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New York Dispute Resolution Lawyer

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

Message from the Chair


John Wilkinson

The most significant occurrence in New York this year with respect to dispute resolution was the exciting opening of the New York International Arbitration Center ("NYIAC") in New York City. I am proud to say that working in conjunction with Judith Kaye, our Section played a leading role in helping NYIAC become a reality.

NYIAC is a nonprofit organization whose purpose is to promote the conduct of international arbitration in New York. Among other things: (i) it offers world class hearing rooms, breakout rooms and state of the art technology for international arbitrations and mediations of any size; (ii) it develops programs and materials which underscore the reasons why New York is the ideal site for international arbitration; and (iii) it sponsors and organizes important dialogue, discussion and constructive debate directed to international arbitration in New York.

New York has always been a prime site for international arbitration. Recently, however, New York's position has been challenged by highly competitive efforts in foreign countries to attract international arbitration by building physical arbitration facilities. With the opening of NYIAC, New York has once again leaped to the front of the pack as the premier site for international arbitration.

Our Section worked long and hard against difficult odds to help bring NYIAC into existence. Many of us were involved, but special credits go (in alphabetical order) to Sherman Kahn, Richard Mattiaccio, Rona Shamoon and Edna Sussman and to the NYSBA International Section. The physical space was graciously made available on a sublet basis by the American Arbitration Association as it moved into its new offices midtown. We look forward to working with NYIAC in developing its relationships with all of the New York-based providers of arbitration services, including the AAA, ICDR, ICC, CPR and JAMS, as well as institutional providers from other jurisdictions.

Now that NYIAC is open and operating, our Section continues to play an instrumental role. Three members of our Executive Committee, including Richard Silberberg, serve on the NYIAC Board; Edna Sussman is Vice Chair/Director of NYIAC and serves with Judith Kaye as Co-Chair of the Search Committee; and Richard Mattiaccio is Chair of the Contracts Committee.

Much of our Section's focus will continue to be on NYIAC, and we expect a mutually beneficial relationship for many years to come. On June 20 of this year, for example, our Executive Committee unanimously approved an unprecedented gift of $30,000 to NYIAC. That gift from our Section has been approved by the Finance Committee and the Executive Committee of the NYSBA. And on

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Message from the Co-Editors-in-Chief


Edna Sussman

We are at the beginning of our sixth year as a Section. We have been fortunate to have extraordinary leadership in those years: Simeon Baum, Jonathan Honig, Edna Sussman, Rona Shamoon, and now John Wilkinson. All of our past Chairs have remained active contributors to the Section. Edna, as the creator and one of the Co-Editors-in-Chief of this Journal, has been a steady presence with high energy and great vision. But the work on this *Journal* is very demanding and Edna and I are thrilled to welcome another Section stalwart to share our editorial work. Sherman Kahn has actually been with us from the start, someone we could rely upon for the now annual survey of Supreme Court arbitration cases and to whom we regularly turned for special projects.

We hope you have been able to routinely find items of interest to you among our very wide ranging selections and that together the three of us and all our wonderful contributors can continue to bring you interesting and innovative developments in the ADR world.

Dispute Resolution Section News

In this issue we note that the AAA has issued amended commercial arbitration rules, which we will address in future issues. We also report on the development of the New York International Arbitration Center in which our Section has been instrumental. David Singer describes the developments spearheaded by our Section on the development of court-annexed mediation. Alexandra Dosman tells us about the purpose of NYIAC in supporting and promoting to support New York as a preferred venue for international arbitration. Edna Sussman is interviewed about the benefits of using NYIAC and New York for arbitrations.

We also report on our wonderful and successful trainings.

Ethics

We are very proud of Elayne Greenberg's ongoing column, the Ethical Compass. It raises interesting and important issues to challenge all of us to remain sensitive to the ethical grounding of our ADR work. In this issue's column, Elayne focuses on ADR advocacy and the ethical underpinnings of negotiating for a client. Elayne uses the well-known "Sally Soprano" training video as a jumping-off point for her provocative analysis.

Ombuds


Laura A. Kaster

Dispute resolution is a field that can include many modalities and creative concepts. One we have not previously examined here is the role of the Ombudsman or Ombuds in resolving internal corporate, governmental, organization and association disputes before they blossom into formal cases or claims. What does it mean to be an Ombuds? What tools are used and how to they relate to mediative skills and requirements? In this issue we have three articles introducing us to this ADR role and its work and to several practicing Ombuds, who all think they have landed the best job in the world.

Arbitration

Our annual review by Sherman Kahn provides insight to the unstoppable pro-arbitration march of the Supreme Court. Abigail Pessen provides an interesting take on revisiting and employing a tailored Federal Rule of Civil Procedure 68 in arbitration. Olivier André tells us about the expansion of CPR into the field of administered arbitration and the rules they have recently issued. Harold Coleman Jr. describes the workings of the new Mediation.org, launched by the AAA.

Mediation

In recent years our annual meeting and the ABA annual meeting have had numerous offerings on decision-making and neuroscience. In this issue Pauline Tesler and our own Norman Solovay ask the important question: Is Neuro-Literacy Optional any more. Perhaps this arena will soon find itself on the pages of the Ethical Compass.

International

Giuseppe De Palo, President of ADR Center, member of JAMS International in Rome, Italy, brings us very interesting information about the ups and downs of mandatory arbitration in Italy and the economic consequences of early case resolutions there.

Our former Chair, Edna Sussman, reports on the background and likely impact on counsel conduct of the recently issued International Bar Association Guidelines on Party Representation in International Arbitration.

Book Reviews

Our former Chair, Simeon Baum, reviews the massive Third Edition of Robert Haig's *Commercial Litigation*

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(Laura A. Kaster)

the same day it made the gift to NYIAC, our Executive Committee also approved a new standing committee (the International Dispute Resolution Committee), which will be taking on a number of important projects, one of which will be to work as closely as possible with NYIAC in many different areas. That Committee will be co-chaired by Richard Mattiaccio and John Fellas.[1]

While NYIAC has certainly been front and center for our Section for some time, our wonderful committees have been hard at work in many other areas. I can't possibly mention all such committees or all such projects in this limited space, but set forth below are some of the highlights.

The ADR in the Courts Committee (co-chaired by Steve Hochman and Bob Rubin) has devoted great effort to establishing and improving court-annexed mediation programs in New York's State and Federal courts. It has developed strong lines of communication with high-ranking people in the court system who are in a position to approve and implement important recommendations of the Committee. The Committee has worked effectively to increase the number of cases sent to mediation by the courts and to educate members of the bar and judiciary as to the advantages of mediation and other ADR processes.

The Arbitration Committee (co-chaired by Abigail Pessen and Jim Rhodes) has sponsored many wonderful CLE programs designed to dispel negative myths about arbitration and to educate advocates and arbitrators about how to increase the efficiency and cost effectiveness of the arbitration process. In addition, the Committee has drafted Guidelines for the Efficient Conduct of both Domestic and International Arbitration in the Pre-Hearing Phase. Both of these sets of Guidelines were adopted by the NYSBA's House of Delegates and, thus, have become statements of policy of the NYSBA. In addition, the Committee (under the leadership of John Fellas) developed a wonderful, eye-catching booklet on *Why Choose New York for International Arbitration*. These booklets have been widely distributed around the world to a point where we are just about ready for a minor update and a second printing.

At its monthly meetings, the Mediation Committee (co-chaired by David Singer and Irene Warshauer) has featured excellent speakers with diverse mediation expertise who have led discussions which were always interesting and sometimes contentious in the best sense. The Committee also issued an important report on Accreditation of Mediators, and most recently, it worked with the ADR in the Courts Committee to issue "Recommendations for the Adoption of Court-Annexed Mediation Throughout the Courts of New York State." We anticipate that these Recommendations will mark a major step forward in establishing court-mandated mediation throughout the New York court system.

In June of this year, we formed a Trusts & Estates Subcommittee of the Mediation Committee. While the Section does not normally create practice-specific subcommittees, the need to depart from that rule of thumb became apparent last year when Leona Beane organized and implemented a robustly attended and highly acclaimed program on Trusts & Estates Mediation. Based on interviews with attendees and other input, we believe that Leona's subcommittee will generate a significant number of new members of our Section and will play a pivotal overall role in the Section going forward.

The Diversity Committee (co-chaired by Alfreida Kenny and Carolyn Hansen) has worked tirelessly to increase diversity throughout the dispute resolution community in New York State. In furtherance of this goal, it reached out to and worked with minority bar associations to implement major, highly attended programs to promote diversity in the dispute resolution field. Among other things, the Committee has succeeded in greatly increasing diversity in our Section, both as to members, as well as officers, co-chairs and members of the Executive Committee. I'm proud to say that all this hard work was recently recognized when the NYSBA named our Section "2013 Diversity Challenge, Section Diversity Champion." In addition to the current chairs, Dan Kolb and Rick Weil deserve great credit for the stunning success of the Diversity Committee.

The Legislation Committee (co-chaired by Kathleen Scanlon and Geraldine Reed Brown) has repeatedly and effectively voiced opposition to bills in the New York legislature that would be contrary to the interests of the dispute resolution community. So far, no bill the Committee has opposed has been enacted into law.

The Education Committee (chaired by Jackie Nolan Haley of Fordham Law School) has worked long hours to expand the teaching of arbitration and mediation in New York law schools. Clearly, if the teaching of ADR is increased, the use of ADR by practicing attorneys will increase commensurately. This year, the Committee authored a widely acclaimed paper stating reasons why state bar exam questions related to ADR should be expanded and directed solely to ADR.

The CLE Committee (co-chaired by Gail Davis and Elizabeth Shampnoi) again organized and implemented wonderful fall and annual meetings which were heavily attended and featured carefully selected programs in areas of immediate interest to the ADR community. Among many other things, the co-chairs get great credit for the diversity of attendees and panelists and for reaching out to upstate New York in connection with planning their panels of experts. In addition, the Section planned and implemented a wonderful program in Buffalo this year. It was enthusiastically embraced by upstate New York and was a great success in terms of attendance, topics of

great interest and quality of panelists. Rona Shamoon and Marc Goldstein get much credit for conceiving and implementing this effort.

The Section also held two large and well attended Section meetings consisting of a five-day mediation training program (headed by Simeon Baum and Steve Hochman) and a three-day arbitration training program (headed by Charlie Moxley and Edna Sussman). The feedback on these programs was just "through the roof." Special thanks to Simeon, Steve, Charlie and Edna for all they did to make these Section meetings possible and so highly successful.

The Website Committee (co-chaired by Leona Beane and Alexander Walden) holds great promise for the coming year. Alexander is an associate at Bryan Cave and is truly a website expert. We are so excited about Alexander's commitment (along with Leona's) to bring real improvement to the Section's website this year. On a related topic, Gerry Krauss (our Blogmaster) has created a blog for the Section which is simply beyond compare. You can get there by going to the NYSBA's website and clicking on "blogs" on the left hand side of the page. We encourage everyone to visit our blog because if you do so, you will be in for a real treat.

The New Lawyers and Students Committee (chaired by Asari Aniagolu and Ross Kartez) is one of our most energetic, motivated committees. Last year, it organized and implemented a hugely attended reception for New York law students at which the students networked with Section members and then heard presentations from Section members about a career in dispute resolution. Currently, the Committee is planning a unique and interesting type of arbitration competition which will be a two day event and will feature teams from most if not all of the law schools in New York State.

The Section's future health and vitality rests totally in the hands of the Membership Committee, co-chaired by Rick Weil, Rich Silberberg and Eridania Perez. There is no question that our membership numbers have been challenged during the sluggish economy of the past four years. In response, the Membership Committee has developed a marketing plan for the Section which would be the envy of any Fortune 500 company. And happily, this effort is resulting in some recent success. Much remains to be done, however, in implementing this plan and in taking other steps to increase membership. This will be one of the Section's highest priorities in the coming year.

The Publications Committee is co-chaired by Edna Sussman and Laura Kaster and due to the immense amount of work involved, we just added Sherman Kahn as a third co-chair and Rona Shamoon as an editor for the coming year. Nothing need be said here about the Section's publications because you are at the start of one of them right now and if you just spend some time turning pages and digesting the wonderful content, you will quickly see that the Publications Committee generates first rate articles on cutting edge topics and is one of the prime reasons for the interest of so many in our Section.

* * * *

Well, that's about it for now. Thanks to the great efforts of so many, we are looking forward to a most exciting year at the Dispute Resolution Section.

John Wilkinson

Endnote

1. When we formed the International Dispute Resolution Committee, we also created an International Mediation Subcommittee of the International Dispute Resolution Committee and the Mediation Committee. That subcommittee will be chaired by Carolyn Hansen.

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

in New York State Courts and points us to the portions of most import to the ADR world.

Our excellent regular book reviewer Stefan Kalina reviews *Outsourcing Justice: The Rise of Modern Arbitration Laws in America* by Imre Szalai which tracks the development of arbitration in the U.S. and examines whether it has moved beyond its intended applications. Stefan reports that he thoroughly enjoyed the book.

Case Notes

This month's New York cases focus on the power of arbitrators to manage, sanction, and grant interest and the limited authority of the courts under FAA Section 10(a)(3). They should be of interest to advocates and neutrals.

We also report on a recent New Jersey Supreme Court decision dealing with mediation confidentiality and the new rule the Court established requiring a written agreement to avoid any need to violate mediation confidentiality.

Edna Sussman, Laura A. Kaster and Sherman W. Kahn

The New AAA Commercial Arbitration Rules

The AAA (American Arbitration Association) has just issued amended commercial arbitration rules effective October 1, 2013. There are a number of important changes and the AAA Website has a helpful summary. The revisions include:

- a mediation step for all cases with claims of $75,000 or more (subject to the ability of any party to opt-out)
- arbitral control over information exchange (discovery)
- the availability of emergency measures of protection
- access to dispositive motions
- new preliminary hearing rules as well as remedies and sanctions for non-compliance

We will address individual Rules in future issues.

You can check out the new rules at www.ADR.org.

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The Dispute Resolution Section Adopts Recommendations for Court-Annexed Mediation in New York State

By David C. Singer

A subcommittee of the Mediation and ADR in the Courts Committees was established in 2012 to assess and make recommendations regarding the desirability of establishing court-annexed mediation in the New York State courts. The subcommittee met and ultimately issued Recommendations.

Essentially, the Recommendations include that each court in New York State Court (civil) devise and adopt a court-annexed mediation program, which can be implemented on a non-mandatory basis and at no cost to the court (thereby requiring no personnel to administer the program). Those courts that already have court-annexed mediation programs need not devise new programs.

The Recommendations were presented to the Executive Committee of the DRS at its July 11, 2013 meeting and adopted by the EC at such meeting.

The Recommendations are set forth in full as follows:

DISPUTE RESOLUTION SECTION
NEW YORK STATE BAR ASSOCIATION

RECOMMENDATIONS FOR THE ADOPTION OF COURT-ANNEXED MEDIATION THROUGHOUT THE COURTS OF NEW YORK STATE (CIVIL)

I. Introduction

Disputes arise across a broad spectrum of relationships and substantive areas of the law. Alternatives to litigation may best serve client needs for resolving many of these disputes. Litigation can become a lengthy, stressful and expensive proposition. As some disputes will invariably arise, lawyers seeking to best serve their clients must consider other forms of dispute resolution as an alternative to traditional litigation. Mediation is often responsive to party needs in a way that is not possible in a court proceeding.

Mediation has applicability in a variety of substantive practice areas of law. It has become common in the resolution of commercial and non-commercial disputes between and among business entities and/or individuals. Mediation is routinely incorporated into contract dispute resolution clauses as a method of choice for resolving disputes that may arise in the future. Even in the absence of such clauses, mediation is routinely used after problems arise and the parties are seeking an appropriate means to resolve their disputes.

Some judges have the authority to order the parties to mediation, such as New York judges in the Matrimonial Parts and Commercial Divisions of the Supreme Court of New York County and other counties. In addition, many judges who recognize how the parties can benefit from the early settlement of cases will suggest that the parties try mediation even in the absence of a court rule authorizing the judges to order mediation.

A court-annexed mediation program provides an invaluable resource for courts, helping alleviate the burden of reduced resources and the backlog of cases. Some courts in New York State have already adopted court-annexed mediation programs, and those courts are listed in the New York State Court System website.

The Recommendations set forth herein include that each New York State Court (Civil) adopt an appropriate court-annexed mediation program available to litigants on a voluntary basis or as may be directed by the court. Such programs may be adopted at no cost and, therefore, no additional funding would be required.

II. The Benefits of Mediation

Mediation Works. Mediation is a confidential process in which the parties engage a neutral third person to work with them to resolve their dispute. The growth of mediation over the past twenty years has been exponential, a tribute to the success of the process. User satisfaction is high as parties retain control and tailor their own solutions in a less confrontational setting that can preserve relationships and result in a win/win instead of a win/lose. Any case that can be settled can be mediated, and there are many reasons why mediation works after direct settlement negotiations have failed.

> ***"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, and expenses, and waste of time."***
>
> **Abraham Lincoln (circa 1850)**

Although over 90% of lawsuits are settled even without the benefits of mediation, the settlements are often not reached until late in the litigation process, sometimes not until the eve or middle of trial. Mediation is most effective in reducing costs if used early in the litigation.

A mediator can assist the parties and their attorneys in obtaining the information they need in order to evaluate their case more quickly and efficiently than by formal discovery. With sufficient information in hand, the mediator can help establish the most conducive framework for facilitating settlement.

Confidential Process and Result. Mediation is conducted in private—only the mediator, the parties and their representatives participate. The mediator is generally bound not to divulge any information disclosed in the mediation. Confidentiality agreements are often entered into to reinforce the confidentiality of the mediation. Moreover, the parties may agree to keep their dispute and the nature of the settlement confidential when the matter is resolved. Mediation can enable parties to avoid the publicity that may accompany a trial that is open to the public.

The Mediator Plays a Crucial Role. The mediator's goal is to help the parties settle their differences in a manner that meets their needs and interests and is preferable to trial. An experienced mediator can serve as a sounding board, help identify and frame the relevant issues, help the parties make an objective risk/reward and cost/benefit analysis between settling their dispute or proceeding to trial, foster creative solutions, and assist in removing impediments to settlement. A mediator can help generate solutions not previously considered by the parties that may reach beyond the scope of the remedies available in court. The mediator can also provide the patience and persistence that is often necessary to help parties reach resolution.

Mediators can help parties communicate constructively and overcome hostilities that may interfere with making a rational assessment of settlement compared to the costs and uncertainties of trial. Mediators can also serve as unbiased "agents of reality" who help the parties objectively assess their litigation alternatives. Attorney advocates may have advocacy bias, whereby they tend to believe in and overvalue the strength of their client's case. A mediator without any stake in the outcome can be effective in helping the parties be realistic as to the likely outcome at trial.

By meeting privately in confidential sessions with each party and counsel, participants can speak with total candor. The mediator can help the parties ascertain their real interests and concerns and objectively assess the weaknesses as well as the strengths of their case. This process typically leads to a mutually agreeable settlement.

Opportunity to Listen and Be Heard. Parties to mediation have the opportunity to air their views and positions in the presence of their adversaries. The process can thus provide a catharsis for the parties that can engender a willingness to resolve differences between them. Moreover, since they are heard in the presence of a neutral mediator, the parties often feel that they have had their "day in court."

More Creative and Long-Lasting Solutions. A mediator has no authority to make or impose any resolution on the parties. Any resolution through mediation is solely voluntary and at the discretion of the parties. Parties develop and create their own solutions to issues addressed in mediation and may enter into innovative, creative solutions tailored to their own particular lifestyle and business interests rather than being limited by the remedies available in court. Because the parties are involved in crafting their own solutions, the solutions reached are more likely to be lasting ones, adhered to by the parties.

Lessens the Emotional Burden. Since mediation can be conducted sooner, more quickly, less expensively and in a less adversarial manner than in court, there can be less of an emotional burden on the individuals involved than if they were to proceed to trial. Furthermore, proceeding through trial may involve publicly reliving a particularly unpleasant experience or exposing unfavorable business conduct which gave rise to the dispute. This is avoided in mediation.

Mediation Can Save an Existing Relationship. The litigation process can be stressful, time-consuming, costly and personally painful. In the end, the parties are often unable to continue or restart any relationship. In contrast, in mediation, disputes—such as those between an employer and employee or partners in a partnership—can be resolved in manner that saves business and personal relationships that, ultimately, the parties would prefer to preserve.

Avoiding the Uncertainty of Trial. Resolution through mediation avoids the inherently uncertain outcome of a trial and enables the parties to control the outcome. Moreover, since resolution during mediation is completely voluntary, the option to proceed to trial is not lost in the event the mediation is not successful in resolving all issues.

> ***In an analysis of 2,054 cases that went to trial from 2002 to 2005, plaintiffs realized smaller recoveries than the settlement offered in 61% of cases. While defendants made the wrong decision by proceeding to trial far less often—in 24% of cases—they suffered a greater cost—an average of $1.1 million—when they did make the wrong decision.[1]***

III. Proposals for Court-Annexed Mediation in New York Courts

We recommend that the Administrative Board of the New York State Courts adopt Rules relating to court-annexed mediation, as follows:

1. Each civil court of New York State shall approve and adopt a suitable court-annexed mediation program. Such program shall be available to litigants on a voluntary basis or as may be directed by the court.
2. All civil New York State Court judges shall have the authority to direct parties in litigation to engage in mediation.

Some courts may wish to adopt a court-annexed mediation program at no cost so that no additional funding would be required.

Some courts may wish to adopt an administered court-annexed mediation program even if it requires additional funding. For such courts, we refer to the court-annexed mediation programs that have been adopted by the Commercial Division of the N.Y.S. Supreme Court, New York County, and the U.S. District Court for the Eastern District of New York. It should be noted that, under these and other programs, qualified mediators have been willing to serve on a reduced fee or even pro bono basis for at least a portion of their time.

The Dispute Resolution Section of the New York State Bar Association is available to assist in the development of court-annexed mediation programs. Members of the Dispute Resolution Section are also available to provide training and other support regarding court-annexed mediation.

Respectfully submitted,

DISPUTE RESOLUTION SECTION
NEW YORK STATE BAR ASSOCIATION

Subcommittee for the
Adoption of Court-Annexed
Mediation in the Courts of New York State (Civil)

Stephen A. Hochman, Co-Chair
David C. Singer, Co-Chair
Linda Dardis
Gail Davis
Julian S. Millstein
Jacqueline W. Silbermann
Robert Steele
Irene C. Warshauer

Endnote

1. Randall Kiser, Beyond Right and Wrong: *The Power of Effective Decision Making for Attorneys and Clients* (Springer Science + Business Media LLC New York publ.) (2010).

Instructions to Counsel

1. Please complete the attached Case Information Sheet and return it to the Clerk of the Court within _____ (__) days from the date hereof. The Case Information Sheet should be agreed to and signed by all counsel. Any disputes or questions with respect to the Case Information Sheet should be addressed to the Clerk of the Court.

2 Counsel shall have an opportunity, prior to the due date for the return of the Case Information Sheet, to agree on the selection of a mediator (who may, but need not, be listed on any available court roster of mediators or the NYSBA mediation registry). If counsel can agree to the selection of a mediator who is willing to accept the assignment, counsel shall indicate that fact in paragraph 1 of the attached Report to the Court and sign and return the Report to the Court together with the Case Information Sheet.

3. If all counsel have not agreed on the selection of a mediator who is willing and available to serve by the due date of the Case Information Sheet pursuant to paragraph 2 above, then the following shall apply:

   a. If the judicial district has an ADR administrator (*e.g.*, in its Commercial Division), then the Court will deliver the Case Information Sheet to the ADR administrator, in which case the Report to the Court should be signed by all counsel and returned to the Court together with the Case Information Sheet. The ADR administrator will then follow his or her normal procedure for the selection of a mediator. All parties shall comply with the applicable mediation rules as specified by the ADR administrator.

   b. If the judicial district does not have an ADR administrator, each counsel shall be entitled to nominate a maximum of three mediators who are willing and available to serve, and a list of all nominees, together with their bios or resumes, shall be attached to the Report to the Court, without identifying the counsel that has nominated each of the nominees listed. The Report to the Court, together with the list of nominees and attached bios or resuames, should be signed by all counsel and returned to the Court within _____ (__) days after the due date for the return of the Case Information Sheet, and the Court will select the mediator from the list of nominees. Unless the Clerk of the Court directs otherwise, all parties shall comply with the mediation rules of the Commercial Division, Supreme Court, New York County, which are available at www.nycourts.gov/courts/comdiv/PDFs/NYCounty/Attachment1.pdf.

4. Within _____ (__) days after the selection of the mediator pursuant to one of the above procedures, counsel shall contact the mediator to schedule the mediation as promptly as possible. Unless the Court or the parties agree otherwise, the litigation shall not be stayed during the pendency of the mediation

Case Information Sheet

NAME OF CASE

_____ **Index No.:**
(Plaintiff(s))

_____
(Defendant(s))

Counsel for Plaintiff(s)

Name:

Address:

Phone No.:

E-mail:

Counsel for Defendant(s)

Third-Party Plaintiff(s)

Name(s):

Third-Party Defendant(s)

Counsel for Third-Party Plaintiff(s)

Name:

Address:

Phone No.:

E-mail:

Counsel for Third-Party Defendant(s)

Description of the Case:

(Briefly describe the nature of the claim(s), including the ad damnum clause)

Report to the Court

1. If all counsel have agreed on the selection of a mediator as per paragraph 2 of the Instructions to Counsel, please check this box. [ ]

2. By your signatures below, you have agreed to notify the Clerk of the Court of the date that each of the following has occurred:

   a. The date that counsel for all parties has had at least one preliminary conference with the mediator.

   b. The date that all parties, their respective counsel and the mediator have agreed will be the date for the commencement of the mediation.

   c. The date that the mediation has been completed.

3. By your signature below, each of you has agreed to abide by the provisions contained in the Instructions to Counsel.

Counsel for Plaintiff(s)

_____

Date:_____

Counsel for Defendant(s)

_____

Date:_____

Counsel for Third-Party Plaintiff(s)

_____

Date:_____

Counsel for Third-Party Defendant(s)

_____

Date:_____

A Home for International Arbitration in New York

By Alexandra Dosman

In keeping with New York's role as a world financial, cultural, and technology hub, the city now has a dedicated hearing space for international arbitration cases. The New York International Arbitration Center ("NYIAC"), which opened on July 1, 2013, supports and promotes the use of New York-based international arbitration as a dispute resolution mechanism for both commercial and treaty-based arbitrations.

NYIAC offers state of the art hearing rooms for rent in Midtown Manhattan. The Center can accommodate large-scale arbitrations, and is also equipped for video testimony and simultaneous interpretation. But providing hearing rooms is only a one part of NYIAC's mission. NYIAC's primary role is to support and promote New York as a preferred venue for international arbitration. Importantly, NYIAC does not administer arbitrations or issue arbitration rules. This enables NYIAC to work with all existing arbitration institutions with a New York presence to promote the common goal of encouraging international arbitration in New York. NYIAC will be partnering with New York-based arbitration institutions to present training sessions and conferences on issues of importance to the international arbitration community.

So, why should parties and counsel around the world consider holding their international arbitrations in New York? New York is an attractive venue for international arbitration for many reasons, including its international profile, deep pool of talented practitioners and arbitrators, and the highly developed nature of New York substantive law in commercial matters. This article examines three additional aspects of New York's appeal as a leading jurisdiction for international arbitration: its strong public policy in favor of arbitration, the ease of judicial recognition and enforcement of arbitration awards, and strict limitation of grounds for vacatur of arbitration awards rendered in New York.

New York Has a Strong Public Policy in Favor of International Arbitration

New York courts recognize and respect a contractual choice to resolve disputes by arbitration. This is particularly the case when the matter is a commercial dispute between sophisticated international parties. The New York Court of Appeals has emphasized the jurisdiction's "long and strong public policy in favor of arbitration" and the Second Circuit has confirmed that the "federal policy favoring arbitration is even stronger in the context of international transactions."

In New York, parties that choose to resolve their disputes by international arbitration enjoy wide latitude in their choice of applicable law and procedures. In particular, parties routinely choose to follow international practice in arbitration procedures, forgoing depositions and other pre-trial discovery devices used in litigation in the United States—and much feared in the rest of the world. Parties are free to tailor disclosure protocols in an international arbitration proceeding in New York as appropriate for their needs. For example, parties may adopt the International Bar Association's Rules on the Taking of Evidence in International Arbitration. Similarly, by following the NYSBA's Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of International Arbitrations, the parties will significantly streamline the pre-hearing process. In short, there is no reason why an international arbitration seated in New York must use any United States-style discovery mechanisms at all if the parties do not wish to adopt them.

New York Supports Recognition and Enforcement of Arbitral Awards

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958—which was negotiated and signed in New York—is appropriately known as the New York Convention. The New York Convention greatly enhances the portability of arbitral awards by limiting the grounds on which arbitral awards may be denied recognition and providing for enforcement of awards made in another state that is party to the Convention. Domestically, the New York Convention is enacted in United States law as Chapter 2 of the Federal Arbitration Act ("FAA").

The United States is also a party to the Inter-American Convention on International Commercial Arbitration (the Panama Convention). The Panama Convention, which is enacted domestically in the United States as Chapter 3 of the Federal Arbitration Act, has a similar role to that of the New York Convention. The Panama Convention (and not the New York Convention) applies if "a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the [Panama] Convention and are a member of the Organization of American States" (9 U.S.C. § 305(1)).

The purpose of the New York and the Panama Conventions was to facilitate the portability of arbitral awards. The "basic thrust" of the New York Convention was to "liberalize procedures for enforcing foreign arbitral awards." The party wishing to have a foreign arbitral award recognized in New York courts need only follow a simple procedure of providing a certified copy of the arbitration award and the arbitration agreement. Once these basic documents have been provided to the court and jurisdictional requirements have been satisfied,

the burden shifts to the party resisting enforcement to demonstrate that the award should not be enforced.

The New York Convention grounds for denying enforcement are limited and exclusive: (a) the parties were "under some incapacity, or the said agreement is not valid"; (b) a party "was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case…"; (c) the award "deals with a difference not contemplated by or not falling within the terms of the submission to arbitration…"; (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or the applicable law; or (e) the award is not yet binding or has been set aside (vacated) "by a competent authority of the country in which, or under the law of which, that award was made" (Article V(1)). Recognition and enforcement of an arbitral award may also be refused if (a) "the subject matter of the difference is not capable of settlement by arbitration" or (b) the recognition or enforcement of the award "would be contrary to the public policy" of the state in which recognition is sought.

New York courts narrowly construe the grounds for non-recognition of arbitral awards set forth in the New York and Panama Conventions. Notably, recognition and enforcement may not be denied on the basis that the arbitrators erred in their assessment of the facts or interpretation of the law.

New York Provides Only Narrow Grounds for Vacating Arbitral Awards

With respect to arbitration awards that are made in New York, the Federal Arbitration Act provides limited grounds for challenging awards in vacatur proceedings. The FAA grounds are substantially similar to the grounds for non-recognition of arbitral awards set forth in the New York Convention.

The Federal Arbitration Act grounds for vacating an award are that: (1) the award was procured by corruption, fraud, or undue means; (2) there was evident partiality or corruption by the arbitrators; (3) the arbitrators were guilty of misconduct in refusing to hear evidence pertinent and material to the controversy or of any other misbehavior by which the rights of any party have been prejudiced; or (4) the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. A court may only find "evident partiality" to vacate an award "when a reasonable person, considering all of the circumstances, would *have* to conclude that an arbitrator was partial to one side."

Nationwide, the law remains unsettled as to the continued viability or effect of an additional judicially created doctrine, "manifest disregard for the law." In practice, the application of the doctrine is exceedingly rare, especially in the international arbitration context. The standard is extremely difficult to satisfy. Indeed, on the basis of extensive empirical research, a detailed report issued by the Committee on International Commercial Disputes of the New York City Bar Association in August 2012 concluded that "no international arbitral award rendered in New York has ever been set aside in the Second Circuit on the ground of manifest disregard."

In considering whether an arbitral tribunal manifestly disregarded the law, courts in New York will first consider whether "the governing law alleged to have been ignored by the arbitrators was well defined, explicit, and clearly applicable, and, second, whether the arbitrator knew about the existence of an early governing legal principle but decided to ignore it or pay no attention to it." Notably, "misapplication of an ambiguous law does not constitute manifest disregard"; rather, a party must show that the arbitral panel "intentionally defied the law." Even in the absence of reasons by the panel, courts will uphold an arbitration award if they can "discern any valid ground for it." Importantly, for the purposes of a "manifest disregard of the law" challenge, an arbitrator's knowledge of the law is limited to the law as identified by the parties to the arbitration—there is no imputed knowledge of governing law beyond that which is presented during the arbitral process.

Conclusion

New York's strong public policy in favor of party autonomy and finality in international arbitration, along with the narrow grounds for denying recognition and enforcement of foreign arbitral awards under the New York Convention, illustrate New York's pro-arbitration policy and legal framework. New York's appeal as a seat for international arbitrations is enhanced by the city's global profile and accessibility as well as its top-flight arbitration counsel, arbitrators, and service providers. The New York International Arbitration Center will play a key role in showcasing for the world arbitration community the benefits of arbitrating in New York.

Alexandra Dosman is the Executive Director of the New York International Arbitration Center. She can be reached at adosman@nyiac.org. For more information please visit www.nyiac.org.

Editor's Note: With the opening of the New York International Arbitration Center, our own Edna Sussman was interviewed by **Financier Worldwide** *magazine. We share the interview with you.*

10 Questions: New York as a Leading Arbitration Centre

FW speaks with Edna Sussman, an arbitrator and mediator at Sussman ADR LLC, about the advantages of New York as a centre of arbitration.

Q FW: In your opinion, what reputation does New York hold as a centre of arbitration? How does it compare as a chosen seat of arbitration versus other locations?

A Sussman: There are several excellent seats for arbitrations and I have had the pleasure of sitting as an arbitrator in a few of them. New York has long been one of the favoured and continues to be one of the most popular legal seats and locales for the actual conduct of the arbitration. Why is that? Because New York has the best of everything that users consistently list in survey after survey as the factors they look for in selecting a seat and locale for arbitration. First, the courts and the law: New York has neutral courts which strongly support arbitration and a well-developed body of commercial law recognised and used in transactions around the world. Second, the professionals: New York offers a deep pool of lawyers and arbitrators well-schooled in the conduct of arbitrations of all sizes and related to disputes in every industry. Third, infrastructure: New York is equipped to provide support at a reasonable cost for even the most complicated arbitrations and is able to meet every item on a traveller's wish list.

Q FW: You mentioned the courts. What are the courts like in New York and what is their attitude towards arbitration?

A Sussman: Arbitration matters in New York City are brought to judges in the US federal court or to the special commercial division of the State court in New York County, all of whom have significant experience in business disputes. The law in New York is strongly pro-arbitration. The courts recognise New York's role as a centre of financial and business transactions and realise that its role is strengthened by the dependability of its international commercial arbitration laws and its support of international arbitration. The courts repeatedly refer to the federal policy which strongly favours arbitration, a policy which is stated by the courts to be even stronger in the context of international business transactions. In New York the law requires that any doubt as to the scope of arbitration be resolved in favour of arbitration and the courts readily enforce arbitration agreements and compel arbitration. Arbitration awards are almost never vacated in New York and challenges to awards based on the narrow grounds for *vacatur* are routinely rejected. The Supreme Court of the US, in the Oxford Health Plans decision just issued in June of 2013, reaffirmed the deference that must be accorded to arbitral awards in stating "So far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.… The arbitrator's construction holds, however good, bad, or ugly."

Q FW: To what extent will New York assist with the arbitration process when called upon—for example, by empowering the arbitrator, ordering preliminary relief, and granting injunctions?

A Sussman: New York courts frequently refer to the efficiencies realised by honouring party decisions to refer disputes to arbitration and issue rulings to support arbitration and restrict judicial review. Thus, New York courts will assist in the appointment of arbitrators, issue attachments in aid of arbitration, grant preliminary injunctions and issue anti-suit injunctions to prevent parties from engaging in competing parallel proceedings to address the same dispute properly requiring arbitration in New York. The courts will also support arbitral orders directing preliminary relief in the form of injunctions such as prohibiting parties from transferring assets, requiring deposits of funds in escrow, preserving or gathering evidence, or other measures to preserve the status quo. The courts in New York handle such arbitration matters expeditiously so as not to slow down the arbitration process. Petitions to vacate or confirm an award are also handled promptly.

Q FW: What is the reputation of New York Courts when it comes to enforcing arbitral awards? Can New York Courts be considered neutral when resolving litigation arising from international arbitration agreements or proceedings?

A Sussman: The courts in New York have a reputation for being fair and neutral. They follow a pro-enforcement policy regarding the enforcement of arbitration awards and construe narrowly the limited grounds for *vacatur*, which are very similar to the parallel provisions of the New York Convention to which the US is a party. In response to questions raised abroad about the doctrine

of manifest disregard in New York as an additional basis for *vacatur*, a New York City Bar Association Committee recently conducted a study. It found that no court in New York had ever vacated an international arbitration award based on the doctrine of manifest disregard. The committee further found that legal doctrines for review of arbitral awards, while called by different names and also rarely utilised, are found in the law of other principal arbitration seats, including England, Hong Kong, Switzerland and France. The courts in New York are impartial when parties from different countries appear before them and have denied challenges made by US parties to awards made in favour of foreign parties and confirmed awards against US parties that have concerned entities from diverse countries including China, Japan, Switzerland, Norway, Austria and the UK.

QFW: We have been talking about the choice of seat for an arbitration based on the arbitration law. Does the substantive law of the jurisdiction matter?

ASussman: This is an important question. As you know, while the arbitration can be physically conducted in any locale, the choice of arbitral seat specified in the contract generally dictates the procedural law that will be applied to the arbitration, while the substantive law selected will govern the merits of the dispute. These choices can and often are made independently, but, in a recent survey, 68 percent of the respondents stated that these choices influence one another and often the choice goes together. New York law is widely preferred and is very frequently selected as the substantive law for transactions around the world, even those with no US party. This preference for New York law is well justified. New York offers one of the most sophisticated and developed bodies of contract, commercial, and business partnership law available anywhere, and New York makes it easy for participants to enjoy the benefits of New York law even if their business has little or no connection to New York. New York contract law gives great deference to the contract's terms and the courts do not substitute their judgement for the parties' business decisions. Moreover, New York is a common law jurisdiction which enables its sophisticated courts to respond promptly and develop legal principles and binding precedents as new forms of business transactions and relationships develop in the marketplace.

QFW: You mentioned professionals. What advantages does New York offer in this regard as a seat and locale for arbitration proceedings?

ASussman: As a leading global financial and commercial centre New York affords its lawyers the opportunity to engage in representations in a broad range of industries and financial matters and to practice in many areas of the law. There are many highly qualified New York lawyers who have comprehensive experience in conducting both international and domestic arbitrations. Many are multi-lingual and practice in large international law firms with access to and expertise in multiple legal systems. New York also offers a large pool of arbitrators of many nationalities who are practiced in handling commercial disputes of all sizes and in all business sectors. Arbitrators can be drawn in New York from both legal and other disciplines, from the growing body of full time independent arbitrators, from counsel and arbitrators at multi-national law firms, or from the academic rosters of New York's many leading law schools. Absent specific contractual provisions to the contrary, in accordance with the ethical code for arbitrators issued ten years ago, all US arbitrators are neutral and serve as impartial and independent decision makers. I should note that there are no restrictions on the nationality or qualifications of those who can serve as an arbitrator or counsel in an international arbitration in New York. In addition, New York has many expert mediators should such services be desired.

QFW: You mentioned infrastructure. Compared to other major centres around the world, how does New York's infrastructure measure up as an arbitration centre for resolving international, cross-border disputes in particular?

ASussman: As your question recognises, a locale's infrastructure is very important. As a melting pot for diverse populations and as the home of the United Nations, New York has translators who work capably in every language. Court reporters with excellent qualifications are readily available in New York. In this digital age and expansion of telecommunication, arbitrations frequently require sophisticated technological support, all of which can be found easily in New York. In many other locales translators, court reporters and technology have to be imported which significantly increases costs and causes inconvenience. New York offers direct flights from multiple cities and many and varied accommodation and dining choices. New York hosts the offices of four of the leading arbitral institutions, including the home office of three of them. In addition, New York offers a broad range of options for extracurricular activities. For restaurants, music, dance, art, theatre, sports and shopping, New York's offerings are unparalleled. And jogging in Central Park, bicycle riding along the Hudson River or ice skating at Rockefeller Center can be a welcome break from a difficult hearing. Whatever one's hearing needs and personal preferences, New York has it.

QFW: How has New York's status as a prime arbitration seat and locale been bolstered by the opening of the New York International Arbitration Centre?

ASussman: New York is pleased to offer its newly established New York International Arbitration Center (NYIAC) for the conduct of arbitrations in New York. Arbitration centres have been emerging in jurisdictions around the world, including other standalone arbitration hearing facilities. While New York has many other

facilities suitable for a hearing, New York too needed a dedicated arbitration hearing space. A recent survey of what users are looking for in an arbitration hearing centre identified various qualities. NYIAC satisfies every user priority for a hearing space. NYIAC offers hearing rooms that can seat as many as 43 people or as few as 8 people at the table, a translators' booth for simultaneous translation, separate breakout rooms for each party and for the arbitrators, state-of-the-art Wi-Fi and IT, and a neutral ground in a brand-new facility with broad daylight in every room at a reasonable price with an attentive staff dedicated to addressing user needs. The facility is located at 150 East 42d Street directly across the street from Grand Central Station, a location adjacent to many transportation options and numerous hotels and restaurants. I would like to call attention to the fact that NYIAC will *not* be administering arbitrations; there are many institutions in New York that already do that. But NYIAC does plan to do a great deal more than host a hearing facility and plans to coordinate with institutional providers, bar associations and other professional organisations to develop programs and materials about international arbitration in New York, the application of New York law in international arbitration, and the recognition, enforcement and implementation in New York of arbitral awards.

Q FW: Have any recent developments affected the arbitration process in New York?

A Sussman: The entire arbitration community has been sensitised to the call by users to deliver more expeditious and cost effective arbitration and New York based arbitrators, arbitral institutions and counsel have all responded to meet that call. Numerous arbitration programs and trainings have been conducted which focus on the subject. The New York State Bar Association issued guidelines for streamlining the pre-hearing and disclosure process. The Commercial Division of the Supreme Court in New York City recently appointed a single judge to hear all matters relating to arbitration in order to assure even more expeditious resolution of arbitration issues that go to court. On the federal level, the proposed Arbitration Fairness Act bill drew criticism from the arbitration community when introduced in Congress a few years ago. That bill was amended to limit arbitration to a post dispute choice only as applied to consumers, employees and antitrust class actions, leaving the well-developed US case law relating to arbitration of commercial disputes unaffected. In any case, that bill is not likely to be law any time soon.

Q FW: Is there any advice you can give to firms considering arbitration proceedings in New York? What steps can they take to control the costs involved?

A Sussman: As the practice has globalised and common and civil law traditions have been melded in arbitration, the advice for arbitration users in New York would be the same as would apply in other jurisdictions. One of the key advantages of arbitration over courts is the ability to pick the decision maker and to design the process. Both should be approached with deliberation and care. New York arbitrators are generally sensitive to the need to control the time and cost of the proceedings, and arbitrators can be chosen by the parties to meet their needs. The drafting of the contract can be tailored to meet the requirements of the parties and, if time and cost is a concern, provisions can be included in the arbitration agreement or arbitration clause to circumscribe pre-hearing exchanges of information and specify time limits for various phases of the arbitration. In addition, choosing counsel with arbitration expertise committed to containing costs and expediting the proceeding, selecting an arbitral institution that fosters expedition and cost savings, setting an abbreviated schedule for the arbitration, working cooperatively with opposing counsel and taking steps to streamline the hearing are all options that are in the hands of the parties and their counsel. Attention to these choices and seizing the opportunities that arbitration affords can significantly increase satisfaction with the arbitration process and reduce time and cost in all jurisdictions.

Edna Sussman is a full-time independent arbitrator and mediator and is the Distinguished ADR Practitioner in Residence at Fordham University School of Law in New York City. She was formerly a litigation partner at White & Case LLP. Ms. Sussman is Vice-Chair of the New York International Arbitration Center and serves on the Board and Executive Committee of the American Arbitration Association and the Board and Executive Committee of the College of Commercial Arbitrators. She is a fellow of the Chartered Institute of Arbitrators and is certified by the International Mediation Institute. Ms. Sussman can be contacted by email; esussman@SussmanADR.com.

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What Sally Soprano Teaches Lawyers About Hitting the Right Ethical Note in ADR Advocacy

By Elayne E. Greenberg

The Problem

Paradoxically, when lawyers opt to mediate or arbitrate, lawyers may still wind up selecting, shaping and advocating in these dispute resolution processes to resemble the very litigation process they have sought to avoid.[1] After all, litigation likely comports with the lawyer's own conflict style, comfort level and concepts of justice.[2] As a consequence of this litigation bias, we see that the metaphorical doors of a multi-door courthouse that once offered a menu of dispute resolution choices are increasingly leading us back to one choice: a variation of the litigation door. Even though the Model Rules of Professional Conduct confirm that a lawyer's litigation preference may be within ethical parameters, this practice may, at times, directly contravene his client's interests. Let me explain.

Consider Sally Soprano. Sally Soprano gained her fame, not as one of Peter Gelb's Metropolitan Opera divas, but as a dispute resolution icon in the well-worn negotiation simulation between an opera singer questionably past her prime and an opera house in desperate need an operatic lead. The private instructions of this negotiation exercise inform Sally's lawyer that she wants the part so much, she would even be willing to perform for free. Many aspiring lawyers in law schools throughout the country and experienced lawyers seeking to hone their negotiation skills in negotiation training courses have enthusiastically played the part of Sally's lawyer. And too many times, these lawyers have supplanted Sally's wishes with their own by negotiating Sally's compensation at the risk of costing Sally the lead. Of course, these lawyers justified their actions, because they believed that compensation was more important than landing the lead role. According to many of the lawyers' thinking, who in their right mind would want to work for free? Sally Soprano teaches lawyers the challenge and importance of representing their clients' wishes, even when those wishes don't comport with the lawyer's own values and biases.

This same lawyer/client tension potentially emerges when lawyers, the ultimate consumers of dispute resolution services, opt to mediate or arbitrate. Lawyers may select neutrals, shape the process and advocate in the chosen dispute resolution process in a way that comports with the lawyer's own conflict style and is more akin to the lawyer's litigation-bent, sometimes at the expense of their client's expressed needs. This issue's column will discuss this tension and suggest ways ethical lawyers might proceed. Part One will explain the correlation between a lawyer's philosophical map and the litigation-bent decisions that shape his or her arbitration and mediation use. In Part Two, I will explore the ethical parameters that guide this discussion. In Part Three, I will suggest strategies for lawyers to better honor their client's wishes and deal with this ethical tension. Finally, I will conclude by framing this problem as part of the lawyering evolution that is experimenting with the most effective ways to integrate dispute resolution into a lawyer's case management.

Part One: Understanding the Lawyer's Litigation-Bent: The Correlation Between a Lawyer's Philosophical Map and Advocacy Decisions

Dispute resolution scholars Tom Stipanowich and Jacqueline Nolan-Haley red-flag that the lawyer's advocacy decisions are increasingly shaping arbitration and mediation processes on a continuum to resemble the litigation default.[3] The lawyer's philosophical map may influence the types of neutral that is selected, the lawyer's style of advocacy and the procedures incorporated into the chosen dispute resolution process. Over three decades ago, Professor Len Riskin described the lawyer's "standard philosophical map" as one that is more consistent with an adversarial system: parties are adversaries; legal conflicts are about rights and rules; the law provides the answers to disputes; and emotions, people and relationships are undervalued.[4] Even though we may take pride in the fact that as individual lawyers we are each our own person, as a group many of us share similar psychological traits that contribute to why some lawyers have a litigation bent.

Goldfien and Robbennolt's study on law students' preferences for mediator's styles contribute that as a group, lawyers tended to measure on the Myers-Briggs Type Indicator (MBTI) as having a Thinking, Introverted orientation.[5] Translated into lay people's terms, lawyers who are thinkers have a bent to defining the problem narrowly and rely on more objective standards such as the law.[6] Those lawyers with the introvert dimension prefer to keep the information to themselves rather than share information with colleagues, a defining value in a collaborative approach.[7]

Goldfien and Robbennolt's study also gives us some insight into how a lawyer's conflict style and philosophical map may in some cases contribute to shaping dispute-resolution processes into veritable litigation clones.

Although many of the study participants indicated a general preference for mediators who were creative and at times used elicitive techniques, the participants also indicated a preference about half the time for lawyer-mediators who were more directive. According to the study, the participants preferred directive and evaluative behaviors in context.[8]

In his aptly penned law review article "Arbitration: 'The New Litigation,'" Tom Stipanowich laments how arbitration is no longer an expeditious forum for justice. How ironic that arbitration has reworked itself to resemble the litigation process it has been trying to avoid. Among the examples he cites to illustrate the judicialization of arbitration include increased discovery, docketing problems that cause endless delays for hearings, judicial review of awards and challenges to arbitrators' impartiality.[9]

Professor Jacqueline Nolan-Haley opines in her award-winning article, "Mediation: The 'New Arbitration,'" how the core mediation values of party self-determination and party control of the outcome are becoming obfuscated by the injection of adjudication-like practices in mediation. Adversarial advocacy and evaluative mediators collide with the purpose of party self-determination. In another example of mediation's lost benefit, the value of mediation becomes muted when it is part of a med/arb process. Mediation as a free standing dispute resolution process or as part of a mulit-step process is being altered to resemble more of an arbitration policy. Multi-step processes are in practice compressed so that the arbitration stage remains at the center.[10]

The optimists among us believe all is not bleak. The legal culture is in the midst of an evolution, and this "backlash" is a natural part of any cultural shift. Similarly, the lawyer's "philosophical map" continues to evolve as more and more law schools teach aspiring lawyers not only the skills of dispute resolution, but the values underlying each process.

Part Two: The Ethical Parameters

Ethically, lawyers should avoid shaping dispute resolution processes into litigation-like forums unless the client agrees to such modification. Although ethical lawyering lore educates that it is the attorney who decides the strategy and the means for achieving the client's objectives, a more careful reading of the Professional Rules of Conduct suggests that this is not an absolute.[11] According to the Professional Rules of Conduct for Lawyers, attorneys may take the lead so long as the client does not object to the means.[12] Injecting another bit of reality into ethical lore, the ethical codes for mediators and arbitrators remind lawyers that respecting party self-determination[13] and achieving justice for both parties[14] are central to these alternative dispute resolution processes. As a natural corollary, lawyers who opt to mediate or arbitrate their client's disputes, believing these processes will advance their client's interests, also have an ethical obligation to calibrate their advocacy in a way that will promote their client's interests in these forums. This discussion is framed, in part, by the lawyer's ethical obligations to their clients as detailed in the Professional Rules 1.2, 1.4 and 2.1.

Prior to selecting a dispute resolution process or means to advance a client's interest, a lawyer has an ethical obligation to consider the multi-dimensions of his or hers client's interests, As the client's advisor, Rule 2.1 prescribes that lawyers "in rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, psychological and political factors that may be relevant to the client's situation."[15] Depending on the interests of the client, the lawyer may recommend mediation or arbitration as a preferable forum instead of litigation. In his commentary, Roy Simon suggests that it "may be advisable under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation."[16]

Whatever the lawyer is recommending, the lawyer still must consult with the client about the means of resolving the dispute. Rule 1.2 (a) provides, in relevant part, that "Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of the representation and, as required by Rule 1.4, shall consult with the client as to the means to which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter.…" However, in those situations where the attorney and client do *not* agree on the means, Rule 1.2 is silent about how the attorney and client should proceed. In his comment, Simon advises that if the attorney and client are not able to reach a "mutually acceptable resolution of the disagreement," the client may discharge the lawyer or the lawyer may withdraw from the case.[17]

The challenge for ethical purposes is how you characterize "means." If lawyers shape mediation and arbitration in a way that it looks like litigation, does mediation and arbitration become so radically altered that they almost become a different "means" that implicate additional ethical action? I suggest that when a chosen dispute resolution process has morphed into a means that is a litigation clone instead of the alternative dispute resolution purpose the process purports to offer, that dispute resolution process has in actuality become a different means.

Part Three: Recommendations

Extrapolating from the ethical codes and comments, I posit that when lawyers shape mediation and advocacy processes into litigation-like processes they ethically need to do more. First, they should make sure that the client is fully informed about the means the attorney is using. All mediations are not alike. Directive mediation is distinctly

different than an elicitive mediation.[18] Similarly, all arbitrations are not alike. An arbitration with a panel that includes a party-appointed arbitrator, extensive discovery and a non-binding award is a distinctly different process than an expedited arbitration with a binding award.

Second, when selecting, shaping and advocating in a chosen dispute resolution process, the lawyer must distinguish his personal biases from his professional acumen. As Sally Soprano reminds us, if an attorney's biases are directing his choices at the expense of advancing his client's interests, that attorney's conduct is in direct contravention of the Professional Rules of Conduct for Lawyers.

Conclusion

As our legal culture continues to experiment with the ethical and effective ways to integrate dispute resolution into lawyering, there is not a clear or easy path. Rather, as with any cultural evolution there are steps forward, backlash reactions and supportive cultural shifts that need to take place before dispute resolution is fully and effectively integrated into lawyering. The increase of client-centered dispute resolution processes such as mediation spotlights the tension between a lawyer's own biases about conflict resolution and the client's expressed interests.

Now more than ever, a client's interests need to be center stage. Although some attorneys may pooh pooh this, defending that they know better, more client-centered attorneys appreciate that their clients may know best. Effective attorneys pause and develop a heightened awareness of when the attorney's own biases may collide with the client's interests.

In order for such dispute resolution processes as arbitration and mediation to be true alternatives rather than variants of litigation, increasing numbers of lawyers need to expand their lawyer's philosophical map. Another helpful step would be to continue to revise the Professional Rules of Conduct for Lawyer from a more litigation-centric guide to a more integrated advocacy and dispute resolution guide, to help lawyers resolve the inevitable ethical conundrums that will continue to arise when they use ADR processes as advocates. Bravo, Sally Soprano!

Endnotes

1. *See, e.g.,* Jacqueline Nolan-Haley, *Mediation: The "New Arbitration,"* 17 Harv. Negot. L. Rev. 61(2012); Tom Stipanowich, *Arbitration: The "New Litigation,"* 1 Univ. Ill. L. Rev. (2010).
2. Jeffrey H. Goldfien & Jennifer K. Robbennolt, *What If the Lawyers Have Their Way? An Empirical Assessment of Conflict Strategies and Attitudes Toward Mediation Styles,* 22 Ohio St. J. on Disp. Resol. 277 (2007).
3. Stipanowich and Nolan-Haley, *supra* note 1.
4. Chris Gutherie, *The Lawyer's Philosophical Map and the Disputant's Philosophical: Impediments to Facilitative Mediation and Lawyering,* 6 Harv. Negotiation L. Rev. 145 (2001).
5. Goldfien and Robbennolt, *supra* note 2 at 310.
6. *Id.* at 311.
7. *Id.* at 311.
8. *Id.* at 306.
9. Stipanowich, *supra* note 1.
10. Nolan-Haley, *supra* note 1.
11. Simon's NY Rules of Professional Conduct Annotated 2013 Edition, Rule 1.2 Scope of Representation and Allocation of Authority Between Client, Comment 2 (2012).
12. *Id.* at Rule 1.4 Comment 3 (2012).
13. ABA Model Standards of Conduct for Mediators, Standard I Party Self- Determination (2005).
14. ABA Code of Ethics for Arbitrators in Commercial Disputes Canon I guides that arbitrators have an obligation to conduct the arbitration in a way that protects each party's rights (2004).
15. *See supra* note 11 NY Rules of Professional Conduct 2.1 Advisor.
16. *See supra* note 11 NY Rules of Professional Conduct Rule 2.1 Advisor, Comment 5, Offering Advice.
17. *See supra* note 11 NY Rules of Professional Conduct, Rule 1.2, Scope of Representation and Allocation of Authority Between Client and Lawyer Rule, Comment 2.
18. Leonard I. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System,* 79 Notre Dame L. Rev. 1,30 (2003). Professor Riskin uses the terms directive and elicitive to distinguish mediator conduct on a spectrum. On one end of the spectrum, the directive mediator directs the mediation process and the parties' mediation outcome. On the other end of the spectrum, the elicitive mediator supports party autonomy and self-determination.

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Organizational Ombuds—Ensuring an Effective Dispute Resolution System

By Randy Williams

There is an evolving dispute resolution system for organizations and corporations that affords a new opportunity for the use of mediation skills and a possibility for better corporate risk avoidance. Now, more than ever, today's competitive, fast changing and rapidly evolving global environment requires senior leaders and boards of directors to have timely access to unfiltered information about how their organizations conduct themselves. They are seeking to mitigate risk, protect reputation, reduce financial and human cost, build trust and foster an ethical culture. Are their organizations' countless daily decisions and actions legal, ethical, fair and transparent? Unfortunately, traditional sources for answers to this question often are ineffective either because the information arrives too late, if at all, or because the information has been so skewed, filtered or redacted as to be of little use. What is at stake is nothing less than the organizations' long-term sustainability.

"Ombuds provide a zero barrier office—a safe, accessible place for anyone to discuss concerns about any kind of workplace problem."

What we have learned is that solutions can be found in the observations of unethical behavior and malfeasance by employees at all levels. However, what is often missing is a method for bringing such observations to light. What is needed is a resolution system designed to encourage employees to come forward with their observations, experiences and concerns without fear of placing their job security in jeopardy. With this information, leaders can take actions and make changes to address problems and prevent them from recurring.

To be complete and successful, a resolution system needs the capabilities of both *formal* (e.g., Legal, Compliance, Human Resources, Ethics, line management, etc.) and *informal* (organizational Ombuds) channels. Most organizations have the formal components of a resolution system, e.g., acting as strategic partners with management, setting and enforcing policies, accepting notice on behalf of enterprise, formally investigating, keeping records, reporting and serving as change agents, etc.

However critical, formal channels are not enough to ensure risk mitigation, transparency and an ethical culture. The 2011 Ethics Resource Center Survey shows that even with strong formal channels, 45% of employees observe unethical behavior and 35% do not report what they have observed. Additionally retaliation against whistleblowers increased to 22%. The types of observed unethical behavior are significant, e.g., sexual harassment, substance abuse, insider trading, illegal political contributions, stealing, environmental violations, improper contacts, anti-competitive practices, etc. The 2010 Supplemental Research on Culture emphasized the need for management to know about misconduct: *"Misconduct—especially misconduct that management is unaware of, and therefore can't address—puts the company at risk. It can lead to a damaged reputation; deteriorating relationships with customers and clients; loss of valued employees; prosecution; fines and even debarment."*

An Organizational Ombuds Program fills this gap. It completes the resolution system by offering unique and essential capabilities that formal channels cannot because of their mission; therefore Ombuds capabilities are complementary, not duplicative to those of the formal channels. The primary characteristics of organizational Ombuds are: (1) Independence—The Ombuds is independent of ordinary line and staff management structures and provides data from a neutral viewpoint to the board and senior executives; (2) Informality—Conversations with the ombuds are informal and off-the-record; the Ombuds Office is not a channel to give the organization notice of claims against it; (3) Complete confidentiality—The Ombuds holds all communications with those seeking assistance in strict confidence and does not disclose confidential communications unless given permission to do so. The only exception to this privilege of confidentiality is where there appears to be imminent risk of serious harm. Confidentiality is based on assertion of privilege under Federal Rule of Evidence 501 and based on the terms under which the ombuds program is made available; (4) Neutrality—The Ombuds is a designated neutral and remains unaligned and impartial. The Ombuds is not an advocate for the employee or management, but an advocate for fair processes.

Ombuds work with all line and staff managers. They assist in coordinating the resolution system and communicating good practices. Ombuds provide significant and unique value in the following areas.

Identifying Issues Across the Entire Organization

Ombuds "see" and hear from the entire organization; they can and do receive the widest range of issues, from the entire range of employees and managers. Ombuds provide a zero barrier office—a safe, accessible place for anyone to discuss concerns about any kind of workplace problem. The Ombuds provides guidance to all in developing responsible and effective options for

addressing those concerns. The individual coming to the office remains in control and determines the next step. The Ombuds is often the only channel to view the whole organization. Ombuds are often contacted for complex, multi-ethnic, multi-issue, multi-cohort problems that reach across organizational and policy boundaries.

Providing Early Warnings About New and Potentially Disruptive Issues

Ombuds programs detect "new issues" and provide early warnings to managers.

Managers and employees often go to an Ombuds when they: do not know how to handle a concern or where to report it, and seek support and coaching; are concerned about "not having enough evidence"; do not understand the context, or the implications of a problem; want to have an informal conversation with a neutral party to understand policies and procedures, before taking a formal action; want to avoid loss of relationships or retaliation from management or co-workers; are concerned that no action or too much action will be taken; are concerned that they might be tangled up in a bad situation; want to maintain anonymity.

Organizational surveys show that without an Ombuds program, many employees would not have raised their concerns at all, or not as early and/or would have left the enterprise.

Supporting Fair Resolution of Concerns

Much of the work will be familiar to mediators but with added information on institutional access and channels for resolution. Ombuds assist the organization in addressing concerns in a fair and effective way. Ombuds assist employees in identifying and assessing potential options to address their concerns. They help get concerns to the appropriate resolution channel in a responsive and timely manner. This saves time and resources which is especially valuable when timeliness is essential for achieving good solutions. Ombuds provide shuttle diplomacy and informal mediation between and among managers and employee or among peers.They also assist resolution channels in assessing options for addressing issues brought to them.

Supporting Compliance with Laws, Regulations and Policies

Ombuds programs support compliance with laws and regulations, including U.S. Sentencing Guidelines, Sarbanes-Oxley and Dodd-Frank. U.S. Sentencing Guidelines require employers "to have and publicize a system…whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation." Recently the Ethics Resource Center recommended that the Guidelines "should explicitly recognize that Ombuds are important and an appropriate component for corporations to meet the requirements."

Ombuds programs help issues get addressed internally, reducing potentially adversarial relationships between leadership and employees.

Ombuds can help avoid costly lawsuits and use of outside counsel. They can help avoid the bounties now available to relevant whistleblowers. Surveys show that without an Ombuds program a percentage of employees would have taken their concerns to outside counsel.

Preventing Problems from Recurring

An Ombuds program provides information and recommendations to prevent serious problems from recurring.

While maintaining the confidentiality of those who contact the office, the Ombuds program provides important information to the board of directors and key stakeholders about potential problems, patterns of problems, and areas of vulnerability. The Ombuds identifies root causes, and links patterns of concerns to business outcomes and risk management and recommends potential changes.

Ombuds help with system improvement. For example, they share best practices among business units, provide training, write articles, and provide informal input to task forces and those who are creating or reviewing policy or employee surveys.

A high percentage of managers and employees report that they are better able to handle future problems after going to the Ombuds Office.

Fostering an Ethical Culture and Building Trust

An Ombuds program is an important governance tool in helping to build trust and foster a respectful, ethical work environment.

Reputation and trust are key in attracting all stakeholders (investors, customers, employees). For example, LRN 2007 Survey shows 94% of employees say it is critical or important that the company they work for is ethical.

Ethics Resource 2010 Reporting Supplement research concludes: "*Management can and should do what it can to encourage ethical conduct in employees and to reduce the amount of wrongdoing that occurs. But its next best line of defense is to know what is happening when it happens. Reporting of observed misconduct reduces ethics risk by ensuring that management is aware of and able to address problems instead of being vulnerable to lurking issues.*"

Ensuring an Effective Program and Incorporating Ombuds Profession Best Practices

Some of the success factors for an effective Ombuds program as part of the resolution system include: a charter or term of reference for the program, strong and visible sponsorship by an organization's leaders and key stakeholders, alignment with an organization's mission, values and priorities, reporting lines to senior leaders and board, respectful working relationships with key stakeholders, professional/quality Ombuds staff, and Ombuds staff's thorough knowledge of the organization's strategies, policies, procedures, resolution channels, top risks, etc.

Ombuds programs need to align their activities with the International Ombudsman Association's Standards of Practice and Code of Ethics.

The Ombuds participate in professional training, conferences and networking opportunities, serve on panels, write articles, etc.

The Office periodically evaluates its effectiveness by assessing awareness about the program, perceptions of the program, how the program is fulfilling its role (confidential, neutral, informal and independent), how the program is helping to identify and resolve issues, the impact of the program on the organization, and how the program is helping to prevent issues from recurring.

In conclusion, an Ombuds program has a unique capability to offer complete confidentiality, informality, official neutrality and independence; an organizational Ombuds is an essential part of a resolution system that mitigates risk, protects reputation, reduces financial and human costs, complies with laws, regulations and policies, and fosters an ethical work environment. It is an expanding and creative use of dispute resolution methods and techniques to improve the workplace while assisting the corporation or organization in its efforts to avoid risk.

Randy Wiliams started in banking and then spent 25 years with American Express. Her last position with Amex was SVP/Corporate Ombudsperson, reporting to the CEO and Audit Committee of the Board. She is currently a Managing Director of Redmond, Williams & Associates, LLC., www.redmondwilliamsassoc.com.

Organizational Ombuds: Competencies, Conversations and Case Management

By Susan Casino

For mediators seeking another way to apply their knowledge, it should be noted that the belief that mediation is an integral part of an Ombuds function is not a universal belief among Ombuds currently. Perhaps half of all Ombuds actually use informal mediation in their practice. The term mediation when used in Ombuds' work can be used synonymously with the term "facilitated conversation." Ombuds are considered third-party neutrals and they are present to facilitate the conversation. However, there are a number of distinctions that must be understood.

Ombuds deal with conflict. Like any professional working toward resolution, information is required in order to formulate solutions. Information is power. In the Ombud's world, "power" connotes unpretentious influence. With the information that is shared, an Ombuds has the ability to create options for resolution. The options are not mandates nor are they ever presented in a biased fashion. They are simply possibilities. It is because of the neutrality with which the options are presented, as well as the lack of judgment, that the conflicted parties can feel the freedom to return to the Ombuds Office if their attempts at resolutions fail.

Most Organizational Ombudsmen reside at the executive level of the company's hierarchy, holding no organizational authority. Absent power, influence alone remains. Many Ombuds began their careers within their companies and had noteworthy positions prior to stepping into the Ombuds role. It is their long corporate history that provides a familiarity with the organization's processes, culture, and mission; that foundational knowledge is invaluable. The biggest adjustment is giving up the notion that there is a best path to resolution for the conflicted individual. The tenets to which the Ombuds must ascribe are neutrality, independence, informality and the most significant, the one that sets an Ombuds Office apart from any other department (whether corporate, university or government setting), confidentiality. With the security of true, authentic privacy present, people feel safe. And when people feel safe they are more compelled to share frankly, without restraint, about their fears and concerns and their most private work related conflicts.

The term "inside outsider" describes the necessity of intimate connection a potential Ombuds should have with hir or her organization. That term was used at an International Ombudsman Association (IOA) conference in Montreal, Canada during an Ombuds Foundations Course in 2006. It was part of a list provided as content for our "elevator speech." It struck me then and it remains powerful today as an accurate description of the work of an Ombuds for any organization. An Ombuds knows his or her organization and the players but must keep a neutral distance, maintain detachment and operate from a place of impartiality when listening to individual concerns and raising critical issues related to culture, policy or people.

Establishing whether there are core competencies and the debate about the need for certification has occurred in the mediation community. The Ombuds profession has had similar challenges in determining necessary functions and skills. The International Ombudsman Association (IOA) alongside *Schroeder Measurement Technologies, Inc*. (SMT) completed a Job Analysis in 2008 to define the knowledge and skills required for competence in the profession. The domains that were identified and adopted by the IOA resulting from the analysis are as follows:

> *Conflict Management * Effective Communication *Issue Identity and Dispute Resolution * Outreach and Education * Policies, Procedures and Organizational Culture * IOA Code of Ethics and Standards of Practice * Feedback to the Organization.*[1]

Within each domain there are specific characteristics and skill sets required to function successfully. Just as there is a distinction between a good lawyer and a great lawyer, there are distinctions between a good Ombuds and an exceptional one. Consider the difference between verbally asserting the definition of ADR and having the discernment to know when to offer explicit techniques, measuring how to communicate them to your listeners so that they are able to process appropriately and then pausing just the right amount of time to allow a thoughtful non-pressured response. There is the ability to ask a question, and then there is the talent of digging down so deep that even the visitor is rendered speechless and considers a possibility he or she has never considered before.

Formal Mediation v. Ombuds-Facilitated Conversation (Informal Mediation)

While there are parallel processes in formal mediation and the Ombuds' facilitated conversation, there are distinctions that must be noted. In a formal mediation the sole function of the third party neutral is to mediate. In an informal mediation the function of the third party neutral is to act as a change agent in addition to facilitating the conversation. The most obvious difference is that successful mediation results in a written and fully enforceable agreement, while in informal mediation agreements are generally verbal. Additional distinctions between these two ADR (Alternative Dispute Resolution) platforms in-

clude the fact that a mediator does not provide upward feedback, make recommendations on institutional policy or practice nor do they provide informal fact finding prior to or after a facilitation. Ombuds must provide upward feedback and make recommendations for systemic changes and they must educate and coach parties in more productive ways of communicating, often providing intensive coaching for specific conflict management. The focus of a mediator is only on the participants while the focus of the Ombuds is on the participants and the organization. A mediator will likely have communication with the parties prior to the mediation, but an Ombuds can have communication before, during and after the facilitation. Lastly, a mediator cannot act without knowing a person's identity even if an individual wishes to discuss a concern and maintain anonymity; an Ombuds can receive anonymous concerns and act as he or she deems necessary. Ultimately, the purpose of a facilitated conversation and a formal mediation is to confidentially create a mutually acceptable resolution, but with many distinctions to note along the way.

Case Management

To protect the confidentiality of the Ombuds' conversations, special attention must be paid to ensure cases are handled in accordance with the IOA's Standard of Practice (see previous article). For example, each initial conversation begins with an introductory statement reviewing the four tenets of the office: Independence, Neutrality, Informality and Confidentiality and underscoring the disclosure that the Ombuds Office does not represent the company and does not receive formal complaints. In addition, speaking to the Ombuds does not place the company on notice. After the employee shares the details of the conflict, the brainstorming begins. Options for resolution are considered in detail and a thorough discussion of pros and cons are often played out for each. While arsenals of possibilities are established, the predominant options are facilitated conversations, shuttle diplomacy (a form of mediation) and individual coaching which enables the individuals to have their own difficult conversation.

If the issue is potentially serious, systemic or presents a process/policy concern, a discussion is had with the employee to surface the issue and with permission it may be surfaced. When the inside-outsider knows most of the players and is known by them, approaching higher levels of management is less of a challenge. When a solid relationship exists between the Ombuds and leadership, the conversation is often encouraged and welcomed. Senior level leaders generally want to know the issues that exist in their organization; often they wish to know, regardless of the size or severity. A common fear among leadership involves not just the things they know require attention, but all the things they don't *yet* know.

Ombuds Example

It can occur in any organization, anywhere. It looks like this. Joe-Director manages a large department and is perceived by the staff to be unprofessional, cold and retaliatory. Joe-Director is perceived by his supervisor to be professional, kind and fair. The Ombudsman has heard from the entire department and the conversations establish that the problems are consistent, far reaching, and long-standing. Joe-Director has prohibited staff from speaking to anyone outside the department. Fear is significant and not unfounded, as some have attempted to raise the issue elsewhere and those individuals are no longer with the organization.

The Ombudsman is given permission by staff to surface the issue by way of shuttle diplomacy to 2 levels above as s/he believes this is a key individual who may not know about their ongoing concerns.

Anonymity is easily upheld when surfacing 2 levels above.

We know it to be true, yet it's so easily forgotten: what a person sees is completely dependent on where he or she sits.

Endnote

1. International Ombudsman Association, Job Analysis Report, 2008. *Id.* at 24. http://www.ombudsassociation.org/sites/default/files/IOA-Final_Job%20Analysis%20Report-IOA_website_version.pdf.

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Profiles in ADR—
Paths to the Same Amazing Job—Ombudsman

By Laura A. Kaster

For in-house lawyers and young lawyers in general who desire to find a path to work in the field of dispute prevention and resolution and for forward looking companies that want to reduce their risk profile, there is a job that can be aspired to or created—the ombudsman. In the separate article by Randy Williams more about the Ombudsman job itself is described. For our purposes, we can assume that the job, which may require certification, including by the International Ombudsman Association, is one that demands a very high level of corporate commitment, and direct line responsibility to the highest corporate officers. It entails confidentiality (the ombudsman reports only statistical and systemic information, not about specific disputes), neutrality, and independence and anticipates outreach and communications that can encourage the achievement of its key purposes: issue resolution, issue prevention and systemic change.[1]

This article is based on interviews with three amazing ombudsmen. All of them feel they landed their dream job and want to encourage the spread of their profession.

Randy Williams had been in business for quite some time before becoming an ombudsman. She earned a B.A. in Economics, did graduate work in banking and studied strategic planning, organizational change, mediation and negotiation. She worked in the not-for-profit world and in banking when she joined American Express Company. At American Express, she held many leadership positions, starting with quality assurance and customer service; she moved up to Senior Vice President of Human Resources, Learning and Development and Quality for the Travel Services/Corporate Card when American Express created its first Ombudsman office in the United States. She sees her long tenure at American Express—nineteen years before she assumed the ombudsman position—as critical to her ability to negotiate the institution and her access to the most senior executives. Her background in risk assessment and major re-engineering of profit and loss for collections and dispute prevention and dissatisfaction avoidance led to a customer-focused prevention model, and she established an employee-focused process as well. She was selected after an internal search for a new ombudsman just as American Express was expanding the role to be international. The application process included interviews by the head of the Audit Committee of the Amex Board of Trustees, demonstrating the high level of importance placed on the job by the corporation.

In addition to the strong corporate commitment viewed as assuring a positive work environment and protecting the American Express brand and reputation, the ombudsman became part of the culture of the company. Randy states:

> I experienced how providing a safe and confidential resource for employees to discuss concerns and problems enabled them to consider various resolution options and decide the next step. Stress and anxiety were reduced and employee engagement was increased. Additionally, surveys show that most employees feel that after going to the Ombuds Office, they are better equipped to handle future issues or concerns.

The Company also benefited not only from resolving specific disputes but from the proactive role:

> For example; the Ombuds identified changes and opportunities to prevent issues from recurring by surfacing early warnings and analyzing root causes of issue trends; they shared best practices across units; provided informal input into codes of conduct, new or revised policies, and trainings.

Randy was involved in the benchmarking of over 100 organizations' ombuds offices. She has been involved in developing measures of ombuds' effectiveness that can be tailored to individual organizations. When she left American Express, she co-founded Redmond, Williams & Associates LLC which advocates for the profession of ombudsman and helps other organizations establish or enhance their programs. Her website includes articles on the value of the ombuds programs, www.redmondwilliamsassoc.com. Randy also tells us that with smaller and mid-size companies there may be an opportunity to be a freelance or contractor performing the role, but it is challenging to gain the requisite inside knowledge of the organizations's mission, values, priorities processes and policies to assure the successful communication that is necessary to the role.

Marcy E. Wilkov, who is now the American Express Ombudsperson, came to her job by a different path. With a background in political science at Mt. Holyoke College, she became a lobbyist. Thinking law school would enhance her lobbying career, Marcy got a J.D. at NYU Law School followed by a federal clerkship. She decided to try practicing law and went from a law firm to an in-house position at American Express where she practiced law for 22 years. As a lawyer, she viewed one of her key roles as engaging in risk assessment and mitigation. She was

peripherally involved in mediation as a lawyer but had no direct experience as a mediator. Although American Express had established the Office of the Ombudsperson in 1994, she had had no direct contact with the ombudsman. She was encouraged and honored to apply for the ombuds position when when it came open. It was a very significant transition from investigating and fixing problems and advocating for a person or cause to listening, creating options, seeing all sides of the issue and developing practical possibilities. Although she had expected the job to focus on whistleblowing and the escalation of serious issues requiring systemic change, she has found great satisfaction in simply providing employees the opportunity to be heard and help in taking control of distressing situations.

Marcy reports directly to the CEO who endorses the role and reminds employees of the office and its use. She solicits feedback from employees and from stakeholders with whom her office has had interaction and has had overwhelmingly favorable feedback. She in turn provides information to the Board of Directors on the value of the Ombuds Office. She would like to see much wider development of ombuds offices, which can:

> Foster creation of a culture of integrity and reinforce such a culture once it exists. In-house lawyers, through their legal work with the business, gain a great perspective on the needs of a company and the value that can come from an embedded resource employees can access to resolve work place issues. I think that in-house lawyers are ideal people to encourage the creation of an ombuds office.

Susan Casino is the Director of Ombuds Services for Apollo Group Inc. Apollo owns and operates for-profit higher education institutions, of which University of Phoenix is the largest. Susan found herself in an Ombuds position quite unexpectedly. She earned a B.A. in psychology that led to her work within the State of New Jersey's Division of Youth and Family Services investigating child abuse and neglect cases for almost a decade. She stayed with state government for a time in a Director's role within the same Division before moving on to complete her M.B.A. While completing her graduate degree she began her career with University of Phoenix and while there held several positions from recruiting to training to managing and developing a Leadership Development Program (LDP). Additionally Susan pursued a Mediation Certificate with the desire to go into the field full time. She's had experience mediating claims in Maricopa County Superior Court, teaching mediation courses for the University of Phoenix as well as assisting with the development of additional mediation courses serving as subject matter expert. In her role as LDP Director she was tasked with teaching communication and dispute resolution skills to leadership. It was in this role for the UoP that her skills caught the attention of the Chairman of the Board and President, and after an internal search was completed she was elected to the role of Ombudsman. Apollo did not formally have an Ombuds Office and Susan found herself with the challenge of creating, marketing and managing the first Ombuds Office for Apollo Group and its subsidiaries. She received support from the IOA and other active Ombudsman as she took on this endeavor. Susan, as do so many in this profession, call the Ombuds role a "dream job," as it allows her and others fortunate enough to work in the area of conflict resolution to work without the constraints of formal documentation. Her office has now subsisted two sets of leadership and an improving culture fostered by informal resolution. She reports annually to the CEO and her work is consonant with recently adopted organizational core values: empower excellence, improving society, integrity and trust, and treat others as we would like to be treated.

Susan believes that any institution is enhanced by the establishment of an ombuds office because:

> The mere presence of an Ombuds Office speaks volumes to the integrity an organization has or is attempting to build. While the concept is still catching on in Corporate America, the notion of vetting through an issue that empowers an individual to gain resolution, without involving a formal process is effective and appealing. Many simply want an issue resolved and do not wish to betray a colleague or boss by reporting them when this may not be necessary. An Ombuds Office is a critical piece of dispute resolution…people often feel added safety expressing critical issues to someone they know is an Independent, Neutral and maintains no records.

There can be many paths to an ombuds office. These are only three. Mediators have many of the foundational skills for this work and it provides another avenue for expanding ADR and reducing conflict.

Endnote

1. *See* Charles L. Howard, *The Organizational Ombudsman* (ABA 2010).

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An Emphasis on Arbitrator Authority—Arbitration at the Supreme Court (2012 to 2013 Term)

By Sherman Kahn

The United States Supreme Court issued two regular opinions and one *per curiam* opinion on arbitration during its 2012 term (commencing in October 2012 and extending until June 2013). While the Court's two regular opinions continued the Court's recent concern with the intersection between arbitration and class action procedures, an argument can be made that the overriding theme of this year's Supreme Court arbitration jurisprudence is judicial deference to arbitrators' decisions and those of the parties who appoint them. The Court's three opinions are discussed below.

A. *Nitro-Lift Technologies, L.L.C. v. Howard*[1]

Early in the term, the Supreme Court issued a per curiam opinion offering a sharp rebuke to the Oklahoma Supreme Court for declaring non-competition provisions in two employment contracts null and void under an Oklahoma statute when, according to the Court, that decision should have been left to an arbitrator.[2]

The Court's per curiam opinion in *Nitro-Lift Technologies L.L.C. v. Howard* stresses the primacy of the Federal Arbitration Act ("FAA"), including the FAA's policy favoring arbitration, over state law.[3] The dispute in *Nitro-Lift* concerned an employment agreement under which two employees worked for Nitro-Lift on oil wells in Oklahoma, Texas and Arkansas. The employment agreements included confidentiality and noncompetition provisions and an arbitration clause calling for arbitration in Houston, Texas under AAA rules.[4] When the two employees left Nitro-Lift and began working for a competitor, Nitro-Lift served the employees with a demand for arbitration.[5]

The employees filed suit in Oklahoma state court and asked the court to declare the noncompetition agreements null and void pursuant to an Oklahoma statute. The lower Oklahoma Court dismissed the complaint, finding that the contracts contained valid arbitration clauses under which an arbitrator, and not the court, should decide the validity of the noncompetition agreements.[6]

The Oklahoma Supreme Court, on the employees' appeal issued an order to show cause why the matter should not be resolved by the application of Okla. Stat. Tit. 15 §219A, which limits the enforceability of noncompetition agreements in Oklahoma.[7] Nitro-Lift argued that under Supreme Court precedent interpreting the FAA, the decision on whether the noncompetition clauses were valid was for the arbitrator and not the court.[8] The Oklahoma Supreme Court found the noncompetition clauses invalid as against public policy, holding that the "existence of an arbitration agreement in an employment contract does not prohibit judicial review of the underlying agreement."[9]

The United States Supreme Court reversed, holding precisely to the contrary, "when parties commit to arbitrate contractual disputes, it is a mainstay of the [FAA]'s substantive law that attacks on the validity of the contract, as distinct from attacks on the validity of the arbitration clause itself, are to be resolved by the arbitrator in the first instance, not by a federal or state court."[10] Moreover, the Court held that the Oklahoma courts did not have an adequate and independent state ground to review the validity of the contract because to do so would be in conflict with the federal law construing the FAA.[11]

In *Nitro-Lift*, the Supreme Court issued a clear statement that state courts, regardless of the public policy involved, are not to usurp the arbitrator's role to interpret the validity of contracts put into arbitration pursuant to a valid arbitration clause.

B. *Oxford Health Plans LLC v. Sutter*[12]

The Supreme Court further explored judicial deference to arbitral authority in its unanimous decision in *Oxford Health Plans v. Sutter.*[13] *Oxford Health Plans* was a challenge to an arbitrator's finding that a contract provided for class arbitration under FAA Section 10(a)(4) on the ground that the arbitrator had exceeded his powers.[14] The Court held that it must defer to the arbitrator's decision on the class arbitration decision, whether right or wrong, because the parties duly submitted the question to the arbitrator and the arbitrator decided the issue as a matter of contract interpretation.[15]

Sutter, a doctor who had contracted with Oxford to provide medical services to members of Oxford's insurance network, filed suit against Oxford in New Jersey Superior Court on behalf of himself and a putative class of other New Jersey physicians alleging that Oxford had not fully paid the doctors for their services.[16] Oxford moved to compel arbitration pursuant to an arbitration clause in the agreement between Oxford and Sutter and the New Jersey court granted the motion, referring the matter to arbitration.[17]

In the arbitration, "the parties agreed that the arbitrator should decide whether their contract authorized class arbitrations, and he determined that it did."[18] The arbitrator based his finding on language in the arbitration clause stating that "[n]o civil action concerning any dispute arising under this Agreement shall be instituted before any

court, and all such disputes shall be submitted to final and binding arbitration.…"[19] The arbitrator reasoned based on this language that the intent of the clause was to vest in the arbitration process everything that is prohibited from the court process and that a class action is one such prohibited civil action and is therefore encompassed by the arbitration agreement.[20]

Oxford then filed a motion in federal court to vacate the arbitrator's decision on the ground that he had exceeded his powers under Section 10(a)(4) of the FAA.[21] The district court denied Oxford's motion and the Third Circuit affirmed the denial.[22] As the arbitration continued, the Supreme Court issued its opinion in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp*,[23] holding that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.[24]

Oxford asked the arbitrator to reconsider his decision on class arbitration based on *Stolt-Nielsen* and the arbitrator found that *Stolt-Nielsen* had no effect on the arbitration because the agreement authorized class arbitration.[25] Oxford again moved in federal court to vacate the arbitrators decision under FAA Section 10(a)(4).[26] The district court again denied Oxford's motion and the Third Circuit again affirmed.[27]

The Supreme Court granted certiorari to address the issue of whether FAA Section 10(a)(4) allows a court to vacate an arbitral award in similar circumstances and held it does not.[28] The Court emphasized that to obtain relief under FAA Section 10(a)(4) on the ground that an arbitrator exceeded his powers the challenger bears a heavy burden and an arbitral decision even arguably construing or applying the contract must stand, "regardless of a court's view of its (de)merits."[29] Thus, the Court concluded that the sole question before it was whether the arbitrator (even arguably) interpreted the parties' contract, and not whether he got its meaning right or wrong."[30] As the arbitrator's decisions were "through and through" interpretations of the parties agreement, the Court held that the arbitrator did not exceed his powers.[31]

The Supreme Court rejected Oxford's argument that *Stolt-Nielsen* authorizes a court to vacate an award where an arbitrator imposes class arbitration without a valid contractual basis.[32] The Court found this to be a misreading of *Stolt-Nielsen*, which had overturned an arbitral decision on the ground that it lacked any basis in the contract and not on the ground that it lacked a "sufficient" one.[33] The Court pointed out that in *Stolt-Nielsen*, the parties had entered what the Court describes as "an unusual stipulation" that they had never reached an agreement on class arbitration, which left the arbitral tribunal no room for an inquiry regarding the parties' intent.[34]

A footnote in the *Oxford Health Plans* decision provides what is likely to be a road-map for the next challenge to class arbitration. The Court pointed out that it would face a different issue had Oxford argued that the availability of class arbitration was a matter of arbitrability—which is presumptively for the courts to decide.[35] According to the Court, *Stolt-Nielsen* made clear that the Court has not yet decided whether the availability of class arbitration is a question of arbitrability but that Oxford precluded consideration of that question when it agreed that the arbitrator should decide the question.[36]

C. *American Express Company v. Italian Colors Restaurant*[37]

The Supreme Court again addressed the intersection of arbitration with class actions in *American Express Co. v. Italian Colors Restaurant,* although with considerably less unanimity.[38] Justice Scalia's opinion for the Court found that a contractual waiver of class arbitration is enforceable even where the plaintiff's cost of individually arbitrating a federal statutory claim demonstrably exceeds the potential recovery on the arbitrated claim.[39]

American Express has a protracted procedural history. The case arose as a dispute between merchants who accept American Express charge cards and American Express.[40] The merchants filed a class action for violation of the antitrust laws on the ground that American Express had allegedly used its monopoly power in the market for charge cards to force merchants to accept credit cards at a rate 30% higher than the rate charged for competing credit cards.[41]

American Express moved to compel individual arbitration based upon its agreement with the merchants that provided for arbitration of all disputes between the parties and also provided that "there shall be no right or authority for any Claims to be arbitrated on a class action basis."[42] The merchants submitted a declaration from an economist who estimated that the cost of the expert analysis necessary to determine the antitrust claims would be several hundred thousand to more than one million dollars, while the maximum recovery for the individual plaintiff would be $12,850 or $38,549 if trebled.[43] The district court granted American Express's motion and dismissed the action, but the Second Circuit reversed and remanded because the merchants had established that they would incur prohibitive costs if compelled to arbitrate under the class action waiver, making the waiver unenforceable.[44]

The Supreme Court then granted certiorari, vacated the Second Circuit's judgment and remanded for further consideration in light of *Stolt-Nielsen.*[45] The Second Circuit stood by its original ruling on the ground that its earlier ruling did not compel class arbitration.[46] The Second Circuit then *sua sponte* reconsidered its second opinion in

light of *AT&T Mobility v. Concepcion*,[47] which held that the FAA preempted a state law barring enforcement of a class action waiver, but again reaffirmed its original ruling as there was no issue of preemption.[48] The Supreme Court again granted certiorari and reversed the Second Circuit.

The Supreme Court began its opinion by emphasizing that, under the FAA, courts rigorously enforce arbitration agreements according to their terms including terms that specify with whom parties will arbitrate their disputes and the rules under which the arbitration will be conducted.[49] The Court rejected the merchants' argument that, by requiring arbitration and excluding class arbitration in its adhesion agreement, American Express was, in effect, using its monopoly power to avoid liability under the antitrust laws because no individual merchant would be able to afford to arbitrate the issue.[50]

The Court first argued that nothing in the antitrust laws themselves require the availability of class action procedures.[51] The Court pointed out that Rule 23 of the Federal Rules of Civil Procedure (authorizing class actions) post-dates the enaction of the Sherman and Clayton Acts and argued that, therefore, the availability of class actions cannot be a requirement of those laws.[52] The Court also reasoned that Rule 23 itself does not establish an entitlement to vindicate federal statutory rights, but rather only an opportunity to do so if all the procedural predicates are met.[53]

The Court's opinion then goes on to reject the merchants' argument that American Express's ban on class arbitration should be invalidated because it prevents the effective vindication of a federal statutory right.[54] This argument is based on the Supreme Court's opinion in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[55] in which the Court approved arbitration of a federal statutory claim "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum."[56] The *American Express* Court, while acknowledging that subsequent Supreme Court cases have recognized an effective vindication exception, took the position that the discussion of effective vindication in *Mitsubishi Motors* was dictum.[57]

Although the majority opinion called the effective vindication exception dictum, it did not eliminate it entirely—rather the Court stated that the exception applies where arbitration might prevent "prospective waiver of a party's *right to pursue* statutory remedies."[58] This the court differentiated from whether it is worth the expense to *prove* the statutory remedy.[59] Thus, the Court reasons, the remedy can still be pursued on an individual basis just as antitrust remedies could be pursued before Rule 23 was enacted.[60]

The majority ends its opinion by rejecting the characterization of *AT&T Mobility v. Concepcion*,[61] which invalidated a California law on the ground that it was preempted by the FAA, as limited to preemption. In a footnote, the Court characterizes *AT&T Mobility* expansively, stating that it established "that the FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low value claims."[62]

Justice Kagan's dissent, joined by Justices Ginsburg and Breyer, not surprisingly, disagrees with the majority opinion's application of the effective vindication exception, stating that "as applied here, the [effective vindication] rule would ensure that Amex's arbitration clause does not foreclose Italian Colors from vindicating its right to redress antitrust harm."[63] In the dissent's view, if it is not permissible to obtain absolution from antitrust liability through a direct exculpatory clause, it should not be permissible to achieve the same result through the erection of procedural hurdles.[64]

Perhaps the most provocative and interesting argument raised by the *American Express* dissent is that to allow arbitration clauses that effectively strip parties of the economic incentive to enforce their federal statutory rights *frustrates*, rather than advances, the goals of the FAA.[65] This is because the FAA promotes arbitration, but arbitration clauses such as the one at issue in *American Express*, which limit claimants to individual actions but contain no procedural safeguards to ensure such actions can be economically brought, result in no arbitrations being initiated.[66] Such clauses, according to the dissent, act not as arbitration clauses, but rather as *de facto* waivers of liability for the clause-drafter.[67]

Justice Kagan's point is an important one. If the FAA begins to be perceived as a tool to limit substantive rights, legislative efforts to remedy that situation could create problems for commercial and international arbitration. It remains to be seen whether the Court's aggressive approach to enforcing class action waivers will lead to such legislative action.[68]

D. The Upcoming Term

The upcoming Supreme Court term, to commence in October 2013, already promises to be an interesting one. The Court has granted certiorari in *BG Group PLC v. Republic of Argentina,* an investment treaty arbitration matter.[69] The question presented, not explicitly limited in scope to investment arbitration, is "[i]n disputes involving a multi-staged dispute resolution process, does a court or instead the arbitrator determine whether a precondition to arbitrate has been satisfied."[70] This case, for obvious reasons, has been the subject of great interest in the arbitration community and the Court has granted permission to the American Arbitration Association and the United States Counsel for International Business (the U.S. arm of the ICC) to submit briefs as *amici curiae.*[71]

Endnotes

1. 133 S. Ct. 500 (2012).
2. 133 S. Ct. at 501.
3. *Id.*
4. 133 S. Ct. at 501-502.
5. 133 S. Ct. at 502.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. 133 S. Ct. at 503.
11. 133 S. Ct. at 502-503.
12. 133 S. Ct. 2064 (2012).
13. Justice Kagan delivered the opinion of the Court and Justice Alito filed a concurring opinion in which Justice Thomas joined.
14. 13 S. Ct. at 2066.
15. 13 S. Ct. at 2071.
16. 13 S. Ct. at 2067.
17. *Id*.
18. *Id.*
19. *Id.*
20. *Id*.
21. *Id*.
22. *Id.*
23. 559 U.S. 662, 130 S. Ct. 1758 (2010).
24. *Id*., *quoting Stolt-Nielsen,* 559 U.S. at 684.
25. 13 S. Ct. at 2067.
26. 13 S. Ct. at 2068.
27. *Id.*
28. *Id*.
29. *Id*.
30. *Id*.
31. 13 S. Ct. at 2069.
32. *Id*.
33. *Id.*
34. *Id*. It remains unclear why the *Stolt-Nielsen* parties' later agreement to submit the class arbitration issue to the arbitrators did not confer upon them the specific authority to decide the class arbitration issue.
35. 13 S. Ct. at 2068, n. 2.
36. *Id.* Justice Alito's concurrence, joined by Justice Thomas, echoes this point and goes on to say that because the absent class members, unlike Oxford, did not consent to determination by the arbitrator, difficult procedural issues arise with respect to the conduct of class arbitrations.
37. 133 S. Ct. 2304 (2013).
38. 133 S. Ct. at 2307. Justice Scalia delivered the opinion of the Court joined by Chief Justice Roberts and Justices Kennedy, Thomas and Alito. Justice Thomas filed a concurring opinion. Justice Kagan filed a dissenting opinion joined by Justices Ginsburg and Breyer. Justice Sotomayor did not take part in consideration of the case.
39. 133 S. Ct. at 2307.
40. 133 S. Ct. at 2308.
41. *Id*.
42. *Id*.
43. *Id*.
44. *Id.*
45. *Id*.
46. *Id.*, *citing In re American Express Merchants' Litigation*, 634 F.3d 187 (2d Cir. 2011).
47. 131 S. Ct. 1740 (2011).
48. *Id.*, *citing In re American Express Merchants' Litigation*, 681 F.3d 139 (2d Cir. 2012).
49. 133 S. Ct. at 2309.
50. *Id*.
51. *Id*.
52. *Id.*
53. *Id*.
54. *Id*.
55. 473 U.S. 614, 637 n. 19.
56. 113 S. Ct. at 2310.
57. 133 S. Ct. at 2310 and n. 2. Justice Kagan's dissent calls this reduction to dictum of *Mitsubishi's* effective vindication exception "dead wrong." 113 S. Ct. at 2317, n. 3.
58. 113 S. Ct. at 2310 (emphasis in the original).
59. 113 S. Ct. at 2310.
60. 113 S. Ct. at 2311.
61. 131 S. Ct. 1740.
62. 113 S. Ct. at 2312, n. 5. Justice Thomas follows the majority opinion with a concurrence in which he states that because the merchants had not furnished grounds for the revocation of any contract, but instead argued only that to proceed would be economically infeasible, the arbitration clause must be upheld under the FAA. 2013 113 S. Ct. at 2312-13.
63. 113 S. Ct. at 2313.
64. 113 S. Ct. at 2313-14.
65. 113 S. Ct. at 2315.
66. *Id.*
67. *Id.*
68. The possibility of legislative action is not purely speculative. The latest iteration of the Arbitration Fairness Act, HR 1844 and S. 878 introduced on May 7, 2013, would if enacted invalidate any predispute arbitration agreement if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.
69. 2013 U.S. LEXIS 4532.
70. 2012 U.S. S. Ct. Briefs LEXIS 3231.
71. 2013 U.S. LEXIS 4532.

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The Bespoke Clause: Tailoring Federal Rule 68 to Arbitration for a Better Fit

By Abigail Pessen

One of arbitration's great benefits is the opportunity it offers parties to design a process custom-tailored to their needs. Regrettably, this opportunity is often overlooked, and a "one size fits all" arbitration clause adopted instead, frequently borrowing the Federal Rules of Civil Procedure *en masse*. Although such wholesale adoption of the Federal Rules is anathema to the arbitration community, Federal Rule 68 might be a useful stand-alone import, and indeed would have far more oomph in arbitration than it does in federal court litigation.[1]

This article accordingly describes the Rule's features and suggests ways in which it might be altered and incorporated into arbitration clauses.

Rule 68 is the only federal rule to explicitly encourage settlement.[2] It provides, in substance, that if a defendant makes an offer of judgment which the plaintiff rejects, and the plaintiff later recovers a judgment less favorable than the rejected offer, then the plaintiff must pay the costs incurred after the offer was made. In theory, this consequence encourages plaintiffs to evaluate their cases accurately and to consider settlement offers seriously. However, because costs—statutorily defined—are so minimal in federal litigation,[3] the leverage created by the Rule is as a practical matter negligible and it is rarely invoked.[4]

In contrast, arbitration "costs" are far more substantial, encompassing the administering entity's filing fees and the arbitrator(s)' compensation, which may in large cases easily climb into six figures. Thus, even if Rule 68 were incorporated into an arbitration clause "as is," its settlement-incentivizing effect in arbitration could be robust. And, if the Rule were tweaked—as arbitration parties are free to do—(i) to make it symmetrical, (ii) to have it triggered by written settlement offers (rather than "offers of judgment"), and/or (iii) to expand the definition of potentially shifted "costs" to include attorneys' fees, or e-discovery costs—then parties would be motivated to consider settlement offers in arbitration very seriously indeed.

Rule Symmetry

Only defendants are permitted to make offers of judgment under the current version of Federal Rule 68. In contrast, twenty-three states (but not New York) have adopted some variation of a two-way rule.[5]

No articulated rationale for the one-way regime is found in the sparse legislative history of the Rule. However, unless attorneys' fees are included in recoverable costs, or some multiplier of costs is included, altering the Rule to make it available to claimants in arbitration would not confer any additional benefit on them, because the costs awarded under a Rule 68 scenario would be no more than the costs typically already recoverable by prevailing parties. (In contrast, respondents would likely benefit from Rule 68 since without it, their costs typically would not be recoverable if a claimant recovers an award of any amount after hearing.)

Allowing Written Settlement Offers to Trigger the Rule

Rule 68 applies only when a defendant offers in writing to have a "judgment" entered against it on specified terms; a simple settlement offer does not suffice. To encourage use of the Rule in arbitration, parties may choose to have it triggered by written settlement offers rather than offers of judgment, particularly since parties in arbitration often prize confidentiality and might well prefer that no judgment be entered. (Indeed, because there is no pending litigation, it is questionable whether a judgment could even be entered as contemplated by the Rule, without a consent award, thus adding another layer of expense.) On the other hand, the spectre of invoking the Rule following any settlement discussion might have the perverse effect of discouraging settlement discussions at all, especially at early stages in the arbitration.

Including Attorneys' Fees in the "Costs" Shifted Under the Rule

Modifying Rule 68 to include as part of recoverable costs the attorneys' fees incurred by the offeror following the offer's rejection would significantly raise the stakes involved in weighing such an offer, and thus would encourage early settlement of cases, in turn enhancing the efficiency of arbitration. Such a change would also presumably deter claimants from pursuing marginal claims beyond the point where the costs of arbitration outstrip any potential recovery, and—if the Rule were made symmetrical—deter respondents from using superior resources to "wear out" claimants.

To prevent potential injustice resulting from fee-shifting under the Rule, arbitration parties could agree that (i) fee-shifting be inapplicable unless the award at the hearing is a certain percentage below the rejected offer; and/or (ii) arbitrators be given considerable discretion to modify or deny fee-shifting based on the facts and circumstances of a given case.

By way of example, Alaska's counterpart to Federal Rule 68, Alaska R. Civ. P. 68, contains these two elements, providing:

- An award of "reasonable actual" post-offer attorneys' fees to the offeror is triggered when the judgment at trial is 5-10% (depending on whether or not there are multiple defendants) less favorable than the refused offer.

  Courts are given discretion to deviate from the guidelines and adjust attorneys' fees based on: (i) the complexity of the litigation, (ii) the length of trial, (iii) the reasonableness of the attorney's rates, hours expended, attorneys used, and attorney's efforts to minimize fees (iv) the reasonableness of the claims and defenses pursued by each side, (v) bad faith, (vi) the amount of work performed and the significance of the matters at stake, (vii) the extent to which an overly onerous fee would deter future litigants, and (viii) other equitable factors.

California's counterpart to Federal Rule 68, Cal. Civ. Proc. Code § 1021, also requires trial judges to consider the following multiple factors in deciding whether to award attorneys' fees to the offeror following a judgment at trial less favorable than the rejected offer:

- The reasonableness of the offeree's failure to accept the offer, including: (i) the merit or lack of merit of the claim; (ii) the closeness of the questions of fact and law; (iii) whether the offeror has unreasonably failed to disclose relevant information; (iv) whether the matter was considering a question of significant importance that the court had not yet addressed; (v) relief that might reasonably have been anticipated, given known information at the time of the offer; and (vi) the amount of additional delay, cost and expense that the offeror reasonably would be expected to incur if the litigation should be prolonged;
- The amount of damages and other relief sought and the results obtained;
- The efforts made by the parties or the attorneys to settle the controversy; and
- The existence of any bad faith or abuse of legal procedure by the parties or the attorneys.

In this regard, the existence of a statutory fee-shifting mechanism applicable to the underlying claim (i.e., civil rights or employment discrimination) might be a factor militating against awarding the respondent some or all of the fees it would otherwise be entitled to. Conversely, if claimants become entitled to make offers of judgment in Title VII cases, to make the rule truly symmetrical they would have to receive a "premium" on their recovery of attorneys' fees if they obtained an award in excess of a rejected Rule 68 offer.

In considering whether to include attorneys' fee-shifting in an adaptation of Rule 68, arbitration parties should be mindful of many commentators' serious concerns that such a rule change will put undue pressure on claimants in particular to accept low offers of judgment, rather than risk being saddled with the respondent's attorneys' fees if the arbitrator awards less than anticipated; accordingly, a party's right to a hearing will, as a practical matter, be restricted. The rule change would modify the "American rule"—long established in our jurisprudence—which leaves each party responsible for its own attorneys' fees, win or lose, unless a contract or relevant statute provides otherwise; however, the American rule would remain unchanged unless Rule 68 were triggered. Moreover, giving arbitrators discretion to modify the Rule will create a new layer of post-hearing briefing and expense as parties attempt to influence the exercise of that discretion.

Including E-Discovery Cost-Shifting Under Rule 68

Finally, arbitration parties may wish to consider including e-discovery costs in the costs to be shifted under the version of Federal Rule 68 they agree to import. Some courts have permitted parties entitled to "copying costs" under Rule 68 to recover e-discovery costs. While the cost of "copying" electronic documents (in contrast to searching for or reviewing them) is minimal, some courts have been interpreting electronic "copying costs" expansively.[6] However, the first appellate court to address the issue recently rejected this approach.[7]

The potential benefit of including e-discovery costs as part of the costs shifted under Rule 68 is that it would increase the incentives to accept a Rule 68 offer, and encourage litigants to seek only necessary discovery. On the other hand, such a change could have the opposite effect of encouraging unnecessary e-discovery in the hope of convincing an adversary to accept a Rule 68 offer, and also might increase "satellite arbitration" to determine the reasonableness of various e-discovery costs sought by the Rule 68 offeror. Additionally, although not relevant to arbitration parties' choices, including e-discovery costs would contravene the intent of Rule 68's drafters, who could not have envisioned/intended that the "copying" costs to be imported from Section 1920 would encompass the enormous costs of contemporary e-discovery.

Conclusion

Federal Rule 68 imposes cost-shifting consequences on parties who "guess wrong" in rejecting settlement offers in federal litigations; including it "as is" in arbitration clauses would surely give pause to parties considering settlement offers. Moreover, in contrast to the cumbersome process required to amend any of the Federal Rules of Civil Procedure, arbitration's flexibility allows parties to tailor Rule 68 to their particular specifications with a few clicks of a mouse, thereby making the consequences of rejecting settlement offers even more substantial, as well as reciprocal. Whatever the decision, the pros and cons of including such a provision in an arbitration clause merits thoughtful consideration by counsel.

Endnotes

1. The idea for this article evolved from a report of the NYC Bar Association Federal Courts Committee on Federal Rule 68 which was co-authored by Honorable James Francis, David Hennes, Evan Mandel, Stuart Riback, and myself. That report is posted at: http://www2.nycbar.org/pdf/report/uploads/20072454ReportonRule68oftheFed.RulesofCivilProcedure.pdf. My co-authors' invaluable research and drafting contributions to the original report, much of which are included here, are gratefully acknowledged. Thanks also are due to Fordham Law School student Nicholas Giannuzzi, whose research and drafting assistance contributed greatly to the original report.
2. Rule 68 in its current form provides:

   > (a) MAKING AN OFFER; JUDGMENT ON AN ACCEPTED OFFER. At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.
   >
   > (b) UNACCEPTED OFFER. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.
   >
   > (c) OFFER AFTER LIABILITY IS DETERMINED. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time—but at least 14 days—before the date set for a hearing to determine the extent of liability.
   >
   > (d) PAYING COSTS AFTER AN UNACCEPTED OFFER. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

3. 28 U.S.C. Section 1920 enumerates the costs recoverable by a prevailing party in a federal court litigation.
4. The exception is in cases brought under Section 1983 and other statutes entitling plaintiffs to recover attorneys' fees; the Supreme Court held in *Marek v. Chesny,* 473 U.S. 1 (1985), that such attorneys' fees are part of "costs" under Rule 68 and therefore not recoverable by a plaintiff who rejects a Rule 68 offer and then recovers less at trial.
5. See, e.g., Alaska Statutes Annotated, § 09.30.065 (1986); Arizona Rule of Civil Procedure 68 (2007); West Ann. Cal. C.C.P. § 998(2005); Colorado Rev. Stats. Annotated § 13–17–202 (2003); Connecticut General Stats. Annotated § 52–192a (2007); Florida Stats. Annotated § 768.79(2007); Ga. Code Ann. § 9–11–68 (2006); Hawaii Rule of Civ. Procedure 68 (1999); Louisiana Rule of Civ. Procedure (1997); Mich. Court Rules of 1985, Rule 2.405 (2003); Minn. Rule of Civ. Procedure 68 (1989); West's Nev. R.S.A. § 17.115 (2005); N.J. Stats. Annotated Rule 4:58–1 (2006); New Mexico Rule of Civil Proc. 1–068 (2003); North Dakota Rule of Civ. Procedure 68 (2007); Oklahoma Rule of Civ. Procedure (1995); South Carolina Rule of Civil Procedure 68 (2006); South Dakota Civ. Procedure 68 (2005); Tennessee Rules of Procedure 68 (1984); Texas Rule of Civ. Procedure 167.2 (2004); Utah Rule of Civ. Procedure 68(2006); Wisconsin Statutes Annotated, Chapter 807, § 807.01 (2007); Wyoming Rules of Civ. Procedure (2007).
6. *CBT Flint Partners, LLC v. Return Path, Inc.*, 676 F. Supp. 2d 1376 (N.D. Ga. 2009), *aff'd in part, rev'd in part on other grounds, and remanded*, 654 F.3d 1353 (Fed. Cir. 2011). *CBT Flint Partners, LLC v. Return Path, Inc.*, 676 F. Supp. 2d 1376 (N.D. Ga. 2009), *aff'd in part, rev'd in part on other grounds, and remanded*, 654 F.3d 1353 (Fed. Cir. 2011).
7. *Race Tires America, Inc. v. Hoosier Racing Tire Corp.,* 674 F.3d. 158 (3d Cir. 2012).

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CPR Expands Arbitration Options with Newly Released Administered Arbitration Rules

By Olivier P. André

The International Institute for Conflict Prevention and Resolution (CPR) officially launched its inaugural set of administered arbitration rules at a reception held on May 13, 2013, at the New York office of Simpson Thacher & Bartlett L.L.C.

The launch of these new rules, which have become effective on July 1, 2013, is a major development for the field of arbitration and for CPR. When it comes to arbitration, CPR has championed the use of non-administered arbitration to resolve disputes in an efficient and cost-effective way since its creation by Fortune 500 General Counsel in the late seventies. With the promulgation of its administered arbitration rules, CPR is again expanding the range of options to consider when tailoring a dispute resolution process best adapted to the parties' interests and needs.[1]

The CPR non-administered arbitration rules[2] have been used for years in large B2B complex commercial disputes by users who appreciate the flexibility they offer while reducing the costs. Nonetheless, parties may prefer the ongoing involvement of an administrative organization for certain categories of disputes. With these new rules, CPR is responding to the request expressed by its members[3] and users to also offer an administered arbitration option.

The CPR Administered Arbitration Rules (the "Rules") are based on CPR's well-tested and comprehensive non-administered arbitration rules, an attractive alternative to the UNCITRAL arbitration rules.[4] They have been carefully drafted by arbitration experts from CPR's Arbitration Committee[5] to meet business needs and offer only what parties need from an administering institution, and no more. CPR will assist the parties during the critical arbitrator selection phase, handle all billing and advances on costs with the input from the Tribunal, address any arbitrator challenge that may arise,[6] and perform a limited review of the award before it is issued. The administrative services are designed to make these rules cost-efficient. For example, submissions of filings and pleadings to CPR will be in electronic format only. To streamline the process, the Tribunal will interface directly with the parties for scheduling matters and advise CPR of the status. Attorneys already on staff with CPR, and experienced with arbitration, will assist the parties and administer cases out of CPR's New York office. Below is a short description of some of the key features of the Rules.

Arbitrator Selection

Parties using the Rules will have access to the elite Panel of CPR Distinguished Neutrals[7] worldwide. All CPR arbitrators have proven experience conducting arbitrations for complex commercial disputes and are strictly vetted and evaluated before being admitted to the CPR Panel.[8]

"With the promulgation of its administered arbitration rules, CPR is again expanding the range of options to consider when tailoring a dispute resolution process best adapted to the parties' interests and needs."

Under the default arbitrator selection process, the Tribunal consists of 3 arbitrators. Each party designates a party-arbitrator candidate for appointment in the notice of arbitration or the response.[9] CPR queries the party-designated arbitrator candidates for conflicts, availability, and rates. If no objection to their independence or impartiality is raised and sustained, those candidates are appointed by CPR. The Chair is appointed by CPR using a list-ranking process with the parties' participation.[10]

The rules offer numerous other arbitrator selection options to ensure that the parties have a range of options to address their specific needs and ultimately maintain control over the process. As a variation of the default process, the parties can, for example, provide in their arbitration clause that the two party-appointed arbitrators will designate the Chair[11] or that all three arbitrators will be appointed by CPR using a list-ranking process with the parties' participation. The clause can also provide that the unique CPR-screened process for the appointment of party-appointed arbitrators will be used. Pursuant to the screened process provided by Rule 5.4, the parties each select their own party-appointed arbitrator without that arbitrator knowing which party has appointed them because CPR acts as a "screen" during the selection phase.

Finally, the parties can also specify in their arbitration clause that they will use a sole arbitrator instead of a three-member tribunal. In that case, the clause can specify whether the arbitrator will be jointly designated by the parties—with CPR's assistance only if the parties are unable to agree—or selected by CPR using a list-ranking process with the parties' participation.

Administrative Fees, Advance on Costs, and Arbitrators' Fees

The administrative fee schedule has been designed to be user-friendly and offer certainty to arbitration users. The claimant is required to pay a flat filing fee of $1,750 and there is no separate filing fee for counterclaims. In addition to the filing fee, the parties are required to pay a flat administrative fee[12] based on a scale of amounts in dispute,[13] rather than a percentage of the amount in dispute.[14] The fee schedule is also designed to encourage efficiency. The administrative fee is based on the delivery of the final award by the Tribunal to CPR for review within 12 months of the initial pre-hearing conference.[15] CPR must approve any scheduling orders extending beyond this period, and has discretion to convene a call with the parties and arbitrators to discuss the factors relevant to such an extension. CPR may charge an additional $2,000 administrative fee for each additional 6-month period.

The arbitrators set their own fees on a reasonable basis, and those fees are fully disclosed to the parties prior to appointment. Advances on costs are determined by CPR with input from the Tribunal.[16]

Conservatory and Interim Measures

Pursuant to Rule 13, a party may request the Tribunal to take any interim measures of protection it deems necessary, including measures for the preservation of assets, the conservation of goods or the sale of perishable goods.[17] Pursuant to Rule 14, a party may also seek any interim measures of protection permissible under the contract or the applicable law prior to the constitution of the Tribunal by requesting CPR to appoint a Special Arbitrator. The Special Arbitrator can be appointed within 2 business days of the request for interim relief from a list of arbitrators maintained by CPR for that purpose.[18] This mechanism for emergency relief automatically applies under the Rules unless the parties agree otherwise. If the parties opt to go to court for judicial interim relief, the agreement to arbitrate is not waived.[19]

Discovery

Under Rule 11, the Tribunal "may require and facilitate" appropriate discovery as deemed necessary under the circumstances, taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective. It is to be noted, however, that an arbitration clause can always be customized to provide specific discovery provisions tailored to the parties' needs. To do so, the parties can adopt one of the modes provided for in the CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration.[20] This Protocol, released in 2009 by the CPR Arbitration Committee provides different degrees of document disclosure—including electronic documents—and presentation of witnesses. Parties may also refer to the IBA Rules on the Taking of Evidence in International Arbitration (2010).[21]

The Tribunal may issue orders to protect the confidentiality of proprietary information, trade secrets and other sensitive information disclosed in discovery.[22]

Award and CPR Limited Review of Award

Unless otherwise agreed, the award must be written and reasoned.[23] The Tribunal may grant any remedy or relief, including specific performance, within the scope of the agreement or the law(s) or rules of law applicable to the dispute.[24] The dispute should in most circumstances be submitted to the Tribunal for decision within 6 months after the initial pre-hearing conference.[25] The Tribunal should in most circumstances submit the final award to CPR within 30 days after the close of the hearing and CPR should deliver the award to the parties promptly thereafter.[26] CPR must approve any scheduling orders or extensions that would result in a final award being rendered more than 12 months after the initial pre-hearing conference.[27]

Under the Administered Arbitration Rules, CPR performs a limited review of the award for format, clerical, typographical or computational errors[28] before it is delivered to the parties. After the delivery of the award, the parties have a limited 15-day period during which they may request the Tribunal to clarify the award before it becomes final and binding.[29]

Settlement and Mediation

A provision directly built into the Rules allows the Tribunal to suggest that the parties explore settlement or mediation at any time during the arbitration.[30] This provision has long been a part of CPR Non-Administered Arbitration Rules and can lead to consensual resolution opportunities spotted by arbitrators during the proceeding. If mediation is used, the mediator shall be a person other than a member of the arbitral Tribunal.

Pre-Dispute Model Clause

> Any dispute arising out of or relating to this contract, including the breach, termination or validity thereof, shall be finally resolved by arbitration in accordance with the International Institute for Conflict Prevention and Resolution ("CPR") Rules for Administered Arbitration (the "Administered Rules" or "Rules") by **[a sole arbitrator] [three arbitrators, of**

whom each party shall designate one, with the third arbitrator to be appointed by CPR] [three arbitrators, of whom each party shall designate one, with the third arbitrator to be designated by the two party-appointed arbitrators] [three arbitrators, of whom each party shall designate one in accordance with the screened appointment procedure provided in Rule 5.4] [three arbitrators, none of whom shall be designated by either party]. The arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The place of the arbitration shall be **[city, state]**.

Existing Dispute Submission Agreement

We, the undersigned parties, hereby agree to submit to arbitration in accordance with the International Institute for Conflict Prevention and Resolution ("CPR") Rules for Administered Arbitration (the "Administered Rules" or "Rules") the following dispute:

[Describe briefly]

We further agree that the above dispute shall be submitted to **[a sole arbitrator] [three arbitrators, of whom each party shall designate one, with the third arbitrator to be appointed by CPR] [three arbitrators, of whom each party shall designate one, with the third arbitrator to be designated by the two party-appointed arbitrators] [three arbitrators, of whom each party shall designate one in accordance with the screened appointment procedure provided in Rule 5.4] [three arbitrators, none of whom shall be designated by either party]**. **[We further agree that we shall faithfully observe this agreement and the Administered Rules and that we shall abide by and perform any award rendered by the arbitrator(s).]** The arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The place of arbitration shall be **[city, state]**.

Endnotes

1. With its Corporate ADR Pledge, signed by over 4,000 corporate entities, and its recently promulgated 21st Century Corporate ADR Pledge©, already signed by 26 major multinationals, CPR advocates for a global, sustainable and systemic approach to dispute resolution and prevention by corporations. Such an approach should systematically utilize, as needed, all options available in the dispute resolution process toolbox, including non-administered and administered arbitration. More information about the CPR Pledges is available at http://cpradr.org/About/CPRPledges.aspx.
2. The CPR Non-Administered Arbitration Rules (2007) and their counterpart for international disputes, the CPR Rules for Non-Administered Arbitration of International Disputes (2007), are designed to provide users with maximum control over the proceedings. Any aspects of the rules can be customized to fit the parties' specific needs and CPR only gets involved when necessary (*e.g.*, when there is a non-responding respondent, a deadlock in the selection of the arbitrators under the default mechanism, a challenge raised against a particular arbitrator, or there is a need to appoint a special arbitrator for interim measures of protection prior to the constitution of the tribunal) or when the parties require it in their contract (*e.g.*, when the parties have decided to provide for an arbitrator selection mechanism which involves CPR's assistance). There is no filing fee to commence an arbitration and, when CPR gets involved, it charges a fee based on the service rendered. Because the arbitrators directly handle all administrative aspects of the proceedings, the parties do not have to pay any administrative fees.
3. CPR membership comprises General Counsel and senior lawyers of Fortune 1,000 organizations, attorneys from the top law firms around the world, leading ADR practitioners and academics, highly experienced neutrals, sitting and retired judges, and government officials. This sophisticated, executive-level community of leading practitioners and thought leaders is dedicated to advancing ADR in their particular industries.
4. While the Administered Arbitration Rules can be adapted by parties for use in cross-border disputes, CPR is currently working on a set of Administered Arbitration Rules specifically tailored for international disputes.
5. The Drafting Subcommittee was led by Robert Smit, Esq., of Simpson Thacher & Bartlett LLP, Co-Chair of the Firm's International Arbitration and Dispute Resolution Practice. The CPR Arbitration Committee is currently chaired by Ank Santens, Esq., of White & Case LLP, and Felix Weinacht, Esq., Head of Industry Litigation at Siemens serves as Vice-Chair.
6. All arbitrators appointed under CPR Rules must be independent and impartial, with no exception (Rule 7.1). Challenges to the independence and impartiality of appointed arbitrators are decided by the CPR Challenge Officer or a CPR Challenge Review Committee in accordance with the CPR Challenge Protocol, available at http://cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/619/CPR-Challenge-Protocol.aspx.
7. CPR Members can also access the Panel of Distinguished Neutrals 24/7 online, search for neutrals using a variety of criteria and display their biographies.
8. All CPR Distinguished Neutrals undergo a highly selective vetting and evaluation process, which involves user and peer review of applicants, before being admitted to the Panel. To facilitate arbitrator selection in complex cases, CPR also maintains more than 20 specialty panels composed of arbitrators possessing specific practice experience and background. The Global Panel comprises highly qualified arbitrators in more than 20 countries and the National Panel is an elite panel comprising CPR's most distinguished neutrals who are nationally recognized for

their success and experience across the ADR spectrum. More information about CPR's Panel of Neutrals is available at http://cpradr.org/FileaCase/CPRsNeutrals.aspx.

9. CPR will provide a list of candidates from the CPR Panel upon request of a party. However, a candidate designated by a party does not have to be a member of the CPR Panels of Distinguished Neutrals. See Rule 5.1(b).
10. CPR convenes a conference call with the parties to determine the profile of the best chair candidates for the case at hand. See Rule 5.2.
11. In this case, CPR appoints the Chair using a list ranking process with the parties' participation only if the two party-appointed arbitrators are unable to designate a Chair for appointment. See Rule 5.2(b).
12. The administrative fee is capped at $32,250 for disputes over $500 million at issue. See the CPR Administered Arbitration Schedule of Costs at http://www.cpradr.org/FileaCase/CPRScheduleofAdministeredArbitrationCosts.aspx.
13. Calculated from the amounts in dispute in the claim(s) and counterclaim(s).
14. Unless otherwise agreed, the fee is split equally among the parties and is subject to allocation among the parties by the Tribunal in the award.
15. Pursuant to Rule 9.3, the Tribunal is required to hold an initial pre-hearing conference call with the parties for the planning and scheduling of the proceeding promptly after its constitution. Disputes should in most circumstances be submitted to the Tribunal for a decision within 6 months after the initial pre-hearing conference. See Rule 15.8.
16. See Rule 17.
17. See Rule 13.1.
18. See Rule 14.5.
19. See Rule 14.13.
20. See http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ArticleType/ArticleView/ArticleID/614/Default.aspx.
21. See http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#takingevidence.
22. See Rule 11 and also Rule 20 which provides that, unless otherwise agreed, the parties, the arbitrators and CPR shall treat the arbitral proceedings, any related discovery and the decisions of the Tribunal as confidential, except in connection with judicial proceedings ancillary to the arbitration.
23. See Rule 15.2.
24. See Rule 10.3.
25. See Rule 15.8.
26. *Id.*
27. *Id.*
28. See Rule 15.5.
29. See Rules 15.6 and 15.7.
30. See Rule 21.

Olivier P. André is Special Counsel and Director of Dispute Resolution Services, International Institute for Conflict Prevention & Resolution (CPR).

American Arbitration Association Launches Mediation.org

By Harold Coleman, Jr.

The American Arbitration Association® (AAA®) has launched a new division, Mediation.org, to expand the Association's focus on the fast-growing mediation component of the alternative dispute resolution (ADR) field. The goal of Mediation.org is to promote and enhance the growth of mediation through concentrations on practice and education.

Mediation.org is a web-based tool that bridges the day-to-day practice of mediation. We aspire to equip the global mediation community and its various stakeholders with the knowledge to achieve further mediation success."

Mediation.org is needed because between 95 and 98 percent of litigation cases are now resolved without going to trial, and the vast majority of those settlements result directly from mediation. Those are significant statistics in any industry, but they are especially important to the U.S. judicial system in which courts in all regions are seriously backlogged. Accordingly, mediation is a trusted option for parties and the courts to resolve differences and move on.

Billed as "a new, comprehensive online resource for all aspects of mediation, built by mediators for mediators—and those who need them," Mediation.org provides individuals, governmental agencies, and companies seeking qualified mediators with a searchable database of mediators with expertise in diverse fields; mediation case-management and mediation case-management tools; and online dispute resolution. And on the flip side, practicing mediators now have an opportunity to publish their resumes in the searchable online mediator database (mediators are not required to be AAA® panel mediators in order to be listed); practice tips and tools; professional development resources; and education and training.

Mediation.org includes a large educational component and provides the required basic and advanced training for private credentialing and practice proficiency purposes. From encouraging the novice to enter the field through advanced training for established mediators, the site provides instruction about the process and the diverse practice areas in which the principles and skills of mediation have been applied. A cornerstone of the program is the very popular *Essential Mediation Skills for the New Mediator,* a five-day intensive program held around the country. Its counterpart, *Advanced Mediator Training: The Extent—or Limit—of Mediator Influence to Effect Settlement*, is a one-day course for those already practicing in the field.

Mediation embraces skills important to all of modern society, including negotiation, listening, solid communications, and the ability to leverage and facilitate a mutual desire to reach a solution to a problem. That's why we built Mediation.org to help anybody who uses mediation or wants to be better at using mediation, including human resources officers, business development professionals, educators, social workers, and even parents. And that's why Mediation.org is so exciting. It has so much promise for helping people from all walks of life to know more about the principles, science and application of mediation for a host of everyday conflicts.

"[Mediation.org is] 'a new, comprehensive online resource for all aspects of mediation, built by mediators for mediators—and those who need them…'"

Mediation.org services will be available on a worldwide basis to private and public sector entities. International mediation has a plethora of applications, from peacekeeping to multinational business disputes. Mediation.org is prepared to extend its services anywhere in any time zone to make sure that as many people as possible understand the positive potential mediation offers to dispute resolution.

With its many areas and applications for so many types of users, what would the proverbial "elevator pitch" sound like for the new Mediation.org? There would be enough for many trips up and down, as follows:

- Mediation.org is geared to help practicing mediators to market and grow their mediation practices through publication of their detailed mediator resumes in directory of mediators.
- Mediation.org is suitable for the online filing of disputes that parties consider to be fairly straightforward; cases must involve just two parties, with neither claim nor any counterclaim valued at greater than $10,000. The entire mediation process is conducted online by a trained Mediation.org/AAA Staff Mediator, with no telephone sessions or face-to-face meetings.
- Mediation.org has technical support and customized programs to resolve high-volume, large-scale caseloads for disaster recovery, mortgage foreclosure, and similar mass claims.

- Innovative and cutting-edge mediation services that meet unique conflict-management needs are also included under the umbrella of Mediation.org, such as residential mortgage mediation programs and Judicial Settlement Conference Services, which utilize neutrals selected from a panel of former judges with especially strong settlement skills.
- And not to ignore the "social" aspect of the newest AAA division, Mediation.org also is envisioned to become a community of colleagues for mediators to use however they want—their "club," library, or forum. Current articles and news releases will be seen on the site, and users are encouraged to contribute their own literary submissions.

Navigation around the site is free; mediators who want to post their resumes can join with a subscription. For details see www.Mediation.org.

Harold Coleman, Jr., Esq., is senior vice president for mediation at the American Arbitration Association (AAA) and executive director/mediator for Mediation.org, a division of the AAA. He is a 26-year veteran of multiple levels of arbitration and mediation, a member of the AAA Panel of Arbitrators since 1987, and an AAA Board of Directors member since 2011. Coleman also trains new AAA arbitrators and aspiring mediators in basic/advanced arbitration case management techniques and basic/advanced mediation skills. A former multi-disciplinary project manager and complex litigation attorney, Coleman has mediated and arbitrated hundreds of litigated and non-litigated disputes. He is a Fellow and director of the College of Commercial Arbitrators (CCA) and board member of the International Mediation Institute (IMI). Contact information: ColemanH@mediation.org; 213.457.0353

Neuroscience and Law: Is Neuro-Literacy Optional Anymore?

By Pauline Tesler and Norman Solovay

Most civil matters—some say more than 90%—now settle without a full trial to judgment, thus making settlement the actual job of advocate lawyers.[1] Settlement modalities that enhance the quality of settlement practice and increase client satisfaction with legal representation (notably mediation and collaborative law) have grown exponentially in recent years, with ample statutory support.[2] Yet neither the vanishing trial nor the popularity of out-of-court settlement practice nor the low regard felt by the public toward the legal profession[3] have diminished the vigorous opposition of the organized litigation bar to these new and evolving ways of protecting clients from the escalating financial and emotional costs and collateral damage resulting from litigating personal disputes.[4] So although there is wide acknowledgment that litigation and courthouse steps settlements by their nature serve the human needs of both lawyers and their clients poorly,[5] we still are far from victory in the battle to establish scientifically valid understanding of our biological human nature as a core competency of lawyers who work with clients whose legal problems arise out of fractured human relationships.

Fortunately, change is pressing in upon our conservative profession from many directions, thanks to an explosion of new research discoveries about how humans experience and resolve conflicts. Reports coming our way daily from the fields of decision science, evolutionary neuroscience, neuro-economics, and positive psychology explicate discoveries that "challenge core beliefs about human consciousness and rationality imbedded in our legal institutions."[6] Until recent years, cutting edge scientific research was typically regarded by policymakers and professionals as obscure or esoteric, and seldom led directly to significant societal impact. But thanks to popular science writers whose articles and blogs make the fruits of this research accessible to policymakers and the general public, and thanks to some major governmental, think-tank, and foundation initiatives to translate neuroscience discoveries into terms that can be understood and applied by judges and law school professors, even the most diehard defenders of the legal status quo at this point have little ground to stand on when they ignore the large and still-growing evidence that traditional legal premises about the primacy of rational processes in our clients' as well as our own decision-making are just plain wrong. For proof, look at the *New York Times* of June 25, 2013, a date significant only because it is the date this article is being written. Three articles in that issue address the growing impact of neuroscience and its close cousins, positive psychology and neuro-economics, on our changing understanding of how biology drives human behavior.

The first, a very favorable review of a new book entitled *Touching a Nerve*, begins: "'You cannot understand the mind without understanding how the brain works,' writes the philosopher Patricia S. Churchland in this marvelous book, which uses recent findings from neuroscience and evolution to illuminate deep questions about human nature."[7]

The second reports on the opening of a museum exhibition on illusions, stating: "There will also be some good old-fashioned tricks, with a pair of neuroscientists, Stephen Macknik and Susana Martinez-Conde, co-authors of *Sleights of Mind* on hand to explain their cognitive underpinnings. 'Illusions allow us to study how and why the brain fills in missing or ambiguous information,' said Paul Gleeson, a researcher for the show who is also a magician.'"

"[A]lthough there is wide acknowledgment that litigation and courthouse steps settlements by their nature serve the human needs of both lawyers and their clients poorly, we still are far from victory in the battle to establish scientifically valid understanding of our biological human nature as a core competency of lawyers who work with clients whose legal problems arise out of fractured human relationships."

The third is an article on a 3D Map of the Human Brain called "Big Brain," which gives "unprecedented detail" 50 times better than anything previously seen, and is being made "available to researchers everywhere." In the article a prominent neuroscientist describes "Big Brain" as a "technological tour de force," linking it to the even more significant new brain initiative recently announced by the Obama administration. That mega-billion dollar national research project to map the brain carries its own much publicized and much repeated message about the importance of neuroscience. *The New York Times* (February 23, 2013) described the initiative as "a breathtaking goal…that would lead to a much deeper understanding of how the brain works," and, according to the President, would "involve a level of research and development not seen since the height of the space race."

It's likely that similar reports from the front lines of neuroscience research could be found in almost any is-

sue of the *Times*, and every week sees the publication of new books and articles translating statistical evidence from reports in scientific journals into practical, accessible understandings and tools for business, professions, and ordinary folks. Given the elevated place held by classical enlightenment theories about human behavior in our jurisprudence and traditional legal dispute resolution practice, it would be difficult to find a more appropriate audience for this new knowledge about the brain and the body-mind continuum than the legal profession. There is consensus on that point in some very influential places. For instance, consider the Gruter Institute, a private think tank located in the heart of Silicon Valley since 1981. The Institute's current mission, which grows out of its founder's belief that "human legal behavior is both facilitated and constrained by our biological nature," is to foster education and communication among "law professors, judges, lawyers, economists, scholars from...other social sciences, and behavioral biologists, including evolutionary biologists and neuroscientists."[8] Because biological advances in our understanding of human behavior are unfolding faster than the legal profession or our broader legal culture can incorporate, Gruter has partnered with some heavy hitters to help lawyers put this science to practical use. Its newest project, The Law Lab, is based in the Center for Internet and Society at Harvard University, where its interdisciplinary scholars will "investigate and harness the varied forces—evolutionary, social, psychological, neurological and economic—that shape the role of law and social norms as they enable cooperation, governance and entrepreneurial innovation." The aim of The Law Lab is nothing less than to bring a laboratory approach to legal scholarship in order to "fundamentally transform law."

In partnership with the MacArthur Foundation, Gruter has taken an active role in their ongoing "Neuroscience and Law" project. (Baylor Medical College, in Houston, operates a similarly named program, "The Initiative on Neuroscience and Law.") While most of the MacArthur project's activity involves scholarly research about the brain science of criminal culpability, the Gruter Institute's focus in the project is on educating federal and state court judges and legal scholars about law, human nature, and biology. Since 2007, the Dana Foundation has provided grants to the American Association for the Advancement of Science to conduct seminars for federal judges on emerging issues in neuroscience and the law as they affect legal determinations. Law professors from Vanderbilt and the University of Minnesota have written the first legal textbook on the intersection of law and neuroscience, to be published later this year. The book, like the MacArthur Foundation project and the Baylor program, focuses primarily on defects, injuries, and dysfunctionalities in the human brains of criminals, drug addicts, the mentally ill and brain damaged, and persons with character disorders, looking to provide new perspectives on longstanding challenges in criminal trials and dispositions. In other words, the focus in these high-profile initiatives is largely on "them" (clients who commit criminal offenses), not us, the part of the legal profession charged with resolving civil disputes between individuals.

But fortunately, the impact of neuroscience and biology-based social sciences is also beginning to be felt on our ground, where dispute-resolution lawyer meets client. At the think-tank level, scholars supported directly by the Gruter Institute are investigating such topics as the evolution in primates of reconciliation behavior during conflict; the biological basis for our seemingly innate sense of right and wrong, and our human capacity for moral reasoning and for trust. Among the more accessible products of research supported by Gruter are two books by Paul Zak (the economist who invented the term "neuro-economics), *Moral Markets*[9] and *The Moral Molecule*[10] (a very readable account of how the neurotransmitter oxytocin may be central to our moral capacities as human beings).

We lawyers who focus on resolving fundamentally personal disputes are in the vanguard of our profession in embracing the fruits of this research. It is no coincidence that at the 2012 annual ABA Dispute Resolution Program there were six separate programs dealing with neuroscience.[11] Nor should it be a surprise to find that collaborative lawyers—whose work by definition takes place entirely outside the courtroom, far from litigation template thinking about settlement negotiations—are leading the way in adapting these "revolutionary implications for our day to day work with clients, depicting a brain that is driven not by reason, but by emotion…[which are] already beginning to transform dispute resolution practice."[12] A movement to bring awareness of neuroscience and positive psychology into mainstream dispute resolution practice is being spearheaded by the Integrative Law Institute at Commonweal ("ILI"),[13] a nonprofit program that is taking the discoveries gleaned from sophisticated collaborative interdisciplinary team practice further and deeper, adding to the mix immersion in neuroscience, decision science, and positive psychology, seasoning the mix with new values-based transactional methods for making and memorializing deals, and icing the cake with communications skills training, body-mind awareness practices, coaching aimed at strategic practice transformation, and much more—all aimed not just at family lawyers, but at all of us who help clients embroiled in the legal fallout from fractured human relationships.

ILI's aim is to teach lawyers to become more intentional, self aware and self reflective in our legal work with both colleagues and clients, offering continuing education courses that examine dispute resolution habits through the lens of biological realities about being human primates. ILI's requirements for earning certification as an integrative lawyer include learning sophisticated communication techniques that go below content to explore the subtle, biologically driven meta-communications that cannot be suppressed and often elude self-awareness; expanded understanding of the conscious and unconscious, constructive

and harmful, therapeutic and anti-therapeutic impacts of every interaction we have with another person during our workday; basic grounding in brain science and decision science as they relate to negotiations and informed choice; basic education in neuro-economics, focusing on the biologically driven irrational side of choices that cannot be explained by classical economic theory; neuro-ethics and neuro-morality as they relate to disputes arising from broken relationships; and information from cognitive, social, and positive psychology, systems theory, and body-mind awareness practices, all aimed at making lawyers more conscious of the systems-based and biology-driven nature of our work—all toward the end of making us better at our job—settling disputes.

We have seen "touchy-feely" efforts to transform testosterone-poisoned litigators into crunchy granola peacemakers before, and we know that the impact of those approaches seldom extends beyond the already converted. What's different about the Integrative Law movement is its emphasis on hard science about the biological realities of human nature and human behavior as reflected in legal conflict resolution practice. You can argue with a guru in ways that you can't argue with lab results or brain scans. ILI has developed an array of courses aimed at the needs of lawyers working in the trenches of personal dispute resolution. These courses explore the intersection of many of the biologically informed behavioral sciences, translating research findings into practical concepts and tools for lawyers. Topics include: "Law, Money, and Values in Negotiations and Settlements," "Neuro-Economics, Neuro-Morality and Distributive Negotiations," and "Neuro-Literacy 101: Introduction to Brain Science for Lawyers, Judges, and Mediators." Workshops on these and similar topics have been presented at the annual Forum of the International Academy of Collaborative Professionals and the annual gathering of Collaborative-Practice California, and at the Vancouver (Canada) Collaborative Roster Society, as well as under the auspices of the New Hampshire State Bar Association and the Texas chapter of the Association of Family and Conciliation Courts, and to commercial and legal aid lawyers in Cape Town and Johannesburg, South Africa.

What does all this mean? We, the authors, submit that our culture is experiencing the early days of a scientific revolution as enormous in its implications as the shift from medieval to renaissance thinking about the place of science in human affairs. We lawyers will not anytime soon have a clear roadmap telling us step by step how we can apply these changed understandings of how our brains actually function in service of better, evidence-based ways of dealing with colleagues and clients—but that is no excuse for willful blindness.[14] Our choices right now are to act from unexamined habit or to become aware and self reflective; and to be conscious or to be willfully unconscious about the probable impact of our methods on the people we are ethically obliged to assist as skillfully as we are able. Our conclusion: neuro-literacy is no longer optional. It's part of what our human (as distinct from corporate) clients need from us when we help them settle disputes, and if our law schools have not yet caught up with the policy implications of this dramatic convergence of thinking about law and brain science, we lawyers will simply have to educate ourselves by enrolling in high quality integrative law and neuroscience workshops and trainings wherever we can find them. Our clients deserve no less.

Endnotes

1. Julie Macfarlane, The New Lawyer: How Settlement is Transforming the Practice of Law, UBC Press, p. 1.
2. Macfarlane, p. 7.
3. "You're giving a speech about lawyers and conflict resolution? Huh. I don't usually connect lawyers with conflict resolution." Macfarlane, p. 1.
4. The Uniform Collaborative Law Act ("UCLA") was approved by a unanimous vote of the Uniform Law Committee and a number of states and courts, including California, Florida, North Carolina, Louisiana, Minnesota, Ohio, Utah, New York and Hawaii, have enacted collaborative law statutes and/or provided court rules for the use of collaborative law. Moreover, the UCLA is supported by the Ohio Bar Association, South Carolina Bar Association, Tennessee Bar Association Board of Governors, Vermont Bar Association Board of Managers and the Association of the Bar of the City of New York, as well as the Family Law Sections of the Minnesota Bar and New Mexico and Wisconsin Bar Associations and the ADR Sections of the Virginia and Wisconsin Bar Associations. However, the opposition of the Litigation Section in the ABA House of Delegates—on the asserted ground that collaborative law is unacceptably risky for clients—has consistently prevented official ABA support for the UCLA to date.
5. See, e.g., Mary E. O'Connell and J. Herbie DiFonzo, "Family Law Education Reform Project Final Report," *Family Court Review*, October 2006, the fruits of a blue-ribbon study of the failure of law schools to prepare students for the reality of family law practice. The report is available at http://www.afccnet.org/ResourceCenter/CenterforExcellenceinFamilyCourtPractice/ctl/ViewCommittee/CommitteeID/15/mid/495, last consulted June 30, 2013.

   > As this sea of change has occurred, however, law school curricula and teaching have remained relatively static. The result, predictably, is that lawyers entering family law practice regularly find themselves unprepared for what they encounter. A substantial and growing gap between family law teaching and family law practice undermines the best efforts of new family lawyers to assist parents and children in separation, divorce, abuse and neglect, dependency, and delinquency actions Lawyers need to think about—and law students need to talk about—how one helps a client in emotional turmoil to engage in effective planning despite the fact that it is difficult.

   Although this study was confined to education of family lawyers, the problem of poor preparation for the actual job of helping distressed clients resolve their disputes is not.
6. From program description of British Columbia Collaborative Roster Society program: "The Next Step: How Integrative Law is Reclaiming the Healing Heart of Legal Practice; A Day with Pauline Tesler," March 4, 2013.
7. Patricia S. Churchland, Touching a Nerve: The Self as Brain. W.W.Norton, p. 1:

   > Every day brings new discoveries about the brain: here is your brain on drugs, here is our brain on music, on jokes, on porn; here is your brain on bragging, on hating, on meditating. Sometimes it seems that neuroscience knows more about myself than I do.
8. www.gruterinstitute.org/about_us.html, last consulted June 27, 2013.

9. http://press.princeton.edu/titles/8657.html, last consulted June 30, 2013.
10. http://www.moralmolecule.com/, last consulted June 30, 2013.
11. They were: "This is Your Brain on Mediation: Reflections on Neuroscience and Practical Implications for Mediators as Well as Negotiators"; "The Neurobiology of International and Inter-Cultural Dispute Resolution"; "Overcoming Cognitive Illusions to Provide Procedural and Substantive Justice Arbitration"; "The Embodied Brain of Peacemaking: It's Not Just In Your Head"; "Brain Based Listening: A Key to Successful Mediation"; and "The Transformative Master Practitioner: The Social Brain-Conflict Transformation and Trauma in Intractable Clients."
12. From program description of New Hampshire Bar Association program: "Practical Neuro-Literacy: Where Divorce Practice, Neuroscience, and Legal Conflict Resolution Intersect," June 14, 2012.
13. http://www.commonweal.org/program/integrative-law-institute/.
14. As noted in Churchland, p. 32:

> My take on the roster of sensitive issues [generated by neuroscience] is that although much is still unknown about the nervous system and how it works, what is known begins to free us from the leaden shackles of ignorance. It makes us less vulnerable to flimflam and to false trails. It grounds us in what makes sense rather than in the futility of wishful thinking. It adds to the meaningfulness of life by enhancing the connections between our everyday lives and the science of how things are. Harmony and balance in our lives are deepened and enhanced by that connectedness.

Pauline Tesler is a Certified Specialist in Family Law (State Bar of California Board of Legal Specialization); fellow, American Academy of Matrimonial Lawyers; co-founder and first President, International Academy of Collaborative Professionals; and recipient of first ABA "Lawyers as Problem-Solvers" award. Ms. Tesler wrote the first treatise on collaborative law. She writes, speaks, blogs, and trains internationally about interdisciplinary collaborative practice, and about practical neuroscience applications in conflict resolution work, and consults with lawyers and law firms about expanding competency in these areas. Contact Ms. Tesler at: teslercollaboration@lawtsf.com or go to her firm's website, www.lawtsf.com.

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

Lead 5.4 Million Thirsty Horses to Water in Italy—Developments in Mandatory Mediation

By Giuseppe De Palo

On Saturday, June 15th, 2013 Italy's Government led by Prime Minister Enrico Letta, in an effort to boost the country's heavily weakened economy, approved a substantial decree. In addition to removing obstacles to doing business in Italy, the decree features improvements to the notoriously slow civil justice system, ranked 158th by the World Bank's Doing Business Report. According to a report by the Bank of Italy, these delays cost Italy the equivalent to 1% of the country's annual GDP, equaling close to 15€ billion euro annually. Specifically, the decree re-introduces mandatory mediation in a broad range of legal disputes, through which the Government aims to cut over one million civil disputes over the next 5 years. Currently, 5.4 million civil disputes are pending before the Italian courts.

Mediation in Italy has quite the history; introduced in March 2011, a mediation mandate produced notable results. During a little more than a year when this law was in effect, over 220,000 mediations were started and, when both parties appeared before the mediator, close to 50% were settled. When compared to the normal three-year wait for a trial decision (which can exceed 9 years, if appeals are considered) these results should be considered a stunning success.

Unprecedented in the EU, this mediation explosion came to an abrupt halt in October of 2012, when the government policies making mediation mandatory were ruled unconstitutional. At that point, virtually all mediations stopped, including those initiated voluntarily. Other EU states, considering mandatory mediation and monitoring the Italian developments, suspended their plans.

In what was, reportedly, a divisive decision, the Italian Constitutional Court ruled that the mandate was not specified as within the power of the Italian Government as opposed to Parliament to issue, and thus was no longer viable legislation. While devastating for a mediation industry that had grown exponentially, the court decision stated important policy concerns about conditioning access to the courts. The country went straight from virtually none, to a lot, to—again—almost no mediation at the change of a single factor: the requirement to try mediation before litigating in courts.

A study presented at the European Parliament in May of 2011 found that the average "mediation effectiveness break-even point" was around 30%. This represents the rate at which the increased time and costs of litigation, when pre-trial mediations fail, is offset by the savings of those mediations that succeed. Based on a documented 50% success rate of mediation under the mandate (83% of which were mandatory), Anna Maria Cancellieri, the Italian Minister of Justice, undertook the task of re-writing Italian mediation policies, and did not hesitate to push, again, for mandatory mediation.

Ms. Cancellieri, though, did not simply reinstate the earlier mandate, but proposed a refined policy that sought to appease critics of the earlier mandate. Such a policy would be capable of inspiring EU countries struggling with the EU "mediation paradox," the existence of an effective dispute resolution process few people use. Ms. Cancellieri "mediated" between the concerns of advocates and critics of mandatory mediation: bringing litigants into the mediator room, while assuring that costs remained low, so as not to violate the right of access to justice. This balance was reached by allowing the litigants, at the initial stage of the mediation, to withdraw from the process at nominal cost if they found that settlement was unlikely. Within the new decree, the statutory cap for preliminary mediation fee, as required by law, is 120€ per party, in a dispute worth up to 10,000€. If the amount in dispute is more than 50,000€, the maximum fee is now 250€.

This "easy-way-out" mechanism is similar to, but possibly more effective than, the so called "mandatory mediation information meeting" requirement, present in other EU countries, where litigants would be obliged to meet with a mediation counselor before filing a lawsuit (if the parties are willing to, they can then start a voluntary mediation). Both mechanisms share the goal of making sure people give serious consideration to the mediation option, but the Italian opt-out system promises to be more effective than an opt-in, as it provides an actual "mediation experience" for litigants. This opt-out system also offers quality assurance: if the mediator is not good, either party may withdraw at virtually no cost, a critical factor, especially in states like Italy, where mediation becomes a mass product and mediators are not chosen by the litigants, but by the mediation organization selected by the plaintiff, in the absence of a mediation clause.

Additionally, the new bill addresses other criticisms of the earlier mandate, for example, reducing the 120-day maximum duration of the procedure, where the parties decide to continue after the initial meeting with the mediator, to 90 days and excluding RC Auto (claims for damages generated by vehicles) from the list of civil matters required to attend mediation.

Critics argue that a "too easy" way out might render the mandate useless, and fail to increase mediations. Still, as noted, when Italian litigants were obliged to "show

up" at the mediators' office, an agreement was reached in half of the cases. This represents an impressive statistic that shocks many non-Italian mediators, especially when accompanied with the fact that a large majority of the mediations conducted in Italy are without the disputants at the table, but with only the mediator and the attorneys present. Critics of mandatory mediation resort to the old saying that "you can lead a horse to water, but you cannot make it drink"—in this case meaning, you can force litigants into the mediator's room, but not oblige them to settle. The retort to this statement is clear: if you lead 5.4 million horses to water, lots of them will drink, which is particularly true if the alternative is to wait for years.

Despite the earlier concerns of legal professionals, mandatory mediation left law firms and bar associations virtually un-impacted. Under the earlier mandate, litigants in mediation were represented by lawyers in over 80% of the cases. Legal professionals, such as, Giovanni Lega, President of Italy's Associazione Studi Legali Associati (ASLA), acknowledge that aside from reducing court delays, mediation offers additional benefits for disputants, "mediation is a tool that, in certain disputes, provides more flexibility and advantages [to litigation]," allowing for settlements without the red-tape of trial decisions.

In light of these changes, making mediation faster, more specific, and cost effective, a growing number of legal professionals and associations, including many Bar Associations, are welcoming the return of the mandate. A translation of statements includes: "Recent developments on mediation clearly go in the direction of resuscitating an important tool; there might be further adaptation in order to make it more easily digestible to the majority of practitioners but the fact that a good number of local bar associations have set up specific mediation bodies means that they have understood the importance of the instrument," stated Fabrizio Colonna, from ASLA. Mr. Colonna continues to state that he believes "in the long term, mediation will be successful primarily because of the slowness of the judiciary system in Italy and the need for quicker solutions to more frequent problems."

In Italy we say that "There is no rose without thorns," and in fact the June 15 decree re-introduces a controversial mechanism to make sure that people not only enter the mediator's room, but are encouraged to reach an agreement. This mechanism will allow the mediator to record in writing a proposed solution that, if rejected, might cost the rejecting party, even if that party is successful at trial. In this case, the judge may shift on to the rejecting party all mediation and litigation costs, subsequent to the proposal, if the judgment is consistent with the proposal.

Yet despite this feature, the Italian model of mandatory mediation, moderated by the "easy way out" feature, may inspire other EU countries struggling under the weight of increasing litigation costs and delays, court budget cuts, and low use of mediation. For now, the Italian decree must be converted into a law by Parliament within 60 days after initiation. "We shall see"—as Italians often say.

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Can Counsel Ethics Beat Guerrilla Tactics?: Background and Impact of the New IBA Guidelines on Party Representation in International Arbitration

By Edna Sussman

> ***[The absence of common legal cultures] "does not mean that international practitioners are pirates sailing under no national flag; it only means that on the high seas, navigators need more than a coastal chart."***
>
> **V.V. Veeder**[1]

The call for something more than a "coastal chart" to govern counsel ethics in international arbitration has intensified in recent years and has led to action. Following a comprehensive review of the subject, in May of 2013 the International Bar Association issued its Guidelines on Party Representation in International Arbitration (the "Guidelines").[2] In developing its recommendations, the IBA's Arbitration Committee investigated the different ethical and cultural norms and disciplinary rules that apply to counsel in international arbitrations. While these are only Guidelines with no inherent authority, the Guidelines are likely to foster significant changes that will aid in the accomplishment of their objectives.

The Guidelines should inspire tribunals in international arbitrations to at the very least conduct a conversation with counsel at the inception of the case to clarify what ethical norms govern each party's counsel and whether there are strictures that apply to some but not all of the parties that create inequities. Agreements as to conduct can be incorporated into the first procedural order. But even absent agreement, awareness alone can enable the tribunal to make appropriate adjustments to ensure a fair process. And just knowing about the counsel's practices enables opposing counsel to be better prepared to counter them. If the Guidelines serve no other purpose than to enable and encourage a dialogue of this nature early in the proceeding, they will accomplish a great deal.

The Guidelines may serve to focus the arbitral institutions' attention more closely to counsel ethics and to what role they can play in ensuring the integrity of the process. It is the institutions that have the ability to establish an ethics regime that empowers tribunals with the enforcement powers necessary to drive conduct. In the wake of the Guidelines release, the arbitration community may look to the institutions to issue rules that proscribe unethical conduct or conduct that obstructs or delays the proceedings and authorize the tribunal to issue appropriate sanctions.

Practitioners should welcome the promulgation of the IBA Guidelines. Adherence to the Guidelines would not automatically protect counsel from being in violation of the ethical code of their home jurisdiction. But local ethical codes may provide, or be amended to provide for counsel to be governed by the ethical regime adopted by an international arbitral tribunal. The existence of the Guidelines and the growth of international arbitration as a practice area should encourage the development of such local ethical provisions.

I. Background

Consideration of issues relating to counsel ethics in international arbitration is not new. Michael Reisman and Detlev Vagts recognized the need for uniform ethical guidelines applicable to counsel in international arbitration long ago.[3] Jan Paulsson proposed the idea in 1992.[4] The topic gained prominence in recent years. Catherine Rogers, a leading scholar in the field, expressed the view in 2010 that this "ethical no-man's land"[5] should not be permitted to persist. A number of commentators believed that there can be no workable solution to this problem, that there were too many guidelines already confusing the field of international arbitration, and that regulation would diminish the flexibility of the process.[6] However, an increasing number supported the view that the adoption of a code of ethics specific to the conduct of counsel in international arbitration was long overdue. Several proposed solutions emerged.

Doak Bishop and Margrete Stevens proposed an *International Code of Ethics for Lawyers*[7] which adopted an approach of positing simple, elegant and essential rules for counsel's ethical duties. *The Hague Principles on Ethical Standards,* the work product of the International Law Association, provided another proposed set of ethical rules.[8] Cyrus Benson offered the *Checklist of Ethical Standards for Counsel in International Arbitration*, a proposal in the form of a checklist to be reviewed at the start of the arbitration by all parties and subject to the agreement of the parties.[9]

Sundaresh Menon's opening address at the ICCA Congress in 2012,[10] urging the development of "a code of conduct and practice to guide international arbitrators and international arbitration counsel," galvanized further debate on the issue. The concept gradually gained acceptability.[11] The survey broadly disseminated by the Arbitration Committee of the IBA in order to inform its work

helped identify specific divergent counsel practices that presented the greatest difficulties and confirmed support for the development of international guidelines for party representatives.

II. The Issues to Be Addressed

The Guidelines address the two issues relating to counsel conduct that have been the subject of discussion. First, it addresses the practices that are unethical under some national codes or rules of professional conduct but not under others. Second, it addresses what has come to be known as "guerrilla tactics," tactics used to delay, obstruct or subvert the arbitration process.

a. Divergence in Ethical Obligations

Differences in ethical obligations are inherent to an international forum where counsel come from different jurisdictions and often find themselves conducting an arbitration seated in a yet another jurisdiction and physically held in yet a third jurisdiction. Without an overriding ethical code there is no clear answer to the question of which ethical obligations are applicable as among all of these possible jurisdictions. Moreover, there is the potential for disadvantaging parties if their counsel is bound by the more restrictive ethical rules. Only a common set of ethical obligations can level the playing field.

The examples most frequently used to illustrate the significant divergences in ethical obligations of counsel include witness preparation, the nature of counsel's obligation to assure production of responsive documents, *ex parte* communications with the arbitrator, statements of fact to the tribunal known to be unsupported by the evidence, the obligation to report perjury, the obligation to advise the court of adverse legal authority and differences concerning lawyer communication with employees of an adverse corporate party.[12]

b. Guerrilla Tactics

Like counsel ethics, the use of "guerrilla tactics," those intended to obstruct, delay or derail an arbitration, has been the theme of a growing number of articles[13] and has been the subject of several recent international arbitration conferences. It was urged that any ethical regulation issued should include provisions that inhibit such conduct.[14]

Two reasons are typically offered for the changes in the practice of arbitration that have made this issue of such pressing concern. First, arbitration has evolved from a forum for a speedy, inexpensive and pragmatic decision on trade disputes to a forum that resolves sophisticated legal disputes with millions of dollars, and often hundreds of millions, at stake. With so much at stake, differences in ethical obligations that give a party an advantage are problematic and the size of the amount at stake can drive counsel over the line from zealous representation to guerrilla tactics. Second, as international arbitration has grown, both counsel and arbitrators new to the practice have become active. With the entry of new practitioners not schooled in the norms of the practice and not part of the former elite international arbitration "club," there is no shared understanding with the new entrants of how they perceive their role and no in-group induced constraint on their conduct. Whatever the cause, the reality was felt to require action.

A survey conducted to determine whether the use of guerrilla tactics in international arbitration was really a problem of sufficient frequency and moment to warrant attention confirmed the importance of the issue. Sixty-six percent of the 81 respondents reported that they had been subjected to or had witnessed guerrilla tactics. The most common examples of guerrilla tactics described included abuse of document production, delay tactics, creating conflicts, frivolous challenges of arbitrators, last-minute surprise, frivolous anti-arbitration injunctions and other approaches to courts, *ex parte* communications, witness tampering, lack of respect, courtesy towards the tribunal and opposing counsel and various strategies to frustrate an orderly and fair hearing.[15]

III. Guidelines Provisions Highlighted

The Guidelines address many of the issues frequently flagged as the most problematic ethical conflicts: The Guidelines:

- Preclude the creation of a conflict by barring taking on a party representation that would create a conflict with an arbitrator and states that the tribunal may exclude the new party representative who takes on a representation in violation of this guideline. Guidelines 5-6.
- Forbid *ex parte* communications (apart from circumscribed interview contacts and absent specific agreement by the parties to the contrary or party non-appearance). Guidelines 7-8.
- Bar knowingly presenting false evidence and provide guidance on action to be taken if falsity is later discovered. Guidelines 9-11
- Address the need to preserve documents and to produce responsive documents and prohibit the making of any request to produce documents for an improper purpose such as to harass or cause unnecessary delay. Guidelines 12-17.
- Permit counsel to meet and discuss with experts and lay witnesses to help prepare witness statements and prepare for prospective testimony but counsel may not invite or encourage false evidence. Guidelines 18-25.

While the provisions cover the most frequently cited ethical conflicts, a question remains whether these provisions are sufficient to curb the many faces of guerrilla

tactics. The Guidelines do specifically deal with two of the identified guerrilla tactics: creating a conflict with the arbitrator and document related tactics. Perhaps the wide variety of obstructive and delaying actions by counsel and the amorphous wording that would be required to describe them precluded their specific inclusion in the guidelines.

The Guidelines do, however, empower the tribunal to address "misconduct" by a party representative after giving the parties notice and a reasonable opportunity to be heard. Misconduct is broadly defined to include a "breach of the present Guidelines, or any other conduct that the Arbitral Tribunal determines to be contrary to the duties of a Party Representative."[16] We will have to wait and see if the word "misconduct" is read broadly enough to encompass a wide variety of guerilla tactics.

The Guidelines give the tribunal power to respond to behavior in violation of the Guidelines. The tribunal may admonish the party representative, draw inferences, apportion costs, and take other "appropriate measures in order to preserve the fairness and integrity of the proceeding." In determining the remedy, the tribunal is to consider the nature and gravity of the misconduct, the good faith of the party representative, the extent to which the party representative knew about or participated in the misconduct, the potential impact of a ruling on the rights of the parties, the need to preserve the integrity and fairness of the arbitral proceedings and the enforceability of the award. Guidelines 26-27.

IV. Implementation of the Guidelines

Like all guidelines, the Guidelines are just guidelines and have no weight beyond that given to them by counsel and/or the arbitrators. As they state, the Guidelines are not intended to displace otherwise applicable mandatory law, professional or disciplinary rules, or agreed arbitration rules that may be relevant or applicable to matters of party representation. Nor are they intended to vest arbitral tribunals with powers otherwise reserved to bar associations or other professional bodies. It is the intention of the drafters of the Guidelines that the parties may adopt the Guidelines by agreement or that arbitral tribunals may apply the Guidelines in their discretion, subject to any applicable mandatory rules, if they conclude they have the authority to do so.

While not automatically binding in an arbitration, the Guidelines provide an excellent opening for the tribunal to initiate a discussion with counsel as to what should be deemed to be appropriate conduct in the arbitration to equalize ethical norms, curb guerrilla tactics and ensure fundamental fairness. Those in the arbitral community who were of the view that no counsel ethics regulation should be issued because "if it ain't broke, don't fix it," may be persuaded that it is "broke" now and that corrective action is required.

The Guidelines provisions can be used as a jumping off point to see if other limiting parameters for conduct can be established by agreement. Reference to the Benson checklist, the Bishop & Stevens ethical code and the Hague Principles discussed above can provide specific ideas for expansion by agreement of the Guidelines scope to protect against additional areas of ethical conflict and of potential obstruction and delay. For example, if the tribunal wishes to go further in discouraging guerrilla tactics, the parties can be asked to consider whether they also wish to adopt one of Benson's checklist items: "A lawyer shall not assert a position, conduct a defense, question witnesses or take other action on behalf of the client when the lawyer knows, or when it is obvious that, such action is irrelevant to the case and/or would serve merely to (i) delay proceedings, (ii) cause undue burden or expense or (iii) harass or maliciously injure another."[17] It would be difficult for counsel to reject such a provision. But in balancing how far to go with the imposition of specific restraints on misconduct, a tribunal must keep in mind that such strictures could give rise to the possibility of repeated approaches to the tribunal during the pendency of the proceeding asserting violations and requesting sanctions, a scenario which the tribunal may not wish to encourage. Like so many things, judgment must be exercised as to what is best for the case and care must be taken in structuring any special process.

A system of counsel regulation cannot be truly effective unless the tribunal is authorized to take corrective action. The Guidelines limit the tribunal to actions they believe they have the authority to undertake and expressly take no position as to whether the tribunal has the authority to rule on matters of party representation or to apply the Guidelines in the absence of an agreement by the parties. Thus the Guidelines are limited by their very nature. In order to give effect to the Guidelines, in the absence of case-by-case agreement of the parties, action by the arbitral institutions is essential. While it would not comfortably be the institutions' role to enforce ethical codes, it is well within their purview to promulgate rules that impose ethical constraints and rules that empower the tribunal to impose appropriate remedies.

The institutions have already taken some steps in this direction and it appears further steps will be taken in the near future. For example, the ICDR addressed some of the concerns a few years ago. Article 7 of the ICDR International Dispute Resolution Procedures bars *ex parte* communications with the chair altogether and, like the Guidelines, limits communications with the party-appointed arbitrators to the interview. The ICDR Guidelines for Arbitrators Concerning Exchanges of Information seeks to put the parties on the same footing by providing that the tribunal should to the extent possible apply the same rules as to ethics and privilege to both sides, giving preference to the party's rule that provides the highest level of protection. By establishing a limited scope for disclosure

and empowering the arbitrator to exercise firm control, the ICDR Guidelines also serve to control many of the document disclosure-related guerrilla tactics.

The ICC 2012 arbitration rules revision now provides in Article 37(6) that in the allocation of costs the tribunal may consider the extent to which the party "conducted the arbitration in an expeditious and cost effective manner" thus specifically authorizing cost shifting if a party delays or obstructs the proceedings. The LCIA is reported to be planning to adopt a rule later this year which incorporates "basic norms expected of counsel in an arbitration under their auspices," and gives tribunals the power to exclude counsel who were found to be in serious and persistent violation of those norms.[18]

V. Conclusion

The Guidelines are likely to be accepted over time as a source of soft law with at least as much influence as has been achieved by the IBA Guidelines on Conflicts of Interest in International Arbitration, which deals with arbitrator conflicts and disclosure obligations. But it is likely that the Guidelines will have much greater impact than would result from their mere adoption in an arbitration. The Guidelines are likely to encourage a meaningful dialogue between the tribunal and the parties regarding ethical obligations that go beyond those dealt with in the Guidelines. The Guidelines are also likely to inspire institutional action to embrace the issue and adopt institutional rules that give the tribunal authority to enforce rules that foster a fair process undisturbed by obstructionist tactics.

Endnotes

1. *The 2001 Goff Lecture—The Lawyer's Duty to Arbitrate in Good Faith*, 18 Arbitration International 2002, no. 4, p. 431.
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3. See W. Michael Reisman, *Nullity and Revision: The Review and Enforcement of International Judgments and Awards*, 116-17 (1971); Detlev F. Vagts, *The International Legal Profession: A Need for More Governance?*, 90 Am. J. Int'l L. 250, 250 (1996).
4. Jan Paulsson, *Standards of Conduct for Counsel in International Arbitration*, 3 Am. Rev. Int'l Arb. 214 (1992).
5. Catherine A. Rogers, *The Ethics of Advocacy in International Arbitration*, Penn State Law, Legal Studies Research Paper No. 18-2010, at 2-3 (2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1559012. Laurel S. Terry, et al., *Transnational Legal Practice*, 42 Int'l Lawyer 833 (2008).
6. See authorities cited in Rogers, *supra* note 5 at fn. 28.
7. Doak Bishop & Margrete Stevens, ICCA Congress 2010, *International Code of Ethics for Lawyers,* available at http://www.arbitration-icca.org/media/0/12763302939400/stevens_bishop_draft_code_of_ethics_in_ia.pdf; the code accompanied their keynote address on the subject, available at http://www.arbitration-icca.org/media/0/12763302233510/icca_rio_keynote_speech.pdf.
8. International Law Association Study Group on the Practice and Procedure of International Courts and Tribunals, *The Hague Principles on Ethical Standards* (Sep. 27, 2010), *available at* www.ucl.ac.uk/laws/cict/docs/Hague_Sept2010.pdf.
9. Cyrus Benson, *Can Professional Ethics Wait? The Need for Transparency in International Arbitration*, 3 Disp. Resol. Int'l 78 (Mar. 2009).
10. Sundaresh Menon, *International Arbitration, The Coming of Age for Asia (and Elsewhere),* ICCA Congress 2012, available at http://www.arbitration-icca.org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf.
11. Sebastian Perry, *Policing Ethical Conduct: Menon and Paulsson Debate Regulation*, Global Arbitration Review, June 5, 2013.
12. See Rogers *supra* note 5, at 3-5; Benson *supra* note 9, at 82-85; Catherine A. Rogers, *Lawyers Without Borders,* U. Pa. J. Int'l L. Vol. 30:4 at 1036-1037 ((2009).
13. *See* articles collected in *Guerrilla Tactics in International Arbitration and Litigation* in Transnational Dispute Management, Volume 7(2) November 2010.
14. Edna Sussman & Solomon Ebere, *All's Fair in Love and War—Or Is It? The Call for Ethical Standards for Counsel in International Arbitration*, Am. Rev. Int'l Arb. 22 (2011): 612.
15. *Id*.
16. Guidelines, Definitions Section.
17. Benson, *supra* note 9, checklist Category 1(2).
18. Perry, *supra* note 11.

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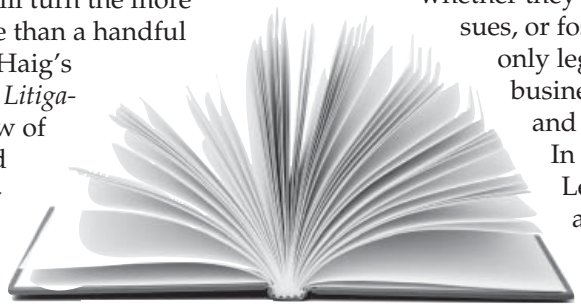
Book Reviews

Commercial Litigation in New York State Courts (Third Edition)—A Handy Resource for the Commercial ADR Neutral and Professional

Reviewed by Simeon H. Baum

> Books! tis a dull and endless strife:
> Come, hear the woodland linnet,
> How sweet his music! on my life,
> There's more of wisdom in it."
> (*The Tables Turned*, William Wordsworth)

While Wordsworth (aptly named) might have a point, even in the age of the Internet we lawyers, and even spontaneous ADR resolutionaries, still turn the more than occasional page. There are more than a handful of pages (8,400 to be precise) in Bob Haig's multi-volume treatise on *Commercial Litigation in New York State Courts*. A review of this rich resource with an eye toward its utility for ADR professionals raises another opportunity to revisit the common theme of the place of knowledge and expertise in the ADR field.



First, let us take a quick look at the *Commercial Litigation* compendium. It presents a scholarly, readable and practical compilation of chapters by 144 experts in the field. Indeed, just the task of gathering and organizing so many experts is a feat for which the compendium's editor, former New York County Bar President and founding Chair of the Commercial and Federal Litigation Section of the New York State Bar Association, Bob Haig, commands awe. Beyond this, the treatise is organized into a rational and intuitively usable order.

The first volume—led off by Chief Judge Jonathan Lippman's accessible and scholarly piece presenting an historical overview of commercial litigation in New York, culminating in the birth of the Commercial Division, considering its state today, and contemplating its future—begins at the beginning, with preliminary considerations and actions. It ranges from jurisdiction and venue, through case investigation and evaluation, to pleadings, third party actions, removal, specific performance, and rescission. The volume continues with a useful and novel comparison of commercial litigation in federal and state courts. It considers choice of law clauses, joinder, consolidation and severance, and the handling and coordination of multi-district litigation. It finishes with issue and claim preclusion and inter-jurisdictional considerations and nonjudicial determinations. Within this first volume ADR aficionados can find Brad Karp and Roberta Kaplan's piece on *Investigation of the Case* helpful. Some of the approaches they suggest can be useful even for a mediator in helping parties and counsel to develop key information and think about a matter. Moreover, their insights into the value of—and approaches to—reducing the time and cost of formal discovery are worth sharing.

Alan Raylesberg's chapter on *Case Evaluation* merits special attention, both because it is tremendously helpful, and further because it provides us with an occasion to reflect on the role today of evaluation in commercial mediation. Twenty years ago, there was great debate in the mediation field over the question of whether it was proper for mediators to engage in evaluation. Much of this discussion was prompted and defined by Professor Len Riskin's landmark article,[1] which included a chart—that came to be known as Riskin's grid—in which Riskin plotted out mediator orientations according to whether they were facilitative or also evaluative and directive, and whether they were narrowly focused on legal issues, or fostered broader consideration of not only legal issues, but also party interests, business considerations, relationships, and even societal values and principles. In reaction to Riskin's grid, Professors Lela Love and Kim Kovach wrote an article in which they called "evaluative mediation" an oxymoron.[2] Their chart, the great divide, posited that the mediator's role is fundamentally that of a facilitator. They urged that it should be the parties' and not the mediator's judgments and evaluations that matter, and the parties' choices, not the mediator's direction, which steer the negotiation process and resolution. A couple of years after Riskin's *Grid for the Perplexed* was published, Professor Josh Stulberg published a piece questioning the entire framework. He noted that reorienting parties' understanding of, and relationship to, one another in order to promote resolution of a dispute requires the fostering of dialogue, reflection, and analysis that is aided by the mediator's being informed about the nature and context of the dispute.[3]

Understanding of the mediator's purpose and role has continued to develop and be refined over the last fifteen years.[4] Certainly, there are a good number of times when the focus of a commercial mediation is less on defining the "shadow of the law"[5] and more on fleshing out party interests and creatively exploring the contours of a potential business deal. There is little doubt, however, that case evaluation—whether it is an activity of the parties facilitated by the mediator or also involves direct feedback from the mediator—has assumed a meaningful place in commercial mediation. Sometimes developing a sense of case strengths and weaknesses happens only in advance of the mediation. Parties, with the help of counsel, might look to assess their case as part of their preparation for bargaining. This gives them a preliminary view of their litigation BATNA (the best alternative to a negoti-

ated agreement)—the "shadow of the law." The mediator might similarly prepare by getting pre-mediation statements and through pre-mediation communications with counsel in joint conference calls or private telephonic caucuses. Even if the mediator never plans on giving a direct evaluation, this prepares the mediator to conduct an effective discussion—with appropriately focused and informed areas of inquiry—when the parties and counsel get together for a mediation session. It is possible that, having been prepared by an understanding of the case, parties might recognize that the greatest value to be had in mediation is in focusing on the deal, not the case. But the case assessment got them to that point in the first place. Quite often, of course, case evaluation processes occur during the mediation session. These can be a side consideration at any stage of the mediation—early, middle or later in the process. An ancillary risk analysis can serve as a good prod at any stage to shift parties away from the case to creative deal making. Additionally, a good number of times, the evaluative process becomes the main event. For these processes, opening sessions might involve initial case summaries. Later sessions can involve further development of information and probing of strengths and weaknesses. Further on in the process, there might be a risk and transaction cost analysis informed by what has been gathered throughout the process. These assessments—by parties and counsel, or with mediator input—can frame and form the iterative content of the final bargaining that closes the deal.

Understanding that case evaluation can play a significant role in preparing for or conducting a mediation, ADR readers—whether in the role of representatives or neutrals—will certainly appreciate the contribution of Alan Raylesberg's Chapter by that name. He has a wealth of practical tips that mirror what happens in the mediation process. Mr. Raylesberg considers evaluations not only of trial outcome but at all stages of a case. He reminds us of the critical role insurance can play. He considers ways of setting goals and considerations relating not only to the case but also to cost and delay. He takes a careful look at how information developed from discovery, including deposition testimony, can affect assessment of a case's settlement value. We can laud Mr. Raylesberg for specifically advising the reader to consider ADR options and to use alternative procedures not only to resolve a case but even for their benefit in evaluating a case. His chapter ends with some checklists on case evaluation and a sample written case evaluation that can be helpful for both representatives and mediators.

A final Chapter worth highlighting in the first volume of this treatise is T. Barry Kingham's *Enforcement of Forum Selection and Arbitration Clauses,* which is plainly of interest to those involved in arbitration.

Was Wordsworth right? Having culled just a handful of pieces from the wealth of material in the first volume, we are stunned to have five more volumes to go. Yet, though nearly endless, they are anything but dull, and are well worth the effort. For the reader's sake here, we will highlight just a few of the various chapters that are of value to representatives and neutrals in ADR processes.

In the second volume, there are three Chapters that stand out for ADR professionals. The Chapter on Disclosure, by James M. Ringer and Thomas F. Fleming can be very useful to arbitrators in commercial matters, particularly given the degree to which arbitration has begun to parallel litigation. In 2008, NYSBA's Dispute Resolution Section was charged by NYSBA's then-President Bernice Leber with developing a discovery protocol for commercial arbitration.[6] Given the differences between domestic and international commercial arbitration practices, our Section developed two protocols, each of which was approved by NYSBA: (a) one for Domestic Commercial Arbitration and (b) one issued the following year for International arbitration.[7] Complementing the advice that can be gleaned from these protocols, Messrs. Ringer and Fleming's Discovery Chapter offers representatives and neutrals good insights into factors to consider when developing a discovery plan and for handling the ever growing area of e-discovery. There are particularly useful thoughts for preliminary conferences (22:25) and supervised discovery (22:26). Insights into discovery can also be very useful for mediators when fleshing out details for a Commercial Division based transaction cost analysis.

Additional insights for ADR neutrals are provided in William F. Kuntz's Chapter on Referees and Special Masters. Dispute Resolution Section members who serve in this capacity will have particular appreciation for this piece. Bill Kuntz provides an excellent synopsis of those processes, including guidance on the scope, power and function of referees and special masters.

The ADR capstone of Bob Haig's second volume is its Chapter on Settlements by current NYSBA President David Schraver. Having seen Dave Schraver in action at the House of Delegates over the years, and more recently in his new role as State Bar President, this reviewer has an empirical basis for stating that Mr. Schraver has profound expertise and insight into the art and wisdom of arriving at negotiated resolutions. This Chapter is a case negotiation primer, loaded with tips for the negotiator. Dave urges "litig-negotiators" to think resolution from the start. He highlights the vital importance of preparation; recognizing the perspective of one's counterparty; and developing flexible goals. He reminds negotiators of the importance of complying with ethical guidelines, and the benefit of adopting a constructive, joint, mutual gains problem solving approach that steers a middle path between competition and accommodation.[8] Dave also recommends that negotiators develop skills in active listening and develop an holistic understanding of the problems and people involved in a given dispute and its context. For this he draws on a central ADR resource, Fisher and Ury's classic, *Getting to Yes*.[9] Mr. Schraver offers tips

on how to handle a negotiating counterparty who prefers an obstructionist approach.[10] He closes with excellent tips for settlement agreements and admirably encourages negotiators to consider some form of alternative dispute resolution [34:22].

One chapter in the next volume is of obvious interest to members of this Section: John Hartje's Chapter on Alternative Dispute Resolution. Mr. Hartje provides an excellent overview of ADR, with a focus on mediation, and its place in the New York State Court system. The piece has a nice summary of the benefits and nature of mediation. It provides reference to some classic reading in negotiation theory pertinent to mediation as "structured negotiation" and some mediation resources. The Chapter offers tips on mediator selection; recommended terms for a mediation agreement; and an accessible description of the mediation process. It goes on to provide a brief description of privilege and confidentiality in mediation. Of institutional significance to NYSBA and to its Dispute Resolution Section is Mr. Hartje's support for the Uniform Mediation Act (UMA). Commencing in 2008, the Dispute Resolution Section urged the State Bar to press for New York State's adoption of the UMA, and the Bar responded by placing this at the top of its list for legislative lobbying. Our lobbying efforts have continued over the past several years, but, unfortunately, the UMA has not yet been adopted by New York's legislature. Greater clarity and widespread implementation of a mediation privilege, and of confidentiality in general, are needed to reinforce the reasonable expectation that mediation communications are confidential. This is essential to the character of mediation as a forum where parties in conflict can experiment with trust and efforts at reconciliation, without concern that their tentative expressions for peacemaking will come back to bite them in a courtroom, in the news, or at the office water cooler. Beyond the protections that could be afforded outside the Commercial Division by the UMA, Mr. Hartje informs us of the protections that are fortunately in place within the Commercial Division—detailing its rules on confidentiality, privilege and mediator immunity, and mediation ethics. He also provides a more abbreviated look at other dispute resolution processes, including neutral fact-finding, ENE, med/arb, mini-trials, summary jury trials. He reviews the Commercial Division's mediation training requirements and introduces the reader to the current ADR administrator, Simone Abrams. Finally, the Chapter contains an informative section on Arbitration, including a listing of key providers, and ends with some useful checklists and forms of mediation agreements.

The remaining volumes in the treatise are expansions of this last mentioned volume.[11] They contain a number of pieces that are useful for refining one's analysis and approach to dispute resolution as neutral or advocate. These include Mitchell J. Auslander's chapter on *Litigation Avoidance and Prevention*, promoting the "upstreaming" of dispute resolution. Also along these lines is Barry R. Ostrager and Mary Kay Vyskocil's chapter on *Crisis Management*, with useful tips for all dispute resolvers. Similarly, the next three chapters give transferable advice on streamlining and managing litigation: *Techniques for Streamlining and Expediting Litigation*, by Steven Wolowitz; *Litigation Management by Corporations*, by the late Joseph T. McLaughlin and by Nader H. Salehi; and *Litigation Management by Law Firms*, by Robert E. Crotty.

These are followed by instructive pieces on ethics and civility, reflective of the sensibility of ADR practitioners. Stewart D. Aaron presents a chapter on *Ethical Issues in Commercial Litigation*, followed by an excellent piece on *Civility* by Hon. Ann T. Pfau, then-Chief Administrative Judge of the State of New York, together with Jeremy Feinberg and Laura Smith from the Office of Court Administration.

Embedded in these remaining volumes are chapters that will be of particular interest to neutrals and practitioners concentrating in a particular substantive area or addressing particular substantive issues. For example, Stephen L. Ratner, David A. Picon, and Bruce E. Fader's chapter on *Broker-Dealer Litigation and Arbitration* will certainly be of interest to practitioners in that field. Beyond this, practitioners, including mediators and arbitrators, who could use a quick step into a substantive arena can find guidance in these pages. For example, when I was struggling as a neutral with a knotty question of damages relating to loss causation in a hedge fund tax, accounting malpractice action, I found a very helpful discussion that took me to the heart of the matter in Richard Swanson's chapter on *Professional Liability Litigation*. Similarly, Margaret Dale's chapter on *Admissibility Issues in Commercial Cases* can be helpful not only for practitioners, but also for arbitrators looking to consider how to rule, or at least to assess the worth of evidence they heard, when they promised to "take it for what it is worth." It can also be helpful for mediators engaging the parties and counsel in a risk analysis. Along similar lines, the Dispute Resolution Section's longstanding liaison, Claire Gutekunst, offers valuable insights in her chapter on *Jury Conduct, Instructions and Verdicts*.

In sum, while many a tree has been lost in the service of Bob Haig's treatise, much meaning has been gathered in this wealth of collective wisdom. I commend it to the ADR Bar.

Endnotes

1. Leonard L. Riskin, *Understanding Mediator Orientations, Strategies, And Techniques: A Grid For The Perplexed*, 1 Harv. Neg. L. Rev. 7, 8-13, 17-38 (1996).
2. Kimberlee K. Kovach & Lela P. Love, "*Evaluative" Mediation Is an Oxymoron*, 14 Alternatives To High Cost Litig. 31 (1996).
3. Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing The "Grid" Lock*, 24 FSU L. Rev. 985.
4. This has had practical consequences in New York. In the early 1990s, Chief Judge Judith Kaye commissioned Margaret Shaw,

Ken Feinberg and Fern Schair to hold public hearings and issue a report on the state of ADR in New York State. The Kaye Task Force report recommended 24 hours of training for mediators. As a consequence, the Commercial Mediation training that Steve Hochman and I have presented for Commercial Division mediators began as a three-day course. Because of its commercial focus, it integrated facilitative skills and theory with approaches to evaluation in the commercial mediation context. Various Advisory Groups were formed as a consequence of the Kaye Task Force, including groups on standards and qualifications for mediators, led by Lela Love, on which this reviewer served. That group sought to integrate the insight that mediation is primarily the facilitation of the parties' own dealmaking and dispute resolution with the observation that in commercial matters participating parties and counsel often will engage in a facilitated evaluative process, and might even turn to the mediator for some evaluative feedback or "reality testing." The group recommended that the 24 hour training requirement be expanded to 40 hours, 16 of which would address both skills of neutral evaluation and application of mediation to the substantive area involved. That led to the issuance of Part 146 of the Rules of the Chief Administrator, and more recently the promulgation of standards and guidelines under Part 146, developed by Unified Court System's Office of ADR. The ADR Office now approves training programs under Part 146. In approving the Commercial Mediation training that Mr. Hochman and I have delivered for the Court for the last 17 years, the ADR Office struggled with defining what should be in the first three days and what should be in the last, since we had integrated all elements into the first three from the start. This struggle mirrors the points captured and questioned in Josh Stulberg's article, n. 3, *supra*.

5. This phrase was made popular by Robert H. Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950 (1979).
6. President Leber presented me, as then-Dispute Resolution Section's Chair, with a Goldilocks and the Three Bears issue—in lieu of too little discovery for a fair process and outcome or too much discovery, mirroring the cost, delay and inefficiency of litigation, how does one create guidelines for discovery in arbitration with a balance that is just right? I quickly passed this hot potato to Section members Carroll Neesemann, John Wilkinson, and Sherman Kahn in view of their expertise in arbitration. Now, five years later, John Wilkinson is Chair and Sherman Kahn is Chair-Elect of the Dispute Resolution Section.
7. A brochure containing both sets of protocols—Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic Commercial Arbitrations and Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of International Arbitrations—can be found online at: http://www.nysba.org/Content/NavigationMenu/Publications/GuidelinesforArbitration/DR_guidelines_booklet_proof_10-24-11.pdf. The Domestic Commercial Arbitration Guidelines were approved by the Executive Committee of NYSBA in April 2009, and the International Guidelines were approved in November 2010.
8. One useful resource that could have been mentioned in this Chapter is the Thomas-Kilman Conflict Mode Instrument, which places negotiators on a scale of five preferred responses to conflict: competing, avoiding, accommodating, compromising and collaborating. More information can be found at: http://www.kilmanndiagnostics.com/overview-thomas-kilmann-conflict-mode-instrument-tki. One observation that emerges from study of the TKMCI is recognition that at different times, in different circumstances, and for different purposes, a different one of the five modes of handling conflict might be the optimal mode. This creates a dynamic and variegated approach to negotiation and conflict resolution.
9. Mr. Schraver's excellent recommendation to spend time developing client goals could have gone further by elaborating Fisher and Ury's advice of identifying interests and using them as the basis for generating options to achieve mutual gains.
10. The Chapter could have added a citation to Ury's highly readable sequel, *Getting Past No*. Also of interest might be this reviewer's piece, "*Tips on How to Negotiate and Acquire Negotiation Skills*," drawn from a NYSBA Dispute Resolution Section joint meeting with NYSBA's Labor and Employment Law Section: http://www.nadn.org/articles/BAUM-HowToNegotiateAndAcquireNegotiationSkills.pdf.
11. Mr. Hartje's piece on ADR is found in Volume 4. The remaining volumes are Volumes 4A, 4B, 4C, and 4D.

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* * *

Outsourcing Justice: The Rise of Modern Arbitration Laws in America

By Imre Szalai

Reviewed by Stefan B. Kalina

This history of "the rise" of arbitration law arrives as public discussion of arbitration reaches new heights. Arbitration may be found in an ever increasing array of contracts in use today. Arbitration is thus having a wider and deeper impact on businesses and individuals alike. Indeed, the Supreme Court's recent decision in the commercial case of *American Express Company v. Italian Colors Restaurant* received an editorial response by *The New York Times*. Professor Szalai's timely volume provides needed context to understand how arbitration reached this position and to analyze the propriety of its spread from purely commercial contracts into such areas as consumer and employment contracts.

To begin, Professor Szalai traces the history of the reform movement in the early 1900s that led to the enactment of New York's arbitration statute, the Federal Arbitration Act and many other state arbitration laws. Although pre-existing laws were favorable to arbitration, they did not assure the enforceability of arbitration agreements. Such agreements were revocable, and courts refused to enforce many of them. Business disputes thus remained the province of the courts.

This state of affairs collided with the rapid advancement of business at the turn of the twentieth century. At that time, business leaders wished to use the less-formal and speedier private arbitration that permitted fellow merchants to serve as neutrals to resolve their disputes. The friction between arbitration and litigation in the commercial context was exacerbated by the complexity of then-existing civil procedures which business people saw as disadvantageous (and which themselves were in nascent stages of reform). To relieve the tension, business leaders in New York, spearheaded by Charles Bernheimer, embarked on an effort to secure statutory recognition of arbitration agreements as both irrevocable and enforceable. Their success resulted in the modern laws that paved the way for greater use of arbitration.

Professor Szalai draws, in great detail, on "previously untapped archival sources," as well as secondary materials, to narrate the history of arbitration in America preceding and during the reform movement. He teaches that arbitration was used by Colonial-era merchants belonging to the New York Chamber of Commerce "to adjust disputes" between members. This foundational use of arbitration was carried forward into the early twentieth century where it was further shaped by the forces of global economic panic and world war. Reformers, both inside and beyond the business community, saw arbitration as useful tool for resolving economic and political disputes before they led to such phenomena. Arbitration, as a process, was also viewed as consistent with the procedural reforms of the era and the rise of progressive, bureaucratic means to deal with the increasing complexity of issues facing modern America in the twentieth century.

Professor Szalai brings this story to life by taking the reader on a journey alongside Mr. Bernheimer and his colleagues as they marshal their forces, garner support and battle opponents alike in the business, legal and political circles of New York, Washington and beyond to secure enactment of modern arbitration laws. This narrative, complete with many historical revelations and connections, is an entertaining and compelling read. On a deeper level, however, Professor Szalai draws a historical distinction between the reformers' limited aspiration for arbitration's role in American society (for the resolution of commercial disputes between merchants and political entities) and the wider application given to it by courts of later generations.

Using primary sources and historiography, Professor Szalai demonstrates how modern American arbitration laws arose from this crucible of devising a system for resolving disputes between members of the mercantile community or the community of nations. In accord with this historical motivation, he argues that strong statutory enforcement of arbitration agreements should remain properly confined to those stakeholders in the business and political communities who specifically sought and obtained arbitration as an available method to resolve their disputes. As a corollary, Professor Szalai further contends that applying this statutory scheme to members of societal groups who have not sought such protection is inconsistent with the historical guideposts defining the proper scope of arbitration law. Against the historical backdrop, Professor Szalai concludes that the proliferation of arbitration into such arenas as employment and consumer contracts is a distortion of the reformers' intent and, hence, the legislative intent of the arbitration statutes.

The title of this accessible book, *Outsourcing Justice*, illustrates the thesis. Relying upon historical research as counterpoint to recent jurisprudence, Professor Szalai strongly asserts that courts have misconstrued the historical limitations on arbitration, thereby allowing private arbitration to replace public litigation. With equal emphasis, he argues that many would-be litigants who do not share an equal interest in arbitration (nor equal bargaining power with their counterparts) are being deprived of the procedural protection of litigation that is appropriate for their particular disputes.

Readers of *Outsourcing Justice* are treated to a provocative discussion about arbitration as a social justice issue. The deep historical review, paired with legislative analysis and a discussion of pertinent case law, enables readers to draw their own conclusions. The final section containing "concluding observations" enhances the contemplative aspects of the book. An extensive notes section is also included should the reader wish to track down leads of further interest. This book should be recommended to anyone interested in the legal and social ramifications of public and private dispute resolution.

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The Power to Sanction—*Seagate Technology, LLC v. Western Digital Corporation*

By Laura A. Kaster

This recent Minnesota Appellate Court decision,[1] relying in part on Second Circuit authority in *ReliaStar Life Ins. Co of N.Y. v. EMC Nat'l Life Ins. Co.*,[2] upholds the authority of the arbitrator to sanction by precluding evidence on certain claims and entering judgment on those claims. Given the otherwise broad authority granted to the arbitrator, he had this power despite the absence of any express authority to impose sanctions in the arbitration agreement or the applicable AAA Rules.

This decision is a pro-arbitration decision that again emphasizes the limited review permitted following an arbitral decision. Although the Court applies the Uniform Arbitration Act, it acknowledges that the FAA would govern if conflicting.[3] It found no such conflict.

The dispute between Seagate and Western Digital related to trade secret claims against a former employee of Seagate, Sining Mao, and a claim against Western Digital, his subsequent employer, for tortious interference with contractual relations. The arbitrator was a retired Judge of the Appellate Court who was reviewing the decision vacating his award by the state trial court.

Seagate claimed, and the arbitrator found, that to support his defense that the trade secrets had been made public, Mao altered a set of PowerPoint slides that he had delivered in a public presentation by adding two slides that contained secrets relevant to Seagate's claims 4-6. The format of those two slides was the Western Digital format and the arbitrator found that Western Digital had to be aware of the fabrication. For what the arbitrator characterized as egregious litigation misconduct, the arbitrator precluded the presentation of any evidence on those claims and entered judgment against Western Digital and Mao for misappropriation. The arbitrator also found breach of Mao's employment contract, awarded damages of $525 million, and interest of nearly $110 million. All of this followed 4 years of discovery, 34 days of hearing and an opinion of 27 pages.

When Seagate sought to confirm the award, Western Digital and Mao moved to vacate, claiming that the arbitrator had exceeded his authority by imposing the sanctions, or had failed to consider lesser sanctions and had misapplied sanctions law and violated public policy. The trial court vacated the arbitrator's decision on these grounds and remanded to a different arbitrator.

The Appellate Court first holds that because Western Digital itself sought sanctions against Seagate and because it never made a specific objection to the arbitrator about his authority to impose sanctions, it waived any objection to the arbitrator's authority.

Recognizing that this was a sufficient basis to reject the trial court's ruling on this ground, the Court nevertheless examines whether the arbitrator had authority independent of the waiver and concludes that he did. The Court's view based on precedent was that the power to fashion remedies is a necessary part of the arbitrator's jurisdiction, particularly under a broadly worded arbitration agreement, unless the specific contractual language withdraws that authority. Thus, the sanctioning authority is inherent. The Court cites to *ReliaStar Life Ins.* for this precise proposition. Here, silence cuts in favor of the authority.

The Court also rejects the trial court's examination of sanctions law because it was an improper encroachment into the merits of the dispute on which the arbitrator is the final authority. Mere misapplication of the law is no basis for vacating an award and manifest disregard may only relate to the stated statutory grounds for vacatur.

The trial court was wrong to invoke the public policy exception to enforcement of awards without the identification of a specific and dominant public policy that would be violated by confirming the award.[4]

Finally, the Court held that in directing that rehearing take place before a different arbitrator, the trial court abused its discretion. The Court acknowledge that the Uniform Arbitration Act provides authority for remand to a new arbitrator but doing so requires findings that the award was procured by corruption or that the arbitrator exhibited partiality that would justify beginning the arbitration anew.

The arbitration award was confirmed.

Although this case was something of an endurance test, the Court lays groundwork for severely limiting the realistic challenges that parties can raise to an arbitral award.

Endnotes

1. 834 N.W.2d 555 (Minn. Ct. App. 2013).
2. 564 F.3d 81, 86 (2d Cir. 2009).
3. Seagate at n. 12.
4. Slip at 19.

* * *

LJL 33rd Street Assoc. v. Pitcairn Properties, Nos. 11-5425, 12-1382 (2d Cir. July 31 2013)

In this case, focusing on a very specific arbitration clause, the Second Circuit reverses Judge Rakoff's ruling vacating an arbitrator's order. The central basis for Judge Rakoff's ruling was that the arbitrator's exclusion of hearsay valuation evidence submitted by Pitcairn had unfairly prejudiced it in a hearing set to determine the "Stated Value," or the fair market value, of the building that was the subject of the arbitration. The Second Circuit's decision reinforces its adherence to the strict terms of arbitration clauses and its respect for the discretion of the arbitrator. It specifically held that the arbitrator had the discretion to decline to admit hearsay evidence, particularly where the offering party had the opportunity to present admissible evidence that would have been subject to cross examination. 9 U.S.C. § 10 (a)(3), which permits the vacation of an arbitral award "where the arbitrators were guilty of misconduct in…refusing to hear evidence pertinent and material to the controversy," was not properly invoked by the district court. The Second Circuit affirmed Judge Rakoff's ruling that the arbitrator did not abuse his discretion by refusing to expand his deliberation to include the "Purchase Price" as defined in the contract.

LJL and Pitcairn jointly owned a high-rise luxury residential building in New York City. Their contract provided LJL an option to purchase if Salah A. Mekkawy, then managing the company, ceased to be employed by Pitcairn. Pitcairn did let Mekkawy go and LJL invoked its contractual right. Under the operable provisions, the Purchase Price was payable in cash and was to

> produce for the Selling Member the same cash consideration as Selling Member would have received if the assets of the Company had been sold on the Buy/Sell Transfer Date to a third party in an all-cash sale for a purchase price equal to the Stated Value…as if the company had been dissolved and woundup following such sale and the proceeds of such sale remaining after discharge and payment had been distributed to the Members.…

The contract further provided that if the parties were unable to agree on the Stated Value, then either party could elect expedited arbitration "whereupon the arbitrator shall select an independent third party MA1 appraiser who shall determine Stated Value."

LJL sought arbitration and asked for a determination of both the Stated Value and Purchase Price. Pitcairn objected to the Purchase Price demand. arguing it was outside the arbitration provision. The arbitrator refused to consider Purchase Price but appointed an appraiser to determine the property's value. The arbitration hearing involved testimony and reports of appraisers but LJL successfully objected to four of Pitcairn's exhibits: (1) an asset summary report of a real estate banking firm suggesting the price should be $10 to $20 million higher than the valuation LJL proposed; (2) a valuation made by another advisor based on materials presented to Pitcairn's Board; (3) a letter by one of the shaireholders of Pitcairn holdings; (4) a non-binding letter of intent to purchase the property for $68 million. LJL objected on hearsay grounds and other grounds and without further explanation the arbitrator excluded the evidence and determined the Stated Value to be $56.4 million.

LJL petitions to confirm the arbitrator's determination of Stated Value and to vacate his refusal to determine Purchase Price. Judge Rakoff sustained the arbitrator's refusal to determine Purchase Price but vacated the Stated Value award because of the excluded evidence.

The Second Circuit focused on the very specific scope of the arbitration clause to uphold Judge Rakoff's refusal to determine Purchase Price. But the heart of its decision is the analysis of the evidentiary point. The Court is deferential to the arbitrator and finds the exclusion of the hearsay evidence to be well within his discretion. Indeed, the Court notes that admitting the hearsay and disabling LJL from cross examining the authors of the reports or estimates would have been prejudicial to LJL. The rule that arbitrators may admit hearsay evidence cannot be transformed into a rule that they must do so. It was not fundamentally unfair, although an exclusion of pertinent evidence that deprived a party of the opportunity to support its contentions could be fundamentally unfair. Here Pitcairn had a means of introducing the evidence by proffering the authors—in a way that would have permitted cross examination. It did not provide any evidence as to why it could not do so. Refusal to admit the hearsay under these circumstances was not "misconduct" under Section 10(a)(3) of the FAA. The case was remanded to the district court with instructions to confirm the arbitration award.

* * *

The New Jersey Supreme Court Focuses on the Mediation Privilege in *Willingboro Mall v. Franklin Ave.*[1]

In order to prevent threats to the mediation confidentiality and the mediation privilege established under the Uniform Mediation Act (UMA), the New Jersey rules of court and rules of evidence, a unanimous New Jersey Supreme Court has just issues a new rule: **"To be clear, going forward, a settlement that is reached at mediation but not reduced to a signed written agreement will not be enforceable."**[2]

If the parties to mediation reach an agreement to resolve their dispute, the terms of that settlement must be reduced to writing and signed by the parties before the mediation comes to a close. "In those cases in which

the complexity of the settlement cannot be drafted by the time the mediation session was expected to have ended, the mediation session should be continued for a brief but reasonable period of time to allow for the signing of the settlement."[3]

Willingboro is an important case. New York has not adopted the UMA and law about mediation privilege is less developed but the problems that arose in *Willingboro* are instructive and should be carefully considered by neutrals and advocates in mediation.

In the underlying case, the Court found that the parties had waived the mediation privilege and Willingboro could not assert it after it had "shredded" the privilege. The Court ruled that an oral settlement had been reached and was binding on the parties.

But the Court also found that certifications filed by Franklin's attorney and the mediator in an effort to support a motion to enforce the oral settlement agreement Franklin asserted had been reached in mediation improperly disclosed privileged mediation communications by referring to statements made during the mediation: "Here the mediator went far beyond merely communicating to the court that the parties had reached a settlement. The mediator certified to the accuracy of Franklin's …letter, which set forth in eight numbered paragraphs the terms of an oral agreement between the parties.… By validating the contents of Franklin's letter, the mediator breached the privilege."[4] Without Willingboro's advance consent, these communications of privileged information were improper. Had Willingboro promptly objected, a different result would have followed.

The underlying case was a dispute about a mortgage foreclosure sent to mediation by the court. A mediation was conducted with both parties represented. An offer of $100,000 was made by Franklin to Willingboro in exchange for settlement of all claims and discharge of the mortgage on the mall property. Willingboro's representative orally accepted the offer in the presence of the mediator. However the terms of the settlement were not reduced to writing before the conclusion of the mediation session.

Franklin forwarded to the judge in the case a letter dated November 9, 2007, from Willingboro, stating the case had been settled and set forth the purported terms of settlement. When Willingboro rejected the settlement terms, Franklin filed a motion to enforce the settlement agreement and attached certifications from its attorney and the mediator that revealed communications made during the mediation. Willingboro did not move to strike the certifications or to dismiss the motion but instead requested an evidentiary hearing and the taking of discovery. When the mediator was called to testify in his deposition, he refused to do so unless ordered by the court. Upon receiving oral waiver of any issues of confidentiality, the court ordered the mediator to testify. A four-day evidentiary hearing followed during which Willingboro changed its position on the waiver and sought to expunge all confidential communications. The trial court found that Willingboro had waived any privilege and ultimately found that a binding oral settlement had been reached. The Appellate Division affirmed. The Supreme Court granted Willingboro's petition for certification.

It is fair to say the court was appalled by the developments in this case: "Mediation will not always be successful, but it should not spawn more litigation. In this case, the parties engaged in protracted litigation over whether they had reached an oral settlement agreement in mediation. Instead of litigating the dispute that was sent to mediation, the mediation became the dispute."[5] For that reason, the Court to protect against similar breaches of confidentiality and disputes over terms established a requirement that settlement agreements be written to be enforceable.

The Court also noted that the mediator breached the confidentiality obligation when the mediator averred in his certification that the parties had voluntarily "entered into a binding settlement agreement with full knowledge of its terms, without any mistake or surprise and without any threat or coercion" and agreeing that the terms were as set forth in Franklin's letter.[6] However, Willingboro waived its objections when it failed to move to dismiss the motion or strike the certification and when it requested an evidentiary hearing and the taking of discovery, and cross-examining the mediator at his deposition. At the evidentiary hearing the Willingboro representative asserted he had been pressured into settling and that he believed the entire process was nonbinding. His attorney testified that Willingboro had agreed to the settlement. The Appellate Division affirmed.

On appeal to the Supreme Court Willingboro urged the Court to rule that under the controlling Rule, a settlement is not enforceable unless reduced to writing and that it did not waive the mediation-communication privilege by presenting evidence in opposition to the motion to enforce the oral agreement because the privilege had already been destroyed by Franklin's motion and the certifications. The Court rejected both propositions but established a new forward-looking rule requiring a writing in order to protect mediation communication confidentiality, which promotes candid and unrestrained discussion. The Court reasoned that "In the absence of a signed settlement agreement or waiver, it is difficult to imagine any scenario in which a party would be able to prove a settlement was reached during the mediation without running afoul of the mediation-communication privilege."[7]

Willingboro waived the privilege: "Only after filing a certification, participating in five discovery depositions and a day of evidentiary hearing all of which included myriad breaches of the mediation-communiciation privi-

lege—did Willingboro attempt to invoke the privilege. Although Franklin instituted the enforcement litigation and fired the first shot that breached the privilege, Willingboro returned fire, further shredding the privilege."[8]

This case has lessons for all participants in mediation.

Endnotes

1. http://www.judiciary.state.nj.us/opinions/supreme/A6211WillingboroMallvFranklinAve.pdf.
2. Slip Op. at 29.
3. Slip Op. 28-29.
4. Slip Op. at 23.
5. Slip Op. at 1-2.
6. Slip Op. at 5.
7. Slip Op. at 23.
8. Slip Op. at 27.

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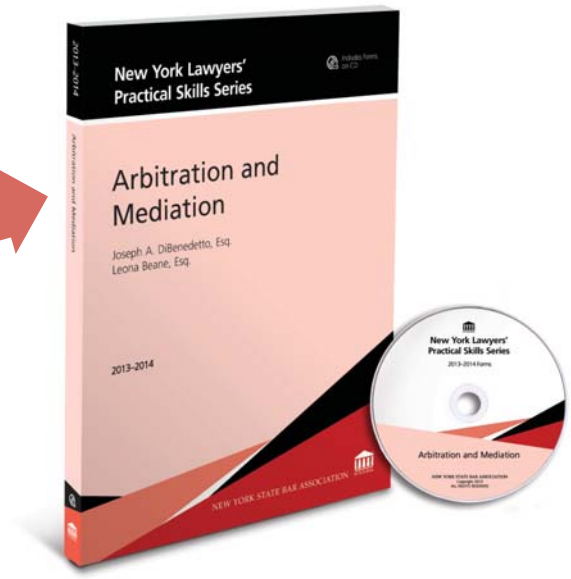

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