NYSBA FALL 2014 | Vol. 7 | NO. 2

New York Dispute Resolution Lawyer

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

Message from the Chair


Sherman Kahn

This is an exciting time for dispute resolution practice in New York. We have seen several new initiatives to promote ADR generally and New York as a hub of international dispute resolution practice particularly. I would like to focus a just a few of those initiatives here.

In 2010, Steve Younger, at the time the President of the New York State Bar Association, established a Task Force on New York Law in International Matters. The Task Force included members from more than 30 major law firms as well as academics and judges. It issued a final report in April 2011. The Final Report included a variety of recommendations for initiatives in the dispute resolution field that the Task Force felt could help cement New York's standing as a first-tier center for international dispute resolution proceedings.

Some of the proposed initiatives seemed at the time to be more aspirational than achievable. For example, the Task Force proposed that the State Bar support the creation of a permanent Center for International Arbitration in New York. At the time, this seemed somewhat fanciful—how could we finance a brick-and-mortar arbitration center? But only three years later, it exists.

The New York International Arbitration Center, also known as NYIAC, with the support of the Dispute Resolution Section and the International Section as well as a number of major law firms, is now firmly embedded in the fabric of arbitration practice in New York. The next issue of this publication will be a special issue dedicated to NYIAC, so I will reserve further comment regarding NYIAC for that issue. In the meantime, readers should visit NYIAC's website at www.nyiac.org, which includes information regarding NYIAC and also has a variety of resources helpful to arbitration practitioners and neutrals alike.

The recommendation that New York create an arbitration center was not the only recommendation of the Task Force that has been adopted. For example, the Task Force recommended that the State Bar explore with the New York judiciary the introduction of a degree of judicial specialization, such as the designation of particular judges as specialized chambers to deal with international arbitration matters. This, too, has been implemented.

On September 16, 2013, Chief Administrative Judge Prudenti issued an Administrative Order Designating Hon. Charles E. Ramos, Justice of the Supreme Court, New York County, to handle all international arbitration cases before the Commercial Division, New York County. For purposes of this designation, international arbitration cases are defined as cases brought under CPLR article 75 or under the Federal Arbitration Act except for cases arising out of a relationship that is entirely between citizens of the United States with no reasonable relationship with

(continued on page 5)

Inside

TO JOIN THE DISPUTE RESOLUTION SECTION, SEE PAGE 53 OR GO TO WWW.NYSBA.ORG/DRS

Message from the Co-Editors-in-Chief


Edna Sussman


Sherman Kahn


Laura A. Kaster

As we embark on a new Section year, with Sherman Kahn as both a co-editor-in-chief of this journal and having been passed the baton, or in this case the hosu of leadership as the Chair of the Section, we have much to look back on and many challenges ahead. We have determined to change this message from one that simply outlines the articles, case notes, and reports of this issue to a short summary of our own views.

We are quite proud of the Section's work. In its seven short years of existence, it has not only served the neutral community and the bar but our city and state. Our Section's leaders were there at the inception and the fulfillment of NYIAC, our pamphlets have supported arbitration in New York and the choice of New York law for international arbitrations. New York has become the site of the majority of U.S. ICC filings in 2013 and New York law has been chosen in a majority of U.S. filed international ICC arbitrations as reported by the ICC. The ICDR statistics for 2013 similarly show New York to be by far the most popular seat for arbitrations seated in the U.S., and New York drew almost three times as many arbitrations as the next most popular U.S. seat. We are supporting the expansion of mediation in the Commercial Division (and hopefully beyond) and in probate and elder law. We continue to provide wonderful trainings and opportunities for advanced work for arbitrators and mediators.

It is our hope that this journal will provide you with information about the Section and also the developments in the wider world of ADR. Despite significant progress, mediation remains underutilized in New York and in many areas of this country and the world. Mediation techniques should be more widely used to reduce the stalemate of unaddressed conflict. International Arbitration is growing but there continue to be questions about how best to return domestic arbitration to a more cost-effective alternative to litigation. And there are many interesting and challenging issues that we continue to bring to your attention. We hope that we can encourage you to be part of movement to change the course of ADR and increase its effectiveness and use and that we can help you keep abreast of the developments on the horizon.

Edna Sussman, Laura A. Kaster and Sherman Kahn

Table of Contents

(continued on page 4)

Book Reviews

Case Notes

a foreign state. This should send all international arbitration cases filed in the State Court system in New York County to Judge Ramos for decision.

The Task Force concluded that the assignment of all such cases to a single judge would enhance the speed and reliability of the resolution of international arbitration-related judicial decision-making. A number of other jurisdictions around the world have been adopting a similar approach as a way of facilitating prompt and correct resolution of international arbitration issues. Of course, many international arbitration cases go to Federal Court for decision, but Judge Ramos' appointment is still an important step with respect to maintain New York's position in the international arbitration field.

Another important development for New York in the international arbitration field is the creation of SICANA, a U.S. Corporate entity based in New York responsible for administering ICC arbitrations in North America. In January of this year, SICANA began administering existing ICC arbitrations and registering new requests for arbitrations in North America. The ICC reports that cases with North American parties made up nearly 10% of the ICC's arbitration cases in 2013, so this means that many ICC cases will be administered from New York. The statistics generated in the few months since SICANA began administering cases fully support this conclusion. Josefa Sicard-Mirabal of SICANA reported at the Dispute Resolution Section's very successful Commercial Arbitration training last July that in this short period, the ICC has already registered 45 cases, including 11 domestic U.S. cases. The ICC has now joined the AAA and ICDR, JAMS, and CPR to further enhance New York's standing as a center of arbitration and dispute resolution practice. The domestic cases that the ICC has registered demonstrate that domestic arbitration is alive and well in New York as well. And the exciting developments in ADR are not limited to arbitration.

The Commercial Division of the Supreme Court, New York County is implementing a pilot project in which every fifth case assigned to the Commercial Division will be automatically assigned to mediation. The assignments will be made on a weekly basis based upon a list of cases newly assigned to the Commercial Division upon the filing of a Request for Judicial Intervention. There are some exceptions, such as where one of the parties appears *pro se*, where all parties agree to be excluded from the program or where the assigned Justice exempts the case from the program on a showing of good cause. Notwithstanding those exceptions, the pilot program should greatly expand the number of Commercial Division cases that are referred to mediation.

Laura Kaster has written a comprehensive article describing the program for this issue and I refer you to that article for details. However, I have set forth below a few important features of the new program:

- The parties will be given an opportunity to agree upon a mediator before a mediator is appointed by the court's ADR Coordinator;
- Even if the parties are unable to agree, the ADR Coordinator will present the parties with a list of three mediators who have cleared conflicts and would be able to handle the matter; the parties can then agree on one of the three or rank their choices and return their rankings to the ADR Coordinator for a final choice;
- The Coordinator will designate the mediator if the parties are unresponsive;
- The new program includes timing and deadlines consistent with those from the existing program;
- Mediator compensation is handled in the same way as in the existing program (and parties are free to contract directly with mediators they agree upon); and
- The existing program will continue in tandem with the Pilot Program and justices will continue to refer cases to mediation as they deem appropriate.

This Pilot Program presents an enormous opportunity for mediation to take hold as an essential part of the life of a court proceeding in New York. If successful, this mediation Pilot Program could be expanded to other Commercial Divisions throughout the state. If, on the other hand, the Pilot Program is not successful, it could be a major setback for mediation in New York. For this reason, the Dispute Resolution Section is dedicated to doing whatever is in its power to help the Pilot Program succeed.

We have created a special task force from our Mediation and ADR in the Courts Committees, which will coordinate with the New York Commercial Division to help in any way we can.

The items discussed above are just a few of the many initiatives that are improving the environment for ADR. I look forward to seeing even more success in the coming year.

Sherman Kahn

Ethical Compass
When the Price of Settlement Is Ethically Prohibitive: Non-Disparagement Clauses That Apply to Lawyers

By Elayne E. Greenberg

Introduction

At last! You have lived with this case for many years, and you are now on the verge of finalizing the terms of a settlement agreement. All the contentious issues have finally been resolved, so you thought, when the defendant leans over the table and says, "Just one more thing. We want you and your client to sign a non-disparagement clause as part of the settlement." Yes, non-disparagement clauses have been frequently used as a controversial reputational shield in high-conflict divorces, sensitive employee terminations and contentious consumer actions. However, barely discussed is whether lawyers are ethically able to suggest or be bound by disparagement clauses. This column will address the ethical considerations that lawyers should consider before suggesting or agreeing to sign a non-disparagement clause.

Ethical Underpinnings

Whether or not a lawyer is ethically permitted to sign a non-disparagement clause or suggest one to another lawyer depends on whether the scope of the non-disparagement clause "restricts a lawyer's right to practice law" and restricts the lawyer's ability to represent both current clients and future clients.

The New York Rules of Professional Conduct Rule 5.6 (a)(2) (Restriction On Right to Practice) provides:

> A lawyer shall not participate in offering or making an agreement in which a restriction on a lawyer's right to practice is part of the settlement of a client controversy.[1]

The ABA Formal Op. 00-417 (April 7, 2000) *Settlement Terms Limiting A Lawyer's Use of Information* explains the rationale for the Model Rule 5.6 and its New York counterpart Rule 5.6 (a)(2) that proscribe agreements such as non-disparagement clauses for lawyers.[2] As explained in the opinion, there is a strong public policy "favoring the public's unfettered choice of counsel."[3] Non-disparagement clauses interfere with that public policy in three main ways. First, such restrictive agreements limit the public access to lawyers.[4] A second rationale for disfavoring disparagement agreements is that they are considered to actually be veiled attempts to "buy off" plaintiff's counsel.[5] Third, disparagement clauses create potential conflicts for lawyers between the interests of representing current clients and the interests of potential future clients.[6]

The ABA Formal Op. further clarifies that Model Rule 5.6 is not a blanket proscription, but rather there are limits to the Rule's reach. For example, Rule 1.6 (Confidentiality of Information) safeguards the attorney-client communications that are privileged.[7] Then, Rule 1.9(c) (Conflict of Interest: Former Client) requires permission of the former client to reveal relevant information about the past representation.[8] In another exception to Rule 5.6(a)(2), Rule 3.3 (Candor towards the Tribunal) may require disclosing information that might otherwise be silenced by a non-disparagement clause.[9]

"[N]on-disparagement clauses have been frequently used as a controversial reputational shield in high-conflict divorces, sensitive employee terminations and contentious consumer actions. However, barely discussed is whether lawyers are ethically able to suggest or be bound by disparagement clauses."

For those lawyers who are advocating that the attorney on the other side sign a non-disparagement clause, you too may be in ethical peril for making such a demand. Beyond Rule 5.6(a)(2)'s deep waters, you may also be violating Rule 8.4. Rule 8.4 provides in relevant part that " A lawyer or law firm shall not: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly." Thus whether a lawyer demands that opposing counsel sign a non-disparagement clause as an expression of his or her client's wishes or as part of a broader settlement strategy, the attorney making the request is violating the Rules of Professional Conduct.

Although in real life we may all know colleagues who report that non-disparagement clauses for lawyers are a regular part of settlement, I have been unable to locate any recent New York Ethical Opinions that address this issue on point.[10] A related, and unresolved, issue was raised in *Mandell v. Mandell*[11] when the Court questioned the enforceability of a Collaborative Law Participation Agreement.[12] In *Mandell*, the Court reinforced the importance

of Rule 5.6(a)(2) to assess whether the proscriptions in a settlement agreement were ethically permissible but left open the issue of whether non-litigation clauses as part of Collaborative Agreements were an abridgement of a lawyer's Rule 5.6 (a)(2) ethical rights to practice law.[13]

Bridging Ethical Considerations with Realistic Suggestions

So you now understand the ethical rationale against broad non-disparagement clauses for attorneys. You are still sitting at the table trying to finalize the settlement. The other attorney still has the non-disparagement clause there waiting for your signature. Your client is urging you to get this deal done, and the non-disparagement clause is the last unfinished business. You cannot be the deal breaker. What do you do?

Now is the time to artfully apply your dispute resolution skills. Ask clarifying questions, focus on prioritized interests, educate about the permissible ethical parameters for your actions based on the Professional Rules of Conduct, and explore feasible options to address the interests in having a non-disparagement clause for the attorney. What does the client mean by the term non-disparagement? What interest(s) are the client trying to achieve with a non-disparagement clause? How might you satisfy those interests other than with a non-disparagement clause in a way that allows both attorneys to still comply with the relevant New York Rules of Professional Conduct?

By way of illustration, let's assume you are a lawyer who has successfully represented vulnerable plaintiffs against exploitive financial institutional practices, and in this case, had successfully waged war for your client over a five-year period. As part of your litigation strategy, you had repeatedly used the media to publicize these unfair practices and expose larger systematic problems, publicly disparaging the financial institution. Just saying "no" to the signing of a non-disparagement clause may bring the long-desired settlement to a halt.

Instead, at this juncture in settlement, you could pause, breathe and apply your dispute resolution skills. Ask the financial institution's lawyer precisely what he or she means by non-disparagement. Question and understand what the lawyer and financial institution are actually trying to achieve with such a clause. Remind the lawyer for the financial institution about your shared ethical obligations under the New York Rules of Professional Conduct proscribing lawyers to offer or sign non-disparagement clauses that interfere with a lawyer's right to practice.

Even though the financial institution may be dreaming about putting lawyers like you out of business and preventing you from ever disparaging them again in future cases you may have, the financial institution's focused concern may be to stop you from using the media to disparage the financial institution about the particulars of this case. As we have been discussing, the financial institution can't ethically have you sign anything that will interfere with your ability to represent future clients. Given the interests of each side and the permissible ethical contours of any remediation, what are the ethically permissible options to resolve their concern about this case? One option to address these concerns is to agree to keep the terms of the case confidential and memorialize that understanding in a confidentiality agreement. Of course, you, in collaboration with the lawyer on the other side, might develop other creative, ethical options to help overcome the non-disparagement clause impasse.

Conclusion

On the eve of settlement, attorneys may suggest or be required to sign a non-disparagement clause. Broad non-disparagement clauses directly contravene the New York Rules of Professional Conduct. However, lawyers who apply their dispute resolution skills may still figure out how to ethically get past no, get to yes and reach an ethical settlement.

Endnotes

1. NY Rules of Prof'l Conduct R. 5.6 (a)(2).
2. ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 00-427 (2000).
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Cf.* NYC. Assn. B. Comm., Formal Op. 1999-03(March, 1999) affirming that an agreement that prohibits a lawyer from representing the same client or different clients in disputes against the defendant is unenforceable; NYSBA Comm. on Prof'l Ethics, Op. 858 (March 17, 2011) stating that in-house attorney's confidentiality agreement is not enforceable after the termination of employment if it restricts the lawyer's right to practice law.
11. 36 Misc.3d. 797, 949 N.Y.S.2d 580. 2012 N.Y. Slip Op. 22172.
12. *Id.*
13. *Id.*

Elayne E. Greenberg is Assistant Dean of Dispute Resolution Programs, Professor of Legal Practice and Director of the Hugh L. Carey Center for Dispute Resolution at St. John's University School of Law. She may be reached at greenbee@stjohns.edu.

Arbitrator Deliberations: The Impact of the Unconscious on Decision Making

By Edna Sussman

> Most studies of arbitration are devoted to discussions about the applicable law or the various procedural rules. It seems far more important to try to analyze how and why arbitrators make up their minds.
>
> —**Robert Coulson**, President
> American Arbitration Association, 1990[1]

Mr. Coulson's discussion of what was known at the time about psychological influences on arbitrator decision-making presaged the vigorous discussion of that subject which developed recently, some 25 years later. With the explosion of best-selling books on decision-making and the popularization of the psychological learning on the subject,[2] attention has turned in conference after conference to its applicability to arbitrators.

I. Introduction

The literature which studies the psychological phenomena that are the subject of this article refers to them as "biases." Because the word "bias" has such profound negative connotations in the field of arbitration, this article borrows the nomenclature used by Professor Guthrie, and refers to biases as "blinders."[3] The biases/blinders discussed here are those that are simply human nature. While constraints imposed by the law to increase certainty and predictability, such as specifying elements for causes of action and establishing burdens of proof, are effective to some degree, ultimately decisions are made by judges and arbitrators who are human beings. Their minds function anatomically just as do the minds of others. Legal training cannot and does not alter that fundamental reality.

The human brain has both an intuitive and a deliberative component, a fact long known and discussed as far back as Plato. It has been now scientifically proven. Recently Nobel Prize winner Daniel Kahneman popularized what he refers to as System 1, our fast, automatic, high capacity, low effort, and intuitive mode, and System 2, our slow, deliberate, limited capacity and high-effort mode.[4] His modern research-based analysis essentially posits that we cannot function without both and that human decision making operates with System 1 making intuitive judgments which are sometimes modified by System 2's deliberative process.

This dichotomy mirrors the two traditional models with which judging has traditionally been viewed: the "formalist" model pursuant to which it is believed that judges apply the law to the facts in a logical and deliberative way, and the "realist" model pursuant to which it is believed that judges follow their intuition to reach their judgment and later rationalize their judgment with reasoning.[5]

Scholars have explored System 1 and System 2 as it impacts legal decision-making. Research has shown that, as with all human beings, the intuitive reactions of System 1 play a significant role in judges' decision making.[6] Given the similarity of the tasks, one must conclude that those same impacts affect arbitrators' decision making also.

"While constraints imposed by the law to increase certainty and predictability… are effective to some degree, ultimately decisions are made by judges and arbitrators who are human beings."

It is the unconscious intuitive processes, the blinders, which are addressed in this article, with suggestions to foster a more robust deliberative overlay and improve the quality of decisions by arbitrators. In order to provide a context that reflects actual arbitrator decision making, the results of a survey of arbitrators I conducted in October of 2012 (the "2012 Arbitrators Survey") are reported. The survey, which was distributed both in the U.S. and to colleagues around the world, drew 401 responses.

II. Unconscious Blinders

Guthrie, Wistrich and Rachlinski, in their leading works on the subject of judicial decision making, addressed the question of why it can be difficult to get a decision in a case right with studies conducted with hundreds of judges.[7] They identified three sets of blinders that are the psychological influences that can lead to erroneous decisions: informational blinders, cognitive blinders and attitudinal blinders.[8] These categorizations are useful and are adopted here.

A. Informational Blinders—Inadmissible Evidence

The 2012 Arbitrators Survey confirmed that arbitrators usually allow evidence to be introduced that would not be admissible in court. Yet studies with judges have confirmed that inadmissible evidence, once heard, has a

profound impact on decisions made by judges. Judges who saw a clearly privileged document devastating to the plaintiff's case ruled for the defendant about twice as often as those who had not seen it. Only 75% of Judges who saw a recall notice, an inadmissible subsequent remedial measure, ruled for the defense while 100% of the judges who had not seen it did so.[9] As one court put it, you can't "un-ring the bell."[10] Given the unconscious, this result is not surprising.

What can arbitrators do to try to overcome this blinder? First and foremost, arbitrators should really do what they say they will do and consciously weigh the reliability of evidence they have promised to assess as to weight. Reviewing preliminary conclusions of the case to see if the outcome would differ if unreliable evidence admitted on that basis had not been introduced may serve as a check by showing the arbitrators the extent to which such pieces of evidence have influenced their thinking.

B. Cognitive Blinders—Heuristics

Cognitive blinders are patterns of deviation in judgment which can lead to perceptual distortion, inaccurate judgment, or illogical interpretation. They include heuristics, mental shortcuts that permit people to solve problems and make judgments and react to situations quickly and efficiently without constantly stopping to think about the next course of action.

1. Hindsight Blinder

Studies have shown that subsequent events color decision making. For example, in one study 57% of judges who were told a flood had taken place and no precautions had been taken found negligence while of the judges who were not told about the subsequent flood only 24% found negligence.[11] The very nature of arbitration calls for an evaluation of events after the fact, thus making the process particularly vulnerable to the hindsight blinder. Hindsight has been described as the most "troublesome problem for judges."[12]

The burden of proof may in some instances be of assistance in countering hindsight. If one isolates and lists the facts that were proven as of the relevant time frame from later biasing events and applies the burden of proof just to the earlier facts, it should assist in minimizing the impact of hindsight.

2. Anchoring Blinder

Numbers wholly irrelevant to a decision can have a dramatic influence on damages findings. In one study judges who heard a demand in a settlement conference of $10 million awarded $2.2 million while other judges given the same facts, but only told that there had been a request for a lot of money, awarded $800,000.[13] In another study judges who heard a motion to dismiss for failure to meet the court's $75,000 jurisdictional minimum awarded a mean of $880,000 while those who had not heard the motion awarded a mean of $1,200,000 on the same facts.[14] Study after study has proven that people will be anchored in their response by numbers that bear no relationship to the question they are asked to answer and will unconsciously use the number as a focal point and adjust from it.

The 2012 Arbitrators Survey results demonstrated that many arbitrators find that quantifying damages is often more difficult than determining liability. There is often no clear right answer, perhaps opening the door for the influence of the anchoring blinder. Awareness of the anchoring blinder while analyzing the damages evidence should assist arbitrators in avoiding falling prey to it.

3. Framing Blinder

In a fascinating experiment, the same two sets of adjectives in a different order were used to describe two people.

- Alan—intelligent-industrious-impulsive-critical-stubborn-envious
- Ben—envious-stubborn-critical-impulsive-industrious-intelligent

The study found that the initial adjective colored the subject's assessment of the later adjectives, leading the experiment subjects to view Alan as an able person with certain shortcomings and Ben as a problem whose abilities are hampered by his serious difficulties.[15]

Arbitrators are conscious of the fact that differences in the quality of the lawyering can affect their decision. Arbitrators do try to look beyond the manner and style of presentations to ascertain the true story. Again, recognition of the psychological influence that a well-crafted presentation can have should serve to heighten arbitrator's ability to overcome well-framed but faulty arguments.

4. Confirmation Blinder

In the context of arbitral decision-making the confirmation blinder is a particularly pernicious blinder. All arbitrators say that they keep "an open mind" until the close of the hearing, and surely arbitrators honestly believe that to be true. However, the psychological learning suggests this to be a blinder in and of itself. Waites and Lawrence concluded in their foremost article on the subject of psychology and arbitrators: "A typical arbitrator concludes the initial phase with a single dominant story in mind.… This would mean that for most arbitrators, the actual arbitration presentation is a process of filtering through the evidence to test their individual hypothesis about the case.… Arbitrators…will make every effort to fit their perceptions of the facts and circumstances of the case into the story they have formed.… "[16]

The 2012 Arbitrators Survey results support this conclusion. Eighty-eight percent of the arbitrators formed a preliminary view of the merits of the case at least 25% of the time after only receiving the prehearing submissions while 37% formed such views at least 50% of the time. Sixty percent of the arbitrators changed their view from their preliminary determination only 30% or less of the time.

Making sure that both "stories" are played for discussion throughout the proceeding would help to counter this blinder. Consider whether it would be useful to have the co-arbitrators sum up the evidence each day over lunch, but have them switch which side's evidence they are marshaling from time to time to assure that all perspectives are being fully considered throughout the process.

III. Attitudinal Blinders—Background and Experience

In a striking study, researchers worked with staunch supporters of candidates in the 2004 U.S. presidential elections. Statements by the candidates were played for them. The study demonstrated that the reasoning part (System 2) remained completely inactive; any negative information about their candidate was simply filtered out automatically. The information simply never reached the deliberative part of the brain.[17]

Each arbitrator is uniquely influenced by his or her lifetime experiences and cultural influences and, like judges, is influenced by that background. Summing up these influences on arbitrators, Shari Diamond referenced the "affinity effect" which occurs when "decision-makers are influenced by their cultural backgrounds, their prior experiences, and their personal associations in formulating their understanding of and judging the behavior they must consider in reaching their decisions." And the "expectancy effect" which causes "beliefs about the world and preconceived notions about the likely credibility of particular types of witnesses affect how decision-makers evaluate evidence" and causes decision-makers to be more "likely to reject information that is inconsistent with their beliefs and expectations."[18]

IV. Improving Arbitrator Decision Making

The following suggestions are offered to arbitrators to assist in assuring the active engagement of the brain's deliberative faculties and of unconscious blinders. Many arbitrators already take many of these steps, but there is value in developing a list:

- As you consider your decision and as you write the award consider the opposite side, assuming each to be correct.
- Identify why you may be wrong, what are the important pieces of evidence that go the other way and why are they not reliable or credible.
- Consult your co-arbitrators.
- Make sure you elicit the independent thinking of each member of the tribunal.
- Create a checklist with columns for each party and list the facts that favor that party.
- Create a checklist listing the legal claims and the elements of each claim and review how and whether they have been met looking at it from each side's perspective.
- Reduce your reliance on memory; look for record citations for all of the important facts.
- Replay how you reached your conclusion and think about what evidence you rejected and why.
- Write down your reasoning, even if you are issuing a bare award.
- Estimate the odds of being wrong. If they are too high, rethink the case.
- Try to identify any significant evidence that would be inadmissible or is unreliable that may have influenced you and consider the outcome without that evidence.
- Focus on the blinders and consciously consider whether you may have been influenced by them.
- Don't take too many cases. Make sure you leave enough time to think through all of the issues, both factual and legal.
- Leave time to sleep on the award so that you can go back and review it with fresh eyes.
- Consider what you would have needed to have presented to you to have come to the opposite conclusion and consider whether in fact such evidence was presented.
- Ask yourself what the losing party would feel that you overlooked in your analysis.
- Consider, if somebody were to have concluded the other way, how would he or she write it, where and how would he or she differ?

As arbitrators learn more about the blinders that affect their thinking, best practices to foster a more engaged deliberative process are likely to evolve to improve the quality of decision making.

V. Advice for Arbitration Counsel

Many sources offering guidance for effective advocacy have been published. Such tips as reading everything a prospective arbitrator has written, developing an appealing "story," tailoring the manner and substance of the presentation to appeal to the specific arbitrators, are all practices which are, in fact, designed to understand and/or play to the unconscious of the arbitrator. To the wealth of literature on the subject, consider three additional thoughts for counsel addressed specifically to uncovering and addressing or deflecting unconscious blinders.

A. How Many Arbitrators

If the size of the case warrants it and the accuracy of the decision is paramount, consideration should be given to having three arbitrators rather than one. The suggestion in the literature that "group decision-makers might be better equipped to combat some of the more pernicious cognitive blinders like hindsight bias"[19] should not be ignored. Groups can remember more facts than individuals and in deliberating with one another can share remembered information leading to a more accurate determination. Three arbitrators bring different backgrounds and experiences to the arbitration and bring to the deliberations "differing insights and views of the events and motivations" which "provide the group with a more complete perspective out of which a better quality decision can be made."[20]

B. Tapping the Social Scientists

Jury consultants have long been employed in the United States as a response to the importance of selection and messaging in winning cases. Users of jury consultants find them useful and their widespread use is a testament to their utility. The arbitration community is just beginning to explore the arbitrators' psychology. In cases that warrant such an additional expenditure, utilizing the services of social scientists to assist with an understanding of the psychological dimensions may be useful. Waites and Lawrence concluded in the foremost article on the subject of psychology and arbitrators that, like the mock jury used to prepare for a jury trial, "the most useful scientific tool we have in preparing for an arbitration hearing is a mock arbitration panel study."[21] To facilitate parties' ability to assess their case with input from arbitrators the American Arbitration Association recently launched an online arbitration case evaluation product called CaseXplorer Arbitration. Three or five arbitrators from AAA's database of arbitrators selected by the users provide evaluative responses and feedback in a short time frame based on the materials provided on line.[22]

C. Enhanced Arbitrator Interviews

There is general approval of interviews of prospective arbitrators in the arbitral community, with only 12% of the respondents to the 2012 Queen Mary and White & Case International Arbitration Survey considering them inappropriate.[23] However, there was lack of agreement as to precisely what kinds of questions were permissible. Can we and should we now ask questions tailored to the dispute to flush out psychological drivers? While it might be argued that allowing an expansion of permissible questions would open a Pandora's Box and counsel could easily find themselves, even inadvertently, contaminating the neutrality of the prospective arbitrator, in the wake of the new information about psychology and the arbitrator a more detailed discussion of what should or should not be permissible in an arbitrator interview may be inevitable.

VI. Conclusion

While legal principles and precedents impose some rigor on decision making by arbitrators, subconscious factors that inevitably influence every person also play a significant role. With the current recognition of the psychological influences, a reexamination of best practices in arbitrator decision making is in order and concrete debiasing steps that arbitrators can take to improve the quality of their decisions should be considered.

Endnotes

1. Robert Coulson, *The Decisionmaking Process*, 45 Arbitration Journal 37, 37 (1990).
2. Recent best-selling books on the subject include: Daniel Kahneman, Thinking, Fast and Slow (2011); Richard H. Thaler/Cass R. Sunstein, Nudge: Improving Decisions About Health, Wealth, and Happiness (2009).
3. See Chris Guthrie, *Misjudging*, 7 Nev. L. J. 420, 420 (2007) (hereafter "Misjudging').
4. Kahneman, *supra* note 2 at 19-105.
5. Chris Guthrie/Jeffrey Rachlinski/Andrew Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 Cornell L. R. 101, 102-103 (2007) (hereinafter "Blinking on the Bench"); Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 Rutgers L. J. 1 (1998).
6. *Id.*
7. Andrew Wistrich/Chris Guthrie/Jeffrey Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. Pa. L R. 1251, 1279-81 (2005) (hereafter "Inadmissible Information").
8. Misjudging, *supra* note 3 at 421.
9. Inadmissible Information, *supra* note 7 at 1294-98. Misjudging, *supra* note 3 at 422-24.
10. See *National Labor Relations Board v. Jackson Hospital Corp.*, 257 F.R.D. 302, 307 (D. Col. 2009).
11. Misjudging, *supra* note 3 at 432-33.
12. Chris Guthrie/ Jeffrey J. Rachlinski/ Andrew J. Wistrich, *Inside the Judicial Mind*, 86 Cornell L. Rev. 777, 825 (2001) (hereafter "Inside the Judicial Mind").
13. Inadmissible Information, *supra* note 7 at 1288-91.
14. Misjudging, *supra* note 3, at 43.

15. Inadmissible Information, *supra* note 7 at 1266.
16. Richard C. Waites/James E. Lawrence, *Psychological Dynamics in International Arbitration Advocacy,* in THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION, 109-110, 114 (Doak Bishop and Edward G. Kehoe Ads. 2010).
17. Drew Westen/Pavel S. Blagov/Keith Harenski, Clint Kilts/Stephan Hamann, *Neural Bases of Motivated Reasoning: An fMRI Study of Emotional Constraints and Partisan Political Judgment in the 2004 U.S. Presidential Election,* 18:11 JOURNAL OF COGNITIVE NEUROSCIENCE, 1947 (2006).
18. Shari Seidman Diamond, *The Psychological Aspects of Dispute Resolution*, INTERNATIONAL COMMERCIAL ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS, ICCA Congress Series, No. 11, 631-633, London 2002 (Albert Jan van den Berg ed., 2003).
19. Misjudging, *supra* note 3 at 452-53.
20. *Waites/Lawrence, supra* note 16 at 115.
21. *Id.* at 118, 119.
22. See http://www.casexplorerarbitration.com/.
23. Queen Mary University of London/White & Case, *2012 International Arbitration Survey: Current and Preferred Practices and the Arbitral Process,* at 6.

Edna Sussman, www.sussmanADR.com, a former chair of the Dispute Resolution Section of the New York State Bar Association is a full-time independent arbitrator and mediator specializing in international and domestic commercial disputes and the Distinguished ADR Practitioner in Residence at Fordham University School of Law. She serves on the arbitration and mediation panels of many of the leading dispute resolution institutions and serves as Vice Chair of the New York International Arbitration Center and on the board and the executive committee of the American Arbitration Association and of the College of Commercial Arbitrators. A frequent author and lecturer, she chaired the Arbitration Committee of the American Bar Association's Section of International Law and of Dispute Resolution.

This article is adapted from a more comprehensive article on the subject: Edna Sussman, *Arbitrator Decision Making: Unconscious Psychological Influences and What You Can Do About Them*, American Review of International Arbitration, Vol. 24. No. 3 (2013).

AAA Releases New Construction Industry Cost Containment Rules—It's Not Too Late to Opt In

By Amy Eckman

On June 15, 2014 the American Arbitration Association (the "AAA") released a new set of Supplementary Rules for Fixed Time and Cost Construction Arbitration (the "New Rules") to address concerns in the industry about arbitration not always being faster and less expensive than litigation. The New Rules are intended to provide predictability in total time and cost and are "most appropriately used for cases with discrete issues that would benefit from limited document exchange and discovery."[1] The New Rules complement the existing AAA Construction Industry Arbitration Rules, which are also now under review for possible revision, and both sets of rules will apply to disputes calling for arbitration under the New Rules.

"It's not too late to opt into the New Rules, even for disputes arising from contracts containing standard arbitration clauses."

Under the New Rules, the parties will be able to calculate with some certainty the maximum time to complete the arbitration, the number of hearing days it will run, the arbitrator costs, and the AAA administrative fees.

Opting In. It's not too late to opt into the New Rules, even for disputes arising from contracts containing standard arbitration clauses. In order to avail themselves of these rules immediately, parties to a current dispute—regardless of what the existing contract arbitration clause may say—may opt into them by filing a "submission agreement" to arbitrate under the New Rules, signed by the parties and submitted through any AAA office along with the required filing fee.[2] While at contract formation the parties can customize their dispute resolution clause in any way they see fit (including providing for use of these New Rules under appropriate circumstances), this can always be varied by subsequent agreement.

Communications and Designated Party Employees. The New Rules streamline communication among the parties, and are *limited to arbitrations where there are two parties involved* (although a surety may be involved under certain circumstances).[3] In contrast with current standard procedure, the New Rules require direct communication with parties (along with counsel), providing that all communications be via email and that designated "party employees," such as in-house counsel or a senior level executive, *must* be copied on all correspondence. This should achieve the important purpose of keeping the parties in the loop at all times.

Schedule of Fees and Durations. Time to complete, AAA fees and arbitrator compensation are calculated based on the size of the claim or counterclaim (whichever is largest). There are four general categories: (1) claims between $75,000 and $250,000, (2) claims between $250,000 and $500,000, (3) claims between $500,000 and $1 million, and (4) claims between $1 million and $5 million. Maximum days from filing to award, number of hearing days, arbitrator compensation and study time hours are capped at amounts determined by the size of the claim. (see schedule below).[4]

One Arbitrator Only. In all cases under the New Rules there will be a single arbitrator. For cases in the $1 million to $5 million range, this represents a significant departure from the regular "large complex case" default provision of a panel of three arbitrators and should result in significant savings and efficiency in both cost and scheduling matters.

Meet and Confer Conference. The New Rules contemplate a collaborative process. There is a requirement that the parties get together *on their own* within 14 days after the initial AAA Administrative Conference to address issues normally dealt with at a preliminary conference. At this so-called "Meet and Confer Conference"—before any preliminary hearing—the parties are to agree on three prospective arbitrators from a list provided by the AAA from which the AAA will appoint one, as well as to agree on a time, date and place of the hearing, the number of hearing days and allocation of days to each party, and any discovery within the limitations permissible, all for the arbitrator's review once he or she comes on board.[5]

Discovery. Regarding discovery, which is generally discouraged, the rules similarly place this primarily in the hands of the parties and their representatives, with discovery only to be had if they determine it is "essential." At the Meet and Confer Conference the parties and their representatives are to develop a discovery plan to be presented to the arbitrator, who before approving it will review it to ensure that "it adheres to the tenets of arbitration as a time- and cost-effective process as well as to the applicable timeframes."[6]

Time Limitations and Presentations at Hearing. At the evidentiary hearing, the parties must adhere to the stated time limitations. In order to achieve this, the arbitrator may impose a schedule and procedures for each party's presentation, including the use of a "chess clock,"

written statements in lieu of testimony, and other similar measures.[7]

Post-Hearing Briefs. Post-hearing briefs are discouraged, and if allowed, are limited to five pages, with some limited review time/arbitrator compensation for this.[8]

Awards. In contrast with the current 30 days to make the award once the hearings are closed, the New Rules shorten this by a third, to a 20 days time frame.[9] Awards are limited to three pages, with a concise written financial breakdown of monetary awards and line item disposition of any nonmonetary claims. The drafters (which included both the AAA and the National Construction Dispute Resolution Committee, comprised of industry leaders) considered allowing more flexibility in the page limitations, but decided there would be more compliance if the limitations were strictly adhered to. Under the New Rules, if the parties require a reasoned award or findings of fact and conclusions of law, the case is kicked into the Regular or Large, Complex Procedures, along with its associated fees.[10] The New Rules thus build in incentives to keep it simple and remain within the cost containment goals.

Defaults. Another significant change involves a procedure for a "Default Award" if a party fails to pay requested fees or deposits "without good cause shown," in contrast with regular Rule 56 "Remedies for Nonpayment."[11] Under the New Rules, a default award may be issued in these circumstances, but only after notice is given to the non-paying party requesting a response within 7 days, after which proof of damages is submitted to the arbitrator at a scheduled hearing.[12] It remains to be seen how this might work in practice since presumably a non-paying party has the right to attend such a scheduled hearing and at least defend on the issue of damages.

According to Michael Marra, AAA Construction Division Vice President in the northeast, the response so far has been very positive for these rules from both in-house and outside counsel, a number of whom have indicated an intention to write them into their construction contracts. For now, for parties with disputes that fit these New Rules, opting in by "submission agreement" under SR-8 may be an excellent option to contain cost and time in relatively simple construction arbitrations.

Endnotes

1. Supplementary Rules for Fixed Time and Cost Construction Arbitration ("SR") Introduction.
2. SR-8. Filing Requirements Under a Submission Agreement.
3. SR-1. Agreement of Parties and Applicability.
4. **Fee Schedule**

   Fees will be billed in accordance with the following Time/Cost Schedules:

   Between $75,000 and $250,000: AAA fees: $2,500; max days from filing to award: 120; max hearing days: 3; arbitrator compensation: under $250/hour; max study time-hours: 8; max total fees: $10,500.

   Between $250,000 and $500,000: AAA fees: $5,000; max days from filing to award: 180; max hearing days: 3; arbitrator compensation: under $275/hour; max study time-hours: 12; max total fees: $14,900.

   Between $500,000 and $1 million: max days from filing to award: 270; max hearing days: 5; arbitrator compensation: under $300/hour; max study time-hours: 20; max total fees: $25,500.

   Between $1 million and $5 million: max days from filing to award: 360; max hearing days: 10; arbitrator compensation: under $350/hour; max study time-hours: 40; max total fees: $52,000.

   Does not include possible additional fees as described in the Supplementary Rules and in other charts. Total Fees also do not include reasonable travel-related expenses incurred by the Arbitrator.
5. SR-11. Meet and Confer Conference.
6. SR-11(d) Meet and Confer Conference, Document Exchange and Discovery.
7. SR-15. Hearings.
8. SR-16 Post-Hearing Briefs. Note also that statements of claim (and statements of counterclaim) are likewise limited to five pages. SR-5.
9. SR-17. Time of Award.
10. SR-18. Form of Award.
11. Construction Arbitration Rule 56 requires that in the absence of a party, the party who is present must submit "such evidence as the arbitrator may require for making an award." R-56(b).
12. SR-22. Remedies for Nonpayment, Request for Default Award.

Amy Kaplan Eckman is a full-time arbitrator and mediator on the AAA Large, Complex Construction, FINRA and N.Y. Supreme Court Commercial Division panels. A member of the N.Y. and N.H. bars, for over 25 years she owned and was president of Eckman Construction, a large New England commercial construction company. She can be reached at: amy@amyeckmanadr.com.

The Emergence of Emergency Procedures in Arbitration

By Kim Landsman

A Southern District of New York case confirming an arbitral injunction under the "emergency measures of protection" procedure of the American Arbitration Association[1] shows how quick and effective that process can be. Microsoft Corp. invoked it in a contract dispute with Yahoo Inc. over the timing of the transfer of Yahoo's search capabilities and ad services to Bing, and got an evidentiary hearing and decision within 18 days of commencing the arbitration, with the district court confirming the arbitral award a week later.

"[A] case confirming an arbitral injunction under the 'emergency measures of protection' procedure of the American Arbitration Association shows how quick and effective that process can be."

Nature of the Dispute

The dispute arose from an agreement to merge the search capabilities of Microsoft and Yahoo internationally to better compete with Google Inc. The merger was completed in all but Taiwan and Hong Kong, where technical problems led to delays. When Yahoo informed Microsoft that it would delay completion of its migration to Bing past the agreed deadline, Microsoft declared Yahoo to have breached the agreement and initiated an emergency arbitration.

The emergency arbitrator ruled for Microsoft, enjoined Yahoo "from continuing any pause in transitioning" and ordered Yahoo "to use all efforts" to complete the transition in the two areas by specific deadlines.

Challenge in Court

The litigation over the arbitral award proceeded just as quickly—with Judge Patterson sitting in Part I (for emergency matters) confirming the award six days after Yahoo's motion to vacate it was filed. Perhaps as importantly from the parties' perspective, it proceeded without public disclosure of any confidential information: The motion and cross-motion papers (including the agreement at issue and the arbitral award) were all filed under seal. All that was made public was the judge's decision. Yahoo pursued an expedited appeal, but voluntarily dismissed it as moot after the Second Circuit denied its request for a stay pending appeal, which meant that the migration to Bing was completed as ordered by the emergency arbitrator.

Resolution Through the AAA's Emergency Measures of Protection

The AAA recently amended its rules, including the one covering emergency measures of protection. The prior rules made those measures optional; they had to be agreed to by specific reference in the parties' agreement or after the dispute had begun. Effective Oct. 1, 2013, Rule 38 of the Commercial Arbitration Rules made emergency measures of protection applicable to any arbitration in which the underlying contract was entered into on or after that date without the necessity of a specific agreement to those measures.

The emergency measures are not unique to the AAA; other institutions provide for them with various permutations. Indeed, the rule providing for emergency measures of protection was already part of the rules of the AAA's international counterpart, the International Center for Dispute Resolution, as of June 1, 2009, which applies to arbitrations conducted under agreements entered on or after May 1, 2006.[2]

The emergency measures require that an emergency arbitrator be appointed within one business day of the AAA's receipt of a request for emergency relief, and this case shows just how quickly things can happen under the AAA's procedures. The emergency arbitrator began two days of evidentiary hearings involving 10 witnesses 11 days after the arbitration was commenced and issued a decision six days after conclusion of the hearings granting an injunction.

Institutional Adoption of Emergency Procedures

Although arbitral institutions pride themselves on their ability to resolve disputes faster and more efficiently than the courts, the parties still tended to look to the courts for emergency relief in aid of arbitration rather attempting to obtain such relief in the arbitration itself. This was considered by some to be one of arbitration's flaws, especially when dealing with intellectual property disputes.

Arbitral institutions responded by creating explicit rules and procedures for emergency measures. Among arbitral institutions active in the United States with explicit provisions for emergency appointment of arbitrators to consider measures akin to preliminary injunctions are the AAA,[3] the ICDR,[4] the International Institute for Conflict Prevention and Resolution,[5] the International Chamber of Commerce[6] and the London Court of International Arbitration.[7] *Yahoo v. Microsoft* shows just how successful those procedures can be in practice, especially where, as is evi-

dent in this case, the parties and their lawyers are willing and able to work at breakneck speed to get through the briefing and evidentiary hearing.

Practical Implications and Caveats

Yahoo v. Microsoft may well be an anomaly in going from start to judicial confirmation in 25 days—a feat that only the most motivated and well-financed parties can match. Like a show car at an exhibition, however, it highlights and publicizes features that will become more common in the future. It should cause parties who have been dismissive of arbitration for certain types of issues to reconsider the option. Although arbitration has generally been capable of getting parties through a hearing and final award faster than litigation, it has not been thought adept at providing the sort of quick interim relief equivalent to a preliminary injunction that litigation achieves and that intellectual property owners and litigators, for example, value. That perception should change.

One implication of this emerging use of emergency measures is to reemphasize the need for the transactional lawyers who draft arbitration clauses to make sure their clients are aware of the many choices and able to advise knowledgeably on them. Though standard arbitration clauses may stick to the basics of choosing an administering institution and its rules, a place of arbitration, amount of and method of choosing arbitrators, language (in the international context), and applicable law, more creative (or, at least, careful) transactional lawyers have the ability to craft a far more customized arbitration procedure by choosing the arbitral institution whose rules best approximate the desired procedure (because not all institutions' rules and procedures are the same) and then further customizing it by inserting provisions into the arbitration clause that supplement the institution's rules. For example, not all institutions explicitly provide for the appointment of an emergency arbitrator, and those that do vary somewhat in the speed with which it is done.

Another implication may be that arbitration institutions may have focused too much on speed and flexibility in emergency interim orders and have given insufficient attention to protecting respondents who may be subject to unfair ambush and lack redress for an improvidently granted interim order.

American rules of civil procedure for preliminary injunctions mandate certain protections for the misuse of emergency procedures. For example, Federal Rule of Civil Procedure 65(c) allows the court to issue a preliminary injunction "***only if*** the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." CPLR Rule 6312(b) requires that before a preliminary injunction can be granted, "the plaintiff ***shall*** give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he or she was not entitled an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction…" (emphasis added).

Arbitration rules have no such mandatory provisions, but instead give discretion to the arbitrator to decide whether such protections should be granted, and have no provision for compensating a party if the arbitrator(s) who ultimately are deciding the merits determine that the emergency measure of protection was improvidently granted. Rule 38(g) of the AAA Commercial Rules, for example, states that "[a]ny interim award of emergency relief ***may*** be conditioned on provision by the party seeking such relief for appropriate security." (emphasis added). ICDR Article 6(6) (effective June 1, 2014) is essentially the same.[8] While the rules may also give the tribunal discretion to take a wrongful grant of an interim injunction into account in assessing costs, that is not the same as requiring the party who obtained such an award to provide security or an undertaking to make the other party whole for a wrongfully issued preliminary injunction, and there is no cause of action (at least in American common law) for a non-malicious attempt to obtain interim relief from a court or arbitrator.

Case law also provides some protection from ambush to those on the receiving end of a preliminary injunction motion in court. Denying preliminary injunctions to those who delay in seeking them,[9] for example, provides some deterrence against taking too long to bring a claim and then demanding that the adverse party (and the judge) scurry to respond to the claimed exigency. Emergency arbitrators should similarly be wary of such tactics and not place a respondent unfairly at a disadvantage from having an inadequate time to prepare a defense.

Summary

Arbitral institutions offer the informed practitioner a huge buffet of options. *Yahoo v. Microsoft* shows that the option offered by the recent proliferation of emergency arbitration rules is capable of working very effectively in practice, and not just in theory, where both sides are interested in and able to respond at breakneck speed.

There is also a cautionary tale latent in emergency arbitration rules. Emergency arbitrators should be alert to the possibility for abuse by claimants who take the time they need to prepare but seek to deprive respondents of the same opportunity, and they should be careful to ensure appropriate redress (by an undertaking and/or security) if the ultimate tribunal determines that an interim order was improvidently granted.

Endnotes

1. *Yahoo! Inc. v. Microsoft Corp.*, 2013 WL 5708604 No. 13 CV 7237 (PART I) (S.D.N.Y. Oct. 21, 2013).
2. The AAA rules seem to provide the greatest speed in requiring the institution to appoint one within one business day of the request. CPR's new Administered Arbitration Rules give the parties one business day to try to agree on an arbitrator and, "[i]f there is no such timely agreement," then, "[t]o the extent practicable, CPR shall appoint the special arbitrator within one business day of CPR's receipt of the application for interim measures under this Administered Rule." CPR Rule 14.5. The ICC's Emergency Arbitrator Rules require the President to "appoint an emergency arbitrator within as short a time as possible, normally within two days from the Secretariat's receipt of the Application [for Emergency Measures under ICC Rule 29]." Appendix V to ICC Rules.
3. Rule 38 of the AAA's Commercial Arbitration Rules.
4. Article 37 of ICDR's International Dispute Resolution Procedures.
5. Rule 14 of CPR's Administered Arbitration Rules (effective July 1, 2013).
6. Article 29 and Appendix V to the ICC Rules of Arbitration.
7. Article 9 of LCIA's Arbitration Rules allows a party "in exceptional emergency," to "apply to the LCIA Court for the expedited formation of the Arbitral Tribunal" "on or after the commencement of the arbitration," and gives "complete discretion," without specific time limits, to the LCIA Court to "abridge or curtail any time-limit under [its] Rules for the formation of the Arbitral Tribunal."
8. See also ICC Article 28 on Conservatory and Interim Measures ("The arbitral tribunal ***may*** make the granting of any such [interim or conservatory] measure subject to appropriate security being furnished by the requesting party."); CPR Administered Arbitration Rule 13.1 (The Tribunal may require appropriate security as a condition of ordering such [interim] measures [of protection]."
9. "[T]he failure to act sooner undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury." *Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir.1995) (quoting *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 277 (2d Cir.1985)). Indeed, the Second Circuit has "found delays of as little as ten weeks sufficient to defeat the presumption of irreparable harm that is essential to the issuance of a preliminary injunction." *Weight Watchers Intern., Inc. v. Luigino's, Inc.*, 423 F.3d 137, 144 (2d Cir. 2005).

Kim Landsman is a partner in Golenbock Eiseman Assor Bell & Peskoe LLP. An earlier version of this article appeared in Law 360.

Arbitrating a Dispute with a Pro Se Party: The Challenges the Arbitrator Faces

By Jeffrey T. Zaino

Pro se is Latin meaning "for self" or "in one's own behalf." Persons appear pro se in any legal proceeding when they appear without counsel, represent themselves, and do not have an attorney speaking or writing for them. Unlike a judge who may not have the option of refusing to hear a pro se case, arbitrators do, and it is telling that some find the prospect of handling these types of cases so challenging that they will sometimes refuse to handle such cases. This article discusses some of the challenges that a pro se party case creates and gives arbitrators strategies for handling these types of disputes.[1]

Not being able to afford an attorney is the most common reason why parties appear pro se. Even when they can, however, we do sometimes see cases where the party either does not trust an attorney to represent them or feels capable representing themselves better. Whatever the reason, all parties to an arbitration case have the right of self-representation. If they do choose to proceed on a pro se basis, however, they will dramatically alter the process in several ways.

Unique Issues to Pro Se Cases

Several issues arise in pro se cases, but the primary one is that the pro se party is likely to be entering arbitration for the first (and in some cases the only) time. As a result, the pro se parties may be apprehensive, fearful, and in some cases overwhelmed. They may ask basic questions about procedure and express uncertainty about the process. Pro se parties may not only lack knowledge of the rules and procedures, but adversarial skills common to attorneys. They also tend to bring more emotion to the arbitration process. The lack of experience in organizing facts and arguments, dealing with procedural matters, and referring to applicable legal precedent can impact the arbitration process. How should these issues be addressed?

Impact on Arbitrator

When dealing with a pro se party, the arbitrator will likely provide more leeway for the presentation of issues and evidence than if the party were represented by counsel. The arbitrator may also be dealing with emotions over issues that are not relevant to the dispute and be required to assist the pro se party's understanding of the process. It is necessary, therefore, to provide the pro se party with confidence that he or she is being heard and understood.

The arbitrator has an ethical obligation to be fair and impartial to all parties. The *Code of Ethics for Arbitrators in Commercial Disputes* prescribes a number of ethical duties that are applicable to all arbitrators and cases. With a pro se case, the arbitrator should ensure that he or she pays close attention to the requirements regarding fairness, impartiality, and information sharing, as those issues can be even more magnified than in cases where both parties are represented.

Arbitrators also have a duty to prevent abuses of the arbitration process. Self-representation does not entitle the pro se party or the other party to abuse the process and ignore applicable rules and procedures. Canon I.F. of the *Code of Ethics* obligates the arbitrator to prevent abuses of the arbitration process:

> An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision. An arbitrator should make all reasonable efforts to prevent delay tactics, harassment of the parties or other participants, or other abuse or disruption of the arbitration process.

Strategies for Managing the Case

When managing a pro se case, there are three basic strategies that arbitrators should consider employing:

1. **Declare impartiality throughout.** Regardless of the efforts of an arbitrator to be impartial in these types of cases, at some point one or both parties will likely question the arbitrator's impartiality. Particularly when it comes to pro se parties, these types of concerns are not always expressed verbally. As a result, arbitrators in these disputes should never assume that silence is a sign of satisfaction in this regard. The non-pro se party may believe that the arbitrator is overcompensating for the pro se party. The pro se party may feel overwhelmed and *have the perception* that the represented party has an unfair advantage. In most non-pro se cases the arbitrator declares his or her impartiality at the outset of the proceeding. With a pro se case, the arbitrator should declare impartiality throughout and communicate it verbally in clear and unambiguous terms. This can also be achieved through indirect ways such as comments at the appropriate time to both parties. When the arbitrator makes suggestions aimed at improving the pro se's advocacy for the good of the process, the comments should be addressed to both parties to assure the parties of impartiality. For example, the arbitrator might say, *"In order to help make the hearing go smoothly, I want*

each of you to organize your exhibits and number them in order in which you intend to use them."

2. **Educate the parties.** The arbitrator should carefully explain the rules, procedures, and expectations. The arbitrator should walk through the process covering the statement of claim, order of proceedings, evidence, witnesses, closing the hearing, post-hearing and award, and post-award activity. The parties should then be given an opportunity to ask questions and the arbitrator should not proceed until confident that both parties, in particular the pro se party, fully appreciate and understand the process. It is also important that the arbitrator clearly explain the arbitrator's role and where the authority comes from. By providing plenty of education in simple, clear and concise terms, future breaches of the rules/process should not be interpreted as a product of ignorance.

3. **Establish firm limits of assistance**. The arbitrator must advise both parties of the ethical limitations of assistance to the pro se party and stay firm to those limits. If a limit is reached, the arbitrator should be prepared to explain the rationale for drawing the line where he or she did. The arbitrator should not provide legal interpretations, research, legal opinions, or clerical support (e.g., filling out forms or drafting/preparing documents for the pro se).

As concerned as an arbitrator may be about the prospect of overseeing these types of cases, it is important to note that there are steps that can be taken to manage them properly and in the best interests not only of the process, but both parties. Armed with both an understanding of the major concerns of pro se parties and the knowledge of what types of strategies can be employed in these situations, the arbitrator will often find that these types of cases can be rewarding.

Endnote

1. Summary based in part on *Arbitration Fundamentals and Best Practices for New AAA Arbitrators*, American Arbitration Association, 2007, pages 109-120.

Jeffrey T. Zaino, Esq. heads up the AAA® New York Regional Office, focusing on the AAA's Commercial Division. In that role, he interacts with the AAA's clients who file commercial cases and the neutrals serving as arbitrators and mediators in those cases. Jeff joined the AAA in 1990 and previously was vice president in the Labor, Employment and Elections Division, overseeing that caseload as well as the administration of numerous elections for unions and organizations. His professional affiliations include the American Bar Association, Connecticut Bar Association, District of Columbia Bar Association, New York State Bar Association, New York City Bar Association and Westchester County Bar Association. Published extensively on the topics of election reform and ADR, Jeff has appeared on CNN, MSNBC and Bloomberg TV to discuss national election reform efforts and the Help America Vote Act.

Lawyers' "Competence" in the Funding World

By Selvyn Seidel and Sandra Sherman

The Lawyer's Challenges

The lawyer is often the first to know when the client cannot afford to pay the legal fees. In the past, before Third Party Funding, that lawyer and its client could turn to contingency lawyering to try to keep the case alive. Today, they can also turn to Funding, with its *much* different features and *much* wider choice of benefits, although with different possible perils.

Those lawyers who know about Third Party Funding will advise their clients. There are questions, however, about how much they know and how well they can provide advice. Those who do not know will of course not properly advise.

But such incapacity is not tolerated by the law or legal ethics. Rather, under the law and ethical requirements, we submit, lawyers are *required* to know about Funding and to adequately inform their clients—at least in jurisdictions like New York and California, where Funding is comparatively active.[1] Arbitrators and mediators will also need to understand the impact of Third Party Funding. That is the dilemma addressed in this article.

The Governing Ethical and Legal Rules Require Better Understanding

In the U.S., a lawyer *must* be "competent" in serving his or her client. That tenet is embedded in the lawyer's ethical responsibilities.

In California's Rules of Professional Conduct, Rule 3-110(A) states that a lawyer: "Shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." For its part, New York Canon 6-1 states: "The lawyer should…accept employment only in matters which he or she is or intends to become competent to handle." Thus, a personal injury lawyer should generally avoid patent disputes. Nothing tricky or hard to understand; common sense and common decency should suffice.

What is "competence"? New York Canon 6-2 tasks a lawyer with "keeping abreast of current legal literature and developments, participating in continuing legal education programs, [and] concentrating in particular areas of the law."

In California, Rule 3-110(B) states that "'competence' in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service."

Where does this leave the lawyer in the young, fast changing Third Party Funding world? The vast majority either has never heard of Third Party Funding or do not understand it sufficiently, or, finally, are not competent to access Third Party Funding for his or her client. Those that fall into this category face the risk of running afoul of their ethical and/or legal responsibilities.

What is the lawyer to do? Our recommendation: establish an internal structure, to meet the challenges discussed below, designed to protect your clients and yourselves through self-help. In this article, we focus on New York—where Third Party Funding is established—and on California, where it is growing in importance. But the same principles apply elsewhere wherever funding use is comparably active.

Third Party Funding, and Problems Posed for the Claimant's Lawyers, Summarized

In summary and over-simplified form, Third Party Funding occurs when a third party steps into a dispute to provide cash to the claimant, typically to pay the legal fees of the financially distressed claimant to prosecute a meritorious claim, on a non-recourse basis. If the claim is successful, the funder will receive a return and profit, often measured (directly or indirectly) by the size of the recovery. If the claim is not successful, that is the financial loss of the funder, not the claimant.

Funding is a young, fast-developing industry, which is still undefined in many ways. For that reason, it does not have many specific rules. It is changing swiftly on a real-time basis, where book learning about funding and the funders is not nearly as important as experience in and with the industry.

Once a case is funded, the complications do not end. Some of the most difficult are just beginning, and can last throughout the dispute.

The public company claimant poses its own additional, overarching complications in a funding situation: what must it disclose to the public, to shareholders and other interested parties?[2]

Further, it must be underscored that the consequences of Third Party Funding are different in the contexts of arbitration and litigation because of different customs and regulatory environments, and that international arbitration is even further removed from international litigation in this regard. Different policies and rules apply to each of these. Different lawyer competencies are therefore

required. So do different competencies in Funding of international arbitrations.

Funding of arbitration lags behind funding of litigation. The law and policies are therefore more uncertain. At the same time, there is more room for creative thinking in international arbitration, based on experience gained in funding of litigations. The lawyer in an international arbitration must be especially capable in this specialized area.[3]

So how can a lawyer be expected to know enough and advise adequately in this area, especially when there are other compelling duties that take priority (such as litigating the case)? Indeed, identifying and sourcing capital in an effective way is a tough assignment, even for the skilled and experienced who do it full time.

Issues in the Funding World

Given the relative newness of the Funding market and industry and the swift pace of development and change, coupled with the lack of specific rules and regulations, there is no shortage of issues in this area. Indeed, it seems that as one issue is resolved, two more emerge. Some are real and others are bogus, created by opponents of the industry.

On the legitimate side, challengers have raised questions such as: champerty; control of the litigation; confidentiality and disclosure; conflicts among the client, its lawyer, and the funder; unfair pricing; risks possibly posed to the attorney-client privilege and work-product protection; and lack of specific rules, to mention a number of the most important concerns.

On the not-so-legitimate side, sometimes objections have been pressed simply as the basis for attacks on the industry. For example, accusations are often made that the industry causes frivolous claims to be asserted, though this does not recognize that Funders typically seek good claims that will win on the merits and provide the Funder a good return. As another example, accusations are often made that Funders take advantage of helpless claimants, even though commercial Funders deal with sophisticated commercial claimants, who have professionals advising them.

There are different entities and organizations that have been particularly vocal in raising issues, such as, and particularly, the U.S. Chamber of Commerce.[4]

As noted above, international arbitration involves different policies, rules, and regulations—or lack of them—than does litigation. Funding is just beginning to address arbitration, at least in the international arbitration of private disputes, as opposed to claims against foreign sovereigns where funding has been fairly active compared to other areas. Courts, rule-makers, and lawyers will have a clean slate (especially regarding private disputes) to work on, which adds uncertainties but also leaves a more friendly opportunity to write new and better rules. Today, precious few legislation-type "rules" exist that specifically address the industry, except for the recent UK Code of Conduct for Litigation Funders (2014) which was prepared by the industry and is entirely voluntary.[5] The source of "rules" is found for the most part in the rules and decisions issued by the courts. Also, there are a number of bar associations which are issuing what they consider rules or "best practices"—such as the rules published in 2011 by the New York City Bar Association on Ethics and Third Party Funding, New York City Bar Association Formal Ethics Opinion 2011-2, and the white paper of the American Bar Association, which undertook a three-year study of the industry.[6]

Within this swirl of issues and debate, there are at least a few certainties.

- The market and industry embrace and live with many issues;
- International arbitration is a fast developing area, and is combining with the developing world of funding, to provide fertile grounds for each to grow;
- Different solutions and suggestions arrive on a daily basis, each of which brings something new;
- The industry and market are making their way through the issues, managing them, and developing and growing as knowledge spreads;
- This situation poses challenges for the lawyer, as further discussed below.

What path should the lawyer take?

The Lawyer's Dilemma

Problems concerning Funding start as soon as the client walks through the lawyer's door. Should the client be advised of Funding, so it can choose whether or not to pursue it? What if the lawyer does not know about it, or enough about it?

If the client wishes to explore and use Funding, the client typically turns the search over to the lawyer. The client depends on the lawyer.

Is the lawyer competent to take on the assignment? Worse, is the lawyer sufficiently competent to know whether he or she is incompetent to do so?

Lawyers equipped to fulfill their duties adequately are, it seems, few and far between. That is not a criticism. To the contrary, it is neither realistic nor fair to expect otherwise.

Why is a lawyer so ill-equipped? This is so for a host of reasons:

- First, many do not know about funding, full stop.
- Second, those who know about it do not know enough to assist the client competently.
- Third, what about the lawyer's priority, pressing forward with pursuing the litigation itself? Is that neglected if the lawyer needs to spend significant time on the Funding project?
- Fourth, and at least equally important, the lawyer and his or her client have actual and apparent conflicts when it comes to sourcing Funding and prosecuting a funded case. As a threshold conflict: the lawyer wants to get the case funded for his or her own benefit as well as the clients but may lean in favor of a particular Funder, not because it is the best for the claim, but because the Funder sends it cases to litigate. Here is another example: in the midst of litigation, what if the client does not want to settle at an offered amount, but the Funder does? Is the lawyer—wittingly or unwittingly, actually or apparently—going to promote settling to please the Funder (whom the lawyer might work with on other cases, or hope to work with on future cases) despite the desires or interest of the client? Is this appearance of a conflict, even if not a reality, a danger and a fertile field for claims against a lawyer, however pure the lawyer's intentions may be? We think there is risk.

Courts in New York have basically held that a lawyer is obligated to tell/warn a client about any factors that could influence his or her decisions in pursuit of the case, including those that will affect whether to pursue the case at all.[7] In New York see, e.g., *Romano v. Ficchi*, supra at n.7 (lawyer failed to inform client that impending construction reduced the value of her unit such that she would not otherwise have purchased it), *Sitar v. Sitar*, 2008 N.Y. App. Div. Lexis 2964 (N.Y. Sup. Ct. 2008) (attorney failed to disclose diminished value of company that plaintiff intended to purchase), and *Darby & Darby v. VSI International*, 1998 N.Y. Lexis 428 (N.Y. Sup. Ct. 1998) (failure to advise client regarding insurance and coverage of legal expenses could be grounds for malpractice).

See in particular New York City Bar Association Formal Ethics Opinion 2011-2, which deserves special mention. The Opinion concluded that funding is not *per se* a problem, but that it poses a number of ethical hazards for the lawyer which must be avoided. Section II.C, for example, specifically cites the potential conflicts involved in lawyers' advising clients about funding. See also S. Seidel, "Investing in Commercial Claims: New York Perspectives," *New York Dispute Resolution Lawyer* (Spring 2011).

In California, see *Trousil v. State Bar*, 38 Cal. 3d 337 (CA Sup. Ct. 1985) (lawyer suspended for failing to act competently in four separate matters, doing nothing for over two years and failing to keep client informed of situation). In the Funding context, if the lawyer does not properly inform the client about Funding, the same problem arises. See also *Charnay v. Cobert*, 2006 Lexis Cal. App. Lexis 1868 (CA Ct. App. 2006), where failure to advise a client of the risk of losing her case, and consequent liability for opposing party's attorney fees far in excess of the original demand, constituted grounds for lawyer's negligence. The court noted that had the client seen the risk of losing and consequent liability she would not have continued the litigation. Again, this case reflects the need of the lawyer to be competent and to advise the client properly about Funding. There are, in fact, numerous California cases where a failure to disclose information to a client has been grounds negligence. See, e.g. *Baronowski v. State Bar*, 1979 Cal. Lexis 248 (CA Sup. Ct. 1979) (failure to inform client of change of opinion on outcome of case) and *Hawkins v. State Bar*, 1979 Cal. Lexis 220 (CA Sup. Ct. 1979) (failure to inform client of payment terms that involved a conflict of interest).

Other jurisdictions are coming to similar conclusions. See, e.g., *Klychak v. Samchuk*, (2012) ABQB 85 (Alberta Queen's Bench) citing *Dugal v. Manulife*, 2011 ONSC 1785 (2011, Sup. Ct. Ontario), where the court stated that "In addition to services on a contingency basis, another possibility that litigants should be required to explore in Canada today is third party litigation funding: *Dugal*. It may well be that in appropriate circumstances the cost of third party litigation funding is itself a recoverable cost." (para. 55); and, in the U.K., *Adris v Royal Bank of Scotland* [2010] EWHC 941, 4 Costs LR 598, where the court ordered a non-party costs order against solicitors who had represented to clients that they would obtain ATE insurance but had failed to do so. The court considered it obvious that the clients would not have proceeded with the litigation without ATE insurance.

Indeed, the U.K. *Code of Conduct for Litigation Funders* recognizes the potential pitfalls facing attorneys when they become involved with funders, and states at §9.2 that a funder will "not take any steps that cause or are likely to cause the Litigant's solicitor or barrister to act in breach of their professional duties."

The UK *Code of Conduct* stands virtually alone in explicitly dealing with the Funding industry. Court decisions specifically addressing the problem of lawyer incompetence in the Funding world have not yet emerged. They are, however, forseeable from other rules and decisions. This article is designed to raise the issue of regulation early, and to promote early solutions rather than face after-the-fact liability.

Suggested Way Forward: Self-Help

How does one address these problems?

Our first suggestion: do not stop with this brief article. Rather, just start with it. Make your own independent investigations and decisions.

Begin by exploring specific areas such as Funding of international litigation or of international arbitration, rather than treating the issue as unitary. Draw lines and work from more specific areas, rather than trying to just develop broad-brush approaches. For example, draw a line between international litigation and international arbitration, and recognize that funding in one area is governed by different policies and rules than the other, and needs different analyses.

Moreover, our recommendation is that the lawyer's first and foremost way to attack the concerns is to look inside the firm, and develop his or her firm's internal ability to evaluate matters to determine whether they are good candidates for Funding.

This could eliminate the need to look for help outside the firm—and, in any event, should reduce significantly reliance on outside experts.

In this connection, we recommend that each law firm establish its own funding unit. Task that unit with understanding what is going on in the market and industry. Ask it to establish appropriate relationships with funders, investors, experts, and others, to better be able to reach out for support as appropriate.

Further, ensure that the unit, as a first priority, conducts an internal audit within the firm to see what cases already in house have needs not being met. For example, the finance committee and the litigation department can review all the litigations to determine where clients exist who cannot keep up with the firm's bills, resulting in arrears and a handicap for the firm continuing to act on the case. If the case has good merit, it is a candidate for seeking funding.

Put simply, we are urging forward-thinking self-help. This will assist the firm's clients. It will attract new clients. It will further the firm's interests in many ways, especially in a legal services environment, which itself is changing quickly, and by recognizing a number of new ways to improve its business. Self-help is the universal hallmark of a good lawyer in the U.S. As is often the case, that is all a good lawyer needs.

Endnotes

1. See S. Seidel, "The Lawyer's 'Duty to Know and Duty to Tell' in Third Party Funding: A Time to Recognize and Respect these Obligations," *Corporate LiveWire* (July/August 2012).
2. See S. Seidel and S. Sherman, "'Corporate Governance' Rules are Coming to Third Party Funding," ICC Publication *Dossier X: Third Party Funding in International Arbitration* (October 2013).
3. For discussions of funding in an international arbitration setting, see S. Seidel, "Third Party Investing in International Arbitration Claims: To Invest of Not to Invest? A Daunting Question," ICC Publication *Dossier X*, supra at n. 2; S. Seidel, "Funding International Arbitration—A Growth Industry?," *Commercial Dispute Resolution Magazine* (Nov. 24, 2011); S. Seidel, "Investing in International Arbitration Claims," *Iberian Lawyer* (Jan. 4, 2011). See also Booklet of Collected Authorities on Funding of International Arbitration, prepared by Global Arbitration Review (GAR) and Fulbrook Capital Management, available on request.
4. See, for example, the article authored on its behalf by Skadden Arps, "Selling Lawsuits, Buying Trouble" (2009) that has become a well-known, frequently cited article.
5. The 2011 Code was recently revised. See http://associationoflitigationfunders.com/wp-content/uploads/2014/02/Code-of-conduct-Jan-2014-Final-PDFv2-2.pdf. There is also a procedure for litigants to bring complaints against funders. See http://associationoflitigationfunders.com/wp-content/uploads/2014/02/ALF-Complaints-Procedure-Final-PDF.pdf.
6. See ABA Ethics 20/20 Commission white paper, http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf
7. See, e.g., *Romano v. Ficchi*, 23 Misc. 3d 1130A, 2009 N.Y. Misc. Lexis 1240 (N.Y. Sup. Ct. 2009), 3, stating that "[a]kin to medical malpractice actions sounding in lack of informed consent, as a general principle when an attorney, whether negligently or intentionally, withholds from a client information which is material to a client's decision and knows or has reason to know the client would rely on the information, the attorney may be held liable for the consequential losses resulting from the client's uninformed decision (see *15 N.Y.Prac., New York Law of Torts § 13:33 Chapter 13. Professional Malpractice*). If an attorney negligently or willfully withholds from his client information material to the client's decision to pursue a given course of action, or to abstain therefrom, then the attorney is liable for the client's losses suffered as a result of the action taken without benefit of the undisclosed material facts (*Heine v. Newman, Tannenbaum, Helpern, Syracuse & Hirschtritt*, 856 F.Supp. 190, 194-195 [S.D.N.Y., 1994])."

Selvyn Seidel is the Co-founder and former Chair of Burford, and the Founder, Chair, and CEO of Fulbrook Capital Management LLC, and Sandra Sherman is the IP Manager of Fulbrook Capital Management LLC.

New York Commercial Division's New Mandatory Mediation Pilot Program

By Laura A. Kaster

Starting on July 28, 2014, every fifth case in the Commercial Division will be assigned for mandatory mediation. The parties will get an opportunity to select their own mediator but if they fail to do so, a list of three mediators will be provided and then one appointed after ranking of by the parties. The aim is to have the mediation early to respond to the demands of corporate disputants who want to see an earlier and less costly solution for litigated matters. The hope is that there will be a reduction of costs for the court system and the litigants. Other cases may still be selected by the judges and referred to mediation. The pilot program was the subject of a notice and comment period and it will be evaluated in 18 months and either continued, extended to other courts in the New York system, or possibly terminated. There was some opposition to various aspects of the program and even—after a long history with court-ordered mediation—some objection to mandatory mediation. This article will provide resources for understanding the program rules and a selective discussion of some of the issues raised during the comment period.

"The aim [of the pilot program] is to have the mediation early to respond to the demands of corporate disputants who want to see an earlier and less costly solution for litigated matters."

The Rules and Procedures of the Alternative Dispute Resolution Program are readily available on the Court's website.[1] A brief summary of the background and highlights of the rules follow. The conception for the new plan grew out of a Task Force chaired by former Chief Judge Judith Kaye and Martin Lipton that issued in June 2012.[2] The report recommended both mandatory mediation and the idea of sending every fifth newly filed case in the Commercial Division to mediation. The Commercial Division Advisory Council headed by Robert L. Haig, concurred with the recommendation and provided practical input. Administrative Judge for Civil Matters, Sherry Klein Heitler, then issued a standing administrative order requiring the Chief Clerk and the Executive Officer to refer every fifth case in which a Request for Judicial Intervention has been newly filed and an assignment to a Division Justice has been made.[3] In a letter to mediators on the Court's panel, Judge Heitler described key aspects of the program:

- Once every week, every fifth newly assigned Commercial Division case, except any in which there is an unrepresented party, will be designated as subject to mandatory mediation.
- The parties may stipulate to exclude the matter from the project and the court on application may exclude the case for good cause.
- Parties may agree on a mediator and must inform the ADR Coordinator no later than 120 days from the filing of the Request for Judicial Intervention.[4]
- The Coordinator will then identify three mediators and supply the names to the parties.
- If the parties do not agree on one of those named, they rank the names in order of preference and report to the Coordinator, who chooses the highest ranking mediator or, if none, one of the listed mediators—the intent here as expressed by Judge Heitler is to enhance the parties' commitment through their participation in the choice of mediator.
- Notice of appointment to the mediator provides a Confirmation Date, after which the mediation must commence within 30 days and conclude within 45 days subject to a possible 30-day extension (some additional time my be provided if discovery information is required for the mediation).
- The prior program of assigning mediators to matters referred by the judges under an Order of Reference will coexist with the pilot program. Once a mediator has been appointed, there is little distinction between the programs.
- Under both programs, the mediator provides four hours of mediation free, pre-mediation services are not compensable, and mediation hours in excess of the four may be charged at a cap of $300 per hour, unless the parties agree to a different fee in writing. Either party may opt out of mediation at the end of the four hours.

Rule 8 provides for confidentiality of the mediation for any document prepared or communication made in connection with the proceeding, and no party is permitted to seek to compel production of documents, notes or other writings prepared in connection with the mediation or to compel the testimony of a party or neutral concerning communications during the mediation, except as required

by law. Rule 9 provides immunity for "Any Neutral from the Panel" who is designated to serve pursuant to the rules.

What was the background leading to this new pilot program and what were the objections? The Task Force that conceived the program expressed its goal as[5] fostering the vitality of New York in the 21st Century, and continuing to attract businesses to New York. It responded to the fact that while in excess of 90% of cases result in settlement, the business community views the costs incurred to get to settlement as excessive. It also sought to free time for the judiciary to address the complex issues in cases that actually need court time.[6] Therefore, the focus was on early resolution before all of the costs of discovery are incurred. The Task Force was mindful that despite the recognition of mediation as an effective solution for parties and courts it was underutilized, suggesting that mandatory mediation might be a solution.

The Court issued a request for comments before approving the new pilot program. The NYSBA Dispute Resolution Section strongly supported the proposal that has resulted in the current program. The Commercial and Federal Litigation Section of the NYSBA also supported the program in light of the strong endorsement of corporate counsel and the underutilization of mediation. Other Bar Associations agreed. A few dissenting voices questioned making the voluntary mediation process into a mandatory process. But the objections would have required more judicial selection of appropriate cases (which the judges have not so far done under the existing program) or reliance on attorneys who seem to view a request to mediate as a blink in the stare down of opponents. Legitimate concern was also expressed about the ongoing provision of mediators' services for free, particularly in cases where all the parties are compensating their counsel and the stakes are significant. It is important for court-sponsored programs to provide a gateway into the profession, but the ongoing assumption that mediators should provide services not to indigent parties but to those who benefit from the service needs to be rethought. In addition, provision ought to be made, as it is in some appellate mediation programs, for a party to suggest mediation assignment without having to notify the other party. This would enhance the opportunity for parties to commit to the process without the need to blink.

The careful observation and monitoring of this pilot program can be enormously useful. There have not been many early mediation programs that have been evaluated. California did undertake a study of its early mediation program and found that while fewer cases settle in early mediation, the savings to the parties and the court are considerable. The California study monetized the saved judge-days from the program and came to the conclusion that in San Diego alone $1.6 million had been saved by the program in the year studied. Litigants' costs were reduced 16% and attorneys' hours were reduced by 51 to 57%.[7] There is a great deal of promise to the program and we hope that promise will be fulfilled.

Endnotes

1. http://www.nycourts.gov/courts/comdiv/ny/PDFs/ADRRulesPros62014.pdf.
2. https://www.nycourts.gov/courts/comdiv/PDFs/ChiefJudgesTaskForceOnCommercialLitigationInThe21stpdf.pdf.
3. http://www.nycourts.gov/courts/comdiv/NY/PDFs/AO-ADR62014.pdf.
4. This is a unique NY process by which the parties bring the matter to the attention of the court and trigger assignment of a judge and administration of the case by the court.
5. https://www.nycourts.gov/rules/comments/PDF/received/CommDivMediationPC-Recvd.pdf.
6. https://www.nycourts.gov/courts/comdiv/PDFs/ChiefJudgesTaskForceOnCommercialLitigationInThe21stpdf.pdf at 19.
7. http://www.courts.ca.gov/documents/empprept.pdf at 41, 65 (2004).

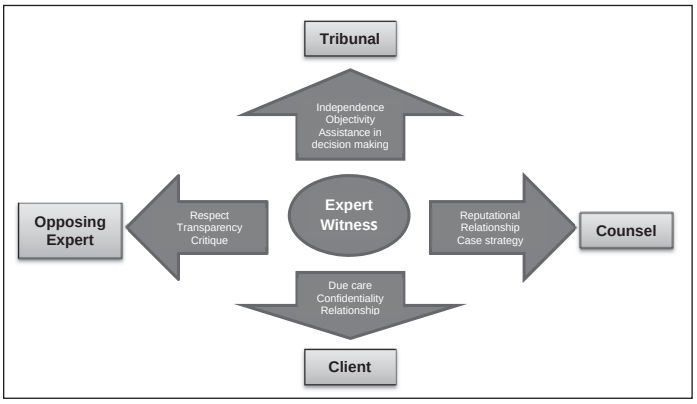
Laura A. Kaster is a full-time neutral and Co-Editor-in-Chief of this journal. She received the NJSBA's 2014 Boskey Award for ADR Practitioner of the Year. She is a fellow in the College of Commercial Arbitrators, Executive Committee member for the New Jersey Academy of Mediators and Arbitrators, an IMI Certified and CEDR Accredited mediator, adjunct professor of ADR at Seton Hall Law School, and Vice President of the Garibaldi Inn of Court.

How Useful Are Party-Appointed Experts in International Arbitration?

By Howard Rosen

The role of the expert witness in domestic and international arbitration is a subject that has been often written about, debated, scrutinized, and reviewed. Experts, being in the role of "neutrals" with the obligation to assist arbitrator(s) in reaching decisions on issues that require special expertise, have come under suspicion as being advocates in disguise for the party retaining them. Further, published decisions from arbitrators have failed to adequately identify those experts, or attributes of expert reports, that they find helpful and/or unhelpful, and thus there is no formal feedback mechanism for the arbitration community to identify those experts, or qualities found in expert reports, which are perceived to be inappropriate.

Notwithstanding the well-known role of the expert, and their duty to the trier of fact, experts find themselves pulled in different directions by the various factors that influence their behaviour. The chart below summarizes these various forces:



The criticism frequently leveled at experts is based on the manifestation of factors that can be seen at the bottom and to the right in the chart above. It is generally assumed that party-appointed experts will behave in a manner that ingratiates them to their clients and retaining counsel in order to "plant the seed" for future engagements and financial rewards. In these circumstances, it is assumed that party-appointed experts will act as advocates to further the position of their client, and not to assist the Tribunal in understanding the expert issues. This further manifests itself most blatantly when we see expert reports that are a thin disguise for their client's pleadings.

As a potential counterweight to the perceived adverse forces presented above, experts are also bound by certain rules governing their conduct and work product, which ultimately should have a bearing on the credibility and objectivity of their work. These can be split into three broad categories: jurisdictional rules; rules and practice in arbitration; and professional body rules.

Experts in U.S. courts must meet the applicability threshold established under Rule 702 of the *Federal Rules of Evidence*:[1]

- The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- The testimony is based on sufficient facts or data;
- The testimony is the product of reliable principles and methods; and,
- The expert has reliably applied the principles and methods of the facts of the case.

The *Federal Rules of Evidence* is silent on the duties of independence and impartiality; however, as outlined in the non-exclusive list below, Rule 702 is supplemented by the criteria established by the judgment on *Daubert v. Merrell*[2] (the "Daubert Criteria"):[3]

- Has the technique/theory been tested, or can it be tested;
- Has the technique/theory been subject to peer review and publication;
- What is the potential rate of error;
- Whether there exists standards controlling its operation; and,
- Has the technique/theory attracted widespread acceptance within the relevant scientific community.

Similar thresholds apply in other jurisdictions such as Canada, the U.K. and Australia, where the expert's duty is defined under various court rules and prior decisions.[4] Unlike the Canadian and U.S. courts, English case law has a low reliability review of expert evidence in court and relies upon detailed review at the adjudication stage by the trier of fact.[5] The expert's general duties in Australian courts echo that of the U.K. *Civil Procedure Rules*.[6]

The overriding duty to the court and the necessity of independence and objectivity are explicitly stated in the U.K., Canada, and Australia, but absent from the federal rules governing experts in the U.S. This absence of a specific rule governing independence and objectivity in and of itself is not evidence that quantum experts from the U.S. are any less prone to adopt these important attributes. Professional guidelines set out by the various professional bodies, of which quantum experts are generally members, further serves to guide the behaviour of experts. Further,

specific cases or case law may also serve to reinforce and modify behaviour and guide expert conduct.

However, in the case of arbitration, such jurisdictional rules may not apply. As in some jurisdictions, the practice of "qualifying" an expert does not exist in arbitration. There is no overt examination of an expert's experience and credentials for the purposes of determining whether the expert being proffered possesses the necessary expertise to assist the court with issues that are beyond their own expertise. No *voir dire* is employed to determine the competency of expert witnesses, and what their opinion should be limited to. The IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules") and U.K. *Civil Procedure Rules* seek to mitigate the potential for partisanship and bias inherent in a system of party-appointed experts, but it is possible, however, that they do not go far enough towards achieving their goal. For that reason, I suggest below three measures that might help to preserve the best features of party-appointed experts while blunting those experts' incentives to take unreasonable, contradictory or partisan positions.

1. Instructions Received by the Expert

The first recommendation is focused at the outset of the expert retainer, and deals with the instructions received by the expert. I believe that expert reports will be more useful to the parties and arbitral tribunals if the instructions once received from the parties, are reviewed with the tribunal. It is my experience (and that of my colleagues) that the vast majority of the differences between party-appointed experts arise in consequence either of their having received different instructions or their having employed different assumptions. When party-appointed experts reach strong opposing conclusions, it may be difficult for a Tribunal to know how much weight to place on either expert's evidence or to identify the instructions or assumptions that polarise the experts' opinions.

The new IBA Rules take a useful step towards transparency by requiring party-appointed experts to describe their instructions. A further step in that direction would be for parties to submit their proposed instructions to the Tribunal prior to their delivery to the expert. The Tribunal could then review those instructions and agree (or order) changes so that the instructions were clear and fitted the purposes of the Tribunal.

In my view, such requirement would be strengthened if experts were obliged to document the assumptions that they have made in drawing their conclusions. The clear documentation of assumptions—highlighting those that are a matter of instruction—will assist Tribunals' understanding of the underpinnings of each expert's evidence.[7] It could also allow a Tribunal to order both experts to prepare their conclusions on the basis of one or more sets of instructions and assumptions, which I shall refer to as "common-basis conclusions." Such an order seems likely either to close the gap between two experts or, at a minimum, sharply to define the source of any further assumption(s) leading to divergent views.

In principle, an order to reach common-basis conclusions might be more powerful than existing procedures aimed at narrowing differences between experts, such as meetings of experts or witness conferencing. In my experience, those procedures do not result in a substantive narrowing of the gap if the experts' approaches embody incompatible instructions or assumptions or if one of the parties seeks to emphasise sources of disagreement. An order to present one or more sets of common-basis conclusions solves these problems and could be used by a Tribunal either before or after a hearing to aid its understanding of the impact of different assumptions or instructions.

2. Requirement of Arbitrators to Comment on the Merits of Experts' Work

The second recommendation is aimed squarely at the arbitrators. Arbitrators should be required to explicitly report in their awards their views on the roles the experts played in the arbitration, and if their reports, and conduct at the hearing, were helpful to the arbitrators.

It might be thought that party-appointed experts face pressure to adopt assumptions, points of view or approaches that are favourable to the party that instructed them. In my experience, that is generally untrue. The actual incentives faced by experts are more subtle.

Chief among the incentives faced by experts is that their testimony in a current case may have a bearing on their future opportunities to testify. At first glance, therefore, it might be thought that experts would wish to be known for their pliancy and helpfulness to the instructing party. In practice, that is unlikely to be the case, because a pliant expert might well find that Tribunals assign a lower weight to his or her testimony. That, in turn, would potentially diminish any future stream of expert instructions. A good expert therefore has an incentive to know where to draw the line between being helpful and being partisan and to resist unreasonable pressure to cross it.

In national courts, where expert evidence and judges' opinions of it are often made public, the incentive to remain independent is strong: a partisan expert may quickly be "found out." International arbitrations, however, provide much weaker incentives, particularly when the parties have agreed to strong privacy controls: in many arbitrations, the proceedings, expert evidence, awards and Tribunals' reasoning remain confidential. In those circumstances, a Tribunal's disregard for or criticism of an expert's testimony may be known only to a

small circle of insiders. Under a veil of confidentiality, a partisan expert might prosper for a considerable period. The diffuse nature of international arbitration may also mean that word travels only slowly between seats of arbitration or between arbitrators.

The best antidotes to expert partisanship, therefore, are transparency, feedback and peer review. The more that arbitrators comment on the merits of experts' work and the more than those comments are published, the greater will be the incentives for experts to remain independent of the parties appointing them. Those incentives will counteract, and probably outweigh, an expert's desire to please, leading to an increase in actual as well as perceived independence.

3. Joint Expert Reports

The third recommendation is to require a joint expert report in all cases where party appointed experts provide opinions. Appendix 1 on page 29 is a sample joint expert report that I have been using for several years, which I feel allows the Tribunal an excellent summary document of the important issues that have an effect on the expert's opinion as to the quantum of damage. It isolates the technical points of the experts, where they agree completely, have some agreement, or disagree completely. It would also identify the approximate effect on the quantum of damages of each position. Using this summary report, the Tribunal can then decide which issues are best brought up in witness conferencing (if provided for), and determine based on the quality of the evidence, which expert position they prefer.

This article has outlined the various factors that influence the behaviour of experts and posited that the best way to increase the perceived independence of party-appointed experts is to increase transparency and disclosure, so as to align the interests of experts with those of the Tribunal. A requirement for experts to document their assumptions, highlighting those upon which they have received instruction, will serve to highlight the sources of difference between experts. A requirement for experts' instructions to be agreed with the Tribunal, or for common instructions to be imposed on experts, may also limit the potential for experts to address or emphasise different issues in their reports. An order for experts to issue common-basis conclusions may assist Tribunals' understanding of the impact of different assumptions and help narrow the differences between experts. If Tribunals were also encouraged to comment on expert testimony and to publish those comments, experts would receive feedback on their work and be subject to outside scrutiny. That feedback and scrutiny will alter experts' incentives and go some way to resolving party-appointed experts' perceived lack of independence.

Although I accept that there is currently no requirement for transparency in many arbitrations, I am aware of comments by legal professionals arguing that publication of awards would advance the law upon which arbitration relies. The interests of Tribunals, experts and counsel on this point might therefore be aligned, even if parties often prefer confidentiality.

This article is based on material presented at the 22nd ICCA congress, "Legitimacy: Myths, Realities, Challenges," Miami, 6-9 April 2014.[8]

Endnotes

1. Federal Rules of Evidence, Rule 702. Testimony by Experts, available at <http://www.uscourts.gov/uscourts/rulesandpolicies/rules/2010%20rules/evidence.pdf> (last accessed 19 February 2014).
2. Daubert v. Merrell Dow Pharmaceuticals (1993) U.S.
3. In the 1993 judgment on Daubert v. Merrell, the role of the judge as a "gatekeeper" for the qualification of scientific experts was established, and subsequently in 1999, the judgment on Kumho Tire v. Carmichael extended the scope of the Daubert Criteria for admissibility of scientific experts to include all experts. Source: "Daubert Challenges to Financial Experts: An 11-year study of trends and outcomes," available at <http://www.pwc.com/us/en/forensic-services/publications/daubert-study-2010.jhtml> (last accessed 20 February 2014). Daubert v. Merrell Dow Pharmaceuticals (1993) U.S.
4. See, for example, Canadian Federal Court Rules, section 52 Expert Witnesses, available at <http://laws-lois.justice.gc.ca/eng/regulations/SOR-98-106/> (last accessed 19 February, 2014), the U.K. Civil Procedure Rules, Part 35 Experts and Assessors, available at <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part35> (last accessed 20 February 2014) and "*The Ikarian Reefer,*" National Justice Compania Naviera SA v. Prudential Assurance Company Limited [1993] 2 Lloyd's Rep. 68 at 81-82 (Q.B.D.).
5. A. W. Jurs "Balancing Legal Process with Scientific Expertise: Expert Witness Methodology in Five Nations and Suggestions for Reform of Post-Daubert U.S. Reliability Determinations," pages1378-1379, available at < http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=5134&context=mulr> (last accessed 19 February 2014).
6. Expert witnesses in proceedings in the Federal Court of Australia, Guideline 1, available at <http://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/cm7> (last accessed 20 February 2014).
7. That is not to say that counsel-directed assumptions are always illegitimate. Occasionally, an expert may reach a "fork in the road" in the course of analysis, each path being open to a reasonable expert. In such cases, the expert must either seek instruction from counsel as to which assumption should be preferred, or present his or her conclusions on the basis of both assumptions. If the expert chooses to take instruction, however, the fact should be clearly documented.
8. "How Useful Are Party-Appointed Experts in International Arbitration?" in A.J. van den Berg, ed., *Legitimacy: Myths, Realities, Challenges,* ICCA Congress Series no. 18 (Kluwer Law International, forthcoming).

Howard Rosen is with FTI Consulting Inc. **The author would like to acknowledge the following individuals for their contributions in researching this article: Greig Taylor, James Searby, Neal Mizrahi, and Ellen Dong.**

APPENDIX 1

Category	Issue	Claimant Expert	Respondent Expert	Agreement or Disagreement	Reason for Agreement/ Disagreement
Valuation Date	Date of alleged taking or current date of report.	2007 as advised by counsel.	2009 as advised by counsel.	Not Applicable	This is a factual issue that neither the Claimant Expert nor the Respondent Expert offer an opinion on.
Cost Method of Valuation	Applicability	FMV based on the cost approach, based on the assumptions stated in paragraph 101 of the Claimant Expert report.	FMV based on the cost approach, based on the following assumptions: 1) A development license would be granted and that commerciality would be achieved; 2) Expert A's estimates of production would be realized; and, 3) Contract X supply could be used to feed the Plant.	Disagree	Methodological difference.
Market Method of Valuation	Applicability	The Claimant Expert has reviewed comparable companies and transactions to assess the reasonability of the range of values estimated for the Project. The comparable companies approach resulted in an estimated value for the Project of $500 million and the comparable transactions approach resulted in an estimated value for the Project of $600 million.	The Respondent Expert does not comment on the comparable companies and transactions assessed by the Claimant Expert.	Disagree	Methodological difference.
Discounted Cash Flow Method of Valuation	Applicability and sufficiency of information to enable construction of a meaningful future cash flow model.	Claimant Expert has assumed Contract X supply cannot be obtained and a cash flow model is not applicable.	Respondent Expert has assumed Contract X supply will be used to allow for commercial viability of the Project and as such has performed a DCF valuation approach in accordance with paragraph 56 of the Respondent Expert Report.	Disagree	Methodological difference.
WACC	Relevant discount factor	Real WACC assuming: 1) Capital structure based on historical debt/equity ratios; and, 2) Tax rate of 40%.	Real WACC assuming: 1) Capital structure based on optimal debt/equity ratios; and, 2) Tax rate of 40%.	Disagree	Difference in the assumption of the appropriate capital structure.
Cost of Equity	Relevant discount factor	Cost of Equity is calculated by assuming: 1) Risk free rate of borrowing of 6%; 2) Beta factor assuming the theory that the beta of a company will eventually revert to the beta of the market, which is 1; 3) Equity risk premium based on the arithmetic average of returns between 1926 to 2010; and, 4) A country risk premium of 3%.	Cost of Equity is calculated by assuming: 1) Risk free rate of borrowing of 6%; 2) Beta factor based on comparable companies in the same industry; 3) Equity risk premium based on the geometric average of returns between 1980 to 2010; and, 4) A country risk premium of 6%.	Disagree	Methodological difference.
Pre-Judgement Interest rate	WACC versus cost of debt.	Claimant Expert has assumed the prejudgment interest should be based on WACC, as the cash flow foregone could have been invested into other projects that the Company was pursuing.	Claimant Expert has assumed the prejudgment interest should be based on the cost of debt; absent the incident the Company would have drawn a correspondingly lower amount from its debt facility.	Disagree	Methodological difference.
Cost of Debt	Relevant discount factor	Cost of Debt is calculated in accordance with Debt Contract XY.	Cost of Debt is calculated in accordance with Debt Contract XY.	Agree	
Future Price Curve	Futures price curve.	2007 futures price for commodity Y.	2009 futures price for commodity Y.	Agree	Same methodology, differences in values are based on differences in valuation date.
Taxation	Applicable tax rate.	Conclusions are presented on an after-tax basis and that an additional gross up of damages may be required if taxes are levied on the damages.	Conclusions are presented on an after-tax basis.	Agree	
Inflation	Applicable inflation factor.	Inflation factor is based on the cumulative monthly inflation adjustment from the month immediately after the date of the valuation.	Inflation factor is based on the cumulative monthly inflation adjustment from the month immediately after the date of the valuation.	Agree	Same methodology, differences in values are based on differences in valuation date.

Arbitration by Default Rather Than by Consent

By Margaret L. Moses

Although consent is often said to be the cornerstone of arbitration, it has become increasingly less important in international commercial arbitration. As arbitration has come to be the standard means of resolving international commercial disputes, arbitrators are finding many disputes arbitrable that involve non-signatories or issues of consolidation of disputes among parties who did not sign the same arbitration agreement. Complex, multiparty disputes may be found to be arbitrable even if all the parties are not the same, and even if the arbitration clauses in different contracts may not be identical.[1] A signal of the decline in the necessity of actual consent is that arbitrators may find parties bound to arbitrate based on a number of different theories—such as implied consent, agency, estoppel, intertwined relationships, piercing the corporate veil, or group of companies.[2]

"[C]onsent…has become increasingly less important in international commercial arbitration."

In recent times, however, some commentators have suggested an even larger step away from consent-based arbitration. They assert that in the international commercial context, it is time for non-consensual arbitration to become the default rule.[3] The proposal is that in international contracts, if the contracting parties have not chosen a method of dispute resolution, they should be required to arbitrate. Thus, instead of being required to litigate if they did not choose arbitration, parties would be required to arbitrate unless they included in their contract an express agreement to go to court.

The basis for imposing non-consensual arbitration would be either a new international convention, or state legislation, or reciprocal agreements between states, such as in a bilateral investment treaty.[4] Thus, either legislation or a treaty would provide the legal foundation for imposing arbitration on the parties.

While these proposals for non-consensual arbitration may seem objectionable or impracticable, non-consensual arbitration appears to make some sense in the international context. The arguments commentators put forth in favor of a default rule that provides for non-consensual arbitration are similar to the standard arguments supporting the advantages of arbitration. Arbitration enhances fairness because the decision-maker is more likely to be neutral, and the parties are on a more equal footing than they would be if they were in the national court of one of them. Confidentiality is more likely to be preserved. The procedures are more flexible, and parties can, by agreement, design and tailor the process to their needs. In addition, in many countries, justice by the national courts may be slow or non-existent. Given the great diversity of court systems, a national court might not be able to render a decision that was as fair or speedy as an arbitral tribunal. Finally, enforcement of an arbitration award is generally more easily obtained than enforcement of a court judgment. Thus, commentators have concluded that parties to international transactions who did not choose a method of dispute resolution would be better off in arbitration than in a national court.[5]

The process for a default arbitration could be similar to one found in the Inter-American Convention on International Commercial Arbitration (the "Panama Convention").[6] That Convention provides that when the parties have agreed to arbitrate, but have not chosen specific rules, they will be deemed to have consented to the Arbitration Rules of the Inter-American Commercial Arbitration Commission, which has rules that are virtually identical to the UNCITRAL Arbitration Rules.[7] Similarly, if parties were covered by a national or international provision requiring arbitration because they did not choose a method of dispute resolution in their international contract, appropriate procedures could be made applicable.[8]

However, even though arbitration may be favored for a number of reasons, imposing it on companies that have not freely chosen it may not be the best solution. There are disadvantages to arbitration which could cause a reasonable international company not to prefer it. For example, in an international dispute involving anti-trust issues, where the burden of proof is on the claimant but the documents necessary to prove the case may be under the control of the respondent, the limitations in arbitration on the amount of discovery could affect the outcome of the case. In addition, the lack of availability of review on the merits can be considered a major drawback. Business executives might not want to bet the company on an arbitrator whose decision could not be appealed on the merits.

Moreover, there are policy reasons for not forcing most international cases into arbitration. Greatly increasing the cases that are arbitrated could contribute to undermining the public function of courts. In the common law system, when courts interpret statutes and lay down rules, they not only develop a jurisprudence, but they also educate the public about the law, and about how the legal system functions. Confidentiality of commercial arbitral proceedings and awards prevents the public from knowing what arbitrators do and which rules they apply. Finally, because there is no controlling precedent in arbitration cases, the risk is that tribunals will be inconsistent in their decisions on similar issues.

Thus, although the role of consent in international commercial arbitration has diminished, it is not clear that the business community would welcome giving up its right of access to a court, even if that court turned out to be in a different nation. Of course, prudent counsel should always try to ensure that the parties choose a dispute resolution method in their contract, and that the contract deals carefully with all related parties who might become involved in a subsequent dispute. In most instances, party autonomy can be assured by careful drafting, so that the method of resolving disputes will be one that was chosen by the parties and not imposed on them after the fact. The question remains, however, whether parties that have not included a dispute resolution clause in their international commercial contract would be better off in arbitration or in litigation, and whether the default rule that governs this question should send them to an arbitral tribunal or to a national court. How ready are we to give up the contractual foundation of arbitration?

Endnotes

1. *See* Andreo Marco Steingruber, *Consent in International Arbitration* (2012), at 171-79.
2. *See generally*, Karim Youssef, *Decline of Consent and the Construction of a Global Commercial Justice* , and *Arbitration as the Juge Naturel of International Commerce*, in CONSENT IN CONTEXT: FULFILLING THE PROMISE OF INTERNATIONAL ARBITRATION (2009), pp. 334-341, pp. 342-348.
3. *See generally*, Jack Graves, *Court Litigation over Arbitration Agreements: Is it Time for a New Default Rule?*, 23 Amer. Rev. Int'l Arb. 113 (2012); Gilles Cuniberti, *Beyond Contract—The Case of Default Arbitration in International Commercial Disputes*, 32 Fordham Int'l L. J. 417 (2009).
4. *See* Cuniberti, *supra* note 3 at 487-88; *see also* Graves, *supra* note 3 at 133, 135 (suggesting that consent could be found "through contract principles addressing normative default rules" or could be implied "from the parties' actions in engaging in a transaction governed by a positive default rule of law" and urging the adoption of a new international convention that recognizes arbitration as a default rule in international commercial disputes).
5. *See, e.g.*, Cuniberti, *supra* note 3, at 423-33.
6. O.A.S. Ser. A20 (S.E.P.E.F.), 14 I.L.M. 336 (1975).
7. *See id*, Article 3.
8. *See* Graves, *supra* note 3, at 133.

Professor Moses is Professor of Law and Director of International Programs at Loyola University Chicago. She also serves from time to time as an arbitrator, has published numerous articles on international arbitration, and has authored a treatise, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, published by Cambridge University Press (second edition, 2012).

The New 2014 WIPO ADR Rule Set: Flexible, Efficient and Improved

By Peter Michaelson

The World Intellectual Property Organization (WIPO), based in Geneva, Switzerland, a self-funded agency of the United Nations, acts as a global forum for intellectual property services, policy, information and cooperation.[1] The WIPO Arbitration and Mediation Center ("Center"), established in 1994, offers alternative dispute resolution (ADR) services to resolve international commercial disputes between private parties.[2]

In 1994, the Center developed its first set of arbitration and mediation rules. While these rules were initially formulated to accommodate certain characteristics of IP-based technology disputes, they proved to be a general, flexible, cost- and time-effective framework for arbitrations and mediations embracing a wide variety of IP-related substantive areas.[3] In 2002 these rules were updated and expanded to include the WIPO Expedited Arbitration Rules and in 2007 further expanded by addition of the WIPO Expert Determination Rules.

The new 2014 WIPO Rule Set applies to all arbitrations, mediations and expert determinations commenced on or after June 1, 2014. These new rules are based on work from 2013-2014. The 2002 Rule Set was updated to formalize beneficial practices that were utilized by the Center and to take into account revisions made through the 2010 UNCITRAL Arbitration Rules. These updates were also based on consultations by the Center with a group of selected IP arbitration and mediation experts from around the world, including WIPO neutrals and party representatives.[4]

This article addresses: (1) key differences under the 2014 Rule Set between standard and expedited WIPO arbitration proceedings; (2) core revisions made to the 2002 Rules that are incorporated in the 2014 Arbitration and Expedited Arbitration Rules—these revisions include specific provisions regarding joinder and consolidation; setting, as a default process, the list selection procedure for selecting a sole/presiding arbitrator; mandating the use of a preparatory conference; and concerning emergency relief; and (3) the 2014 WIPO Expert Determination and Mediation Rules.

Standard and Expedited Arbitration Under the 2014 Rule Set

Where time and cost are primary concerns, expedited arbitration may provide significant efficiencies over standard arbitration. However, while both processes are very similar under the 2014 Rules, several important distinctions should be considered when choosing between them.

While a standard arbitration can utilize a sole or tripartite panel, an expedited proceeding only employs a sole panelist ((Exp.) Arb. Rules Art. (14) 14, 16, 17).

All time periods are compressed in an expedited arbitration. A standard arbitration typically completes within 14-16 months from its commencement; an expedited arbitration typically completes within half that time.

Specifically, in a standard arbitration, the Answer to a Request for Arbitration is due 30 days after the respondent received the Request (Arb. Article 11), but 20 days after receipt in an expedited arbitration (Exp. Arb. Article 11). Further, in a standard arbitration, a Statement of Claim or Defense (including any counterclaim) may accompany, respectively, the Arbitration Request or the Answer (Arb. Arts. 10, 12, 41). In the absence of a simultaneous filing, the Statement of Claim is due 30 days after the establishment of the tribunal, with the Statement of Defense being due 30 days after the respondent's receipt of the Statement of Claim or the establishment of the tribunal, whichever is later (Arb. Arts. 41, 42). However, in an expedited arbitration, the Statement of Claim and Defense must be filed coincident with the Request and the Answer, respectively (Exp. Arb. Arts. 10 and 12). If a counterclaim is filed, then in a standard arbitration, a corresponding reply must be filed within 30 days of the claimant's receipt of the Statement of Defense (Arb. Arts. 42 and 43). This time period is shortened to 20 days in an expedited arbitration (Exp. Arb. Art. 36 and 37).

In a standard arbitration, the tribunal has flexibility to set the date of the evidentiary hearing as it deems appropriate (Arb. Article 55); in an expedited arbitration, the hearing must be convened within 30 days after the claimant has received the Answer and Statement of Defense (Exp. Arb. Article 47). Further, while an evidentiary hearing is not limited in duration in a standard arbitration, in an expedited arbitration it can only last 3 days, absent exceptional circumstances ((Exp.) Arb. Article (49) 57).

A standard arbitration proceeding is declared closed within 9 months after the tribunal receives the Statement of Defense or the tribunal is established, whichever is later, with the arbitral award due 3 months later, though both periods can be extended (Arb. Art. 65). These periods are reduced to 3 months and 1 month, respectively, in an expedited arbitration; here too, these periods can also be extended (Exp. Arb. Article 57).[5]

The administrative fees charged by the Center are specified by WIPO's Fee Schedule and increase as a function of the amount in dispute up to maximum fees

of $15,000 and $25,000 for expedited and standard arbitrations, respectively, each with $10 million or more in dispute. For standard arbitrations, arbitrator's fees range from $300-$600 per hour, or a commensurate daily rate agreed upon among the Center, the parties and the arbitrator(s). However, in an expedited arbitration involving amounts in dispute of up to $2.5 million and between $2.5-10 million, arbitrator's fees are respectively fixed at $20,000 and $40,000. For expedited arbitrations involving larger amounts, the arbitrator's fees are not specified and are simply subject to agreement among the Center, the parties and the arbitrator.[6] Based on the parties' agreement, either arbitration proceeding may be preceded by a mediation or an expert determination.[7]

Core Revisions in the 2014 Arbitration and Expedited Arbitration Rules

Joinder

Often in disputes involving multiple parties, a need arises to add a new party after an arbitration has commenced.

Modeled on Article 17(5) of the 2010 UNCITRAL Arbitration Rules, Article (40) 46 of the 2014 (Exp.) Arbitration Rules permits a tribunal to order that an additional party be joined to a pending arbitration. Unlike UNCITRAL Article 17(5), which requires that the additional party be a party to the underlying arbitration agreement and that all parties have an opportunity to be heard on the issue of joinder, the 2014 Rules do not require that the additional party be a party to the agreement but do require that all parties, including the additional party, agree to joinder.

Further, under the 2014 Rules, to determine whether joinder is appropriate, the tribunal should consider all relevant circumstances including the stage of the arbitration when joinder is requested. Additionally, a request for joinder should be filed as early as possible with the Center, either with the Request for Arbitration or the Answer, or, should relevant circumstances arise later justifying joinder, within 15 days after the requesting party acquires knowledge of those circumstances ((Exp.) Arb. Article (40) 46).

Consolidation

Given the increasing prevalence of separate proceedings related by substance or parties, Article (40) 47 of the 2014 (Exp.) Arbitration Rules permits consolidation of a new arbitration into a pending one. The new arbitration must either: (a) concern subject matter that is substantially related to that which forms the basis of the dispute in the pending arbitration; or (b) involve the same parties as in the pending arbitration. Furthermore, before ordering consolidation, the tribunal in the pending arbitration needs to: (a) consult with all the parties in both arbitrations and any tribunal, if any, which has been appointed in the new arbitration; and (b) obtain agreement of all parties and the appointed tribunal to consolidation. As with joinder, the tribunal in the pending arbitration must take into account, in deciding whether to order consolidation, all relevant circumstances, including the stage then reached, in the pending arbitration.

List Procedure for Selecting a Sole/Presiding Arbitrator

The 2002 WIPO Arbitration Rules incorporated a "list procedure" for use by the Center in appointing a sole or presiding arbitrator in instances where the parties failed to make such an appointment. Through this procedure, the Center takes into account the particular qualifications then sought by the parties, establishes a list of at least 3 candidates from its own panel of neutrals, and provides that list and accompanying biographical information to each party. Each party strikes any candidate to which it objects and numerically ranks, in order of preference, the remaining candidates, and then returns a marked list to the Center. The Center combines the rankings and appoints the candidate with the highest combined ranking. If the marked lists fail to reveal any candidate acceptable to the parties, then the Center, acting in its discretion, selects the sole or presiding arbitrator from the lists, taking into account any preferences or objections expressed by the parties.[8] This approach is embodied in Article 8 of the 2010 UNCITRAL Arbitration Rules.

As this list procedure proved over time to be effective and well-balanced, the Center, through Exp. Arb. Article 14, set it as the default process for selecting the sole arbitrator in expedited arbitrations. Pursuant to this Article, this process is only used when the arbitrator is not nominated, through party agreement, within 15 days after the proceeding commenced. Further, under this article, each party has a maximum period of 7 days to return its marked list to the Center. When this procedure is used, as the default process under Arb. Article 19, to appoint either the sole or presiding arbitrator in a standard arbitration, these two periods are set to 45 and 20 days, respectively.

Preparatory Conference

Focusing and organizing an arbitration proceeding and scheduling its constituent stages through a preparatory conference (preliminary hearing), held shortly after the tribunal has been appointed, often significantly increased both the time and cost efficiency and overall effectiveness of the proceeding. Though this practice has been optional, the Center strongly favored its use. To achieve efficiencies across all WIPO arbitrations, under the 2014 Rules, such conferences are now mandatory under (Exp.) Arb. Article (34) 40. Further, pursuant to (Exp.) Arb. Article (51) 57, a tribunal should also raise, at this conference, its need to appoint its own independent expert(s) to opine on any specific issues.

Emergency Relief

Under the 2002 WIPO (Exp.) Arbitration Rules and continuing through the 2014 Rules ((Exp.) Arb. Article (42) 48), an arbitration tribunal is empowered to award interim relief by issuing provisional orders or undertake other interim measures, as it deems necessary, to conserve goods and obtain appropriate security for claims and costs. The 2014 Rules expand the concept of available relief to include emergency relief. Through (Exp.) Arb. Article (43) 49, a party need not wait for the entire tribunal to be appointed—which, depending on specific circumstances, can consume considerable time—to submit a request to the Center for emergency relief.

The Center, in turn, will inform the other party of the request and then proceed to appoint a sole emergency arbitrator, all within 2 days. Within certain limitations noted in (Exp.) Arb. Article (43) 49, that arbitrator has the same powers as the tribunal. Any challenges raised to the appointment must be made within 3 days thereafter.

The emergency arbitrator can conduct the proceeding in any manner (s)he deems appropriate, taking into account the urgency of the emergency proceeding and the need to ensure that each party has a reasonable opportunity to present its case. That arbitrator can issue any order (s)he deems necessary and condition such orders on the requesting party furnishing appropriate security, and also apportion costs for the emergency relief proceeding. The emergency arbitrator can also modify or terminate that order, as appropriate. Emergency proceedings automatically terminate if arbitration is not commenced within 30 days from the date the Center received the request for emergency relief. Further, once the tribunal is established, the power of the emergency arbitrator ceases and the tribunal, upon party request, can modify or terminate any measure ordered by the emergency arbitrator. The emergency arbitrator is prohibited, unless the parties agree otherwise, from being a member of the tribunal. Emergency relief under these rules is only available, unless the parties have agreed otherwise, for arbitration agreements that have been entered into on or after January 1, 2014.

2014 WIPO Expert Determination Rules

Through an expert determination,[9] parties, by mutual agreement, can submit a specific matter(s) (e.g., technical question(s), IP asset valuation, specific royalty rates) to one or more experts who will make a determination on that matter. Once the proceeding commences, a party cannot unilaterally withdraw from it. The proceeding is confidential with its results being binding on the parties unless they agree otherwise (Exp. Det. Arts. 15 and 16). The Expert Determination rules remain principally unchanged from their 2007 version.

Basically, the proceeding entails a party first filing with the Center a request, copied to the other party, for an expert determination (Exp. Det. Article 5) and an accompanying administrative fee (Article 20). The other party then has 14 calendar days to file its answer, including pertinent documents (Article 7). Thereafter, an expert—generally one though more may be appointed if necessary—is selected and appointed pursuant to Article 8 under which the expert(s), if any, mutually selected by the parties is appointed, failing which, the Center, in consultation with the parties, selects and appoints a suitable independent and impartial expert(s). The expert, under Article 9, is prohibited from having any other role in any future proceeding (judicial, arbitral or otherwise) involving the matter submitted to expert determination. Under Article 10, the expert: (a) remains under a duty to disclose, throughout the proceeding, any facts that might give rise to justifiable doubt as to that expert's continuing impartiality/independence, and (b) is subject to challenge for a perceived lack of independence or partiality. The challenge period is 7 days after the expert is appointed or the challenging side becomes aware of facts underlying its basis for challenge. Under Article 13, the expert can conduct the proceeding as (s)he deems appropriate provided each party has an adequate opportunity to present information relevant to the determination. The expert can hold meetings however (s)he deems best, e.g., teleconference, videoconference, web conference or inperson. The expert can request further submissions from the parties or inspection of a site, property, product or process. Pursuant to Article 16, the expert issues a written determination of the issues presented. Within a 30-day amendment period, a party can request the expert to correct clerical and other similar errors in the determination. Should a settlement occur prior to the written determination, then, under Article 18, the expert terminates the determination. The fees for the determination are shared equally by the parties, unless the parties agree otherwise with, under WIPO's Fee Schedule, the fees of the expert ranging between $300-$600/hour (or $1,500-$3,500 per day) and the administrative fees linearly increasing with the amount in dispute up to a maximum of $10,000 (Arts. 21 and 23).

2014 WIPO Mediation Rules

To initiate a mediation, under the 2014 WIPO Mediation Rules, a party files a request with the Center (and copied to the other party) together with payment of the appropriate administrative fee (Med. Rules Arts. 3 and 21). The Center then proceeds, under Article 6, to appoint a mediator mutually agreed by the parties, or, failing that, to select, in consultation with the parties, and appoint a suitable mediator based on its list selection process. The mediator then conducts the mediation as the parties have agreed or, in the absence of such agreement, as the mediator deems best (Arts. 9-13). The mediation process is confidential with a written undertaking being executed by all involved (Article 15) and, unless the parties agree to the contrary, privileged (Article 17).

The mediation fees are shared equally by the parties, unless the parties agree otherwise, with, under WIPO's Fee Schedule, the fees of the mediator ranging between $300-$600/hour (or $1,500-$3,500 per day) and the administrative fees increasing with the amount in dispute up to a maximum of $10,000 (Arts. 22 and 24).

The 2014 Mediation Rules incorporate two principal changes from the 2002 version: the delineation in Article 6 of the list procedure as a default procedure for mediator selection and, in Article 13, the preclusion of a med-arb proceeding in which the mediator previously had the ability, with the consent of the parties, to act as a sole arbitrator in a subsequent (expedited) arbitration.

Conclusion

The new 2014 WIPO Rule Set enhances the ADR framework established by the prior rules to advantageously provide additional flexibility and further time and cost efficiencies. Accordingly, counsel and parties should seriously consider adopting and using these new rules for resolving disputes, occurring across a wide variety of substantive areas, that involve IP-related issues.

Endnotes

1. WIPO home page at http://www.wipo.int.
2. See http://www.wipo.int/amc/en/center/background.html.
3. H. Wollgast et al., "WIPO Arbitration and Mediation Center: New 2014 WIPO Rules; WIPO FRAND Arbitration," *ASA Bulletin*, Vol. 32, No. 2 (June 2014), pages 145-155, specifically p. 146.
4. *Id.* at p. 146. The author participated in such a consultation session held in New York City during June 2013.
5. A table comparing these time periods is available at http://www.wipo.int/amc/en/arbitration/expedited-rules/compared.html.
6. The WIPO Arbitration/Expedited Arbitration Fee Schedule is available at http://www.wipo.int/amc/en/arbitration/fees/index.html.
7. See http://www.wipo.int/amc/en/clauses/index.html.
8. Wollgast et al. at p. 147.
9. See http://www.wipo.int/amc/en/expert-determination/.

Peter Michaelson, of Michaelson ADR Chambers, LLC with offices in New York City and Rumson, NJ, is an arbitrator and mediator primarily handling domestic and international IP (particularly patents), IT and technology-related disputes. He is a panelist for institutions including WIPO, AAA & ICDR, CPR, LCIA, SIAC, KLRCA and HKIAC, various federal and state courts, a Fellow and Chartered Arbitrator of the Chartered Institute of Arbitrators and Chair of its New York Branch; a Fellow of the College of Commercial Arbitrators, and also serves as a court-appointed expert in patent law. The author can be reached at: pete@plmadr.com.

The author expresses his sincere gratitude to the WIPO Arbitration and Mediation Center for all the assistance it graciously provided to him during his preparation of this article.

Toward a Treaty Basis for Transparency in Investor-State Arbitration

By Alexandra Dosman

In recent years, the United Nations Commission on International Trade Law ("UNCITRAL") has taken important steps toward increasing transparency in the investor-state dispute resolution process.[1] In 2013, UNCITRAL adopted Rules on Transparency in Treaty-Based Investor-State Arbitration ("Transparency Rules"). The Transparency Rules took effect on April 1, 2014, and apply to investor-state disputes under the UNCITRAL Arbitration Rules arising out of treaties concluded after April 1, 2014.[2]

In addition, at its 47th session in New York in July 2014, UNCITRAL approved the draft text of a Convention on Transparency in Treaty-Based Investor-State Arbitration. The purpose of the Convention—which will be submitted to the United Nations General Assembly for final consideration this autumn—is to extend the application of the Transparency Rules to claims arising under investment treaties entered into by signatory States prior to April 1, 2014.

These developments reflect a shift in the investor-state arbitration paradigm toward increased public disclosure and participation—and impose significant new duties on arbitral tribunals and international practitioners.

The UNCITRAL Transparency Rules

The Transparency Rules provide comprehensive guidance and procedures for parties and tribunals in investor-state arbitration. Parties "may not derogate" from the rules, even by agreement, unless permitted to do so by the relevant investor-state treaty. (Rules, Article 1, 3(a).) When exercising discretion as permitted by the rules, arbitral tribunals are required to take into account both the "public interest in transparency in treaty-based investor-State arbitration and in the particular arbitral proceedings" and the "disputing parties' interest in a fair and efficient resolution of their dispute." (Rules, Article 1, (4).)

The UNCITRAL Arbitration Rules were also updated to reflect the mandatory nature of the Transparency Rules for investor-state arbitrations using those rules. An updated version of the UNCITRAL rules—which also came into effect on April 1, 2014—provides that "for investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors, these Rules include the UNCITRAL Rules on Transparency…."[3]

If there is a conflict between the Transparency Rules and the applicable arbitration rules, the Transparency Rules will govern. However, if there is a conflict between the Transparency Rules and the treaty under which the claim is made, the treaty will govern. The Transparency Rules do not displace any applicable law "from which the disputing parties cannot derogate," such as mandatory laws. (Rules, Article 1, (7), (8).)

"The Transparency Rules envisage a central repository for information made public as a result of the Rules. The transparency registry—operational as of April 1, 2014—is housed and administered by the UNCITRAL Secretariat in Vienna."

Transparency Obligations and Procedures

The Transparency Rules envisage a central repository for information made public as a result of the Rules. The transparency registry—operational as of April 1, 2014—is housed and administered by the UNCITRAL Secretariat in Vienna. As of time of writing, there are no documents published to the repository.[4]

The Transparency Rules set out five categories of transparency obligations and procedures: (1) publication of initial information regarding an arbitration; (2) publication of documents filed in the arbitration; (3) submissions by third persons to the dispute; (4) submissions by other States to a investment treaty (that are not parties to the particular dispute); and (5) public hearings. The rules also include exceptions to transparency obligations, including in the case of "confidential business information." If any party objects to the application of the Transparency Rules to the dispute, it is for the arbitral tribunal to decide on their application.[5]

(1) ***Initial information***. When the Transparency Rules apply, a notice of arbitration must be communicated to the central repository as soon as it is transmitted to the respondent. The repository will then publish basic information: the names of the parties, the economic sector of the dispute, and the treaty under which the claim is made. (Rules, Article 2.) To facilitate this process, UNCITRAL has created information sheet templates for use by the parties or the tribunal.[6] Once an arbitral tribunal has been constituted, it is solely responsible for transmission of information and documents to the repository. All documents are

to be sent electronically in specific formats, as set out in UNCITRAL guidelines.[7]

(2) *Publication of Documents*. The notice of arbitration, statements of claim and defense, written submissions (memorials), a table of exhibits if available, and orders of the arbitral tribunal are all to be made available to the public, subject to the exceptions set out in the Transparency Rules. Expert reports and witness statements must be made available to the public upon request "by any person." (Rules, Article 3, (2).) It is within the arbitral tribunal's discretion to make exhibits and other documents publicly available, after consultation with the parties.

(3) *Submissions by Third Persons*. The Transparency Rules allow for written submissions by third persons to a dispute, following a determination by the arbitral tribunal and consultation with the parties. In making its determination, the arbitral tribunal must consider whether the potential *amicus* has a "significant interest" in the arbitral proceedings, and to what extent the submission would aid the tribunal by "bringing a perspective, particular knowledge or insight" that differs from the disputing parties.

(4) *Submissions by Non-disputing Treaty Parties*. States or multistate entities that are parties to an investment treaty may make submissions "on issues of treaty interpretation." The arbitral tribunal may also allow submissions on broader issues, with the caveat that such submissions are not to rise to the level of supporting an investor's claim "in a manner tantamount to diplomatic protection." (Rules, Article 5, (2).)

(5) *Public Hearings*. When the Transparency Rules apply, public oral hearings are the default. However, hearings may be held in private either to protect confidential information or the arbitral process, as well as if necessary "for logistical reasons." (Rules, Article 6, (1)-(3).)

Exceptions to Transparency

The Transparency Rules provide exceptions for confidential business information, information that is protected from being made public under by treaty, information that is protected under the law of the respondent State or "under any law or rules determined by the arbitral tribunal to be applicable." Information need not be disclosed when to do so would impede law enforcement or a State's "essential security interests." (Rules, Article 7, (2), (5).) Documents may be redacted in order to accomplish these goals. Importantly, if a tribunal decides that redacted information or certain documents should be made public over a person's objections, the person who submitted the document may elect to withdraw it from the arbitral record. (Rules, Article 7, (4).)

The UNCITRAL Transparency Convention

A minority of UNCITRAL delegates had advocated for Transparency Rules that would apply to claims made under *all* investor state treaties, but the majority preferred an "opt in" scheme for claims made under treaties that pre-date the Transparency Rules. The purpose of the new draft Convention on Transparency is to extend the application of the Transparency Rules back in time to cover claims under older investment treaties made by signatory States.

The Transparency Convention is broad in scope, and envisages application to arbitrations "between an investor and a State or a regional economic integration organization conducted on the basis of an investment treaty concluded before 1 April 2014." (There are over 3,000 existing investment treaties.) The Convention further provides that the UNCITRAL Transparency Rules will—absent a reservation by the signatory State—apply to any investor-state arbitration against the State, regardless of whether the arbitration is conducted under the UNCITRAL Arbitration Rules. (Convention, Article 2 (1).)

The Convention is to be presented to the United Nations General Assembly at its 2014 autumn session. Once accepted, it will be opened for signature, and will enter into force six months after it has been ratified by three member States. (Convention, Article 9, (1).)

"[I]f the Transparency Convention gains traction, the international arbitration community will need to be alert to the expansion of those obligations to cover certain claims arising out of investment treaties dating from before April 1, 2014."

The UNCITRAL Transparency Regime to Date

The UNCITRAL Transparency Rules, updated Arbitration Rules, and new information repository have been in effect for almost four months, since April 1, 2014. According to UNCTAD, ten international investment agreements have been signed since April 1, 2014, but none have yet entered into force.[8] These agreements contain varying levels of protection for investors and more (or less) explicit provisions on transparency. As investor-state claims are made based on these agreements under the UNCITRAL Arbitration Rules, practitioners and arbitral tribunals will need to take account of their new transparency obligations. And if the Transparency Convention gains traction, the international arbitration community will need to be alert to the expansion of those obligations to cover certain claims arising out of investment treaties dating from before April 1, 2014.

Endnotes

1. UNCITRAL is made up of sixty member-States of the United Nations, elected by the United Nations General Assembly for six-year terms.
2. Investment treaties may exclude the application of the Transparency Rules. The Transparency Rules may apply to disputes based on treaties concluded prior to April 1, 2014 if the parties to the dispute or the parties to the treaty expressly agree. The Transparency Rules are also available for use, by agreement, in investor-state arbitrations that do not use the UNCITRAL Rules.
3. UNCITRAL Arbitration Rules, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html [last accessed July 23, 2014].
4. United Nations Commission on International Trade Law, Transparency Registry, http://www.uncitral.org/transparency-registry/registry/index.jspx [last accessed July 23, 2014].
5. United Nations Commission on International Trade Law, Transparency Registry Guidelines, http://www.uncitral.org/transparency-registry/en/guidelines.html [last accessed July 23, 2014].
6. United Nations Commission on International Trade Law, Transparency Registry Guidelines, http://www.uncitral.org/transparency-registry/en/guidelines.html [last accessed July 23, 2014].
7. "The arbitral tribunal shall submit the documents by email, through upload to http:// or by courier, on USB stick, CD-ROM or DVD.… The documents shall be sent electronically, in searchable pdf format, 300 dpi. The document size shall not exceed 5 MB." United Nations Commission on International Trade Law, Transparency Registry Guidelines, http://www.uncitral.org/transparency-registry/en/guidelines.html [last accessed July 23, 2014].
8. They are: Australia-Republic of Korea FIA, signed April 8, 2014; Malaysia-Turkey FTA, signed April 17, 2014; the Treaty on Eurasian Economic Union (2014), signed May 29, 2014; the Georgia-Switzerland BIT (2014), signed June 3, 2014; the Canada-Republic of Korea FTA, signed June 13, 2014; the EU-Ukraine Association Agreement, signed June 27, 2014; the EU-Moldova Association Agreement, signed June 27, 2014; the EU-Georgia Association Agreement, signed June 27, 2014; the Australia-Japan EPA, signed July 8, 2014; and the Columbia-France BIT, signed July 10, 2014. United Nations Conference on Trade and Development, Investment Policy Hub, http://investmentpolicyhub.unctad.org/IIA/MostRecentTreaties#iiaInnerMenu [last accessed July 21, 2014].

Alexandra Dosman is the Executive Director of the New York International Arbitration Center ("NYIAC"). NYIAC is a nonprofit organization formed to advance, strengthen and promote the conduct of international arbitration in New York. NYIAC also supports dialogue, discussion and debate on key issues in international arbitration for the legal, judicial, academic and business communities.

Book Reviews

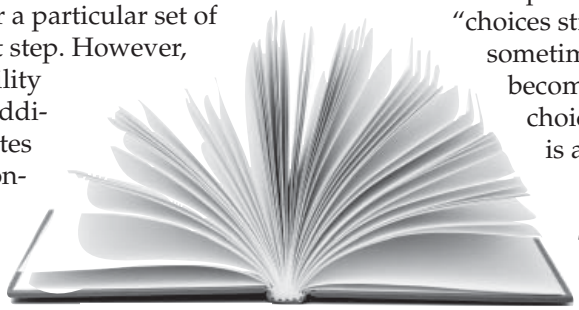
Soft Law in International Arbitration

Lawrence W. Newman and Michael J. Radine, Editors and Contributors (with Additional Contributors Paul Friedland, Damien Nyer, Thomas J. Stipanowich and Edna Sussman)

(JurisNet, LLC 2014)

Reviewed by Stefan B. Kalina

The aspirational goals of arbitration are not easily realized. Agreeing to arbitrate under a particular set of institutional rules is a necessary first step. However, achieving the desired control, flexibility and speed of proceedings requires additional legwork. Drafters and advocates must also be aware of an array of non-binding rules, protocols, checklists and best practices that address procedural concerns that arbitral rules purposely leave open. This patchwork quilt of disparate materials is known as "soft law," and it has evolved to help practitioners tailor their arbitration to the specific needs of the transaction in dispute. The editors of *Soft Law in International Arbitration* provide "the most useful of such materials," thereby making soft law accessible to all who may, and should be, interested using it. In so doing, *Soft Law in International Arbitration* helps put the freedom of arbitration to immediate and effective use.



This neat, single volume treatise is organized into five sections, each addressing a key phase of arbitration that parties are expected to confront within the broad framework of arbitral rules, and sometimes with the assistance of their arbitrators. They are: (i) drafting arbitration clauses; (ii) organizing and conducting proceedings; (iii) ethical issues; (iv) disclosure and the taking of evidence; and (v) drafting awards. As the editors point out, these areas are not, generally, subject to any detailed rules issued by the main arbitral institutions. Rather, they are areas in which parties and arbitrators can, or are expected to, exercise broad discretion afforded to them under institutional rules to craft and manage *their* process in accord with *their* transaction and resulting dispute.

Soft Law in International Arbitration thus sounds the clarion call that these areas require due attention. The editors remind experienced practitioners—as well as those newly initiated to the practice—that "particular concerns about cost, delay and inefficiency" are not resolved by agreeing, simply, to arbitrate. Indeed, as the editors effectively demonstrate in the first section of the book dealing with arbitration clauses, the initial election to arbitrate is "often treated by contract drafters as one of several boilerplate provisions that can be tacked at the back of the agreement with little or no negotiation." This leaves parties (and their advocates and arbitrators) exposed to unintended procedural consequences that they may not have sought, or worse—those they sought to avoid—when they first decided to arbitrate their future dispute. Many institutions have "helped to address this problem by developing, promoting and making available…standard clauses that can be used in connection with their arbitration rules." The editors point out that, however helpful these standard clauses may be, "choices still remain to be made by drafters, sometimes crucial ones.…" Here, soft law becomes available to assist making proper choices to ensure the arbitration sought is actually obtained.

Beyond identifying such issues, *Soft Law in International Arbitration* provides expert commentary on how to navigate the specific choices parties can, and in many instances should, consider throughout the arbitration process, from drafting arbitration clauses to drafting arbitration awards. To aid the process, the editors (and their contributors) cull from the myriad of available soft law materials those that are recognized by arbitral institutions and courts alike for their reliable guidance. For example, in the drafting process described above, the full text of the *AAA Drafting Dispute Resolution Clauses: A Practical Guide* as well as *the IBA Guidelines for Drafting International Clauses* are both provided.

Notably, the editors do not state or advocate for any particular approach to arbitrating in accord with any such guidelines. Rather, the usefulness of the book lies in the expert "issue spotting" brought to bear on the choices available in arbitration and providing "the most useful of such materials" that allow participants to make informed choices. For this reason alone, *Soft Law in International Arbitration* merits shelf space in the offices of "business users, counsel, arbitrators and provider institutions."

Yet, *Soft Law in International Arbitration* accomplishes more than offering a guiding hand on the tiller. The editors are sensitive to the evolving trends in arbitration that also resonate in the developments of soft law. In turn, readers are made aware, for example, of the tensions that exist between the "need for guidelines designed to promote more efficient resolution of conflict" with the view that "the proliferation of guidelines as leading to over-regulation and over-formalization of a process that was meant to be flexible and responsive to the needs of individual cases" (internal citation omitted). The editors thus modulate their treatment of soft law "as a

compass—a non-compulsory touchstone…rather than a straightjacket."

To do so, the editors and contributors provide insightful historical context for the various guidelines, checklists and protocols that have been prepared and disseminated over the years, including but not limited to those materials reproduced in the book. This helps explain which documents have been accepted by certain stakeholders in the process and why. This further enables the readers of *Soft Law in International Arbitration*, i.e., the consumers of those documents actually reproduced, to better understand how to effectively deploy them in order to achieve the desired level of procedural certainty.

This is illustrated in the second section of the book which discusses the organization and conduct of the commercial arbitration proceedings. In this area, the seminal *UNCITRAL Notes on Organizing Arbitral Proceedings* is cited as "among the first authoritative standards" as well as the fact that it "frequently serve[s] as the essential backbone for case management and the primary template for early preliminary hearings or pre-hearing conferences" (internal quotation omitted). Although the *UNCITRAL Notes* offer "non-binding guidance as opposed to binding rules" in the spirit of soft law, its comprehensiveness nonetheless draws concern for being part of the "creeping judicialization" trend in arbitration. In response, the ICC prepared *Techniques for Controlling Time and Costs in Arbitration* and the CCA prepared its *Protocols for Expeditious, Cost-Effective Commercial Arbitration* (internal citations omitted).

While all three documents are provided for the benefit of the reader, the differences in their respective "format and emphasis" are noted and a synthesis of how, for example, they offer "many of the same key insight for parties seeking efficiency and economy in commercial arbitration" is provided. In addition, readers are told how documents such as the *ICC Techniques* and *CCA Protocols* have led to further developments in arbitral rules and soft law. This section of the book "addresses[es] the guidelines in the broadest scope…and conclude[s] with those standards focusing on discrete elements of commercial arbitration." In addition, this section illuminates the use of administrative secretaries, made available by arbitral institutions, as "important but heretofore little-explored element of arbitration practice."

Beyond procedural concerns, *Soft Law in International Arbitration* also explores ethical issues and, specifically, how "soft law tools provide, along with applicable national law, the guidance required to foster ethical conduct…." The third section complements the procedural discussion because "[t]he integrity of the arbitration process is essential to preserve arbitration's ability to offer parties a fair forum for resolution of their disputes to maintain trust in the process." To do so, it distills the "many codes, rules and guidelines" to four of the "most prominent" soft law documents addressing ethical considerations, including obstructive tactics. Readers may confidently refer to this expertly selected section for a review of ethical issues and possible solutions.

The editors and contributors of *Soft Law in International Arbitration* also anticipate the "[d]ifferences in ethical obligations are inherent to an international forum where counsel come from different jurisdictions and often find themselves conducting arbitration seated in a third jurisdiction and physically held in another jurisdiction." The background and implementation of applicable guidelines (reproduced for ease of reference) is presented in an accessible manner that allows readers to identify and to resolve the conflicts they will surely encounter..

The fourth section of the book, about taking evidence in arbitration, highlights the fact that "rules generally leave the conduct of the proceedings with respect to evidence to the parties and arbitrators" and, consequently, "disputes and misunderstandings can arise between parties, particularly those from different legal cultures…." Accordingly, this section, too, provides the necessary soft law materials and expert guidance to bridge such divides.

The fifth and final section concerns itself with drafting awards. Typically viewed as the final phase of arbitration, the editors and contributors make the important point that "contentious issues in awards" may prolong the process and, possibly, "result in vacatur." No matter the ultimate result, they make the more subtle point that any ensuing litigation over an award "undoes the bargain struck when the parties agreed to arbitrate." Therefore, this section rounds out the book's theme and purpose by helping parties use soft law materials to realize their initial goal of achieving resolution through a process of their choosing. Consistent with book's format, it does so by presenting the pertinent soft law materials the editors and contributors have chosen as aids. These materials, "a[s] with the other guidelines in this book…fill in the spaces that substantive law and arbitration rules have intentionally left blank." More than this, they remind readers of the natural tension between rules and soft law materials, i.e., that while soft law materials—if implemented—"may restrain flexibility…they can reduce uncertainty and expensive challenges to awards." In a fitting conclusion, this section attunes all stakeholders that soft law can help "balance between flexibility and certainty," all in the name of proactive and effective arbitration.

In sum, *Soft Law in International Arbitration* is a valuable tool. It can be used to anticipate general issues or it can help fashion remedies to specific problems that arise in a particular arbitration. However one may choose to use this important book, the benefits are apparent. Moreover, the efforts undertaken by the editors and contributors to present their soft law selections in such a rich and

contextual framework should be rewarded by improved arbitration practice overall and across many jurisdictions.

Stefan B. Kalina is Counsel with Cox Padmore Skolnik & Shakarchy, LLP in New York, where his practice includes international arbitration. He may be reached at kalina@cpsslaw.com.

* * *

Guerrilla Tactics in International Arbitration

Edited by Gunther J. Horvath and Stephan Wilske

Reviewed by Edna Sussman

The subject of guerrilla tactics in international arbitration has been a focal point of both formal presentations at conferences and informal conversations throughout the international arbitration community during the last few years. Guerrilla tactics, coupled with the clashes in ethical obligations between counsel from different jurisdictions, led to a growing recognition that it was necessary to enunciate harmonized norms to assure a fair process. The development of the International Bar Association's Guidelines for Party Representatives in International Arbitration and the new arbitration rules of the London Court of International Arbitration are manifestations of the consensus that these issues had to be addressed.

Two reasons are typically offered for the changes in the practice of arbitration that have made the issue of guerrilla tactics and the disparities in ethical obligations 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. The size of the amount at issue can drive counsel over the line from zealous representation to guerrilla tactics; differences in ethical obligations that give a party an advantage are problematic. Second, as international arbitration has grown, there has been an influx of both counsel and arbitrators new to the practice. 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 of appropriate conduct and no in-group induced constraint on behavior.

Mssrs. Horvath and Wilske were early commentators on the subject of guerrilla tactics and bring a wealth of experience and knowledge to the subject. They have succeeded in eliciting the assistance of noted international arbitration practitioners, each of whom contributed a chapter to this collection. The result is a very useful set of discussions on the subject.

The book starts with an analysis of precisely what constitutes a guerrilla tactic, a term not easily defined in the arbitration context. The definition, depending on one's perspective, can range from just playing arbitration hardball to criminal acts. The authors discuss various categories of guerrilla tactics. They identify unacceptable conduct such as delay tactics, frivolous challenges, bribery, use of surveillance methods, fraud, intimidation of arbitrators and witnesses, threats of violence and blatant abuse of state authority. However, they also identify other conduct, which may or may not be viewed as a guerrilla tactic, such as withholding evidence for late production, introducing evidence through witnesses to ambush opposing counsel, disregard of professional courtesies, and excessive document requests. Interestingly, the authors also bring up the issue of guerrilla tactics by the arbitral tribunal itself and provide several examples such as being unavailable for deliberations, demonstrating bias by constantly objecting to even basic procedural orders, and, most egregiously, disseminating information about the tribunal's deliberations and thought process.

Who should be charged with the responsibility for regulating guerrilla tactics has been a central question in the debate about guerrilla tactics and what, if anything, should be done about them. The discussion offered in the book of the role that can be played by local bar associations, local courts, arbitral institutions, and the tribunal itself provides a useful analysis of their powers to regulate conduct, and the wisdom of charging any one of these players with that role. The unique issues that arise in the context of arbitrations involving states and state entities are flagged for the reader. Perhaps most importantly, the book reviews the tools to curb guerrilla tactics that may be available to each of those entities and provides step-by-step guidance in the arbitral proceeding.

The authors included an extensive consideration of what they referred to as the "bag and baggage" of national systems in the search for insights on how to deal with guerrilla tactics in international arbitration. Chapters are devoted to diverse systems of law including common law, civil law, post socialist, Asian, African, Arabic Islamic, and Southeast Asian, as well as the treatment of guerrilla tactics at international courts and institutions, including the International Court of Justice, the World Trade Organization and the Court of Arbitration for Sport.

Consideration of ethical regulations governing conduct by counsel is an essential element of any discussion of guerrilla tactics, and Catherine Rogers, the leading scholar on the subject, has contributed a thoughtful and comprehensive chapter. She highlights

the fact that there had been no ethical standards that unambiguously governs all counsel in arbitration and emphasizes the importance of such standards. However, she notes that "mechanisms and legal justifications for enforcement…remain subject to many open questions."

The authors conclude with an explanation of their objectives in organizing the book. They have achieved their own goals. The book successfully provides a categorization of guerrilla tactics, offers the perspectives of all those involved in the arbitration process, gives guidance on tools for arbitrators to consider and provides information about best practices in various jurisdictions that could potentially be of assistance in international arbitration in combating guerrilla tactics.

Those involved in international arbitration as both arbitrators and counsel will find this book both instructive and useful in fulfilling their roles most effectively. Arbitrators will find useful tips on how to control guerrilla tactics while counsel will learn what conduct is considered by the international arbitration community to be unacceptable and how they can endeavor to curb such conduct by their adversaries.

Edna Sussman, www.SussmanADR.com, is Co-Editor-in-Chief of this journal, a full-time independent arbitrator and mediator focusing on international and domestic commercial disputes, and the Distinguished ADR Practitioner in Residence at Fordham University School of Law. She serves on the arbitration and mediation panels of many of the leading dispute resolution institutions. She is Vice-Chair of the New York International Arbitration Center, former Chair of the NYSBA Dispute Resolution Section, and past Chair of the Arbitration Committees of the International Section and the Dispute Resolution Section of the American Bar Association.

Veleron Holding— U.S. Courts Will Not Follow Foreign Arbitral Confidentiality Requirements

By Laura A. Kaster

In *Veleron Holding, BV v. Morgan Stanley*,[1] the district court addressed two important questions: (1) will a U.S. court respect the total confidentiality and "utmost secrecy" imposed by a London Court of International Arbitration for any information generated in the arbitration or provided by the parties to the arbitration; and (2) can the decisions in that arbitration collaterally estop a party to the U.S. proceeding?

The case addressed two motions. First, the defendants, multiple affiliates of Morgan Stanley, sought summary judgment dismissing the claim for insider trading and market manipulation on the ground of collateral estoppel based on a foreign arbitration. Second, the plaintiff moved to unseal portions of the record that were originally filed under seal.

The Morgan Stanley defendants were relying upon an arbitration in the London Court of International Arbitration (LCIA) between Veleron affiliate corporations and BNP Paribas SA. During the pendency of the London arbitration, the District Court had permitted the U.S. litigation to proceed entirely under seal. By the time this ruling was issued, the arbitration had recently concluded but under LCIA rules, the award was to be held in confidence.

However, the District Court found that Morgan Stanley itself was not party to any private arbitration agreement nor was it permitted to cloak itself with secrecy in the U.S. Furthermore: "No principle of international comity requires this Court to conduct a proceeding to enforce the securities laws of the United States in secret simply because a related proceeding was cloaked in confidentiality."

The background facts are these: The U.S. plaintiff, Veleron, is the subsidiary of RM, a party to the LCIA arbitration. Veleron based the U.S. complaint for insider trading and market manipulation on documents improperly disclosed to it by its parent corporation in violation of the LCIA confidentiality rules. The essence of the claim was that Morgan Stanley had violated U.S. securities law by shorting stock of a company that was subject to a notice of acceleration of a margin call (loan). Morgan Stanley was the Disposal Agent obligated to sell that stock but it not only shorted the stock in advance of the sale, it informed certain select customers of the identity of the security before making a public announcement of the sale.

The London arbitration was brought by BNP to collect on the guarantee for the underlying loan from RM. RM disclosed the arbitration file to its subsidiary, Veleron.

RM was clearly violating the confidentiality of the LCIA proceeding and the LCIA specifically held the parent company had violated its rules. The District Court held that the sanctions for that conduct would be up to the London arbitrator.

The court relied on the recent holding in *Delaware Coal. For Open Gov't v. Strine*,[2] rejecting private arbitration conducted by Delaware judges, to hold that the commercial courts of the U.S. cannot constitutionally proceed in private. There is both a constitutional and common law right of access to judicial documents relevant to the performance of the judicial function. It rejected Morgan Stanley's effort to obtain "eternal privacy" as part of a "well-documented effort by private business parties to get around liberal American discovery rules by finding ways to shroud, not just dispute resolution proceedings, but evidence about disputed matters, with secrecy." (Citations omitted.)

The court also unsealed the entire file, subject to proof that individual documents might meet traditional confidentiality requirements:

> Litigation in an American court is not governed by the principle that "what happens in Vegas stays in Vegas"—or in this case, in London. Private agreements cannot be used to circumvent United States courts' policy in favor of open litigation…[3]
>
> * * *
>
> Private parties are perfectly free to decide that they will resolve disputes among themselves in private fora rather than in courts of law—and that, in connection with such dispute resolution and as between themselves, they will keep confidential everything that is said or done in connection with such dispute resolution. But they are not free to immunize materials that are relevant to some other dispute from disclosure in connection with a wholly separate dispute resolution proceeding—particularly where, as here,

> that proceeding is conducted in a court of law in a country dedicated to open proceedings.[4]

This case is one of very few cases to address the interplay of international arbitration confidentiality rules and U.S. judicial proceedings. It is important from that perspective and could have an impact on many international arbitrations when enforcement is sought in the U.S.

With respect to collateral estoppel, the court assumed that if all requirements could be met, an arbitration might provide issue preclusion. However, none of the requirements were met here because the proceedings were subject to different legal standards, the parties were different, and the issues could not have been "fully and fairly" litigated. The court found that Morgan Stanley was relying on supposition not on specific clear and necessary findings of the arbitrators on any element of the *Veleron* case against Morgan Stanley. In addition the court found that there was no full and fair opportunity to raise the issues against Morgan Stanley, which was not party to the arbitration. The court also stated, in dicta, that collateral estoppel is precluded, where the discovery available in a prior proceeding was significantly narrower than the discovery available in the U.S. court or new material discovered in the court action demonstrates that issues were not addressed. If the analysis that limits on discovery create an impediment to issue preclusion were generally adopted, it could significantly limit the availability of issue preclusion based on arbitration in many court cases. However, this analysis does not correlate with the holdings of many courts that the arbitration forum affords a full and fair opportunity to present a case even though discovery in arbitration is more limited because the parties had bargained for that limitation when they agreed to arbitration. Under this analysis, at least as between the same parties, issue preclusion should not be foreclosed.

For practitioners and arbitrators concerned about confidentiality in arbitration and the collateral estoppel impact of arbitral decisions, *Veleron* is worth reviewing.

Endnotes

1. 2014 WL 1569610 (SDNY April 16 2014).
2. 733 F.3d 510, 521 (3d Cir. 2013).
3. 2014 WL 1569610 at *1.
4. *Id* at *8.

Laura A. Kaster, is a Co-Editor-in-Chief of this journal, an arbitrator and mediator in the Greater NY area, a Fellow in the College of Commercial Arbitrators, and an IMI Certified and CEDR Accredited mediator. She received the NJSBA's 2014 Boskey Award for ADR Practitioner of the Year. She can be reached at Appropriate Dispute Solutions, Princeton, NJ, www.AppropriateDisputeSolutions.com.

* * *

CEATS, Inc. v. Continental Airlines, Inc.—Using an Objective Reasonableness Standard, the Federal Circuit Finds That a Mediator's Duty to Disclose Potential Conflicts Is Analogous to a Judge's Duty to Recuse Under 28 U.S.C. §455(a)

By Barbara A. Mentz

CEATS, Inc. v. Continental Airlines, Inc., et al. ("*CEATS*")[1] was an appeal to the United States Court of Appeals for the Federal Circuit from a District Court's denial of plaintiff's motion under Federal Rule of Civil Procedure Rule 60(b) to overturn a jury verdict. Although there was a trial, prior to that trial there was a mediation by a court-appointed mediator. The motion was based on the mediator's failure to disclose potential conflicts. The District Court found that the court-appointed mediator had no duty to disclose his relationship with one of the law firms representing some of the defendants.[2] The Federal Circuit disagreed with that finding and found that the mediator breached his duty to disclose "all actual and potential conflicts of interests that are reasonably known to the mediator and could *reasonably be seen* as raising a question about the mediator's impartiality."[3] This case is unusual because the relief sought for the mediator's noncompliance with his disclosure requirements was to seek to overturn a judgment entered on a jury verdict under Rule 60(b)(6) rather than a challenge to a mediation result. Although the Federal Circuit found that the mediator failed to comply with his disclosure requirements, the Court found that based on the record before it the nondisclosure did not constitute extraordinary circumstances that would justify overturning the jury verdict under Rule 60(b)(6).[4]

Background

Plaintiff brought a patent infringement action against defendants in the Eastern District of Texas. The District Court ordered the parties to mediation and former magistrate judge Robert Faulkner, a JAMS mediator, was appointed as the mediator. Two mediation sessions were held within 10 days of each other, both of which were unsuccessful. Nine months later an 8-day jury trial was conducted. During the trial additional mediation sessions were held but the mediation did not result in a settlement. At the end of the trial the jury found for the plaintiff on patent infringement, but found that the patents were invalid. Plaintiff filed an appeal of the jury's finding of the invalidity of the patents and while the appeal was pending also filed a motion before the District Court for relief from the judgment, *inter alia*, under Rule 60(b)(6) (relief may be granted "for any other reason that justifies relief"). The basis for the motion with respect to mediator

Faulkner was his failure to disclose his relationship with the law firm (hereinafter the "Law Firm") that represented some of the defendants in *CEATS.* Plaintiff asserted that after judgment was entered in *CEATS* it learned of the mediator's relationship with the Law Firm from a news article. The article discussed a lawsuit filed against Mr. Faulkner and the Law Firm stemming from an unrelated arbitration that had been filed three years before the *CEATS* action and continued during the time the mediation in *CEATS* was taking place.

During the pendency of the *CEATS* case, issues arose about Mr. Faulkner in an earlier unrelated arbitration. Mr. Faulkner served as an arbitrator in a matter in which he issued a multi-million dollar arbitration award. The award was in favor of a party who was represented by the same Law Firm that later represented some of the defendants in the *CEATS* action. The party against whom the award was rendered moved to vacate the award in a Texas state court. There were lengthy proceedings in which Mr. Faulkner testified in support of the arbitration award and about his relationships with the Law Firm that represented a party in whose favor the award had been rendered and his relationship with an individual partner in the Law Firm. The testimony revealed that although Mr. Faulkner made initial disclosure in the arbitration that he previously participated in arbitrations and mediations in which attorneys from the Law Firm represented parties, he did not disclose any other contact with the Law Firm. In particular, he did not disclose that he had an active business relationship with the Law Firm. This relationship included making a business development presentation to the Law Firm and being hired as a neutral by the Law Firm. Moreover, when a partner from the Law Firm made an appearance in the arbitration four days after his initial disclosure, Mr. Faulkner did not change his disclosure to indicate that he knew the partner even though he had an "enduring" social relationship with the partner, including expensive outings and gifts. The record showed that during the course of the arbitration he acted as if he did not know the partner. The case was argued before the Texas Court of Appeals two months after Mr. Faulkner was appointed mediator in the *CEATS* action and six months before the first mediation. The partner from the Law Firm who argued on behalf of its client that the award should be upheld, defending Mr. Faulkner's decision not to disclose his relationships, was the same partner who represented some of the defendants in the *CEATS* action. Between the first and second mediation sessions, the Texas Court of Appeals vacated the award on the grounds that Mr. Faulkner failed to disclose his relationship with the Law Firm and with a partner in the Law Firm and that such failure violated his obligations as an arbitrator and tainted the arbitration award.[5]

When Mr. Faulkner was appointed and during the time he served as the mediator in *CEATS*, he did not disclose any of the facts surrounding the earlier arbitration, including the decision of the Texas Court of Appeals.

In denying plaintiff's Rule 60(b)(6) motion, the District Court in *CEATS* found that the mediator did not have a duty to disclose such facts, finding that a reasonably objective person would not have wanted to consider the circumstances surrounding that matter in deciding whether to object to Mr. Faulkner's appointment as a mediator. The Federal Circuit disagreed with the District Court's finding.[6]

Discussion

The Court found that mediators are bound by disclosure requirements similar to the recusal requirements of judges under 28 U.S.C. §455 (a) ("Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.") and that a mediator's duty to disclose potential conflicts where impartiality might reasonably be questioned is analogous to a judge's duty to recuse under 28 U.S.C. §455(a).[7] The Court noted that, "Indeed, all mediation standards *require* the mediator to disclose any facts or circumstances that even reasonably create a presumption of bias."[8] The Court recognized that mediators perform different functions than judges and arbitrators, but stressed the "vital" role that mediators play in the litigation process, the heavy dependence the courts have on the mediation process to help resolve disputes and the need for courts to feel confident that they are referring the parties to a fair and efficient process. Moreover, because of the intimate relationship parties have with the mediator, the Court found that it is critical that potential mediators not project any reasonable hint of bias or partiality and that parties, who are encouraged to share confidential information with the mediator, have absolute trust that their confidences will be preserved.[9]

Because the Court found that the mediator's disclosure requirements are similar to the recusal requirements imposed on judges, the Court analyzed the mediator's disclosure requirements under the Supreme Court decision in *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988). In *Liljeberg*, the Supreme Court held that a district court judge violated 28 U.S.C. §455(a) by failing to recuse himself. The Supreme Court found that a violation itself did not automatically entitle the movant to relief under Rule 60(b)(6), but that relief should be granted if such action is appropriate to accomplish justice and only in "extraordinary circumstances." The Supreme Court set forth three criteria for courts to use in determining whether a judgment should be vacated under Rule 60(b)(6) for a violation of §455(a).[10] The Court in *CEATS* used the *Liljeberg* criteria in analyzing whether to affirm the District Court's decision.

As a threshold matter, the Court found that based upon the totality of the facts and circumstances surrounding the unrelated litigation, the mediator breached his duty to disclose "all actual and potential conflicts of interest that are reasonably known to the mediator and could *reasonably be seen* as raising a question about the mediator's impartiality," citing the ABA Model Standards of Conduct for Mediators § III.C (2005) (emphasis added by the Court).[11] The totality of facts that the Court considered were: a) at the same time Mr. Faulkner served as a court-appointed mediator, his relationship with the Law Firm and one of its partners was directly at issue in a state appellate court; b) a partner at the Law Firm who was actively defending Mr. Faulkner's disclosure decisions at the same time Mr. Faulkner was mediating the *CEATS* case was the same partner who served as the lead trial counsel for some of the defendants in the *CEATS* action; c) the ongoing defense of the arbitration award by the Law Firm reasonably could give rise to the appearance of impropriety; d) the mere fact that Mr. Faulkner testified in support of the arbitration award and was asked about his relationship with the Law Firm and its clients and one of its partners further emphasized the need for disclosure of these facts; e) the Texas Court of Appeals decision, issued while the *CEATS* action was ongoing, that Mr. Faulkner's relationship with the Law Firm and one of its partners was a disqualifying, social and business relationship which could reasonably be seen as raising a question about the mediator's impartiality. Given these facts, the Court found it irrelevant that the Law Firm partner with whom Mr. Faulkner had a relationship was not counsel of record in the *CEATS* action.

Having determined that Mr. Faulkner had a duty to disclose, the Court next considered the three criteria enunciated in *Liljeberg* to determine whether the case presented an extraordinary circumstance where the court should grant relief from judgment under Rule 60(b)(6). The Court determined that plaintiff failed to satisfy the first criteria, the risk of injustice to the parties in *CEATS*, because plaintiff was ultimately able to fully and fairly present its case before an impartial judge and jury and plaintiff admitted that there was no evidence on the record that suggested that the mediator wrongfully disclosed confidential information. It is of note that the plaintiff in the *CEATS* action never sought discovery in an attempt to determine whether such wrongful disclosure had occurred. The Court determined that plaintiff failed to satisfy the second criteria, the risk of injustice in other cases. Although the Court expressed concern about failing to provide a remedy for a mediator's duty to disclose, on the record before it the Court did not believe that there was a sufficient threat of injustice in other cases to justify the extraordinary step of setting aside a jury verdict. The Court found that the mere fact that a final judgment after a full jury trial will not be overturned every time a mediator fails to disclose a potential conflict is not likely to affect the disclosure decisions of other mediators. Moreover, the Court noted that, beyond his failure to disclose, there was no evidence that the mediator acted inappropriately or ineffectively when mediating the case. The Court determined that plaintiff failed to satisfy the third criteria, the risk of undermining public confidence in the mediation process. The Court did find that public confidence in the mediation process would be undermined to some extent by the Court's failure to put greater teeth in the mediator's disclosure obligations. However, it did not find that fact justified the extraordinary relief sought in *CEATS* based upon the record before it. Because plaintiff had the opportunity to present its case to an unbiased judge and impartial jury the Court did not believe that refusing to grant the relief would undermine public confidence in the judicial process.[12] It is clear from the Federal Circuit's decision that relief under Rule 60(b)(6) could be available based upon a mediator's non-compliance, but in *CEATS* there was no evidence, and in fact there had been no discovery on the issue, that the mediator shared any confidential information with the Law Firm that he had gained in the mediation from the plaintiff or that he engaged in any other impropriety,

This is an unusual case in which the failure to disclose during an unsuccessful mediation threatened the judgment after trial. Although that judgment was maintained, the rule of disclosure established here is strict and clear. Disclosure must parallel a judge's duty to recuse under 28 U.S.C. §455(a).

Endnotes

1. __F. 3d__, 2014, WL 2848630 (C.A. Fed. (Tex.)).
2. *Id.* at *1, citing *CEATS, Inc. v Continental Airlines, Inc. ("Rule 60(b) Order")*, No. 6:10-cv-120, ECF No. 1101, slip op. at 16 (E.D. Tex. June 28, 2013). *CEATS* was a patent infringement case. Because the denial of a Rule 60 (b) motion is a procedural question, the Court reviewed the District Court's decision using the Fifth Circuit's abuse of discretion standard. *Id.* at *3.
3. *Id.* at *7, citing ABA Model Standards of Conduct for Mediators § III.C (2005) (emphasis added by the Court).
4. *Id.* at *9.
5. *Id*. at *1-*2.
6. *Id*. at *6.
7. *Id*. at *4-*6. To the extent that the District Court appeared to imply a different disclosure requirement for the mediator and judges because the mediator had no authority to make or influence legal or factual rulings in the case, the Court rejected that implication. *Id*. at *6.
8. *Id*. at *5, citing ABA Model Standards of Conduct for Mediators § III.C (2005). The Court also cited to E.D. Tex Civ. R. App'x H ¶ IV making mediators who serve in that district subject to the ABA Model Standards of Conduct for Mediators; JAMS Int'l Mediation Rule 6 (2011) (mediator will disclose to JAMS and to the parties, *inter alia*, "whether there exists any fact or circumstance reasonably likely to create a presumption of bias); Unif. Mediation Act § 9(a) (1)-(2) (2001) (requiring disclosure of "facts that a reasonable individual would consider likely to affect the impartiality of the mediator"); 1 Alt. Disp. Resol. §4.44

(3rd ed.) (Sep. 2013) ("A mediator must disclose all actual and potential conflicts of interest reasonably known to the mediator"); and, Tex. Mediator Standards of Practice and Codes of Ethics §4 (Prior to commencing mediation, "the mediator shall make full disclosure of any known relationship with their parties or their counsel that may affect or give the appearance of affecting the mediator's neutrality"). *Id.* at note 4.

9. *Id.*

10. 486 U.S. 847, 863-64 (1988). The criteria are: (1) the risk of injustice to the parties in the particular case; (2) the risk that the denial of relief will produce injustice in other cases; and, (3) the risk of undermining the public's confidence in the judicial process.

11. The Court did not decide whether any one of the facts, standing alone, was sufficient to require disclosure. *Id.* at *7.

12. *Id*. at *7-*9.

Barbara A. Mentz, bmentz@mentz.org, is an arbitrator and mediator. She is a Fellow of the Chartered Institute of Arbitrators and a member of arbitration and mediation panels, including arbitration panels for the American Arbitration Association, the International Centre for Dispute Resolution, the International Institute for Conflict Prevention and Resolution (CPR), FINRA and the National Futures Association and mediation panels for the state courts in New York and New Jersey and the United States District Court for the Southern District of New York. She is the Treasurer of the NYSBA's Dispute Resolution Section. More information is available at www.mentzadr.com.

* * *

Cellu Beep, Inc. v. Telecorp Communications, Inc.[1]—Ruling on Statute of Limitation by Arbitrator Did Not Establish Bias and Decision That Mediation Did Not Toll Limitations and Was Not Manifest Disregard

By Laura A. Kaster

In the underlying dispute in this case, Cellu Beep, a distributor of wireless equipment and services, raised a dispute with Telecorp (which was ultimately AT&T Wireless) by filing a lawsuit in 2003. However, their agreement required a step process including good faith negotiation, then mediation, and arbitration if mediation failed. A motion to dismiss the lawsuit in favor of arbitration was filed and succeeded in 2004. Cellu Beep did initiate the step process and the parties negotiated in good faith from 2005 to 2008 and then engaged in an unsuccessful mediation. Cellu Beep commenced an arbitration in July 2012. In response, Telecorp's answering statement included a limitations defense. Cellu Beep then filed an amended claim and Telecorp filed a motion to dismiss that did not include the limitations issue. Unprompted by the filing, the arbitrator asked Telecorp if it was not also seeking dismissal based on limitations. Telecorp included the limitations in its reply submission and Cellu Beep was permitted to file a responsive brief.

The arbitrator ruled that the matter was barred by the limitations and relying on New York law found that "the running of the limitations period [was] not affected by either the negotiation or the mediation phase provided in [the Agreement]." Cellu Beep filed a motion with the district court to vacate the award on the basis of evident partiality and manifest disregard of law. Telecorp cross-petitioned for confirmation of the award. The district court rejected Cellu Beep's challenge and confirmed the award.

Analysis and Unfortunate Dicta

No Bias Established by Ruling on Tolling

Relying on the FAA provision that permits vacation of an award "where there was evident partiality or corruption in the arbitrators," 9 U.S.C. § 10(a)(2), Cellu Beep asserted that in ruling on the limitations issue which had not been raised in the motion to dismiss, the arbitrator demonstrated evident partiality. Noting that under New York law Cellu Beep had to show by clear and convincing evidence that, considering all the circumstances, a reasonable person would *have* to conclude that an arbitrator was partial to one side, the court rejected Cellu Beep's contention as speculation and conjecture. In dicta the court stated that:

> Soliciting briefing on a potentially dispositive issue, especially when both parties are afforded an opportunity to brief the matter, is certainly legitimate. In fact, it is within the purview of the arbitrator to dismiss a case *sua sponte* on statute of limitations grounds, even without granting petitioner a briefing opportunity.

The case the court cited for this unnecessary proposition was not an arbitration decision but one relating to judicial authority.[2] Moreover, *Walters*, the cited case, itself suggests that the law discourages judges from entering *sua sponte* decisions and also presupposes that the issue is raised by the submission of the plaintiff or otherwise in the pleadings:

> For instance, although the statute of limitations is ordinarily "an affirmative defense that the defendant must raise at the pleadings stage and that is subject to rules of forfeiture and waiver," *John R. Sand & Gravel Co. v. United States,* 552 U.S. 130, 133, 128 S.Ct. 750, 169 L.Ed.2d 591 (2008), district courts may dismiss an action *sua sponte* on limitations grounds

> in certain circumstances where "the facts supporting the statute of limitations defense are set forth in the papers plaintiff himself submitted," *Leonhard v. United States*, 633 F.2d 599, 609 n. 11 (2d Cir.1980) (cited in *Snider v. Melindez*, 199 F.3d at 112); *but cf. Davis v. Bryan*, 810 F.2d 42, 44 (2d Cir.1987) (discouraging *sua sponte* consideration of limitations defense)…

Telecop had raised the issue, just not in the motion to dismiss, and the arbitrator gave Cellu Beep an opportunity to respond. On these facts, it is hard to see how Cellu Beep could establish bias.

No Manifest Disregard Based on Ruling That Mediation Did Not Toll Limitations

The district court also addressed and rejected the claim that in failing to rule that the mediation had tolled the limitations period, the arbitrator had acted in manifest disregard of the law. It acknowledged the continued vitality of manifest disregard in the Second Circuit despite *Hall Street* and *Stolt-Nielsen*.[3] However, because the law was admittedly unsettled on the impact of mediation on tolling limitations, there could be no manifest disregard. Manifest disregard requires that the arbitrator knowingly ignore settled law that clearly applies to the issue.

This is an interesting decision in an area where there is not a wealth of arbitration law.

Endnotes

1. 2014 WL 3585515 (S.D.N.Y. July 18, 2014).
2. *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 293 (2d Cir. 2011).
3. *See Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584–91 (2008) (holding that §§ 10 and 11 of the FAA specify the exclusive grounds for vacating, modifying, or correcting an arbitration award); *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 672 n.3, 130 S. Ct. 1758, 176 L.Ed.2d 605 (2010).

Laura A. Kaster is a Co-Editor-in-Chief of this journal, an arbitrator and mediator in the Greater NY area, a Fellow in the College of Commercial Arbitrators, and an IMI Certified and CEDR Accredited mediator. She received the NJSBA's 2014 Boskey Award for ADR Practitioner of the Year. She can be reached at Appropriate Dispute Solutions, Princeton, NJ, www.AppropriateDisputeSolutions.com.

* * *

Union Carbide Canada Inc. v Bombardier Inc.—Mediation Is Inherently Confidential Yet Mediation Communications Are Admissible in Court Proceedings to Enforce a Settlement Agreement Allegedly Made in Mediation

By Barry Leon

In *Union Carbide Canada Inc. v. Bombardier Inc.*,[1] the Supreme Court of Canada unanimously held that an absolute confidentiality clause in a mediation agreement does not necessarily preclude a party from bringing court proceedings to enforce a settlement allegedly reached in the mediation.

The parties were involved in long, multi-million dollar civil litigation about defective gas tanks used on Sea-Doo personal watercraft. The Respondent claimed that the tanks supplied by the Appellant were unfit for their intended use and sued the Appellant for damages in the Quebec Superior Court. The parties agreed to private mediation and signed a standard mediation agreement containing the following confidentiality clause: "Nothing which transpires in the Mediation will be alleged, referred to or sought to be put into evidence in any proceeding."

The Appellant submitted a settlement offer which the Respondent subsequently accepted. Two days later, the Appellant asserted that the parties had reached a global settlement. The Respondent replied that the settlement was for the particular litigation only.

The Respondent moved in the Quebec Superior Court to enforce the settlement. In response, the Appellant moved to strike allegations contained in the Respondent's motion on the ground that they referred to events that took place in the mediation.

The court struck certain allegations because they referred to discussions that occurred or submissions that were made in the mediation.

The Quebec Court of Appeal allowed the appeal from that decision. It held that when mediation results in an agreement, communications made in the mediation cease to be privileged. Settlement privilege does not prevent a party from producing evidence of confidential communications in order to prove the existence of a disputed settlement agreement arising from the mediation or to assist in the interpretation of the agreement. The Appellant appealed to the Supreme Court of Canada.

The Supreme Court held that at common law settlement privilege is a rule of evidence that protects communications exchanged by the parties as they try to settle a dispute and applies even in the absence of statutory provisions or contractual clauses with respect to confidentiality. The rule, the Court held, promotes honest and frank discussions between the parties, which can make it easier to reach a settlement. However, a communication that leads to a settlement ceases to be privileged if disclosing it is necessary to prove the existence or scope of the settlement.

The Court noted that confidentiality is inherent in mediation in that the parties are typically discussing a settlement. This means that their communications are protected by the common law settlement privilege. However, parties can tailor their confidentiality requirements by contract to exceed the scope of that privilege.

The Court noted that settlement privilege and a confidentiality clause are not the same, and they may in some circumstances conflict. The former is a rule of evidence, while the latter is a binding agreement; they do not afford the same protection, nor are the consequences for breaching them necessarily the same. The Court reasoned that while allowing parties to freely contract for confidentiality protection furthers the valuable public purpose of promoting settlement, contracting out of the exception to settlement privilege that applies where a party seeks to prove the terms of a settlement might prevent parties from enforcing the terms of settlements they have negotiated.

The Court held that to determine whether an absolute confidentiality clause in a mediation agreement displaces this common law exception to settlement privilege, one must begin with an interpretation of the agreement and ask whether the confidentiality clause actually conflicts with settlement privilege or with the recognized exceptions to that privilege. Where parties agree to greater confidentiality protection than is available at common law, the will of the parties should presumptively be upheld (absent concerns such as fraud or illegality).

However, the mere fact of signing a mediation agreement that contains a confidentiality clause does not automatically displace the settlement privilege and its exceptions. Where an agreement could have the effect of preventing the application of a recognized exception to settlement privilege, its terms must be clear.

In this case, the mediation agreement showed a common intention of the parties that what transpired in the mediation would be confidential. However, the nature of the contract, the circumstances in which it was formed and the contract as a whole revealed that the parties did not intend to disregard the usual rule that settlement privilege can be dispensed with in order to prove the terms of a settlement. The mediation agreement was signed on the eve of the mediation with the apparent purpose of settling an ongoing dispute. It was a standard form agreement provided by the mediator, and neither party amended it or added any provisions relating to confidentiality. There was no evidence that the parties thought they were deviating from the settlement privilege that usually applies. The Court held that absent an express provision to the contrary, it is unreasonable to assume that parties who have agreed to mediation for the purpose of reaching a settlement would renounce their right to prove the terms of the settlement. Consequently, parties may produce evidence insofar as it is necessary in order to prove the terms of the settlement.

The Court had regard to the United Nations Commission on International Trade Law's Model Law on International Commercial Conciliation, although the province of Quebec has not implemented it. The Supreme Court noted that jurisdictions in 14 countries with both common law and civil law, including the Canadian provinces of Ontario and Nova Scotia, have implemented the Model Law, which provides that "[u]nless otherwise agreed by the parties, all information relating to the conciliation proceedings shall be kept confidential, except where disclosure is required under the law *or for the purposes of implementation or enforcement of a settlement agreement*." (Emphasis added by the Court.)[2]

The Court noted that this provision recognizes the need for confidentiality in the settlement context, but that parties may enter into their own agreements in this regard, and it indicates widespread acceptance in both common law and civil law jurisdictions of an exception to settlement privilege where a party seeks to prove the existence or the terms of a settlement.

An important issue for those involved in mediation, particularly mediators, that the Supreme Court did not address is one that was highlighted by one of the interveners (*amicus curiae*), Arbitration Place, an arbitration hearing center in Toronto with neutrals engaged in arbitration and mediation, in its application for leave to intervene in the appeal.

Arbitration Place noted that it is standard for the confidentiality clause in a mediation agreement to impose duties of confidentiality on the mediator as well as the parties, and to guarantee that the mediator cannot be called to testify on the discussions at mediation. The confidentiality clause at issue on the appeal provided that "The recollections, documents and work product of the Mediator will be confidential and not subject to disclosure or compellable as evidence in any proceeding."

Can mediators be compelled or even permitted to give evidence for one of the parties against another?

In *Rogacki v. Belz et al.*,[3] Madam Justice Abella of the Ontario Court of Appeal (as she then was, now on the Supreme Court of Canada) adopted the following passage from Jonnette Watson Hamilton, "Protecting Confidentiality in Mandatory Mediation: Lessons from Ontario and Saskatchewan."[4]

> One of the results of requiring mediators to testify or produce documents may be a perception that the mediator, the program or the process itself does not keep confidences. While such a perception might normally cause parties to avoid mediation, they cannot do so where it is mandatory. They might, however, treat mediation as a mere formality.
>
> Treating mediation as a formality would frustrate the goals of annexing it to the legal system. The goals of mandatory mediation include efficiency improvements for court systems and administrators by relieving case load pressures and reducing delay and cost for litigants, qualitative improvements for participants through more satisfying or more appropriate procedures and outcomes, relationship preservation and improvement and community and responsibility building. Indeed, if participation in mediation becomes merely an empty gesture, then the legal system will become less efficient, and the parties less satisfied rather than more (citations omitted).

Many mediation agreements are drafted by the mediator, and are signed by the mediator as well. The mediation agreement is this case was a letter from the mediator to the litigants.

This important issue awaits to be determined another day.

Mediation is well accepted and widely used in Canada.

For now, parties involved in mediation in Canada can take comfort in the key determinations by the Supreme Court of Canada on this appeal, namely that mediation is inherently confidential and second, that a party asserting the existence or terms of a settlement can rely on what occurred in the mediation in court proceedings to enforce the settlement.

Endnotes

1. 2014 SCC 35. (This case note is based in part on the Supreme Court of Canada's official summary of the judgment).
2. *Id. at para. 52. UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002* (2004), at p. 5.
3. (2003) O.J. No. 3809 (Ont. C.A.).
4. (1999) 24 Queen's L.J. 561 at p. 574.

Barry Leon is a Partner and Head of the International Arbitration Group at Perley-Robertson, Hill & McDougall LLP in Ottawa, Canada. He is an IMI Certified Mediator, Fellow of the Chartered Institute of Arbitrators, and Chair of ICC Canada. Barry is an arbitrator and mediator with Arbitration Place, www.arbitrationplace.com (and a member of its Advisory Board), and ADR Chamber, www.adrchambers.com. His bio is at www.perlaw.ca/en/expertise/international-arbitration. He can be reached bleon@perlaw.ca.

Section Committees and Chairs

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

ADR in the Courts
Stephen A. Hochman
600 Lexington Avenue, 15th Fl.
New York, NY 10022-6018
shochman@prodigy.net

Robert A. Rubin
McCarter & English, LLP
245 Park Avenue, 27th Fl.
New York, NY 10167
rrubin@mccarter.com

ADR within Governmental Agencies
Pamela R. Esterman
Sive Paget & Riesel PC
460 Park Ave
New York, NY 10022-1906
pesterman@sprlaw.com

Charles Eric Miller
Sills, Cummis & Gross, P.C.
30 Rockefeller Plaza
New York, NY 10112
cmiller@sillscummis.com

Arbitration
William L. D. Barrett
Fulton Rowe & Hart
1 Rockefeller Plaza, 22nd Fl.
New York, NY 10020
wldbarrett@aol.com

Abigail J. Pessen
Dispute Resolution Services
372 Central Park West
New York, NY 10025
abigailpessen@gmail.com

Blog Master
Geri S. Krauss
Krauss PLLC
1 North Broadway, Ste. 1001
White Plains, NY 10601-2325
gsk@kraussny.com

Collaborative Law
Harriette M. Steinberg
Harriette M. Steinberg, P.C.
675 Old Country Road
Westbury, NY 11590-4503
hms@lawyersonli.com

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

Deborah Masucci
20 Polhemus Place
Brooklyn, NY 11215
masuccid11@gmail.com

Diversity
Carolyn E. Hansen
P.O. Box 801
Stone Ridge, NY 12484-0801
attyhansen@earthlink.net

Alfreida B. Kenny
Law Office of Alfreida B. Kenny
111 John Street, Ste. 800
New York, NY 10038-3101
abkenny@abkenny.com

Ethical Issues and Ethical Standards
Barry A. Cozier
LeClair Ryan
885 Third Avenue, 16th Fl.
New York, NY 10022
barry.cozier@leclairryan.com

Daniel F. Kolb
Davis Polk & Wardwell
450 Lexington Avenue
New York, NY 10017-3911
daniel.kolb@davispolk.com

International Dispute Resolution
John N. Fellas
Hughes Hubbard & Reed LLP
One Battery Park Plaza
New York, NY 10004
fellas@hugheshubbard.com

Richard L. Mattiaccio
Squire Patton Boggs LLP
30 Rockefeller Plaza
23rd Floor
New York, NY 10112
richard.mattiaccio@squirepb.com

Legislation
Kathleen Marie Scanlon
Law Offices of Kathleen M. Scanlon PLLC
120 E 79th St., Ste 2e
New York, NY 10075-0319
kscanlon@adradvocate.com

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

Mediation
Irene C. Warshauer
60 East 42nd St., Ste. 2527
New York, NY 10165
icw@irenewarshauer.com
David C. Singer
Dorsey & Whitney LLP
51 West 52nd Street
New York, NY 10019-6119
singer.david@dorsey.com

Membership
Elizabeth Jean Shampnoi
Stout Risius Ross, Inc. (SRR)
120 West 45th Street, Ste. 2800
New York, NY 10036
eshampnoi@srr.com

Richard H. Silberberg
Dorsey & Whitney LLP
51 West 52nd Street
New York, NY 10019
silberberg.richard@dorsey.com

Negotiation
Norman Solovay
The Solovay Practice
260 Madison Avenue
New York, NY 10016
nsolovay@solovaypractice.com

Peter J. Bernbaum
Law Office of Peter Jay Bernbaum
5 Acker Drive
Rye Brook, NY 10573-1719
rockclock@aol.com

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

Sherman W. Kahn
Mauriel Kapouytian Woods LLP
27 West 24th Street, Ste. 302
New York, NY 10010
skahn@mkwllp.com

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

Education
Jacqueline Nolan-Haley
Fordham Univ. School of Law
140 West 62nd Street
Lincoln Center
New York, NY 10023-7407
jnolan-haley@mail.lawnet.fordham.edu

Liaison and District Rep Coordination
Marc J. Goldstein
Marc J Goldstein Litigation & Arbitration Chambers
One Rockefeller Plaza, 11th Fl.
New York, NY 10020-1513
goldstein@lexmarc.us

New Lawyers and Law Students
Asari A.C. Aniagolu
Arent Fox LLP
1675 Broadway
New York, NY 10019-5820
asariani@gmail.com

Ross Kartez
Franzino & Scher, LLC
900 Third Avenue, 7th Fl.
New York, NY 10022
rkartez@franzscherlaw.com

Speaker's Bureau Special Committee
Marc Owen Sheridan
Markus & Sheridan, LLP
116 Radio Circle, Ste. 304
Mount Kisco, NY 10549
marc@mslawny.com

Website
Alexander David Walden
Bryan Cave LLP
1290 Avenue of the Americas
New York, NY 10104-0101
alexander.walden@bryancave.com

Joan D. Hogarth
153 Fairview Avenue
South Orange, NJ 07079
jnnhogarth@aol.com

Hui Liu
Morrison & Foerster LLP
250 West 55th Street
New York, NY 10019
hliu@mofo.com

Escape the Fray

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

Enlist in the Dispute Resolution Section

Find out how you can:

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

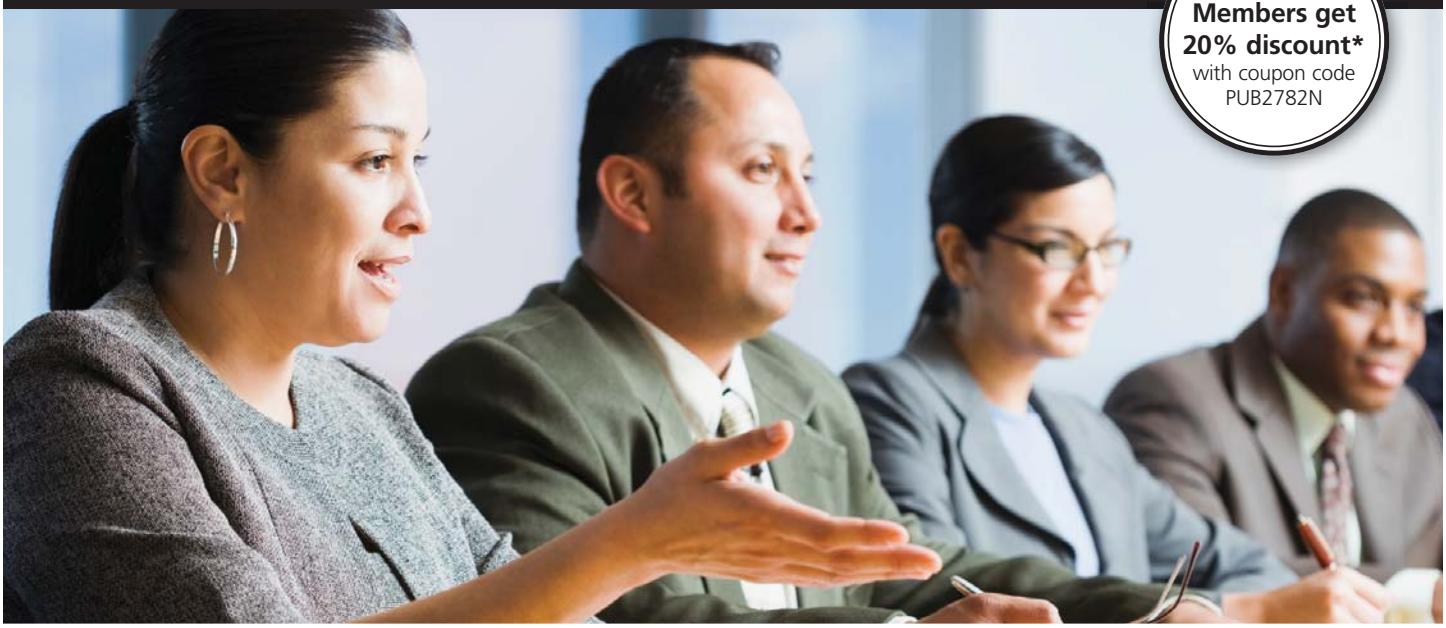
For more information visit www.nysba.org/drs and join today at drs@nysba.org or call 518-463-3200

Accommodations for Persons with Disabilities:
NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact the Bar Center at (518) 463-3200.

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

From the NYSBA Book Store

Section Members get 20% discount* with coupon code PUB2782N



Arbitration and Mediation

(Forms on CD)

AUTHORS

Joseph A. DiBenedetto, Esq.
Leona Beane, Esq.

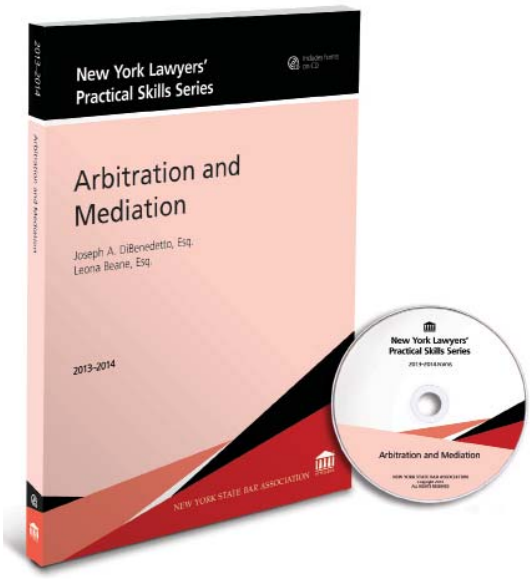
Arbitration and Mediation examines the two most common forms of alternative dispute resolution. This practice guide resolves the misconception that these two procedures are interchangeable by discussing their differences and providing examples of when each procedure should be used.

Arbitration and Mediation provides useful practice tips on navigating arbitration hearing procedures and describes how mediation is used to resolve disputes.

Complete with valuable practice pointers, sample arbitration forms and appendices, this practice guide also includes **Forms on CD**.

CONTENTS AT A GLANCE

Enforceability of Arbitration Agreements
Hearing Procedures
Procedure After Decision Is Rendered
Attorney-Client Fee Disputes
Current Uses of Mediation to Resolve Disputes
Confidentiality and Ethics
Mediation Provisions in Agreements
Appendices



PRODUCT INFO AND PRICES

2013-2014 / about 110 pp., softbound
PN: 4023

NYSBA Members	**$110**
Non-members	$125

$5.95 shipping and handling within the continental U.S. The cost for shipping and handling outside the continental U.S. will be based on destination and added to your order. Prices do not include applicable sales tax.

***Discount good until November 14, 2014**

Get the Information Edge

NEW YORK STATE BAR ASSOCIATION
1.800.582.2452 www.nysba.org/pubs Mention Code: PUB2782N

NYSBA

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

ADDRESS SERVICE REQUESTED

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

ANNUAL MEETING 2015

SAVE THE DATE

January 26 – 31, 2015

New York Hilton Midtown
1335 Avenue of the Americas,
New York City

Dispute Resolution Section Program

Thursday, January 29, 2015

For more information, go to www.nysba.org