispute, and eventually to the CEO level. A second type of ADR is the use of mediation, where a neutral third party is called upon to facilitate, but has no authority to impose, an agreed-upon resolution. Technical disputes can be resolved by a neutral technician appointed by the parties. Finally, on the far end of the spectrum, binding arbitration by a single arbitrator or a panel of arbitrators can be used in lieu of litigation.

Indeed, providing for arbitration can be essential when the outsourcing relationship crosses international borders. Even after the long and arduous process of obtaining a judgment in court, it is often very difficult to enforce such a judgment in a foreign jurisdiction—and it may be necessary to do just that if the other party resides (or keeps its assets) in that foreign jurisdiction. Many countries' courts are not hospitable to foreigners, some are corrupt, and many have arduous and time-consuming procedures that make real relief untenable. International arbitration can solve this problem. In the more than 150 jurisdictions that are signatories to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention"), arbitration awards can be routinely enforced with very little opportunity for

challenge or relitigation even if the award was obtained and confirmed overseas. Arbitration, a private procedure, also avoids corruption issues, and allows for efficient resolution of disputes in jurisdictions with slow or procedure-laden court systems.

This brings us to our first principle:

A. ADR Should Be Used Routinely in the Ongoing and Regular Management of Outsourcing Relationships

Disputes get in the way of good relationships. But disputes that are not resolved and fester are much, much worse than disputes that are quickly resolved, however painfully. Outsourcing relationships are complicated and most are long-term. Books have been written about their governance. However, human beings almost always shrink from tackling disputes if there is a way to sweep them under the rug, primarily because they believe that if they do not acknowledge a dispute, their bosses will think they are doing a better job. But disputes swept under the rug grow virulent—they need to see the light of day.

To improve outsourcing relationships, the parties should follow contractual dispute escalation processes **to the letter.** Project management office ("PMO") minutes should maintain a tickler of unresolved disputes and track their escalation toward top executives. Those top executives should not see the existence of disputes as the fault of their employees, but should look at the dispute as suggesting issues in the relationship that can be improved upon.

For example, often a dispute arises because the parties have not really reached agreement on a matter of scope, performance or price. In those cases, the dispute may just mean it is time to nail that issue down. A dispute may arise because one party has not disclosed to the other an important cost or risk or weakness that affects its performance. Resolution puts this issue to bed. Active management of disputes, therefore, leads to more, not less, success.

Now, our second principle:

B. Use a Neutral Third Party Facilitator to Resolve Disputes Which Cannot Be Resolved Internally

Mediation can help cut through communication difficulties about who said what to whom, and help focus the parties' attention to getting real issues resolved. Mediation in this regard is similar to marriage counseling. Because it is usually in the interest of both the customer and the provider to reach a resolution that allows for the ongoing viability of the relationship, they can borrow from the playbook used by parties to joint ventures—business ventures where disputes must be settled between the co-venturers if the venture is to continue. Such ventures often resort to mediation by a mutually trusted person who understands the history and objectives of the venture. It is often useful to select this person in advance, so that the use of mediation is not itself considered a failure of the relationship.

A knowledgeable third party may be able to identify creative ways to resolve disputes, in a manner that the parties cannot. Mediators are trained to look for value which can be traded in such a way that an item that is valued highly by one party, but not by the other, may be traded for a reciprocal item. Often, the mediator can identify these while the parties themselves cannot. For example, a mediator can act as a bridge, receiving confidential information from both sides, and, without disclosing it to the other side, use it to help the parties reach an accord.

Often outsourcing relationships give rise to disputes that are essentially technical in nature. It is often useful to appoint a technically savvy mediator to resolve these types of issues as they arise. A number of the leading arbitral institutions administer proceedings in which experts can be brought in to mediate or resolve disputes. If an agreement has a technical component, providing for dispute resolution by a neutral expert can go a long way to smoothing the relationship.

Marriage counseling has saved many a marriage, and the same holds true for commercial relationships. The parties' agreement to devote time and energy to the mediation process is itself an important indicator of the likelihood of success.

The third principle:

C. Use Binding Arbitration, Rather Than Litigation, to Resolve Other Disputes

Binding arbitration may or may not be more efficient than litigation, but it will be kept private. Also, arbitration awards are more easily enforced internationally than court judgments. These are advantages for both parties. On the other hand, one potential downside of arbitration is that the arbitral award may be appealed only on narrow grounds, generally the bias of the arbitrator. Arbitration clauses must therefore be carefully crafted to deliver a fair and enforceable process, especially for agreements that are trans-border. Use of a panel of three arbitrators, although more costly, is preferable for high-stakes disputes, since the use of a single arbitrator without appeal has more risk of a surprising result which then cannot be remedied. It is often useful to provide for a single arbitrator for smaller, more routine, disputes and three arbitrators for more significant disputes.

Often, it is useful to try to resolve a dispute through a combination of mediation and arbitration. A mediator can help the parties narrow down a dispute. For example, with the help of a mediator, general displeasure with service performance may be tracked to a root cause. Both parties can settle on an agreed solution, with only the cost of the solution left to be arbitrated.

Finally, even if your company believes litigation is best handled in court, arbitration is an important tool when a dispute must be adjudicated (or enforced) in a court system which has problems in rendering timely decisions. For example, under Indian law, a dispute under an agreement between the Indian affiliates of two contracting companies must be litigated in Indian courts, which are notoriously slow, unless the parties agree to arbitration. Thus a global deal which provides for litigation between the parties should at a minimum contain an exception providing that disputes between certain local country affiliates will be arbitrated. Similarly, agreements involving parties residing in countries where courts are not reliable or may be unlikely to enforce foreign judgments should include arbitration provisions.

Parties may wish to accept that in these complicated multi-year (and often multi-party) relationships, difficult disputes will be inevitable, and therefore designate arbitration panels which are available on call should an impasse occur. So-called Dispute Resolution Boards are used in the construction industry, where large multi-year projects cannot be put at risk of being sidetracked by disputes between developers, contractors and sub-contractors. The building must go on, just as the process must go on in an outsourcing.

The fourth principle:

D. ADR Is Most Effective When a Well Thought Out Dispute Resolution Process Appropriate to the Particular Situation Is Included in the Original Outsourcing Agreement

No one wants to think about disputes when they are working on building a relationship. However, a carefully thought through dispute resolution process incorporated in the outsourcing agreement can be a powerful tool to resolve issues before they expand to damage the relationship.

By developing a procedure set forth in the agreement for the resolution of disputes, parties can avoid spending inordinate time determining "the shape of the table." Clear and unambiguous dispute resolution procedures will also help both the provider and the customer document and resolve issues, thereby reducing the possibility that either party will have unreasonable expectations.

If the agreement includes a step-clause (*e.g.*, negotiation, mediation, arbitration), ensure that the clause is clear as to how each step is initiated and how each step must be completed. Be sure to place time limits on all preliminary stages. If the agreement provides for specialized proceedings for certain kinds of disputes, be careful to carefully define the applicability of disputes to those proceedings.

If the agreement provides for arbitration, make sure that the agreement provides for a choice of substantive law, a place of arbitration, a specific set of arbitration rules and, if applicable, an administering organization. Be sure to specify that arbitration awards will be final and binding. If the parties to the agreement are from different countries, choose a language of the arbitration.

Finally, ensure that the arbitration clause is sufficiently broad and consult with local counsel, if necessary, in the place you choose for arbitration, the place providing the substantive law of the agreement, and the primary places of business of all the parties. Some jurisdictions have special language that must be included in an arbitration agreement to make a clause enforceable.

E. Practice Tips

Alternative Dispute Resolution is the best way to manage most disputes in outsourcing arrangements, particularly international outsourcing arrangements. The following practice tips should be helpful:

1. Provide for timely escalation of disputes. Escalation provisions should be strictly drafted and followed. Disputes should be tracked through the governance process. All billing disagreements should be memorialized in writing and a procedure for such memorialization is often best included in the outsourcing agreement.

2. Draft a change control process that the parties can actually follow. Often, the outsourcing agreement has a template for a change control process that does not conform to how the parties actually govern change. In negotiating the agreement, make sure that the agreed-upon change process will be consistent with the governance structure, and that both are adopted operationally.

3. Contractually identify specific areas which could be resolved by mediation, and the process to be used. For example, parties often know in advance that certain pricing, scope or performance issues will arise because solutions are not complete or change is expected. The resolution or filling of these "holes" could be supported by mediation, if necessary.

4. Consider employing an "expert" proceeding to resolve routine technical disputes that may arise during the course of performance.

5. Consider using arbitration when litigation resolutions will not be easily enforceable or where litigation will not yield fruitful and timely results for either party.

6. Certain disputes are good candidates for resolution through so-called "baseball" arbitration, where both sides suggest a resolution and the arbitrator must select one or the other, but may not interpolate. The process of preparing a proposal for this type of arbitration requires both sides to "seek the middle" and tends to narrow the dispute.

7. Be specific in the dispute resolution clause. Address whether you wish arbitrations to be administered by an organization (e.g., the American Arbitration Association ("AAA"), the International Chamber of Commerce ("ICC"), JAMS) or whether you would prefer an ad hoc or non-administered procedure. Also consider which rules will apply to mediation or arbitration, identify a place of arbitration, the language of arbitration and a method or choosing the arbitrator(s). Most administering organizations have several sets of rules for different types of arbitrations. Be specific as to which rules should apply. Other rules can be used for non-administered arbitrations (*e.g.*, UNCITRAL, CPR, etc.).

8. In developing dispute resolution clauses, try to avoid complicated or ambiguous procedures. Consider providing for expedited or simplified procedures to speed up the process where disputes may be routine and/or where early resolution is important to the ongoing transaction. Consider how much discovery should be exchanged in the arbitration. If there are specific needs for providing or limiting discovery, to the extent they can be itemized up front in the Agreement, there will be less opportunity for problems to arise later. Often these concerns can be addressed through the choice of administering organization and/or arbitration/mediation rules.

Julian S. Millstein, JMillstein@mofo.com, a mediator and arbitrator, is Senior Counselor at Morrison & Foerster LLP. He has over 30 years of experience negotiating and litigating complex outsourcing, e-commerce, and technology-related matters, across a wide range of industries and is ranked as a "Senior Statesman" in Chambers USA 2010. He is co-author of "Doing Business on the Internet – Forms and Analysis" and served as Adjunct Professor of Law at Fordham University School of Law for many years.

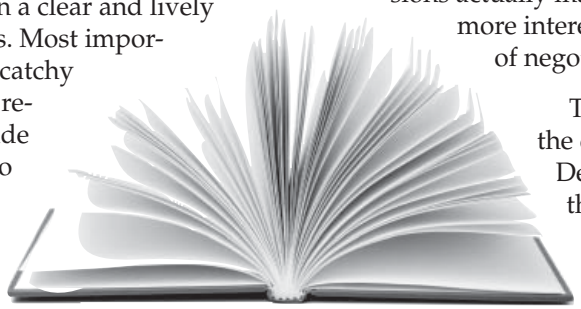
Sherman Kahn is of-counsel with the New York office of Morrison & Foerster LLP and co-chair of the Arbitration Committee of the Dispute Resolution Section of the New York State Bar Association. He can be reached at skahn@mofo.com.

Book Reviews

Bargaining With The Devil: When to Negotiate, When to Fight by Robert Mnookin

Reviewed by Vivian Berger

Treating conflicts as disparate as World War II and divorce, this fascinating book marries history with negotiation theory and practice. Written in a clear and lively style, it entertains as well as educates. Most important, it delivers on the promise of its catchy title. By the end the reader will have received invaluable aid on how to decide the perplexing question of whether to bargain with someone regarded as an enemy: an adversary "you don't trust...whose behavior you may even see as evil."



The author, Professor Robert Mnookin, is a leading scholar and practitioner of alternative dispute resolution, who holds a chair at Harvard Law School. He frames the discussion with introductory chapters setting forth the challenges presented by his subject and a brief conclusion suggesting an approach to the problem comprised of a few general guidelines. (The author is much too sensible and modest to attempt to give black-letter "answers.")

In between, he tells eight stories, several with an international setting, in great detail; he uses these both to illustrate and to develop his points. Three involve global events with hundreds of thousands—even millions—of lives at stake. The protagonists, a Hungarian Jew named Rudolf Kasztner, Winston Churchill, and Nelson Mandela had to decide whether to bargain with true devils: Eichmann, Hitler and the South African apartheid regime. A fourth concerns Anatoli Sharansky, a Russian "refusenik" who spurned talks with the KGB at the price of remaining imprisoned in the Gulag. Although only his personal well-being was directly at risk, he too faced an evil system and a choice implicating much broader issues. The other narratives deal with business and family issues drawn mainly from Mnookin's own cases: an intellectual property dispute involving two software giants, IBM and Fujitsu; severe and recurring controversies within the San Francisco Symphony; a rather mundane divorce litigation (the only chapter that could usefully have been omitted); and sibling warfare over an inherited beach property (which serves as the springboard for an incredibly deft mediation by the author).

The "devils" in these private stories, while hardly in the Nazi league, nonetheless posed the same quandary for their adversaries as the notorious public devils. Should one reject negotiating with evil on principle or, instead, be practical and concede that "you may have to give the Devil something you feel *he doesn't deserve*"? Look backward, dwelling on past wrongs, or focus on the future and the need for resolution? The punitive impulse, Mnookin notes with typical insight, "can be as powerful in business and family disputes as in international conflicts—perhaps even more so." Hence, the seemingly odd choice to draw on such dissimilar sources, macro and micro, for his conclusions actually makes good sense as well as providing more interesting reading than the average study of negotiation.

The author's substantive response to the question whether to bargain with the Devil is: "Not always, but more often than you feel like it." In disavowing the position that a disputant should always attempt to settle, Mnookin departs from conventional wisdom in the dispute resolution field. However, in his concern with process—*how* to decide in particular cases whether to do so—he embodies the common professional approach. Chiefly, he suggests three decisional guidelines. First, in order to avoid knee-jerk, intuitive reactions, conduct a systematic cost-benefit analysis. Rationally examine the parties' interests and alternatives to bargaining to see if any potential agreement might serve them better than their best options away from the table (BATNAs). Also consider each side's costs of negotiation and issues of implementation and enforcement. Second, during this evaluation get advice from others with less emotional involvement. Third, employ a presumption in favor of negotiation.

Is Mnookin right to place a heavy thumb on the scale in favor of sitting down with the enemy? He acknowledges that in the toughest situations, which most keenly pit principle against pragmatic concerns, he tilts very far toward pragmatism. Indeed, a fourth, atypically categorical "guideline" declares it "improper" for a person acting as a representative to let his personal moral intuitions override a practical assessment counseling bargaining—individuals acting in their own behalf may choose to assume the relevant risks. Once again, this stance is characteristic of neutrals. Some may say that he gives moral considerations too short shrift. Yet the author expressly states: "When fully explored by the analytic part of the brain...moral values should, and in some cases must, be factored into decision-making."

Further, he persuasively justifies his approach as a counterweight to the powerful forces spurring refusal to bargain with perceived devils. These are the so-called negative traps, which include demonization, zero-sum thinking, tribalism and moralism. While some may view these stances as simply realistic in confrontations with

monsters like Hitler, they plainly detract from rational analysis. (Moreover, even in devilish systems like South Africa under apartheid, the individuals with whom one deals, like Prime Ministers Piether Botha and F.W. de Klerk, are often recognizably human, if deeply flawed.) In addition, in assessing the courses pursued by his dramatis personae, he sometimes views decisions not to negotiate as wise or, at least, defensible—as, for example, Sharanski's and Churchill's. By contrast, Mnookin believes that Kasztner, who never gave up trying to make a deal with Eichmann despite his proven untrustworthiness, would have done better at some point to adopt a "mixed" strategy. This would have entailed Kasztner's trying to warn his constituents to hide or flee when his plan to trade large numbers of Jewish lives for money or property was plainly not working.

Mnookin's discussions of historical figures necessarily rest on second-hand evidence. Much of it seems reasonably reliable; Mandela's Autobiography and the later-released secret minutes of Churchill's War Cabinet spring to mind. Yet the author must still make speculative leaps that analysis of his own cases does not require. Further, in the symphony and software sagas, the parties waived confidentiality, thus allowing Mnookin to relate the relevant events in all their authentic specificity. Although in one instance, the IBM-Fujitsu clash, his closeness to the story proves something of a drawback, enticing him to drown the reader in arguably excessive detail, the account yields compensating benefits. As with the other private disputes, it offers more directly useful insights to dispute resolution professionals than the studies of conflicts involving matters of state and public affairs. These go beyond dealing with the central question of the book (one to be answered in particular instances by parties, not neutrals) of whether to negotiate in the first place.

Hired to arbitrate a very complex international lawsuit capping years of corporate warfare, Mnookin and a fellow arbitrator, a non-attorney computer expert, realized that new disputes were arising faster than they could be addressed. (In 20-20 hindsight, the emergence of this difficulty was predictable since the two companies remained partners in an ongoing joint venture.) "But designing a new process was not part of an arbitrator's job description." Nonetheless, managing to gain the litigants' consent—in the case of the highly suspicious Fujitsu, no easy matter—Mnookin and his cohort fashioned a "new hybrid process": they undertook to "mediate where possible and rule where necessary." Alternating roles as mediators, private judges, and administrators (the latter function required by the welter of technical issues), they succeeded in creating a global solution to the companies' problems. It put an end to past squabbles while permitting the parties to continue working together in the future.

What can practitioners draw from this tale? For one thing, it serves as a helpful reminder that there is no one-size-fits-all approach to the art of dispute resolution. To paraphrase Mnookin, thinking out of the box *is* the job description of the neutral—whether the conflicts be large or small. In addition, the story illustrates how cultural differences can cause or intensify disagreements as well as hamper negotiations. The marked differences between the American and Japanese "styles" included the Japanese emphasis on the relationship rather than the written contract and their inability to move ahead on new issues in face-to-face meetings since they do not give those at the table authority to depart from positions reached earlier by consensus. The case also vividly shows that corporations (through their agents) can act as emotionally as individuals: Fujitsu's president, feeling disrespected, betrayed and humiliated by its adversary's threats, responded with a declaration of "war."

The author closes on a note of diffidence, conceding that this work will not constitute the last word on the vexing question of whether to negotiate with the Devil. He hopes, however, to have helped the reader "think more clearly about how to navigate this terrain with integrity—and wisdom." He has more than achieved this goal. A wise man, Mnookin has produced an accessible, yet profound—and very wise—book.

Vivian Berger, vberger@law.columbia.edu, is the Nash Professor of Law Emerita at Columbia Law School and a neutral focusing on the mediation of employment disputes. She mediates privately as well as for the AAA, the EEOC, the U.S. Courts for the Southern and Eastern Districts of New York, and the New Jersey state court system. She also is a member of bar committees, serves as a speaker, and publishes in the fields of alternative dispute resolution and labor and employment. More about her activities can be found at http://vberger-mediator.com.

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Take the Witness: Cross-Examination in International Arbitration by Lawrence W. Newman and Ben H. Sheppard, Jr., Editors (JurisNet, LLC 2010)

Reviewed by Stefan B. Kalina

Successful cross-examination is built on "preparation, organization and hard work." Leading by example, co-editors Lawrence W. Newman and Ben H. Sheppard, Jr. have prepared a masterful set of instructional essays, organized around the central question: "whether the projected cross-examination has been best calibrated to have the maximum impact with the arbitrators hearing the evidence." The rigor of their editorial focus foretells the meaningful answers they provide. Within the taut confines of this single and slender volume, Messrs. Newman and Sheppard "identify those aspects of the process" that must be examined as carefully as any witness. Then, with marshaled guidance from eminent academics and practitioners

of international arbitration, they demonstrate concretely how cross-examination can be "efficiently and effectively carried out" in this particular setting. Simply put, this book helps lawyers work well—not just hard—towards achieving success in international arbitration.

The treatment begins where any advocacy technique necessarily ends—the arbitration decision. The book's thesis is concisely provided by co-editor Ben Sheppard's three "preliminaries—a disclosure, a concession, and a declaration" about the outcome determinative effect of cross-examination. Although cross-examination is discussed from an American, and hence common-law perspective, each essay concedes that "there are important differences between an American courtroom and an international arbitration," especially the skeptical view of cross-examination held by many civil law trained arbitrators who sit on panels and decide cases.

Against this backdrop, the combined essays do more than instruct lawyers how to apply this "standard feature" of arbitration in the dynamic, international environment. With equal emphasis, each and every essay explains how attorneys can approach the varying legal cultures of the arbitrators and adversaries that they may encounter on the panel and across the table. Each explanation is followed by practical examples of how to actually craft a cross-examination that dovetails with the shared values of the common and civil law traditions. The editors also assemble strategies for harnessing the potent effect of cross-examination without reinforcing the negative (and stereotypical) paradigm of the "Ugly American" whose questioning style often diverges from civil law's traditional approach to evidentiary review. The editors likewise present "techniques of successful cross-examination" for the benefit of common and civil law trained advocates "with more limited experience" in an effort to guide them through the process while also increasing their appreciation for cross-examination's ability to better ground testimonial evidence "in reality and fact."

This thematic approach elevates the usefulness of the treatise. It gives lawyers the tools to decide whether to cross-examine and, if so, when and how to do so in a manner that amplifies rather than diminishes its intended effect on the panel, however populated. Mr. Sheppard, joined by his colleagues, thus declares that cross-examination can and should be used to beneficially advance your case in international arbitration.

For example, with careful attention to how civil law trained arbitrators often rely on documentary evidence and detailed witness statements to decide cases, Mr. Sheppard proposes cross-examining adverse witnesses to "persuasively emphasize" the favorable documents to "your claim or defense." Rather than directly challenging the witness as an American jury would expect, Mr. Sheppard suggests limiting cross-examination to reading helpful passages, asking the adverse witness to confirm that the reading was correct, and then moving onto the next question without ever inviting the witness to explain the passage just read. This draws on the American attorney's familiar inclination to tightly control witnesses during cross-examination while avoiding the wholesale exposition of documents or direct witness challenges that an arbitration panel may resent. Mr. Sheppard reveals the potential success of applying a blended perspective and technique by recounting a prominent arbitrator who "writes the award based upon the briefs but decides who wins based on cross-examination."

The editors have prepared and organized the text much as they suggest preparing for cross-examination itself. This essay collection is organized into four "parts" that progresses logically and with alacrity towards the conclusion that cross-examination can be sensibly deployed in hostile procedural settings that ultimately better serves the arbitration process and the administration of justice. In addition, the editors have adroitly ensured that each essay can stand alone as a primer on a particular topic or in the company of the others to form a unified treatise. Thus, readers of any experience level may approach the book as introductory or refresher manual. However utilized, the precepts and tactics are provided as suggested guidelines borne of experience but not as final directives. The decision as to whether and how to apply them belongs to the attorney and arbitrators alike facing their specific challenges. The unique attributes of each arbitration will warrant and facilitate their reference to the text time and time again.

Logically, the editors begin with the foundational "Techniques of Cross-examination in International Arbitration." Chock full of concrete examples, several contributing authors discuss witness control, impeachment on friendly and confrontational terms, using limited discovery and intuition advantageously, time management and how to identify and avoid pitfalls and mistakes in cross-examination. Across the board, the authors sound the call to consider and use cross-examination within the confines of international arbitration and in a manner calculated to have maximum impact on the panel. Importantly, they show how to make those calculations.

For example, the editors address the absence of pre-hearing depositions and the seeming limiting effect that has on preparing for effective cross-examination. While depositions may abound in pre-trial discovery and offer opportunities to explore and exploit witness credibility that so often persuades lay juries, the limited witness statements allowed by an arbitration panel may reveal its particular perspective on the utility of witness testimony. Arbitrators understand that the parties may have already tried to resolve potential disputes by fashioning broad contractual language regarding their relative rights and obligations in order to complete the given transaction. The panel may, therefore, be seeking assistance from witnesses to determine which party "acted most reasonably in the face of [acknowledged] factual and legal uncertainty."

From this standpoint, arbitrators, as opposed to juries, are less apt to choose between "saints and sinners" and are "less interested in character" because they "enjoy the luxury of living a dispute in ways that jurors cannot do and do not wish to do."

As illustrated, limited discovery may force an "attitudinal" shift in the examining attorney and serve to hone his cross-examination to the edge of the panel's interest. Mr. Newman also reminds readers that such limited discovery presents different paths for persuading the panel. He explains that "it is up to the cross-examiner to obtain information independently about the facts and circumstances about which the witness has spoken in the witness statement" and then, "in front of the arbitrators," he may engage in "intense, intuition-based and precise questioning" about undisclosed matters that "can bring about results…that make the risks worth taking." In effect, limited discovery affords common law trained attorneys with the "freedom" to focus and probe material rather than collateral matters that may very well "go a long way towards influencing the ultimate result of your case."

The second "part" deals with "Anticipating Cross-Examination in the Presentation of the Witness." Here again, the editors have solicited useful contributions on how to effectively challenge document based evidence without offending arbitrators' view that the "document is supreme," and, in the process, "help the tribunal arrive somewhere closer to the truth in most cases." This goal impacts witness preparation as much as witness examination. Accordingly, the authors explain how the "process of drafting the witness statement leads naturally into the detailed preparation for cross-examination." Sensitivity is the watchword. Drafting includes determining "which facts need to be explained in detail if the panel is to understand them and which can be presented summarily, which examples are most telling, and which documents should be quoted at length." In like manner, if the witness can withstand "sustained, topic oriented cross-examination," the witness's credibility will surface more clearly than by "the piecemeal questioning generally delivered by a tribunal operating in the [civil] inquisitorial style."

The third "part" surveys "Special Considerations in the Cross-Examination of Experts," including the legal, scientific and financial and technical experts commonly encountered in arbitration. Here, the authors address such stylistic issues as toning down cross-examination to a level that respects both the witness and the arbitration panel's expectation that polite deference be maintained by counsel. This is more than mere nicety. Unlike a jury, a panel must state why they reject the expert. Therefore, polite questioning emphasizing areas of agreement on predicate matters should be undertaken before turning to areas of disagreement on penultimate issues. This holds true for the mistaken or lying witness. In either event, the authors illuminate the need to garner the attention of the panel and persuade them by demonstrating the contradictory evidence that supports your case and defeats your opponent's case. Cross-examination, they suggest, can effectively test the written evidence to draw out case winning distinctions.

The authors also explore procedural differences between arbitration and litigation, such as the "hot tubbing" of experts. Unlike trials, the witness statement (i.e. the expert report) supplants direct testimony. The panelists then subject the experts from both sides to simultaneous questioning on particular issues in the presence of each other. Here the litigator faces unique procedural hurdles to cross-examination. Consistently, the authors again review how cross-examination assists the panel to see your side of the case. As in exploring documents through lay witnesses or competing reports through experts, attorneys are urged to use the available question period to "elicit agreement from the adverse expert to a series of premises that the examiner's own expert has relied upon." In so doing, cross-examination is used to separate areas of agreement from disputed issues and focus the panel on your side of the case, once again without alienating the sensibilities of the witness and, hence, the panel in the process.

Lastly, the fourth "part" looks at "Cultural Issues" and does so with observations from practitioners from several jurisdictions. They examine whether cross-examination is, in the first instance, worth the endeavor and conclude that the neutral concept of examining adverse witnesses is beneficial for a variety of reasons and leads to "a fairer and fuller process, a better informed tribunal, more sophisticated decision-making, a more secure award and greater probability of immediate and voluntary compliance." Such examinations must remain flexible, adaptable "on a case-by case basis through party autonomy and tribunal decision" to apply the rules or customs of any particular jurisdiction or tradition. Beyond this general endorsement, the editors provide perspectives of cross-examination in European, Asian and Latin American arbitrations. In addition, the editors address the unique challenges posed by language barriers often prevalent in international arbitrations.

In sum, the editors bring the broad themes of cross-examination into sharp relief. They have tuned the echoes of classic litigation texts by Wellman, Younger, and McElhaney to the flexible needs of international arbitration. By treating "those aspects of the process which should be kept in mind" by practitioners, the editors also advocate for wider appreciation and acceptance of cross-examination by the international arbitration community. This book thus deserves a place on bookshelves of lawyers and arbitrators alike.

Stefan B. Kalina is with the law firm of Cox Padmore Skolnik & Shakarchy LLP. He may be reached at kalina@cpsslaw.com.

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The Middle Voice by Joseph B. Stulberg and Lela P. Love

Reviewed by Laura A. Kaster

One of the great challenges for anyone trying to advance in a profession is incorporating and adapting theory, skills, rules, and processes to fit his or her own talents and personality, allowing tools to become a fluid and natural vocabulary. *The Middle Voice—Mediating Conflict Successfully* (Carolina Academic Press 2009) by Joseph Stulberg and Lela Love (former head to the ABA Dispute Resolution Section), is the product of over twenty years of training both beginning and advanced mediators by these two gifted teachers and mediators with the hope of helping them do just that. The authors are generous in sharing insight and providing specific guidance on the rudiments but also on the sophisticated issues presented during efforts to resolve disputes. The middle voice of the Stulberg-Love mediator is the voice of a prepared mediator who "acts in deliberate, thoughtful, and structured ways to try to promote understanding and agreements."[1] It is both a helpful initial training manual and introduction to mediation and a valuable reference for the experienced mediator that can deepen the understanding of techniques, common barriers, and the significance of structure.

The book is divided into three parts with multiple chapters collected in each part. The first is entitled "Responses to Conflict" and discusses intervener models, patterns in conflict, the mediator's job description, the mediator's qualities, and then techniques for preparation, including "assessing entry." The second part, "BADGER: Mediator Skills and Strategies," focuses on the specifics for setting the procedural framework, getting started, accumulating information, asking helpful questions, mining for conversational gold, beginning the discussion, generating movement, deciding whether to caucus and moving to closure, including an interesting section on agreement drafting. The last part, "The Lessons of Experience," addresses interesting or overarching questions including questions of ethics, neutrality, duties to the parties and the use of mediator's proposal or opinions on fairness.

Although the repeated use of acronyms felt a bit forced, they can be useful in keeping track of the stages and steps for the initiate. For example, BADGER, an acronym used by the authors, has become a well-accepted memory device for outlining stages of the mediation, **B**egin the discussion, **A**ccumulate information, **D**evelop the agenda, **G**enerate movement, **E**lect whether to caucus, and **R**each closure. There are helpful specifics throughout, including samples of mediator openings and an explanation of the need to simplify language**,** to be mindful of choices of formality or informality, to choose neutral language and to take advantage of the only time to make a first impression. There are tips on selective note taking and a very helpful discussion of framing the issues with examples of translating issues into nonjudgmental language. The discussion on developing a bargaining agenda with highlighting common interests and resolving easy issues first in a logical sequence is also concrete and an homage to the authors' commitment to the mediator assisting the parties by maintaining supervision of the process. There is a very useful section on how to encourage the parties to change perspective that includes the use of humor. Here, although not all the techniques can be taught, it is the license to use one's own personality along with encouragement to flexibility that is particularly helpful.

One chapter is devoted to electing to caucus, but really does not discuss the alternative of remaining in joint session throughout the mediation. The assumption is that the timing of caucus should be considered as well as the right parties to meet with, but the chapter assumes that caucus is expected and preferred. It will be interesting to see if the no-caucus, understanding-based model of Gary Freidman and Jack Himmelstein, Challenging Conflict (ABA 2009), which has had a substantial impact on some mediators, will receive a wider audience or if the preference for caucus by many mediators will persist. Nevertheless, this section does provide important administrative information and tips for maintaining neutrality and maintaining the parties' confidence during caucus, particularly for the absent party. The use of specific examples throughout strengthens the book.

Before moving to closure and then questions and issues, the authors address the agreement and give specific drafting tips, providing that the mediator may be the scribe or a coach to the parties or their attorneys. Here the ABA's recent Ethics opinion on the limitations for the mediator as scrivener is of some interest and should be considered before the mediator takes on drafting responsibilities beyond recording the parties' agreement.[2]

In part three, "The Lessons of Experience," the authors give their own forthright answers to specific and frequently encountered questions, such as: "What if the parties ask the mediator for her assessment of whether a particular offer of settlement is fair or reasonable?"[3] The answer is a strong "Don't give it" and the counsel to put the responsibility back in the parties' laps with a statement that the mediator's view is not important, the arrangement must be one that the parties endorse.

This is a very good manual for teachers and students of mediation at whatever stage of their mediation career. It is accessible and full of concrete and helpful examples that reflect the voice and strong opinions of two very able practitioners and teachers willing to share.

Endnotes

1. *Middle Voice* at 21.
2. See Elayne E. Greenberg, The Ethical Compass, NYSBA 3 Dispute Resolution Lawyer 9 (Fall 2010).
3. *Middle Voice* at 134.

Laura A. Kaster, kaster@AppropriateDisputeSolutions.com, is co-editor of this Journal, an arbitrator and mediator in Princeton, NJ, with over 30 years of experience in complex civil litigation as a partner at Jenner & Block and Chief Litigation Counsel at AT&T.

Pre-Hearing Deposition of Witness Allowed in Federal Compulsory Arbitration Case

By Ira J. Raab

Civil cases of a value of $150,000 or less in the U. S. District Court, Eastern District of New York (and other District Courts), are compelled by local rules to be heard by arbitrators, instead of magistrates or judges (Local Rule 83.10), although parties may seek a trial de novo after the arbitration is completed.

The rules neither prohibit nor provide for pre-arbitration depositions. In the case of *Griffith v. Melaleuca, Inc.,* (Case 1:10-cv-01957-JBW-VVP, U.S.D.C., E.D.N.Y, January 26, 2011) the question was raised as to whether an arbitrator may direct a pre-hearing deposition of an opponent's non-party expert witness.

Plaintiff Dorothy Griffith alleged that she contracted salmonella after eating the defendant's candy bar prior to receipt of a Notice of Recall. The plaintiff's attorney disclosed his intention to call at the arbitration hearing an expert witness to testify as to causal connection to the defendant's product.

The defendant moved for an order to depose the plaintiff's expert before the hearing, limited to the question, "Did the plaintiff contract salmonella from the defendant's product?" The defendant agreed to pay for all costs of the deposition, including the reasonable fee of the plaintiff's expert. The plaintiff opposed the application, contending that pre-hearing depositions are unnecessary and are contrary to the intended purpose of arbitration, to provide a quick and inexpensive alternative to a trial before a magistrate or judge. The plaintiff offered to supply the defendant, before the hearing, with a copy of the expert's report and credentials and the facts upon which the expert relied.

The arbitrator, retired NYS Supreme Court Justice Ira J. Raab, ruled that in a compulsory arbitration case an arbitrator has the authority under the local rule to direct a pre-hearing expedited deposition of a non-party expert witness limited to the issue of causal connection.

Noting that the rules are silent on the question, the arbitrator looked elsewhere for helpful guidance, including Rules 30 and 45 of the Federal Rules of Civil Procedure (FRCP), the Federal Arbitration Act (FAA), and the rules of private arbitration forums, not court annexed.

FRCP Rule 30 provides for discovery, including oral depositions, of "any person." FRCP Rule 45 provides for the issuance of subpoenas to compel non-parties to appear and give testimony. Local Rule 83.10 (c) (l) gives counsel 90 days before arbitration to complete "discovery," without specifying what discovery it refers to. Local Rule 83.10 (f) (4) provides that FRCP Rule 45 shall apply to subpoenas for attendance of witnesses at an arbitration hearing. The Guidelines for Arbitrators that accompany the Notice of Arbitration refer to FCRP Rule 45, but omits the words "at an arbitration hearing."

FAA Section 7 gives arbitrators the authority to summon in writing any person to "attend before them" as a witness. The reported cases are split on the authority of an arbitrator to compel a non-party witness to appear as a witness at a pre-hearing deposition, whether or not the arbitrator is present at the pre-hearing deposition.

Private arbitration forums, not court annexed, provide for limited expedited and economical pre-hearing depositions at the sound discretion of the arbitrator upon good cause shown (American Arbitration Association Rule L-4 (d); JAMS, Inc. Rule 16.2; National Arbitration and Mediation Rule 11).

Accordingly, the arbitrator directed an expedited pre-hearing deposition of the plaintiff's non-party expert witness, holding that it would shorten the hearing, and could also lead to a settlement before the hearing.

District Courts Lack Inherent Authority to Sanction for Conduct Occurring During Court-Ordered Arbitration: *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*

By Anthony Gambol

Introduction

The Fifth Circuit recently held in *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*[1] that a district court lacks the inherent authority to sanction an attorney for conduct that occurred during a court-ordered arbitration. The court held that arbitrations based upon pre-dispute contractual obligations are independent of the courts and that conduct occurring within them cannot threaten the courts' authority and therefore cannot justify sanctions.

Background of the Case

Positive Software Solutions, Inc. sued New Century Mortgage Corp. for alleged copyright infringement of telemarketing software products it licensed to New Century. The district court ordered the parties to arbitrate pursuant to their contractual agreement. One attorney for New Century, Ophelia Camiña of Susman Godfey LLP, advised them on discovery issues. The arbitrator and Ms. Camiña failed to disclose a previous professional relationship. The arbitrator dismissed Positive Software's claims and found for New Century. However, the district court set aside the arbitration award because of the undisclosed relationship. On appeal, the Fifth Circuit reversed the vacatur and remanded the case, because it found that the limited professional contacts Ms. Camiña had had with the arbitrator many years before did not warrant vacatur of the arbitration award on a theory of evident partiality.[2] At this point in the proceedings, New Century declared bankruptcy. Positive Software settled its claims against New Century; the settlement agreement included the transfer to Positive Software of New Century's attorney-client privileges and work product materials so that Positive Software could pursue sanctions. Positive Software then sought sanctions in federal court under the Federal Rules[3] and the district court's inherent authority. Relying upon its inherent authority, the district court sanctioned Camiña a portion of Positive Software's attorneys' fees, a decision which she subsequently appealed.

The Limits of Judicial Authority in Arbitration Proceedings

The Fifth Circuit addressed only Camiña's argument that the district court lacked inherent authority to impose sanctions for misconduct that occurred during arbitration. It agreed with Camiña, relying upon its earlier rulings that a district court only has inherent authority to impose sanctions "in order to control the litigation before it"[4] and that that authority "may be exercised only if essential to preserve the authority of the court.…"[5] The Fifth Circuit also extended its holding in *FDIC v. Maxxam, Inc.*,[6] where it found that a district court did not have the inherent authority to sanction for conduct associated with a collateral administrative proceeding because the conduct alleged "do[es] not threaten the court's own judicial authority or proceedings."[7]

In this case, that reasoning is extended to arbitration: "To begin with, arbitration is not an annex to litigation, but an *alternative* method for dispute resolution."[8] Because the parties originally agreed to arbitrate to avoid litigation, treating the arbitration as an adjunct to litigation is untenable and would undermine the purpose of arbitration. The fact that the arbitration was court-ordered has no bearing on the courts' role regarding it. "[That position] would allow trial courts to oversee arbitrations in which one party had to be compelled to arbitrate but not those in which both parties complied with their arbitration agreement."[9] The Fifth Circuit views *Positive Software* as being on all fours with *Maxxam*; because the district court sanctioned Camiña for conduct which was "neither before the district court nor in direct defiance of its orders, the conduct is beyond the reach of the court's inherent authority.…"[10]

Further supporting its decision, the Fifth Circuit proscribes an extension of inherent authority by the district court as in tension with the Federal Arbitration Act.[11] The Act confines the courts' authority to compelling arbitration and to determining whether an award should be confirmed, vacated, or modified.[12] "Beyond those narrowly defined procedural powers, the court has no authority to interfere with an arbitration proceeding."[13]

Conclusion

Perhaps most importantly for an arbitration practitioner, the Fifth Circuit maintains a separation between litigation and arbitration, warning the courts against being "roving commission[s] to supervise…precisely where they do not belong."[14] The court points to alternative

channels through which Positive Software might have pursued action against Camiña for arbitration misconduct, including petitioning the American Arbitration Association to re-open proceedings to request sanctions and following the Association grievance process.

Endnotes

1. No. 09-10355, 2010 WL 3530013 (5th Cir. Sept. 13, 2010).
2. *See Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 476 F.3d 278, 282-83 (5th Cir. 2007) ("[N]ondisclosure alone does not require vacatur of an arbitral award for evident partiality. An arbitrator's failure to disclose must involve a significant compromising connection to the parties.").
3. FED. R. CIV. P. 37; 28 U.S.C. § 1927.
4. *See NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 894 F.2d 696, 703 (5th Cir. 1990), *aff'd sub nom. Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991).
5. *See Natural Gas Pipeline Co. of Am. v. Energy Gathering, Inc.*, 86 F.3d 464, 467 (5th Cir. 1996).
6. 523 F.3d 566 (5th Cir. 2008).
7. *See id.* at 593.
8. *Positive Software*, 2010 WL 3530013, at *2 (emphasis in original).
9. *Id.*
10. *See id.* at *3.
11. 9 U.S.C. § 1.
12. *See id.* at §§ 2-4, 9-11.
13. *Positive Software*, 2010 WL 3530013, at *3.
14. *See id.* at *4-5.

Anthony Gambol is a 2L at Fordham University School of Law.

New York Court of Appeals Establishes Ability to Pay as the Standard for Challenging Cost-Sharing Provisions in Arbitration Agreements

By Alyssa Astiz

In *Brady v. Williams Capital Grp.*, the New York State Court of Appeals adopted the federal standard for addressing challenges to fee and cost provisions included within arbitration agreements, and established a process for applying the standard.[1] As a matter of first impression, the court evaluated an employee's challenge to an "equal share" provision, requiring the employee and employer to split the arbitrator's fees and costs.[2] Guided by the Supreme Court's decision in *Green Tree Fin. Corp.-Ala. v. Randolph*,[3] the court held that such challenges require lower courts to conduct case-by-case evaluations to resolve the question of a litigant's financial ability to share arbitral costs.[4]

Background

Ms. Brady was hired by the defendant, Williams, as a securities salesperson in 1999.[5] In 2000, Ms. Brady was required to sign an employment manual containing an arbitration agreement for resolution of disputes and providing for equal sharing of the arbitrator's fees and costs.[6] At the time, the equal share provision was consistent with the American Arbitration Association's rules.[7]

Williams terminated Ms. Brady's employment in 2005, and she subsequently filed a Demand for Arbitration with the AAA seeking damages for race and sex discrimination.[8] According to the AAA's 2002 rule modifications requiring employers to pay all arbitration costs, the AAA deemed Williams responsible for full payment.[9] After numerous unsuccessful attempts to secure the arbitrator's fee from Williams, the AAA cancelled the arbitration.[10]

Ms. Brady commenced an article 78 proceeding seeking to compel Williams to pay or to compel the AAA to enter default judgment against Williams.[11] The trial court dismissed the petition and held that the parties' agreement, rather than the AAA rules, governed.[12] On appeal, the Appellate Division agreed that the parties' agreement controlled, but reversed in a 3-2 decision holding that the equal share provision was unenforceable as against public policy.[13] The court determined that Ms. Brady met her burden of establishing that the arbitration costs were so high as to discourage vindication of her statutory rights.[14] Williams appealed to the Court of Appeals.[15]

The Court of Appeals' Decision

The Court of Appeals agreed that the parties' fee sharing agreement governed, noting the State's policy of interfering "as little as possible with the freedom of consenting parties in structuring their arbitration relationship."[16] The court concluded, however, that the lower courts erred in ruling without the detailed findings required to resolve whether Ms. Brady was financially able to share the costs, and thereby vindicate her statutory rights.[17]

In crafting a standard for courts to resolve the issue, the court noted that under *Gilmer v. Interstate/Johnson Lane Corp*. statutory claims can be subject to mandatory arbitration agreements so long as the litigant has access to vindication in the arbitral forum.[18] The court then reviewed the Supreme Court's application of *Gilmer* in *Green Tree* to a litigant's fee challenge premised on prohibitive expense.[19] Guided by *Green Tree*, the court held that such challenges must be evaluated on a case-by-case basis whereby the party seeking invalidation bears the burden of demonstrating the likelihood of incurring costs that would deter arbitration and vindication of rights.[20]

In adopting *Green Tree* and the fact-specific approach of several federal circuit courts,[21] the court held that the inquiry regarding a litigant's financial ability must at minimum consider (1) whether the litigant can pay the arbitration fees and costs, (2) what is the expected cost differential between arbitration and litigation in court, and (3) whether the cost differential is so substantial as to deter the bringing of claims in the arbitral forum.[22] The court noted that a full hearing is not always required, but instructed lower courts to record the findings and determine the documentation that should be requested of litigants.[23] The court remanded the case for a hearing and noted that if the equal share provision is deemed unenforceable, the trial court is to determine "whether to sever the clause and enforce the rest of the Arbitration Agreement, or to offer petitioner a choice between accepting the 'equal pay' provision or bringing a lawsuit in court."[24]

Conclusion

This case establishes a practical method of establishing whether any challenged financial burden placed on a party to arbitration will actually impede access to justice.

Endnotes

1. 928 N.E.2d 383 (N.Y. 2010).
2. *Id.*
3. 531 U.S. 79 (2000).
4. *Brady v. Williams Capital Grp. L.P.*, 928 N.E.2d 383, 387-88 (N.Y. 2010).
5. *Brady*, 928 N.E.2d at 384.
6. *Id.*
7. *Brady*, 928 N.E.2d at 385.
8. *Brady*, 928 N.E.2d at 384-85.
9. *Brady*, 928 N.E.2d at at 385.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Brady*, 928 N.E.2d at 386.
16. *Id.*
17. *Id.*
18. *Brady*, 928 N.E.2d at 386-87 (citing *Gilmer,* 500 U.S. 20 (1991)).
19. *Brady*, 928 N.E.2d at 387 (citing *Green Tree*, 531 U.S. 79 (2000)).
20. *Id.*
21. *Brady,* 928 N.E.2d at 387 (citing *Morrison v. Circuit City Stores, Inc.,* 317 F.3d 646 (6th Cir. 2003)*; Spinetti v. Serv. Corp. Int'l.,* 324 F.3d 212 (3d Cir. 2003)*; Bradford v. Rockwell Semiconductor Sys., Inc.,* 238 F.3d 549 (4th Cir. 2001).
22. *Brady,* 928 N.E.2d at 388 (citing *Bradford*, 238 F.3d at 556*).*
23. *Brady,* 928 N.E.2d at 388.
24. *Id.*

Alyssa Astiz is a second-year student at Fordham University School of Law.

When Divorcing Spouses Can Neither Collaborate Nor Cooperate, Texas Court Rules on Collaborative and Cooperative Law: *In re Mary Lynn Mabray*

By Meghan Hill

A recent Texas Court of Appeals decision legitimizes the use of a relatively new alternative dispute resolution process for divorce proceedings, known as "cooperative law agreements." *In re Mary Lynn Mabray*[1] addresses the potential conflict between collaborative law agreements, which are governed by Texas statute, and cooperative law agreements, which are not, and whether public policy conclusively prohibits cooperative law agreements. Although a lengthy dissenting opinion agreed with petitioner Mary Lynn Mabray's arguments challenging cooperative law agreements, the majority decided that such agreements do not violate Texas public policy.

Background

When Mary Lynn and Gary Mabray divorced after thirty-five years, they fashioned with their attorneys a document titled "cooperative law agreement," that laid out guidelines for the resolution of their divorce through informal mediation techniques, and included a binding arbitration agreement if the parties could not resolve their differences more amicably within a prescribed period. The parties agreed to forgo formal discovery in favor of good faith-driven disclosures. When their self-appointed deadline rolled around and the proceedings were no closer to resolution, both parties asked for a court order submitting their case to arbitration. After the Court signed the order, Mary Lynn filed a motion seeking to invalidate many aspects of the cooperative law agreement, attempting to disqualify her husband's attorney despite the agreement to the contrary and to withdraw her consent to the arbitration agreement.

The trial court denied Mary Lynn's motions to disqualify Gary's counsel and to revoke consent, and ordered the parties to submit to arbitration. Unable to appeal the decision, Mary Lynn commenced mandamus proceedings, seeking relief from the Court of Appeals.

What Is the Difference Between Cooperative and Collaborative Law?

In Texas, statute governs collaborative law processes for the marriage dissolution.[2] The statute provides that the proceedings occur under general good faith standards, with each party making best efforts to resolve the dissolution of marriage without judicial intervention and agreeing to suspend judicial intervention while the process is under way. Both parties also agree to provide full and candid disclosures and to hire experts jointly. Their counsel agree to withdraw if the parties move past the collaborative process into litigation or arbitration.

Cooperative law is not codified in Texas. Rather, it is an emerging field that is somewhat of an offshoot of collaborative law. "Put simply, cooperative law agreements mirror collaborative law agreements in spirit and objective, but lack the [counsel] disqualification clause unique to collaborative law agreements."[3]

Does Collaborative Law Control or Invalidate Cooperative Law?

Mary Lynn claimed that because collaborative law is codified under statute in Texas, it preempts and/or controls the possible use of cooperative law agreements. Her argument was that the parties can evade neither the protections nor the strictures of Texas's collaborative law statute by using the word "cooperative" in the title of the agreement. The trial court found that cooperative law agreements differ sufficiently from collaborative law agreements, and therefore do not have to conform with Texas's collaborative law statute, especially given that the Mabrays' agreement never referenced collaborative law or the statute.

The Court of Appeals upheld this decision, reasoning that to dictate the application of the statute, the court would either have to mandate the use of collaborative law proceedings or to forbid cooperative law agreements. The Court looked both at the language of the statute and the legislative history, and determined that neither required this result. Texas recognizes four forms of alternative dispute resolution: arbitration, mediation, collaborative law, and informal settlement conferences. The Court further determined that in their agreement, the Mabrays cited to the arbitration and informal settlement conference provisions.[4] Because the Mabrays did not cite to the collaborative law statute, but did cite the "informal settlement" provision, the Court determined that the Mabrays intended to fashion a remedy outside the bounds of the collaborative law statute.

Does Cooperative Law Violate Public Policy?

The Court turned next to Mary Lynn's second set of arguments that she never agreed to the agreement and/or revoked her consent to arbitrate, or that Gary's actions constituted a breach of their agreement, as well as the claim that cooperative law as a practice violates Texas public policy.

The Court looked at Texas statutes to determine public policy, on the theory that Texas expresses its policy through its statutes. Both the policy to allow alternative dispute resolution and to allow parties freedom to contract are expressed in Texas statutes. Having established that statutes do not forbid the use of cooperative law agreements, the Court also found no common law prohibition against cooperative law. Because Texas law specifically allows parties freedom to design their own dispute resolution agreements, the Court declared that cooperative law agreements could violate public policy only in relation to the ability of attorneys to continue to represent their clients in an adjudicative proceeding following failed settlement discussions.

The Court acknowledged the "four-way disclosure threat" that is possible with a cooperative law agreement that proceeds to litigation or arbitration; not only the parties, but also the attorneys have informally received information through good-faith disclosure during the informal mediation stage of the proceedings, without the protection of discovery rules or attorney-client privilege. The court examined whether that possibility was injurious to the public good and held it was not.

The dissent views Texas public policy as prohibiting cooperative proceedings, in part because of that risk. First, under Texas family law, marriages are presumptively valid unless dissolved through recognized procedures.[5] Because cooperative law is not contained in statute, the dissent argues, it is not a valid form of marriage dissolution. Second, Texas public policy underlying the collaborative law statute is to protect divorce participants with certain procedural safeguards, including the disqualification of attorneys who have assisted in the non-adjudicative proceedings. In the Mabrays' case, "the overall picking and choosing among the provisions of the collaborative law statute shows the clear intent of the drafters of the [cooperative] Agreement to avoid the protections of [collaborative] law."[6]

However, the majority determined that the threat of disclosure also existed with collaborative law because the parties are free to disclose information they learned during mediation to their new counsel. That risk did not prevent Texas legislature from adopting the collaborative law statute, and therefore does not prevent the use of cooperative law agreements. Further, the parties knew what they were doing when they designed this agreement, and they signified their intent by citing to the statutory provision allowing for informal, unspecified resolution processes.

For these reasons, collaborative and cooperative law can coexist, at least in Texas.

Endnotes

1. No. 01-09-01099-CV, 2010 WL 3448198 (Tex. App. Hous. (1 Dist.) August 31, 2010).
2. Tex. Fam. Code Ann. §6.603 (West 2009).
3. *Mabray*, 2010 WL 3448198 at *5.
4. Tex. Fam. Code Ann. §§6.601, 6.604 (West 2009).
5. Tex. Fam. Code Ann. §1.101 (West 2009).
6. *Mabray*, 2010 WL 3448198 at *25 (Keyes, J., dissenting).

Meghan Hill is a 2L at Fordham Law School.

Nachmani v. By Design, LLC: A Cautionary Note on Drafting Arbitration Clauses

By Katherine Vance Hynes

Background and the Trial Court Ruling

The very short one-page order by the Appellate Division contains important and disturbing news for New York lawyers drafting arbitration provisions because it upsets what may have been settled expectations that an arbitration clause providing for application of the Rules of the American Arbitration Association (AAA) would automatically provide for AAA administration of the arbitration.

Oded Nachmani alleged that he was wrongfully terminated from his employment at By Design, LLC. The employment contract contained an arbitration clause, which stated in relevant part: "…A hearing shall be held by the arbitrator or arbitrators in the City of New York, and a decision of the matter so submitted shall be rendered promptly in accordance with the commercial rules of the [AAA]…."[1] The clause also provided that each party would name an independent arbitrator, and the two party arbitrators would select a third independent arbitrator.[2]

Mr. Nachmani served a notice of arbitration on By Design, and identified his independent arbitrator. By Design responded by asserting a counterclaim and naming its own independent arbitrator. By Design then challenged the "independence" of the arbitrator Mr. Nachmani had selected. By Design sought guidance from the American Arbitration Association (AAA), which had not been administering the matter because neither party had filed a demand with the AAA. The AAA informed By Design that it would "administer" the arbitration should either party elect to file a demand for arbitration with the AAA. It further stated that when parties agree to arbitrate under the AAA Rules, "they thereby authorize the AAA to administer the arbitration."[3]

At this time, four months had elapsed from the initial filing of the arbitration; By Design proceeded to file its own demand of arbitration with the AAA.[4] The unintended effect of By Design's actions was to effectively commence a second arbitration of the same dispute with By Design as the claimant. In response, Mr. Nachmani commenced a special proceeding in New York Supreme Court to enjoin By Design from proceeding with this "second" arbitration before the AAA, objecting to administration by the AAA, and seeking an order requiring the first, ad-hoc arbitration to proceed. The trial court granted his petition and enjoined the AAA from proceeding, holding that the first filed non-administered arbitration should proceed.[5]

The First Department's Decision

By Design believed the arbitration clause language constituted an agreement that the AAA would administer any arbitration arising under the contract. That argument was the core of By Design's appeal to the First Department. However, the First Department viewed By Design's filing with the AAA as a delay tactic given By Design's participation in the earlier filed proceeding by filing a counterclaim and designating an arbitrator. Furthermore, the Court ruled that the selection of New York law in the choice of law provision displaced the Federal Arbitration Act and that the specification of the AAA Commercial Arbitration Rules was a "choice of law rather than a forum selection clause." Therefore, it held that the clause did not authorize or mandate AAA administration of the matter.[6]

By interpreting the language that an arbitration would be conducted "in accordance with" the AAA's rules as merely a choice of law clause, the court rejected the AAA's interpretation of its own rules and seems to have ignored previous decisions from federal circuit courts.[7]

Conclusion

This case is yet another instance of bad facts leading to bad law. Had By Design sought to compel arbitration and have the court direct Nachmani to file his demand for arbitration with the AAA, the supreme court and Court of Appeals would not have been faced with two simultaneous arbitral proceedings and might have viewed the matter differently. As a result of the First Department's decision, careful drafters must include language that specifies that an arbitral organization will administer the arbitration; relying on an election of the governing rules will not suffice. This short opinion may have long ramifications.

Endnotes

1. Steven H. Reisberg and Kristin M. Pauley, "First Department Decision Raises Drafting Issue for Arbitration Clauses," August 24, 2010, *New York Law Journa*l, Volume 244, No. 38.
2. *Id.*
3. *Id*.
4. *Id.*
5. *Nachmani v. By Design, LLC*. 901 N.Y.S.2d 838 (1st Dep't 2010).
6. Reisberg, *supra* note 1.
7. *Id*. *See York Research Corp. v. Landgarten*, 927 F.2d 119, 123 (2d. Cir. 1991) (provision specifying AAA Rules is an agreement that the AAA should administer the arbitration and apply its rules); *see also Prostyakov v. Masco Corp.*, 513 F.3d 716, 724 (7th Cir. 2008) (parties submitted to AAA participation by agreeing that the arbitration was under the AAA Rules).

Katherine Vance Hynes is a third-year student at Fordham Law School.

DRS Committee Reports

Our Section's committees offer an array of valuable opportunities to enhance and grow your understanding and practice. We invite you to become involved and look forward to seeing you at our committee meetings. Or please join us by phone from anywhere in the state. Please be in touch with us about your interests and to join a committee at ESussman@sussmanADR.com.

Committee on Arbitration, Subcommittee on International Arbitration

Sherman Kahn
Co-Chair

The Arbitration Committee, chaired by John Wilkinson and Sherman Kahn, has completed a number of significant projects over the last 2 years and is currently engaged in a variety of additional pursuits. Last year, for example, the committee drafted and adopted a series of guidelines designed to make discovery more cost effective in domestic, commercial arbitrations. The guidelines were adopted by the NYSBA's Executive Committee and House of Delegates.

John Wilkinson
Co-Chair

The International Arbitration Subcommittee, chaired by John Fellas, has been working with a team of well-known, respected practitioners in international arbitration and has created a brochure (for broad circulation) as to why parties and attorneys from around the world should select New York as the site of their international arbitrations. Working with John and Sherman the subcommittee drafted a series of guidelines aimed at making the pre-hearing phase of international arbitrations more cost-effective. The guidelines were adopted by the NYSBA's Executive Committee and House of Delegates.

John Fellas
Subcommittee Chair

In addition, the committee has scheduled a series of discussion sessions on current and important arbitration topics. Each of these discussions is moderated by two or more people who are leaders in the arbitration field and who have first-hand experience in the area under discussion. The discussions this year include such varied subjects as arbitrators involvement in settlement, third party subpoenas, refusal of one party to pay, an international arbitration statute for New York, substantive motions in arbitration and more. It is expected that these discussions will lead to productive future projects for the committee to undertake.

Committee on ADR in the Courts

Hon. Jaqueline
Silbermann, Chair

The ADR in the Courts Committee, chaired by the Hon. Jacqueline W. Silbermann and vice-chaired by Stephen Hochman, 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. The committee is organizing a network of practitioners around the state to work with their local judges on increasing the utilization of mediation services.

Stephen Hochman
Vice Chair

The committee met 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. Since that meeting, the Southern District has issued a new set of rules for mediation which it is hoped will lead to a significant increase in the use of mediation in that court. The committee will continue to work with the Southern District as those rules are implemented.

The committee this year is working with other sections and bar association groups in a review of whether and how the courts in New York can facilitate the effectiveness of arbitration as a dispute resolution tool.

Committee on Mediation

Margaret Shaw
Co-Chair

The Mediation Committee has been very active over this past year and has several exciting projects in the pipeline. The committee's report on mediator quality—the result of a year-long study of past and current thinking on the topic—was enthusiastically adopted by the Section in May of 2010. The committee also undertook an ambitious survey of New York litigators to learn their views on mediation; the results have been tabulated and were adopted by the Section.

Abigail J. Pessen
Co-Chair

Another project now well underway is a mentor-mentee matchmaking service, which we expect to work smoothly and simply to give fledgling mediators opportunities to learn from their more experienced colleagues.

In addition to these ventures, we've invited leading practitioners in the field to our bi-monthly meetings to facilitate discussions of best practices and practice development, including fee issues, mediators' proposals, settlement agreements, moving past impasse and risk analysis. This is a continuing feature at our committee meetings.

As mediation is a dispute resolution tool that is of great benefit in many substantive areas of the law, a series of papers on the benefits of mediation in many fields of law were prepared to educate practitioners about how mediation might benefit their clients and how it might be of particular applicability in specific fields of law.

Committee on CLE

The CLE Committee, chaired by Rona Shamoon and Lisa Brogan, had an active year. CLE has, in many ways, become the lifeblood of the Bar Association, providing opportunities for members to stay current on developments and critical thinking in their areas of expertise, meet their state licensing requirements, and come together as a community to share the best of their own experience with one another.

Rona Shamoon
Co-Chair

Our Section has harnessed these opportunities not only for the continued education of its members, but also as a means of attracting new members to the Section. Last year in the Fall, we ran a joint program with the Labor and Employment Section. In January, in addition to our own excellent Winter Program at the NYSBA's Annual Meeting, we collaborated with the International Section on an exciting Joint Program. In the Spring of 2010, with the gracious assistance of Simeon Baum and Steve Hochman, we held a sold-out Commercial Mediation Training, preparing a new group of mediators.

Lisa Brogan
Co-Chair

This year, on October 12, 2010, the Section sponsored a full day joint CLE program with the Entertainment, Arts and Sports Law Section at Fordham Law School entitled "How to Maximize Results in Mediation and Arbitration." This program included both a mock mediation and a mock arbitration illustrating the best practices for addressing major issues that typically arise in mediations and arbitrations, from the perspectives of mediators, arbitrators and counsel. It was focused on a fact pattern involving issues in the entertainment, arts and sports areas.

On October 28, 2010 Section sponsored an afternoon joint program with the Elder Law and Senior Lawyer Section at the Renaissance Westchester Hotel in White Plains. The program addressed the wide range of issues and the rich possibilities that can be found in the mediation of estate disputes, family business disputes, life insurance issues, parent/child issues, health law, long-term care facility and nursing home matters, and contested guardianship proceedings, as well as providing tips on effective representation in mediation, and advice on developing a practice as a mediator.

The committee sponsored another mediation training session in March 2011 and is planning an arbitrator training session for June 2011. Programming on ADR for the Trust and Estates Law Section and the Commercial and Federal Litigation Section is being planned as well as a session for the Association of Towns. The CLE committee will continue to look for opportunities to work with other sections on the presentation of ADR programs tailored to the specific practice area.

We welcome members interested in proposing programs and organizing new and creative programs that will continue to raise the Section's profile in the Bar Association. Please share your ideas with us.

Committee on Membership

Gail R. Davis
Co-Chair

The Membership Committee, co chaired by Gail R. Davis and Geraldine R. Brown, has accomplished a great deal in the last 2 years. It has increased our membership from approximately 50 original members of the section in June, 2008 to almost 3,000 today. The Membership Committee developed our section brochure, posters, recruitment literature, postcards and law student literature. The committee established liaisons with various organizations, ADR and professional organizations and Bar Associations, and co-sponsored events and trainings with these organizations.

Geraldine Reed Brown
Co-Chair

The committee continues to work on increasing member benefits. The Section already offers many benefits including CLE programs on ADR and networking opportunities, a subscription to the *New York Dispute Resolution Lawyer* publication, a subscription to the Section newsletter, the opportunity to meet with others in the ADR field at committee meetings to discuss and learn from others about issues and techniques in ADR, a mediation mentoring program for our members developed with the Diversity and Mediation Committees, reduced charges for DR Section programming and liaisons with diverse Bar Associations with whom we are working in conjunction with the Diversity Committee to develop joint programs. The committee is also investigating how to provide low rate group malpractice insurance for mediators.

As our young members are critical to the Section's growth and to the utilization of ADR, the committee has been actively reaching out to the law schools and recent graduates. The committee contacts all of the law school professors that teach ADR in New York area schools at the beginning of each academic year asking them to post and hand out specially developed literature and special offers focusing on law students. The committee has utilized law students to write case notes for the Section's publication and had them serve as "reporters" for our annual meeting programs providing students with free entry to the program and an opportunity to report on the program in an article. Section members have attended many law school events in which students learn about different areas of law and what career paths they may pursue to discuss ADR with them. The Membership Committee plans to continue and expand on these initiatives. Please join to help continue to increase our membership; which, in turn, supports and encourages the acceptance and usage of dispute resolution processes in New York.

Committee on Legislation

Charles Moxley
Co-Chair

The focus of the Legislation Committee, chaired by Charles Moxley and William Brown, is to report to the Section on significant legislative developments and make recommendations in selected instances.

Major initiatives over recent years have related to the Uniform Mediation Act ("UMA") and the Revised Uniform Arbitration Act ("RUAA"). In addition, Edna Sussman, as an *ex officio* member of our committee, has performed yeoman service reporting on developments with respect to the Arbitration Fairness Act, the Dodd-Frank Act and other initiatives in the Congress.

William Brown
Co-Chair

Over the past year, we submitted our report to the Section, supporting certain amendments to the New York Judiciary Law affecting attorneys' liens in connection with attorneys' rendering of professional services as counsel in arbitrations and mediations. This report was endorsed by the Section and submitted by the New York State Bar Association to the Legislature.

An ongoing initiative of the Legislation Committee at this time is our study, in conjunction with the Collaborative Law Committee, of the new Uniform Collaborative Law Act. A report has been prepared and approved by the section's Executive Committee.

We welcome suggestions and participation from other members of the Section and from the profession generally with respect to legislative developments relating to arbitration, mediation, ADR and other forms of dispute resolution.

Committee on ADR within Government Agencies

The work of the Committee on ADR within Government Agencies, chaired by Pam Esterman and Charles Miller, is focused on the use of alternatives to litigation and/or trial of disputes with federal, state, and local agencies and municipalities, including (but not limited to) disputes involving zoning, environmental, and similar issues. Such alternatives include but are not limited to arbitration and mediation. According to current statistics, a total of approximately 200,000 lawsuits are filed each year


Pam Esterman
Co-Chair

throughout the United States by or against governmental entities at the federal, state and local levels. Countless other disputes of this type are resolved prior to litigation. Hence, there is an enormous opportunity for expanding the use of ADR into these areas.

Currently, there is an ongoing project within this committee, which has received inputs from related committees on arbitration, legislation and ADR in the Courts, dealing with proposed legislation and court rules for the introduction of plaintiff-initiated, court-mandated, forum-administered arbitration of civil actions against the U.S. Patent and Trademark Office in the U.S. District Court for the District of Columbia filed for judicial review of adverse administrative decisions of the agency. If enacted, such legislation could serve as a template for similar legislation in other government agency litigation contexts.


Dr. Charles E. Miller
Co-Chair

The committee presented two sessions in February of 2011 at the Association of Towns meeting.

Liaison and District Rep. Coordination Committee


Geri Krauss
Chair

As ADR can be useful in virtually every area of law, the Liaison and District Representative Coordination Committee, chaired by Geri Krauss, is working on establishing and nurturing liaison relationships with other Sections. The hope is that these relationships will lead to mutually beneficial activities and help to educate other lawyers and Sections about how they can utilize ADR to benefit their clients.

Through the able leadership of our CLE Committee and other members of our Section who have stepped up to chair and organize specific programs, several joint programs were accomplished. These have included a full day joint CLE program with the Entertainment, Arts and Sports Law Section on October 12, 2010 at Fordham Law School entitled "How to Maximize Results in Mediation and Arbitration." On October 28, 2010, the Section sponsored an afternoon joint program with the Elder Law and Senior Lawyer Sections at the Renaissance Westchester Hotel in White Plains. We are working to set up additional joint programs to be presented as the year progresses and expect to do a joint program with the Trusts and Estates Law Section, the Commercial and Federal Litigation Section and others. If you have a suggestion for a joint program with another Section please let us know.

In addition to joint programming, the committee is assisting in the coordination and involvement of other Sections in the development of a series of white papers on why ADR is useful in different areas of practice. While many have been completed there are gaps. If you would like to be involved in the preparation of a white paper on ADR in your area of practice, please let us know.

Involvement by NYSBA members throughout the state in ADR activities is an important part of the Section's mission. The committee works with the district representatives to sponsor programming to educate other lawyers and Sections on ADR and to share ideas for engaging NYSBA members in their communities.

Committee on Collaborative Law

Chaired by Norman Solovay and Chaim Steinberger, the Collaborative Law Committee is engaged in the further development of an exciting area of expansion in ADR.


Chaim Steinberger
Co-Chair

Collaborative Law ("CL") has been described as a cousin to mediation. Its practitioners typically help the parties reach a resolution by agreement, using interest-based negotiation rather than positional bargaining. It differs from mediation in that each party has an attorney who helps the party develop and crystallize the party's interests, objectives and concerns, points out the relevant and helpful practical and legal facts and arguments, and ensures that each party makes a well-informed decision.


Norman Solovay
Co-Chair

The most striking feature of CL is the parties' and attorneys' agreement that both parties' attorneys withdraw if either party leaves the negotiation and proceeds to adversarial-litigation. The parties and attorneys display their commitment to a negotiated settlement and employ the techniques typically employed by mediators to establish rapport with the other party, reframing and looping the concerns of each party and understanding the interests beneath any stated

positions. CL is best when the relationship between the parties is as important as the issue that is in dispute and empowers the parties to be in control of the final resolution.

The committee helps to (i) spread knowledge of CL to non-CL lawyers; (ii) develop best practices in CL; (iii) promote and expand the use of CL in appropriate circumstances in both family and civil cases.

The committee has been monitoring the Uniform Law Commission's efforts to promulgate a Uniform Collaborative Law Act ("UCLA") and in conjunction with other Bar Association Committees has been providing feedback to the Commission. The committee drafted a report, in cooperation with the Section's Legislative Committee, on the substance and advisability of the UCLA for the NYSBA DR Section. The report was approved by the Executive Committee and was used to inform the New York delegates to the American Bar Association House of Delegates which had before it a resolution relating to the UCLA.

Committee on Diversity

Barbara A. Mentz
Co-Chair

The Diversity Committee, chaired by Irene Warshauer and Barbara Mentz, serves to encourage, foster and support the development of diverse talent and diversity in ADR. To further our goal, we have initiated a program to reach out to, and coordinate with, minority bar associations to have joint programs with them and to encourage their members to use ADR as advocates in their practices and encourage their members to become neutrals. A successful first program in conjunction with the Nigerian Bar Association was held in March of 2011.

Irene C. Warshauer
Co-Chair

We have established a mentor/mentee shadowing program jointly with the Mediation Committee for all members of the Dispute Resolution Section. This program provides new mediators, who have been trained in mediation, the opportunity to observe more experienced mediators and learn from their observations. We have actively promoted diversity on panels and speakers for Section programs.

We welcome suggestions for programs, speakers, networking events and articles on diversity in the ADR profession, including articles discussing diversity efforts of corporations, law firms and other entities. The committee will assist in getting these articles published in the *Dispute Resolution Lawyer*, the Section's magazine.

Committee on Ethical Issues and Ethical Standards

Elayne Greenberg
Co-Chair

The ADR Ethics Committee, chaired by Elayne Greenberg and Kathleen Scanlon, offers programs that help dispute resolution professionals, neutrals and advocates calibrate their ethical compass when confronting the ongoing challenges of dispute resolution practice. The committee welcomes the participation of all interested section members. The committee is always available to meet with other committees to address ethical issues of concern.

Kathleen Scanlon
Co-Chair

This year's programs included programming at the Section's fall meeting and at the NYSBA annual meeting in January. The committee organizes special committee meetings. This year it addressed the ever present issue of "Clarifying the Limits of Arbitrator's Disclosure of Conflicts" which will consider the latest case law on the subject and will address the emerging interest in "Globalizing ADR Ethics?"

Newsletter Committee

Stefan Kalina
Chair

Dispute resolution is evolving rapidly. To stay current, we publish an electronic newsletter designed to educate Section members about key developments in the field. The inaugural edition of the newsletter surveyed the current work of each Section committee. It revealed that dispute resolution is practiced by different methodologies and in varied venues, as it relates and is applied to an array of practice areas. Accordingly, the Newsletter Committee aims to collect and disseminate timely content of common value to practitioners, academics, and observers across this wide spectrum. We will be doing so in tandem with the Publications and other committees to provide an outlet for information sharing that complements the full length substantive articles and white papers they aptly produce on a long-range basis. From this vantage point, we will be developing an editorial perspective and content calendar that meets the

needs of Section members for quicker and briefer updates regarding the law and practice of dispute resolution. We welcome your participation and suggestions.

Committee on Publications

Edna Sussman
Co-Chair

Co-edited by Edna Sussman and Laura A. Kaster this premier journal, the *New York Dispute Resolution Lawyer*, covers all aspects of dispute resolution processes. It includes a regular column on ADR ethics and thought provoking articles on practice developments, legislation and hot topics impacting neutrals, advocates, and parties to arbitration and mediation as well as the entire spectrum of ADR. It includes the white papers produced by the Section and reports on the Section's committee activities.

Laura Kaster
Co-Chair

In its first two years, the publication has gained wide recognition as a comprehensive and incisive source of information about ADR both domestic and international (covering both commercial and investor state issues). Subjects covered have been diverse and all encompassing. The publication reported on relevant new rules, guidelines and directives issued by the New York Courts, ICDR, CPR, UNCITRAL, ICC, FINRA, the EU Commission, CCA, CIArb, and others. Analyses of important recent decisions in the field were addressed in thoughtful articles and case notes. Discussion of model acts on arbitration, mediation and collaborative law set the stage for consideration for their adoption in New York. Updates on Congressional developments were provided. The publication regularly offered a review and analysis of relevant Supreme Court decisions and kept our readers up to date as these Supreme Court decisions were construed by the courts.

The *New York Dispute Resolution Lawyer* has to date also published two theme issues. The first theme issue published in the Spring of 2009 offered fifteen perspectives on arbitration and mediation from around the world. Since practice and traditions vary significantly from country to country, the articles included commentary from every continent and culture to afford a comprehensive overview. The second theme issue, published in the Fall of 2010, offered discussions of the many and varied ADR tools in what Folberg, Golann, Stipanowich and Kloppenberg coined as the "Dispute Resolution Spectrum." The publication covered deal mediation, dispute boards, direct discussions between the parties, with the use of settlement counsel and collaborative law, assisted negotiation, including many forms of mediation, early neutral evaluation, mini-trial, arbitration, and victim offender dialog.

Law student editors contribute notes on recent cases, enriching the publication and fostering interest and engagement in ADR in our all-important younger lawyer population.

We can't do it without you. The Publication Committee relies on guest authors to contribute articles and is always looking for article proposals and for creative new ideas for publication themes to cover. If you have written an article or would like to write one for consideration for publication in the *New York Dispute Resolution Lawyer,* please e-mail a proposal to Laura.Kaster@gmail.com. Articles and proposals should be submitted in electronic document format (pdfs are not acceptable) and include contact and biographical information.

Committee on Education

Jackie Nolan Haley, Chair

Chaired by Jackie Nolan Haley, Director of the ADR & Conflict Resolution Program at Fordham Law School, the newly formed Education Committee has an important agenda for the year. Fordham, which was ranked 8th in the nation by the 2011 *U.S. News & World Report* for its Dispute Resolution program, is pleased to take the lead on this important NYSBA DR Section activity.

ADR, where controversies between parties are settled outside of the litigation process, is one of today's most dynamic areas of legal practice. Its significant recent growth requires a re-examination of how ADR is taught in law schools. We are fortunate to have Steve Younger, a previous chair of the Dispute Resolution Committee and one of those instrumental in the creation of this DR section, as the President of the NYSBA this year. Steve has asked us to look into the question of including ADR in the New York State bar exam.

To accomplish its goals, the committee explored how ADR is currently being taught in law schools in New York State. The analysis reviewed whether and how ADR is included in the curriculum and what kind of extra-curricular activities are offered to educate students about ADR. The committee will respond to Steve Younger's inquiry, research what other states are doing on their bar exam with respect to ADR and consider whether and how ADR should be added to the NYS bar exam.

The committee includes in its membership professors from several of New York State's law schools. The committee will be working with the Membership Com-

mittee to develop a network of student liaisons to the DR Section across the state at the various law schools and to offer additional ADR educational opportunities to law students.

Website Committee

Leona Beane
Chair

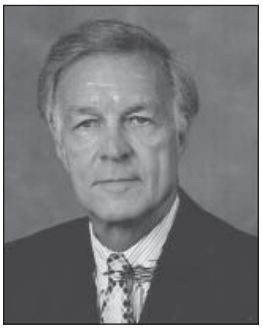
The Website Committee, chaired by Leona Beane, works on making sure that the website is a useful resource for members of the DR Section. The website offers a wealth of information and we invite you to explore it and visit it often.

The website enables DR Section members to "meet" the Section leaders and contact them directly with suggestions for future activities, questions and requests to get involved. A website calendar lists the CLE programs and all of the Section's committee meetings (all of which are open to all members of the Section). The member directory enables Section members to find and contact one another. Archives of the *New York Dispute Resolution Lawyer* are available for research and review. Section reports are published on the website for review by all. Minutes of Executive Committee meetings are posted so members can find out what activities are planned and what progress has been made on Section projects. The upcoming addition of Loislaw will provide a free resource with up to date case developments in the field.

The website is a work "in progress" and is continually being updated. We welcome your suggestions as to how to make it even better.

The Website Committee also developed a survey that was sent to all members of the Section to obtain more information about our members and their interests.

District Report: Eighth District



Richard Griffin,
District Representative
Eighth District

The Section members from the Eighth District have set an agenda that includes the need for support from the Section in our efforts to persuade the Office of Court Administration—and others involved with administration of our judicial system—to have our Supreme Court justices make more use of the private mediation component of the District's existing ADR program. Members also recently met with President-Elect Vincent E. Doyle III to obtain his assistance, both in the promotion of ADR in the district and in having programs established in districts throughout the state.

NYSBA Dispute Resolution Section Adopts Report on the Uniform Collaborative Law Act

The National Conference of Commissioners on Uniform State Laws ("NCCUSL") recently enacted the Uniform Collaborative Law Act (UCLA) to standardize the increasingly utilized form of dispute resolution known as Collaborative Law. The Collaborative Law and Legislative Committees of the Dispute Resolution Section were jointly tasked with evaluating its merits and, after considerable study, issued a joint Report approving the UCLA. That Report was approved and adopted at the January 17, 2011 annual meeting of the Dispute Resolution Section.

Collaborative Law employs cooperative negotiations by counsel and parties to achieve settlement of disputes in the most mutually beneficial manner possible. In a Collaborative Law proceeding each party retains counsel for settlement negotiations as opposed to employing a third party neutral to serve as mediator. If the cooperative negotiations fail and the dispute proceeds to litigation, the attorneys who participated in the Collaborative Law process are required to withdraw from representation of their respective clients. This obligation is designed to ensure that the Collaborative Law process is a cooperative one and the participating lawyers have no economic incentive to have the parties litigate the matter. Collaborative Law participation agreements also generally contain provisions calling for good faith negotiation, the sharing of relevant information, the use of joint experts, client participation in the negotiations, respectful communications, and the confidentiality of the negotiation process.

Our Section's Report concludes that Collaborative Law is potentially a useful process for people in certain kinds of legal disputes where maintaining an ongoing good relationship can be important and that the UCLA is a useful vehicle for making Collaborative Law practice more uniform from state to state. It further recommends that the NYSBA delegates to the ABA House of Delegates support endorsement of the UCLA at the next upcoming meeting of that body.

Reports on the Panels at the DRS Annual Meeting

Our student reporters provide detailed descriptions of our sessions on January 27, 2011:

Topics in International Arbitration

By Glen Parker

The annual meeting of the NYS Bar Association's Dispute Resolution Section began with a panel discussion chaired by James M. Rhodes, Esq, addressing recent attitudes and trends in the field of International Arbitration.

William Rowley discussed criticisms of international arbitration which called it "a broken process," on "a dangerous track" and "a far cry from its roots," with which he emphatically disagreed. Rowley, an arbitrator in London and Toronto, gave three possible reasons for these views.

First, critics find fault with the seemingly closed-ranked group of senior arbitrators, whom he called "the Mafia," who may prevent newcomers from entering the field. Rowley stated that they are simply well-known arbitrators who have been proven to add value to the process and are consequently sought out; that the parties are the ones who determine who is in "the Mafia" and vote with their feet by choosing well-qualified arbitrators with the best reputations.

Secondly, Rowley cited concerns over "pro forma, unduly long procedures which are blindly followed" as another reason for criticism of international arbitration. Rowley cautioned that the standard process is only a guideline or road map to draft your own process and procedural order, emphasizing that getting off to a good start, with no surprises down the road, is important, and that the parties should discuss and consider everything at the first meeting. Lastly, the third basis for discontent with international arbitration is that it is too costly, to which Rowley rhetorically asked, "Compared to what?" Noting that Arbitration involves far less document disclosure than regular court proceedings, which account for upwards of 70% of the cost of litigation, here again, "the cost is in the hands of the parties." According to Rowley, citing an ICC study, the cost of the tribunal comprises only 16% of the total cost of the arbitration. Any additional costs are predominantly the costs of the lawyers. In short, the parties control the process. Parties may take advantage of the inherent flexible nature of international arbitration by making the process reflect their needs, financial and otherwise. However, if they fail to do so, it is no wonder that such criticism would result.

The second speaker, Luis Martinez, Vice-President of the International Centre for Dispute Resolution, concurred that international arbitration is not a broken process. He reported seeing increasing usage of the process around the world. Last year, the ICDR, the international arm of the American Arbitration Association, had well over 800 international arbitrations.

Martinez reported that the United States Supreme Court has decided 8 cases dealing only with arbitration in the past 2 years. A leading case, *Stolt-Nielsen S.A. v. Animalfeeds International Corp.*, 130 S.Ct. 1758 (2010), held that class-action arbitration is not available if the arbitration clause is silent on the matter. Although this decision undermined the court's previous ruling in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003) [holding that the question of whether a class-action arbitration is appropriate or not is a question for the arbitrator to decide], the ruling has not had a significant effect on the class action docket at the AAA, according to Martinez.

John Fellas, of Hughes Hubbard & Reed, addressed the role of the New York courts in assisting parties in international arbitration, even when the seat of the arbitration occurs outside the United States.

A party may seek provisional relief to aid arbitration by bringing an anti-suit injunction in U.S. courts, which is commonly used in cases of parallel litigation where the parties bring suit against one another in two different countries; i.e. A sues B in the U.S. and B sues A in the U.K.

New York federal courts may act to enjoin parties from pursuing claims in foreign courts in violation of arbitration clauses. See *Amaprop Ltd. v. Indiabulls Financial Services Ltd.*, No. 10 Civ. 1853, 2010 WL 1050988 (S.D.N.Y. March 23, 2010). The question of whether an anti-suit injunction will issue pursuant to a foreign arbitration clause turns on (1) whether the U.S. court has authority based on personal jurisdiction, and (2) whether it seems appropriate to exercise that authority, which entails balancing the federal court's tendency to favor arbitration versus its concern for international comity in not wanting to interfere with the laws and judicial process of another state.

Similarly, New York law is particularly suited to assist in the enforcement of an arbitration award. A party may invoke New York CPLR 5225(b) which permits a prevailing party to commence a special proceeding against anyone holding the property of the debtor or losing party. In 2009, the New York State Court of Appeals held that a court could order a bank in Bermuda to produce a debtor's assets which were being held in Bermuda if the court had personal jurisdiction over a branch of that bank in which the debtor maintained an account. See *Koehler v. Bank of Bermuda*, 12 NY3d 533 (2009). If the court finds personal jurisdiction, a New York court could order a bank to transfer assets located anywhere in the world, stated Fellas. Although the dissenting opinion in *Koehler* pointed out that the decision creates a forum shopping opportunity, Fellas and audience members welcomed such an opportunity to "make New York the center of [international] arbitration."

The last speaker, Efraim Chalamish, addressed recent trends in Investor-State arbitrations which mainly occur through "ICSID," the International Centre for the Settlement of Investment Disputes. Increasingly, more countries are utilizing Bilateral Investment Treaties, "BITs," to protect investor's interests and attract investments.

Although each BIT is different, generally the standards of treatment of foreign investments should be fair and equitable, non-discriminatory and provide for security for foreign investors. Chalamish questioned whether there will be growth in such cases resulting from the financial crisis of 2008 with the United States subsidizing U.S. car manufacturers and financial institutions and whether a foreign investor could claim discrimination; from the nationalization of industries in some countries; from the growth of democratization in the developing world; and with more countries becoming ICSID members.

Glen Parker is a JD and LL.M. in Dispute Resolution and Advocacy candidate at Cardozo School of Law

* * *

Metaphors in Mediation: Sirens' Songs and Michelangelo's *David*

A Report on the Panel Discussion in Program II: Developing Trends and Controversial Topics in Mediation

By Kate Heidbrink

The second program of the NYSBA Dispute Resolution's annual meeting on 1/27/2011 featured a panel discussion on emerging trends in Mediation, moderated by Abigail Pessen, a New York City mediator and arbitrator of business and employment disputes. The lively panel included the Hon. Elizabeth S. Stong, a Judge of the U.S. Bankruptcy Court for the Eastern District of New York; David H. Burt, in-house counsel for E.I. DuPont de Nemours & Company; Anne Golden of Outten & Golden LLP, representing employees in employment disputes; and Simeon Baum, Esq., President of Resolve Mediation Services.

Ms. Pessen began the session by questioning the utility of the joint session in mediation. Ms. Golden highly recommended a joint session as a good for both parties in employment disputes: "You can see them and they can see you," and the joint session will serve as an overview

of what court will be like if mediation fails. She encourages and coaches her clients to speak for themselves in the joint session and to give a 5 to 10 minute opening statement reporting on 3 personal issues: 1) What happened, 2) Why there was a legal harm, and 3) Why that party felt hurt. If the attorneys alone give the opening statements, rather than the parties, they are less effective since they are "just hired guns" with no personal stake in the contract and often have the facts wrong in some respect. Ms. Golden prepares her clients for the joint session by saying, "You will hear things that are not true and very insulting" and alerts them to understand that this is the opposing party's case.

Mr. Burt agreed that a joint session is important and stated that it is "absolutely beneficial to hear the other side's case," that it helps both parties focus on the issues in chief, and that it may limit motion practice. Burt noted that even in business disputes, often the parties' feelings are involved and they may be concerned about losing market advantage. A joint session helps move the dialogue from "chest thumping" to a collegial atmosphere and, even if the parties later litigate, may lead to economy in the conduct of the litigation

Mr. Baum explained that the mediator can maximize the value of the joint session by setting expectations and orienting the parties toward trying to understand each other, resulting in changed perceptions. Mr. Baum encourages lawyers to let their clients talk and hear the other side by giving them an image of Ulysses from Homer's, *The Odyssey* when he was strapped to the mast while passing the Island of the Sirens. Unlike his ship's crew who stuffed their ears with wax, Ulysses was able to hear the Sirens' song but was unable to move or react to it.

Judge Stong mediates commercial disputes referred to her by other Judges which have often been ongoing for 5 to 10 years in multiple forums and she seeks to "put a stop on [the litigation] and get a solution." Judge Stong prefers to hold the joint session with only the lawyers first and utilizes this as an opportunity to change the relationship between the attorneys. At the joint session, Judge Stong will start with the attorneys making opening statements on the record, while she sits behind the bench in her robe and then she proceeds to change the culture of the dispute by unzipping her robe, stepping down from the bench, and sitting down between the attorneys. In such a joint session, Judge Stong attempts to chisel away at the case and build that trust between and among the attorneys. She sees her role as finding the hidden core issues—"somewhere, within the block of marble, is a David."

The next topic was the importance of confidentiality in mediation. Ms. Golden noted the importance of the mediator maintaining known confidences of either party. Mr. Burt said, "Everything we do in the presence of the mediator is calculated and prepared—we're not taking our clothes off." Rather, we will leak things out little by little. Also, he suggests that his clients reveal bad facts deliberately, since they will come out eventually.

Mr. Baum noted that confidentiality is fundamental and central to build and maintain trust. Under the Model Standards of Conduct for Mediators as well as the Uniform Mediation Act, the mediator has a duty to preserve trust and maintain confidences; however, such a duty would not prevent a mediator from encouraging the parties and recognizing areas of the overlap.

Judge Stong said the mediation process upends the usual ethical rule of candor before a tribunal. Rather than openness, everything is cloaked in a shield of confidence. However, she cautions the parties that although "everything is confidential, there is no amnesia. You may see a discovery request [for an item discussed] down the road." As to confidences discussed in caucus with only one party, Judge Stong usually asks each party to alert her if there is anything she should preserve in confidence from

the other side, rather than asking permission for each individual disclosure.

The discussion next addressed the value of having a judge or former judge rather than a non-judge as a mediator. The panel generally agreed that while there may be case specific reasons to select a judge as mediator, the parties tend to overemphasize the importance of factual or legal knowledge in selecting a good mediator. Rather than legal expertise, the key to choosing a good mediator is the mediation process skill of the mediator. As Mr. Burt stated, "You want a smart, flexible multi-tasker who listens and feeds back to the parties" their input, breaking down complex issues. Ms. Golden noted that she seeks a mediator who is an expert in psychology, language, and can understand what people really want.

Finally, the panel discussed whether a mediator should make a settlement proposal to the parties. The general consensus was that a mediator-led proposal is disfavored because it can derail the parties' own problem-solving efforts to reach agreement. As Mr. Burt put it, a mediator's proposal can "encourage people to be codependent and cede solving problems" to the mediator. Mr. Burt also noted that law school generally takes a "free-spirited and open sponge of a person" and narrows his focus "to the vanishing point," in contrast to the mediation process which encourages active, right-brained thinking. Mr. Baum agreed, noting that in over nine hundred mediations, he has made fewer proposals than the fingers on one hand. A proposal, he said, can turn parties into witnesses instead of active participants who explore "the broad possibilities of mediation." Judge Stong suggested talking about figures for settlement in private caucus with only one party present and using the following language: "I ran the numbers this way…tell me how it feels [to you]."

Although, as Mr. Burt noted, mediation is in its adolescence, this lively discussion of best practices and creative ideas may help the field mature.

Kate Heidbrink is a J.D.-M.B.A. Candidate at Regent University.

* * *

Many Ways to Skin a Cat: Ethical and Practical Issues Concerning Arbitral Settlements

By Mark Irlando

"Promoting Settlement from Within Arbitration: Ethical and Practical Issues," the third program of the NYSBA Dispute Resolution Section's Annual Meeting, surveyed topics ranging from whether the parties want the arbitrator to promote settlement to ethical issues involving aggressive scheduling. Sherman W. Kahn, of Morrison and Foerster LLP, chaired the panel and posed questions to distinguished speakers: Deborah Masucci, of Chartis Insurance, Professor Jacqueline Nolan-Haley, of Fordham Law School, Edna Sussman, of SussmanADR and chair of the Dispute Resolution Section, and John Wilkinson, an arbitrator and mediator with JAMS. Over the course of the program, the panelists explored ethical and practical considerations regarding the parties, the arbitrator, and the procedures and hybrid processes to encourage settlement within arbitration.

Kahn began the discussion by questioning whether the parties wanted the arbitrator to suggest settlement during the arbitration. Masucci noted that disputants have often exhausted other processes—negotiation and mediation—before finally opting to arbitrate. Sussman stated that an arbitrator's suggestion to mediate, in appropriate circumstances, might alleviate any concern that such a suggestion by a party might be seen as a sign of weakness. From the ethical perspective, Nolan-Haley averred that by suggesting settlement, the arbitral panel would be acting within its bounds so long as it did not pressure the parties into mediation. She also suggested the panel should consider the disputants' expectations when balancing the desire to propose mediation with its own obligations.

Then Kahn continued to explore the arbitrator's role in promoting settlement by asking Wilkinson whether an arbitrator should reveal a view of the case before all evidence has been presented. Even if the parties mutually consent to a pre-settlement take on the case, Wilkinson cautioned against offering any reasoning before a final award is issued. He noted that such disclosure would likely anger one party and the arbitrator's conclusions on the merits could change as more information became available. Sussman cautioned that an arbitrator proceed carefully in proposing mediation to avoid any party misconception that such a proposal is a view of the merits of the case. Ideally, the arbitrator would explain that he/she routinely proposes mediation at a number of predetermined points in the process and then proceed to suggest it as an option at those specified points.

The discussion continued by considering various procedures and hybrid processes to promote settlement. As in-house counsel, Masucci commented on summary dispositions which she worried could embolden one side not to settle since some issues would be decided prior to a final award. Professor Nolan-Haley commented on the ethical issues surrounding aggressive scheduling to promote settlement. However, the panel concurred and cautioned against using any such technique as a means to pressure or force settlement.

Wilkinson addressed the usage of depositions which are often excluded in arbitrations and noted that although depositions might slow down the arbitration process, if limited in number and time spent, they might disclose information important to settling the matter.

The final discussion addressed hybrid processes such as Arb – Med – Arb with the panel agreeing that such processes are risky and that mixing the roles of arbitrator and mediator present conflicting ethical duties which may be irreconcilable. An example of such conflicting duties is that an arbitrator may not engage in or consider *ex parte* communications whereas a mediator in caucus may discover information which must be kept confidential and secret from the other side. Nolan-Haley worried that the competing professional obligations could make some arbitration awards vulnerable. Sussman suggested that a completely separate arbitration and mediation could proceed simultaneously with different neutrals involved; however, she noted that such simultaneous processes could be quite costly. Sussman provided other alternatives such as: having the two wing arbitrators on a panel act as mediators while the chair could continue acting as a sole arbitrator to decide the case, if needed; eliminating *ex parte* communications and the caucus when holding settlement discussions in the middle of an arbitration; or completing the arbitration process and issuing a sealed award whereupon the arbitrator(s) continues as mediator(s), and if settlement is reached, the award remains sealed and is discarded, but if no settlement is reached, the award is unsealed and issued.

During this final program of the Section's annual meeting the panelists raised several concerns—both ethical and practical—in promoting settlement within arbitration; however, they all agreed that if the parties gave informed consent and the arbitrators took appropriate precautions to avoid ethical dilemmas, disputants might benefit from reaching a settlement agreement rather than having the arbitrator(s) issue an award.

Mark Irlando is a J.D. Candidate at Cardozo Law School in June 2011.

Escape the Fray

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

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

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
Pamela R. Esterman
Sive Paget & Riesel PC
460 Park Ave
New York, NY 10022-1906
pesterman@sprlaw.com

Dr. Charles E. Miller
Dickstein Shapiro LLP
1633 Broadway
New York, NY 10019
millercharles@dicksteinshapiro.com

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

John Wilkinson
Fulton, Rowe, Hart & Coon
One Rockefeller Plaza
Suite 301
New York, NY 10021-2001
Johnhwilkinson@msn.com

Collaborative Law
Norman Solovay
McLaughlin & Stern, LLP
260 Madison Avenue
New York, NY 10016
nsolovay@mclaughlinstern.com

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

Continuing Legal Education
Rona G. Shamoon
Skadden, Arps, Slate, Meagher & Flom LLP
4 Times Square
New York, NY 10036-6522
rona.shamoon@skadden.com

Lisa Brogan
565 Plandome Road, Suite 157
Manhasset, NY 11030
lisa@lisabrogan.com

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

Barbara Antonello Mentz
140 West 86th Street
New York, NY 10024
bmentz@mentz.org

Ethical Issues and Ethical Standards
Elayne E. Greenberg
St. John's University School of Law
25 Potters Lane
Great Neck, NY 11024
elayneegreenberg@juno.com

Kathleen Marie Scanlon
Law Offices Of Kathleen M Scanlon PLLC
120 E 79th St Ste 2e
New York, NY 10075-0319
kscanlon@adradvocate.com

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

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

Mediation
Abigail J. Pessen
Mediation Services
1 Battery Park Plaza, 34th Floor
New York, NY 10004-1411
abigail@pessenadr.com

Margaret L. Shaw
34th Floor
620 Eighth Avenue
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

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

Education
Jacqueline Nolan-Haley
Fordham University School of Law
140 West 62nd Street
Lincoln Center
New York, NY 10023-7407
jnolan-haley@mail.lawnet.fordham.edu

Liaison and District Rep Coordination
Geri Sprung Krauss
Krauss PLLC
1 North Broadway, Suite 1001
White Plains, NY 10601-2325
gsk@kraussny.com

Negotiation
Jason Aylesworth
Sendroff & Baruch, LLP
1500 Broadway, Suite 2001
New York, NY 10036
jaylesworth@sendroffbaruch.com

Newsletter
Stefan Kalina
Lowenstein Sandler, PC
1251 Avenue of the Americas, 18th Fl.
New York, NY 10020-1104
skalina@lowenstein.com

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

Website
Leona Beane
Mediator & Arbitrator
11 Park Place, Suite 1100
New York, NY 10007
LBMediateADR@aol.com

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
LBMediateADR@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

Karen Mills
KarimSyah Law Firm
7th Floor, Plaza Mutiara
Jl. Lingkar Mega Kuningan Kav. 1 & 2
Jakarta 12950 INDONESIA
kmills@cbn.net.id

Student Editors
Anthony Gambol
Alyssa Astiz
Meghan Hill
Katherine Vance Hynes

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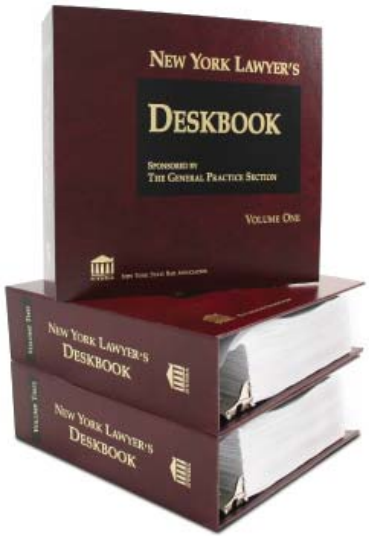

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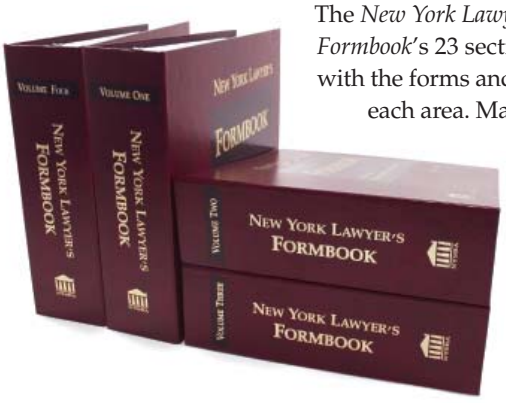

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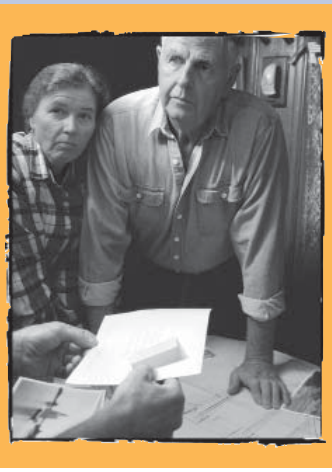

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