

New York Dispute Resolution Lawyer



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



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- Risky Business: The Consequences of Counting on Liability Alone
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... and more



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Message from the Chair

Why do parties seek to resolve disputes through alternatives to the court system? For those of us who have worked in the alternative dispute resolution field, the reasons roll off our tongues. Parties seek a more efficient, less costly method to resolve disputes and, if they use arbitration, often select persons knowledgeable in the subject matter of the dispute.



The last half of 2018 brought renewed attacks on the arbitration process. To be precise, the attacks are on the practice of including arbitration as a required process in pre-dispute agreements primarily in the consumer and employment context. The attacks are distressing, especially when they are based on misunderstandings about the process.

Roosevelt. Herbert Hoover and Calvin Coolidge can be credited with the passage of the Federal Arbitration Act.³

Is arbitration perfect justice—no, it is not, but it is a way to meet clients' goals for dispute management and resolution. Is it the right process for every dispute? Again, the answer is no and for that reason, we have seen a rise in the use of mediation.

While arbitration is not perfect justice, some of the criticism we hear is directed toward specific issues and sometimes in specific types of disputes. In the era of the “#MeToo movement” confidentiality within the arbitration process is being criticized. But how confidential is arbitration? Under most domestic arbitration rules, only the forum and the arbitrators are required by the rules to maintain the confidentiality of arbitration proceedings. Absent an agreement or order of the tribunal, the parties may speak about the proceedings outside the hearings and may also talk to the press—but do they want to?

The American Arbitration Association (AAA) publishes all employment arbitration awards through West-law. The names of the parties are visible unless there is a

“A more recent attack on arbitration in general is the dearth of minorities and women on the rosters of arbitrators.”

The inclusion of pre-dispute arbitration clauses in agreements has a long history in the United States. President George Washington included such a clause in his last will and testament. In his will, he expresses his hope that he was clear enough with his direction that there would not be any disputes over his bequests; however, in case a dispute arises, he provided that “all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding.”¹

Fast forward 100 years and we note that before Abraham Lincoln became President, he had a vibrant practice as an attorney and he actively advocated using alternative dispute resolution processes to resolve disputes. He regularly used binding arbitration to achieve client goals. He also used his personal experiences when he served as an arbitrator to reduce costs and time for disputing parties.²

Other Presidents supported using arbitration for a wide range of both domestic and international disputes including Presidents Ulysses Grant, Grover Cleveland, Theodore Roosevelt, Herbert Hoover, Calvin Coolidge, Woodrow Wilson, William Howard Taft, and Franklin

request for redaction. So there is a way to find out about similar cases. Commonly, settlement agreements (even in court proceedings) contain non-disclosure clauses. Yes, this protects the perpetrator of harassment if that is the issue at bar, but it also protects the victim. Does a victim of harassment really want to be subjected to the publicity about the settlement and the circumstances leading to the settlement? Another twist is the passage of statutes and regulations that eliminate any tax benefits for settlements relating to sexual harassment when a non-disclosure clause is incorporated into a settlement agreement⁴—a trap if the lawyers negotiating the agreement are unaware of the different state and local statutes and regulations.

A more recent attack on arbitration in general is the dearth of minorities and women on the rosters of arbitrators. In the beginning of this column I highlighted that President Washington elected to have “men” appointed to arbitrate any disputes under his will. Unlike in the days when our nation was born, today's disputants and their lawyers are diverse and arbitration does serve as a substitute for public processes. Accordingly, the rosters from which disputants select arbitrators should be diverse.

All alternative dispute resolution providers have made strides to increase the number of women and minorities on their rosters. The AAA has been a leader through their Higginbotham Fellows Program. The AAA roster is comprised of 24 percent women and minorities.⁵ The AAA requires women and minorities to be named on each list offered for selection by the parties.

In October 2018, JAMS announced the inclusion of a diversity rider in its arbitration clauses to encourage parties to select diverse neutrals.⁶ CPR, which had formed a diversity task force and pioneered a diversity pledge for its member corporations, in March 2018 promulgated the Young Lawyer rule to provide opportunities for women and minorities to advocate in arbitration proceedings, thereby increasing opportunities for them to be recognized.⁷

All of these initiatives are increasing the number of choices that disputing parties have to select from, but placing names on a list doesn't get diverse neutrals selected. Disputing parties need to make a conscious effort to give diverse neutrals an opportunity to serve. Otherwise, like "wallflowers" at a ball never asked to dance, diverse neutrals will not be selected. In 2019, the Dispute Resolu-

tion Section will support and act to open the doors wider to encourage the selection of women and minorities. Look for our "Guide for Establishing an Alternative Dispute Resolution Practice" and our "Report on Women and Minorities in the Field."

Deborah Masucci

Endnotes

1. https://www.trans-lex.org/800900/_/arbitration-clause-in-the-will-of-george-washington-1799/#clause.
2. See <https://law.pepperdine.edu/parris-institute/app/content/stipanowich-lincoln-article.pdf> for a more extensive discussion about how Lincoln used mediation and arbitration.
3. See <https://www.arbresolutions.com/presidents-and-arbitration/> for a summary of each Presidents' supporting actions.
4. See Federal Tax Cuts and Jobs Act of 2017 Section 162 (q) as an example.
5. <https://www.adr.org/RosterDiversity>.
6. <https://www.jamsadr.com/pdf-viewer.aspx?pdf=/files/uploads/documents/articles/taylor-ccbj-model-arbitration-rider-encourages-diversity-in-selection-of-neutrals-october-2018.pdf>.
7. <https://www.cpradr.org/news-publications/press-releases/2018-02-20-cpr-incorporates-young-lawyer-rule-into-its-arbitration-rules>.

NEW YORK STATE BAR ASSOCIATION

REQUEST FOR ARTICLES

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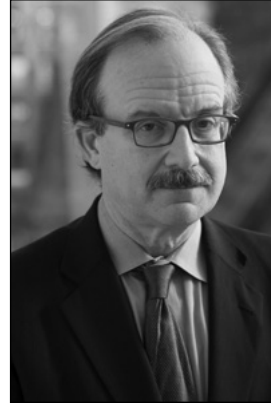


Message from the Co-Editors in Chief

We are pleased to have compiled another issue of *New York Dispute Resolution Lawyer* that provides informative, instructive, and in some cases provocative, discussions of the issues dispute resolution professionals face. Providing informative evidence-based discussion of the issues in the field is all the more important in the current environment, in which misperceptions of dispute resolution processes, and of arbitration in particular, have been proliferating in the press and in legislative agendas across the country.



Edna Sussman



Sherman Kahn



Laura A. Kaster

As this issue goes to press, a variety of bills have been introduced in the New York State legislature that could change the practice of arbitration in New York. Some of those bills misunderstand the arbitration process or seek to solve a perceived problem with arbitration of consumer contracts in a way that may be detrimental to commercial arbitration. The Dispute Resolution Section is working with the NYSBA Legislative Affairs Office to provide commentary on these proposals. Other ADR-focused bar groups are focusing on these issues as well.

We need to address these proposals to ensure the continued strength of arbitration as a dispute resolution process in New York and to continue New York's leadership in international arbitration. It is important, though, to acknowledge that the current crop of legislative proposals arise from a legitimate concern that ADR processes may be misused by certain players to exploit parties with

less power over the process and limit those parties' rights without their understanding and true consent. In our efforts to support arbitration and other forms of alternative dispute resolution, it would benefit us as dispute resolution practitioners to take these concerns seriously and work with the legislators to address them, while promoting the benefits that we all recognize can be obtained from alternative dispute resolution. As mediators, we learn that parties that feel that they have been heard are more amenable to a solution that benefits all. By working together with the legislators to address their concerns based on a deep understanding of the process, we can ensure that New York's leadership in international and commercial arbitration is preserved and strengthened.

Edna Sussman, Laura A. Kaster and Sherman Kahn

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The Changed BATNA

By Professor Elayne E. Greenberg

Introduction

This column invites readers to consider whether the adjudicated outcome should be relied on as a realistic benchmark for advocates and mediators. In everyday dispute resolution practice, advocates and mediators regularly consider an adjudicated decision to be a realistic point of comparison to a negotiated or mediated outcome. For example, when assessing the merits of settlement, lawyers preparing for a legal negotiation and mediation frequently consider the likely adjudicated outcome as their best alternative to a negotiated agreement (hereinafter BATNA). In mediation, mediators often focus parties and their lawyers on the cost, time and likelihood of a favorable adjudicated decision as part of the mediators' reality testing with parties who are ambivalent about settling.

Despite this reliance on an adjudicated outcome, however, we also know that only 5 percent of civil cases and 1.8 percent of federal cases are actually adjudicated to decision.¹ Does it make sense to use an adjudicated outcome as a measure of settlement reasonableness or alternative to settlement if such a measure only represents a small percentage of actual legal resolutions? Are there more realistic BATNAs and viable alternatives that should be used? This provocative discussion takes place in three parts. Part One explains why using an adjudicated decision as a BATNA may not be as helpful as we think. Part Two explains how ethical mandates may require adding other factors to the assessment of alternatives. Part Three suggests alternative BATNAs. I then conclude by cautioning that this discussion about the changed BATNA is actually part of a broader discussion about the changing reliance on the rule of law.

Part One: Why Isn't an Adjudicated Decision a Helpful BATNA?

It is a well-touted tenet of negotiation practice that skilled negotiators should always have a strong BATNA prior to beginning any negotiation.² A strong BATNA is a negotiator's power. It is a negotiator's protection against making a bad deal and a useful measure to assess and compare the attractiveness of any proposed settlement options. After all, why would a negotiator opt to agree to a settlement that is less attractive than the negotiator's BATNA?

In the settlement discussions of legal disputes, however, lawyers often posture that their BATNA is getting an adjudicated decision even though their calculation of

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a BATNA may reflect cherry-picking information and not the reasonableness of any proposed settlements. Lawyers further justify and bolster this BATNA, by selectively finding case precedent that supports their position.

Let's dispel this fantasy of accurate risk assessment. Research shows that a litigator's ability to predict their success in obtaining a favorable court outcome is unreliable.³ Furthermore, since less than 5 percent of cases are adjudicated to decision, it is highly unlikely that even if settlement efforts fail and the case is tried in court that the case will be resolved by an adjudicated decision. Rather, at every stage of a litigated case, courts are pushing attorneys to settle. Sophisticated lawyers appreciate that a judge's interim decisions regarding court motions filed may, depending on the judge's ruling, increase or decrease a lawyer's leverage in case settlement. However, the likelihood of your case being adjudicated to decision is slim. Thus, we see trials vanishing and settlements increase.⁴ Another likely vulnerability in using the adjudicated case to decision as your BATNA is the adjudicated cases may be stale law and less likely to reflect current legal thinking. Moreover, adjudicated cases to decision may only be representative of those litigants with power and/or money to afford the escalating cost of justice.

Part Two: Why Is This an Ethical Problem?

When lawyers rely only on the adjudicated decision to comply with their ethical obligations as advisors⁵ and as advancers of their client's interests,⁶ lawyers may not be presenting clients with a full picture or realistic information sufficient to help them make informed decisions about the appropriate means to achieve the client's objectives. Specifically, Rule 1.4(b) of the New York Rules of Professional Conduct provides:

A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment 5 of this Rule fleshes out the lawyer's ethical obligation to provide her client accurate information about the adjudicated outcome (*italics for emphasis*):

Explaining Matters [5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. *In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others.* On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interest and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(j).⁷

Furthermore, Rule 2.1 Advisor Comment 5 reinforces a lawyer's ethical obligation to provide her client with realistic information about the consequences of pursuing either dispute resolution or litigation to resolve her dispute:

In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be advisable under Rule 1.4 to

inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.⁸

Thus, the New York Rules of Professional Conduct implicitly require attorneys, as part of their ethical obligation to inform their client, to educate their clients about *reasonable* and *realistic* options to settle their case. If an adjudication decision has less than a 5 percent chance of occurring, then that should be factored into the discussion that the lawyer has with the client.

When parties then opt to mediate their case, the mediator, as part of his or her ethical obligation to ensure mediation participants' informed consent, will use reality-testing strategies to help participants fully understand the benefits of settling in mediation rather than proceeding in court to an adjudicated decision.⁹ According to the Model Standards of Conduct for Mediators STANDARD I. SELF-DETERMINATION provides:

A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.¹⁰

When referencing the adjudicated decision as part of their reality-testing, however, mediators often focus on the risk tolerance of the parties and the ambiguity of success. Should mediators also discuss the low probability of ever receiving a favorable adjudicated decision? As part of a mediator's ethical obligation to conduct a mediation with informed mediation participants, should a mediator reference other measures as well?

Part Three: Other BATNAs?

If the adjudicated outcome is not a sufficient BATNA or a helpful benchmark by itself, what are some more realistic alternatives or additional considerations? For some parties, walking away from the entire dispute is a more attractive option that saves them emotional and financial resources. For other parties, using the court for interim decisions will provide the added leverage for settlement or the relief desired. Still others may consider objective data or business norms to find a more helpful alternative. And, of course, those devout parties might rely on the

power of their faith to shine the light on more favorable courses of action.

Increasingly, however, we now see how parties are effectively using the power of all forms of media as their BATNA in lieu of hoping for a favorable adjudicated outcome.¹¹ Growing numbers of disgruntled consumers are realizing their power against large corporations when the consumer broadcasts their complaints online rather than seeking an adjudicated decision in court.¹² In another example, eBay, Air BnB, Facebook and Google have each removed the pre-dispute clauses for sexual harassment claims that were part of their employment contracts after the employees of each of these companies coordinated and publicized protests against such pre-dispute clause.¹³ In another dazzling example of the power of the media, Jay-Z masterfully spotlighted the paucity of neutral diversity in his own arbitration with the American Arbitration Association that is likely to finally motivate ADR providers to achieve meaningful diversity in their ADR rosters.¹⁴

Conclusion

As our access to justice becomes more challenging and as it becomes even more unlikely your legal case will be resolved by an adjudicated decision in your favor, a natural corollary is that you should also consider other benchmarks and BATNAs in addition to going to court for an adjudicated decision. Therefore, advocates and mediators need to ensure that clients have accurate information about the probability of receiving an adjudicated decision if their case gets tried in court. Moreover, each client has different values, different risk preferences and different approaches to resolving legal conflicts. Advocates and mediators cannot assume all litigants are alike and need to take the time to appreciate from the client's perspective, what might be a favorable BATNA.

Every action causes a reaction. So, too, does the changing justice reality that is being altered as we shift our BATNA. Thus, this discussion has a broader implication than just about a changed BATNA. Our prescient and esteemed colleague Owen Fiss named the elephant in the room that is implicit in this discussion. How will this increasing reliance on ADR and decreasing reliance on the court affect the rule of law?

Endnotes

1. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, J. of Empirical Legal Studies (Nov. 4, 2004).
2. See Roger Fisher & William Ury, *Getting to Yes* (Penguin Books, 2011).
3. See Randall Kiser, *Beyond Right and Wrong: the Power of Effective Decision Making for Attorneys and Clients* (Springer, 2010).
4. See, e.g., Owen Fiss, *Against Settlement*, 92 Yale L.J. 1073 (1984); Marc Galanter, *supra* note 1.

5. See New York Rules of Prof'l Conduct (N.Y. State Bar Ass'n 2009), <https://www.nysba.org/DownloadAsset.aspx?id=50671>.
6. *Id.*
7. *Id.* at 7.
8. *Id.* at 103-04.
9. See F. Peter Phillips, *Can You Recognize When You're Being "Reality Tested"?* Business Conflict Management LLC Blog (Mar. 1, 2010), <http://www.businessconflictmanagement.com/blog/2010/03/can-you-recognize-when-youre-being-reality-tested/>.
10. See Model Standards of Conduct for Mediators (Sep. 2005), https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf.
11. Amy J. Schmitz & Colin Rule, *The New Handshake: Online Dispute Resolution and the Future of Consumer Protection* (2017).
12. *Id.*
13. See, e.g., Adi Robertson, *eBay and Airbnb Will End Mandatory Arbitration for Sexual Harassment Claims*, The Verge, Nov. 12, 2018, <https://www.theverge.com/2018/11/12/18089398/ebay-airbnb-end-forced-arbitration-clauses-sexual-harassment-discrimination-google-protest-backlash>; Jena McGregor, *Google and Facebook Ended Forced Arbitration for Sexual Harassment Claims. Why More Companies Should Follow*, Washington Post, Nov. 12, 2018, https://www.washingtonpost.com/business/2018/11/12/google-facebook-ended-forced-arbitration-sex-harassment-claims-why-more-companies-could-follow/?utm_term=.e5497e9867f3.
14. See *Judge Halts Arbitration in Jay-Z Suit Because of Racial Bias*, Forbes Magazine, Nov. 29, 2018, <https://www.forbes.com/sites/legalentertainment/2018/11/29/jay-z-successfully-halts-arbitration-due-to-racial-bias/#287f44126f5a>; See also Caroline Simson, *Jay-Z Adds Star Power to Diversity Concerns in Arbitration*, Law 360, Dec. 14, 2018, <https://www.law360.com/articles/1111523/jay-z-adds-star-power-to-diversity-concerns-in-arbitration>.

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Dealing With Experts and Expert Evidence in Commercial Arbitration

By Stephen P. Gilbert

Dealing with expert evidence can be a significant challenge for an arbitral tribunal in commercial disputes, particularly when the evidence (at least initially) is confusing, incomplete, and/or contradictory (e.g., when opposing experts disagree).¹ Fortunately, there are steps a tribunal can take to meet that challenge. Those steps (discussed below) require that from the outset the tribunal be mindful of the possibility that expert evidence may be part of the case.²

A Tribunal Should Ascertain as Soon as Possible Whether Expert Evidence Is Likely to Be Presented

A tribunal should inquire no later than during the preliminary hearing whether either side anticipates introducing expert evidence and, if so, what subject matter the experts will address. If counsel says he or she expects to introduce expert evidence on one or more identified topics, that should be sufficient at this stage.³ On the other hand, counsel may say he or she does not plan to introduce any expert evidence, and that may raise several issues.

Tribunals are charged with deciding their cases and have the power to request information needed for making those decisions.⁴ From the papers reviewed by the tribunal before the preliminary hearing (e.g., demand, statement of defense) and from any additional information provided by counsel during that hearing, the tribunal may believe expert testimony would be helpful. If counsel says he or she does not expect to introduce expert evidence, it would not be unreasonable for a tribunal to ask how counsel intends to prove something that seems (at least to the tribunal) to require expert evidence. However, the tribunal must be careful if it is going to make such inquiry not to put its finger on the scales of justice—and not to be perceived as doing so—by seeming to suggest how a side should prove its case when that side has possibly not recognized the need for expert evidence without which there might be a significant hole in its case.⁵

The reverse (one or both sides want to introduce expert evidence but the panel does not see the need for it) is conceptually easier to handle. Because counsel almost certainly know their respective cases substantially better than the tribunal does, a tribunal should be loath to tell counsel they cannot introduce such evidence (unless the arbitration agreement expressly and unquestionably prohibits such evidence—but, of course, the parties may agree to modify or eliminate any such prohibition). Dur-

ing the evidentiary hearing, if the tribunal believes expert testimony is not needed and would be a significant waste of time (e.g., clearly cumulative), the tribunal could ask counsel to explain why that evidence is necessary and, for example, not cumulative. Nevertheless, a tribunal should carefully consider the matter before stopping a side from introducing evidence that side believes is necessary for its case and should have an excellent reason for doing so that does not jeopardize the award.⁶

Even if counsel and the tribunal all agree during the preliminary hearing that expert evidence is not needed, it is possible the need for such evidence will later arise or that the earlier need for such evidence was not previously appreciated. For example, additional facts may come to light (e.g., during discovery) that would help a party prove a claim or a defense and expert evidence is needed to explain how those facts support the claim/defense, or an allowed additional or changed claim, or a defense, may require previously unneeded expert evidence. The tribunal must remain alert for changes in the case that call for expert evidence.

Tribunals need to run cost-effective, efficient, expeditious arbitrations, and late addition of an expert, particularly on a new topic, can be seriously disruptive.⁷ One solution that may adequately balance fairness, expedition, etc. is for the tribunal during the preliminary hearing to ask the parties to agree to (or, if there is no agreement, for the tribunal to order) the following: (i) a first (and early) deadline for the parties to indicate whether experts will be used and, if so, to specify how many experts and on what topics they will present evidence,⁸ and (ii) that experts and topics will not be added after that first deadline without good cause being shown.⁹ The tribunal should also decide (after hearing from counsel) whether to limit the number of experts who will offer evidence. And the tribunal should tell the parties that if experts are to go to testify: (a) the tribunal will expect to have expert reports containing certain information (discussed below), e.g.,

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identification of the expert's key assumptions, and (b) the parties will be asked to confer on (and hopefully agree regarding) several associated issues (discussed below), e.g., the modality for expert testimony at the hearing (for example, "hot tubbing").

A Tribunal Should Set a Deadline for Each Side to Identify Its Experts and the Topics on Which Each Expert Will Provide Evidence

The tribunal (after hearing from counsel) should set a second deadline for each side to *identify* the experts from whom it *likely* will seek to elicit evidence and the topics on which each expert will opine.¹⁰ This disclosure should include the expert's CV.¹¹ In some cases, the first and second deadlines may be merged.

If appropriate, a third later deadline may be set (again, after hearing from counsel) for each side to make changes (addition/deletions of experts and topics) necessitated by the other side's identification of its likely experts and their topics.¹²

advance of the hearing.¹³ A tribunal's review of the report in advance of the hearing will help the tribunal comprehend the expert's hearing testimony and sensitize the tribunal regarding the fact evidence on which the expert relies.

Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure prescribes the content of reports to be filed in U.S. District Courts by experts who will testify (unless otherwise stipulated or ordered by the Court). In addition to the two items indicated in endnote 11 (broadly speaking, the expert's qualifications, including publications, and cases in which he or she has offered evidence), that rule requires a report to contain a complete statement of all the opinions the expert witness will express and the basis and reasons for them, the facts or data considered by the expert in forming those opinions, any exhibits that will be used to summarize or support those opinions, and a statement of the compensation the expert is receiving.

An arbitral tribunal should ask each expert to include in his or her report the items of Rule 26(a)(2)(B) as well as one or more of the following (as appropriate¹⁴):

"It is a given that opposing experts will disagree on one or more material issues, but the tribunal should take action before, during, and (if necessary) after the evidentiary hearing to sufficiently resolve the disagreements so it can properly rule on the claims."

Prompt identification of all likely experts and the topics on which they will testify allows the tribunal to conduct conflict searches and bring any possible issues to the parties' attention sooner rather than later. Prompt disclosure also tends to prevent assertions by a side that it has been unfairly disadvantaged by the other side's late disclosure, for example, that it was unable to timely obtain its own experts on certain topics and adequately prepare and that it now needs more time (with possible disruption of the previously agreed-upon schedule). Nevertheless, disclosure of all likely experts and their evidentiary topics may not be possible until some discovery—or at least discovery in certain areas—has been completed.

Each case is different and there is no universally correct rule for deciding in advance how many of these three deadlines to have or exactly when they should occur (before or after the close of document production, before or after the close of any fact witness depositions, etc.).

A Tribunal Should Set a Deadline for Each Expert to Provide at Least a Main Expert Report and Also Consider the Associated Issues

If an expert is going to testify at the hearing, a written report from that expert should be served and filed well in

- a list of the most important assumptions (e.g., not more than five) being made and an explanation of why each of those assumptions was made;
- a sensitivity analysis showing how variations in those assumptions (one at a time and then in groups, as appropriate) affect each bottom line conclusion;
- a description of any models used (e.g., damages models) and of the other models that might have been used, and the justification for selecting the model that was used;
- a list of the most important numeric variables in the model used, what the reasonable range is for each variable, what value was chosen for each, and why;
- a sensitivity analysis showing how variations in those variables (one at a time and then in groups, as appropriate) affect each bottom line conclusion;
- with respect to damages, if discount rates, currency issues, tax issues, inflation, and/or interest are important, a clear statement of the assumptions made and why they were made, and a sensitivity analysis

showing how variations in those assumptions affect each bottom line conclusion; and

- a description of the most significant criticisms that could be made of the expert's opinions, assumptions made, model(s) used, etc., and an explanation of why each of those criticisms is wrong.¹⁵

The tribunal should also hear from counsel regarding other issues associated with experts and then establish whether to allow rebuttal reports, whether experts can be deposed, the deadlines for and order of filing the reports, whether any of the reports should be used as any part of the direct testimony, and the modality for experts' testimony at the hearing (discussed below). These issues are interrelated and depend on factors such as the topics on which the experts are opining, the complexity of their evidence, who has the burden of proof on each issue that is the subject of expert evidence, how tight the schedule is, possible cost-shifting, etc.

It would not be unreasonable in some cases to have only main expert reports (i.e., no rebuttal reports), have no expert depositions, and have each report constitute the respective expert's direct testimony at the hearing (the expert could be "warmed up" as a witness for just a few minutes with questions concerning his or her qualifications, bottom-line opinions, and criticisms of the opposing expert's report and then be subject to full cross-examination etc.). In other cases, rebuttal expert reports and expert depositions will be appropriate and the deposition testimony will not be used as any part of the expert's direct testimony. Claimant has the burden of proof on the issues necessary for it to prove its claims and if Respondent has no counterclaims, the order of filing expert reports could be Claimant's experts file first and Respondent's experts file a reasonable time later (rather than simultaneous filing of all initial reports).

Again, there is no one-size-fits-all rule for these issues; rather, it is what makes sense in each case to help provide a cost-effective, efficient, expeditious arbitration.

A Tribunal Should Take Steps to Resolve Key Differences in the Opinions of Opposing Experts

It is a given that opposing experts will disagree on one or more material issues, but the tribunal should take action before, during, and (if necessary) after the evidentiary hearing to sufficiently resolve the disagreements so it can properly rule on the claims.

Before the hearing and after expert reports have been filed and any expert depositions have occurred, opposing experts could be asked to meet and confer to determine the areas of agreement and disagreement and to report them to the tribunal in writing.¹⁶

During the hearing, experts could be examined one at a time on all topics on which each will offer evidence

(i.e., the customary direct/cross/re-direct/re-cross format), or all of the experts on a topic could be examined together (often called "hot tubbing" or "witness conferencing"), or a mixture of the two techniques could be used. The customary format could initially be used for all experts and then some recalled for hot tubbing on certain topics. The tribunal could allow the experts to ask each other questions.

At an appropriate time (e.g., after counsel have asked their questions), the tribunal might ask an expert one or more of the following questions:

- Do you believe the opposing expert provided valuable opinions and conclusions and, if so, what are they?
- What questions would you most like to ask the opposing expert?
- What do you believe are the biggest disagreements between you and the opposing expert in this matter?
- Can you explain why you believe you are correct and he or she (the opposing expert) is wrong?
- How should the tribunal go about resolving each of the disagreements between you and the opposing expert in a principled manner (i.e., consistent with the precepts of your discipline)?
- If you had unlimited resources and time to bolster your conclusions and/or to try to prove the opposing expert is wrong, what would you do and why?

After the experts have testified but before the end of the hearing, if experts' disagreements on material issues remain that the tribunal cannot sufficiently resolve, the tribunal should consider recalling the experts to testify, either in person or by videoconference or telephone. If that is not possible, the tribunal should consider submitting appropriately worded questions to the experts through counsel. The tribunal usually should not wait until after post-hearing briefs are filed to ask those new questions because that can be problematic (the longer the tribunal waits, the greater the chance the experts will become unavailable, lose the familiarity with the subject matter they had at the time of hearing, etc., and it disadvantages counsel because at the time the briefs are written, counsel will not know what additional evidence the experts will provide).¹⁷

Conclusion

A tribunal must do everything it can properly do to timely learn if experts will be used and, if so, obtain the information it needs from them (including information to sufficiently resolve their likely material disagreements) so it can render a fair, principled, and well-informed award.

Endnotes

1. Expert evidence may concern, for example, technology, the practices in an industry, the applicable standard of care, how agency regulations are customarily applied, the law in a specialized area (patents, financial instruments, etc.), the law of a foreign jurisdiction, or the value a business would have had but for the alleged wrong.
2. Such evidence includes expert depositions, hearing testimony, and written reports.
3. Deadlines for further disclosure regarding experts are discussed below.
4. For example, Rule R-34 (Evidence), Paragraph (a), of the AAA's Commercial Arbitration Rules reads in part as follows (emphasis added): "The parties may offer such evidence as is relevant and material to the dispute and *shall* produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute."
5. In some cases, the tribunal is expressly given the power to appoint its own experts. *See, e.g.*, Article 25 (Tribunal-Appointed Expert) of the AAA/ICDR's International Arbitration Rules, Paragraph 1: "The arbitral tribunal, after consultation with the parties, may appoint one or more independent experts to report to it, in writing, on issues designated by the tribunal and communicated to the parties." Such appointment ultimately increases the cost of the proceeding for at least one of the parties and raises other issues.
6. *See, e.g.*, 9 U.S.C. § 10(a) (emphasis added): "In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration ... (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in *refusing to hear evidence pertinent and material to the controversy*; or of any other misbehavior by which the rights of any party have been prejudiced"
7. What is late is case-specific, obviously depending on the previously established schedule, the expectations of the parties, any time limits established by the arbitration agreement or applicable law or rules, etc.
8. It usually will be sufficient if by that first deadline Party A learns that Party B intends to have one or more experts provide evidence on one or more topics without Party A learning the identity of each opposing expert (something Party B may not itself yet know).
9. During the preliminary hearing, the parties will likely readily agree to the first item and not object to the second item if the tribunal makes it clear it will be reasonable in determining what constitutes "good cause."
10. If Party A says it does not need an expert, Party B will more often than not decide to also do without; however, if Party B still says it will have an expert, Party A should then be given a short deadline to change its mind and identify an expert.
11. Additional information should be provided if the witness does in fact provide evidence. *See, e.g.*, Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure (Disclosure of Expert Testimony), which requires an expert furnishing a written report to include in the report, among other things, his or her qualifications (including a list of his/her publications within the previous ten years) and a list of all cases in which he or she has testified as an expert or by deposition during the previous four years. Expert CVs often already contain such information.
12. It will be apparent if Party A first discloses an expert in the last round (i.e., after the second deadline and before the third deadline) who should have previously been disclosed. Such attempted gamesmanship will likely not sit well with the tribunal, which can always allow more time for Party B to name an expert to counter Party A's late-disclosed expert, if necessary.
13. In some cases, all expert evidence will be adduced only in written reports.
14. It would be a rare case in which all of the items listed were appropriate to have an expert address in his or her report. In any given case, at least some of the items will be inapplicable (e.g., an expert testifying on foreign privacy laws will almost certainly not need to discuss discount rates) or will overlap (e.g., the most important assumptions being made by the expert might be what numeric variables were used). Soon after the parties say they will be offering experts, the tribunal should tell the parties the tribunal will expect main reports and what the tribunal will expect in them, especially because it is more than what is in Rule 26(a)(2)(B). Parties may feel "sandbagged" if some of the additional items are first requested by the tribunal at the evidentiary hearing, and an expert may need more time to carefully consider and address those items than he or she could take during a hearing. Again, every case is different.
15. An expert's identifying and discussing such criticisms in his or her report may aid the tribunal and will reflect on the expert's knowledge and intellectual honesty, which, in turn, bear on credibility and the weight given the expert's opinions.
16. The tribunal should consider whether opposing experts should meet by themselves, i.e., without any party representatives or counsel being present. Without counsel present, the experts may have a more "open" discussion; however, the tribunal should carefully consider whether to order such a meeting if either side objects.
17. It is better for the tribunal to ask all of its questions before the hearing concludes, but that may not be possible.

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ADR in the Age of Cybersecurity

By Steven A. Certilman and Eric W. Wiechmann

Not too long ago, back when paper and pen ruled the world, just about all arbitrators or mediators had to do to ensure the security of confidential case records was lock their office door and not leave their briefcase on the train. Not so any more.

Information security is a global challenge, and as even the computer systems of some of our most vital national security agencies and corporations have been hacked, preventing data intrusion must be regarded as a herculean task. Many of us have used such mental tricks as believing that we are too small to be hacked, or that with so many more tempting targets out there our anonymity makes the risk infinitesimal. It goes without saying that hiding behind these self-deceptions falls short of a reasonable effort to maintain cybersecurity. Even the solo and small firm practitioners among us must face the reality that reasonable steps are required of all of us. The time to start is now.

Why Do We Care?

Before we review some of the many measures that may be adopted by alternative dispute resolution professionals as part of a cybersecurity strategy, a quick look at the professional reasons *why* we should care is warranted.

The community of ADR providers is a diverse lot. We have people in all forms of practice, from partners in the largest firms to solo practitioners and non lawyers. In a sense, we are a cross-section of the computing world. While those practicing in large firms may have minions to address cybersecurity issues, doing so is far more challenging for solo and small firm practitioners. Nevertheless, we must resist the temptation to bury our heads. We are bound by the ethical duty to safeguard the confidences of the parties to our proceedings. This duty is independent of, and in addition to, the similar duty of those of us who are attorneys.

Life used to be much simpler for arbitrators as we contemplated our confidentiality obligations under the rules and ethical guidelines of the arbitral organizations and courts through which we serve. Fifteen years ago, when we reviewed Rules R-23 and R-25 of the Commercial Arbitration Rules of the American Arbitration Association (AAA)¹ or Article VI(B) of the ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes,² we focused on a few clear and obvious duties: to refrain from discussing the identities of the parties or the subject matter of the dispute and to keep confidential, and not lose, the pleadings, submissions or evidence of the parties. A little common sense and discretion seemed all that was required. The materials to be kept confidential were

typically maintained and exchanged in a hard copy paper format. Even native electronically stored information was typically produced for disclosure in paper format, and later through a CD-ROM or thumb drive. There was little if any focus on whether the document production might contain sensitive personal data.

“Arbitrators today must take their confidentiality responsibilities to a whole new level.”

Times have changed! With the ubiquity of email usage and the explosion of electronically stored data, electronic transmission of data and cloud-based data storage, the need for a new level of information security has become apparent. Examples of how easily this information can be unlawfully accessed by criminals, competitors, NGOs such as Wiki-Leaks and governments have come with alarming regularity, causing a reassessment of business processes that are affecting the working environment of businesses, attorneys, government and others. Businesses, which now budget significant amounts to the protection of their sensitive information, have come to expect a similar focus on vigilance by their attorneys. We, as arbitrators, must see ourselves as sharing the same responsibility for diligently protecting information entrusted to us for the resolution of disputes. To be sure, arbitrators today must take their confidentiality responsibilities to a whole new level. Administering bodies (AAA, JAMS, CPR and the LCIA, to name just a few) have begun to impose specific cybersecurity duties on arbitrators,³ and those arbitrators who are also attorneys must be equally focused on their obligations under the Rules of Professional Conduct of their states of admission and the ABA and state codes of ethics.⁴ Prominent membership organizations in the field have done so as well.⁵ Moreover, depending on the nature of their practices, arbitrators may also need to become familiar with, and comply with, state, federal and even international data protection laws such as HIPAA,⁶ or the European Union General Data Protection Regulation⁷ (GDPR). Many corporate and governmental parties impose their own data protection requirements as well.

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The breach of confidential data or documents used in an arbitration or the unintentional release of such information can, in the absence of adequate precautions having been taken by the arbitrator, lead to serious professional consequences. With clients increasingly cautious about the dissemination of confidential data in their possession, a data breach caused by an arbitrator's failure to take reasonable precautions can form the basis of a grievance being filed against a lawyer-arbitrator, sanctions being imposed by the arbitral organization administering the proceeding, and loss of membership on an arbitration panel or in a professional membership organization. Even with the general immunity that arbitrators and mediators enjoy under the laws or court rules of many states⁸ and the rules of many arbitral organizations,⁹ a cybersecurity incident can lead to a lawsuit and can possibly be career threatening.

What follows are observations and suggestions designed to assist ADR professionals in avoiding, or at least minimizing, inadvertent or unauthorized disclosure of confidential party information. While few will adopt every suggestion, it is recommended that they all be considered in deciding whether you are taking reasonable steps to protect the sensitive material. In the interest of facilitating review and implementation, it is provided in outline format.

I. Storage of Data

a. Internal Hard Drive or a connected external hard drive

- i. The most insecure format.
- ii. Click on a link in the wrong email and you open a door for malware or unauthorized access.
- iii. If your computer has been infiltrated, this data likely will be as well.
- iv. Risk of ransomware, where you lose access to your data unless a ransom is paid.
- v. External drives have become very small and easy to use, but they can easily be lost if used portably.
- vi. Is the drive encrypted? Much better, but slows the computer down.
- vii. Generally external drives need a cable, which are easily forgotten.
- viii. These drives are subject to crashing (mechanical malfunction).

b. Cloud-Based (e.g. Google Docs, iCloud or Dropbox)

- i. How does the data get there?
- ii. Services may be either encrypted or unencrypted. If encrypted, who holds the key?

- iii. Look for services that have "end to end" encryption? Data is encrypted getting to their servers and encrypted while residing on their servers.
- iv. Many services tell you in their Terms of Service that they have the right to "mine" your data and use for marketing or to sell to other marketers. Generally, e.g., iCloud, Google Docs.
- v. With the very popular Dropbox, they hold the encryption key rather than you, so documents can be made available by them without your involvement, e.g., under court order. While you could encrypt your own documents individually, this is rarely done.
- vi. There are other services such as Tresorit (tresorit.com), a modestly priced service similar to Dropbox except that it has end-to-end encryption and YOU, not they, hold the encryption key. This service is becoming increasingly popular for that reason. It is presently \$20 per month for 1 Tb of storage. They also offer a secure way to send attachments similar to Dropbox.

c. USB Drive

- i. Probably the worst choice. The military commonly disables USB drives in its computers. Risk outweighs convenience.
- ii. So easy to lose. May carry viruses built in and invisible, especially freebies distributed at conferences, etc. for marketing purposes.
- iii. Easy to misplace, or be used for a later purpose.
- iv. If you must use one, make sure it is encrypted.

d. Re-writable CD-ROM

- i. Very 1990s. Almost not worth mentioning.
- ii. Most portable computing devices do not even have CD drives any longer.
- iii. At a minimum, password protect.

e. The challenge is in finding the right balance between convenience and security

II. Communications

a. **Consider discussing confidentiality and security issues during your preliminary conference.** It is an opportunity to bring a great deal of certainty to the security concern. There are various permutations of responsibility. See below.

b. For you, with their information

- i. Consider building into your first preliminary order a confidentiality and security agreement.

- ii. Check the arbitration clause to determine whether the parties have already agreed to provisions which will bind you.
- iii. See AAA Rule R-23(a).

The arbitrator may issue order “conditioning any exchange or production of confidential documents and information, and the admission of confidential evidence at the hearing, on appropriate orders to preserve such confidentiality.”

- iv. See ICDR Art. 37(2)):

- 1. Confidential information disclosed during the arbitration by the parties or by witnesses shall not be divulged by an arbitrator or by the Administrator. Except as provided in Article 30, unless otherwise agreed by the parties or required by applicable law, the members of the arbitral tribunal and the Administrator shall keep

Tribunal any sensitive personal identifiers such as social security numbers (or other national identification numbers), dates of birth or financial account numbers, but may submit partially masked versions of such data if such masking is generally accepted for public use of such data (e.g., last four digits of credit card or social security numbers). The parties shall not submit to the Tribunal un-redacted documents containing personal identifying numbers, individual health information or financial information unless there is a demonstrated need for the Tribunal to have such information due to the matters at issue in the arbitration.

- vi. Agree when to use (or not use) unencrypted email. Encrypted email is readily available but use is cumbersome.

“With the ubiquity of email usage and the explosion of electronically stored data, electronic transmission of data and cloud-based data storage, the need for a new level of information security has become apparent.”

confidential all matters relating to the arbitration or the award.

- 2. Unless the parties agree otherwise, the tribunal may make orders concerning the confidentiality of the arbitration or any matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.

- v. If appropriate, consider including a clause such as the following, written by arbitrator Sherman Kahn:

The parties are instructed to jointly consider methodologies to protect confidential and private data that may be exchanged in the arbitration and/or submitted to the Tribunal. Such methodologies should take into account the parties’ need for information in the arbitration and whether such information must be provided to the Tribunal or exchanged among the parties in light of the sensitivity of the information and its relevance to the proceedings. The parties shall redact from information provided to the

- vii. An alternative is to password protect individual documents as necessary.

- viii. Once you develop a preferred communication protocol, explain what it is and ask if any objections.

- ix. If necessary, can use HIPAA compliant process, have a plan.

- x. Address when you will destroy the file and delete electronic records.

c. The parties, with each other’s information

- i. Consider addressing the partial or complete redaction of unnecessary personal confidential information such as Social Security numbers, dates of birth, financial account numbers, medical information, etc..
- ii. If exchanging documents on a CD, consider a format in which the entire CD can be password protected and send the password separately.
- iii. To facilitate confirming all this in the order, you may wish to have “standing orders” for confidentiality (should include how witnesses, experts, consultants will be bound by confidentiality and

cybersecurity measures and how that will be enforced).

d. As you referee issues related to discovery, and the hearing process, continue to have in mind the requirements of the governing rules such as AAA Rule R-23(a) and ICDR Art. 37(2)

e. General communication issues

Avoid the use of public Wi-Fi. If you must use it, as most of us do, use a VPN. Unsecured public Wi-Fi can be easily hacked and the hacker, who technologically positions himself between you and the web, can capture your every keystroke and distribute malware to your computing device, without you knowing it. If you plan to use a public Wi-Fi network (e.g., hotel, airport, mass transit, Starbucks), purchase a Virtual Private Network service. With a VPN, your transmissions are encrypted and most hackers, who are looking for easily accessible information, will discard it.

When browsing on the web, look at the address bar. If the Internet Address does not begin with "https://", it is not an SSL (Secure) connection. Use extreme caution before entering authentication information such as passwords into unsecured sites. The login page of most websites will be an SSL page. Always use the https:// option if given a choice.

Keep Wi-Fi and Bluetooth off when not using them. Not only does this close the door to hackers, it will greatly extend your battery life.

III. Use of Email

a. Reply-all error

- i. We're all busy, hurriedly exchanging emails with case administrators, co-arbitrators and others. We hit the send button and then it sinks in—you've just accidentally sent confidential information to the wrong party
- ii. The ABA's stance on the ethics applicable to a party's accidental receipt of privileged information has evolved over time. Today's rules ask attorneys simply to inform the sender that they've received the information

- b. Any time you receive an unexpected email from a website urging you to click a link or open a document, put the process into slow motion and consider whether the request makes sense. An email that purports to be from a site you use, and says so in the sender box, may be a forgery. There are two easy things you can do to ensure the email is legitimate. If you are using Microsoft Outlook, roll your cursor over the link but do not click it. The email address or destination website of the link will

appear on the lower left-hand corner of the Outlook window. If it is not the site you are expecting, hard delete (press shift + delete) the email. Also, you can double click on the sender's name to see the address from which it actually came. If it isn't the address you are expecting, hard delete as well.

IV. Concerns That Arise at Issuance of the Award

a. What confidentiality issues come into play in the award writing process?

- i. What if the award contains confidential information that a party would not wish to have filed in court in a confirmation or vacate proceeding? Some courts refuse to seal even those awards as part of the enforcement process. Can the arbitrator modify it?

"A cybersecurity incident can lead to a lawsuit and can possibly be career threatening."

- ii. Not likely. See AAA Rule R-50 and ICDR Art. 33. Outside of permissible scope.
- iii. But see Section 11 of the Federal Arbitration Act (9 U.S.C. 11), under which the District Court is authorized as follows: "Where the award is **imperfect** in matter of form not affecting the merits of the controversy. The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties." Can an argument be made to modify to protect privacy under this language?
- iv. Collaterally, do we have a duty to draft the award to avoid exposing party confidential information? Probably, at least where we know we are doing so.
- v. Underscores need to consider this issue when drafting the award.
- vi. Workarounds? (Show draft award to parties for review for confidential information).

V. Post-proceeding Concerns

a. Continuing duty to parties

b. Disposal of file

- i. Is the paper file treated any differently from the electronic records?
- ii. In its form Award transmittal letter, the AAA says:
Pursuant to the AAA's current policy, in the normal course of our administration,

the AAA may maintain certain electronic case documents in our electronic records system. Such electronic documents may not constitute a complete case file. Other than certain types of electronic case documents that the AAA maintains indefinitely, electronic case documents will be destroyed 18 months after the date of this letter.

c. There is no hard and fast rule for how long to retain documents

- i. Certainly for the modification period (See the FAA, 9 USC 9-11, state law (e.g., CPLR 7509) and the applicable rules).
- ii. Probably even long enough for the possibility of a vacatur proceeding to play out. In New York, that's 90 days for the vacatur period plus the duration of a pending proceeding. CPLR 7511.

public Wi-Fi networks. Avoid them unless you are sure it is legit and you are using a VPN with end to end encryption.

- c. Cellular data is more secure but you should still use a VPN as they too can be attacked.
- d. So, always use an end-to-end encrypted VPN any time you are out of the office.
- e. With your own office Wi-Fi, use an inconspicuous network name, set it up for WPA2 encryption, change your network key regularly and make sure to change the router's password from the factory default!
- f. Be careful of international travel with your iPad or laptop that has confidential arbitration information stored. In certain countries as soon as you activate your device on their cellular system your device may be penetrat-

"Make sure your professional liability insurance policy includes cyber liability and data breach response coverage."

VI. Summary of Best Practices

a. Take reasonable measures to avoid malware, including ransomware

- i. Maintain anti-virus/anti-malware software and regularly monitor it to ensure that the definitions are up to date and that it has not been disabled.
- ii. Maintain constant backup using a service such as Carbonite. Backing up data hourly would seem to be an appropriate level of protection.
- iii. Avoid phishing attacks. A DOJ report says that on average more than 4,000 ransomware attacks have occurred daily since January 1, 2016.
 - 1. Spear phishing attacks are emails that try to get you to click on a malicious link.
 - 2. Whale phishing emails are similar but they appear to come from a CEO or other VIP and ask you to deliver valuable information.
 - 3. Use the mouse rollover technique to check the link and click on the sender's email address to verify that it really comes from the purported sender. Generally this must be done on a desktop browser.
 - 4. Keep your guard up!
 - b. Any public Wi-Fi is inherently insecure. Public Wi-Fi is any Wi-Fi you do not control. That includes hotel, airport and other

ed by malware. Many people travel to these countries with a clean device with nothing on it which is of any concern, and then wipe the device clean after leaving the country.

- g. Insurance—make sure your professional liability insurance policy includes cyber liability and data breach response coverage. It is available as an add-on if not part of your basic policy. Even if you do not maintain an arbitrator malpractice insurance coverage, consider a separate policy for cybercrime and privacy claims. For instance, HUB International (<https://www.hubinternational.com/>) provides such coverage for a fairly nominal charge.
- h. Upgrade your passwords.
- i. Consider using a password manager. It can store all your passwords.
- j. Update your software—older versions may lack security improvements and make it easier to infiltrate your system.
- k. Don't let your browser memorize your passwords (such as your password to the e-Center).
- l. Use services that require (or opt to utilize) two-factor authentication wherever possible.

You get an email or a text message which you have to enter to login.

- m. Encrypt your portable devices such as smart phones and tablets. The operating systems usually include the ability standard
- n. Check the site www.haveibeenpwned.com to see if your account information is showing up on nefarious websites, which will mean at one point or another your computer or an online account has been hacked. It's an identity theft early warning site. You input your email addresses and user names and the site will tell you if they come up in the sites database of known hacks. It's a good way to screen for your password having been stolen.
- o. Carefully handle and dispose of written documents (usually you do not need both an electronic and hard copy of the material)
- p. Devices like the Amazon Alexa are always listening! That's how she hears her name to wake up! Guess where everything said in its presence is sent for voice recognition?

For most of us in ADR, particularly full-time neutrals who typically are solo practitioners, focusing on our greatest vulnerabilities is likely the best first step. It's a process. Let's all get started!

Endnotes

1. American Arbitration Association Commercial Arbitration Rules and Mediation Procedures (2007).
2. The Code of Ethics for Arbitrators in Commercial Disputes, American Bar Association and American Arbitration Association (2004).
3. See, e.g., JAMS Comprehensive Arbitration Rules & Procedures Rule 26; ICDR International Dispute Resolution Procedures Article 37; CPR Administered Arbitration Rules Rule 20; See also CPR 2018 Non-Administered Arbitration Rules Rule 9.3. "Matters to be considered in the initial prehearing conference, may include, ... F. The possibility of implementing steps to address issues of cybersecurity and to protect the security of information in the arbitration."
4. ABA Model Rules of Professional Conduct, Rule 1.1 (Competence) and 1.6 (Confidentiality of Information); ABA Formal Opinions 477R and 483: Securing communication of protected client information (2017); New York State Bar Association Ethics Opinion 842 (2010), "Using an outside online storage provider to store client confidential information."
5. Examples include the Chartered Institute of Arbitrators and the College of Commercial Arbitrators.
6. Health Insurance Portability and Accountability Act, Pub.L. 104-191, 110 Stat. 1936.
7. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.
8. See, e.g., *Austern v. Chicago Board Options Exchange, Inc.*, 898 F.2d 882, 885-86 (2d Cir. 1990) and *Calzarano v. Liebowitz*, 550 F.Supp. 1389, 1391 (S.D.N.Y. 1982); *Stasz v. Schwab* (2004), 121 Cal.App.4th 420.
9. See, e.g., AAA Commercial Arbitration Rules R-52(d); ICDR International Dispute Resolution Procedures Article 38; JAMS Comprehensive Arbitration Rules & Procedures Rule 30(c); CPR Administered Arbitration Rules Rule 22.



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The ICCA-ASIL Task Force on Damages Creates a New Interactive Web App for Damages

By Catherine Amirfar, Gabrielle Nater-Bass, Stefanie Pfisterer and Aasiya Glover

Introduction

In December 2016, ICCA and ASIL joined forces to establish the ICCA-ASIL Task Force on Damages. The Task Force was charged with addressing an issue that, despite its importance, is nevertheless too often overlooked in the field of international arbitration: the quantification of damages.

The Task Force is co-chaired by Catherine Amirfar (Debevoise & Plimpton, United States) and Gabrielle Nater-Bass (Homburger, Switzerland). It brings together a blue-ribbon panel of leading legal and valuation experts from across the globe to think creatively about how to promote consistency and rigor in the field's approach to damages in international arbitration cases, be it commercial or investor-state arbitrations.¹

"The Task Force strives to bring about concrete change through the development of a web app of practical use for legal practitioners, arbitrators, and students interested in the topic."

The Task Force's mandate includes fostering the development of a more robust and uniform approach to the analysis of damages in international arbitration. To that end, the Task Force has analyzed legal, valuation, and procedural principles underpinning damages in the field of international arbitration, with a view not only to describing the consensus on the fundamentals, but also to identifying and disentangling thorny and disputed issues related to damages.

The Task Force strives to bring about concrete change through the development of a web app of practical use for legal practitioners, arbitrators, and students interested in the topic.

The Work of the Task Force to Date

Since it has been established, the Task Force has hosted a number of meetings and seminars on damages in international arbitration.

In particular, the Task Force led various seminars open to the public, including a seminar in Washington, D.C. co-hosted by ICSID on April 11, 2017, a full-day seminar at the Hong Kong International Arbitration Centre (HKIAC) on November 15, 2017, a breakfast seminar at the ICCA Congress in Sydney on April 16, 2018, and a breakfast seminar at the Annual IBA Conference in Rome on October 9, 2018.

At these seminars, the Task Force has presented the mandate of the Task Force, discussed the challenging legal and quantification issues related to damages that typically arise in international arbitrations, and introduced the prototype of the damages app.

So far, the interest in the work of the Task Force has been enormous, leading to the creation of an Advisory Board comprised of a pool of close to 30 expert advisors who will be able to review and comment on the app before it will be officially launched.

The Task Force intends to launch the web app in 2019.

The Web App Developed by the Task Force

As stated, the Task Force is developing an interactive web app of practical use.

The Task Force has designed the organization and content of the app to serve equally practitioners putting together a case on damages, arbitrators deciding questions of damages, law students looking for a deeper dive on

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damages subjects, and experts who want to explore the legal and quantitative framework underlying damages in international arbitration cases.

The web app guides users through the key procedural, legal and quantitative issues implicated by the calculation of damages in international arbitration. It covers the law on damages in the context of both international investment and commercial arbitrations, and damages topics arising under both international and domestic law. Experts from various legal systems (including international, civil, and common law) have contributed to the content.

The web app therefore aims to cover all the major topics that would be important to a practitioner, as identified and organized by the leading experts in each field. This organization assists practitioners in locating information about each concept, while also understanding and identifying other related and possibly relevant legal concepts. In terms of function, the web app is fully interactive, permitting users to click through linked pages to

law. The Valuation Date category addresses the choice of Date of Breach or Date of Award in the context of an arbitration governed by international law. The Limiting Principles grouping includes content on the key bases for limiting damages in an arbitration based on international law: Mitigation, Reasonable Certainty, Double Recovery, Contributory Conduct, and Legal Causation.

From there, by clicking on the “Categories of Remedies” button—a user could access the primary remedies available in investment arbitration. These remedies—restitution, compensation, satisfaction, and interest—appear as separate buttons that can be clicked on to reveal more detailed information. For example, the “Restitution” button reveals a final page of content including a general overview of the meaning of the term, a summary of key issues, and selected sources for further reading. Key issues point a user to debates, pitfalls to avoid or important considerations to take into account; in the “Restitution” context, one key issue is that some arbitral tribunals take the position that restitution or specific performance would be an undue interference with a state’s sovereignty.

“The Task Force brings together a blue-ribbon panel of leading legal and valuation experts from across the globe to think creatively about how to promote consistency and rigor in the field’s approach to damages in international arbitration cases, be it commercial or investor-state arbitrations.”

reveal an increasingly interrelated network of damages topics. For example, a user interested in learning more about the pertinent legal principles relevant to international investment arbitrations will be presented with three buttons on the home page: “Procedural,” “Legal” and “Valuation.” The user may then click the “Legal” button, which opens a new page displaying two alternative options: “International” and “National.”

Clicking the “International” button provides the user a network of international law legal principles, with the narrower legal concepts nested within the overarching categories until the user clicks on a button to reveal content specific to a certain category. For example, the web app groups the relevant legal principles on international law into seven major categories: Nature of Claim, Legal Standard, Categories of Remedies, Valuation Date, Elements of Claim, Proof Relation to Damages, and Limiting Principles. Each of these groupings includes the primary legal principles or requirements in its set. The Nature of Claim category, for instance, provides detailed information on the damages implications of certain types of international law-based claims, including content on the damages considerations for unlawful and lawful expropriation, as well as other breaches of international

To the extent that the topics arise in national legal systems, the user can click on the “National” button to reveal a decision tree for each of common and civil law, and continue down either path to learn more about “Categories of Remedies” in the context of a commercial arbitration governed by laws under each legal system.

Importantly, the content for each topic also contains intra-site links for key words and issues arising within damages, allowing the user to navigate between topics fluidly and to identify the major questions and sources for each topic. The user can therefore explore how topics are related, and how issues arising in each area of the damages phase are often dependent upon each other.

Through the web app, the Task Force hopes to drive home the point that issues concerning damages arise from the very outset of cases, throughout the life of the case, and should be dealt with proactively and rigorously, taking into account quantum and legal consequences.

Finally, the web app is intended to be descriptive, not prescriptive. It is a resource designed to illustrate the landscape of damages in international arbitration and point to the specific locations where that landscape is unsettled or practitioners should take special care to

investigate further. In that vein, the web app identifies and discusses key disputes and challenges to ensure that divergent viewpoints are considered, not necessarily to determine the “right” answer.

Conclusion

A thorough and nuanced understanding of damages is essential for practitioners in international arbitration. Damages are too often isolated from the remainder of the dispute, sometimes because the procedural steps place the consideration of damages toward the end of proceedings. For example, experts may be brought in at a different stage long after jurisdictional questions have been decided, or damages may be pled, briefed, and heard after a final decision on the merits of a claim. However, the various procedural, legal, and quantitative issues arising in a discussion of damages are necessarily interlinked both with the various stages of an arbitration proceeding and with each other. It is therefore necessary for practitioners to engage deeply in the damages issues from the very beginning of a case, with the requisite special consideration given to the procedure early on—an issue which the web app also addresses.

It is the hope of this Task Force that the web app it is creating will contribute to, and serve as a primary resource for, the rigorous and nuanced analysis of damages in international arbitration.

Endnote

1. The Task Force consists of the following members Olufunke Adekoya (Aélex, Nigeria), Sarah Grimmer (Hong Kong International Arbitration Center, Hong Kong), Hilary Heilbron (Brick Court Chambers, United Kingdom), Mark Kantor (Independent Arbitrator, United States), Swee Yen Koh (Wongpartnership LLP, Singapore), M. Alexis Maniatis (The Brattle Group, United States), Irmgard Marboe (University of Vienna, Austria), Chudozie Okongwu (NERA Economic Consulting, United States), Kathleen Paisley (Amboslaw, Belgium), Patrick W. Pearsall (Jenner & Block, United States), Adriana San Román Rivera (Wöss & Partners, United States and Mexico), Guido Santiago Tawil (M&M Bomchil Abogados, Argentina), Thierry J. Senechal (Groupe ISD, France), Jennifer Hall Vanderhart (Analytics Research Group, United States), and Karim A. Youssef (Youssef & Partners, Egypt). The Task Force is assisted by Aasiya Glover (Debevoise & Plimpton, United States), Stefanie Pfisterer (Homburger, Switzerland), and Christel Y. Tham (PCA, The Netherlands), acting as Rapporteurs.

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California—A Rising Star Among International Arbitration Seats

By Gary Benton and Katalin Meier

The International Arbitration Spotlight on California

California's new international arbitration legislation, Article 1.5 of the California International Commercial Arbitration and Conciliation Act, effective January 1, 2019, promises to improve California's standing as an international arbitration seat and, in so doing, provide new opportunities for all international arbitration practitioners.

International arbitration is the preferred dispute resolution tool for commercial disputes between parties from different countries.¹ Although U.S. companies and their counsel are more familiar with U.S. litigation, companies involved in international commerce are increasingly turning to the more effective and efficient dispute resolution offered through international arbitration.

Few parties to an international dispute are willing to put faith in the hands of a foreign country's courts. The main reason why international arbitration is the preferred means for international business dispute resolution is trust: international arbitration offers impartial, independent and experienced arbitrators to address complex, multi-jurisdictional claims that cannot be readily resolved by local courts.

Although for many years international arbitration was largely focused on Europe, particularly London, Paris and Geneva, along with several other respected regional seats, there has been a significant shift over the years. New York is one of the top international seats and seats in Asia have recently achieved international prominence.

In the United States, California has also long played a role as a seat for international arbitration.² According to ICC statistics, California is the second most utilized seat for ICC international arbitrations in the United States.³ Other U.S. jurisdictions are notable in specific sectors. Washington, D.C. has a strong presence for investor-state arbitration. Texas has consistently held a share for oil and gas-related arbitration. In recent years, Florida has developed a growing role in Latin America-related work. With respect to substantive law, the most frequent choice was New York law, followed by California law and Delaware law.⁴

Comparison of U.S. seats does not provide a full perspective on challenges and opportunities for international arbitration in the U.S. The more important consideration is that there has been substantial growth in Asia, particularly in the past decade, both with respect to leading efforts by Hong Kong and Singapore, and with respect to regional efforts to capture market share. This regional activity includes activity in Southeast Asia, India, Korea

and Japan and as well as recent initiatives by a number of rapidly developing institutions in mainland China. As a result of the rise and growth of Asian institutions, parties in Asia have less incentive to look to Paris, London or New York for their arbitrations.

The challenge for the U.S. (and the rest of the world outside Asia) is to remain relevant given this shift toward Asia. Fortunately, the shift parallels a rise in the volume of arbitrations, meaning increased opportunities for all. California, which has long been focused its attention more to Asia than Europe, is well-positioned to capture a significant portion of Asia and Pacific Rim arbitration for the United States. Indeed, increased international arbitration activity in California offers to significantly expand international dispute resolution opportunities for all U.S. practitioners.

Why International Arbitration in California?

California is the fifth largest economy in the world and, in the U.S., the leading exporter to Asia and Europe. California's current GDP tops \$2.7 trillion—a figure steadily growing each year.⁵ California's economic strength and geographic position gives it an edge in international business and dispute resolution.

California's position is compelling. However, until recently, California faced a challenge in developing its potential as an international arbitration seat due to some uncertainty as to whether foreign counsel could represent their clients in international arbitration in California. That uncertainty was used by critics to question California's commitment to international arbitration. This has been detrimental to international arbitration practice throughout the US. While critics debated the merits of international arbitration in California, Pacific Rim arbitration has flourished and increasingly shifted to Asia. California's confirmation that foreign counsel can arbitrate in California will strengthen the opportunity for Pacific Rim arbitration in the U.S.

What most of the leading arbitration seats have in common is that their laws and legal climate favor international arbitration. All abide by commitments to enforce

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agreements and awards and provide appropriate judicial support. They promise due process and the rule of law and their courts provide fair and independent decision-making. They have a professional base of international practitioners and a sound infrastructure to support international business and practice. California has long offered all of these elements.

In nearly all the leading jurisdictions, foreign counsel are allowed to represent parties in international arbitration proceedings pursuant to inclusive “fly-in-fly-out” (FIFO) representation laws. California arguably lagged as to this one factor.⁶ That has been resolved. Effective January 1, 2019, California has adopted new, strong FIFO statutory protections in Article 1.5 of the California International Commercial Arbitration and Conciliation Act (CIACA; Title 9.3 of the California Code of Civil Procedure (Cal CCP), § 1297.11 *et seq.*). As of January 1, 2019, California will have one of the world’s most inclusive FIFO rules, allowing out-of-state and foreign counsel to represent their clients in international arbitrations in California. Under the statute, no *pro hac vice* admission or registration is required for international arbitration.

in California under the broad wording of the statute. Out-of-state and foreign attorneys representing parties in international arbitrations in California are required to comply with the same professional standards as attorneys admitted in California. (CCP 1297.188(a).)

This legislative statement should resolve all uncertainties as to whether California is a favorable jurisdiction in which to conduct international arbitration. New York practitioners should give thoughtful consideration to the benefits of this development. While some may see California as a competitive threat, the reality is that California provides new opportunities. International businesses and practitioners now have the clear opportunity to conduct US-based international arbitration on the Pacific Rim with their counsel of choice.

In reality, California has always been an attractive forum for international arbitration. California was one of the first U.S. jurisdictions to adopt an international arbitration statute—the California International Arbitration and Conciliation Act was enacted in 1988. More significantly, California’s statute is one of the few in the U.S.-

“California’s new legislation ensures that out-of-state and foreign practitioners can represent clients in international arbitrations in California.”

The new Article 1.5 of the CIACA allows a foreign or out-of-state attorney to participate in a California seated arbitration if *any* one of five broad conditions is met:

- i. The services are undertaken in association with an attorney who is admitted to practice in this state and who actively participates in the matter;
- ii. The services arise out of or are reasonably related to the attorney’s practice in a jurisdiction in which the attorney is admitted to practice;
- iii. The services are performed for a client who resides in or has an office in the jurisdiction in which the attorney is admitted or otherwise authorized to practice;
- iv. The services arise out of or are reasonably related to a matter that has a substantial connection to a jurisdiction in which the attorney is admitted or otherwise authorized to practice; or
- v. The services arise out of a dispute governed primarily by international law or the law of a foreign or out-of-state jurisdiction.

Presumably all international arbitration practitioners meet the standard under the new statute and even domestic practitioners are allowed to represent their clients

based on the UNCITRAL Model Law.⁷ This UNCITRAL Model Law based legislation has long offered international parties a highly recognizable and favorable statutory environment for international arbitrations.

In addition, California has an impeccable record for enforcement of international arbitration agreements and awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Although the California state courts, and to some extent the Ninth Circuit, are notable for asserting employee and consumer protections in domestic arbitration, both the state and federal courts in California have shown strong deference to international commercial arbitration and can be readily relied upon to provide appropriate judicial assistance in international arbitration consistent with UNCITRAL Model Law standards.⁸

California’s position as a business and innovation center also helps make it an attractive place to conduct an arbitration. California is home to robust innovative international businesses including leaders in technology, entertainment, finance, shipping, sports, music, agriculture, hospitality and renewable energy to name a few. California’s entrepreneurial outlook constantly generates new business and in turn new legal issues. Accordingly, California case law is well developed in many innovation sectors. Such broad and deep know-how is of an immense

value when parties look for fair and reasonable arbitral results.

Likewise, California is home to many major international law firms and has many experienced and sophisticated international practitioners, including in technology and intellectual property. Under California's new law, it is now clear that parties in California will also have the opportunity to access the expertise of international arbitration practitioners from all over the world.

Also, like other United States jurisdictions, California strongly favors arbitrator independence and impartiality. Although California's rigorous domestic arbitration disclosure rules do not apply in international arbitration, arbitrators practicing in California are unhesitant about making full disclosures. Such an allegiance to due process and disclosure provides protections for parties rarely found outside the U.S.

Importantly, California is a strong proponent of and has been a leader in implementing mediation and other alternative dispute resolution techniques. California has demonstrated openness to flexible approaches to resolve legal disputes, including a strong tradition of mediation. This is not just by coincidence: mediation has always been a preferred ADR method in the sports, music and the film industry, where time and cost-efficient solutions are critical. And those international cases for which mediation is not the appropriate resolution (e.g., cases needing an enforceable award) can be resolved by arbitration. This affinity toward ADR and particularly settlement arguably fits well with Asian based models of conciliation and hybrid arbitration-mediation dispute resolution.

Finally, California is ideally situated geographically to serve as a focal point for trade with Asia and the Pacific. Several Asia-based institutions, including the Korean Commercial Arbitration Board (KCAB) and the Shenzhen Court of International Arbitration (SCIA), have already set up offices in California to both attract cases to Asia and administer arbitrations in California. Further, California is attractive to parties in countries around the Pacific Rim who may choose New York substantive law (or the substantive law of other Western jurisdictions) but prefer not to travel the extra distance to the East Coast.

Domestic arbitration institutions are also expanding their international arbitration activities in California. For example, JAMS, traditionally a strong domestic provider, is opening a new International Arbitration Center in Los Angeles and has announced plans for a similar facility in San Francisco. Other international providers are carefully considering their next steps.

The California International Arbitration Council

A leading array of law firm, corporate and other international arbitration practitioners and academics have recently joined together to form the California In-

ternational Arbitration Council (CIAC). Similar to New York's successful marketing effort through the creation of the New York International Arbitration Center (NY-IAC), CIAC's mission is to coordinate initiatives to promote international arbitration in California. CIAC will (1) provide online and other informational resources on international arbitration in California; (2) support arbitral institutions and practitioners in offering international arbitration services in California; and (3) engage business and government leaders on the benefits of international arbitration and offer educational outreach to universities, law firms, businesses and other users. CIAC will work to identify or consider development of hearing facilities in Northern California and Southern California to support international arbitration.

"The expansion of international arbitration in California provides all international arbitration practitioners a U.S. beachhead on the Pacific Rim."

CIAC is a non-profit corporation officially launched in January 2019. CIAC's Board of Directors will be appointing a Global Advisory Council of leading practitioners from around the world. As well, membership will be open to California and non-California practitioners. (For more information visit <http://www.ciac.us>.)

Conclusion

California's rise in international arbitration brings new promise for Pacific Rim dispute resolution and shines a spotlight on California. It offers businesses in the U.S. and throughout the Pacific Rim better alternatives for effective and efficient international dispute resolution. It offers arbitration practitioners and providers new opportunities for East-West engagement. For international arbitration practitioners in New York and elsewhere in the US, California promises new opportunities for West Coast, Asia and other Pacific Rim arbitration work.

Endnotes

1. Queen Mary, University of London and White & Case: 2018 International Arbitration Survey: The Evolution of International Arbitration.
2. Queen Mary, University of London and White & Case: 2018 International Arbitration Survey: The Evolution of International Arbitration.
3. "Out of the 58 ICC cases seated in the USA, 28 were in New York, seven in California, six in Florida (Miami), three in Texas (Houston), and one in each of Iowa, Indiana, Nevada, Hawaii, Minnesota, Utah and the District of Columbia." 2017 ICC Dispute Resolution Statistics, in: International Chamber of Commerce, Dispute Resolution Bulletin 2018, Issue 2, at 60.

4. 2017 ICC Dispute Resolution Statistics, in: International Chamber of Commerce, Dispute Resolution Bulletin 2018, Issue 2, at 61.
5. Eric Z. Chang, *Golden Opportunities for The Golden State: The Rise of International Arbitration in California*, California Litigation Vol. 31, No. 2 (2018), at p. 35.
6. The uncertainty in California regarding the right of foreign counsel to appear in arbitrations can be traced to a 1998 California Supreme Court case, *Birbrower, Montalbano, Condo & Frank v. Superior Court of Santa Clara County*, 17 Cal. 4th 119 (1998). Although *Birbrower* was not an international arbitration case and actually contained language favorable to representation by foreign counsel in international proceedings, it was read by some as a threat to foreign counsel. The California legislature adopted a registration requirement for out of state counsel appearing in domestic arbitration and, in so doing, left a gap with respect to international arbitration. Over the past years, there have been several attempts to clarify this situation. The California

legislature, with the support of the Supreme Court and the Governor, determined that resolving any ambiguity will benefit the overall economy of the state as well as strengthen international arbitrations in the United States in general. See Eric Z. Chang, *Golden Opportunities for The Golden State: The Rise of International Arbitration in California*, California Litigation Vol. 31, No. 2 (2018).

7. California International Commercial Arbitration and Conciliation Act; Title 9.3 of the California Code of Civil Procedure, § 1297.11 et seq., added by Stats. 1988, Ch. 23, Sec. 1.
8. Domestic arbitration in California is governed by a different statute than international arbitration, the California Arbitration Act; Title 9 of the California Code of Civil Procedure, § 1280 et seq. Other criticisms of arbitration in California, e.g., legislation requiring detailed arbitrator disclosures, do not apply in international arbitration.

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Publicity for Diversity in the ADR World

By Laura A. Kaster

Is all publicity good publicity? The aphorism has certainly faced its challenges. When it comes to arbitration and mediation, it doesn't ring true. As our Chair notes in her message, arbitration in particular has come in for a round of attacks, many ill-founded. What about the truths that get seriously distorted or misused? The recent filing by Jay-Z weaponizes an important problem in the field that really must be better addressed.

Jay-Z, a sophisticated and well-represented entertainer, was involved in an arbitration about the use of a logo. He had sold his clothing company Rocawear and then started a new company called Roc Nation. The owner of Rocawear filed an arbitration claiming that the new company was violating the terms of the sale agreement by using a trademark. These sophisticated parties, dealing at arm's length, had agreed to arbitrate disputes before the American Arbitration Association. Jay-Z, represented by a team of lawyers that did not include any African-Americans, challenged the arbitration and sought to stay it, alleging that the list of 12 arbitrators given to the parties by the provider he had agreed to, the AAA, was insufficiently diverse.

It should be noted that the list included preeminent arbitrator, retired Third Circuit Judge, Timothy Lewis, who also happens to be African-American as well as two other highly qualified African-American arbitrators. Although the Jay-Z team deemed all three proposed African-American Arbitrators unacceptable, it did not assert conflicts or publicly explain why it rejected the three listed African American arbitrators, except insofar as the Jay-Z team's demand for male arbitrators only implicitly disqualified one of the African-American choices.

Although the news reported that a TRO had been granted because of racial bias, in fact the emergency judge hearing the motion expressed her skepticism on the record: "If there are—three of the 12 are African-American individuals, I don't know where you could possibly go with this." She also said on the record: "What is it about that as opposed to a situation where a criminal case where one is—wants to have a jury reflect the diversity of the city. When you choose—when you voluntarily choose AAA, you know what AAA has. Why haven't you—why are you alleging now something that you chose, that you've agreed to, and now you're dissatisfied because you think that African-American arbitrators are somehow going to decide a commercial dispute differently than Asian-Americans, than women, than gay arbitrators, than all of the other protected classes? What is that about?"

The judge made no decision on the merits but rather held the case over for the judge assigned to the matter to

make the decision. Before that judge could hear the motion, Jay-Z's team withdrew it and agreed to work with the AAA to find a solution.

To the extent that this tactic brought the crying need for diversity in the field to the fore, it might have fallen under the rubric of "any publicity." However, the tactical use here of alleged bias is highly questionable. Although the ADR world is even less diverse than the legal community as a whole, which itself suffers from inadequate promotion of women and minorities, the AAA, JAMS, CPR and FINRA are committed to improvement and have all been laboring to change the landscape.

"The presence of large numbers of women in the field for over 25 years belies the distracting focus on availability; diverse neutrals are available and able, they are just not being selected in sufficient numbers."

There are in fact many highly qualified diverse neutrals who need more visibility and listing by providers. Some of the focus has been on "pipeline" issues—the need to see more training of diverse neutrals. But the presence of large numbers of women in the field for over 25 years belies the distracting focus on availability; diverse neutrals are available and able, they are just not being selected in sufficient numbers. And it is actual selection that will make the real difference. There must be selection by the attorneys who are gatekeepers and the corporate clients and parties who typically support diversity in many other arenas but do not insist on diverse panels in arbitration. Metrics are needed to measure improvement year over year.

The Chair's message notes some of the efforts the providers have undertaken. ArbitralWomen, the ABA, our own Section and others are trying to move the needle and we all can support, mentor and recommend and select diverse neutrals. Indeed, we must do better. But let's not commend the attempt to create a new weapon for attacking a process selected and agreed to by sophisticated parties.

LAURA A. KASTER (laura.kaster@gamil.com) is a member of the ADR Inclusion Network and on the CPR Diversity Task Force. She has written about and supported diversity in ADR since 2006 and is one of the Co-Editors in Chief of this *Journal*.

Everyone Can Be a Winner in Baseball Arbitration: History and Practical Guidance

By Edna Sussman and Erin Gleason

“Somebody’s gotta win and somebody’s gotta lose and I believe in letting the other guy lose.”

—Pete Rose, all time Major League Baseball leader in hits

While it may be that in baseball there has to be a winner and a loser, that is not necessarily the case in arbitration. Baseball Arbitration, also known as Final Offer Arbitration (FOA), is a process that is rarely discussed in commercial and international practice, though it offers efficiencies that would be “winners” for both parties. In FOA, parties have the opportunity to manage risk and drive settlement—features that are advantageous for both sides. It is time to focus on the application of this useful tool, which can help parties avoid the extremes of winning or losing in arbitration and perhaps enhance their chances of achieving the win-win of an agreed-upon settlement. Moreover, the FOA process generally shortens the time to the issuance of the award and opens the door for discussions about other mechanisms to streamline the proceeding and save time and costs. The following discussion provides a brief history of FOA and offers practical guidance for its application by parties and arbitrators.

Overview

In its most basic form, FOA allows parties to submit proposed final offers/award amounts to an arbitrator. Upon the conclusion of the arbitration, the arbitrator is bound to issue an award with one of the final offers submitted as the award value.

While the process goes back to the trial of Socrates, modern-day references to FOA emerged in the 1950s in the context of collective bargaining agreements in the United States. At the time, the use of strikes as part of the dispute resolution process became too unsettling—parties needed better tools to facilitate negotiations. In this context, FOA was seen as an ideal way to resolve impasse arising from union and management disputes. It created a structured dispute resolution process, which was less disruptive and provided enhanced transparency of process.

It was not until the 1970s that the use of FOA was introduced to the world of baseball, and when FOA assumed its more popular moniker, “baseball arbitration.” After years of strife between teams and players over find-

ing the right balance of power in player contract and salary negotiations, FOA was adopted as a means for addressing power imbalances that had arisen in negotiations.¹

But FOA was also seen as a way of stemming the risks associated with allowing an arbitrator to render awards without specific direction from the parties. It was almost necessarily assumed that an arbitral award, absent FOA direction from the parties, would result in splitting the difference between two numbers, another common concern expressed today despite numerous studies that have disproved this urban legend.²

FOA sought to eliminate these risks because parties could add controls to a process that otherwise felt too susceptible to compromises in decision making. It also came with the added incentive for parties to think critically about making more concerted efforts toward fruitful negotiations prior to the hearing—thus obviating the need for the arbitral process altogether.

This point is most intriguing—an arbitral process that was seemingly founded to avoid arbitration altogether.

The Psychology of FOA

In the years after FOA was introduced to Major League Baseball, the practice was studied by lawyers, psychologists and sociologists alike. Fascination with this process primarily stems from the effect it had on the decision-making processes of the parties and the arbitrators.

For example, in one study volunteer arbitrators were given a series of hypothetical fact patterns and were then asked to produce conventional arbitration awards and also respond to FOA scenarios for those same disputes. The purpose of the experiment was to observe the variation among arbitrators’ awards where they had free rein to make a decision versus the final offer cases where the arbitrator was forced to choose between two proposals submitted by the parties.³

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Interestingly, while there were differences in the final determinations rendered by arbitrators across the pools of hypothetical conventional arbitration and FOA cases, arbitrators' methods for making decisions demonstrated "a substantial degree of underlying consistency." The awards studied tended to show that arbitrators based their awards on the facts presented and relied less on the demands or offers made.

Years later, another study examined the negotiation patterns of parties involved in FOA processes.⁴ This time, the research focused on why parties would allow the decision to be made by an arbitrator, instead of retaining the decision-making power themselves. The sophistication of parties to the negotiation, along with their relative optimism about their positions, were examined to understand how parties approached the process.

Controlled experiments confirmed that parties' optimistic expectations increased the distance between their final offers. The findings here demonstrate the importance of more fully informing party expectations as an effective way of improving negotiated outcomes. The study also highlighted an important consideration in managing one's expectations—the value in considering counter-party valuations and the merits of an opposing party's case. To the extent that parties are able to move toward limiting—or eliminating—the biases in their own expectations, they are more likely to reach voluntary settlements more often.

Most significantly, study after study has demonstrated that using an FOA process enhances the chances of settlement. As summarized: "Negotiators have a strong incentive to make realistic appraisals of the probable decision of the arbitrator and to submit offers and demands that are fairly close to what they really expect the arbitrator to award." It creates "an environment in which negotiators... find it in their respective self-interest to exchange reasonable offers and demands."⁵ Thus adopting the FOA process drives parties towards conduct that facilitates settlement.

FOA Variations

FOA is utilized in many fields other than baseball and collective bargaining disputes. International negotiations over trade and political issues, mergers and acquisitions disputes, real estate, tax, insurance, and other commercial matters are routinely submitted for FOA. Indeed scholars have suggested the process should be employed and would be particularly useful for the resolution of investor state disputes.⁶ And baseball arbitration has recently been utilized in several states, including pursuant to a 2015 New York law, to mandate baseball arbitration to resolve disputes relating to patients' unexpected medical bills.⁷ Recently the U.S. DC Circuit Court found that the irrevocable offer to engage in baseball style arbitra-

tion made the government's theories in its effort to block AT&T's acquisition of Time Warner "largely irrelevant."⁸

While all versions of FOA have in common the submission of final offers, there are several variations to consider, and the ramifications of the associated process decisions must be carefully assessed. Options include the following:

TRADITIONAL FOA. Under this process, the parties submit proposed final offers/award amounts to the arbitrator. Once the parties submit these figures to the arbitrator, they are usually unable to make any revisions to the number submitted. Upon the conclusion of the arbitration, the arbitrator is bound to issue an award with one of the final offers submitted as the award value.

... "most intriguing—an arbitral process that was seemingly founded to avoid arbitration altogether."

NIGHT BASEBALL. This process differs in that the final offers are either concealed from the other party or from the arbitrator. As with traditional FOA, parties in night baseball agree among themselves that the final award must be one of the offers proposed prior to the award's issuance. The parties may provide that their proposal is never exchanged with the other party and the arbitrator must choose one proposal. Or the parties may provide that the proposal not be shared with the arbitrator, who will issue an award, and the parties agree to select as the final award the number that is closest to the arbitrator's award amount. Or as another alternative, the parties might limit the arbitrator's power in rendering the award so that no monetary value would be specified by the arbitrator—the arbitrator would only rule in favor of one party or the other. The prevailing party's final offer would then constitute the final award amount.

HIGH-LOW ARBITRATION. Under this variation, parties agree to a range for the arbitral award: an award that is greater than the bracketed amount is reduced to the higher of the offers; an award that is rendered below the lower amount is increased to the lower of the offered amounts. And any award within the agreed range receives no adjustment. The arbitrator is not informed of the range. Under another variation of high-low, the arbitrator is informed of the offers but limited to issuing an award within the range.

MEDIATION AND LAST OFFER ARBITRATION. "MEDALOA" is yet another option. A MEDALOA process involves two steps, starting with the mediation. If mediation does not resolve the dispute, the parties submit their last offers to the mediator, who is then asked to serve as an arbitrator

and choose the award amount. Additional proceedings and presentation of evidence before the issuance of the award may or may not be provided.

Drafting the Clause

As is always the case, careful drafting of the arbitration clause is essential. We focus here only on the aspects of the clause that pertain specifically to FOA options.⁹ A mere reference to “baseball arbitration,” or “first-offer arbitration” is not sufficient to ensure that the process will be executed in the manner intended.

OBJECTIVE: The first issue that must be considered is why is an FOA procedure being adopted. Is it to promote settlement? Is it to manage risk? Is it to streamline the proceeding to provide a more cost-efficient process? Or is there some other objective? The answer to that question is central to determining the process choice.

“The selection of the final offer to be proposed by a party is perhaps the process’s most critical aspect.”

If it is to promote settlement, the objective for which FOA was originally devised, several exchanges of offers preceding the hearing are advisable. A night baseball process in which the offers are never shared with the opposing party would defeat the whole point of the exercise.

To promote settlement, a process that calls for two or more rounds of exchanges of final offers prior to the hearing and before the final and unchangeable offer is submitted to the arbitrator would encourage settlement. The International Centre for Dispute Resolution’s Final Offer Arbitration Supplementary Rules provide such a structure and can be incorporated into the arbitration agreement.¹⁰

If the objective is to manage risk, a high-low limit process might be most effective, but this requires a successful negotiation between the parties to arrive at a range that they are willing to accept.

If the objective is to streamline the proceeding by shortening the time to award but to otherwise have a full opportunity to present and assess the merits, a proposal made to the arbitrator at the conclusion of the hearing when the parties are better informed might be the best process choice.

But in all events, the process by which parties will exchange offers should be clear from the arbitration

clause. And while parties may hope that a settlement will be achieved, the clause must assume that an award is possible and ensure that the arbitrator and lawyers understand from the plain language of the clause how the process should be conducted. Accordingly, issues that should be considered in the drafting of the arbitration clause include:

TIMING: While typically the FOA is required by the arbitration agreement, it can be equally useful when proposed after the dispute has arisen. In the words of Nobel Prize economist Daniel Kahneman and his colleague Max Bazerman, who have closely studied how to manage risk through the use of FOA in business disputes: [the FOA] “strategy allows one side to encourage reasonableness on the part of the other by making a demonstrably fair offer at the outset and then, if the other side is unreasonable, challenging it to take the competing offers to an arbitrator who must choose one or the other rather than a compromise between them.”¹¹ FOA has been successfully used as a process choice after the dispute has arisen and its availability at that juncture should be kept in mind.

RULES SELECTION: Whether selecting an ad hoc process with the adoption of non-administered rules or an institutionally administered arbitration, it is important to specify not only the arbitral rules that will govern the dispute resolution process but also expressly state that the parties have tailored the application of those rules to include an FOA process.

THE FINAL OFFERS: The number of rounds of exchanges of offers, when the offers are exchanged, whether or not they will be shared among the parties, and whether they will be shared with the arbitrator may be specified and should be stated if a particular process is sought.

SCOPE: Parties may specify whether the FOA process they choose relates to any dispute that arises under the contract, or if the FOA process should be limited to discrete issues (including specific monetary aspects of the dispute). FOA is often most effective in the context of claim value, or where liability issues have been clarified. As discussed above, FOA may be useful post-dispute where liability is established to determine damages.

ARBITRATOR’S AUTHORITY: Expressly limiting the arbitrator’s authority to require that the arbitrator follow the process selected by the parties is essential.

BASIS FOR DECISION: Parties may wish to consider whether they want to provide some guidance to the arbitrator as to the basis upon which the arbitrator should make his or her decision. Should the arbitrator pick the offer, that is viewed as more “reasonable,” a somewhat vague term that leaves the arbitrator some discretion within the dictates of the authority granted? Or should the arbitrator be required to select the final offer that was provided by the party that the arbitrator finds would have prevailed on the merits? Or should the arbitrator

be required to select the final offer that was closer to the quantum of damages that the arbitrator concluded would have been awarded but for the FOA process?

AWARD: An award resulting from an FOA process may be reasoned but is frequently issued as a bare award. Parties may wish to specify their preference so there is clarity on this important point. It should be kept in mind that a bare award is not enforceable in some jurisdictions around the world,¹² so thought should be given to where enforcement might be sought in deciding whether an award should be reasoned or not.

The authors are not aware of any decisions that have dealt with whether an award that provides reasons on the merits but is limited in its choice of damages is enforceable as a reasoned award. But in light of the fact that consent awards are widely accepted as enforceable, and the issuance of awards based on an *ex aequo et bono* equitable decision, while rarely sought, is accepted as an alternative arbitration decision-making process, it would seem that there would be no enforcement issue with a reasoned award that adopted an FOA process.

In a reasoned award, the arbitrators' discussion would not only include the standard elements—history of the case, recitation of facts, and discussion of the applicable law, etc.—but, in addition to the explanation of the FOA process within the procedural section that would be included in any FOA award, the arbitrator's analysis of why the winning final offer was selected should be provided.

Guidance For Parties

In an FOA arbitration, the selection of the final offer to be proposed by a party is perhaps the most critical aspect. Careful thought must be given to providing a final offer that the arbitrator will find to be the most appropriate resolution in light of the case presented. Parties would be well advised to conduct a comprehensive case evaluation process and pursue a thorough vetting of a claim's strengths, both on the merits and on damages.

The reasonableness of a counter-party's position should also be carefully evaluated. Finally, consideration should be given to the concessions the party is willing to make to maximize the chance that it will have the prevailing final offer.

As was observed in the research on FOA discussed earlier in this article, party over-confidence, lack of preparation, or hostility toward counter-parties may not only hinder settlement. It may also defeat the ability to prevail in the arbitration. These factors can cause a party to provide a final offer that the arbitrator will not find to be the better choice. Some counsel have employed the use of a mock arbitration in order to assist them in determining the number that should be provided as the final offer.¹³

Arbitrator selection is important as always. Parties may wish to ensure that the arbitrators selected under-

stand the parameters of their role in this unique process and are comfortable with the limitations imposed on their authority. To that end, parties may wish to issue joint questionnaires to arbitrators, or conduct interviews, inquiring as to familiarity with FOA and whether the arbitrator has served in other FOA processes.

Guidance for Arbitrators

The parties' choice of an arbitral process guides the manner in which the arbitrator may manage the case. But in this instance, the challenges that an arbitrator may face in rendering an enforceable award are as unique as the FOA process itself. Certainly, the clause should provide that an award that follows the process shall be enforceable.

What actions can an arbitrator take if he or she feels that one or both of the offers are out of line? If the claimant's offer seems too high, but awarding the respondent's offer is too low, does the arbitrator have any recourse?

If the arbitrator deviates from the FOA process, refusing to select one of the offers submitted and inserting his or her own instead, will the award be enforceable? The short answer is that the arbitrator has little to no ability to deviate from the provisions of the arbitration agreement.

In some cases where the arbitrator feels that the process will lead to an unfair outcome in light of the facts and the law, the arbitrator may consider whether it would be appropriate to ask the parties if they are committed to following the FOA process set forth in their agreement—or, alternatively, ask whether the parties would be agreeable to switching to a high-low process. Before making any such suggestion, the arbitrator must consider whether changing the process would favor one party over another and would demonstrate partiality toward one of the parties. In the right circumstances, such a discussion may be appropriate. Unless both parties agree to a change, however, the parties' arbitration agreement dictating the FOA process governs.

Conclusion

FOA offers parties with yet another option for streamlining arbitration. Various iterations of FOA have emerged over the past 70 years to help foster settlement, manage cost, increase efficiency and/or reduce risk in arbitrated disputes. While FOA may not be appropriate for every dispute, careful drafting, planning and case analysis can produce a winning outcome for all.

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Risky Business: the Consequences of Counting on Liability Alone

By Greig Taylor and Alexander Lee

One of the more difficult situations that can confront a tribunal is when liability is found but the tribunal is not persuaded that the claimant's damages evidence is persuasive. There might be concern over the amount claimed and the fact that several of the assumptions that were built into the damages model are unsupported or even contradicted by the factual findings. But the respondent has chosen not to present an alternative damages amount, or even a damages expert, and so there is no evidence for more credible assumptions or for the quantum of damages that would result from the application of those substituted and accurate assumptions. This can present a real dilemma for the tribunal. How will it arrive at a correct award without evidence to support the appropriate quantum?

The purpose of this article is to discuss and understand these issues, to determine the impact they might have on the arbitral process, and to see what lessons can be learned.

The History of Expert Witnesses and Evidence

Expert witness testimony has been a feature of court proceedings for several centuries, with some examples reaching as far back to the 14th century. Expert testimony has covered a wide variety of topics, from surgeons debating causes of death to merchants describing the standard procedure for writing notes of exchange. Early on, experts were summoned to testify by courts or appointed by courts to special juries to decide on specific matters requiring their expertise. However, as court procedure evolved, the parties themselves would begin to appoint experts who could provide testimony to courts directly. Today, it is more common to have party-appointed experts rather than experts appointed directly by the triers of fact.

Although their testimony is seen as a form of opinion evidence, expert witnesses have been admitted when they have been shown to possess specific knowledge that was necessary for the triers of fact to reach a decision and when the absence of such knowledge would result in a failure of justice. The *Folkes v. Chadd* case of 1782, where the plaintiff submitted the testimony of a well-known engineer on the cause of a harbor falling into a state of decay and the defendants objected that the testimony was a matter of opinion, is regarded as the first case to firmly establish the role of expert witnesses in court proceedings.¹ Because of this and other decisions on the role of experts in court proceedings, expert witnesses became the exception to the "opinion rule," the exclusionary rule that restricts witness testimony to facts rather than opinions.

To justify this exception, it became important to demonstrate to the court the necessity of the expert opinion. When that necessity is not demonstrated, the court will typically view opinion evidence as superfluous and dismiss the expert. In the United States, this necessity principle has evolved into the "Daubert Standard" named for the *Daubert v. Merrell Dow Pharmaceuticals* case from 1993. In *Daubert*, the U.S. Supreme Court determined that the triers of fact should act as gatekeepers regarding the expert evidence and provided several guidelines for admissibility.² Subsequently, in *Kumho Tire Co. v. Carmichael* (1999) the U.S. Supreme Court expanded the application of the Daubert Standard to all expert witnesses appearing in federal courts and reaffirmed that courts should consider factors outside of those laid out in *Daubert* where appropriate.³ Rule 702 of the Federal Rules of Evidence which governs the testimony of expert witnesses in U.S. federal court was amended in 2000 to reflect both *Daubert* and *Kumho*.

Although the trajectory of expert witness testimony in arbitration has generally followed that of court proceedings, there are some differences because of the generally more flexible nature of arbitration. For example, while experts have a duty to assist the tribunal and experts are required affirm this duty before providing testimony, tribunals are not required to adhere to a *Daubert*-like standard when qualifying expert witnesses.⁴

The Benefits of Experts and Expert Reports

Experts have traditionally been sought out for many different reasons, but ultimately can be distilled into the following: a party seeking an independent, expert opinion to present to the court or tribunal in order to support their position or claim; a party seeking to refute a point being made by an opposing party that is the subject of expert opinion; and/or the trier of fact requires an expert opinion on a matter beyond their own experience and expertise. Experts can be hired for one or any combination of these reasons. However, it is universally accepted that the duty of the expert witness is to aid the triers of fact, be

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they a court or an arbitral tribunal, in matters beyond the tribunal's expertise and within the expert's experience.

In the context of expert damages reports, the opinion is typically presented as either a single number or a range of numbers, depending on how the expert chooses to present his or her conclusion. The rest of the expert report then supports this conclusion and sets forth a roadmap for its readers to understand the steps required to reach that conclusion. By exchanging and refining expert reports, opposing experts can help narrow the breadth of issues and focus on the material items on which damages or value turn. Ideally, it is this productive exchange of ideas where opposing conclusions are contrasted with one another and weaker arguments are set aside, that ultimately assists the trier of fact in reaching a damages opinion if liability is found.

A Different Approach

Sometimes, however, the affirmative damages position is unchallenged by expert testimony. That situation is uncommon but may occur for several reasons. As examples: (1) opposing counsel may believe that their liability position is strong enough that they do not need to directly address quantum issues; (2) the defendant or respondent may have a time or cost constraint that is limiting their ability to pay an expert to reach an independent conclusion; (3) the opposing expert may have argued internally that he or she were at an information deficit that would have prevented them from producing an independent conclusion that satisfied his or her professional responsibilities; (4) the amounts are *de minimis* and would not justify the cost of hiring an expert to produce an independent opinion on those amounts; (5) the quantification of damages is so simple that an expert report would be redundant to their pleadings; or (6) opposing counsel believes that a *Daubert*-like challenge may result in the expert's opinion being rendered invalid.

If an opposing expert is engaged, they are directed by the strategic priorities of their clients and counsel and, either through omission or instruction, may forgo presenting an independent opinion in favor of focusing exclusively on critiquing the work of their counterpart. This may be due to their belief that a strong enough critique could disqualify the damages conclusion presented to the trier of fact, resulting in an inability to award any damages. While most international valuation standards allow for reports that exist solely to comment on another valuation (e.g., Canadian Institute of Chartered Business Valuation standards refer to these as "limited critique reports"), as discussed later they may not aid the trier of fact in determining what the damages or the value should be. Alternatively, when an expert declares that they have not provided a conclusion as a result of their inability to reliably quantify damages, their issue will typically relate to the alleged speculative nature of the inputs to the damages or valuation calculation. However,

barring some fundamental flaw in the analysis of the expert putting forth a value, we do not believe it is advisable for an opposing expert to simply refuse to submit conclusion on damages or value without a thoroughly researched and well-supported defense of that choice.

Advantages or Disadvantages for Counsel?

The choice to forgo presentation of an opposing conclusion on value may be a strategic one, but it also creates opportunities and challenges for claimants. Next, we summarize a number of viewpoints from discussions we have held with leading international arbitration counsel.

The first opportunity is to clearly communicate to the tribunal that there is only one number, or a range of numbers, in the record regarding damages or valuation. By refusing to offer a number, the opposing side or opposing expert is limited in their ability to argue what the damages or valuation could or should be, which makes claimant's number in a sense the default.

Another area of opportunity, and potential challenge, lies in cross-examination of the opposing expert, when presented. The aim of any effective cross-examination is to impair the opposing expert's credibility in the eyes of the triers of fact. One strategy is to clearly establish that the opposing expert did not present their own valuation or methodology. Establishing this fact early on is important in setting the tone vis-à-vis assisting the trier of fact. Then, the exploration of why such a conclusion was not presented. Was it an instruction from counsel? If so, how does this comport with the expert's duty? If it was not an instruction, why did the expert choose not to present a value conclusion absent the explicit instruction? In an arbitration setting, tribunal members are familiar with the *Daubert* Standard and the fact that courts have taken a dim view of experts who did not render a relevant opinion. Therefore, whether the expert was under instruction or not, the message from claimant's counsel is that the opposing expert is not fulfilling their duty to the arbitrators.

Building on this cross-examination strategy, the next step is to attempt to blunt the critique points the opposing expert raised by showing that the opposition's lack of a conclusion also meant that their comments lacked an underlying methodology. The aim here is to highlight the contrast between one expert, who based their analysis on a replicable methodology that the arbitrators could examine, and the opposing expert, who did not. When successfully deployed, this strategy demonstrates that the opposing expert's critique was performed without a methodology. That then forces the opposing expert to rely more on less quantifiable factors like "professional judgment" or "past experience" to justify their critique.

However, this cross-examination strategy is not without its drawbacks. The cross-examination must not deflect attention from the initial damages or valuation conclusion or unnecessarily highlight any potential issues with it. In

addition, an experienced opposing expert will take any opportunity upon cross-examination to repeat and reinforce their critique points. One approach is to conduct a limited examination that simply ignores a few of the critique points. That is difficult to do as there is always a temptation to go after everything, but ignoring an argument can sometimes be the best way to demonstrate that it should not be taken seriously. Therefore, though it may seem like an advantage if the other expert does not present a competing number, it does present tactical issues that normally do not exist.

What Is a Tribunal to Do?

Faced with a situation in which a respondent either does not present a damages conclusion or even retained an expert, and in which claimant's counsel has effectively highlighted this and taken the position that there is only one amount in the record if liability is found, how does a tribunal respond? To try and answer this question, we surveyed several leading international arbitration arbitrators, who cited two recurring themes: (1) the importance of maintaining neutrality and impartiality and (2) having an understanding of the applicable rules under which they must operate.

In cases that have clear issues with regard to the claimant's calculation, but in which there is no opposing damages conclusion in the record, the tribunal is left in the uncomfortable position of potentially having to step into the shoes of the expert witness. Yet even if there is a clear path based on the facts and the assumptions to establishing a different quantum some arbitrators may feel that they are overstepping and "putting their thumb on the scale" if they take charge in this way and so assist the respondent in reducing the damages to the detriment of the claimant. Therefore, those arbitrators might hesitate before taking steps to establish a quantum different from the one presented by claimant wherein respondent's expert has not presented a contrary figure.

To put it more strongly, one arbitrator felt that the respondent's choice not to present a damages case might be viewed as a foreclosure on their right to respond, thereby effectively endorsing the claimant's position should they prevail on liability, stating:

If respondent wanted to gamble on just presenting on liability and not providing an opposing quantum for the damages they have to bear the consequences if they lose on liability.

However, not all arbitrators think alike. Another arbitrator specifically referenced their ability to choose another approach if they believed that the claimant's analysis was not flawless, but that the respondent has not convinced the arbitrator that damages should be set to nil:

Having been invited to consider its critiques of the claimant's analysis, I think the respondent opened the door for an alternative calculation, so I do not think that I am stuck with the claimant's number or nothing. And in this particular scenario, as the critiques are in the record, I think I would have the power to apply the critiques to come up with an alternative calculation.

Turning to the various institutional rules under which arbitrators must operate, it may be argued that certain rules grant arbitrators substantial powers and authority to enable them to reach a conclusion they feel is warranted. For example, the International Chamber of Commerce's rules empower arbitrators to "establish the facts of the case by all appropriate means," and the International Centre for Dispute Resolution's rules expressly empower arbitrators to direct parties to "focus their presentations," etc. Article 22.1(iii) of the London Court of International Arbitration rules go further to make clear that the tribunal can "conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying relevant issues and ascertaining relevant facts and the law(s) or rules of law applicable to the Arbitration Agreement, the arbitration and the merits of the parties' dispute."

Arbitrators do recognize that these powers should be wielded sparingly, but how many arbitrators would be truly comfortable attempting to manipulate an excel spreadsheet or deriving an entire new damages figure? As one arbitrator remarked, "I never want to hang my hat on something that the parties did not have an opportunity to comment on." The potential solution here is to raise it with the parties for comment rather than let it surface for the first time in an award, yet this may indicate the tribunal's position on liability.

Other alternative solutions to this dilemma include re-opening the hearing and directing the respondent to present a damages conclusion, while also giving the claimant an opportunity to respond; requesting that specific quantum issues be addressed in post-hearing briefs; or issuing a partial award on liability, making findings regarding quantum issues, and then directing the parties to jointly calculate an alternative damages award. Each of these, however, increases the time and costs of the proceeding, a recurring complaint by users of arbitration, and gives the respondent another opportunity to rebut the original damages conclusion which they previously chose not to do, which would likely result in objections from one or both parties.

Therefore, although various tools and techniques are available to arbitrators to deal with such a situation, none is ideal, and outcomes clearly depend on the choices of arbitrators and the selected arbitral rules. Nevertheless, in the interest of preserving the overall fairness of the proceedings, the arbitrators we spoke to universally expressed a clear preference for the respondent's expert to fulfill its duty and submit a proper damages conclusion.

Conclusion

Counsel and experts have many considerations to contemplate in determining whether to submit a competing damages or valuation conclusion. They must assess whether the perceived strategic benefits would be outweighed by the opportunities the conclusion could present to claimant's counsel. More likely than not, it will depend on the choice of arbitrators and the prevailing arbitral rules that guide the arbitrators in enabling them to make their own determination of quantum, or whether

they can only award what is in the record. Counsel also has to consider whether they want to place the tribunal in the uncomfortable position of having to make this determination, or potentially increasing the time and cost of the proceeding, which has been the major source of complaint by users of arbitration.

In our view, this tactic does not further the goal of assisting the trier of fact in deciding on the appropriate value or quantum, which is at heart the primary purpose of an expert.

Endnotes

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LAWYER REFERRAL & INFORMATION SERVICE

Notes From the Field: Has #MeToo Changed ADR?

By Abigail Pessen

*Who will believe thee, Isabel?
My unsoil'd name, the austereness of my life,
My vouch against you, and my place i' the state,
Will so your accusation outweigh,
That you shall stifle in your own report
And smell of calumny.*

Angelo's confident prediction more than 400 years ago in Shakespeare's *Measure for Measure*¹ that his victim's accusation of sexual harassment would be discredited could have been uttered virtually *verbatim* by countless powerful men today, or at least until the zeitgeist incorporated #MeToo. Famous heads are now rolling as revelations about sexual misdeeds in high places continue to emerge. State and federal measures targeting non-disclosure agreements (NDAs), and mandatory arbitration of sexual harassment claims that serve to keep those misdeeds secret, have proliferated. Meanwhile, mediators in sexual harassment cases have observed certain differences in employers' attitudes, but have also questioned whether any fundamental change has occurred, especially in unglamorous workplaces such as restaurants and construction sites. Surveying the ADR landscape in #MeToo's wake, it's fair to say that the terrain is uneven.

Impact on Arbitration

In arbitration, a number of states including New York have already passed or are considering new laws banning mandatory arbitration of sexual harassment claims.² Microsoft, Uber, all 50 State Attorneys General, and the ABA have urged or adopted various proposals targeting mandatory arbitration of sexual harassment claims, and the bipartisan *Ending Forced Arbitration of Sexual Harassment Act* was introduced (but not passed) in the last Congress to amend the Federal Arbitration Act (FAA) to prohibit mandatory arbitration of such claims. Unless the FAA is amended, state laws prohibiting mandatory arbitration are almost certain to be preempted.³

The merits and disadvantages of mandatory employment arbitration have been passionately debated ever since the Supreme Court's decisions in *Gilmer v. Interstate/Johnson Lane Corp.*⁴ and *Circuit City Stores, Inc. v. Adams.*⁵ While some employers, faced with administering multiple arbitrations and the absence of meaningful

review, are re-thinking the advantages of the process, employees, conversely, are recognizing that the privacy arbitration affords, shielding sometimes salacious and unflattering allegations from internet trolls and prospective employers, can be extremely beneficial. And ardent opponents of mandatory arbitration question why sexual harassment claims should be singled out for release from arbitration, while victims of other categories of workplace discrimination remain bound by mandatory arbitration agreements.

Impact on Confidential Settlements

Galvanized by intense public sentiment against "secret" settlements of sexual harassment claims protected from outside scrutiny by NDAs, many states have passed or are considering legislation banning or penalizing the practice of requiring consent to NDAs as a condition of employment or of settlement.⁶ A bipartisan EMPOWER bill introduced in the last Congress similarly would prohibit NDAs intended to prevent disclosure of workplace sexual harassment claims.

Notably, banishing the use of NDAs may impede some sexual harassment settlements. Statutes outlawing NDAs with no exceptions⁷ may indeed reflect sound public policy, insuring that serial harassers cannot pay hush money to silence a victim while continuing to prey on unsuspecting successive victims. However, the benefit of transparency to the public, and to future victims in a harasser's workplace, may conflict with the individual victim's preference for privacy.⁸ A less blunt instrument, such as a requirement that employers keep databases of settlements and disclose them to complainants, may be more effective than banning private settlements altogether. The EMPOWER bill, *supra*, takes an approach along these lines, requiring public companies to include details about settlements of sexual harassment claims in their annual SEC filings.

In addition to the plethora of legislative initiatives, the Internal Revenue Service recently added a provision to the Internal Revenue Code disallowing deductions of settlement payments and related attorneys' fees where the settlements are subject to NDAs.⁹ Logic would suggest that the provision was intended to apply only to

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the attorneys' fees of the defendant insisting on the NDA. However, the provision's ambiguous wording has caused mischief in negotiating settlements that include NDAs; plaintiffs' attorneys fear that their own fees will be ruled non-deductible and accordingly negotiate for indemnification from the defendant.

Finally, it's worth filing under "Unintended Consequences" that the demise of NDAs may cause employers to tighten their fists in negotiating sexual harassment settlements, fearful that additional employees will come forward upon learning the details of a payout.

Impact on Mediation

Two actual cases in point illustrate #MeToo's impact, or lack thereof, on mediation. In one, "Jill," a young woman employed as a server at a chain restaurant, claimed that a co-worker frequently touched her inappropriately and made offensive comments. Jill claimed that she had complained repeatedly to her supervisor

to trial, its defense would succeed that Jane had unreasonably failed to take advantage of the company's sexual harassment hotline and other channels for complaints; its settlement offer was accordingly low. (The case eventually settled, after fierce negotiations arising from the company's desire for an NDA and Jane's attorney's concern that IRC § 162(q), *supra*, might jeopardize the deductibility of his fees.)

The employers' confidence of success in both cases stemmed from the law governing employers' liability for sexual harassment committed by a co-worker. In 2013, the Supreme Court held in *Vance v. Ball State University* that in such situations, an employer is responsible only if proven to have been negligent in permitting the harassment to occur, i.e., "did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed..."¹⁰ To prevail at trial or arbitration, Jill and Jane would therefore need to establish that they did complain and that their employers failed to respond, or that

"#MeToo's impact on ADR continues to evolve, as victims, employers, counsel, state and federal government, and society at large struggle to find solutions to the pernicious problem of sexual harassment in the workplace."

about the harasser, to no avail. Finally, after the co-worker had pulled Jill into a closet when they were alone in the restaurant at closing time, she managed to break away and never returned to work.

Jill initiated mediation, claiming constructive discharge caused by sexual harassment.

At the mediation, perhaps due to #MeToo's effects, rather than invoking the customary "he said/she said" defense, the employer acknowledged that Jill's claims of sexual harassment were credible, but claimed that Jill had never reported her complaints to management. In light of the absence of any record of complaint, the restaurant believed it was highly likely to prevail in arbitration, and accordingly was willing to offer only nuisance value in settlement.

In the second example, "Jane," the female employee of a major corporation, claimed that she was fired in retaliation for having complained, via the company's hotline, of a sexual assault committed by a co-worker. Here, too, during mediation the company did not challenge Jane's credibility as to the sexual assault, but, as in Jill's case, denied any record of a complaint, contending that Jane's termination was due to performance issues. The company therefore predicted that, if the case went

they were discouraged from complaining. Accordingly, their credibility remained an issue in their mediations, but in contrast to the pre-#MeToo era, the focus shifted from doubts that sexual harassment had occurred to doubts that the victims had complained about it.

The above scenarios, which anecdotal evidence indicates are far from unique, suggest that the criteria for employer negligence set forth in *Vance*, and in particular, failure to "provide a system for registering complaints," would benefit from further refinement. If purchasing a frying pan from Amazon instantly generates an online order number, why not mandate that complaints of sexual harassment—to any supervisor, Human Resources staff, or hotline—be automatically registered and confirmed, by text message or some other means? This simple requirement would virtually eliminate credibility issues relating to whether a complaint had been made. Moreover, even if a victim of sexual harassment did fail to complain, #MeToo has made it abundantly clear that in many workplaces, it is simply too dangerous to do so, either because the harasser is "the boss" or the victim fears a negative impact on her career. Greater acknowledgement of this reality may gradually lead courts to erode the "she didn't complain" defense invoked by many employers.

Conclusion

#MeToo's impact on ADR continues to evolve, as victims, employers, counsel, state and federal government, and society at large struggle to find solutions to the pernicious problem of sexual harassment in the workplace. While victims' accusations of harassment may be believed more readily in the current climate than in Shakespeare's day, employers continue to find refuge in the defense that the victims did not complain, reflecting a failure to recognize the reality that such complaints are ineffective or downright dangerous to career prospects in many workplaces. Legislative efforts to respond to the problem have been robust, although some may backfire. In both mediation and arbitration, individuals' interests in maintaining their privacy may collide with #MeToo's rallying cry of transparency. In sum, it's too early to tell whether #MeToo's effects on ADR will be a sea change or a ripple.

Endnotes

1. Measure for Measure, Act II, Scene 4.
2. In addition to New York, Vermont and Washington have passed such laws.
3. New York's statute is in the form of a new CPLR provision, § 7515. Subsection 4(b) tacitly acknowledges the preemption threat, by voiding mandatory arbitration of sexual harassment claims "except where inconsistent with federal law."
4. 500 U.S. 20 (1991).
5. 532 U.S. 105 (2001).
6. A Google search identified Arizona, California, Colorado, Delaware, Maryland, New York, New Jersey, Pennsylvania, Tennessee, Vermont, and Washington as states with such enacted or pending legislation. New York's new law is codified at CPLR 5003-b and General Obligations Law § 5-336.
7. California's SB820 permits only the settlement amount and the claimant's identity (if requested by the claimant) to be kept confidential; the facts underlying the settlement may not be kept secret.
8. For example, the New York Times reported on Dec. 11, 2018 that the financial terms of a settlement with CBS over sexual harassment claims "were confidential, at the request of the women." New York's new law gives victims the option to keep their settlements confidential following a mandatory, non-waivable waiting period.
9. IRC § 162(q).
10. *Vance v. Ball State Univ.*, 133 S.Ct. 2434; 570 U.S. 421, at 428 (2013).

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Moving Mediation Practice Forward—Is It Time for Certification?

By Deborah Masucci

Celebrations were many in 2018. The New York State Bar Association Dispute Resolution Section celebrated its 10th Anniversary, the International Mediation Institute (IMI) also celebrated the same landmark, and the American Bar Association Dispute Resolution Section held its 20th Spring Conference. The celebrations covered domestic U.S. and international organizations. The field of dispute resolution has grown and developed in the past two decades. The adoption of the Singapore Convention by UNCITRAL¹ in 2018 is a testament to the popularity of mediation and its expansion to resolve cross-border disputes.

“[C]ertification demonstrates professionalism and signifies personal credibility as well as credibility in the mediation process itself.”

The year is also one for examination. In April 2018, Chief Judge Janet DiFiore and Chief Administrative Judge Lawrence K. Marks established an Advisory Committee to evaluate alternative dispute resolution (ADR) practices and programs in courts around the country to fortify the New York State (NYS) court system’s existing ADR programs, extend the range of ADR services, and facilitate the utilization of mediation and other forms of alternative dispute resolution in civil legal matters, where suitable.² The legal profession expects that the outcome of the Committee’s work will result in a substantial increase in court-sponsored mediation programs. There will be sharp focus on mediator quality with recruitment of large number of mediators to meet the demands of the court programs.

In this time of celebration and examination it may be timely to revisit whether mediators should be certified.³

The Pros and Cons

When the concept of certification is discussed proponents assert that certification is a means to ensure quality, share information about mediators, and open access to new, diverse neutrals. Opponents believe that certification is unnecessary since the market self-regulates when users select mediators whom they trust and have a proven track record for settlement. The field is open and broad. Many people who are regularly selected have no formal mediation training but are highly trusted by

the people who select them. Confidence in their abilities grows with successful resolution of disputes. Opponents also view credentialing as a slippery slope to regulation, thereby increasing the cost of mediation, and a way to keep especially talented individuals out of the process.

There have been a number of reports published by U.S. legal professional organizations both nationally and locally. The conclusion of all of these reports is that organizations should focus on mediation and mediator quality in lieu of supporting a credentialing or certification process.⁴ However, if a certification process is established that it should not bar non-lawyers from becoming credentialed, hamper innovation, or bar disputants from selecting non-accredited mediator. The goal for a certification program should be to protect consumers and the integrity of the mediation process.

What Is Certification?

One definition of certification is: Formal procedure by which an accredited or authorized person or agency assesses and verifies (and attests in writing by issuing a certificate) the attributes, characteristics, quality, qualification, or status of individuals or organizations, goods or services, procedures or processes, or events or situations, in accordance with established requirements or standards.⁵

According to the 2012 ABA Task Force on Mediator Credentialing there appears to be no common understanding of what a credential means in the context of mediation, either domestically or internationally, or what mediators should specifically be required to do or to demonstrate to obtain a credential. Most, if not all, private organizations and court systems that maintain panels of mediators require that members complete a training program. Some provide a credential, or certificate, to anyone who completes training and meets other qualifications, without requiring them to demonstrate specific competencies. Other organizations require candidates to demonstrate specific skills through a testing process. Still others emphasize provision of information, requiring mediators to provide client assessments which are made available to potential users.

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In fact, many of the reports created after studying the issue indicate that it is unclear what mediator and mediation qualities should be measured and what should be the standard of measurement.

U.S. courts have standards for an individual to be certified to mediate in their specific courthouse.⁶ The standards are different for each court but seek to achieve the same goal—high quality mediation. Despite progress, many judges anecdotally report bad experience or lack of confidence in the court rosters.

What should be paramount is that the basis for any certification or credentialing scheme must be supported by evidence and not guesswork, and that credentialing be premised on fair and objective criteria, not on arbitrarily chosen ones.

In 2008, the International Mediation Institute⁷ (IMI) was established to set high standards of mediation practice globally. The foundation of its promotion of high standards is a process to certify mediators based on the knowledge, education, and demonstrated understanding

centre for the resolution of business disputes. The IMI certification model was broadened and deepened to address the needs of Asia.

So, despite strong resistance, models for certification exist and are in demand to promote the professional, quality practice of mediation.

Is Certification Desired?

In 2016 IMI published a Biennial Census Survey Report⁹ on the field of international mediation and ADR. Mediators and stakeholders were asked several questions about what professional development attributes are valued when selecting a mediator. When mediators were asked about the type of support they valued in their profession they pointed to the ability to receive some form of tangible diploma or certification. Responding mediators also chose to acquire a professional license or certification to demonstrate professionalism and to signify personal credibility as well as credibility in the mediation process itself. The responses suggest that certification establishes self-confidence of mediators and confidence of clients.

“Any certification process should not bar non-lawyers from becoming credentialed, hamper innovation, nor bar disputants from selecting non-accredited mediator.”

of mediation skills. The core of IMI certification is a feedback digest for every certified mediator. The feedback digest is created by an independent reviewer who collects information from the mediator’s users and creates a summary of the input provided about how the mediator operates. The individual user names are confidential but the feedback digest is publicly available and transparent.

The IMI certification process includes many of the elements of a certification program recommended in the 2012 ABA Report. The elements include: defined skills, knowledge and values that a credentialed person must possess; adequate training that includes role playing, observation of the candidate being assessed and co-mediation with a certified mediator; the certification program should be administered by an organization different from the training organization; an assessment process; an explanation of what credentialing means; and, an accessible, transparent complaint system. IMI certified mediators include representation from the United States, Western Europe, Eastern Europe, the Middle East, South America and other parts of the globe. The breadth of its database shows its popularity.

In 2014, the Singapore International Mediation Institute⁸ (SIMI) was established based on the IMI model. Since its establishment, SIMI has become a force in Asia promoting mediation and establishing Singapore as a

From 2016-17, the IMI conducted a series of events to determine the future of dispute resolution globally. One of the questions asked participants sought guidance on what areas they believed would most improve commercial dispute resolution. Overall, the fourth highest ranked answer was accreditation or certification systems for dispute resolution providers. Party representatives and non-adjudicative providers believe certification systems will improve commercial dispute resolution.

The European Union (EU) was lauded in 2008 when it adopted its Directive on Mediation.¹⁰ The Directive sets a framework for mediation as an integral part of access to justice and directs its member states to develop mediation locally. Some member states such as Italy¹¹ and Turkey¹² established mandatory mediation schemes that have increased the mediation experience. No central certification system is in place but the EU and its member states regularly speak of registry systems. Can a certification system be far behind?

The 2012 ABA Report suggested that there may be a need for a certification process when mediation is mandatory through a public or private entity, or where the parties are unrepresented, or where the lawyers who select mediators do not have a good understanding of the mediation process. It is also believed that certification of a mediator is not needed in large civil disputes where the

mediator is selected by sophisticated counsel or a party or an experienced insurance adjuster. These users are regular consumers of the mediation process and understand the subtleties of the process.

What Now?

We can learn from the past and take ideas to the next level. We have certification models on an international level such as IMI and SIMI that are thriving and can be leveraged to address the concerns of opponents to certification.

The New York City Bar Association’s 2006 Report on Mediator Quality¹³ suggested that NYS mediator membership organizations develop a voluntary system for mediators to acquire the skills, training, and experience to qualify for accreditation. The system would be publicly available and mandatory for mediators who are compensated. Yes, the system should be self-funded by compensated mediators or the provider organizations to which they belong should financially support registration.

Might this be the next chapter in the growth of mediation?

Endnotes

1. See http://www.uncitral.org/pdf/english/commissionsessions/51st-session/Final_Edited_version_in_English_28-8-2018.pdf for the text of the Model Rule and Convention adopted by UNCITRAL in August 2018. The Convention is expected to be signed in August 2019 in Singapore.
2. See https://www.nycourts.gov/PRESS/PDFs/PR18_10.pdf.
3. Throughout the article the words certification and credentialed are interchangeable.
4. The concept of certification or credentialing has been studied a number of times in the last 10 years. A history of the reports

include the American Bar Association’s 2002 report on Mediator Credentialing and Quality Assurance (“ABA 2002 Report”), https://www.americanbar.org/content/dam/aba/directories/dispute_resolution/0116_report_mediator_credentiaing.pdf, the New York City Bar Association’s 2006 Report on Mediator Quality (“City Bar Report”), <https://www.nycbar.org/pdf/report/Mediator%20Quality%20Report%20Final%20%20June%202027.pdf>, the 2008 Report of the ABA’s Task Force on Improving Mediator Quality (“ABA 2008 Report”), <https://www.americanbar.org/content/dam/aba/migrated/dispute/documents/FinalTaskForceMediation.pdf>, the 2010 Report of the Mediation Committee of the Dispute Resolution Section New York State Bar Association, https://www.nysba.org/Sections/Dispute_Resolution/Dispute_Resolution_PDFs/Final_Report_on_Mediator_Quality.html, and the 2012 ABA Task Force on Mediator Credentialing (“ABA 2012 Report”), https://www.americanbar.org/content/dam/aba/images/dispute_resolution/CredentialingTaskForce.pdf.

5. See <http://www.businessdictionary.com/definition/certification.html>.
6. <https://legalstudiesms.com/learning/court-certified-mediator-qualification-requirements/>.
7. See www.imimmediation.org.
8. See <http://www.simi.org.sg/About-Us/Organisation-Information/About-SIMI>.
9. See <https://www.imimmediation.org/2016/10/16/results-published-imi-2016-international-mediation-adr-survey/>.
10. See <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1549459646379&uri=CELEX:32008L0052>.
11. See <https://www.imimmediation.org/2017/06/22/italys-mediation-law-an-overview/>.
12. See <http://mediationblog.kluwerarbitration.com/2019/01/30/turkish-mandatory-mediation-expands-into-commercial-disputes/> Turkey first enacted legislation covering voluntary mediation in 2013. This expanded in 2017 to mandate mediation in labor disputes and expanded mandatory mediation to civil disputes in January 2019.
13. See pages 2-3 <https://www.nycbar.org/pdf/report/Mediator%20Quality%20Report%20Final%20%20June%202027.pdf>.

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How to Productively Conduct a Case Management Conference – Well Begun Is Half Done¹

By Cecilia Carrara

The recent surveys conducted among users and practitioners, in particular by the Queen Mary University of London,² as well as the report issued at the end of the Global Pound Conference Series,³ show that arbitration users increasingly request a more efficient management of the proceedings and seem to prefer proactive arbitrators.

If international commercial arbitration wants to be truly international, i.e., an effective and trustworthy alternative to litigation in national courts of cross-border business disputes, it has to prove its real advantages for the users by overcoming local standards and surmounting the stereotypes of civil vs. common litigation approaches. As surprising as this may seem from some national conventional perspectives, this aim can be better achieved if arbitrators take a more active role than the one to which they sometimes confine themselves. This kind of engagement of the arbitrators does not imply a diminution of party autonomy, or disrespect of the role of counsel, but requires that, especially when it comes to procedural issues, international arbitrators do in their restrain themselves from adopting certain measures *ex officio* when the parties are making unreasonable choices, adopting unruly behaviors, or failing to participate actively in the proceedings.

This proactive, and yet balanced, stance of the arbitrators may prove to be very effective if deployed as soon as at the first case management conference and when deciding upon procedural order no. 1. Indeed, this is when the arbitrators introduce themselves as a tribunal to the parties and set the scene for that specific arbitration. Hence, prepackaged orders and hasty routine conference calls are not the best way to commence an arbitration involving parties, counsel and arbitrators coming from different backgrounds who may have different expectations about what an international arbitration should look like.

The importance of case management conferences as a precious tool for an efficient conduct of the proceedings is recognized by many arbitration rules, either by means of explicit provisions⁴ or in the context of wider provisions of the parties' and arbitrators' duty to conduct the arbitration efficiently.⁵ In any event, holding a case management conference has become a common practice in international arbitration.⁶

Usually the rules regulating the proceedings are contained in a procedural order no. 1 (PO no. 1). However, there is no general consensus on which is the best

way forward to define the contents of PO no. 1. In some cases POs no. 1 are prepared unilaterally by the arbitral tribunal (or sometimes just the chair)⁷ and sent out to the parties. This "directive" approach of the arbitral tribunal, not unusual in some jurisdictions, is based on the consideration that PO no. 1 is a standard document, and therefore discussing its contents would be superfluous and unnecessarily time-consuming.⁸ However, this one-sided determination of procedural issues cannot be viewed as a best practice in international cases where the parties wish to have a say on the rules of the arbitration—this being the advantage of flexibility and party autonomy in arbitration. In other cases, a draft PO no. 1 is circulated by the arbitral tribunal to the parties ahead of the case management conference, and then discussed and finalized during the conference. This approach has been recently favored by the most prominent international arbitral institutions, since it is felt that it increases the parties' awareness of procedural issues and gets them more consciously involved in the arbitration.⁹ This conscious participation, in turn, diminishes the risks of unsatisfied parties and promotes rational and informed procedural choices.

The next question is, should this draft PO no. 1 be a short document, only containing the essential elements of the procedure, or should it be a detailed and fully fledged procedural "manual"? Providing the parties with a very detailed draft of PO no. 1 before the case management conference could have a twofold negative impact: first, it could affect the parties' freedom to determine the rules of procedure as they want them, since they could be influenced by the rules "proposed" by the arbitrators; second, an extremely detailed document could deprive the case management conference of much of its relevance. As to the first aspect, it is true that even an experienced counsel and/or a repeated user may find it uncomfortable to "go against" the arbitrator's view of the rules of procedure, when they are predefined unilaterally in detail, though contained in a document that is still in the form of a draft

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subject to comments. Nevertheless, especially in circumstances when there is an imbalance between the parties and their legal representatives and different cultural and legal approaches are involved, some sort of initial direction from the arbitral tribunal may enhance the efficiency of the proceedings and better preserve a fair hearing. Moreover, if the parties or counsel have different views, which are not purely based on procedural tactics, they may and should address these different views with the arbitral tribunal. The best moment to do so is precisely at the first case management conference.

Thus, it is suggested that a good compromise solution is that the arbitral tribunal circulates a first “skel-eton” PO no. 1, i.e., not overly detailed in a prescriptive form but rather leaving some open points for discussion, inviting the parties’ comments and proposals, and that these be addressed during the case management conference. This approach has the benefit of making the parties more committed from the very earliest stage because

cable rules—and the implications thereof—are clarified at the beginning.

Here are some of the typical core aspects to be addressed at the case management conference, with respect to which the expectations of the parties and their counsel may significantly differ depending on their legal background:¹⁰ Should there be discovery or not,¹¹ how should document production work,¹² at which stage of the proceedings, how many rounds of briefs are customary and in which sequence,¹³ the entire evidence-taking phase,¹⁴ including the possibility of having tribunal-appointed experts.¹⁵

A further aspect that may be addressed, which is a less typical one in common law contexts, is whether the parties would like to have a midstream case management conference after the full round of submissions and before the evidence hearing takes place.¹⁶ At this conference, typically to be held in person, the arbitrators may openly discuss with the parties what they believe are the relevant

“More efficient and acceptable international arbitration ‘can be better achieved if arbitrators take a more active role.’”

they are required to anticipate how they will want to manage the arbitration. They will, therefore, be more responsible for their procedural choices. This will set a consensual framework early on as to the applicable rules of procedure and possibly avoid complaints of the parties at a later stage on the procedural conduct of the case.

From this perspective, the presence of the parties’ representatives at the case management conference may further improve the efficiency of the process, since it enables the parties themselves to receive a more direct understanding of the features, complexities and cost implications of the rules of procedure that will be adopted. Moreover, this is likely to favor a complete communication between counsel and their clients, diminishing the risk of future procedural mishaps that may, or may not, be the result of a misalignment between the party and its counsel. On the other hand, the parties have selected their legal counsel and may prefer not to attend in person—and should of course remain free to abstain or attend. A good approach may thus consist in specifically reminding the parties representatives that they are also welcome to attend, so that, through counsel, they are made expressly aware of this opportunity. An active participation of the parties at the case management meeting may also enhance the possibility of a settlement at an early stage of the arbitration, since instead of postponing possible procedural surprises to a later stage, the appli-

issues at stake, and what they would like the parties to focus on during the hearing. Further, at this conference the arbitral tribunal and the parties may define the next steps of the procedural calendar and the rules of the upcoming evidentiary hearing.¹⁷

This kind of exercise clearly requires that the arbitrators study the file early on and that they feel confident, without any prejudgment or bias, to give some preliminary views on the case to the parties. In this context arbitrators would not be acting as mediators, nor would they offer solutions to the parties, but by indicating their concerns, they could play a decisive role in streamlining the activities of the parties in the interest of efficient case management. This could have a double positive impact: on the parties, who would be in a position to receive some hints from the tribunal on the strengths and weaknesses of their case, and on the specific arbitration more generally, since this kind of exercise requires a hands-on engagement of the arbitrators including an early analysis of the file and confrontation, if not alignment, among the tribunal’s members. Of course, this approach could significantly increase the possibility of an early settlement, since the parties might get a sense from the tribunal of the direction that the dispute is taking.

In addition, if the parties so desire, they may ask to the arbitral tribunal to give them their preliminary views also on the merits of the case. However, the viability of this option should be well assessed on the basis of the

lex arbitri and of the legal background of the parties to the dispute (for example, while the *Referentenkonferenz* is common practice in Germany, Austria and Switzerland,¹⁸ it may not be allowed in arbitrations seated in Sweden). In any event, if the arbitrators and the parties decide to follow this route, the arbitrators should consider drafting terms and conditions of the management conference to avoid any subsequent complaints of the parties on potential violations of due process principles and pay particular attention to the rules that they want to adopt for the transcripts and the protocol of the meeting. Again, given the potential impact of such an exercise in the course of the proceedings, the arbitrators and the parties should consider discussing at the first case management conference whether they would want to have this step included in their arbitration.

In sum, there is no one-size fits all arbitration in international contexts. Thus, as a general rule, standard POs no. 1 are not the best way forward, while a more open discussion with the parties at the stage of the first case management conference may significantly contribute to structuring the arbitration in a tailored way that takes into account the parties' expectations and preferences. Moreover, this process implies an active engagement of the arbitrators from the first steps of the case and values their case management skills. This kind of approach takes into consideration the repeated criticisms of arbitration users and seeks to promote a responsible use of arbitration by all the players involved.

Endnotes

1. This article follows the speech given by Cecilia Carrara at the 13th ICC New York Conference on International Arbitration of September 27-28, 2018.
2. Queen Mary University of London, School of International Arbitration—White & Case LLP, *2018 International Arbitration Survey: The Evolution of International Arbitration*, available at <http://www.arbitration.qmul.ac.uk/research/2018/>.
3. Global Pound Conference Series Report: Global Data Trends and Regional Differences, available at <https://www.globalpound.org/>.
4. Cf. AAA Commercial Arbitration Rules (2013), Art. R-21; ICC Arbitration Rules (2017), Art. 24; ICDR International Arbitration Rules (2014), Art. 20; ICSID Arbitration Rules (2006), Art. 20; SCC Arbitration Rules (2017), Art. 28; SIAC Arbitration Rules (2016), Art. 19; DIS Arbitration Rules (2018), Art. 27.2.
5. DIFC-LCIA Arbitration Rules (2016), Art. 14; LCIA Arbitration Rules (2014), Art. 14; HKIAC Administered Arbitration Rules (2013), Art. 13; UNCITRAL Arbitration Rules (2014), Art. 17; DIS Arbitration Rules (2018), Art. 27.1, Art. 27.4 and Annex 3; Code of Ethics of Arbitrators to the CAM Arbitration Rules (2010), Art. 4 and Art. 8.
6. Cf. UNCITRAL Notes on Organizing Arbitral Proceedings (2016), Art. 1(b), available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2016Notes_proceedings.html.
7. Ugo Draetta, *Cooperation among Arbitrators in International Arbitration*, Indian Journal of Arbitration Law, 2016, Volume Issue 1, p. 116.
8. K. P. Berger and J. Jensen, *Due Process Paranoia and the Procedural Judgement Rule: A Safe Harbour for Procedural Management Decisions by International Arbitrators*, Arbitration International 2016, 32, 415-435; cf. Stephan Wilske and Chloë Edworthy, *Chapter II: The Arbitrator and the Arbitration Procedure, The Predictable Arbitrator: a Blessing or a Curse*, Austrian Yearbook on International Arbitration 2017, Volume 2017, p. 85; Pierre A. Karrer, *Chapter 4: Initial Steps in an Arbitration*, Introduction to International Arbitration Practice, 2014, p. 94.
9. Cf. the report issued by the ICC Commission on Arbitration and ADR *ad hoc* Task Force on techniques for reducing time and costs in Arbitration, *Controlling Time and Cost in International Arbitration* (2nd edition) and the guide issued by the ICC Commission on Arbitration and ADR on effective management of arbitration proceedings, *Effective Management of Arbitration: A Guide for In-House Counsel and Other Party Representatives*.
10. Cf. on topics to discuss: Klaus Peter Berger, *Part III, 20th Scenario: Case Management and Challenges of the Tribunal's Jurisdiction, Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration* (Third Edition, 2015), p. 404-405; cf. also Nigel Blackaby and Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (2015, 6th Edition), p. 368.
11. Corina Gugler and Karina Goldberg, *Privilege and document production in International Arbitration: how do arbitrators deal with different legal systems' approaches?*, Revista Brasileira de Arbitragem, 2017, Volume XIV, Issue 53, p. 65.
12. Günther J. Horvath and Amanda Neil, *Guerrilla Tactics in International Arbitration*, Asian Dispute Review, 2017, Volume 19, Issue 3, p. 134.
13. Michael Polkinghorne and Benjamin Ainsley Gill, *Due Process Paranoia: Need We Be Cruel to Be Kind?*, Journal of International Arbitration 2017, Volum 34, Issue 6, p. 943.
14. Prague Rules (2018), Art. 4, Art. 5.
15. Prague Rules (2018), Art. 6.
16. Fabiane Verçosa, *Case Management em Arbitragem: Much Ado About Nothing Ou a Chave de Sucesso? – Série de Debates CBAr – Rio de Janeiro, 12 de Julho de 2017*, Revista Brasileira de Arbitragem, 2018, Volume XIV, Issue 55, p. 187.
17. This option was considered by the UNCITRAL working group on the Notes on Organizing Arbitral Proceedings, but ultimately it was not included in the final document, since the working group felt that there was no common agreement internationally to have it as a rule. The UNCITRAL Notes on Organizing Arbitral Proceedings (2016) are available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2016Notes_proceedings.html.
18. For Switzerland, see Hansjörg Stutzer, *Settlement Facilitation: Does the Arbitrator have a Role? The "Referentenaudienz"—the "Zurich-Way" of settling the Case*, ASA Bulletin 2017, Volume 35, Issue 3, P-589-608.

The Prague Rules and the Myth of a Civil Law Panacea

By Ferdinando Emanuele, Carlo Santoro, Ari D. MacKinnon, and Zachary S. O'Dell

Introduction

The newly promulgated Prague Rules on the Efficient Conduct of Proceedings in International Arbitration (the “Prague Rules”) would disrupt what has become normal international arbitration practice by adopting an “inquisitorial approach” as a procedural alternative which purportedly “will help the Parties and Arbitral Tribunal reduce the duration and costs of arbitrations.”¹

From the perspective of the authors of this article, who hail from both civil law and common law traditions, the drafters of the Prague Rules: (i) paint civil law procedural “practices” with a single broad brush; (ii) overstate the symmetry between common law procedural features and those found in the IBA Rules on the Taking of Evidence in International Arbitration (the “IBA Rules”); and (iii) afford insufficient weight to the substantial efforts undertaken through the promulgation of the IBA Rules to create soft law that can be flexibly molded to fit the procedural expectations of various legal traditions and the specific contours of a given dispute.

“Common Law” Procedural Tools for the Gathering of Evidence Are Increasingly Being Adopted in Civil Law Jurisdictions

In the Preamble, the Prague Rules state that they are “intended to provide a framework and/or guidance for arbitral tribunals and parties on how to increase efficiency of arbitration by *encouraging a more active role for arbitral tribunals in managing proceedings.*”² In an earlier draft, the Preamble made clear that the desired increase in efficiency could be achieved “by using a traditional inquisitorial approach.”³ And in a section of the *Note from the Working Group*, now deleted, the drafters argued that common law procedural features, including document production, fact witnesses, and party-appointed experts, “are not known or used to the same extent in non-common law jurisdictions.”⁴ It is apparent from these statements—and a plain reading of the rules themselves—that a clear motivation underlying the Prague Rules is to move arbitral proceedings toward a more stereotypical “civil law” approach to the gathering of evidence, in particular with respect to document production.

However, in modern civil law jurisdictions, in particular in continental Europe, the recent trend over the last decade has been to afford parties a more active role in the gathering of evidence. In particular, there have been specific developments in certain areas of law (e.g., competition law and collective action/consumer protection) which have provided putative claimants with greater access to disclosure tools.

Within the European Union, the 2014 Damages Directive created a framework by which individual victims of antitrust infringement may seek damages following sanctions levied by the European Commission or national competition regulators.⁵ The Damages Directive stipulates common procedural features that are available to claimants throughout Europe, including, *inter alia*, the disclosure of “relevant evidence” or “categories of evidence” held by defendants and third parties on the basis of a claimant’s request that is reasonably precise, narrow, and proportionate.⁶ The procedural features of the Damages Directive may very well establish a uniform framework for the gathering of evidence in civil lawsuits in Europe, or at a minimum establish minimum standards, including with respect to disclosure or discovery of documentary evidence.

In 2018, the European Commission also released a proposed Consumer Protection/Collective Action Directive.⁷ Article 13 of the proposed directive contemplates a discovery mechanism whereby claimants would be entitled to access to, and disclosure of, relevant documents.

In Italy, reforms concerning class actions are also currently before the legislature that include various procedural tools, including document discovery and other common law features, which would have been unheard of in Italy 10 years ago.

These developments are unsurprising given that antitrust litigation and class actions have been significant factors in discovery developments in the U.S. In addition, with the expansion of so-called big data, litigants (and their counsel) are increasingly able to process large datasets more efficiently. It is reasonable, therefore, to conclude that these European developments may be

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indicative of a broader trend that is expanding to other areas in the civil law world.

Thus, the Prague Rules' default position to "avoid any form of document production, including e-discovery"⁸ moves in the opposite direction of recent developments in continental European legal systems which have resulted in the adaptation of more "stereotypically" common law procedural features, not less.⁹

The "Civil Law" Innovations of the Prague Rules Are Heavily Diluted

In early drafts, the Prague Rules expressly presented themselves as a necessary alternative to the common law excesses of the IBA Rules. In a section of the *Note from the Working Group*, which has now been removed, the drafters acknowledged that "[t]he IBA Rules were very successful in developing a nearly standardized procedure in international arbitration, at least for proceedings involving Parties from different legal traditions and those with significant amounts at stake."¹⁰ However, the Working Group complained that the IBA Rules are slanted in

procedural efficiency is more a product of the aptitude of the arbitral tribunal and the parties than the rules applicable to the proceedings.¹⁴

Article 2 ("Proactive Role of the Arbitral Tribunal")

Article 2 purports to empower the arbitral tribunal to manage the proceedings in a proactive manner. To that end, Article 2.1 provides that "[t]he arbitral tribunal shall hold a case management conference without any unjustified delay after receiving the case file."¹⁵ Article 2.2 then provides the arbitral tribunal with a checklist of the matters to be addressed at the case management conference, including: (i) procedural calendaring; (ii) clarification of disputed versus undisputed facts; and (iii) the legal grounds on which the parties base their positions.¹⁶

There is an apparent tension between Article 2.1's mandate that the arbitral tribunal "shall" convene a case management conference "without any unjustified delay," on the one hand, and Article 2.2's mandate that the arbitral tribunal "shall" clarify at the same case management

"[M]any of the 'civil law' provisions of the Prague Rules which may, at first glance, appear unique (or even revolutionary vis-à-vis the IBA Rules) are quickly diluted by exceptions and carveouts."

favor of an adversarial or common law approach toward arbitral proceedings.¹¹ They also argued that various common law procedural features of the IBA Rules such as document production, fact witnesses, party-appointed experts, and cross-examination "contribute greatly to the costs of arbitration, while their efficiency is sometimes rather questionable."¹²

First, despite their stated efficiency goals, the Prague Rules are particularly vague and confused concerning when procedural milestones can or should be completed.¹³ This creates an additional burden on the arbitrators and the parties (as they need to decide in each and every arbitration at what stage of the proceedings such milestones can or should be done) and may lead to endless (and wholly inefficient) discussions on procedural matters.

Second, even accepting for the sake of argument the validity of the proposition that common law procedural features are less efficient, many of the "civil law" provisions of the Prague Rules which may, at first glance, appear unique (or even revolutionary *vis-à-vis* the IBA Rules) are quickly diluted by exceptions and carveouts. As a result, the Prague Rules will likely have difficulty consistently delivering promised gains in efficiency and cost-effectiveness. In any event, experience dictates that

conference, *inter alia*, undisputed/disputed facts and the legal foundations of the Parties' respective cases, on the other hand. From experience, particularly in complex disputes, it would be inefficient—if not impossible—to clarify disputed and undisputed facts or legal positions solely on the basis of a Request for Arbitration and Answer, which are typically spare pleadings.

Recognizing this tension, Article 2.3 provides a carveout by which the arbitral tribunal "could deal with the issues mentioned in Article 2.2.b at a later stage of the arbitration." This exception places the provision more in line with existing practices established by the IBA Rules.

Article 4 ("Documentary Evidence"), Article 5 ("Fact Witnesses"), and Article 6 ("Experts")

In a prior draft of the *Note from the Working Group*, the drafters complained that the IBA Rules are "closer to common law traditions, as they follow a more adversarial approach regarding document production, fact witnesses and Party-appointed experts."¹⁷ Although this reference has since been removed, it is obvious that these views provided an important foundation upon which the Prague Rules were drafted.

With respect to *document production*, Article 4.2 declares that “the arbitral tribunal and the parties are encouraged to avoid any form of document production, including e-discovery.”¹⁸ Although the Prague Rules do not define what constitutes “e-discovery” a reasonable reading of this provision is a repudiation of expansive U.S.-style electronic document production. Nevertheless, it would be improper to equate broad U.S.-style discovery with the narrow and limited document production procedure envisioned by the IBA Rules. From experience, there is no equivalence between the two.

To the extent the Prague Rules anchor a default position against document production in Article 4.2, the subsequent provisions of Article 4 retreat almost immediately from this view. Article 4.3 stipulates that a party may request a disclosure procedure at the case management conference if the party “believes that it would need to request certain documents.” Where “the arbitral tribunal is satisfied that the document production may be needed,

unreasonably burdensome, duplicative or for any other reasons not necessary for the resolution of the dispute.”

However, Article 5.7 immediately diminishes the arbitral tribunal’s power to exclude the testimony of certain witnesses by providing that “if a party insists on calling a witness whose witness statement has been submitted by the other party, as a general rule, the arbitral tribunal should call the witness to testify at the hearing, unless there are good reasons not to do so.” Experience counsels that parties will insist on their right to cross-examine any witnesses they wish, leaving parties in roughly the same position they would be in under the IBA Rules framework.

It is important to note here that the Prague Rules’ approach to witness evidence itself differs greatly from the traditional civil law approach. Civil law systems typically contemplate that witnesses only give oral testimony at the hearing (*i.e.*, no written witness statements), and questions are typically asked solely by the judge (normally on

“[T]he Prague Rules’ default position to ‘avoid any form of document production, including e-discovery’ moves in the opposite direction of recent developments in continental European legal systems which have resulted in the adaptation of more ‘stereotypically’ common law procedural features, not less.”

it should decide on a procedure for document production.” Articles 4.4 and 4.5 then foresee an additional mechanism whereby a party “can request the arbitral tribunal to order document production *at a later stage of the arbitration*” of “specific” documents if the party “could not have made such a request at the case management conference.”¹⁹ Article 4.5 also requires that the requested documents be relevant and material to the outcome of the case, not in the public domain, and within the possession, power, or control of the other party.

The end result of these exceptions is a document production regime not all that dissimilar to the one provided for under Article 3 of the IBA Rules but without the specificity of Article 9’s exclusionary rule. Moreover, the Prague Rules’ discovery procedure appears to be less efficient than a traditional Redfern procedure, given the dichotomy between Article 4.2’s requests for “certain” documents and Article 4.4’s *ad hoc* requests for “specific” documents.

With respect to *fact witnesses*, Article 5.2 provides that “the arbitral tribunal [...] will decide which witnesses are to be called for examination during the hearing,” and Article 5.3 further clarifies that “[t]he arbitral tribunal may decide that a certain witness should not be called for examination during the hearing [...] if it considers the testimony of such a witness to be irrelevant, immaterial,

the basis of a list of questions submitted in advance by the parties). This likely reflects the civil law ethos that witnesses should not have direct contacts with the lawyers of either parties. Additionally, the bar rules of most civil law jurisdictions prohibit fact witness preparation. Interestingly, the Prague Rules do not reflect the civil law approach under any of these aspects, and in fact they contemplate both written witness statements²⁰ and primary direct/cross-examination of witnesses by the lawyers.²¹

With respect to *experts*, Article 6 foresees as a default the use of tribunal-appointed experts rather than party-appointed experts. Article 6.1 states that “the arbitral tribunal may appoint one or more independent experts to present a report on disputed materials which require specialized knowledge” and Article 6.4 provides that such expert “[a]t the request of a party or on the arbitral tribunal’s own initiative [...] shall be called for examination at the hearing.”

However, Article 6.5 quickly departs from an exclusive regime of tribunal-appointed experts: “The appointment of any experts by the arbitral tribunal *does not preclude a party from submitting an expert report* by any expert appointed by that party.”²² And like the tribunal-appointed expert, “[a]t the request of any other party or on the arbitral tribunal’s own initiative, *such party-appointed expert shall be called for examination* during the hearing.”²³

Experience dictates that one or both parties may feel the need to hedge against the risks of a single tribunal-appointed expert by proffering their own expert.

Article 6 of the IBA Rules also contemplates the use of tribunal-appointed experts. But this is not a default rule, and in practice many IBA Rules-guided arbitrations see only party-appointed experts. It seems likely that the Prague Rules' attempt to invert this traditional construct will instead result in arbitrations with *both* tribunal- and party-appointed experts, entailing more costs to the parties and more time expended in examination of these experts at the hearing.

Thus, while the Working Group originally expressed its concern that traditional uses of document production, fact witnesses, and party-appointed experts "contribute greatly to the costs of arbitration, while their efficiency is sometimes rather questionable," the alternatives found in the Prague Rules are not likely to actually produce more efficient or less costly proceedings in these respects.

Article 8 ("Hearing")

Article 8.1 foresees that, as a default position,²⁴ "the arbitral tribunal and the parties should seek to resolve the dispute on a documents-only basis." Nevertheless, Article 8.2 quickly retreats from that position by providing that "[i]f one of the parties requests a hearing [...] the parties and the arbitral tribunal shall seek to organize the hearing in the most cost-efficient manner possible [...]."

Again, the power of one party to unilaterally insist upon a hearing, notwithstanding the default rule to resolve the dispute "on a documents-only basis," may prove too difficult to resist particularly in complex or high-value disputes.

The Efficiency Goals of the Prague Rules May Be Achieved Under the IBA Rules Framework With Greater Predictability

If the Prague Rules do not accurately reflect the procedural developments in modern civil law jurisdictions and their most revolutionary features (in particular with respect to document production, fact witnesses, and tribunal-appointed experts) are unlikely to result in more efficient or cost-effective proceedings (particularly in high-value disputes with sophisticated parties), then a reasonable question remains whether the Prague Rules actually provide a meaningful alternative for arbitration users.²⁵ While the Prague Rules tout their flexibility as an *à la carte* procedural menu from which parties may pick and choose,²⁶ the reality is that the IBA Rules framework already provides comparable flexibility.

In practice, arbitral tribunals rarely apply the IBA Rules as firm procedural rules governing proceedings. Instead, a reference is usually inserted into a preliminary procedural order that the arbitral tribunal will take

"guidance" from the IBA Rules, while tailoring specific procedural rules to the needs of the parties and the dispute. This practice is also consistent with Article 2.1 of the IBA Rules requiring that "[t]he Arbitral Tribunal shall consult the Parties at the earliest appropriate time in the proceedings and invite them to consult each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence."²⁷

If parties were in agreement, e.g., that an oral hearing was not required, or that there should be limited (or no) document production, or that there should be a single tribunal-appointed expert opining on a critical issue, all of these features could be adapted easily under the existing soft law framework of the IBA Rules. And by referring to the IBA Rules, the parties also inject a greater level of certainty and predictability with respect to the conduct of the proceedings. This predictability is also not dependent on the quality and ability of the arbitral tribunal, as is the case with the Prague Rules. Finally, if parties want to ensure that the arbitral tribunal takes a more proactive role managing proceedings in an efficient and cost-effective manner, such a mandate could be directly reflected not only in the procedural rules agreed upon under the IBA Rules framework, but, more importantly, through the parties' choice of arbitrators when constituting the tribunal.

The Prague Rules, therefore, do not appear to deliver on their promise to provide a true alternative to the IBA Rules since the "innovations" of the former either already exist or may be easily adapted in the latter.

Endnotes

1. Draft Prague Rules, Note from Working Group, at 2 (Sept. 2018).
2. Prague Rules, preamble (emphasis added). It is questionable to assume that a more active arbitral tribunal—a body in most cases which knows the least about the facts in dispute—would be able to develop facts more efficiently than the parties themselves. *See also* Prague Rules, art. 3. Furthermore, parties expressly choose arbitration as an alternative to state-court litigation. By making this choice, they should be understood as desiring to retain control over the process and not to cede control to an arbitral tribunal which does not even have the democratic legitimacy of the judges the parties elected not to use.
3. Draft Prague Rules, preamble (Sept. 2018).
4. *Id.* at 2, Note from the Working Group.
5. *See* Directive 2014/104 of the European Parliament and of the Council of November 26, 2014.
6. *Id.* art. 5 ("Disclosure of evidence").
7. Proposal for a Directive 2018/0089 (COD) of the European Parliament and of the Council.
8. Prague Rules, art. 4.2.
9. *See also* Michal Kocur, *Why Civil Lawyers Do Not Need the Prague Rules*, LinkedIn (Dec. 17, 2018, 11:36 AM), <https://www.linkedin.com/pulse/why-civil-law-lawyers-do-need-prague-rules-michal-kocur/>.
10. Draft Prague Rules, Note from the Working Group (Sept. 2018).
11. *See id.* at 2.
12. *Id.*

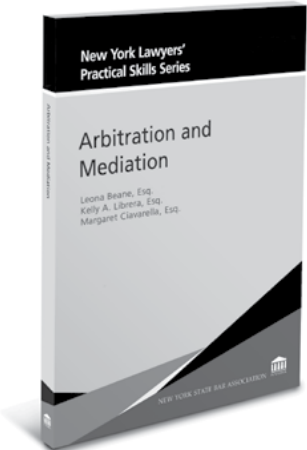
13. See, e.g., Prague Rules, art. 3.2 (tribunal-requested documents); art 4.3 (“certain” document requests); art 4.4 (“exceptional” document requests); art 4.5 (“specific” document requests); and art. 5.1 (identification of witnesses).
14. Cf. Michael McIlwrath, *The Prague Rules: The Real Cultural War Isn't Over Civil vs. Common Law*, KLUWER ARB. BLOG, Dec. 12, 2018.
15. Emphasis added.
16. Article 2.4.e also affords the arbitral tribunal an opportunity to share “preliminary views” as to the relief sought, disputed issues, and the weight and relevance of submitted evidence. Although this rule contends that “[e]xpressing such preliminary views shall not by itself be considered as evidence of the arbitral tribunal’s lack of independence or impartiality,” in reality, great care must be taken to protect the enforceability of any award and to avoid claims that arbitrators expressing their preliminary views are not neutral and have prejudged the dispute.
17. Draft Prague Rules, Note from the Working Group (Sept. 2018).
18. Emphasis added.
19. Emphasis added.
20. See Prague Rules, arts. 5.3-5.8.
21. See *id.* art. 5.9 (contemplating witness examination only “under the direction and control of the arbitral tribunal”).
22. Emphasis added.
23. Emphasis added.
24. Presumably, the hope underlying the Prague Rules’ setting of default rules is to eventually alter conduct over time. However, this theory only works when parties are indifferent to the outcome or actually want a different outcome but are acting irrationally. Because parties currently have “choice” but are not choosing “less” discovery, and given the importance of issues that are being arbitrated, there is no reason to conclude that parties are indifferent or irrational.
25. See, e.g., Duarte G. Henriques, *The Prague Rules: Competitor, Alternative or Addition to the IBA Rules on the Taking of Evidence in International Arbitration*, 36 ASA BULL. 351 (2018); Andrey Panov & Alexandre Khrapoutski, *The Prague Rules—An Alternative Way of Conducting International Arbitration?* 1 ARBITRATION.RU 41 (2018).
26. “Parties and arbitral tribunals may decide to apply the Prague Rules as a binding document or as guidelines to all or any part of the proceedings. They may also exclude the application of any party of the Prague Rules or decide to apply only part of them.” Prague Rules, preamble.
27. Emphasis added.

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The Prague Rules: A Regression or a Step Toward More Efficiency?

By Duarte G. Henriques

I. Introduction

The current state of affairs shows that international arbitration is too costly, too lengthy, and also too inefficient.¹ This is at odds with what has been the ever-since advertised hallmarks of arbitration: a speedy, flexible, and cost-efficient process managed by independent and impartial adjudicators, with strict compliance to the principles of due-process.

There are many reasons for the current scenario but perhaps the most prominent one is related to the model for the conduct of the case that adjudicators adopt. In this regard, it is not worth entering into the debate of whether arbitration is or should be less “American” (or “Anglo-American”), by contrast to a more “civil law” shape.² This is not the occasion for a debate between these two legal cultures, if not for other reasons because, admittedly, in international arbitration the line dividing these two cultures is much more blurred than it was a few years ago.

The debate lies instead in the way parties want adjudicators to conduct their cases, and what is the role that the available regulation framework plays in that endeavour. Leaving aside other considerations (such as those related to the governing law or applicable institutional rules), the great divide rests on two fundamental notions of the conduct of arbitration and, consequently, of the arbitrators’ role: should arbitrators be left to simply moderate the combat between the parties (adversarial model) or, conversely, must the arbitrators intervene during the fight (pro-active model)?³

It seems indisputable that arbitral tribunals are increasingly constricted to a religious observation of due process, and often find themselves suffering from the corresponding “paranoia.” As a consequence, tribunals opt to concede in every request for production of evidence, including full-fledged discovery, lest a challenge is on the way. Several rounds of lengthy submissions are the *cornerstone* of even the simplest case, and parties see no limit in tempering witness statements and requesting cross-examination from the witnesses produced by the opposing party.

This scenario is typical to an adversarial approach on the conduct of arbitration. Admittedly, this is also the target which the coming Prague Rules aim to improve. The question that now follows is whether the existing regulation apparel (i.e., the “IBA Rules on the Taking of Evidence in International Arbitration”) is also targeted by this initiative. The answer is “yes” ... and “no.”

II. The Prague Rules and Legal Cultural Divides

Before proceeding with the explanation, it is indispensable to introduce the Prague Rules. These Rules are a set of provisions compiled by a group of “civil law” practitioners, coming mainly from eastern European countries. This working group conducted a survey among practitioners of several “civil law” jurisdictions and subsequently drafted the “Prague Rules on the Efficient Conduct of International Arbitration,” named after the European city where its final version was approved and signed by a number of individual and institutional supporters.

The drafters of the Prague Rules acknowledge the role that the IBA Rules have been playing in bridging the gap between two different legal cultures and in setting forth “nearly standardized procedures.” At the same time, they pinpoint the IBA Rules as too close to one of the legal cultures (i.e., the “common law”). Consistently, they advocate a more “civil law” approach in the conduct of proceedings. That way, it is assumed, most of the negative costs and time impacts on the efficiency of proceedings will be mitigated.

If so, how is this achieved? What does it mean, to have a more civil law approach?

Broadly speaking, whereas “common law” arbitrators tend to be more of spectators in an adversarial process, their “civil law” congeners are more interventive.⁴ The former are more attached to a process where witnesses are the paramount means of evidence and, therefore, allow extensive examination and cross-examination. This is because, particularly in the U.S., witnesses have strong reminders that perjury is a criminal offense. To the contrary, in many “civil law” countries there are no real penalties against perjury, and witnesses are more comfortable in “forgetting” or “adapting” events to the needs of the party who produced them. Consequently, proceedings are conducted subject almost to no evidence other than documents (“documents don’t lie,” so they say).

In “common law” jurisdictions, an arbitrator may never raise a point of law (or fact) not pleaded by the parties.⁵ In “civil law” jurisdictions, arbitrators may apply a provision not pleaded by the parties (“*iura novit curia*”), provided that the parties are granted the opportunity to be heard.⁶

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A “common law” arbitrator will never share her or his preliminary views with the parties, let alone suggest a settlement, whereas a “civil law” arbitrator would be at ease in doing so (provided, of course, she or he does not render a “decision” in that process). In some “civil law” jurisdictions, such as Brazil, the arbitrator has a fundamental duty to “seek the conciliation between the parties.”⁷

More significantly, a “common law” arbitrator, and more particularly, a U.S. arbitrator, will find it hard to conciliate the principles of the equitable process with a decision that denies a request for discovery, including by electronic means. A “civil law” arbitrator, however, will order the opposing party to produce only those documents that are conspicuously targeted by the requesting party as relevant to the case and material to its outcome.

- The tribunal may appoint experts with specialized knowledge. When parties appoint their experts, the tribunal may instruct them to establish a joint table of contents for their reports, covering the issues they consider relevant, and it may also instruct the experts to render a joint report. (Art. 6).
- If the tribunal deems appropriate, it may apply legal provisions not pleaded by the parties, including public policy rules, provided that the parties are given the opportunity to present their views. (Art. 7).
- The hearing will only take place if one of the parties so requests or the tribunal finds it appropriate. When that happens, the hearing shall take place in the most cost-efficient manner, with the reduction of its duration and the use of electronic means, if possible. (Art. 8).

“The Prague Rules are not on any side of the fence of the debate between “civil law” and “common law,” and not even on a “no man’s land” between these two cultures. (...) The debate should rather be placed between standards—and perhaps crystallized practices—and a proactive efficiency.”

III. Most Salient Features of the Prague Rules

With this landscape in mind, the Prague Rules encourage arbitrators to adopt (and parties to accept) a more interventive role. This backdrop is expressed in the following fundamental features:

- The tribunal is entitled and encouraged to take an active role in finding facts, and may request documents from the parties, appoint experts, perform site inspections, and take any other actions it deems appropriate. In so doing, the tribunal may impose a cut-off date to produce evidence. (Art. 3).
- The tribunal may order the submission of documents that are relevant and material to the outcome of the case, are not in the public domain or are in the possession of the opposing party or third-parties. It shall in any case avoid extensive document production, including any form of e-discovery (Art. 4).
- The tribunal may decide not to call witnesses it considers irrelevant, immaterial, unreasonably burdensome, duplicative or for any other material reasons not necessary for the resolution of the dispute before them. The tribunal shall conduct the examination of witnesses and may reject questions that are irrelevant, immaterial, or redundant. The tribunal may also impose other restrictions on the examination, such as time limits, order of deposition, or types of questions that are allowed (Art. 5).

- Unless one of the parties objects, the tribunal shall assist the parties in reaching a settlement. In so doing, the tribunal may express its preliminary views (if neither party objects), and the tribunal or one of its members may act as mediator with the written consent of all parties. If mediation fails, the arbitrator in question will only resume her or his office if all the parties expressly consent to that. (Art. 9).

More important, arbitrators are encouraged to hold a case management conference without undue delay, where they shall:

- a. clarify with the Parties their respective positions with regard to:
 - i. the relief sought by the Parties;
 - ii. the facts which are undisputed between the Parties and the facts which are disputed;
 - iii. the legal grounds on which the Parties base their positions; and
- b. fix a procedural timetable. (Art. 2)

Further, the tribunal may indicate to the parties:

- a. the facts which it considers to be undisputed between the Parties and the facts which it considers to be disputed;

b. with regard to the disputed facts—type(s) of evidence the Arbitral Tribunal would consider to be appropriate to prove the Parties’ respective positions;

c. its understanding of the legal grounds on which the Parties base their position;

d. the actions which could be taken by the Parties and the Arbitral Tribunal to ascertain the factual and legal basis of the claim and the defense; and/or

e. its preliminary view on the allocation of the burden of proof between Parties. (Art. 2)

The tribunal may share its preliminary views “with regard to the burden of proof or the relief sought, the disputed issues, and the weight and relevance of evidence submitted by the Parties” (Art. 2.5). The tribunal is also “entitled and encouraged to take an active role in establishing the facts of the case which it considers relevant for the resolution of the dispute” (without relieving the parties from their burden of proof—see Art. 3.1).

IV. The Prague Rules and Due Process

This summary raises two fundamental questions. On the one hand, where does fair and equitable treatment, or due process, stand in the Prague Rules? On the other, where lies the duty of the parties to put the proceeding in motion? These questions are pertinent because one of the central features of the Prague Rules is the duty of the tribunal to act in a proactive manner.

However, the Prague Rules do not relieve the parties from the burden of proof, and much less do they allow the tribunal to subrogate in the parties’ duties (and rights) to present and make their case.

Second, there is no power of the arbitral tribunal that could be exercised without giving the parties the opportunity to present their views. Due regard must always be given to mandatory provisions of the “lex arbitri” (Art. Art. 1.3).

Last but surely not the least, the Prague Rules cannot apply to an arbitration where the parties have agreed on its exclusion, and the arbitral tribunal can only apply the Prague Rules after hearing the parties (Art. 1.1 and 1.2). That is what it takes to stay in strict compliance with due process.

In this regard, it is worth mentioning that the parties may opt to apply the Rules, or any part thereof, or even exclude any particular provision (such as Art. 4 related to “prohibition” on discovery), and may do so in the arbitration agreement or later on, at any stage during the proceedings. Flexibility and tailor-making are the keywords: parties may apply them, exclude them, and apply (or exclude) particular provisions thereof. The arbitral tribunal

may, however, apply the Prague Rules—in whole or just in part—when the parties do not reach an agreement in that respect, but in any case only after having heard them.

V. The Prague Rules and the IBA Rules on the Taking of Evidence in International Arbitration

These observations lead us to question what is so fundamentally different in the Prague Rules and the IBA Rules on the Taking of Evidence. Indeed, in the latter one can see that arbitral tribunals enjoy the same powers as they do under the Prague Rules, with minor exceptions or slightly nuanced provisions.⁸ More to the point, the IBA Rules also provide room for a more “muscular” approach, and for a more flexible manner in the conduct of the cases. In other words, under the IBA Rules, arbitral tribunals may also take an active role and conduct the case more efficiently by exercising broad powers.

“Regression? Maybe, but most likely for the better. And after all, arbitration is about parties’ choices, about alternatives and about diversity.”

However, if one reads both Rules in a careful and dispassionate manner, and concedes to a premise drawn from actual experiences that one thing is what has been written in the IBA Rules and the other totally different is the practice that they have been subject to, the contrast could not be more staggering. Also, reading the IBA Rules, one quickly concludes that there is a lack of a “broad mandate” given to tribunals to act more proactively, which is precisely one of the essential messages of the Prague Rules.

VII. The Overarching Mindset of the Prague Rules

In exercising its powers, the arbitral tribunal is *encouraged* to actively manage the case, and to push towards a swift and cost-efficient proceeding. This is the overarching mindset of the Prague Rules and the linchpin around which every provision of the Prague Rules revolves. In sum, the Prague Rules are enshrined by a mandate that the IBA Rules do not provide and that the players fear to use under that setting.

Inasmuch as the Prague Rules aim at providing alternatives to “standardized” practices in international arbitration, they represent a regression, if regression is the proper word to classify more options to the parties, more proactiveness, and thus more efficiency in the conduct of arbitrations.

It is also imperative to bear in mind that the Prague Rules are not meant to compete with the IBA Rules but should instead be seen as an addition or alternative to them.⁹ It merely means more choices to the parties.

All in all, one should concede that the Prague Rules are not on any side of the fence of the debate between “civil law” and “common law,” and not even on a “no man’s land” between these two cultures. This is most likely a misplaced debate. By the same token, the Prague Rules are not on the side of “flexibility” against “predictability” that the IBA Rules may represent. As suggested earlier, it should not be taken for granted that the IBA Rules will never be applied in a “non-standardized” manner by a “rebel” tribunal. In many ways, the IBA Rules may also bear a certain level of unpredictability in themselves, depending mostly on the decision maker applying them. All things considered, what really matters is the level of knowledge the parties may have about the adjudicator.

The debate should rather be placed between standards—and perhaps crystallized practices—and a proactive efficiency. Indeed, the tenet of the Prague Rules is precisely that the use of powers in a more proactive fashion will lead to cost and time savings and will enhance efficiency on the arbitration proceeding. Tribunals will not waste their time in lengthy submissions, needless hours of cross-examinations, and countless volumes of documents. All this with a view to revamp the efficiency of the old days of arbitration, providing the parties with one more option on the way their case should be conducted.

Regression? Maybe, but most likely for the better.

And after all, arbitration is about parties’ choices, about alternatives and about diversity.

Endnotes

1. See the last survey conducted by White & Case and Queen Mary University of London that identifies four main reasons that interviewees and respondents find to be the “worst characteristics” of international arbitration: costs (67 percent of replies), lack of effective sanctions during the arbitral process (45%), lack of power in relation to third parties (39 percent) and lack of speed (34 percent)—The 2018 White & Case and Queen Mary University of London Survey on International Arbitration (W&C / QMUL Survey), available at [http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-\(2\).PDF](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF), at p. 8, last accessed on 28-10-2018.
2. See *The American Influence on International Arbitration*, 19 Ohio St. J. on Disp. Resol. 69 (2003-2004), p. 84, available at https://scholarship.law.nd.edu/law_faculty_scholarship/562, last accessed on 28-10-2018, and George M. von Mehren and Alana C. Jochum, *Is International Arbitration Becoming Too American?*, 2 Global Bus. L. Rev. 47 (2011), available at <http://engagedscholarship.csuohio.edu/gblr/vol2/iss1/6>, last accessed on 28-10-2018.
3. The notion of an “inquisitorial” role, early adopted in the first drafts of the Prague Rules, but abandoned in the current version, should be avoided for its connotation to other areas of the law, particularly criminal law.
4. However, within the realm of the “domestic” arbitration in the U.S., there has been some calls for a more “muscular” approach. See Harvey J. Kirsh, “Pitfalls, Perceptions, and Processes in Construction Arbitration”, 2012, <http://www.cccl.org/Featured%20article%20-%20November%202012.pdf>, last accessed on 2 November 2018. Also, “Protocols for Expeditious, Cost Effective Commercial Arbitration”, Thomas J. Stipanowich, Editor in Chief, Curtis E. von Kann and Deborah Rothman, Associate Editors, 2010, available at <http://apps.americanbar.org/litigation/committees/corporate/docs/2011-cle-materials/10-Prevent-the-Runaway/10c-protocols-expeditious.pdf>, last accessed on 2 November 2018.
5. Very recently, the Commercial High Court of England and Wales set aside an ICC award on the basis of a “serious irregularity” due to the arbitrator’s decision on a claim that had not been sought by any of the parties—see *R] and another v HB [2018] EWHC 2833 (Comm)*, available at <https://www.bailii.org/ew/cases/EWHC/Comm/2018/2833.html>, last accessed on 2 November 2018.
6. See the decision of the Swiss Federal Tribunal 4A_554/2014 of 15 April 2015, ASA Bull. 2/2015, p. 411.
7. See Art. 21(4) of the Law Nr. 9.307 of 23 September 1996, amended by Law Nr. 13.129 of 26 May 2015: “The arbitrator or the arbitral tribunal shall, at the beginning of the procedure, try to conciliate the parties, applying, to the extent possible, Article 28 of this Law.”
8. See a comparison chart by Guillermo Argerich, Sol Argerich, Francisco da Silva Esteves, and Juan Jorge, *Reglas de Praga: nuevas normas de soft law para procedimientos en el arbitraje internacional*, Part I & II, accessible at praguerules.com/upload/iblock/71f/71f1e3c3798c732265837fa883de2043.pdf and <http://praguerules.com/upload/iblock/602/6029a88fc922b016349dfec3147b86d1.pdf>.
9. See Duarte G Henriques, *The Prague Rules: Competitor, Alternative or Addition to the IBA Rules on the Taking of Evidence in International Arbitration?*, in ASA Bull. 2/2018, 351 *et seq.*

A Comparative Overview of the 2018 HKIAC-Administered Arbitration Rules

By Sarah Grimmer and Joe Liu

Following the success of the 2013 HKIAC Administered Arbitration Rules, the Hong Kong International Arbitration Centre (HKIAC) has promulgated a new version of its Administered Arbitration Rules, which came into force on 1 November 2018 (“2018 Rules”). The 2018 Rules respond to users’ needs and the latest arbitration developments by introducing provisions concerning the use of technology and alternative dispute resolution mechanisms; management of multi-party and multi-contract disputes; third-party funding; early determination of points of law or fact; enhanced emergency arbitrator procedure; and time limits for issuing awards.

The introduction of the 2018 Rules is an important development for dispute resolution and transactional lawyers in the United States since HKIAC is commonly chosen to administer disputes between American parties and Asian parties. This article provides a brief analysis of the key features of the 2018 Rules with comparison to the current rules of other arbitral institutions that are often considered by American parties for international commercial disputes, i.e., AAA/ICDR (“ICDR Rules”),¹ ICC (“ICC Rules”)² and SIAC (“SIAC Rules”).³

Arbitrators’ and Emergency Arbitrators’ Fees

The 2018 Rules maintain a well-known feature of HKIAC arbitration which offers parties two options to pay an arbitral tribunal’s fees, i.e., either by hourly rate (capped at HK \$6,500 or approximately U.S. \$830) or by reference to the amount in dispute.⁴ This feature allows parties to agree to use the best option to save costs, i.e., payment by hourly rate for simple but high-value disputes and payment based on the amount in dispute for complex but low-value disputes. If the parties are not able to agree within a time limit, their arbitral tribunal will be paid by hourly rate.

The dual-track fee system does not apply to an emergency arbitrator’s fees, which are paid by hourly rate (capped at HK \$6,500 or approximately U.S. \$830).⁵ Given the nature and urgency of emergency proceedings, there is no time for parties to negotiate and agree how to pay

their emergency arbitrator. In these proceedings, HKIAC considers the hourly rate system to be a fair and accurate way to remunerate an emergency arbitrator. To control the costs of such proceedings, the 2018 Rules do not allow an emergency arbitrator to charge more than HK\$200,000 (approximately U.S. \$25,000) unless all parties agree or HKIAC determines otherwise.⁶

ICDR, ICC and SIAC fix the method of paying an arbitral tribunal’s fees in their respective rules with varying degrees of flexibility. ICDR determines an appropriate daily or hourly rate to remunerate the arbitral tribunal following the commencement of an arbitration taking into account the size and complexity of the case and the arbitrator’s stated rate of compensation.⁷ Both ICC and SIAC fix the fees of a tribunal based on the amount in dispute, with the ICC Rules prohibiting any contrary fee arrangements⁸ and the SIAC Rules allowing the parties to agree to alternative methods of determining the tribunal’s fees.⁹

With respect to emergency arbitrators’ fees, ICC and SIAC require the payment of a fixed amount of U.S. \$30,000¹⁰ and S \$25,000 (approximately U.S. \$18,000),¹¹ respectively, at the time of application. Both institutions have discretion to increase the amount. Unlike the 2018, ICC and SIAC Rules, the ICDR Rules do not include any express provision regarding the remuneration of an emergency arbitrator.

The key takeaways are summarized in the table below:

	HKIAC	ICDR	ICC	SIAC
Arbitral tribunal fees	Based on hourly rate (default) or amount in dispute	Based on daily or hourly rate	Based on amount in dispute	Based on amount in dispute
Emergency arbitrator fees	Based on hourly rate; capped at approx. U.S. \$25,000	No express provisions	Fixed at U.S. \$30,000	Fixed at approx. U.S. \$18,000

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Multi-Party and Multi-Contract Disputes

The 2018 Rules offer four mechanisms to deal with disputes involving multiple parties and/or contracts, i.e., the joinder of an additional party, consolidation of multiple arbitrations, the commencement of a single arbitration under multiple contracts, and concurrent proceedings. These mechanisms cover an unprecedented range of scenarios in which:

- an additional party may be joined to an arbitration before or after the constitution of the tribunal under an express test;¹²
- HKIAC may consolidate several arbitrations commenced between the same or different parties under compatible arbitration agreements giving rise to a common question of law or fact and claims arising from the same transaction or a series of related transactions;¹³
- a party may commence a single arbitration under multiple contracts under the same conditions for consolidation;¹⁴
- an arbitral tribunal may conduct multiple arbitrations between the same or different parties on a concurrent or sequential basis, or suspend any of the arbitrations pending the determination of another arbitration, provided that the same tribunal is constituted in each arbitration and a common question of law or fact arises in all the arbitrations.¹⁵

ICDR, ICC and SIAC each take a different approach to multi-party and multi-contract disputes.

The ICDR Rules contain only joinder and consolidation provisions. Under these rules, a party may seek to join an additional party before the appointment of any arbitrator and any joinder is subject to the tribunal's

power to rule on its own jurisdiction.¹⁶ Any request for consolidation will be decided by a consolidation arbitrator who is able to consolidate arbitrations involving the same parties, same legal relationship and compatible arbitration agreements.¹⁷

The ICC Rules contain joinder and consolidation provisions similar to those in the ICDR Rules, except that a request for joinder may be subject to the ICC Court's *prima facie* decision whether to proceed with the arbitration¹⁸ and a request for consolidation is decided by the ICC Court.¹⁹ In addition, the ICC Rules allow claims under multiple contracts to be made in a single arbitration which may also be subject to the ICC Court's *prima facie* decision to proceed.²⁰

The SIAC Rules also address the issue of joinder, consolidation and the submission of a single Notice of Arbitration in respect of multiple contracts. The joinder provisions are largely similar to those in the 2018 Rules.²¹ A request for consolidation is decided by the SIAC Court or, where any arbitral tribunal has been constituted, by that tribunal provided that the same tribunal has been constituted in each of the relevant arbitrations or no other tribunals have been constituted in those arbitrations.²² Unlike the 2018 Rules and the ICC Rules, the SIAC Rules do not expressly permit the commencement of a single arbitration under multiple contracts. Where a party submits a single Notice of Arbitration under multiple contracts, it will be deemed to have commenced multiple arbitrations and SIAC will treat the Notice of Arbitration as an application for consolidation.²³

It bears noting that none of the ICDR, ICC and SIAC Rules contain express provisions on the conduct of concurrent proceedings.

The key takeaways are summarized in the table below:

	HKIAC	ICDR	ICC	SIAC
Joinder	Joinder and intervention decided by HKIAC or tribunal under an express test	Joinder subject to tribunal's decision on jurisdiction	Joinder subject to ICC's decision to proceed or tribunal's decision on jurisdiction	Joinder and intervention decided by SIAC or tribunal under an express test
Consolidation	HKIAC may consolidate arbitrations between same or different parties with same or different tribunals in each arbitration	Consolidation Arbitrator may consolidate arbitrations between same parties	ICC may consolidate arbitrations between same parties	SIAC or tribunal may consolidate arbitrations between same or different parties. Tribunal may consolidate in the event of same tribunal or no other tribunals in all arbitrations
Single arbitration under multiple contracts	A party may commence a single arbitration under contracts between same or different parties	No express provisions	A party may commence a single arbitration under contracts between same or different parties	Treated as multiple arbitrations and an application for consolidation
Concurrent proceedings	Express provisions	No express provisions	No express provisions	No express provisions

“The introduction of the 2018 Rules is an important development for dispute resolution and transactional lawyers in the United States since HKIAC is commonly chosen to administer disputes between American parties and Asian parties.”

Early Determination of Points of Law or Fact

The 2018 Rules have introduced an Early Determination Procedure (EDP) to allow an arbitral tribunal to deal with an unmeritorious issue of law or fact in a separate and swift procedure instead of going through the full process. Under EDP, a tribunal has the express power to determine a point of law or fact that is manifestly without merit or manifestly outside of its jurisdiction, or a point of law or fact, assuming it is correct, would not result in an award being rendered in favor of the party that submitted such point.²⁴

EDP contemplates a two-stage process under short but extendable time limits. The tribunal must first decide whether to proceed with a request for early determination within 30 days from the date of the request. If the tribunal decides not to proceed, EDP will be completed within 30 days. If the tribunal decides to proceed, it must issue an order or award, which may be in summary form, on the relevant point within 60 days from the date of this decision to proceed.²⁵ EDP therefore contemplates an overall 90-day time limit for the tribunal to issue a decision on the merits of a point of law or fact. Pending the determination of a point of law or fact under EDP, the tribunal may proceed with the rest of the arbitration. The tribunal’s power to proceed can prevent any attempt to disrupt the whole arbitration by filing an abusive or belated application for EDP.²⁶

EDP is part of a recent trend by arbitral institutions to encourage arbitral tribunals to use summary procedures to resolve straightforward disputes. Among the four institutions discussed in this article, only the 2018 Rules and the SIAC Rules include such procedures. ICC has clarified the ability of an arbitral tribunal to adopt such procedures as part of its case management power under the ICC Rules through a practice note. The ICDR Rules do not expressly provide for such procedures but state that the tribunal may decide preliminary issues.²⁷ This is generally viewed as including summary procedures.

The SIAC Rules allow a party to apply to the tribunal for the early dismissal of a claim or defense that is manifestly without legal merit or manifestly outside of the tribunal’s jurisdiction.²⁸ If the tribunal allows the application to proceed, it must make an order or award within 60 days from the date of filing the application.²⁹

While the ICC Rules do not provide for any summary procedure, ICC has updated its Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration to clarify that any application for the expeditious determination of manifestly unmeritorious claims or defences may be dealt with within the scope of the arbitral tribunal’s case management power.³⁰

The key takeaways are summarized in the table below:

	HKIAC	ICDR	ICC	SIAC
Scope of application	Points of law or fact: manifestly without merit; manifestly outside jurisdiction; even at best, no favorable award.	No express provisions	Claims or defences: manifestly devoid of merit; manifestly outside jurisdiction.	Claims or defences: manifestly without legal merit; manifestly outside jurisdiction.
Time limits	30 days to decide whether to proceed; 60 days to decide on merits.	No express provisions	No time limits	No time limits to decide whether to proceed; 60 days to decide on merits.

Other Features

In addition to the features outlined above, HKIAC provides numerous other options to save time and costs under the 2018 Rules. These options include the following:

- The 2018 Rules encourage the use of technology in arbitration,³¹ including the recognition of using a secured online repository provided by HKIAC or parties to streamline the process of delivering electronic documents.³²

- HKIAC's emergency arbitrator procedure provides for an express test for issuing emergency relief, thereby enhancing procedural certainty and saving the costs of litigating the proper test for such relief.³³
- In the 2018 Rules, HKIAC maintains its widely used expedited procedure which fast tracks an arbitration through the appointment of a sole arbitrator (unless all parties agree to three) to decide the dispute based on documents only under a six-month time limit.³⁴

"American companies are consistently featured among the top ten users of HKIAC's arbitration services."

- The 2018 Rules include express provisions to address the disclosure, confidentiality and costs of third-party funding, thereby streamlining the process for arbitrating funded claims.³⁵
- An arbitral tribunal may appoint a legal counsel of HKIAC to act as tribunal secretary to undertake administrative and organizational tasks at a much lower cost.
- An arbitral tribunal is required to notify the parties and HKIAC of the anticipated date of delivering an award at the closure of the proceedings and such date must be within three months from the closure of the proceedings.³⁶

7. ICDR Rules, Art 35.
8. ICC Rules, Appendix III, Art 2.4.
9. SIAC Rules, Art 34.1.
10. ICC Rules, Appendix V, Art 7.1.
11. SIAC Schedule of Fees (effective 1 August 2016).
12. 2018 Rules, Art 27.
13. 2018 Rules, Art 28.
14. 2018 Rules, Art 29.
15. 2018 Rules, Art 30.
16. ICDR Rules, Art 7.1.
17. ICDR Rules, Art 8.
18. ICC Rules, Arts 6(4)(i) and 7.
19. ICC Rules, Art 10.
20. ICC Rules, Arts 6(4)(ii) and 9.
21. SIAC Rules, Art 7.
22. SIAC Rules, Art 8.
23. SIAC Rules, Art 6.
24. 2018 Rules, Art 43.
25. *Id.*
26. 2018 Rules, Art 43.7.
27. ICDR Rules Art. 20.3.
28. SIAC Rules, Art 29.1.
29. *Id.*, Art 29.4.
30. ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, 30 Oct 2017, Section VI(C).
31. *Id.*, Art 13.1.
32. *Id.*, Arts 3.1(e), 3.3 and 3.4.
33. *Id.*, Sch 4, para 11.
34. 2018 Rules, Art 42.
35. 2018 Rules, Arts 34.4, 44 and 45.3(e).
36. *Id.*, Art 31.2.

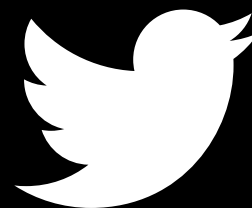
Use of HKIAC by American Parties

Since 2015, HKIAC has registered a total of 63 arbitrations involving American parties. American companies are consistently featured among the top ten users of HKIAC's arbitration services. It is anticipated that the introduction of the 2018 Rules, combined with HKIAC's one-stop shop dispute resolution services, large pool of experienced arbitrators, and strong track record of enforcement around the world, will further enhance HKIAC's appeal as a neutral and sophisticated venue for international commercial disputes between American parties and their foreign counterparts.

Endnotes

1. ICDR International Arbitration Rules (effective 1 June 2014).
2. ICC Arbitration Rules (effective 1 March 2017).
3. SIAC Arbitration Rules (effective 1 August 2016).
4. 2018 Rules, Art 10, Schs 2 and 3.
5. 2018 Rules, Sch 4, para 5.
6. 2018 HKIAC Schedule of Fees, <http://hkiac.org/content/2018-schedule-fees>.

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Recent Innovations from the ICC Court

By Marek Krasula and Mary Kate Wagner

As one of the world's leading arbitral institutions, the International Court of Arbitration of the International Chamber of Commerce ("ICC Court") strives to be at the forefront of addressing the efficiency, diversity and transparency challenges in international arbitration.

According to the 2018 Queen Mary University of London (QMUL) and White & Case International Arbitration Survey,¹ 61 percent of arbitration users indicated that increased efficiency will have the most significant impact on the future evolution of international arbitration.² One can surmise that increased efficiency also figures highly on the priority list of U.S. parties who are the most frequent users of ICC arbitration.³

In 2017, the ICC Rules of Arbitration ("ICC Rules") were amended and a new version of the Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules (the "Note") was issued to include new innovative policies aimed at decreasing time and costs while also increasing the transparency of ICC arbitration procedures for its users and other stakeholders.

These reforms were introduced by way of (i) the entry into force of the Expedited Procedure Provisions (EPP), (ii) the reduction of arbitrators' fees in the event of unjustified delays in submitting draft arbitration awards for scrutiny to the ICC Court, and (iii) providing guidance to parties and arbitral tribunals as to the use of the expeditious determination of manifestly unmeritorious claims or defenses, e.g., the use of dispositive motions.

In addition to the above, it is also important to underline that the ICC Court, for its 2018-2021 term, reached complete gender parity with the appointment of 88 women and 88 men from 104 countries, recognizing that its composition should reflect the regional, generational and geographical diversity of the arbitration community globally.

This development followed the ICC Court's decision to publish on its website the names of the arbitrators sitting in ICC cases, their nationality and their method of appointment for all cases registered as from 1 January 2016 as a way of promoting regional, generational and gender diversity in the appointment of arbitrators, but also to dispel the notion that international arbitration is only open to a select few.

Expedited Procedure Provisions

The EPP adopts a simplified procedure for the conduct of an ICC arbitration with a 20 percent decrease in the arbitrators' fees. The EPP's relevance cannot be understated, as a third of ICC cases registered in 2017 involved amounts in dispute below U.S. \$2 million.

This expedited procedure appearing under Article 30 of the ICC Rules as well as its Appendix VI is applicable to cases where (i) the arbitration agreement was concluded on or after 1 March 2017 and (ii) the amount in dispute does not exceed U.S. \$2 million. The EPP will not apply if the parties decide to opt out or the ICC Court, upon the request of a party before the constitution of the arbitral tribunal or on its own motion, determines that it is inappropriate in the circumstances to apply this procedure.

"One can surmise that increased efficiency also figures highly on the priority list of U.S. parties who are the most frequent users of ICC arbitration."

In such EPP cases, the court may appoint a sole arbitrator notwithstanding any contrary provision of the arbitration agreement. The EPP may also apply, irrespective of the above criteria if the parties have agreed to opt in.

The EPP notably eliminates the need to establish the Terms of Reference—an otherwise mandatory step and document whose purpose is to outline *inter alia* the parties' claims, prayers for relief and issues to be determined during the course of an ICC arbitration.

Instead, the EPP establishes that the arbitral tribunal must hold a case management conference within 15 days of the transmission of the file and render a reasoned final award within six months from that same case management conference.

This six-month time limit includes the time necessary for the ICC Court to scrutinize draft EPP awards, which happens as soon as possible, and in any event no later than two to three weeks of the Secretariat's receipt thereof. As such, all steps of the arbitration must be completed well before the expiry of the six-month time limit under the EPP.

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Under Article 3(4) of Appendix VI, “[t]he arbitral tribunal shall have discretion to adopt such procedural matters as it considers necessary.” While ensuring that each party has a reasonable opportunity to present its case, the arbitral tribunal in EPP cases is provided with greater procedural discretion empowering it to limit document production, the number, length and scope of submissions and witness evidence, and to decide the case based on documents only.

By the end of September 2018, the Secretariat received 111 requests to opt in to the EPP. Of those requests, the parties agreed in 25 cases, the ICC Court decided that the EPP shall apply in two cases, and the EPP applied automatically by operation of the Rules in six cases.

“Although still in its infancy, the EPP and its emerging data confirms that users are taking note of this new procedure and its application will gain further prominence as disputes post-dating the EPP’s entry into force are filed.”

In total, 33 cases were or had been conducted under the EPP involving 74 parties from 35 countries. In 10 of those cases, the proceedings reached a final award, among which eight concluded within the prescribed six-month time limit and two others slightly over such time limit.⁴

Although still in its infancy, the EPP and its emerging data confirms that users are taking note of this new procedure and its application will gain further prominence as disputes post-dating the EPP’s entry into force are filed, especially if current trends continue and one third of new cases filed annually remain around the U.S. \$2 million threshold.

Reduction of Arbitrators’ Fees

According to the 2018 QMUL and White & Case International Arbitration Survey, the high cost and perceived lack of speed are two of the worst features of international arbitration.⁵ Notwithstanding the obligations under Article 22 of the Rules that “[t]he arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute,” concerns about costs and speed persist.

As a means of addressing this concern and incentivizing arbitral tribunals to finalize their drafts in a timely manner, the ICC Court has established financial consequences for unjustified delays in submitting draft awards for scrutiny. Conversely, whenever the arbitral tribunal has conducted the arbitration expeditiously, the benefits thereof were also set out by possibly increasing the arbi-

trators’ fees above the amount that the Court would otherwise consider fixing.

Under the Note, three-member arbitral tribunals are expected to submit draft awards within three months after the last substantive hearing or, if later, the filing of the last written submissions (excluding cost submissions). This time frame is set at two months for sole arbitrators.

If a draft award is submitted beyond that timeframe, the court may lower the fees of arbitrators, unless it is satisfied that the delay is attributable to factors beyond the arbitrators’ control or to exceptional circumstances.⁶

The applicable reductions that the court may apply for awards submitted beyond the above time limit are as follows:

- A delay of up to seven months may incur a reduction in fees of 5 to 10 percent;
- A delay of up to 10 months may incur a reduction in fees of 10 to 20 percent; and
- A delay of more than 10 months may incur a reduction in fees of 20 percent or more.

In 2017, a total of 340 draft final awards were submitted for the court’s scrutiny.⁷

Approximately one-third of these drafts (114 draft final awards) were submitted after the expiry of the prescribed time frame of two or three months, 45 percent of which were submitted with a delay of more than two months.

The court reduced arbitrators’ fees in 40 percent of cases where a final award was submitted late, i.e., in 46 cases, and the fee reduction ranged between 5 percent and 30 percent.

Conversely, in approximately 60 percent of cases where draft final awards were submitted late, the court did not apply a reduction, as it considered that, in light of the circumstances of the matter, the delay was either minor or justified.⁸

A similar policy applies to EPP cases, except that the time limit for rendering the final award begins to run from the case management conference. Accordingly, if the draft award is submitted for scrutiny up to seven months thereafter, the fees may be reduced by 5 to 10 percent, up to 10 months thereafter the fees may be reduced by 10 to

20 percent and more than 10 months thereafter the fees may be reduced by 20 percent or more.

In an EPP case which concluded within six months and 21 days from the case management conference, the Court applied a 5 percent reduction to the sole arbitrator's fees due to the delay incurred.

It bears mentioning that the arbitral institution, and not only the arbitral tribunal, is also accountable for any delays. If delay in the scrutiny process is not attributable to exceptional circumstances beyond the court's control, the ICC administrative expenses will be reduced by up to 20 percent depending on the length of the delay.

In 2017, a 5 percent reduction to the ICC administrative expenses was applied in one case due to a one-and-a-half-week delay beyond the promised four-week time limit.⁹

Expeditious Determination of Manifestly Unmeritorious Claims or Defenses

Although the ability for the arbitral tribunal to dispose of unmeritorious claims is inherent in its mandate under Article 22 of the ICC Rules, the Note now provides specific guidance to parties and arbitral tribunals on how they may dispose of unmeritorious claims within the framework of ICC arbitration.

In particular, the Note states that:

any party may apply to the arbitral tribunal for the expeditious determination of one or more claims or defenses, on grounds that all such claims or defenses are manifestly devoid of merit or fall manifestly outside the arbitral tribunal's jurisdiction.

In other words, the Note may be seen as vesting the arbitral tribunal with express authority to entertain dispositive motions that may resemble those filed in U.S. litigation.

A party wishing to file an application for early disposition should do so as soon as practicable, as it should be evident upon receipt of the parties' submissions that the claims or defenses meet the threshold of "manifestly devoid of merit" or "manifestly outside the arbitral tribunal's jurisdiction."

Inherent in the arbitral tribunal's power to decide such applications is its discretion to decline to do so giv-

ing due regard to the circumstances of the case and in consideration of whether all parties have been afforded a fair opportunity to respond to the application. If the arbitral tribunal allows the application to proceed, it shall promptly adopt the procedural measures it considers appropriate, after consulting the parties. The arbitral tribunal may also determine that a hearing on this issue is appropriate.

The decision on the application may take the form of either order or an award. As with any award rendered pursuant to the ICC Rules, a decision dismissing the claims or defenses as manifestly unmeritorious shall take the form of an award, be reasoned and succinct, and must be scrutinized by the ICC Court. The ICC Court will strive to scrutinize the award within one week.

While not eliminating all delays, these measures provide a framework within which parties and arbitral tribunals may effectively control the time and costs of the arbitration, and give parties and arbitrators the tools required to streamline the arbitration process and encourage the early resolution of disputes. Although all delays cannot be completely eliminated, they may nevertheless be significantly curtailed which may aid in returning international arbitration's reputation to that of an efficient and cost-effective means of resolving disputes. The ICC Court is committed to remaining a leader in that regard.

Endnotes

1. 2018 International Arbitration Survey: The Evolution of International Arbitration conducted by the School of International Arbitration, Queen Mary University of London (QMUL), in partnership with White & Case: [http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-\(2\).PDF](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF).
2. See 2018 International Arbitration Survey: The Evolution of International Arbitration, at 38.
3. See ICC Dispute Resolution Bulletin, issue 2, 2018, *New Developments in 2017*, at 53. One hundred ninety-four parties from the U.S. representing 8.4 percent of all parties in ICC arbitrations in 2017.
4. See ICC Dispute Resolution Bulletin, issue 3, 2018, Mourre, Alexis, *Message from the President*, at 7.
5. See *id.*, at 2.
6. In the event that an arbitral tribunal is severely delayed in rendering the award, the court may also take other measures, such as replacing one or more of the arbitrators.
7. See *supra* note 4, at 6.
8. See *id.*
9. See *id.*

Modernizing ICSID's Dispute Settlement Rules

By Meg Kinnear, Secretary-General, ICSID

The procedural rules of the International Centre for Settlement of Investment Dispute (ICSID) have been applied to the majority of all known international investment disputes. Indeed, the success of the rules—together with world-class case-administration services and global facilities—is such that ICSID is virtually synonymous with investor-state dispute settlement (ISDS).

Over time, ICSID has continually improved its services, leveraging the best of modern technology and aligning with industry best practices. Periodically, ICSID has also updated its procedural rules for arbitration, conciliation and fact-finding. There have been three rounds of rule changes to date, the most recent of which entered into force in April 2006. Those amendments were innovative for their time and included strengthened disclosure requirements for arbitrators; expanded transparency provisions (including a provision allowing open hearings); and a new rule allowing early dismissal of a case due to manifest lack of legal merit.¹

"The amendment process has been grounded in extensive consultation with ICSID's 154 member states and the wider public."

In late 2016, ICSID advised member states it would embark on the fourth round of rule amendments, in what has become the most comprehensive review of the rules to date. Changes are under consideration for ICSID's rules for arbitration, conciliation and fact-finding under both the ICSID Convention and Additional Facility.² Also proposed are an entirely new set of rules for investor-state mediation, thereby expanding the overall set of dispute-settlement mechanisms offered by ICSID.

Extensive Input on the Rule Amendments

From the start, the amendment process has been grounded in extensive consultation with ICSID's 154 member states and the wider public. An initial round of input was intended to generate ideas on the types of rule changes that should be considered. The comments received touched on a wide range of topics, including third-party funding, transparency and the processes for selecting and disqualifying arbitrators. Many users of the ICSID system also asked that ICSID address the cost and duration of investment proceedings. In addition, the ICSID secretariat added numerous ideas based on its extensive practice.

Unveiling the Proposed New Rules

This input fed into a working paper published in August 2018,³ which presents the proposed draft rules in full. ICSID consulted with states and the public on the proposals throughout the second half of 2018 and early 2019, and the working paper was subsequently updated in March 2019 based on the comments received. Overall, the proposals are extensive and far too detailed to summarize here. However, some of the highlights include:

- *Transparency*—All Convention awards would be published with consent of the parties. If a party objects to publication, the proposed rules permit ICSID to publish legal excerpts of the award, with an established process and timeline to do so. In addition, all orders and decisions in ICSID Convention proceedings, and all orders, decisions and awards under the Additional Facility, would be published, with provision to redact confidential information from these documents. The result would be to provide the public with greater access to procedural and substantive decisions.
- *Third-Party Funding*—Parties would be obliged to disclose whether they have third-party funding, and if so, the name of the funder. This information will be provided to potential arbitrators prior to appointment to avoid inadvertent conflicts of interest.
- *Security for Costs*—A new stand-alone rule would allow a tribunal to order security for costs. The rule states that in exercising its discretion to order security for costs, the tribunal must consider the relevant party's ability to comply with an adverse decision on costs, the effect that providing security may have on a party's ability to pursue its claim, and any other relevant circumstances.
- *Initial Procedures*—An express rule is proposed for bifurcation of proceedings and for bifurcation of preliminary objections.
- *Disqualification of Arbitrators*—The process for challenging arbitrators has been revised, including the introduction of an expedited schedule for parties to file a challenge and a requirement to challenge

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within 21 days after a party knows or should have known the facts relevant to the disqualification. An enhanced declaration of independence and impartiality is also proposed for arbitrators.

- *Timeliness of Decisions, Orders and Awards*—New timelines are proposed for issuing decisions, orders and awards. Most procedural orders and decisions, such as a decision on provisional measures, must be issued within 30 days after the last submission. Awards must be rendered within 60 days after the last submission on an application

investors to provide greater mediation capacity, and more generally, to offer parties a greater breadth of dispute resolution tools. They also complement the trend amongst states of including mediation in investment treaties, either as a pre-condition to arbitration or in parallel with other dispute settlement mechanisms. The mediation rules have been designed to align with the Draft Singapore Mediation Convention, which will open for signature in 2019.⁴ This Convention facilitates the enforcement of international settlement agreements arising from mediation, including in the sphere of investor-state mediation.

“ICSID has striven to continually improve its services, leveraging the best of modern technology and aligning with industry best practices.”

for manifest lack of legal merit, 180 days after the last submission on a preliminary objection if it has been bifurcated, and 240 days after the last submission on all other matters.

- *Other Time and Cost Reduction Measures*—Tribunals are given various tools to conduct the proceeding in an expeditious and cost-effective manner. Among other things, the tribunal may convene a case management conference to identify uncontested facts, narrow the issues in dispute, or address any other procedural or substantive matter. A further measure that will reduce costs is that all filings will be made electronically without any paper copies. In addition, an optional “expedited arbitration” process is available.
- *Expanded Access to the Additional Facility*—The proposed rules extend the availability of Additional Facility (AF) arbitration and conciliation rules to cases where neither the claimant nor respondent are ICSID Contracting States or nationals of a Contracting State. The proposed Additional Facility rules also provide regional economic integration organizations with access to AF dispute settlement, reflecting the fact that increasingly States are negotiating investment agreements as regional entities.

As noted above, ICSID has also proposed new rules for mediation. This responds to requests by states and

Next Steps in the Amendment Process

ICSID continues to consult with states and the public on the proposals, with the goal of presenting a package of amendments for a vote by the membership in the fall of 2019 or 2020.

Changes to the ICSID Regulations and Rules require two-thirds approval of the membership, and the Additional Facility Rules need a simple majority. Once adopted, the amended rules will apply to all cases based on consent given after the new rules are brought into force, thereby having an immediate impact on the conduct of investor-state dispute settlement procedures.

Endnotes

1. The ICSID Additional Facility was created on September 27, 1978. It offers arbitration, conciliation, and fact-finding services for certain disputes that fall outside the scope of the ICSID Convention.
2. Arbitration Rule 41(5), and Article 45(6) of the Arbitration (Additional Facility) Rules.
3. In addition to the *Working Paper on Proposals for Amendment of the ICSID Rules*, ICSID has also released a synopsis of the proposed rule changes in English, French, Spanish, Chinese, Russian and Arabic. The consolidated draft rules are also available separately in English, French and Spanish. All materials related to the rule amendment project are available at <https://icsid.worldbank.org/en/Amendments>
4. The United Nations Commission on International Trade Law approved the final draft of the Singapore Mediation Convention on June 26, 2018. A signing ceremony is planned for August 1, 2019, and the Convention will come into force once it is ratified by at least three UN member states.

The Future Is Now: New 2019 CPR Arbitration Rules Incorporate Best Practices for Fast and Efficient Administered Arbitrations

By Olivier P. André and Kenneth B. Reisenfeld

On March 1, 2019, the International Institute for Conflict Prevention & Resolution (CPR) released significant updates to its 2013 CPR Rules for Administered Arbitration and its 2014 CPR Rules for Administered Arbitration of International Disputes.¹ While CPR may be best known for its rules for non-administered or *ad hoc* arbitrations, CPR began offering administered arbitration services five years ago. The just-released 2019 Administered Arbitration Rules not only incorporate innovations from its 2018 Non-Administered Arbitration Rules,² but also feature best practices from arbitral institutions and case developments around the world. This article will focus on four notable improvements to enhance speed and efficiency and three innovations to further protect the security, integrity and long-term viability of CPR administered arbitrations.

A. Improvements to Enhance Speed and Efficiency

Users of arbitral services have made clear their desire for efficient, cost-effective and fair resolution of commercial disputes. The 2019 International Administered Rules offer new tools to satisfy these concerns, including the following innovations:

- *Sole arbitrator*: establish a \$3 million monetary threshold for appointment of a three-arbitrator Tribunal, absent the parties' agreement on the number of arbitrators or CPR's decision based upon complexity or other considerations;
- *Early Disposition*: provide express authority and a defined process for responding to requests for early disposition of claims, counterclaims, defenses and other issues;
- *Settlement or Concurrent Mediation*: provide express authorization for the Tribunal to inquire about settlement and for CPR to contact the parties about potential mediation opportunities at any point during the arbitration;
- *Expected Completion Deadlines*: clarify that the parties, Tribunal and CPR shall use their "best efforts" to complete the oral and written submissions of a case within nine (9) months after the initial pre-hearing conference and issue the final award in most circumstances within two (2) months after the close of the proceedings;³ and

- *Emergency Arbitrators*: rename its "special arbitrators" as "emergency arbitrators" in conformity with broader practice developments since CPR first introduced this category of arbitrator in its 2007 Rules for Non-Administered Arbitration and consistent with an emphasis on the required urgency necessary to support an application to appoint an emergency arbitrator and to adopt emergency measures of protection.⁴

This article will discuss only the first three developments, although these changes, in their totality, could significantly enhance the speed and efficiency of CPR-administered arbitrations.

1. Higher Threshold for Appointment of Three-Arbitrator Tribunal

The number of arbitrators forming the Tribunal can have a significant impact on the cost and scheduling of an arbitration. While parties are encouraged to agree upon the number of arbitrators and the selection process in their arbitration agreement, if the number is not agreed, under the 2019 International Administered Rules the Tribunal will consist of a sole arbitrator if the stated claims or counterclaims do not exceed \$3 million. CPR retains discretion to appoint three arbitrators even for lower valued cases if the complexity of the case or other considerations so warrant. The higher monetary threshold for three-arbitrator cases is designed to decrease costs and shorten time schedules for smaller disputes.⁵

2. Early Disposition of Issues

In 2011, CPR issued its *Guidelines on Early Disposition of Issues in Arbitration*.⁶ The *Guidelines* are intended to streamline the dispute resolution process by narrowing, sequencing and, where appropriate, disposing of claims,

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counterclaims, defenses or factual or legal questions at an early stage. Early disposition is thought to be appropriate for issues such as jurisdiction and standing, claims or legal theories of recovery, defenses or limitations on damages where a prompt, early review could lead to significant efficiencies or winnowing out of issues, but not delay the ultimate disposition of the case.⁷ The *Guidelines* are “designed to strike a balance between, on the one hand, eliminating early on claims that do not justify full-blown hearings and, on the other hand, not providing encouragement to non-meritorious applications for early disposition.”⁸

The subject of early disposition has generated lively discussions in the arbitral community, including raising questions whether a tribunal has inherent authority to dispose of issues early in a proceeding and whether providing explicitly for such a procedure might result in more applications, unnecessary additional expense and delays and open up opportunities for tactical abuse. Since the *Guidelines* were first issued, several arbitration institutions have adopted rules on early disposition. The Stockholm Chamber of Commerce (SCC), for example, adopted a “summary procedure” in its 2017 Arbitration Rules⁹ and the Singapore International Arbitration Centre (SIAC) added a narrower rule in 2016 permitting early dismissal of claims or defenses.¹⁰

The 2019 International Administered Rules take the *Guidelines* approach one step further. In new Rule 9.3.b, the parties and Tribunal are encouraged during the initial pre-hearing conference to address the possibilities for early identification and narrowing of the issues in the arbitration, including the possibility of scheduling briefing(s) and hearing(s) to allow early disposition of any claims, counterclaims, defenses or other legal and factual questions in furtherance of the principles described in the *Guidelines* and in new Rule 12.6.¹¹ New Rule 12.6 expressly affirms the Tribunal’s authority to structure the arbitration to advance efficient resolution of the overall dispute, with due recognition of its responsibility to provide “each party a fair opportunity to present its case and accord[] the parties equality of treatment.”¹²

Rule 12.6 establishes a process for a party to file a preliminary application to the Tribunal if it wants to file a motion for early disposition of issues. The preliminary application must identify (i) the issue(s) to be resolved; (ii) the basis for the proposed motion and relief requested; (iii) how early disposition of the issue(s) “will advance efficient resolution of the overall dispute”; and (iv) the applicant’s proposal as to the procedure for resolving the motion.¹³ The Tribunal will then promptly review the application and determine:

whether there is a reasonable likelihood that hearing the motion for early disposition may result in increased efficiency in

resolving the overall dispute while not unduly delaying the rendering of a final award.¹⁴

The Tribunal will decide the motion expeditiously (generally within 60 days). To deter possible tactical abuse, the Tribunal is expressly authorized to apportion the costs of early disposition proceedings.¹⁵

CPR’s explicit grant of authority to the Tribunal and adoption of an expedited process for disposing of requests for early disposition are designed to enhance the overall efficiency and cost-effectiveness of proceedings, while simultaneously discouraging dilatory or obstructionist conduct.

3. Expanded Opportunities for Settlement or Mediation

Tiered dispute resolution clauses typically establish a set sequence for resolving disputes: first, negotiation with senior managers, then mediation and if not settled, final resolution through binding arbitration. This inflexible step-by-step process may or may not yield a meaningful opportunity for settlement. In practice, many disputes require exchanges of claims and defenses by counsel, disclosures by the parties or development of the evidentiary record before the parties are sufficiently prepared to entertain serious settlement discussions. The 2019 International Administered Rules, like their 2014 predecessor rules, recognize this practical reality by expressly authorizing a Tribunal (1) to inquire at the initial pre-hearing conference whether the parties have engaged in settlement negotiations¹⁶ and, if appropriate, (2) to suggest to the parties “at such times as the Tribunal may deem appropriate” that the parties might want to explore settlement.¹⁷

The 2019 International Administered Rules introduce additional new mechanisms to encourage amicable resolution of the dispute. New Rule 21.3 provides that “at any point in the proceeding,” CPR *sua sponte* may invite the parties to mediate under the CPR International Mediation Procedure¹⁸ or under any mediation procedure acceptable to the parties.¹⁹ In order not to delay the arbitration, “[a]ny such mediation shall take place concurrently with the arbitration.”²⁰ In addition, the Tribunal is encouraged to raise at the initial pre-hearing conference not only whether the parties have engaged in settlement negotiations, but also whether they would like to set a date in the procedural timetable when CPR would query the parties as to their desire to mediate the dispute.²¹ By putting a firm date on the calendar for the CPR case manager to contact the parties about potential mediation—perhaps, for example, immediately after the exchange of pleadings or disclosures—the parties might be prompted to revisit whether the dispute can be settled with or without the assistance of a mediator.

B. Innovations to Protect the Integrity of the Proceeding and Promote Development of Less Experienced Practitioners

The 2019 Administered Rules incorporate three innovative features to protect the integrity and security of CPR administered proceedings and to support development of the next generation of arbitration counsel.

1. Screened Selection of Party-Designated Arbitrators Is Now the Default Procedure

The 2019 International Administered Rules provide that where a Tribunal is to consist of three arbitrators, a “screened selection” procedure will be used to select the arbitrators absent the parties’ agreement on a different procedure.²² “Screened selection” permits each party to nominate an arbitrator, but the process hides from the appointed arbitrators the identity of the party that has nominated each of them. This form of “blind” appointment is thought to protect against any inherent bias or favoritism toward a party if the arbitrator were informed of the nominating party.²³

2. Discretion to Permit Junior Lawyers to Examine Witnesses and Present Argument

New Rule 12.5 authorizes a Tribunal, in its discretion, to encourage lead counsel to permit more junior lawyers “with significantly less arbitration experience” to examine witnesses at a hearing and to present argument under the supervision and with the assistance and support of lead counsel. The rule expressly leaves the ultimate decision of who speaks on behalf of a party to that party and its counsel. The goal is to facilitate the development of the next generation of arbitration lawyers. This feature was embodied in the 2018 Non-Administered Rules and was nominated for “Best Innovation” for the 2018 GAR Awards.

3. Steps to Address Cybersecurity

Carrying forward an innovation first introduced in the 2018 Non-Administered Rules, Rule 9.3.f identifies and encourages discussion during the initial pre-hearing conference of cybersecurity threats and measures, if any, to be adopted by counsel, the parties and Tribunal for the protection of information exchanged or stored during an arbitration.²⁴ Careful attention to these security measures is increasingly critical to preservation of the integrity of the arbitration.²⁵

C. Conclusion

The 2019 International Administered Rules carry forward the innovations of the 2018 Non-Administered Rules. The new rules also introduce several new features enhancing the speed, efficiency and integrity of CPR administered arbitrations. These features reflect and will contribute to best practices around the world.

Endnotes

1. With release of the new 2019 rules, CPR now offers the following four sets of arbitration rules: 2018 Rules for Non-Administered Arbitration (March 1, 2018); 2018 Rules for Non-Administered Arbitration of International Disputes (March 1, 2018) (hereinafter “2018 Non-Administered Rules”); 2019 Rules for Administered Arbitration (March 1, 2019); and the set reviewed in this article, 2019 Rules for Administered Arbitration of International Disputes (March 1, 2019) (hereinafter “2019 International Administered Rules”). CPR’s rules are accessible at <https://www.cpradr.org/resource-center/rules/arbitration>. To account for the legal, cultural and linguistic differences that may distinguish arbitration of an international dispute, CPR has promulgated separate sets of rules for domestic and international disputes. Where parties have provided for CPR arbitration generally without specifying which set of CPR rules would apply, the International Administered Rules would apply “where the parties reside in different countries or where the contract involves property or calls for performance in a country other than the parties’ country of residence.” 2019 International Administered Rules at Rule 1.1. CPR makes the final decision as to which set of CPR rules apply. This article will focus on the 2019 International Administered Arbitration Rules, but we note that there are only small differences between the domestic and international sets of administered rules, none of which implicates the features addressed in this article.
2. CPR Rules for Non-Administered Arbitration of International Disputes (2018), <https://www.cpradr.org/resource-center/rules/international-other/arbitration/2018-International-Non-Administered-Arbitration-Rules>.
3. Rule 15.8. All citations reference the 2019 International Administered Rules, unless otherwise stated.
4. The 2007 CPR Rules for Non-Administered Arbitration were among the first rules to provide for appointment of a special arbitrator to consider applications for interim relief before the constitution of a Tribunal. To conform with subsequent usage and practice, Rule 14 of the 2019 International Administered Rules now substitutes the term “emergency arbitrator” for “special arbitrator” and “emergency measures” for “interim measures.”
5. CPR has issued Fast Track rules for non-administered arbitrations. <https://www.cpradr.org/resource-center/rules/arbitration/fast-track-rules-of-procedure>.
6. <https://www.cpradr.org/resource-center/protocols-guidelines/guidelines-on-early-disposition-of-issues-in-arbitration>.
7. Guidelines at ¶ 2.3.
8. *Id.* at Introduction.
9. Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (2017), Article 39.
10. Arbitration Rules of the Singapore International Arbitration Centre (2016), Rule 29.
11. Rule 9.3.b.
12. Rule 9.1.
13. Rule 12.6.b.
14. Rule 12.6.c.
15. Rule 12.6.f.
16. Rule 9.3.e.
17. Rule 21.1.
18. <https://www.cpradr.org/resource-center/rules/international-other/mediation/cpr-international-mediation-procedure>.
19. Rule 21.3.
20. *Id.*

21. Rule 9.3.e.
22. Rules 5.1.c and 5.4.
23. This procedure was incorporated as an option in the 2014 Non-Administered Rules. The 2019 International Administered Rules make “screened selection” the default selection process for a panel of three arbitrators unless the parties agree otherwise. CPR’s screened selection process was awarded the Global Arbitration Review (GAR) Award for “Best Innovation” in 2016.
24. Rule 9.3.f.
25. The launch of a Working Group on Cybersecurity in International Arbitration jointly formed by the International Council on Commercial Arbitration (ICCA), the International Institute for Conflict Prevention & Resolution (CPR) and the New York City Bar Association received the GAR Award for Best Development in 2018. In April 2018, the Working Group released a draft set of principles to guide parties in an arbitration to assess cybersecurity risks and to adopt, if necessary, cybersecurity measures to protect the information exchanged in the arbitration. See <https://www.arbitration-icca.org/projects/Cybersecurity-in-International-Arbitration.html>.

Welcome New Dispute Resolution Section Members

The following members joined the Section between November 1, 2018 and February 25, 2019:

FIRST DISTRICT

Hon. Richard T. Andrias
 Peter A. Bellacosa
 Robert M. Brill
 Norman Feit
 Anna Pia Felix
 Jonathan Honig
 Robert J. Jossen
 Alexa Lauren Klein
 Leona Krasner
 Luis Manuel Martinez
 Carter Michael Nelson
 Miles Douglas Orton
 Prof. Mark R. Patterson
 Barry J. Peek
 Jill Pilgrim
 Thomas A. Rawlinson Esq.
 Robert L. Savino
 Ailie L. Silbert
 Michael B. Smith
 Frank T. Spano
 Tina L. Stark
 Marc H. Supcoff
 Anastasia Sarantos Taskin
 Bryana L. Turner
 Mira B. Weiss
 L.B. Wright
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SECOND DISTRICT

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 Eric Shawn Landau
 Susan J. Panepento
 Stephanie C. Seto
 Giulio Zanolla

THIRD DISTRICT

Gary S. Bowitch
 Matthew Capezzuto
 Daniel W. Coffey

Kristina Maldonado
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Gregory Michael Brown
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SEVENTH DISTRICT

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ELEVENTH DISTRICT

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TWELFTH DISTRICT

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OUT OF STATE

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 Sara Rosano
 Dave Singh
 Thomas W. Snook
 Eric M. Tant
 Tirza S. Wahrman
 Mia Yugo
 Seokchun Yun
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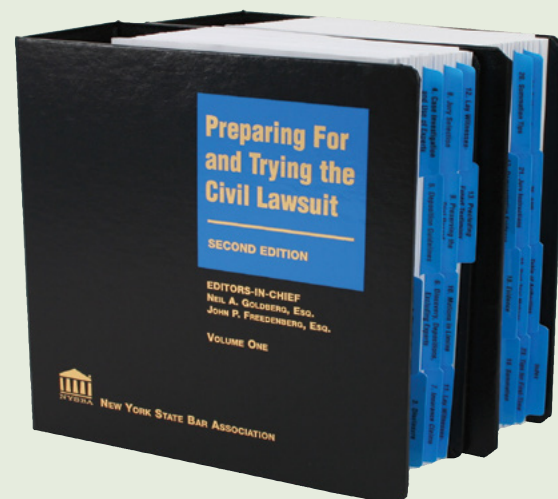
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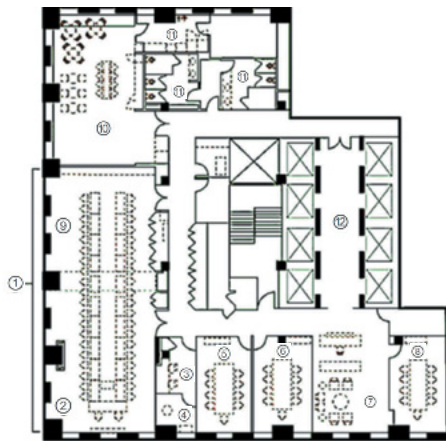
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