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# New York Dispute Resolution Lawyer

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

## Message from the Chair

David C. Singer

In recent years, more than four million cases typically are filed each year in New York State courts. At the same time, the judiciary has been challenged by budget cuts and has had to navigate a difficult fiscal landscape.

In 2013, more than 2.3 million cases filed in New York courts involved *pro se* litigants, who have had to navigate the New York State court system on their own. In that same year, the New York Legal Aid Society was compelled to turn away approximately eight out of ten potential clients due to insufficient resources. Low interest rates have resulted in diminished returns on New York's IOLTA account, further contributing to the lack of resources available to meet the demand of those who cannot afford counsel.

Alternative dispute resolution through mediation and arbitration must continue to play an increasingly important role in providing access to justice in New York. As we all know, it can be more accessible to *pro se* litigants, less expensive and achieve final results more quickly. For many years, a substantial majority of civil cases filed in New York State courts have been filed in New York City Civil courts or City and District courts located outside of New York City. Such courts handle civil, housing and small claims matters, including commercial claims. Claims filed in Small Claims Courts in New York State alone have accounted for a large percentage of all New York State court (civil) filings. Of cases filed in Small Claims Court, the vast majority are resolved by arbitration. In addition, in 2013, pursuant to the Unified Court System's Fee Dispute Resolution Program, 614 attorney–client fee disputes were arbitrated.

The use of mediation in New York's state and federal court systems also continues to increase. Recently, the U.S. District Court for the Northern District of New York adopted a formal court-annexed mediation program. Now, all four federal district courts in New York maintain formal court-annexed mediation programs. Last year, the Commercial Part of the Supreme Court, New York County, adopted a pilot program that modified the existing court-annexed mediation program and provides for every fifth case to be designated for automatic referral to mediation. A Matrimonial Neutral Evaluation Program also has been adopted for the Supreme Court, New York County.

The Unified Court System provides funding to a statewide network of non–profit community dispute resolution centers (CDRC). In 2013, over 30,000 cases were referred to CDRCs by courts, municipal agencies, probation departments, police departments, social service providers and others. Most of these cases were mediated, including civil, custody and visitation, matrimonial, juvenile

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# Message from the Co-Editors-in-Chief

This edition is published under the new leadership of the Section by David Singer. David has been an active member of the Executive Committee and assumes the hossu from a line of stellar and still active Chairs who have provided continuity and energy for our relatively young Section. Some of us may be unaware of the success of our Section in promoting New York as a venue for arbitration including by our participation in NYIAC, our white papers, and the important activities of many of our members and leaders. We have worked on a number of issues ranging from New York law to standards for disclosure and social media use. Committees are active and themselves produce important programs. In this journal, we often publish articles by our members (and others) on cutting-edge legal issues. We have also been singled out by the wider Association for our work on diversity.

Edna Sussman

Sherman Kahn

Laura A. Kaster

In this issue, we bring you a wide range of material. We have a new historical contribution on early American Arbitration. We examine Guided Decision Making, an approach to creating a conducive atmosphere for settlement during arbitration, without mixing the processes. We also explore issues relating to mediation advocacy. We have several articles relating to IP and technology arbitration, including the use of arbitration in patent cases and the determination of fair, reasonable and nondiscriminatory license fees for patents used in standardized products. Our range includes the developments in the arena of consumer arbitration, which can impact the popular assessment of arbitration even in the commercial, business-to-business world. This issue also addresses a number of important case developments.

In our last issue, we had several articles on the consideration of a new international mediation/conciliation convention or guidelines that could potentially exponentially expand the use of mediation worldwide. In February of this year, Working Group II of the United Nations Commission on International Trade Law considered a U.S. proposal for a tectonic shift in the treatment of mediated or conciliated settlements of cross-border commercial disputes using the model of the New York Convention. UNCITRAL's Working Group II (Arbitration and Conciliation) recommended that the Commission as a whole consider moving forward on the proposal.

We promised to continue to report on developments, and there have been some. In Vienna this summer, UNCITRAL concluded that Working Group II will continue its efforts with a broad mandate, although whether a convention will be recommended or some other format will be the result is still unclear. There was considerable opposition from EU countries, partly on the basis that they believe there is an overlap with work being done at the Hague and possibly because it represents a loss of national control over the process of enforcement. In addition to France and Germany, the skeptics included Austria and Poland. Some countries were positive on work going forward but expressed the view that a guidance or model law would be preferable to a convention. These included China and possibly Japan. Other countries believed there was a commercial imperative for the proposed convention, including Ecuador, Argentina, Brazil, Columbia, Israel, Algeria, Egypt, India, the U.S. (specifically stating the Hague conference work was not incompatible), Belarus (subject to controls over quality), Korea, Russia (premature to address format), Philippines, Singapore, Kenya, and Canada, which had criticized the effort initially and wanted to impose limitations in New York. The work will therefore continue. IMI has been an active participant in this effort. We will continue to monitor developments and report.

Please continue to think of us when you have noted important developments in arbitration and mediation and let us know what you think of our journal.

**Laura Kaster, Edna Sussman and Sherman Kahn**

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delinquency and persons in need of supervision, public welfare and benefits, housing, criminal and surrogate matters.

Other states perceive a need for expedition through arbitration. Delaware Governor Jack Markell recently signed legislation enacting the Delaware Rapid Arbitration Act (DRAA), effective May 2, 2015. The Delaware Supreme Court adopted the Delaware Rapid Arbitration Rules, effective June 22, 2015, to provide governing procedures for arbitrations brought under the DRAA and fulfill the DRAA's purpose of providing parties with an option for speedy, inexpensive and confidential arbitration proceedings. The DRAA provides for arbitrations to be completed within 120 days of appointment of the arbitrator.

The NYSBA Dispute Resolution Section must remain in the forefront of efforts to expand the reach and use of alternative dispute resolution processes. First, it must advocate for expanding the use of dispute resolution processes throughout the judicial system, in communities and through internet-based programs and services, making them available to residents throughout New York State who would benefit from such access.

In this regard, the Executive Committee of the Dispute Resolution Section has adopted a Proposal for Court-Annexed Voluntary Mediation in the Civil Courts of New York State, which provides that:

> Each civil court in New York State that does not have a court-annexed mediation program shall create and adopt a court-annexed mediation program that enables parties to participate in mediation on a voluntary basis.

We hope to present the Proposal to the NYSBA Executive Committee at its next meeting in November. If approved, we will then seek to have the Proposal adopted by the Office of Court Administration as a Court Rule that will apply to all New York State courts (civil).

Second, we must continue to educate ourselves and provide training to others on the law and best practices relating to dispute resolution and its processes so that we can become excellent neutrals and practitioners in the field. The Section will fulfill its commitment to training by presenting programs on ethics, negotiation, mediation training for neutrals, arbitration training for neutrals and practitioners, how to develop your own ADR practice, diversity, how practitioners can create and implement successful mediation and arbitration strategies, and other topics. And we hope to provide programs throughout New York State during the upcoming year.

Third, we must redouble our efforts to increase diversity within our membership and more broadly within the dispute resolution field. We will seek to increase diversity within the Section through training, mentoring, outreach to law students and junior attorneys, networking, and other efforts designed to increase diversity. This work is critically important.

I am looking forward to a productive and exciting year. There is much that we can accomplish together.

**David C. Singer**

NYSBA WEBCAST

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# Ethical Compass
# The *Smith* Case: Is the Glass Half Full?

By Elayne E. Greenberg

## Introduction

Many in our ADR community have already chosen to side with one of the choruses of polarized voices that are either supportive of or critical of the recent judicial decision *In re Cody W. Smith*.[1] In that decision, Chief United States Bankruptcy Judge Jeff Bohm disallowed the trustee's appointment of a mediator, because, *inter alia*, the trustee didn't first secure the approval of the presiding bankruptcy judge. A cursory read of Judge Bohm's decision mistakenly leads us to believe that the case is just about a bankruptcy trustee's obligation to follow section 327(a) of the Bankruptcy Code, requiring a trustee to obtain the approval of the court *prior* to spending the estate's money on professionals such as a mediator. The rationale for this rule is to "contain the estate's expenses and avoid intervention by unnecessary participants."[2] However, a more nuanced read of the case ethically challenges us to question existing practices about how mediators get appointed to cases, which cases are appropriate for mediation, and the distinct, but sometimes overlapping, contribution both attorneys and mediators offer in resolving a case.

## The Relevant Context *In re Cody W. Smith*

Cody W. Smith, the Debtor, filed for a Chapter 7 bankruptcy.[3] The appointed trustee identified Mr. Cody's assets that could be liquidated and used to pay off his debts. Included in Mr. Smith's assets to be liquidated was Mr. Cody's one-third interest in a limited partnership of a 14,857-acre ranch.[4] However, Mr. Smith's mother, who happened to be the general partner of the limited partnership, strongly objected to the liquidation of the ranch.[5]

Seeking to overcome this impasse, the trustee *sua sponte* appointed retired Judge Clark as the mediator.[6] The cost of the mediator was to be paid from the Debtor's estate.[7] Judge Clark had served on the bankruptcy bench in Texas from 2004-2012 and had retired from the bench in late 2012. However, the trustee on the case failed to get Judge Bohm's *prior approval* for the appointment of Judge Clark as the mediator and didn't even notify Judge Bohm of the trustee's plan to try mediation.[8]

Beyond the procedural errors for disallowing the mediator's appointment, Judge Bohm discussed two ethical issues that are the focus of this month's column: How does the court ensure transparency in the selection of neutrals? Which cases are appropriate for mediation?

## Freedom of the Appearance of Bias in Mediator Appointment

If courts and ADR providers are to preserve the integrity of their neutral selection process, and mediators are to preserve their impartiality, the process of appointing mediators must be transparent. In the *Smith* case, Judge Bohm explained that when a sitting bankruptcy judge appoints an ex-bankruptcy judges as a mediator without the protection of section 327, such an appointment might create either a real or apparent abuse of the appointing bankruptcy judges' power.[9] However, if section 327 mandates are followed and there is a hearing disclosing the relationship of the sitting and former judge, there is then a more transparent process that provides the creditors an opportunity to object to this appointment if they so choose.[10] As Judge Bohm reminds, the bankruptcy bar was plagued with "cronyisms" and "patronage" prior to the Bankruptcy Reform Act of 1978, and we have an ethical obligation to prevent that from happening again.[11]

The polarized reactions to Judge Bohm's decision reflects, in part, our divided world views about "cronyism." For some, referring a case to your friend, a respected colleague or political supporter is just a reality of everyday business. And that reality extends to the appointment of neutrals. This group speculates that the decision was probably a reaction to challenged personality dynamics among the involved parties. Reacting from a different vantage point, others applaud Judge Bohm's decision for requiring a transparency in the mediation selection process that is too often blurred by cronyism.

Beyond bankruptcy and into our broader ADR world, we have all wondered at times why certain mediators seem to be favored over others and to what degree "cronyism" and "patronage" influence mediator selection. And even though as neutrals we may have adopted as our mantra the words "disclose, disclose, disclose," ADR providers, courts and mediators sometimes don't consider these professional relationships to be a conflict and the subject of disclosure. After all, isn't this just the way business gets done? And, as mediators, if we receive a case from a judge or ADR provider who wants to refer us more cases, how does this, if at all, affect the way we mediate and our bias towards promoting settlement? As

we know all too well, the "cronyism" and "patronage" that influence neutral selection also contribute to the lack of diversity that continues to plague our profession. Some ADR providers such as FINRA have sought to minimize such contamination by selecting mediators through rotating lists. What else can we do to achieve even greater transparency in neutral selection?

## Value Added of Mediators

In his opinion, Judge Bohm identified the following ten factors that he minimally would consider before appointing a mediator:[12]

1) The subject matter of the dispute.

2) The amount of discovery completed.

3) The amount of time the attorneys have spent discussing settlement with their respective clients and whether the lines of communication with the clients have been open.

4) The amount of time the attorneys have spent discussing settlement with opposing counsel, whether the lines of communication have been open, and whether any progress has been made towards a resolution.

5) The actual courtroom experience of the attorneys in adducing testimony and introducing exhibits.

6) Whether the attorneys have explained the mediation process to their respective clients and reviewed with them the costs of mediation versus the costs of simply going forward with the scheduled hearing or trial.

7) The name, qualifications, and fee of the proposed mediator.

8) The estimated cost for each client of the mediation (i.e. the client's share of the mediator's fee, the attorney's fees for representing the client in the mediation, and any travel or other associated costs).

9) The percentage of the estimated cost to the estate (i.e. the estate's portion of the mediator's fee, plus attorneys' fees associated with the mediation, plus costs of lodging and travel, if any) to the actual amount of cash presently in the estate.

10) Whether any of the parties are opposed to mediation because they want their day in court as soon as possible.

This author agrees that it is important to send appropriate cases to mediation. However, there remains a pervasive lack of understanding about how mediation works and what the possible "value added" mediation contributes to case resolution. As one glaring example of such misunderstanding, there remains chronic confusion between the overlapping, yet distinct, contributions an effective mediator and competent settlement lawyers each bring to the resolution of a case. This confusion impacts judges' and lawyers' decisions about which are the appropriate cases to refer to mediation and when it is appropriate to make that referral. Some share Judge Bohm's thinking in *In re Smith*, believing that if you have two good settlement lawyers, you don't need a mediator.

Yes, competent lawyers can and do settle cases, and many don't need a mediator. As my colleague Dwight Golann reminds us in his book, *Sharing a Mediator's Powers: Effective Advocacy in Settlement*, skilled lawyers can integrate into their advocacy approach many of a mediator's skills to settle their own cases.[13] However, even the most competent settlement lawyers may find that they can't settle every case.

A good mediator may provide the "day in court" that each party needs before he can even consider resolution options and a more client-centered process that allows a party to finally focus on settlement rather than revenge. Or, a skilled mediator can provide a welcomed "third side" that helps lawyers and clients understand the impasse and its resolution from a needed alternative perspective. And, we may all recall mediations where the appointment of a mediator expedited discovery and kept parties focused on resolution. In these situations, the appointment of a mediator may make economic and settlement sense.

Mediators have an ethical obligation to correct this misinformation. Specifically, Standard IX Advancement of Mediation Practice of the ABA Model Standards of Conduct (2005) provides:

> A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:
>
> 1. Fostering diversity within the field of mediation.
>
> 2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.
>
> 3. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.
>
> 4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.
>
> 5. Assisting newer mediators through training, mentoring and networking.

B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.[14]

Thus in our work, writings and professional engagements, we need to continue to clarify these misconceptions. Within the bounds of ethical and agreed-upon confidentiality, we need to continue to speak with judges, lawyers and dispute resolution consumers and publicize the range of cases that have benefited from mediation so that even more appropriate cases may access mediation. We also need to refine our understanding about the nuances of effective mediation so that we continue to make mediation a responsive process to the expanding range of parties and cases.

## Conclusion

Dispute resolution professionals regard conflict as an opportunity. The discordant reactions to the *In re Cody W. Smith* decision provides us an opportunity to re-visit two important issues with ethical underpinnings: the appointment of neutrals and the referral of cases to mediators. This mediator sees the glass as half full.

## Endnotes

1. *In re Smith*, 524 B.R. 689 (Bankr. S.D. Tex. 2015).
2. *Id*. at 696 (citing *In re Garden Ridge Corp.*, 32 B.R. 278, 280 (Bankr. D. Del. 2005)).
3. *Id*. at 692.
4. *Id*.
5. *Id*.
6. *Id*. at 693.
7. *Id*.
8. *Id*.
9. *Id*. 697.
10. *Id*. at 700.
11. *Id*. at 698.
12. *Id*. at 704.
13. Dwight Golann, Sharing a Mediator's Powers: Effective Advocacy in Settlement (ABA Publishing 2013).
14. Model Standards of Conduct for Mediators § 9 (2005).

**Elayne E. Greenberg is the Assistant Dean for Dispute Resolution Programs, Director of the Hugh L. Carey Center for Dispute Resolution and Professor of Legal Practice at St. John's Law School.** **I thank Michael McDermott ('15) for his assistance with this column.**


# LET YOUR VOICE BE HEARD!

### Request for Submissions

If you have written an article you would like considered for publication in the *New York Dispute Resolution Lawyer* or have something you want to share in a letter to the editors, please send it to:

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Articles and letters should be submitted in electronic document format (pdfs are not acceptable) and include contact and biographical information.

**www.nysba.org/DisputeResolutionLawyer**

# Developments in IP Arbitration: An Arbitrator's View

By Philip D. O'Neill, Jr.

## I. Introduction

Decades ago in the landmark *Mitsubishi* decision,[1] the United States Supreme Court endorsed the arbitration of complex business disputes with the observation that "…adaptability and access to expertise are hallmarks of arbitration." What was less clear to the Court then, but which has been well tested over the ensuing years, is that complex business controversies can be efficiently, effectively and speedily disposed of in a private system of commercial justice. When problems do arise, they are often the creation of the drafter; that has proved to be as true in the intellectual property (IP) arbitral context as with regular commercial matters.

Still, the marketplace continues to endorse private autonomy in crafting dispute resolution processes to resolve IP and other complex business disputes by arbitration. The volume of IP-related disputes invoking arbitration is increasing steadily, according to the tracking statistics of arbitral institutions. Confidence in the private dispute resolution system is resulting in an influx of patent and trademark licensing, as well as certain types of infringement cases, along with traditional trade secret related claims—not only in institutionally administered cases, but in ad hoc proceedings as well. The stakes in these arbitrations are often quite significant financially, with the disputes ranging in value in the tens of millions frequently, even on the low end, to an upper end that is well into the billions. That companies will entrust such material disputes to a system with so little judicial oversight is a testament to three primary factors: (i) the expertise of the decision makers; (ii) speed of disposition that is consistent with marketplace needs; and (iii) systemic procedural adjustment to meet the technical complexity of the subject matter while producing fair results. Still, the growth of IP arbitration is no more problem-free than that of private adjudication of complex commercial disputes. This article will highlight IP issues well suited to arbitration and some of the problems that should be kept in mind by drafters of the best clauses for IP arbitration.

## II. Arbitral Process Considerations: Pro and Con

IP arbitration raises some distinctive issues, but it also shares virtues and potential problems with other forms of complex business arbitration. For example, one of the salutary effects of the alternate dispute resolution process is the possibility of preserving existing relationships. Thus, arbitration is sometimes employed effectively to value particular IP in a royalty dispute for cross licensing purposes on the next generation of technology to achieve "freedom to operate."[2] The technique can and is used to span multiple generations of technology as an effective means to close otherwise problematic deals. In this way publicity and the depletion of limited royalties by litigation's high costs can often be avoided.

Moreover, the historic arbitral process attributes of flexibility, speed and economy can be readily embraced in an IP dispute. For example, it is not unusual in a "product definition" case involving infringement determinations that no more than one to three days of evidentiary hearings will be needed following written submission of direct and expert testimony, as well as claim construction if necessary. In such cases, the oral evidentiary hearings are essentially devoted to cross examination and oral closing argument. The arbitral preparatory process here usually focuses on information exchange through production of relevant and material documents—rather than those "reasonably calculated to lead to the discovery of admissible evidence" as in litigation. There is also advance expert identification and typically report exchange, as well as increasing practice of "hot tubbing" the experts in which testimony from both side's experts is taken contemporaneously. Start to finish, these cases are done in less than a year, as befits the arbitral promise of speed.

At the same time, there can be and is considerable gamesmanship in commencing IP arbitration, for institutional administration fees are usually tied to the amount in dispute. Such fees can be quite substantial if a party is seeking eight, nine or ten figure relief from arbitrators in IP disputes. Hence, advocates will often try to obfuscate remedial considerations at the outset of an arbitral proceeding to minimize the institutional fees. They typically do so by seeking general declaratory relief. In that way the true dollar value of an IP licensing program in dispute will be veiled to the arbitral institution, resulting in a lower administrative fee. Yet, there is a downside to that approach; the institution deciding on the adequacy of a sole arbitrator rather than a panel is not fully informed about what is ultimately at stake. This may result in appointment of a sole arbitrator when three are warranted. Additionally, a losing party may even seek to challenge an award if it exceeds the range in dispute established by the administrative fee.

## III. Types of IP Cases Arbitrated

Typically patent and trademark licenses cases present contract interpretation issues for which arbitration is well suited, and there is a cadre of seasoned arbitrators equipped to deal with them. Licensing issues that arise in the life science industry are particularly well suited to out-of court resolution, and the parties often focus on a choice between different types of alternative dispute resolution ("ADR"). But ADR may also be used as part of a litigated matter. For example, companies fighting over "freedom to operate" might well have dozens of patents at issue between them. Sometimes the parties are able to

resolve the vast bulk of the issues through cross licensing and monetary means. Rather than have a few remaining patents at issue jeopardize time-sensitive aspects of an otherwise comprehensive settlement, the parties will agree to an alternative means of resolving the unsettled patent disputes privately between themselves. This is usually done within a fixed time period. In the post-litigation context, there can be a focused ADR approach that continues the settlement negotiation up through a "step ladder" of techniques, including traditional methods of executive consultation and neutral-assisted mediation. If those measures fail, then remaining disputed issues like infringement and validity can be and are then arbitrated.

Patent infringement-related disputes also increasingly find their way into arbitration, often in the form of licensing-based conflicts where the definition of a covered "product" is tied contractually to infringement of specific patent claims. In contrast, trademark infringement cases may arise in a contractual context involving post-closing issues that follow the sale of a business, raising issues such as permitted uses of marks for limited periods, or in a particular geographic territory. Another type of dispute arises when long-term relationships are threatened because the trademark royalty falls out of alignment with the value of the developed brand exploiting it. If the license is contested, these expensive cases might be more effectively handled through "expert determination" (see discussion below) in a contractually provided royalty adjustment mechanism.

In the U.S., there is statutory authorization for patent arbitration under 35 U.S.C. Section 294. Internationally, there is less infringement-related international patent arbitration because of arbitrability issues—one has to look at the situs of the proceeding, as well as the likely state(s) of enforcement. In some jurisdictions these rights are not only created by the sovereign, but also can only be adjudicated by the sovereign. In other jurisdictions the generally prevailing view is that if a matter could be settled by the parties, then it can be arbitrated by them. The bottom line in cross-border cases is the need for a threshold examination to determine whether the place of arbitration and/or enforcement permits private determination of sovereign granted rights.

While foreign jurisdictions recognize varying degrees of arbitrability for infringement and invalidity issues, those permitting it typically tie permissibility to a private determination that just impacts the parties to the arbitration. In any event, one sees with some frequency efforts to raise invalidity defensively to infringement claims in arbitration. The preferred technique employed in such matters, however, is to seek to declare the patent license unenforceable, rather than the patent to be invalid.

## IV. Example Distinctions in Neutral IP Resolution

Agreements in the biotech industry well reflect the potential for choice between varying forms of binding ADR. For example, a dispute in a joint venture development agreement over what research path to pursue could blow up the collaboration of the parties. In order to prevent such disagreements from derailing an otherwise mutually beneficial venture, the parties may provide for a decision by an outside expert—frequently a scientist.[3] But then an issue can arise about whether that process is an arbitration, to be conducted within the supporting legal infrastructure of the Federal Arbitration Act, or that of a state statute or even that of a foreign nation. Alternatively, is the decisional process to be considered a hybrid form of ADR because it does not reflect all of the "common incidents" of "classic arbitration?"[4] Drafting is key, for party autonomy ultimately means that the parties determine the resulting type of process so long as they are clear.

To explain, in some jurisdictions both here and abroad, a highly focused and narrow decisional process may well be categorized as an "expert determination," or even an "appraisal" (in appropriate instances), rather than as an arbitration. In New York, for example, there is a separate statute from that governing arbitration for such a process; the same approach obtains in a number of foreign jurisdictions which are popular arbitral sites.[5] In any event, the decision on categorization of the process varies by jurisdiction.

The drafting decision can dictate what procedural and enforcement arbitral remedies are later available to the parties. From a process standpoint, an expert determination tends to be more "inquisitorial"—like judges or arbitrators in Civil Law jurisdictions—than adversarial, as in arbitrations sited here. The nature of one's right to be heard substantively differs, too, depending upon whether the parties are arbitrating or engaged in an expert determination process. Denomination of the dispute resolution process can also make a significant difference at "end game." For example, may a prevailing party seek enforcement through the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, or must the party proceed under a specific statute, or simply be left to traditional remedies through domestic judicial enforcement? If it is the latter, then it may necessitate seeking to invoke "comity" if a foreign court must be called upon to implement a domestic judgment.

The implications of "compartmentalization" of decision making manifest themselves in other ways as well in IP arbitration, primarily because of the heavy weight placed on expertise for arbitrator selection. Choosing the right expert, whether as a sole decision-maker or a member of an arbitration panel, may not be as easy it seems. For example, a cross-border telecommunications patent license may well have ordinary commercial aspects. The dispute resolution clause may provide, however, that in the event there is a "patent" issue between the parties, then a "patent lawyer" must be on the panel and, further, the patent rules must be applied. Could an award issued by a panel that includes experienced patent license litigators, but which does not include a licensed patent lawyer, be challenged under the New York Convention because

the composition of the arbitral tribunal "was not in accordance with the agreement of the parties…."?[6] A blended tribunal with various expertise may be a good solution in such cases.[7]

## V. Systemic Adjustment

As courts and arbitral institutions have recognized the arbitral system's capacity to resolve IP and other complex commercial cases, they have sought to meet particularized needs. For example, in an IP context, the need for emergency relief can sometimes be outcome-determinative. After all, if a trade secret is about to be disseminated to the public, there is scant opportunity to put the genie back in the bottle. Increasing provision for an "emergency arbitrator" mechanism by institutions to address immediate party temporary relief requests before a panel can be formally constituted well illustrates a need that impelled systemic change. A related remedial expansion has occurred in the steady growth and recognition of equitable powers for arbitrators. Both developments have significance for IP arbitrations, where fashioning interim or permanent equitable measures can be critical to dispute resolution effectiveness.

Similarly, arbitral institutions are taking additional case management steps to bring arbitral procedure into alignment with commercial reality. When drafters structure IP licenses or complex commercial contracts into multiple contracts (often interjecting special purpose corporations), they do not always fully harmonize the dispute resolution mechanisms. "Cutting and pasting" from various forms can produce unintended complications, including multiple, related proceedings. As a result, arbitral institutions are meeting this need by empowering joinder and consolidation through new rules changes here and abroad.[8]

## VI. Conclusion

The examples above collectively reflect the kinds of issues and process responses that permeate and sometimes complicate IP arbitrations today, both domestically and internationally. It is a dispute resolution area that is nevertheless expanding primarily because of its ability to bring market timeliness and expertise to bear on resolution of demanding IP issues. Because of the complexity of the issues and the need to achieve fairness in results, while also serving the traditional arbitral goals of speed and economy, there is a need for special care both in crafting the process to client needs and in implementing it. After all, party autonomy is at the very core of arbitration; you get what you bargain for—so beware if speed and economy are valued over fairness and accuracy in structuring the private dispute resolution process. With so much so often at stake in IP arbitrations, poor contract drafting of dispute resolution provisions, coupled with ill-advised tactical decisions, can impede the effectiveness, speed and finality of the process. There is ongoing risk associated with needless, self-inflicted wounds—not only to the parties themselves, but also to the reputation of the private system of adjudication itself, for what may be mistakenly perceived as systemic shortcomings. Nevertheless, today the arbitration of IP disputes is cementing its position as a key sector of our domestic and global dispute resolution process. That process is well positioned to retain continuing vitality; it need only remain flexible enough to evolve with market need.

## Endnotes

1. *Mitsubishi v. Soler Chrysler,* 373 U.S. 614 (1985).
2. Freedom to operate generally means determining whether a particular action, ranging from testing to commercializing a product, can be effected without infringing another's valid IP rights. Such an analysis needs to relate to the places where one seeks to operate since IP rights may vary with the jurisdiction.
3. In a regular commercial case the analogous situation might occur in a post-closing context, where an accountant is appointed to decide valuation adjustments.
4. See, e.g., *Advanced Bodycare Solutions, LLC v. Thione International, Inc.*, 524 F.3d 1235 (11th Cir. 2008) [including "(i) an independent adjudicator, (ii) who applies substantive legal standards (i.e., the parties' agreement and background contract law), (iii) considers evidence and argument (however formally or informally) from each party, and (iv) renders a decision that purports to resolve the rights and duties of the parties, typically by awarding damages or equitable relief."].
5. The New York statute is CPLR Article 76 for expert determinations, whereas arbitrations are governed by Article 75. *See generally, e.g.*, Report of the Committee on International Commercial Disputes of the New York City BAR, "Purchase Price Adjustment Clauses and Expert Determinations: Legal Issues, Practical Problems and Suggested Improvements" (June 2013), available at www2.nycbar.org/Publications/reports/? Other jurisdictions, which distinguish "expert determinations" from arbitrations, include common law locales from London to Hong Kong, as well as European civil law jurisdictions like France and Germany.
6. Article V Section 1(d) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958. *See* 9 U.S.C. Section 201 et seq.
7. For a fuller discussion of example drafting problems and related analysis involving jurisdictional consequences in an IP and complex commercial context, *see generally* O'Neill, "International Arbitral Jurisdiction: When Taking Control Goes Our of Control," Chapter 6 at pages 53-76 of the American Arbitration Association Handbook on International Arbitration Practice (JurisNet LLC 2010).
8. *See, e.g.*, the new rules of the International Centre for Dispute Resolution of the American Arbitration Association, as well as those of the China International Economic and Trade Arbitration Commission and the Japan Commercial Arbitration Association.

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# Arbitrating Standards—Arbitration of FRAND Patent Licensing Disputes

By Jason Bartlett

## Introduction

Networking, telephony, video and numerous other technologies that require electronic equipment and software to interact and communicate are facilitated by international standards. These standards are why the components of our interconnected, information-driven world can talk to each other. Standards are valuable if (and only if) they are widely used. Yet paradoxically, most technical standards are covered by thousands of patents the use of which is essential to comply with the standard ("standards essential patents"). Each essential patent represents a right to exclude all others from the standard—which would defeat the purpose of the standard. Thus, to prevent standards essential patent owners from exercising that power to the detriment of all, standards setting organizations require their participants to promise to license all their essential patents on fair, reasonable and non-discriminatory terms. Patent owners and standards implementers are left to work out what that means through negotiation and, if necessary, dispute resolution. This article discusses some of the reasons why arbitration may become the preferred method of resolution for such disputes.

## Standards and Standards Essential Patents

Industry standards are everywhere. They are why your Samsung laptop and your Apple iPhone connect to the same WiFi networks, decode the same digital videos, and draw power from the same electrical outlets. Companies send engineer delegates to hammer out standards—sometimes over years—in meetings that Standards Setting Organizations (SSOs) sponsor. Many standards evolve and improve over time. An SSO may therefore publish a standard as a series of "releases." For example, GSM (2G), WCDMA (3G), and LTE (4G) are all related to a single mobile wireless standard called UMTS.

Patents complicate the standardization process. Delegates often try to get the SSOs to include technologies that their employers have patented, or hope to patent, in standards. If patented technologies are made standard, their owners can charge royalties on every implementation. Theoretically, they could also refuse to license the patents and thereby block implementation.

It is important to note that standards are often finalized long after companies have sunk substantial resources into implementing them. That is particularly true of evolving standards like UMTS. Standards essential patent owners could take advantage of those sunk investments to "hold up" implementers for royalties in excess of the fair value of the patents before they were incorporated into the standard. In part to prevent such holdups, SSOs enact intellectual property rights policies that typically require participants to submit letters of assurance promising to grant unlimited, irrevocable licenses to standards essential patents on Fair, Reasonable and Non-Discriminatory (referred to as "RAND" or "FRAND") terms.

SSOs do not decide what terms are FRAND. When parties cannot agree on FRAND terms, their only recourse is litigation or, if both sides consent, arbitration. Of course, price (royalty rate) is usually the key disputed issue. Several recent district court cases illustrate how FRAND royalties can be determined.

## Standards Essential Patent Litigation Setting FRAND Royalty Rates

At a high level, courts generally agree that a FRAND royalty is one is based on the "incremental value" that each standards essential patent contributes to the implementer's product. But courts have struggled to develop practical ways to calculate such incremental value in litigation, however.

Jury instructions from the U.S. district court case of *Realtek v. LSI* help illustrate the challenge.[1] That case involved two patents covering a portion of IEEE Standard 802.11 (Wi-Fi). LSI sued Realtek for infringement in the U.S. International Trade Commission without first offering a license. In response, Realtek countersued LSI in District Court for breach of the FRAND commitment. One of the disputed factual issues the jury was to decide was the FRAND royalty for implementing LSI's Wi-Fi standards essential patents in its WiFi chips. The court instructed the jury to consider the value of LSI's patents to the Wi-Fi standard as a whole and the value of that standard to Realtek's products:

> Follow the two steps below in determining the [F]RAND royalty rate resulting from the hypothetical negotiation: (1) consider the importance of the two LSI patents to the standard as a whole, comparing the technical contribution of the two LSI patents to the technical contributions of other patents essential to the standard; (2) consider the contribution of the standard as a whole to the market value of Realtek's products utilizing the standard.[2]

The parties introduced some evidence about the technical contribution of the LSI patents to the Wi-Fi standard. But of necessity the jury did not receive substantial testimony about "the technical contributions of [all] the other patents essential to the standard." Accordingly, we do not know

how the jury performed its analysis or what evidence it found persuasive and, of course, the jury had no background in complex royalty valuations. The jury selected 0.19% as the FRAND royalty.

Standards essential patent issues are sometimes tied to the court—offering a look inside the black box of FRAND royalty rate setting. Judicial opinions written in the U.S. district court cases of *In re Innovatio* and *Microsoft v. Motorola*, and the Japanese IP High Court *E-bit Grand Panel Cases* involving Samsung and Apple are good examples. Each of these courts set out to achieve objectives equivalent to those expressed in the *Realtek* jury instructions, but each approached the FRAND royalty setting problem in a different way.

In *In re Innovatio*,[3] the Northern District of Illinois started by establishing a reasonable royalty for the Wi-Fi standard as a whole equivalent to the average operating profit of the Wi-Fi processors implementing the standard. Next, it found based on the evidence presented that there are 3,000 patents essential to the Wi-Fi standard and that the top 300 of those contributed 84% of the value. Finally, it found that all of the 19 patents-in-suit were among those top 300 patents. Accordingly it awarded a royalty equal to 19/300 (84%) operating profit of the chips.

In *E-bit Grand Panel Case*,[4] like the court in *In re Innovatio*, the Japanese IP High Court started by establishing a reasonable royalty for the (in this case 3G cellular) standard as a whole. It chose 5% of the accused product price. It then apportioned that royalty by taking into account the number of essential patents asserted, the number of essential patents in the standard, and the rate of contribution of the standard to the accused products.

In contrast, in *Microsoft v. Motorola*[5] the Western District of Washington took advantage of defendant Motorola's participation in the development of a standards patent pool to set FRAND royalties on Wi-Fi and video compression standards. Rather than apportion a share of a fair aggregate royalty, the court used patent pool royalty formulas.

Critics of cases like these often attack their royalty-setting methods and judges have no specific background in royalty-rate setting. Some argue that approaches that merely divide the aggregate royalty by the number of essential patents—as is often done in patent pools—pay the same royalties to minor improvements as they do pioneering inventions. Approaches that attempt to distinguish between pioneering patents and minor ones, on the other hand, may be based on inadequate evidence. The *Innovatio* court attributed of 84% of the value of the standard to "top ten percent" patents, for example, based on a single study using 1970s-era data drawn from the field of "electronics" as a whole.[6] It did not address standards (let alone Wi-Fi). To overcome these types of objections, it would be advantageous to have a more flexible, focused forum. Arbitration may provide the solution.

## Standards Essential Patent Arbitration—A Better Alternative for FRAND Rate Setting?

For years, stakeholders from all sides of the standards patent world have suggested that arbitration may prove to be the best chose for setting FRAND royalties. Arbitration can enable the parties to focus on the central issue of the royalty rate; to ensure that the decision-maker has appropriate expertise; and to make the process more efficient. Indeed, some standards patent owners have pre-committed themselves to arbitrate royalty rates with willing licensees. For example:

**Google**: When the FTC investigated Google for allegedly failing to honor its FRAND obligations, Google accepted a consent order requiring it to offer standards essential patent infringers binding FRAND arbitration before seeking an injunction.[7] Moreover, the order requires Google to honor the offer to arbitrate up to 30 days *after* it files an action seeking an injunction.

**Samsung:** Samsung accepted a similar commitment to resolve a European standards essential patent abuse investigation.[8] Originally, Samsung attempted to establish arbitration as the *exclusive* forum for FRAND dispute resolution in the absence of an alternative agreement. This aspect of the commitment was reversed after public commenters took issue with the possibility of being forced, in essence, to waive the right to have a court decide the dispute. But arbitration remains an alternative with the consent of both parties.

**Qualcomm:** Qualcomm representatives have often said that arbitration may be a "good option" for resolving FRAND disputes, although it opposes mandatory arbitration.[9]

**IEEE**: The SSO known as the IEEE (responsible for the Wi-Fi standard among others) recently amended its rules to make explicit the right to arbitrate FRAND disputes, and further that all issues can be arbitrated, including:

> patent validity, enforceability, essentiality, or infringement; Reasonable Rates or other reasonable licensing terms and conditions; compensation for unpaid past royalties or a future royalty rate; any defenses or counterclaims; or any other related issues.[10]

**Commentators**: Stanford Professor Mark Lemley and Hass School of Business Professor Carl Shapiro have advocated that SSOs select "baseball style" arbitration as the exclusive procedure for setting royalties in FRAND disputes.[11]

In preparing this article, the author consulted Dr. Mario Lopez of Edgeworth Economics, an economist who has served as an expert witness in FRAND arbitration and litigation. Dr. Lopez reported that he recently participated in confidential arbitration proceedings to set FRAND royalties on a very large portfolio of standards

essential patents. A panel of neutrals having experience in financial transactions held a two week hearing. Unlike litigation, where the "damages phase" often consists of a few days in the context of a longer trial, the entire focus of the hearing was on royalty rate setting. Each side presented testimony from multiple economics experts whom the panel examined together in a "hot tub" style proceeding. The use of arbitration enabled this focused and innovative proceeding before a specialist panel.

*"Some have argued that a party that commits to binding arbitration to set FRAND royalties is* per se *a willing licensee. Such a rule may be taking root."*

As a forum for FRAND disputes, arbitration offers several obvious advantages. Among these are procedural flexibility and specialized neutrals. Arbitration may also offer a way to overcome certain jurisprudential limits on the scope of district court jurisdiction. The Western District of Wisconsin, for example, refused to adjudicate Apple's suit against Motorola for specific performance of the FRAND obligation on the grounds that to do so would be to issue an "advisory" opinion.[12] The court did not think it proper to merely opine on what the FRAND royalty rate would be if it was not in a position to order Apple to take a license on those terms.

Parties who commit to binding arbitration of FRAND disputes may also find that they enjoy another potential advantage: a presumption that they are "willing" negotiators. Some courts have found that they cannot enjoin a "willing licensee" from practicing a standards essential patent.[13] Some have argued that a party that commits to binding arbitration to set FRAND royalties is *per se* a willing licensee. Such a rule may be taking root. On July 8, 2015, the Japanese Fair Trade Commission published a request for public comment on draft revisions to its "Guidelines for Use of Intellectual Property Under the Antimonopoly Act."[14] Among the proposed revisions is a guideline establishing safe harbor for licensees willing to commit to binding arbitration (or litigation) to set FRAND terms:

> [I]n case the parties do not reach an agreement of license conditions even after a certain period of negotiations, a party which shows its intention to determine the license conditions at court or through arbitration procedures is deemed to be the "willing licensee." Even if a party which intends to be licensed challenges…validity, essentiality or possible infringement of the Essential Patent, the fact itself should not be considered as grounds to deny that the party is a "willing licensee."

If such a safe harbor rule were widely established, it is possible to envision it taking on expanded significance over time. For instance, under U.S. law, is it ever possible for an implementer who is "deemed" a "willing licensee" ever be a "willful infringer"? Or might a willingness to submit to binding arbitration also act as a defense to damages enhancement? Might such a willing licensee even win an award of fees and costs if an SEP owner's royalty demands were found to have been exceptionally excessive?

Parties to FRAND disputes are increasingly turning to arbitration. The advantages that arbitration offers to the process of resolving royalty payment obligations for standards essential patents may lead to FRAND arbitration becoming a key component of the standards process and a significant new area of arbitration practice.

## Endnotes

1. *Realtek Semiconductor Corp. v. LSI Corp.*, Case No. C-12-3451-RMW, Docket No. 298 (N.D. Cal. Feb. 23, 2014).
2. *Id.* at 17.
3. *In re Innovatio IP Ventures, LLC*, 2013 U.S. Dist. LEXIS 144061, at 182-183 (N.D. Ill. Sept. 27, 2013).
4. Japanese Intellectual Property High Court case numbers 2013(Ra) No.10007, 2013(Ra)No.10008, and 2013(Ne)No.10043.
5. *Microsoft Corp. v. Motorola, Inc.*, 2013 U.S. Dist. LEXIS 60233, at 273 (W.D. Wash. Apr. 25, 2013).
6. J. Gregory Sidak, The Meaning of FRAND, Part I: Royalties, 9 J. COMPETITION L. & ECON 931, 1019 (2013).
7. *In re Motorola Mobility LLC, and Google Inc.*, FTC Docket No. C-4410, Decision and Order, at 10-11 (FTC Jul. 23, 2013).
8. European Commission Press Release, *Antitrust: Commission accepts legally binding commitments by Samsung Electronics on standard essential patent injunctions*, April 29, 2014.
9. Mark Snyder, Recent FRAND Decisions: What We Learned, What Remains Unclear, March 1, 2014.
10. IEEE Standards Board Bylaws, Chapter 6, Patents, *available at* http://grouper.ieee.org/groups/pp-dialog/drafts_comments/SBBylaws_100614_redline_current.pdf.
11. Mark A. Lemley & Carl Shapiro, *A Simple Approach to Setting Reasonable Royalties for Standard-Essential Patents*, 28 BERKELEY TECH. L.J. 1135, 1138 (2013).
12. *Apple, Inc. v. Motorola Mobility, Inc.*, 2012 U.S. Dist. LEXIS 157525, *7 (W.D. Wis. Nov. 2, 2012).
13. *See, e.g., Apple, Inc. v. Motorola, Inc.*, 869 F. Supp. 2d 901, 913-14 (N.D. Ill. 2012) (Posner, J.) ("To begin with Motorola's injunction claim, I don't see how, given FRAND, I would be justified in enjoining Apple from infringing the [SEP] unless Apple refuses to pay a royalty that meets the FRAND requirement.").14. JFTC Request for Public Comments on Partial Amendment of "Guidelines for the Use of Intellectual Property under the Antimonopoly Act," July 8, 2015, Attachment 1, at 11.

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# Silicon Valley Arbitration & Mediation Center: Advancing ADR for Tech Disputes

By Gary L. Benton

It is often said that litigation does more harm than good for technology innovation. Take, for example, the widely watched *Apple v. Samsung* smartphone patent dispute, which at one time involved over fifty litigations in twelve countries. After years of costly litigation, Apple and Samsung voluntarily dismissed all the non-U.S. cases. The $1 billion U.S. jury verdict for Apple continues to be chipped away through appeals in the U.S. courts. Most remarkably, for the years the dispute has been ongoing, both Apple and Samsung spent more on litigation than on research and development.

Silicon Valley Arbitration & Mediation Center (SVAMC) (www.siliconvalleyarbitration.org) is a non-profit organization created to confront the challenge of efficient technology dispute resolution. SVAMC works with technology companies, law firms, universities and others to promote cost-efficient resolution of technology disputes. Founded in 2015, SVAMC provides educational programming and other resources to the global technology community.

Unlike the New York International Arbitration Center (NYIAC) and other regional centers, SVAMC is industry-focused, not geographically focused. SVAMC's goal is to serve the interests of the global technology dispute resolution community, particularly with respect to providing resources on ADR to the technology industry.

## Why Technology ADR?

Most lawyers trained in arbitration and mediation would think the benefits of ADR, particularly efficient decision making and cost-savings, would be obvious to the technology industry. There are at least four reasons why that is not the case.

First, the U.S. technology sector hasn't had a need to pay much attention to ADR in the past. U.S. technology companies have had good experiences in the courts, particularly in the federal courts in California, Delaware, Massachusetts and New York, where many skilled technology litigators practice and there are an above-average number of judges who have experience with intellectual property. In international cases, there is a perception by some that U.S. juries tend to favor U.S. companies, although that perception is not necessarily supported by the research.

Second, historically, U.S. technology companies have had negotiating strength over non-U.S. companies and were able to select forums of their choice. Many U.S. companies are now finding they have less negotiating strength, particularly as they try to compete in emerging markets in Asia. The result is that many technology companies doing business internationally are increasingly confronted with unqualified, biased or corrupt decision makers.

Third, the legal teams in many start-up technology companies are relatively young and inexperienced and have limited exposure to ADR. They are often too quick to rely on outside counsel who practice litigation for a living and disfavor ADR. As companies mature they become increasingly concerned with providing shareholder return from dispute resolution processes and are demanding efficiencies from outside counsel.

Fourth, in the past, there were more uncertainties regarding the enforcement of arbitral awards involving intellectual property and the availability of preliminary relief that slowed the adoption of ADR by some technology companies. These limitations are now better understood as the law has developed. Although arbitration has limitations, studies confirm that it can be many times more cost-efficient than litigation. Accordingly, it should always be a considered choice in technology dispute resolution.

Technology ADR is on the rise given new advances in technology and increased globalization. With the Internet, data flows around the world instantaneously. Transactions that once took weeks or months to process are now completed in less than a second. A result of this technological advancement is that U.S. companies face increased competition from global competitors. Established companies often struggle to keep pace with new innovation. These changes have a particular impact in the technology sector where products are often replaced on an annual cycle or with the push of a button.

A further result of this rapid technological change and globalization is that many U.S. companies, and most non-U.S. companies, do not want to deal with the vagaries of the U.S. court system, including its costs, intrusive discovery, emotion-swayed juries and endless appeals. Many of the rising non-U.S. companies are insisting on litigation or arbitration in China, Singapore or elsewhere in Asia, including in forums that are less favorable to U.S. interests. As U.S. legal teams handle more international work, they come to realize the benefits of international arbitration in terms of potential cost efficiencies, expert decision-making and multi-national enforcement of awards. Likewise, in many instances, relying on mediation to settle a dispute is a cultural preference and simply more practical and efficient.

## SVAMC's Role

Through its educational and outreach programs, SVAMC works with U.S. and international technology companies, law firms, ADR providers, neutrals and universities to engage in an open dialogue on the costs and benefits of using of arbitration and mediation to resolve technology disputes. More broadly, SVAMC endeavors to find and develop efficiencies in the resolution of tech disputes both in and out of court by addressing several key

needs in the technology ADR sector, namely (1) educating potential users of the benefits and risks of using different forms of arbitration and mediation to resolve technology disputes; (2) connecting users with skilled legal counsel in the field; (3) providing users a peer-vetted list of leading neutrals with technology expertise, (4) gathering industry feedback for institutional providers and government lawmakers and (5) advancing the use of new technologies to improve dispute resolution. The sections below detail various SVAMC activities that encourage effective and cost-efficient technology dispute resolution.

SVAMC does not administer ADR cases or offer neutral services. It does not compete with anyone. Rather, it works directly with technology companies to address business needs, it helps technology companies better understand ADR opportunities, it connects the technology sector with qualified law firms, providers and neutrals, and it serves as a clearinghouse for academic focus in tech dispute resolution.

### Presentations and Programs

The core of SVAMC's work is educational programming that is offered on a complimentary basis to technology companies, law firm and universities. Often the programs are presented privately to corporate legal teams. On some occasions SVAMC collaborates with interested law firms to educate its client base or assist in a business development visit.

Over fifty technology-focused presentations are currently listed on the Center's website. The programs include topics covering technology arbitration and mediation strategies and planning; tech ADR procedures, technology contract/commercial disputes; technology competition disputes; corporate technology disputes; intellectual property disputes; and international disputes. Many of the programs focus on specific segments of the technology sector, such as IT, biotech or alternative energy. Other programs are country specific.

The SVAMC website Programming page is essentially an online marketplace where companies and their counsel can readily access an applicable program category or title, and the credentials, expertise and contact information of each respective speaker. The breadth and depth of these programs reflect well on the expertise of the presenters.

SVAMC is also collaborating with institutional providers, law firms and other professional groups to provide educational programming. SVAMC has already cosponsored several tech ADR focused events in New York, Silicon Valley and Singapore. Plans are in progress for additional collaboration with the American Arbitration Association/ICDR, the International Chamber of Commerce Court of Arbitration, the CPR Institute for Dispute Resolution, SIAC and HKIAC, as well as the College of Commercial Arbitrators and the Chartered Institute of Arbitrators.

### Membership

SVAMC offers general membership and young practitioner membership opportunities to corporate and law firm tech lawyers, neutrals, academics, judges, government officials, institutional professionals, young lawyers and others. Although applicants must meet membership criteria, the goal is to have a broad-based membership representative of the entire technology dispute resolution community.

By offering memberships, SVAMC reaches out and involves the entire tech dispute community. It encourages fundamental collaboration across a wide range of legal and ADR professionals, academics, students and government officials connected to technology and dispute resolution.

### The SVAMC Tech List

SVAMC publishes a list of neutrals called the List of the World's Leading Technology Neutrals. SVAMC's Tech List is peer-vetted and admission is by invitation only. Admittees to the Tech List are qualified by national and international ADR providers and recognized by peers as the leading experts in technology dispute resolution.

The 2015 Tech List is relatively small, although it is expected to grow each year, particularly as SVAMC expands internationally. In its first year, there are approximately thirty appointees, including five from the New York metropolitan area.

### New ADR Technologies

Various SVAMC members are deeply engaged in efforts to integrate technology advancements into dispute resolution and, more importantly, utilize technology to provide improved processes. SVAMC members are working to evolve online dispute resolution (ODR) technologies, such as those developed at eBay and PayPal, from the Bto-C (business to consumer) sector to the B-to-B (business to business) sector to handle major commercial disputes. SVAMC is also beginning collaboration with university researchers to provide publicly available database profiles on individual arbitrator practices so that users have better resources in selecting neutrals.

### Tech ADR Thought Leadership

SVAMC has begun work with leading law firms and technology companies to provide an organized forum for thought leadership on efficiencies for technology dispute resolution. Meetings are planned for late 2015 and early 2016 to assemble leading in-house and law firm practitioners to develop strategies for improving court and ADR technology dispute resolution processes, including considering judicial, legislative and private institutional improvements to better serve users.

### SVAMC Leadership and Diversity

SVAMC is led by its Board of Directors and guided by its advisors and membership. Management is coordinated through the SVAMC Executive Board and various operating committees and task forces. The Center's leadership is

composed of highly recognized technology practitioners who work collaboratively to advance SVAMC's mission of promoting ADR for tech disputes. They come from a variety of backgrounds, are diverse, and work across borders to build an organization that will serve as the voice of tech ADR. SVAMC intends to expands its leadership base more deeply into the corporate sector as it grows.

One of SVAMC's most important focuses is improving diversity in the technology ADR sector. Both the technology industry and the practice of law are notorious for historical underrepresentation of women and minorities. The resulting harm is compounded in the convergence of the two in technology ADR. SVAMC is working to confront that issue. SVAMC invites young practitioners as general members, is involved in scholarly work on the subject and has a dedicated task force focused on outreach to women and other diverse practitioners. The goal is to have a broad, diverse general membership, encourage the development of tech neutrals with diverse backgrounds, and work to improve opportunities for all.

## Internship Program

SVAMC offers internships to motivated students who wish to learn more about technology, law and ADR. SVAMC recruits interns who have an interest in the law, social media and technology, have a willingness to learn and positive attitude, and possess superior grades, accomplishments, and references. Applications are accepted on a rolling basis throughout the year.

The focus of the SVAMC internship is to educate interns about tech ADR and to provide a rewarding work experience where they can use their research, writing, and technical skills to promote SVAMC's mission.

Through its internship program, SVAMC generates a student interest in tech ADR and offers an enriching experience and exposure to the tech ADR landscape.

## Looking Forward

The SVAMC community is part of a rising tide. With each new member, new program offering, new Tech List appointment and new outreach to users and institutions, And with each advance we increase the opportunities for ADR practice for all.

SVAMC will continue reaching out to the user-community, providing quality resources and service, and expanding both geographically and in diversity.

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Turn the page on write-downs and write-offs

# Eat the Frog First: Address Damages Early

By Carol Ludington

Mark Twain said, "If it's your job to eat a frog, it's best to do it first thing in the morning." In disputes, damages are often the frog. Many judges, arbitrators, and lawyers would rather eat a frog than deal with damages—they would rather focus on the liability issues first and leave damages until later, usually much later. Instead, it is wise to apply Mark Twain's sage words and eat the frog first thing in the morning by performing a realistic assessment of damages as soon as reasonably possible.

A lack of focus on damages early in a case often results in erroneous expenditures of time and energy and ultimately, unhappy parties.

Imagine yourself in the following situations:

***Situation One—"The Drained Pocketbook"***

*You are a judge, arbitrator or attorney involved in a dispute. The dispute has been ongoing for over a year, has been hotly contested, and millions of dollars have been spent on legal fees. Because there are several complex legal issues, it was decided to defer work on damages until late in the process. Fact discovery has ended and damages expert reports are due soon. As the damages experts do their work, you learn that there is a significant damages issue that will likely limit damages to a fraction of the amount that has already been spent on legal fees.*

***Situation Two—"The Missed Opportunity"***

*You are a judge, arbitrator or attorney involved in a dispute. The dispute has been ongoing for over a year, has been hotly contested, fact discovery has ended, and damages expert reports are due soon. As the damages experts do their work, you learn that there is a damages category that has not previously been considered, but that has the potential to dramatically increase the amount of damages at issue. To prove these damages, additional discovery is needed. Unfortunately, because fact discovery has closed and opportunities to obtain this needed discovery have been missed, this additional information is not available. As a result, the damages experts, the attorneys, and the judge or arbitrators do not have the information they need to address these significant damages.*

***Situation Three—"Proportional to What?"***

*You are a judge, arbitrator or attorney involved in a dispute. The case has been bifurcated, with liability to be addressed first and damages to be addressed later. You are now tasked with developing an e-discovery plan that is proportional to the amount at issue. One party claims that damages are huge and the other party insists that any damages are nominal.*

*What amount are you going to consider for proportionality?*

***Situation Four—"Ate the Frog First"***

*You are a judge, arbitrator or attorney involved in a dispute. Shortly after the dispute was initiated, and before discovery began, a damages neutral was appointed to perform an Initial Damages Assessment. The Initial Damages Assessment identified a realistic magnitude of damages, key damages issues, and relevant discovery needed to address these issues. The dispute process was then tailored to fit the magnitude of realistic damages and to ensure that discovery uncovered the information necessary to adequately address key damages issues. Instead of incurring time and expense for formal discovery of basic data, the parties exchanged sales and profitability data in an agreed format. Focused discovery was done related to the key damages issues identified by the Initial Damages Assessment, and the damages neutral assisted in resolving damages discovery disputes. Damages discovery proceeded quickly without multiple rounds of damages discovery and without the need for motions to compel discovery.*

*Because it was decided that settlement would be facilitated by early determination of a key damages issue, the damages neutral provided expert determination related to that issue. The early understanding of the amount of revenues and profits at issue, early discovery, and expert determination on this key issue helped narrow the gap between the parties' views of the amount of damages at issue. Before significant amounts were spent by either party, the parties participated in settlement negotiations with an agreement that if they did not reach a negotiated settlement, the damages neutral would reach an expert determination*

*regarding the categories and amount of damages. In this way, the parties made informed decisions regarding how to proceed regarding liability and avoided the cost of formal damages discovery, expert reports, and motions related to damages.*

In which of these situations would you rather be? If your answer is "Ate the Frog First," then consider implementing some or all of these damages approaches in future matters.

It is often suggested that liability issues need to be decided before addressing damages, but if you do not first determine the magnitude of potential damages related to each issue, how do you know how much time and effort to spend on each liability issue?

> *"…if you do not first determine the magnitude of potential damages related to each issue, how do you know how much time and effort to spend on each liability issue?"*

This problem was demonstrated during a recent international arbitration moot competition. The moot problem involved two breach of contract issues. The first issue involved interesting and challenging legal topics, but relatively insignificant potential damages that were much less than the cost of arbitration. The second issue involved less intriguing legal topics, but big damages. In a real-life dispute, each party would obviously prefer to win on both issues. However, if they could win on only one issue, each party would typically prefer to win the issue with the biggest damages. A party that won on the issue involving insignificant damages but lost the second issue involving big damages would likely not be happy with the outcome or their lawyers. Hence, wise advocates, judges and arbitrators would have devoted more time and energy to the second issue. Instead, many of the moot participants did the opposite and invested much more time and energy to the intriguing liability topics of the first issue than was justified by potential financial rewards, while short-changing the more valuable (but less legally intriguing) second issue.

A focus on the relative magnitude of damages related to each of these issues would have likely shifted the participants' allocation of time and energies to a more appropriate balance between the issues. While this was a moot competition, in real-life disputes counsel often similarly pursue every theory without regard to its economic value, while the parties would have likely preferred that the first issue be resolved or eliminated quickly rather than spend more than it was worth.

Implementing processes to provide relevant damages information early helps match costs to potential rewards, enables better-informed decisions, avoids unpleasant surprises, and facilitates earlier dispute resolution. Establishing damages deadlines, performing an Initial Damages Assessment, exchanging initial damages contentions, exchanging initial data, utilizing damages experts as neutrals, and obtaining early damages determinations are among ways to utilize damages as an effective tool for dispute resolution.

This is not intended to suggest that disputes must necessarily be bifurcated with damages being tried to conclusion before addressing liability issues. To the contrary, it typically makes sense to pursue both liability and damages issues at the same time. Armed with a realistic, preliminary understanding of both the legal issues and potential damages, informed decisions can be made to implement a process that is tailored to fit each case, and that properly matches costs to potential benefits.

### Establish Damages Deadlines

Dispute activities are often triaged based on deadlines, but scheduling and procedural orders typically include few deadlines related to damages. In fact, many such orders do not even include the word "damages." In the absence of damages-related deadlines, damages too often do not rise to the top of the triage pile, and little attention is paid to damages until late in the process. Establishing damages-related deadlines in the scheduling order helps ensure that damages get attention early enough in the process.

### Perform an Initial Damages Assessment

An Initial Damages Assessment follows the 80/20 concept—providing 80 percent of the value for less than 20 percent of the cost. An Initial Damages Assessment does not have to be expensive and can be done by an experienced damages expert before discovery and with few documents.

One approach involves few, if any, documents, a small number of interviews, and limited research. With this information, an Initial Damages Assessment identifies potential damages measures, likely damages magnitudes, key damages issues and relevant discovery. This facilitates informed decision-making, earlier dispute resolution, streamlined discovery, and significant savings of time and costs. It should be done as early in a dispute as practical and should be done by an experienced damages expert retained by one of the parties, by a jointly retained damages expert, or by a damages neutral.

### Consider Utilizing Damages Experts as Neutrals

Using damages experts as neutrals (such as a Damages Special Master, a damages advisor, an Expert Deter-

miner, arbitrator and mediator) leverages the expertise of the damages neutral to provide clear understanding of the issues, needed information, and appropriate damages outcomes.

Appointing a Damages Special Master, a damages advisor or an Expert Determiner does result in some cost to the parties, but these costs are offset by savings that result from early resolution and streamlined discovery. Also, the court or tribunal is provided with better information with which to manage each case, while less time is needed due to the efforts of the damages neutral.

Alternatively, appointing a damages expert as an arbitrator or mediator keeps decision-making authority within the arbitral tribunal while providing damages expertise to facilitate case management and effective decision-making.

Using a damages neutral is not needed in every case, and the selection of a damages neutral is not necessarily intended to replace other neutrals. For example, a damages neutral may assist regarding expert determination of specific damages issues, or to help resolve damages discovery issues, while the tribunal retains ultimate decision authority (similar to a judge and Special Master in court litigation), deals with liability, and retains procedural control. Whether jointly retained or not, employing the services of a damages expert earlier rather than later will enable counsel to calibrate the process to fit the potential recovery or loss.

## Eat the Frog First

Implementing creative damages approaches tailored to fit each case reduces time and cost, better matches cost to potential benefits, and makes dispute resolution more accessible. Although implementing these approaches may require some additional efforts early in a dispute, these efforts are quickly rewarded with better information, efficiencies, and informed decisions. One size does not fit all, and all of these procedures may not be appropriate for a particular dispute, but establishing damages deadlines, exchanging initial damages contentions, exchanging basic data, and performing an initial damages assessment quickly and economically identifies the magnitude of potential damages and key damages issues. With that information, informed decisions can be made about tailoring the rest of the process (and the costs) to fit each case.

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# Congress Seeks to Put New Requirements on the CFPB's Moves to Regulate Consumer Arbitration

By Russ Bleemer

The Consumer Financial Protection Bureau's rewrite of the nation's arbitration practices is back in rewrite.

A long, slow and detailed examination by the CFPB—an Obama administration idea given life by the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act—that had begun three years ago produced a voluminous report in March. It contained data on how consumers get arbitration in their financial services contracts, and the results produced when they use the procedures.[1]

The report didn't give formal recommendations, but provided hard-to-get arbitration statistics, including topic-specific empirical conclusions, which showed more consumers were served by and received more significant returns in class-action litigation than ADR.

> *"A June 17 letter signed by 84 members of the U.S. House of Representatives and the U.S. Senate—all Republicans—asked the CFPB to stop in its tracks. The letter said the study was incomplete, and demanded a re-do."*

The report said consumers also usually didn't know if they were subject to arbitration clauses in their credit-card contracts, and those with clauses "generally either do not know whether they can sue in court or wrongly believe that they can do so."

CFPB Director Richard Cordray said in March that the Bureau would organize gatherings nationwide this year about arbitration processes. The focus appeared to be intended to pinpoint the places in consumer arbitration that the CFPB would regulate, which is its mandate under Dodd-Frank if it finds that regulation would be in the public interest.

But the long and slow report turned out to be too fast for some, and the utility of the CFPB's information clearly is in the eyes of the beholder.

A June 17 letter signed by 84 members of the U.S. House of Representatives and the U.S. Senate—all Republicans—asked the CFPB to stop in its tracks. The letter said the study was incomplete, and demanded a re-do.[2]

Then, the House Appropriations Committee, in a 30-20 vote, agreed the same day to cut off funding for any CFPB arbitration work until the Bureau conducts more research and a cost-benefit analysis on how consumers are served in arbitration.[3]

The letter, and a regulatory process set out by voice vote under a rider to the committee's proposed financial services appropriations bill, covers ground already provided in the March report.

For example, Cordray had said in March—at a public forum in Newark, N.J., that served as the launch for the arbitration report—that any further regulation issued would be subject to comment, which the Appropriations Committee rider spells out.

More specifically, the financial services appropriations bill—introduced on July 9 as H.R. 2995 (see http://ow.ly/PrPh6 for text, status and summary)—demands a cost-benefit analysis on the extent to which consumer class actions "provide net benefits…in light of the CFPB's enforcement and examination authority."

In fact, in a summary release accompanying the March report, the CFPB highlighted the differences between class actions and arbitration results with aggregated numbers. The comparison shows low participation and success for consumers in ADR and individual suits, but in class cases, eligibility for far more consumers to receive relief from big recovery pools.

The CFPB reports that in 341 cases that were resolved by an arbitrator in which the CFPB was "able to ascertain the outcome," out of more than 1,000 2010-2011 American Arbitration Association filings that the CFPB assessed, consumers received affirmative relief in 32 cases and debt forbearance in 46 cases, with five cases overlapping, for, respectively, totals of $172,433 and $189,107.

But companies received relief in 227 of 244 cases where they made claims or counterclaims, for an aggregated amount of more than $2.8 million.

Using a longer five-year study period for class proceedings, the CFPB found that consumers were eligible to receive far more compensation: $1.1 billion paid out over a five-year period to "a minimum of 34 million consumers." That's an average of $220 million to 6.8 million consumers annually.

But in those numbers lies a strong business objection to the data's meaning: The actual individual return for class claims often is extremely low. The congressional objections enumerated in the letter to CFPB Director Cordray are yet another round in the fight over whether arbitration helps or hurts consumers that has been waged for years.

## The Faceoff

Business interests, often led by the U.S. Chamber of Commerce and backed by Republicans, have lobbied Congress, as well as filed U.S. Supreme Court amicus briefs,

supporting mandatory arbitration in recent years backing the validity of contract provisions that waive participation in class litigation in favor of individualized, private arbitration processes.

Consumer interests, with strong allies among the Democrats, want restrictions. They deride complicated arbitration procedures as being a characteristic part of adhesion contracts designed to discourage consumers from making claims, even in the face of wrongdoing by the businesses. They say that the freedom from litigation pushed by business is really designed to cut off claims.

"It's like a four-way intersection," says former FINRA Executive Vice President George Friedman, an ADR consultant who heads his own eponymous consulting firm and teaches at New York's Fordham University School of Law, and who has written about the Washington arbitration maneuvers extensively.[4]

Congress's June intervention into what arbitration experts on both sides predict will be a move by the CFPB to either restrict or eliminate mandatory pre-dispute arbitration clauses from consumer contracts has become an argument over the continuing validity of the mandatory waivers of class action processes that the U.S. Supreme Court backed *AT&T Mobility v. Concepcion*.[5]

Business interests won that Supreme Court battle resoundingly. The case settled the question of whether businesses can include mandatory class waivers in their consumer contracts.

The Court has strengthened that declaration by turning back a detailed mathematical analysis purporting to show the inefficiency and impracticality for plaintiffs to bring individual claims that will yield comparatively small returns under a class waiver that sends disputes to arbitration. That class-action case, *American Express Co. v. Italian Colors Restaurant*,[6] ironically, was a business-to-business dispute.

In retrospect, Congress had anticipated the trends in the Supreme Court decisions when it moved to restrict what consumer advocates call "forced arbitration" with Dodd-Frank. It created the CFPB and ordered the new agency to investigate—and, if it finds the conditions right, regulate arbitration. Dodd-Frank Section 1028 states:

> (a) Study and Report.—The Bureau shall conduct a study of, and shall provide a report to Congress concerning, the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services.
>
> (b) Further Authority.—The Bureau, by regulation, may prohibit or impose conditions or limitations on the use of an agreement between a covered person [which is defined generally to include financial services companies] and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers. The findings in such rule shall be consistent with the study conducted under subsection (a).

The law added a limitation on the CFPB's actions: "The authority described in subsection (b) may not be construed to prohibit or restrict a consumer from entering into a voluntary arbitration agreement with a covered person after a dispute has arisen."

But it's a different Congress now. Republicans have fought hard against the CFPB from the outset, waiting two years before confirming Richard Cordray. They have tried and failed to eliminate the agency, and have attempted to block its work, including on arbitration.

In June, it revived the fight via the financial services appropriations bill and the arbitration rider, with its proscription for the bureau's next steps. It focused on the standard set out in Section 1028(b). While Dodd-Frank itself enumerates various agency duties, the move is the deepest direct Congressional counter to the apparent march to arbitration restrictions the parent law contemplates.

The bill was preceded in May by strong business support from five financial services professional associations--American Bankers Association, American Financial Services Association, Consumer Data Industry Association, Financial Services Roundtable, and the U.S. Chamber of Commerce, all of which are longtime Capitol Hill lobbying groups and oppose the CFPB work—which formally asked for a comment period before a final CFPB rulemaking.[7]

## The Arbitration Rider

The Appropriations Committee rider, proposed by Rep. Steve Womack, R., Ark., and Rep. Tom Graves, R., Ga., prevents the CFPB from using the funds under the financial services appropriations to restrict pre-dispute arbitration despite Section 1028.[8]

The rider layers new requirements onto the CFPB's original mandate. It requires a public notice and comment period, and demands that the bureau solicit public comment, including empirical data; the Congressional letter to Cordray criticizes the CFPB's earlier attempts at incorporating public comment in assembling the arbitration report. The legislative proposal requires the final CFPB report to discuss:

> (A) how, for the kinds of disputes that most consumers are likely to have, the accessibility, cost, fairness, and efficiency of the process afforded by litigation compares to the accessibility, cost, fairness, and efficiency of the process afforded by pre-dispute arbitration; (B) the extent to which arbitration and litigation encourage companies to resolve disputes before their

> customers file formal claims; (C) whether consumers' use of arbitration is adversely affected by a lack of information and the steps that could be taken to better inform consumers about arbitration and to make arbitration more accessible to consumers; (D) the extent to which private class action proceedings on behalf of consumers regarding consumer financial products and services will provide net benefits to consumers in light of the CFPB's enforcement and examination authority; (E) the extent to which particular limitations or conditions on the use of pre-dispute arbitration will have the practical effect of eliminating pre-dispute arbitration; and (F) the impact on cost and availability of credit to consumers and small businesses of prohibiting or limiting pre-dispute arbitration.

Moreover, the appropriations restriction, if passed, would require peer review of the final report's "methodology and findings by a diverse group of individuals with relevant expertise in quantitative and qualitative research methods from the private and public sectors," adding, "The Director of the CFPB shall select individuals whose expertise in research methods is unrelated to dispute resolution."[9] All of the rider requirements and restrictions were incorporated into the report accompanying the July H.R. 2995 introduction.

"Obviously, they're trying to mess with the agency and the budget to issue these rules," says San Francisco employment lawyer Cliff Palefsky, a name partner in McGuinn, Hillsman & Palefsky, who follows arbitration issues closely. "They know it's coming."

"The last time the House Republicans introduced legislation to block the CFPB," says F. Paul F. Bland Jr., who is executive director of Washington, D.C., consumer advocacy law firm Public Justice, "they simply tried to ban the study.[10] This opened them up to the easy criticism that they were simply afraid of what the facts would show. Since that sounded so terrible, and produced some just criticism of [a] willfully know-nothing orientation, this time they are going in the opposite direction, claiming that they need more information. It's right out of the playbook of global warming deniers…. [They are] asking for study of things already studied."

But management-side attorneys echo the legislators' June 17 letter, noting that the original Dodd-Frank Section 1028(b) standards aren't met by the March report.

Jay W. Waks, special counsel to New York's Kaye Scholer, who focuses on complex litigation and employment conflict resolution processes, notes, "Unless there is more to the study than I have read, it does not pinpoint abuses that would justify outlawing or restricting alternatives to the court litigation process, such as arbitration. And there seems to be plenty of data to support the concept that, although not perfect, arbitration has benefited individual claimants. The Bureau cannot paint with a broad brush and must affirmatively find and support its finding that, under Dodd-Frank, prohibiting or imposing conditions or limitations on pre-dispute arbitration agreements 'is in the public interest and for the protection of consumers.' I do not see such a finding or support. Thus, there will be another round of pointless litigation challenging any effort to prohibit or restrict pre-dispute arbitration contracts."

Says ADR consultant George Friedman on the mandatory pre-dispute arbitration data, "They didn't declare that it hurts people, so the Republicans are right: Any rulemaking has to track the findings in the report."

There had been no action on the bill as of press time.

## The Prognostications

So what happens next?

The CFPB had been quiet about arbitration since the March report; there has been no public response by the agency to the Congressional moves to engineer the next report and anticipated regulatory moves.

On July 2, in response to questions about the status of the process-focused gatherings suggested by Director Richard Cordray at the March event, CFPB spokesman David Mayorga stated in an email that the agency's arbitration efforts have continued:

> Since the issuance of the study in March 2015, we have continued to invite feedback and to engage with key stakeholders including through roundtable discussions with both industry and consumer groups. We will continue to carefully consider feedback from stakeholders regarding our research findings to determine appropriate next steps and if additional consumer protections are needed.

Perhaps in a nod to the new House Appropriations Committee requirements, which were still awaiting floor action at press time, Mayorga concluded in his email,

> Further, if the Bureau does decide to proceed with proposed regulation, the procedures governing notice-and-comment rulemaking and the Bureau's rulemaking practices will provide further opportunity for stakeholder participation.

George Friedman says, "My guess is the Bureau will probably act in the fall because they have said several times they will get input from stakeholders…. I think they are going to have to shore up the [March] report to address that part of the [Dodd-Frank] statute that says anti-mandatory arbitration rulemaking must be based on a finding that it is in the public interest and necessary for consumer protection. Any arbitration rulemaking that's not predicated on a

finding that arbitration is harmful to consumers is problematic at best" under the wording of the statute.

Alan Kaplinsky, who is a leading defender of commercial arbitration practices as the head of Philadelphia-based Ballard Spahr's Consumer Financial Services Group, says, "While no one can predict the future with any certainty, we believe that it will be some time before the CFPB adopts any rule concerning consumer arbitration clauses. CFPB has a number of matters on its plate, there may be a need for a SBREFA panel,[11] and we are entering a presidential election cycle."

"Given the SBREFA process," says Public Citizen's Paul Bland, "they can't move as quickly as I would hope. The way the payday lending regulation is gradually emerging, informally at first, is probably a good model for what will happen with arbitration."[12] Bland adds, "I am guessing that they'll announce a general direction they're considering before too long, and then have to wait for comments…before issuing a final rule making."

In July 15 testimony, Richard Cordray told the Senate Committee on Banking, Housing and Urban Affairs that the CFPB was moving ahead and "would convene 'a small business review panel as the first step' in the rulemaking process." Bowen "Bo" Ranney, "Director Cordray appears before Senate Banking Committee," *CFPB Monitor* (July 16, 2015) (available at http://ow.ly/Q2WNw). Cordray's testimony is available in a video on the committee's site here: http://ow.ly/Q2YqN.

Presidential candidate Sen. Ted Cruz, R., Texas, countered the wide-ranging testimony by introducing legislation to eliminate the agency. See Vicki Needham, "Cruz calls for abolishing the Consumer Financial Protection Bureau," *The Hill* (July 21, 2015) (available at http://ow.ly/Q2Xlk).

## The Middle Ground

Some arbitration practitioners are looking beyond the absolutes of an outright ban for mandatory pre-dispute arbitration, or a hands-off, no regulation approach.

For example, Kaplinsky pushed the commission hard at the March Newark hearing to step up its education efforts on ADR effectiveness.[13]

"Everyone agrees on that point," says George Friedman, adding the arbitration proponents also "have got to do a better job on educating customers. The consumers sometimes had no idea what they were agreeing to."

A common criticism of programs is that companies should be singing the praises of arbitration in that it helps consumers stay out of court, and they should slim down the process instructions, which usually appear in fine print well into whatever credit agreement the consumer has signed onto. Disclosures often are formalistic at best. At the same time, big companies often already pick up the costs of arbitrations filed by individuals.

There are other middle-ground positions. An arbitration fairness index proposed three years ago would establish "a public rating system assessing the fairness of arbitration programs associated with contracts for consumer goods or services or individual employment contracts."[14]

George Friedman, who predicts the CFPB ultimately will "ban or severely limit the use of pre-dispute arbitration clauses in contracts governing consumer financial products and services,"[15] proposes an opt-in compromise.

He suggests allowing the customer to choose the contractual conflict resolution method, but strictly pre-dispute, because otherwise it would leave looming uncertainty about the process to be used. That lack of clarity, he says, would be most detrimental to consumers, and would encourage both sides to refuse to arbitrate post-dispute, for whatever tactical reasons they may choose.

Friedman also says that consumers should indicate a clear, knowing, and voluntary agreement to arbitrate, represented by separate initialing or clicks on a separate arbitration web contract. He said customers should be offered online dispute resolution, and "new rules should also require that any customer arbitration system adhere to basic standards of procedural fairness," along the lines of FINRA's arbitration program.

Friedman focuses much of his work on securities ADR. He notes that the CFPB's efforts on regulating arbitration makes it nearly impossible, regardless of outcome, for the U.S. Securities and Exchange Commission to avoid at least investigating similar reform steps. Dodd-Frank, Friedman points out, requires the CFPB to act on arbitration if its findings satisfy the statutory standards.

Barbara Black, a University of Cincinnati College of Law professor who chairs a year-old FINRA arbitration task force charged with, among other things, addressing Dodd-Frank issues, notes that the task force issued an interim report in June that defers action on mandatory pre-dispute arbitration for broker-dealer/consumer securities disputes, which FINRA provides.

The task force report has an extensive list of recommendations for action, including a ban on class-action waivers in pre-dispute arbitration agreements between broker-dealers and customers.

But the report also says that several areas, including pre-dispute mandatory arbitration agreements and whether customers could choose arbitration or litigation post-dispute, needed more review and consideration.[16]

## The ADR Setting, Now

So if the CFPB decides to regulate or ban arbitration practices, it won't be in isolation. Dodd-Frank flat-out bars pre-dispute arbitration agreements in residential mortgage cases, and in whistleblower cases involving commodities and securities fraud.

While the current Congressional moves look to block the effects of the Dodd-Frank Act, the arbitration part of the law itself arguably has its roots in long-running Congressional proposals to ban mandatory pre-dispute arbitration in consumer and employment cases.[17] The current version of the Arbitration Fairness Act, which bans pre-dispute arbitration in consumer and employment cases, is back before Congress, reintroduced in April by Rep. Hank Johnson, D., Ga.[18] For now, it's a nonstarter given House Republicans' overwhelming opposition.

Still, Congress's divide hasn't stopped some compromise restrictions. Military members and their families have long been protected from onerous consumer credit terms, including arbitration, under certain conditions, which the CFPB has sought to extend to all mandatory pre-dispute arbitration.

The so-called Franken Amendment to Section 8116 of the Defense Appropriations Act for Fiscal Year 2010[19] restricted some U.S. Department of Defense contractors and subcontractors from using mandatory arbitration in employee agreements to settle Title VII claims and torts related to sexual assault or harassment.

President Obama extended the 2010 law by executive order last year to all companies working under federal contracts of $1 million or more.[20]

* * *

Plaintiffs' attorney Cliff Palefsky says he has doubts about consumers' ability to make a knowing and voluntary pre-dispute agreement on conflict resolution processes given the complexity of most arbitration disclosures and the pressures of a sale. He says the March CFPB report shows that mandatory processes are a bad idea because they serve to cut off claims.

Says Palefsky, "I just know the bureau got it right. They studied it for a long time…. And now I hope they can fulfill their statutory responsibility and just get it done."

"I am more convinced than ever that the data in the [s]tudy demonstrate that arbitration is superior to class action litigation as a means of resolving consumer disputes," counters Ballard Spahr's Alan Kaplinsky, who says he participated in one CFPB roundtable since the arbitration report's release.

He adds, "We are exploring a number of ways to get the message across to the CFPB and to Congress."

## Endnotes

1. Consumer Financial Protection Bureau Arbitration Study Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a) (March 2015) (available at http://ow.ly/PiNMB).
2. The letter is available at http://ow.ly/PiQHj.
3. Details are on the committee's website, here: http://ow.ly/PiOhQ.
4. See Prof. Friedman's blogs at www.gfriedmanadr.com/blog.
5. 563 U.S. 321 (2011) (available at http://ow.ly/PcucW).
6. 133 S. Ct. 2304 (2013) (available at http://ow.ly/PcuJy).
7. Philadelphia-based Ballard Spahr maintains an excellent blog, CFPB Monitor, which covered the associations' requests to the agency and posted the letter, as well as the Republicans' letter to Cordray at http://ow.ly/Pcy6i.
8. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929-Z, 124 Stat. 1376, 1871 (2010) (available at http://ow.ly/Pd62y).
9. The mark-up rider to the House Appropriations Committee bill that limits the CFPB's arbitration work, containing its reasons for the move, appears here: http://ow.ly/Pbyom. The draft bill is here: http://ow.ly/Pbyrw.
10. Bland is referring to the initial CFPB survey report, released in December 2013, available at http://ow.ly/PcQ1U.
11. The Small Business Regulatory Enforcement Fairness Act of 1996 has a procedural requirement that appears to apply to CFPB rulemaking to assess the impact of the agency's action on small businesses; *see* the U.S. Small Business Administration's website, here: http://ow.ly/Pj35d.
12. The CFPB's most recent moves on payday lending are summarized at its website here: http://ow.ly/PiD5n.
13. Russ Bleemer, "Showdown in Newark: The Consumer Financial Protection Bureau Issues a Massive Three-Year Arbitration Study, Drawing Audience Praise and Industry Scorn," 33 Alternatives to the High Cost of Litigation 51 (April 2015); *see also* Alan S. Kaplinsky, "Even in the CFPB's Numbers, Arbitration Benefits Consumers," 33 Alternatives to the High Cost of Litigation 55 (April 2015).
14. Thomas Stipanowich, "The Arbitration Fairness Index: Using a Public Rating System to Skirt the Legal Logjam and Promote Fairer and More Effective Arbitration of Employment and Consumer Disputes," 60 Kansas L. Rev. 985 (2012) (available at http://ow.ly/Pd8VZ) (noting the U.S. Supreme Court's "dramatic new limitations" on unconscionability defenses in cases on arbitration agreements as a result of *AT&T Mobility v. Concepcion* and the "broadly polarized Congress" on arbitration issues).
15. George H. Friedman, "CFPB Issues Final Report on Arbitration, Telegraphing a Ban or Limits on Arbitration. Should SEC follow Suit?" Securities Arbitration Commenter (March 15, 2015) (available at http://ow.ly/PbxXl).
16. FINRA Dispute Resolution Task Force Interim Summary of Key Issues (June 2015) (available at http://ow.ly/PeYER).
17. *See generally*, Catherine Moore, "The Effect of the Dodd–Frank Act on Arbitration Agreements: A Proposal for Consumer Choice," 12 PEPP. DISP. RESOL. L.J. 503, 514–18 (2012).
18. See H.R. 2087 (available at http://ow.ly/Pfue1).
19. Pub. L. No. 111-118 (available at http://ow.ly/Pfv28).
20. Executive Order--Fair Pay and Safe Workplaces (July 31, 2014) (available at https://www.whitehouse.gov/the-press-office/2014/07/31/executive-order-fair-pay-and-safe-workplaces).

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# New American Arbitration Association Rules for Accounting and Related Services Arbitrations—An Emphasis on Management by the Panel, Efficiency and Proportion

By Barbara Mentz and Dan Kolb

## Introduction

While arbitration should provide a simpler, less expensive and more expeditious form of dispute resolution, too often the arbitration process has become essentially the same as a court proceeding. Recognizing that, in its adoption of both its New Commercial Rules, which became effective on October 1, 2013, and its New Rules for Accounting and Related Services Disputes, which became effective on February 1, 2015, the American Arbitration Association (AAA) has focused on the importance of the Arbitrator or Arbitrators (the "Panel") managing the arbitration process and including steps in the process that should, if adhered to, make an arbitration far more efficient and cost-effective.

Focusing in this writing just on the New Rules for Accounting and Related Services Disputes, we think it is important for practitioners to understand and embrace the new approach. Both accounting firms and their clients are keenly aware of the costs of litigation and should appreciate the substantial improvements directed at efficiency and proportion in the New Rules.

Although we focus here on the New Rules for Accounting and Related Services Disputes, the discussion of arbitration management should also benefit those engaged in the arbitration of other types of commercial cases. That should be true especially of the discussion of the fully developed Rules for managing the discovery process with an emphasis on a more detailed approach to managing E-discovery, production of documents and depositions.

## A Presumption in Favor of Mediation

Just as in the New Commercial Rules, the New Rules for Accounting and Related Services adopt a novel approach to encourage the parties to mediate their dispute before and, if need be, during arbitration. It is presumed in the New Rules that the Parties will mediate either with a mediator nominated by the AAA or a mediator they select privately, unless they take the initiative and opt out of mediation. This, by design, puts the weight on the scale in favor of mediating rather than, as in the past, just providing it as an option the Parties could select. Mediation, if effectively conducted and embraced by the parties, can lead either to an early resolution and significant cost savings or can assist the Parties in focusing on the real issues early so that, if the arbitration process continues, they may have a better appreciation of those steps in preparation for and presentation at the hearing that are necessary.

If the mediation is not immediately successful in bringing about a settlement, the Rules provide that it can continue while the arbitration process moves forward, without delaying the arbitration. Often that can mean that as the Parties learn more as their cases develop they can better assess their strengths and weaknesses and, in time, return to the mediation better equipped to resolve the matter before the hearing. While that will not spare them all the costs of the process it holds the promise of reducing the burden and costs materially.

It is too early to determine how well the presumption in favor of mediation will work but initial indications are that the use of mediators under the New Commercial Rules has increased significantly since those Rules were adopted in 2013. The new presumption in favor of mediation is a novel way to promote increased efficiency that many Parties and their counsel should value.

## The Preliminary Hearing

As in the New Commercial Rules, the new Accounting and Related Services Rules adopt important changes in how the preliminary hearing is to be conducted. They are designed to promote efficiency by, among other things, encouraging stronger management of the arbitration process by the Panel at the hearing. The Rules include a useful checklist of matters to cover at the preliminary hearing that should lead to development of a comprehensive plan for the arbitration by the Panel and Parties. Stress is placed in the Rules on not importing into the arbitration and the preparatory work for it, procedures from court systems which can expand the work that must be done without commensurate benefits for the parties. After directing the process at the preliminary hearing and getting the Parties focused on a plan to get through the preliminary steps before the arbitration, the Panel will typically issue its first Pre-Hearing Order enumerating the anticipated steps leading to the hearing accompanied by dates by which each step is to be taken. That order and such modifications as may be made to it in subsequent Pre-Hearing Orders should serve as the framework for the Parties and counsel as they proceed.

To promote proportion and cost saving in the steps taken at the preliminary hearing, the New Accounting Rules specifically require—to the extent possible—the presence of client representatives at the Preliminary Hearing. Because the client may have a greater sensitivity to litigation costs and the values in close management of the process than counsel, it is hoped that the presence of

client representatives will be a further spur to efficiency. While many litigators embrace efficiency many also see their role as obtaining all the facts so they can do the best job. That may be a worthy goal but it also may be more than the client wants or may need. The client can elect to take the risk of not seeking everything, and that may be harder for counsel.

To promote success in the efforts to have the Panel manage the process for both efficiency and fairness, the New Accounting Rules—just as the New Commercial Rules—provide the Arbitrator with specific enforcement authority. They permit a series of specific directions by the Arbitrator that can, among other things, set search parameters and allocate costs of discovery in order to keep the process in measure. They provide specifically for enforcement orders that can serve as encouragement for the efficiency that will benefit most Parties.

## New Disclosure Rules

Consistent with the emphasis on efficiency as well as proportion, the new Rules for Pre-Hearing Disclosure have been designed based on the conviction that in disputes where professional accounting and related services firms are Parties it is very often in the mutual interest of the Parties to avoid steps in disclosure that can, if not controlled, needlessly inflate the time and cost required to resolve the issues. They afford the Panel the authority, the responsibility and the duty to manage the exchange of information among or between the Parties so as to reduce cost and increase the focus on the central issues in dispute. The Panel is to do so with due consideration for proportionality both as to the scope of any request for information in relation to the likely relevance and materiality of the requested disclosure and the amount at stake in the arbitration. Expressly rejected by the New Disclosure Rules is the dragnet approach, where the objective is to sweep in anything and everything that can be thought of as conceivably relevant.

If the basic concepts embodied in the New Disclosure Rules are understood and guide the Panel and Parties, each decision as to appropriate disclosure will be made with efficiency, proportionality and focus in mind, with the almost certain result that the discovery process will be limited either to or close to all that is really necessary.

If the New Disclosure Rules are not followed and the Parties and their counsel instead proceed with disclosure that is as unrestricted as it can be in court proceedings, they will likely lose many of the significant benefits of efficiency, proportionality and focus that arbitration can provide.

As required by the New Disclosure Rules, the Panel and the Parties should, in addition, adopt the following specific practices.

## Preservation

While, under the New Disclosure Rules the Parties are responsible for preservation of all files and documents that are relevant and material to the Parties' claims and defenses, the Parties would also be expected to identify for discussion with the Panel and other Parties any issues as to preservation that could result in significant and potentially unreasonable burdens for them.

If preservation issues are discussed openly at the first preliminary conference or as soon thereafter as practicable, with the express encouragement of the Panel, the Parties may well reach agreement as to a reasonable scope for preservation by both sides that will eliminate the need to preserve vast bodies of irrelevant electronically stored information ("ESI") and hardcopy documents.

As and when necessary, the Panel should issue preservation orders, with due consideration for proportionality and the importance of avoiding unnecessary delay and expense to the Parties.

## Production of Documents

The New Disclosure Rules provide that with direction from the Panel, the Parties would take a number of practical steps that should serve to limit significantly the burden of document production.

(1) The Parties would be directed to exchange early and to update at set intervals the production of documents, including ESI, upon which they intend to rely. Strategic efforts to hold back evidence for either side often lead to no more than unnecessarily extended efforts to discover such evidence and prolong a proceeding that otherwise may be resolved early if the most significant evidence is known to both sides;

(2) Document requests would be tailored not to sweep in any conceivable evidence but instead to specifically describe what is sought with express indication of how and why the documents sought are likely to be "relevant and material" to the Parties' claims and defenses. To assure focus on what is material and relevant broad language such as "all documents directly or indirectly related to" would be avoided;

(3) All requests would be limited to files that are directly relevant and material to the Parties' claims and defenses. If, for example, the search required is for the files of individual employees, the search would be confined to the files of those employees of the Parties who are identified as spending time of significance, not measured alone by the number of hours spent, working in the areas directly relevant and material to the Parties' claims and defenses. Sweeping requests that all the files be searched for specific evidence—including files

where there is little or no likelihood at all that material information would be found—would be disallowed. Such limitations will be beneficial because at both accounting and related service firms and their clients, it is often the case that copies of ESI and hard copies of documents are received by many individuals who have limited or no involvement at all in the matter in issue;

(4) Where a Party has extensive files, the Panel may direct that an index or description of the documents be made available to the requesting Party in order to facilitate a focused description of relevant and material documents as to which production may reasonably be requested. In the absence of an adequate index or other such written description of file contents, the Panel may direct that a Party produce a knowledgeable witness to provide in a limited deposition a description of the contents of files. After that the Parties should be expected to focus their requests for disclosure;

(5) The Parties would avoid, and the Panel would deny, blanket requests for "all drafts" because for most documents in a production the content of drafts is of no moment; instead the Panel and Parties would limit production of drafts to those actually sent to third Parties, or, on good cause shown, drafts that would likely be material to an identified, significant issue raised by the claims and defenses of the Parties. Examples would be the draft language of a contract where the contract's proper interpretation is in issue or drafts of a working paper with respect to a key audit procedure. As with requests for documents, an application for such drafts would be limited to those files that are directly relevant and material to the Parties' claims and defenses and searches of files of individuals would be limited to the files of those who spent time of significance, not measured alone by the number of hours spent, working on matters relevant and material to the Parties' claims and defenses. The fact that documents are not in the possession of the requesting Party should not in itself be sufficient to establish that there is good cause for production;

(6) To avoid concerns about confidentiality, the Panel may issue appropriate orders protecting confidentiality or proprietary information; otherwise Parties may be forced to work through extensive document reviews looking for the usually very limited number of documents requiring confidential treatment. Such orders are often especially helpful with respect to privileged documents.

## Electronically Stored Information

Of course, the greatest single cost concerns today are usually as to the vast array of ESI that most organizations have in their possession and control. ESI can be particularly problematic where the dispute is between accounting firms and their clients, each of which can have ESI spread among large numbers of employees, officers and directors. Audits can involve many professionals at an accounting firm and many officers, employees and even directors of a client corporation. If an employee's hard drive contains 200 gigabytes it may contain the equivalent of 13 million pages of documents, 20 million pages of e-mails or 33 million pages of spreadsheets.[1] And ESI may be stored in both workplace locations, such as laptops, voicemails, shared systems, file shares, cloud accounts, third party storage, archives and personal locations, such as personal laptops, iPhones, iPads, Facebook and other social media.

Duly recognizing the extent of the ESI problem, in addition to the kind of focused discovery requests outlined above, the New Disclosure Rules include the following additional limitations on the production of ESI: (1) The Party in possession of ESI should be allowed to make it available in a readable form most convenient and economical for it, subject to a showing of good cause that there is a compelling need for access to the documents in a different form; very much as with drafts this will serve to limit special production requirements to instances of genuine need:

(a) The Panel should direct that requests for ESI be narrowly focused and structured to assure that a search will not be unduly burdensome;

(b) Production of categories of ESI such as those below should be allowed only if the Panel determines, on application and for good cause shown, that there is a compelling need for such access:

(i) "deleted," "slack," "fragmented," or "unallocated" data on hard drives;

(ii) random access memory (RAM) or other ephemeral data;

(iii) on-line access data such as temporary internet files, history, cache, cookies, etc.;

(iv) metadata, with the exception of header fields for email correspondence, including fields that are frequently updated automatically, such as last-opened dates;

(v) backup servers, tapes, backup data that is substantially duplicative of data that is more accessible elsewhere or not reasonably accessible or other media data;

(vi) other forms of electronically stored documents that would require extraordinary affirmative measures that are not utilized in the ordinary course of business;

(vii) archives, except as that term may be used by the accounting firm to refer to the filing of its final electronic and manual working papers;

(viii) obsolete media or legacy data.

It is a rare instance when production of such forms of ESI will unearth truly relevant and material evidence. Again, the fact that documents are not in the possession of the requesting party does not itself establish a compelling need.

Key to the discussions with Parties and the determinations made by the Panel may well be knowledge and understanding of the technological challenges that face each of the Parties. Such challenges will not be the same in every arbitration. Therefore, the New Disclosure Rules make it clear that if the Panel would benefit from technical assistance to aid it and the Parties in resolving ESI issues before deciding the application, the Panel should require the attendance of an IT, CIO or other individual who is knowledgeable about the Party's electronic systems and capabilities, including electronic document storage, organization, format issues, relevant information retrieval technology and search methodology, in order to explain those systems and address any questions that the Panel may have.

## Depositions

Although controlling document production can often be the most important step in assuring efficiency in an arbitration, controlling the scope of deposition testimony can also make a significant difference. Accordingly, the New Disclosure Rules provide the following:

(1) Absent an agreement of the Parties with respect to depositions, the Panel should direct that no more than three merits depositions per Party be taken. The New Disclosure Rules permit an exception if, upon application for good cause shown, the Panel determines that an additional deposition or depositions are warranted. They also afford the Parties the option of agreeing on a limited number of depositions that is not inflated but is instead consistent with the scope and importance of the issues in dispute.

(2) Depositions should be limited to witnesses who will testify as to matters that are "relevant and material" to the Parties' claims and defenses and should be limited to no more than two days per deponent, with seven hours per day, not including breaks.

(3) Any order with respect to depositions should include a statement that, except to preserve privilege, no speaking objections should be made.

(4) Where the Panel determines that it is necessary to have a limited deposition or depositions in advance of document requests for the purpose of focusing and restricting the scope of document discovery, such limited depositions should not count against a Party's total number for merits depositions.

## Interrogatories and Requests for Admission

The New Disclosure Rules provide generally that interrogatories and requests for admission should not be used because they are often not cost-efficient. Their use is provided for only in those very limited situations where a Party can demonstrate that it is highly likely that such discovery will significantly narrow the issues or provide a necessary clarification.

Among other things, this approach permits the Parties to avoid the usually fruitless process of calling upon the other side to explain its position on various issues through use of "contention interrogatories" that are often answered in so guarded a way that they become no more than a test of the skills of counsel in avoiding anything harmful.

## Experts

The New Disclosure Rules provide that, absent a showing of good cause, expert testimony will be confined to written reports that can be submitted to the Panel, with cross-examination conducted at the hearing and not before. The Panel may determine that, in some cases, it would be a cost effective procedure to have the experts exchange their opinions on key issues and discuss them directly. Often such steps can result in the narrowing of the issues.

## Costs and Compliance

Parties may seek discovery that is burdensome, time consuming and costly either in and of itself or in proportion to the issues in the arbitration. In deciding the disclosure issues, the New Disclosure Rules provide that the Panel should focus on the time involved, the cost of obtaining the discovery, the issue of proportionality, and whether such discovery will serve the goal of a cost-effective and efficient arbitration. Where appropriate, the Panel may condition granting a request on the requesting Party paying costs. The practical effect of such a condition is often that the Parties confronted with bearing the actual cost of disclosure may be driven to work all the harder to promote efficiency. Similarly, where a Party fails to comply with a discovery order, the Panel may take such failure into consideration when allocating costs and may draw an adverse inference.

## The Importance of Creativity

Because the variation in possible disclosure situations is endless, the New Disclosure Rules encourage the Panel to address situations not otherwise covered by being proactive and creative in seeking realistic and creative ways to avoid needless cost and delay.

## Conclusion

The New Disclosure Rules offer the Parties and the Panel a balanced, focused approach to the management of disclosure. If adopted in drafting an arbitration clause, the new Rules for Arbitration of Accounting and Related Services Disputes, through the New Disclosure Rules, should serve to inform the Parties of what they may expect with respect to disclosure in an arbitration.

## Endnote

1. *See, e.g.*, lexisnexis.com (use search term "How Many Pages in a Gigabyte?").

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# Guided Decision Making: Promoting Settlement During Arbitration

By Ruth V. Glick

Arbitrators are increasingly exploring the appropriate relationship between arbitration and mediation in implementing a dispute resolution process that promotes economy and efficiency and meets the needs of the litigants. Dispute resolution neutrals are often directing the litigants to a more cooperative dispute resolution process that often starts as arbitration, but frequently with some encouragement by the arbitrator, ends in settlement between the parties before an arbitral decision is made. A recent survey conducted at Pepperdine University found that a majority of respondents indicated that a higher proportion of their caseload settled pre-hearing during the last five years than prior to that time.[1]

While careful not to confuse the role of arbitrator and mediator in the eyes of the parties, some neutrals are nonetheless using certain dispute resolution techniques to encourage settlement during the arbitration process.[2] Some new models of resolution are beginning to emerge. In the Guided Choice protocol, mediators work hard to facilitate a settlement when they are engaged before and during the arbitral process. Here the mediator works as a process manager, confidential investigator and diagnostician during the litigation process and before the dispute is arbitrated or adjudicated.[3]

There is no consensus, however, whether arbitrators should become involved in the settlement process. Yet, many seem to do so. In its Guide to Best Practices in Commercial Arbitration, the College of Commercial Arbitrators has spawned an active hands-on managerial arbitrator whose objective is to keep the case moving forward in a timely and cost efficient manner. As a result, arbitrators today are more apt to control the hearing actively, set the tone of professional informality and flexibility, and then involve themselves in setting the stage for settlement more than ever before. As commercial arbitrators have grown more comfortable in their ability to be pro-active managers of the arbitral process, they are increasingly providing opportunities throughout the arbitration process for litigants to seek settlement in what could be called Guided Decision Making, a practice that guides and encourages litigants to seek resolution of their dispute pre-adjudication.

The idea of facilitating settlement during arbitration proceedings is already occurring in the international sphere. The CEDR Rules for the Facilitation of Settlement in International Arbitration are designed to increase prospects that the parties in international arbitrations settle their disputes before the conclusion of those proceedings.[4] It advises that if the parties are not opposed, the Arbitral Tribunal might provide them with preliminary views on the issues, non-binding findings on law or fact, but they may not meet with any party ex parte or obtain information ex parte that is not shared with the other parties.[5]

Many experienced neutrals have served separately as both arbitrators and mediators in various cases throughout their career. Knowing that a very high percentage of commercial disputes settle before litigation and arbitration, these skilled neutrals ponder why a case is being adjudicated and whether the parties have actually made any attempt to settle their dispute. With the American Arbitration Association's new Commercial Rule R-9, an arbitrator is now empowered to advise the litigants without reservation that at any time while the arbitration is pending, they can mediate their dispute. In fact, the new rule encourages mediation to take place concurrently with the arbitration, but not to delay it.[6]

When employing a model of cooperation such as Guided Decision Making, it is important to faithfully adhere to three caveats. First, the neutral must never step out of his or her role as arbitrator. There should never be a doubt in the parties' minds that the arbitrator maintains the power to resolve their dispute. Second, the arbitrator must never meet or talk to the parties ex parte. That way, evidence untested by cross-examination will never be considered. And finally, there is no one-size-fits all format for this protocol. Business cases, where parties are typically more pragmatic and measure risk and reward more than, perhaps, emotion-laden disputes, seem to work well with this model, but it often depends on the parties, their personalities, their lawyers and other intangible factors.

An experienced neutral practicing Guided Decision Making can make a difference in large and complex business or financial matters, by creating a more informal, cooperative and comfortable atmosphere during pre-hearing telephone conference calls or meetings and even at hearings where parties can talk to each other or their attorneys and even collaborate on certain issues. By creating this more cooperative environment, many cases settle between pragmatic parties before the arbitrator makes the decision for them.

Within the arbitration process, there are multiple opportunities for promoting settlement, often utilizing a mediator's skillset to do so. At the first pre-hearing conference, counsel or parties can be invited to tell the arbitrator a little bit about the case and their positions and the issues they believe need resolution. That first conference call is an opportune time to mention mediation and AAA Rule

R-9 if operating under those rules.[7] Usually the parties don't admit to having engaged in mediation, or announce that it hasn't or won't work. At the beginning of arbitration, advocates are out to show the arbitrator the strength of their case and their zealous belief in their client's position. But since the AAA rules now require arbitrators to mention mediation, it gives the neutral license to bring up the concept of possible settlement throughout the arbitration process.

A pre-hearing scheduling order is another initial method to signal collaboration and cooperation. Using language and directives to encourage cooperation between the lawyers is the key. For instance, ordering Counsel to cooperate in the exchange of documents and information and to confer with each other to seek resolution of any discovery dispute is a first step. It the parties cannot agree on a specific matter, they can then notify the Arbitrator who will schedule a conference call. Other instructions to confer with each other on such matters as the scheduling of motions, exchange of documents, or working together on a joint exhibit book can be effective in starting a collaborative process during litigation. In addition, arbitrators should set up regular status conference calls so that they can monitor their progress and remind the parties they can simultaneously be using mediation.

At the onset of arbitration, there are often dispositive motions, which may or may not be productive. The arbitrator's goal should be to encourage motions that are likely to expedite or facilitate the proceedings and discourage those that are time-consuming and not likely to be productive. Certain preliminary matters need a judgment call with reasoned analysis that the arbitrator can provide. And that determination sometimes can lead the parties to think more seriously about their options for settlement.

At some point during the course of the arbitration, experienced arbitrators may see themselves as diagnosticians, asking what has prevented this case from settling. Is it the people, the legal issues, or simply the lack of opportunity to settle? If there is an opportunity to meet in person before the evidentiary hearing, it should be encouraged, particularly if attorneys and their clients can attend. Making them feel comfortable and providing them with an opportunity for talk to each other often sets the stage for meaningful discussion and potential settlement.

Sometimes even the most contentious cases can settle. In a partnership break-up case I recently arbitrated, the first motion from Claimants was to dismiss Respondent's counsel for conflict of interest. Of course, that was not a conducive first step for collaboration between the attorneys. After legal briefing and my ultimate determination and analysis that he could remain as counsel, I continued to have the attorneys work together in providing information for the valuation of the business. We met in person several times for certain pre-arbitration matters, which I believe created some rapport between the opposing lawyers and their opposing clients. The case settled the first day of arbitration before the hearing began and I was named arbitrator in the settlement agreement in case of a breach.

In another large and complex matter with four pre-hearing motions and boxes of documents, exhibits and declarations, an in-person pre-hearing conference was held. Providing the venue for lawyers and their clients to meet in person gave them an opportunity to assess their positions, especially when the arbitrator could communicate to them his or her understanding of the case and question them about the strengths and weaknesses of their respective positions.

Often in these in-person settings, an experienced dispute resolution neutral can employ some mediation techniques, which have proven to be effective. For example, reiterating and restating each party's position shows them how the neutral understands and acknowledges their view. Looking for common ground and beginning to narrow the issues helps them pay attention to the key questions the arbitrator will focus on. Sometimes, even reframing the issues to gain some concession from each of them can be productive in focusing on the major issues. Even, if appropriate, talking about impasse and the risk/reward ratio of going forward in a process where they will have no ability to participate in a final resolution can spur some settlement discussions. And if suitable, a neutral may even use some numbers in her discussion to anchor their thinking.

This is not to suggest that the arbitrator provide the parties with preliminary views on the issues, findings of fact on key issues, or suggested terms of settlement as provided in the CEDR Rules.[8] However, if the parties are open to knowing the arbitrators' understanding of key issues or findings of fact, it might be useful to have an open discussion. Often arbitrators during a hearing will guide parties in communicating to them the evidence they consider important and the issues they would like to see briefed. If there is an opportunity to do so pre-hearing, it might be useful for the litigants in analyzing their case and preparing for settlement.

Continuing to provide opportunities for lawyers and their clients to keep talking, sometimes even leaving the room so that they can negotiate without the decision maker being present, can be effective. Opportunities for client-to-client and lawyer-to-lawyer conferences may also be successful. And if suitable for the case, suggesting other methods of resolution such as baseball or high/low arbitration might be welcomed. Finally, continuing to give the lawyers tasks, which involve collaboration and cooperation, such as working together on certain document or discovery exchange keeps the door open for communication.

This Guided Decision Making protocol folds into the formal procedures of arbitration but sends the message that settlement is encouraged if possible and if desired by the litigants. The demeanor of the arbitrator should be commanding but approachable. And following the three rules: never dropping the role as their independent and neutral arbitrator; never meeting with them ex parte, and never assuming that one size or approach will fit each matter is essential. It is in this manner that promoting settlement during arbitration using a Guided Decision Making approach can become a powerful tool in promoting economy and individualized customization in the arbitral process.

## Endnotes

1. Stipanowich and Ulrich, *Commercial Arbitration and Settlement: Empirical Insights into the Roles Arbitrators Play*, 2014 http://www.mediate.com/pdf/SSRN-id2461839.pdf.
2. Confusion about whether the neutral is an arbitrator or mediator when the stipulation between the parties is not clearly stated is ripe for post-award litigation. For example, in *Lindsay v. Lewandowski* (2006) 139 Cal. App. 4th 1618, the court declined to enforce a stipulation between the parties calling for "binding mediation" because it was unclear what the parties meant by that term. But in *Bowers v. Raymond L. Lucia Companies, Inc.*, Do59333 (May 30, 2012), a California appellate court held that an agreement of the parties to submit their dispute to binding mediation, followed by a binding baseball arbitration in the event the mediation was not successful, was sufficiently clearly stated to be enforceable.
3. See Paul Lurie, Guided Choice Interest Group, www.gcdisputeresoltuion.worldpress.com.
4. CEDR Commission Rules for the Facilitation of Settlement in International Arbitration (2009).
5. *Id.* Article 5.
6. American Arbitration Association Commercial Arbitration Rules and Mediation Procedures, effective Oct. 1, 2013, Rule R-9.
7. *Id*.
8. CEDR, *supra.*

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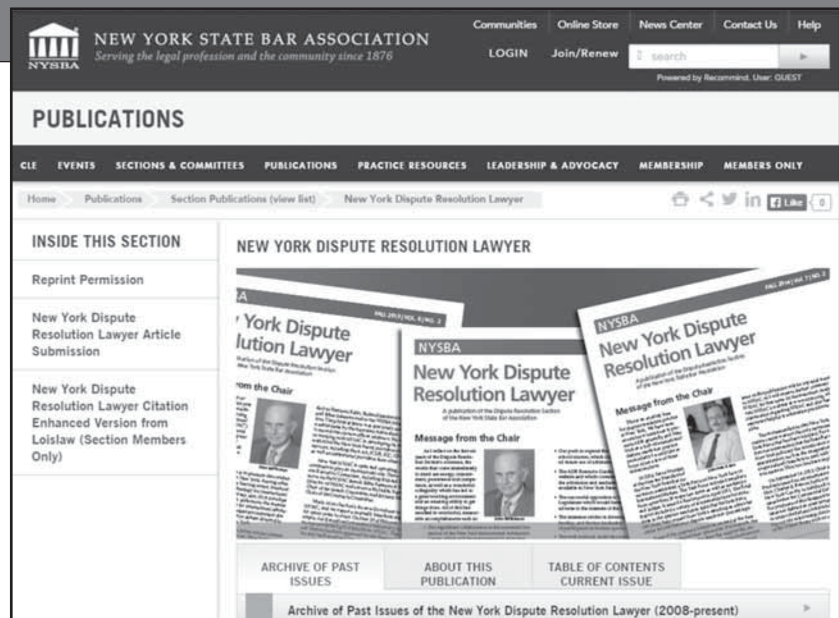


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# International Arbitration in the Early Americas: The 1656 Dispute Resolution Proceeding Regarding Reparations for the Death of a Seneca Captain "Ahiarantouan"

By Jonathan Anderson

In 1656 French Jesuit Missionaries established a mission-embassy, Ste Marie, among the Haudenosaunee (five nations Iroquois Confederacy). They were invited by the Onondaga Canton to erect the settlement on the Shores of Gannentaha (Onondaga Lake, NY). Gannentaha was centrally located within the Confederacy in the territory of the Onondaga—the keepers of the council fires. It proved a strategic and advantageous location. The expedition hoped to end decades of warfare that had been devastating to the stability and welfare of the New France colony.

*"It is historic because it is one of the earliest recorded accounts of a dispute resolution proceeding in the Americas."*

The Jesuit missionaries were highly educated and experienced diplomats. They were well versed in the native culture and some were skilled in native language. The mission was of such critical importance that the French enlisted some of the colony's most experienced Jesuit ambassadors, among them Fr. Francois LeMercier S.J., Jesuit Superior to the New World mission field. He was known to the Iroquois as *"Achiendase,"* a title-name that appears to be attached to Fr. LeMercier's rank as Mission Superior.

The Jesuits, known to the Confederacy as "Black Robes," recorded their experiences in what survive today as the primary historical source material *The Jesuit Relations and Allied Documents.* These records reveal intrigues more convoluted than any work of fiction. The account that focuses on the Ste Marie Mission site recounts the dispute resolution of a native incident involving death and atonement during a great council meeting at Onnontaghe, the capital of the Onondaga Canton, in July 1656. The dispute was arbitrated by Fr. LeMercier. It is historic because it is one of the earliest recorded accounts of a dispute resolution proceeding in the Americas, in what is today central New York State.

The council proceeding of July 1656 was held at Onnontaghe, in what is today the Town of Manlius. Envoys from all the Iroquois nations (Mohawk, Oneida, Onondaga, Cayuga, and Seneca) were in attendance to address several important issues concerning the Confederacy. On the agenda was the matter of recognizing and welcoming the French into the country. Another agenda item was to discuss strategy in waging war upon enemies of the Confederacy, namely upon the Susquehanna to the South, and the Erie to the West. But, paramount and foremost was the need to address atonement for the death of a Seneca man at the hands of the Mohawk. The matter threatened a blood feud between the Confederacy's Seneca and Mohawk cantons. All of the other council matters of concern rested upon the settlement of this dispute.

The victim in this case was Seneca man named Ahiarantouan. He was referred to in the *Relations* as a "Captain," a man of some importance, among his Canton. His heart was said to have been entirely French, and he was a man who was won over to the Faith. Several months prior to his death, serving as an envoy to the French at Quebec, he invited Jesuit teachers to the Seneca country in order to instruct captive, adopted, or converted native Christians who were residing among the Seneca. The Mohawk Canton opposed French-Christian interests and acted with active aggression toward the French and their Algonquin and Huron allies. Ahiarantouan was mortally wounded by the Mohawk in a hunting expedition in the French country. His companions cared for him, and carried him to the Council at Onnontaghe with the intent of seeking reparation for his injury. Unfortunately, he succumbed to his injuries the night before the council. Emotions were high and manifested by lugubrious and mournful chants of the Seneca and others who sought to share their grief.

Although the particular circumstances of choosing an arbitrator for this issue remains an issue of speculation, what is known is that, under mutual agreement by all the attending Iroquois cantons, Fr. LeMercier was chosen to arbitrate the case. Perhaps he was the appropriate choice, being that the injurious incident occurred in the French country. Or perhaps he lobbied for the task in order to improve his reputation. But whatever the circumstance the assignment was well earned. Only days earlier, during a public introduction, a Mohawk envoy opposed the French presence and expressed dissatisfaction through harangues full of jests and raillery against the French. With unexpected command of the native language, Fr. LeMercier refuted the criticism so confidently and convincing, and so impressed the Mohawk spokesman, that he afterwards sought every means to ingratiate himself with the priest. Evidently, Fr. LeMercier established his credentials and was permitted to proceed as arbitrator.

Wisely, Fr. LeMercier did not import European legal practice into the proceeding. The questions of motive or culpability were never explored. Whether or not the inflicted mortal wound was an assassination motivated by

political anti French-Christian sentiment, a case of mistaken identity, or simply an accidental shooting was, to the native parties, irrelevant. From a political perspective, introducing those arguments might have invited insurmountable contentions. Instead, Fr. LeMercier, using his own Christian values and his knowledge of native custom, focused upon atonement.

The *Relations* recognized the Iroquois as "great haranguers" who frequently made use of allegories and metaphors. The Jesuit ambassadors adopted this custom and incorporated Christian doctrine and verse into their addresses. At one point during the council all the Fathers and French in company knelt down, removed their hats, clasped their hands and prayed aloud the *Veni Creator* at full length. It was explained that the French never dealt with any matter of importance without first asking the assistance of the Spirit who governs the whole world. The act delighted and secured the attention of the native spectators.

Throughout the council Fr. LeMercier and his companion Jesuit orators capitalized on one particular native custom in addressing the issues of the council—gift giving. According to native custom, the presentation of a gift invited an explanation of its significance and representation. Upon acceptance of a gift an explanation was welcomed, without interruption, for as long as the presenter deemed necessary. At a later session during this council, Fr. Joseph Chaumonot presented twenty gifts to the native audience. Each gift represented a particular notion, and to each presentation a gospel lesson was attached.

Fr. LeMercier understood the significance of gift giving in connection with atonement for a death. Several native practices were common on such occasions. One was to remove the death cloths from the deceased, and to cloth the body with new garments. The intent of this rite was to prevent the sight of any sort of lugubrious objects from renewing grief. A second practice was to present a mat to the grieving parties so that they could rest upon it during the period of grieving. A third practice was to present a gift to wipe away the tears of those grieving so that their eyes could see the attentions of life, beyond the loss of a loved one in death.

Fr. LeMercier made these propitiations by means of two presents, one of which was to clean away the blood that might have fallen from the dead body upon the council mat. The other served to wipe away the tears of those who grieved the loss of Ahiarantouan, and to restore their council speech, of which death had deprived them. The Onondaga responded with a present that promised that the body would be buried. The relations reported that Ahiarantouan's Christian sentiments had been satisfied, having received the sacrament of baptism two days prior to his death. All the proper death rites were secured.

The *Relations* do not identify the condolence gifts presented. Nor do they identify any particular attached biblical passages. Yet, likely, any metaphoric verse might have referred to the roots of the Great Tree of Peace that each Iroquois Canton, and now the French, held onto. One might imagine Hebrews 12:15 as a perfect fit—"*See to it that no one fails to obtain the grace of God; that no root of bitterness springs up and causes trouble, and through it many become defiled.*" But whatever the presents, and whatever the verse, Fr. LeMercier employed another tactic that served to successfully settle the matter; he did not permit delay. Instead he dealt with the issue quickly in order to focus collective attention upon the other council matters. In response the Onondaga presented another present that announced the opening of the council meeting.

Eventually, events would unfold that would lead to a breakdown in the peace between the Haudenosaunee-Iroquois and the French. Subsequently, the Ste Marie Mission was abandoned in 1658 and hostilities resumed. But at least for one Seneca man, Ahiarantouan, the victim of an unfortunate fate, atonement had been satisfied, and according to both native and Christian rites, his soul rested in peace. This particular dispute resolution process met with success.

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# Effective Advocacy in Mediation

By Leslie Berkoff

Mediation is a collaborative process that allows parties to resolve a pending dispute in a manner that is far more flexible than that which can be achieved under a court decision. In mediation, the parties can contribute to crafting a resolution of the existing dispute in a unique way that might better suit their individualized needs. Much is often written about the style or qualities of the mediator that one can choose for a particular case to guide and steer the mediation process and how that should be accomplished. However, this article is intended to focus on the critical role the mediator-advocate can play in ensuring a successful mediation process from beginning to end in order to facilitate a positive result for the client.

> *"The more the mediator knows and understands about the facts the more effective he or she can be."*

As a result, an attorney's role as an advocate begins at the start of the process with the selection of the mediator. Short shrift should not be given to this decision, as this can be the key in part to achieving a good result. Advocates should feel free to interview the mediator, as well as request that the mediator provide recommendations from participants in past mediations. You should consider polling colleagues to ascertain their own independent experience with a proposed mediator. The screening process should also closely examine whether the mediator has familiarity with the relevant area of the law governing the mediation.

In addition, you should consider the mediator's personality traits to see if they are a good fit for the process and consider your own client's personality and perhaps contrast it with those of your particular adversary and their clients. You want a mediator who can wrangle all of these potentially competing personalities and bring balance in the process. Some cases may call for a more authoritative figure or a more creative one. Knowing the participants may lead you to consider how a strong, soft or other particular style of mediator will best control the process.

Once the selection has been made, it is entirely appropriate to speak to the mediator privately and separately in advance of the mediation process. There is no forbidden ex parte communication in this process, unlike with the court in cases. Many mediators will have a pre-mediation call or calls. While some parties might mistakenly view this as an opportunity to win over the mediator, this is simply not the case. Approaching these calls in this fashion will actually lead you to lose sight of their purpose. Most mediators practice under a construct of being facilitative in the process, not determinative, and are not "siding" with anyone. Rather, during these pre-mediation calls, your goal should be to educate the mediator so that he or she has all key facts and case law germane to the issues at hand. The more the mediator knows and understands about the facts the more effective he or she can be. It is important to convey the concerns your client has about in the litigation, or even the mediation itself, which will impact the process; identifying possible key stumbling blocks to the process; highlighting certain "personality" issues, or raising concern that the presence of certain parties in the process could be constructive or destructive.

Along these lines, if there is someone who you feel your adversary must absolutely bring to the mediation, you should identify that person to the mediator so that it is resolved in advance of the mediation session. Imparting your "institutional" knowledge of the dispute can be tremendously helpful for the mediator. Remember, your goal is to have a successful process. With the right tools, a good mediator can structure a more successful result for both parties if they are not blind to key points and hot button issues.

The next step in the process will normally be preparing a mediation statement. Too often this document becomes nothing more than either a regurgitation of the arguments contained in the pleadings or motions that may have been filed with the Court, or a brief on the law in the area and perhaps some key facts. However, the pre-mediation statement should not be just a recitation of case law and argument, but should be a settlement-focused document designed to educate the other side on the key points of strength in your position.[1] Keep in mind that you are not really arguing your case to the mediator, as he or she is not deciding it, but rather looking to set forth in a clear and concise manner the critical points of fact and law to help guide the mediator through the dispute at hand.

Don't forget that the mediator is stepping into this dispute midway through discovery (or at times before it has even taken place). It is important that in preparing statements to be produced to the mediator, the parties clearly and succinctly lay out their arguments, supporting facts and case law, as well as outline their settlement position, authority and range. This enables the mediator to efficiently focus on the key issues and to ascertain whether there may be common ground and potential for agreement and compromise. In addition, areas where the positions are so divergent that the attention to structuring

the mediation is necessary, to facilitate any resolution, should also be emphasized.

Moreover, the shared pre-mediation statement is a great opportunity to educate the other side about the strengths of your case, factually or legally, so that they enter the mediation in a settlement-focused frame of mind. In many respects, this may be the first time, other than an answer, that the other side is learning your key arguments, your interpretation of the facts or case law. In fact, if the mediation is occurring pre-discovery, the other side has little information to balance their own views of the likelihood of success for their side or yours. Thus, you should include a factual, legal and procedural history of the litigation. Be sure to identify prior efforts at settlement so the mediator has a true scope of what has transpired to date as well as any upcoming key court dates.

Sharing your own analysis can be a very useful tool if appropriately employed. While there are certainly strategic considerations in not sharing every key legal point, at a minimum consider sharing those with the mediator in a separate confidential statement. Don't miss the chance to use this document, as it is a great opportunity to also educate the mediator about any of the kinds of issues that may have, or should have, come up in the pre-mediation call. Moreover, once you have had a chance to review the other side's mediation statement there may be a critical point or two that you want the mediator to specifically focus on for the mediation, so do not be afraid of supplementing confidential statements.

Also, be sure that in advance of the mediation that the client is educated about how the process will work so that he or she is properly prepared for the day's events. While you may have participated in multiple mediations and know how a day can unfold, most likely your client has not. If you fully inform the client about how the process runs, the time lags that occur during the separate caucuses, as well as the purpose and meaning of joint sessions and separate caucuses, he or she can be better prepared for all the developments that follow. Confidentiality rules should also be reviewed with the client and, to the extent appropriate, ensure that the client does not raise "new" surprising points in open session or in front of the mediator without you first having a chance to vet and counsel him or her in this regard. While a good mediator should review all of this, at the end of the day you are your client's advocate and the ultimate burden rests on you.

Prior to the mediation you should also be sure that your client has crystallized his or her goals or wish list in advance; specifically what the client really wants, or needs to, get out of the mediation. You should be sure that the right party or parties are coming to the mediation. Review this with your client; nothing chills or derails the process more than not having the right decision-maker there or the party with the right knowledge. This can adversely impact the chances of success in the process. You can also send a very negative message to both the mediator and the other side as to your "good faith" in the process and willingness to resolve the pending issues. Be sure that tax consequences are considered, if possible, as those can be critical during the process and being prepared in advance is important.

*"The shared pre-mediation statement is a great opportunity to educate the other side about the strengths of your case.…"*

Provided that you meet with success during the mediation process and reach an agreement, be sure that the mediation does not conclude without a written term sheet that has been agreed to and signed by both sides. Too often the desire to close out the day before an agreement is presumably reached can result in remorse the next day, or week after, when the parties suddenly have divergent recollections of the specifics of the deal.

One court has described mediation as "a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute."[2] If you, as the lawyer advocate, take all the proper steps to help effectively prepare the mediator, the other side and your client for the process, then this can be the means to secure the most successful resolution.

## Endnotes

1. *Definitive Creative Impasse-Breaking Techniques in Mediation*, Molly Klapper, J.D. Ph.D, New York State Bar Association, Chapter 2 by Elayne E. Greenberg, Esq.
2. *Cook Children's Med. Ctr. v. New England PPO Plan of Gen. Consol. Mgmt.*, 491 F.3d 266, 276 (5th Cir. 2007) (quoting UNIF. Mediation Act Section 2 (2001)).

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# Utilizing Damages Experts to Make for a Successful Mediation

By Elizabeth Shampnoi

## Introduction

Successful mediations begin with preparation. Counsel's knowledge of the germane issues is critical in enabling the parties to effectively compromise. This includes a thorough understanding of the strengths and weaknesses of all positions, particularly as it relates to damages. Absent a thorough understanding and forthright evaluation of each party's respective position, how do the parties identify an acceptable solution? How does the payer know that he or she has not paid too much? How does the payee know whether to accept the offer or whether the case is likely worth more?

> *"If managed properly, engagement of an expert can be a relatively small investment upfront that can yield a significant return in the form of an early settlement."*

At times, the answers to these questions are black and white. Actual damages are readily identifiable and it is simply a matter of calculating the loss. Other times, it is more complex and requires an analysis outside the scope of the party's and counsel's knowledge. This often occurs when proving special or general damages where the calculation is more complex.

In these instances, a damages expert[1] is a valuable resource. Involving an expert early assists counsel and the parties in defining the germane issues, objectively evaluating the strengths and weaknesses of all positions, and preparing to counter opposing facts. This enables the parties to negotiate from a position of strength at the outset. Moreover, if managed properly, engagement of an expert can be a relatively small investment upfront that can yield a significant return in the form of an early settlement.

## Differing Roles of Damages Experts in Mediation

In mediation, an expert may serve different roles depending on the party's needs. One role involves a consulting expert who works behind the scenes with counsel to formulate strategy. This type of expert generally assists counsel and the client in evaluating the strengths and weaknesses of their case as well as the case of the opposing party. This expert does not appear at the mediation but will generally be available on the day of the mediation to answer any questions counsel or the client may have.

Another role for the expert in mediation is akin to that of a testifying expert in arbitration or litigation. A testifying expert is hired by one party to help evaluate, advance and defend that party's position before the fact finder. This expert will usually prepare and submit a report, be deposed, and testify at the hearing or trial. In mediation, while the expert technically does not testify, an expert's role can involve presenting and defending their findings with the goal of finding a resolution that works for all parties. In other instances, the expert may simply submit a report to the mediator and be available for questions. This expert may be present for the entire mediation or solely present when presenting a report but on call if questions arise.

One expert may also be hired jointly by both parties to evaluate each party's position and provide the mediator with the expert's views of the strengths and weaknesses of each position. This expert works closely with the mediator to identify potential solutions in resolving the dispute.

Finally, the mediator may also serve as the expert. This is common practice when the dispute involves a valuation or accounting issue. A valuation expert, who is also a trained and experienced mediator, works with the parties to resolve the dispute and provides his/her input with respect to the actual value, negating the need for each party to hire its own expert.

## The Effective Expert in Mediation

Mediation often involves a high level of emotion. Having an expert assist in the preparation or presentation helps to diffuse or remove some of the emotion. If the expert provides a succinct analysis and focuses on the major issues, the clients are less likely to get stuck on the minor details that usually stand in the way of settlement.

The expert's part is not that of advocate in mediation, as it typically is in arbitration or litigation. An effective expert in mediation provides an honest interpretation, presents the data and explains the data's significance in a neutral tone. The expert helps eliminate the issues, isolate important facts, and identify areas where agreement on the key issues and facts can be found.

An effective expert helps the client understand the strengths and weaknesses of the case, assists in achiev-

ing a favorable result and convinces the client why settlement is in his or her best interests. Throughout the mediation, an effective expert strives to simplify concepts, focus on key issues, identify risks, reconcile damages, deal with disputed calculations and avoid focus on unimportant or factually unsupported issues. This ensures the parties stay focused on resolution and identify solutions.

Effective experts can also assist with scenario analysis during the mediation. As the parties work to negotiate and compromise, experts can be very helpful by modeling scenarios real-time, displaying how the numbers change based on different findings. Additionally, an effective expert justifies the client's reassessment after the presentation of facts and acceptance of a settlement and continually serves as a reality check.

## Tips for Counsel When Working with Experts in Mediation

In advance of the mediation, counsel should discuss possibly using an expert with the client during the mediation session. If agreement is reached to do so, counsel should then discuss the use of an expert with opposing counsel. It is critical for a successful resolution that the parties enter the mediation on a level playing field. Surprising counsel with an expert could be interpreted as bad faith and trust would be impaired from the start of the mediation.

Once agreement is reached on whether each party will involve an expert during the mediation,[2] counsel should discuss and agree on the role each expert will play in the mediation session. For instance, how will counsel, the clients and the mediator interact with the expert? Will the parties be permitted to speak directly to the expert? Will the expert present to the mediator or to all sides? If there are presentations, will they be timed? Will there be follow-up time for questions about the presentations? Keep in mind that allowing presentations only could potentially polarize positions further. Therefore, a more open forum is likely to be conducive to resolution. It goes without saying that the mediator's views should be obtained with respect to experts and any agreements between counsel should be conveyed.

To ensure a successful mediation, counsel should maintain an open dialog with the expert and the client to ensure that all are on the same page. Indeed, it is key that counsel communicate to the expert a willingness to listen and consider opposing views and accepted theories that may be adverse to their client's position.

Counsel must prepare the experts in advance of the mediation by explaining the process to them as many experts may be inexperienced in mediation. Counsel must also understand the role the expert feels most comfortable playing and how the expert will contribute to settlement.

Counsel should consider whether there is benefit to the experts getting together in advance of the mediation to identify areas in which they agree to help narrow and focus the issues for the mediation.

*"Throughout the mediation, an effective expert strives to simplify concepts, focus on key issues, identify risks, reconcile damages, deal with disputed calculations and avoid focus on unimportant or factually unsupported issues."*

Finally, counsel should consider the governing law and rules with respect to confidentiality of expert reports, including statutes, case law, the mediation agreement and any governing mediation rules. Ideally, counsel will enter into an agreement that all information discussed and shared is for "settlement purposes only" to avoid discovery in any subsequent arbitration or litigation. This is particularly important because the expert's views may change as discovery continues and more facts are learned.

## Conclusion

Depending on a party's needs, it can be in the best interest of settlement for experts to be utilized in mediation. If used effectively, an expert can be the key to understanding the core of the matter at hand and ultimately lead to a successful mediation.

## Endnotes

1. Damages experts have a varied set of education, training, certification and education. Most commonly, damages experts are accountants, valuation analysts, economists or CPAs. These experts are available to calculate the actual damages if necessary or prepare damage models to assist in a more complicated analysis.
2. If agreement cannot be reached on the use of experts, neither party is prevented from utilizing a consulting expert to assist them behind the scenes.

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# Designing an Online Global Mediation Advocacy Training Program for Commercial Lawyers

By Vikki Rogers

As mediation is proliferating as a more popular go-to option to resolve cross-border commercial disputes, there is a burgeoning market of commercial lawyers around the world who would benefit from mediation training. Indeed, the market offers this sort of training, generally organized as a multi-day intensive in-person training seminar, or online lecture series. With that said, about two years ago, I began to consider whether the current training regime is sufficient to meet the needs of lawyers who were (or could be) resolving cross-border commercial disputes via mediation. In particular, could lawyers around the globe practically access these trainings, and did they provide a sincere cross-cultural training experience? As these were interesting challenges ripe for deeper exploration, I sought to respond to them by designing a training program. This article explores my experience developing and administering an unconventional global, interactive online mediation training certificate program, and also reflects on its value in the development of online mediation, more generally.

## Is the Status Quo Sufficient?

From the vantage point of lawyers responsible for resolving commercial disputes, spread across the globe, it seems the inherent limitations in intensive mediation training seminars lie in the physical presence requirement, i.e., (1) only participants with professional, financial and visa flexibility can attend; and (2) in-person trainings are more likely to draw regional crowds, limiting cross-cultural lessons and exposure. Moreover, although online mediation training programs exist—which obviates the need for physical presence—they are generally asynchronous videos and/or rely on written interaction, e.g., discussion boards, chats, or emails. As such, it appears that in these formats, "online" caps their value as participants cannot (1) engage in dynamic simulation exercises; and (2) interact with peers in real time, while seeing and hearing the other participants—two primary value-adds for in-person mediation training.

Given these considerations, the challenge seems to be whether it is possible to create flexibility and internationality, without losing interaction and possibility to engage in simulation exercises and receive feedback. As I am actively involved with the online dispute resolution (ODR) community, particularly at the United Nations Commission on International Trade Law (UNCITRAL), I drew on that exposure to design a different type of online training. Specifically, I developed a synchronous (i.e., interactive), online mediation training component as part of a larger Pace Law School Institute of International Commercial Law (IICL) Certificate Program on International Alternative Dispute Resolution (ADR Certificate). Indeed, the structure provides flexibility, internationality and interaction—albeit, users are spread across the globe, viewing each other on their computer, tablet or smart phone.

## Defining the Scope

There are some ADR providers that are considering the incorporation of technology, e.g., video-conferencing, digital communications, into their mediation services, loosely under the umbrella of "online mediation." In creating the IICL program, it was not my goal to train lawyers to mediate online. Rather, the platform was a means to an end. It permitted the delivery of educational services across the globe, and enabled students to practice lessons learned in online simulation exercises. Acknowledging that online dynamics are different from in-person dynamics, students could still test strategies and approach within this context and receive immediate feedback. Visually, I imagine that "online" and "in-person" dynamics run parallel with each other, neither superior, each offering its own value. For example, in both settings it is possible to pick-up on a person's tone and body cues (a common misconception is that these are lost in online communications), but the dynamic, and corresponding response, will be different given the space created via online presence. Whether online or offline, style and strategy can still be practiced by participants.

After the simulation exercises, I would receive feedback regarding the online experience, but it was not a course objective. With that said, the exposure participants received in resolving disputes online should not be undervalued. For the most part, I found it was the only exposure to technology (beyond email) that many participants had received in their legal training or professional careers to date.

## Program Design

I have administered the ADR Certificate twice (with a third start date scheduled for January 2016). The program runs over a six-month period and students meet online weekly to engage in interactive class discussions with leading ADR experts from across the globe (different experts are invited to cover different subject areas). At the time I created the program I thought participants would benefit from lectures covering the ADR spectrum, with an emphasis on understanding cross-border options, theory and techniques. So in addition to lectures on skills and theory of international commercial arbitration, students

also participated in classroom discussion on cross-border negotiation and mediation fundamentals, strategies and simulation exercises. Each year, the program drew 25-30 participants from about 20 countries, with no one country dominating in representation. Thirty was the average age of the participants. The IICL will continue to offer the international ADR certificate but, based on participant feedback, is now also developing certificates specializing in international mediation advocacy and international commercial arbitration.

In addition, the program benefited from JAMS sponsorship and the support of both UNCITRAL and UNIDROIT. Accordingly, for the mediation component of the program, participants received several hours of presentations and interactive discussion with the JAMS Executive Vice-President and General Counsel on mediation fundamentals, video vignettes on the mediator's perspective, as well as mediation advocacy skills. Topics included, but were not limited to, the various styles of mediation, stages in the process, strategies, best practices, and ethical considerations.

The online platform allowed for a variety of classroom viewing options, with two primary default set-ups. If a PowerPoint was used by a presenter, the PowerPoint dominated the screen, with individual participants' thumbnail shots lined across the top or right-hand side of the screen. The second default option (also used during the mediation exercise) included no PowerPoint presentation but, instead, a Brady Bunch type screen set-up, with thumbnail shots of the participants set up in rows. The fewer the people, the larger each thumbnail grew, and vice-versa. There is an option for the host to mute the entire group, but it was never used. Rather, participants were asked to set their own volume controls, muting to minimize background noise, but retaining control to unmute anytime they wanted to ask a question or actively participate in the discussion.

Participants were required to complete one mediation simulation exercise as part of the course requirements for the certificate. There were three parts to the simulation exercise, assigned over a three-week period. In week one, students participated in a mediation advocacy skills training class, and the simulation exercise was distributed. The simulation was a cross-border commercial law dispute, with "team A" mediating against "team B." Within each team, two persons were assigned. This was done for three reasons (1) so I could assign the roles of "lawyer" and "client" within each team; (2) in case one team member did not show because of a professional or technical conflict, we did not need to reschedule; and (3) even if both team members appeared on the day of the mediation, it reduced the risk of interruption due to possible technical difficulties, as there were two separate connections signing in for each team. On this note, when assigning the teams, I was familiar with the students from the negotiation simulation exercise and could make pairings to reduce these risks even further. Also, within each team participants were from different countries, and where possible, different legal cultures (e.g., civil law and common law pairings). This added an additional cross-cultural experience.

Participants were given one week to "meet" and prepare for the negotiation, and submit a joint memo reflecting this work and their strategy. The second week, participants met online at an assigned hour to complete the simulation. They were instructed to complete the exercise within two hours. As the point of the simulation was for the participants to flex their advocacy muscles, I recruited professional mediators to mediate for each of the groups. In both years, the majority of the mediators were American, and for all of them, this was their first online mediation experience. I think this particular feature—bringing in professional mediators—was made possible because we conducted the exercise online, and it was the greatest value-add of the entire program. It had a dual benefit as it improved the overall participant experience and it gave the mediators an opportunity to "check-out" a new technology that will impact on their future practice.

To prepare the mediators, I distributed the generic facts (teams also had confidential facts), and met with them online prior to the day of the simulation. I demonstrated the different features of the platform, and most importantly showed them how they could put one team on "hold" to caucus with the other team privately. In the first year, we utilized "break-out" rooms from a main meeting room, and I technically controlled the movement of persons in and out of each of the rooms based on the mediators' request. The second year, each mediator logged into their own virtual room, and could control the movement of persons in and out of the room on their own. The latter is the preferred option. In either case, team members had to keep an additional technology open, i.e., Google chat, skype, etc., so that they could communicate confidentially outside of the main meeting room.

After the two-hour mediation session, participants "elected" one person to write-up the results to submit. The following week a de-briefing session was held, evaluating the experience and process with the participants. Subsequently participants were required to submit a final memo reflecting on the exercise (incorporating learnings from the lectures and assigned readings on the topic).

After administering this exercise over two programs, I deduced a number of broad takeaways about conducting this sort of simulation exercise online, which I also think impacts on the concept and possibilities for online mediation more generally:

**Intimacy:** Mediators generally commented on the intimacy of the setting, which they did not think could be achieved in an online environment. Participants (who largely grew up with social media) did not pay particular

note to this point. Parties that did have experience mediating in "real-life" noted that although they thought the skills training was valuable, they did not see using online platforms in practice as many deals are concluded in "hallways during the breaks"—obviously a non-existent feature on online platforms as they exist today.

**Online Can Be More Work:** When you are sitting in a classroom or boardroom, the mind can wander on its own, or perhaps onto a smart phone, or computer application. However, in an interactive online environment, any movement of a person's eyes off the mediation platform is noticed. In many ways, online interaction requires heightened concentration. In this vein, it is also hard to hide poor preparation online. A camera has zoomed onto an image and everybody zooms onto that image as well, awaiting a response. Moreover, from an administrative perspective, online training is a lot more work. In-person, a problem can be distributed, teams assigned in real-time, and students could be asked to find a corner of the room to complete the exercise. Online, significantly more front-end work is required to coordinate teams, mediators and virtual hearing rooms so the technology does not distract from the substance of the simulation exercise.

**Connection Is Key:** The success of any online experience is dependent on the quality of the connection. The same for online mediation simulation exercises. Unfortunately there were a minority of groups that suffered from poor connections. Fortunately, this is an issue that will lessen with every program offering.

**Disengagement Is Easy:** Although this did not happen in the simulation exercises (because it was program requirement), it is obvious that it would be quite easy to lose a party during an online session for a myriad of reasons, including voluntary disengagement, poor internet connection, or distraction (professional or personal).

**IT Administrator Is Necessary:** The mediator and the parties all have their own professional functions and objectives, and managing IT is not one of them. As persons become more comfortable with technology over time, it is likely that IT managers could administer several cases at the same time; however, their presence would be imperative for a successful synchronous online experience.

**Costs and Access:** From a training perspective, technology absolutely enables cost-savings. Participants save on travel, and minimize job interruption. As for online mediation of disputes, it will create the same benefit; however, it could also create new costs, e.g., IT support and infrastructure (unless these needs are otherwise satisfied by an ADR provider). It does create more convenient access, access that can assist a mediator and the process overall, when appropriate.

Overall, an interactive online approach to mediation advocacy training has received positive feedback and has its place amongst the portfolio of mediation training options. It did enable broad global access given the flexibility online environments create, and it also introduced mediation advocacy theory and skills training to a group of lawyers actively engaged in cross-border commercial practice, who practically would not have readily received this experience otherwise. As a byproduct of the online global approach, participants were also able to broaden their own network and meaningfully interact with lawyers from across the globe without leaving their desks. As technology improves and word of mouth spreads across jurisdictions, these sorts of synchronous online programs have the greatest potential to train the broadest reach of commercial lawyers, globally, in the benefits of mediation, the process, and skills to achieve a successful outcome.

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# Unusual but Relevant: Some Commercial Arbitration Treaties to Keep at Hand

By Aníbal Sabater

The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is arguably the best known international treaty on arbitration and certainly the most frequently studied and applied worldwide. It is not, however, the only important treaty of its kind. A large number of lesser-known international arbitration treaties remain in force and can have significant practical effect. This article considers some of them.

### Filling Gaps in the Clause with the Panama Convention

In 1994, a Texas company by the name of Anderra Energy Corporation and its Peruvian affiliate Petro Anderra, S.A., sued SAPET Development Corporation, a California subsidiary of China Petroleum Technology, and other respondents, over some Peruvian oil and gas fields.[1] The plaintiffs initially filed the lawsuit in the 192nd Judicial District of Dallas County, Texas, but the respondents swiftly had it removed to the federal court for the Northern District of Texas. Once there, SAPET moved to compel arbitration under the Rules of Procedure of the Inter-American Commercial Arbitration Commission—IACAC.

Established in 1934 at the Seventh International Conference of American States, IACAC is one of the most venerable, if lesser-known, international arbitration institutions.[2] It is supported by a network of national committees, operates under comprehensive procedures largely inspired by the 1976 UNCITRAL Arbitration Rules, and as a result of a recent agreement, has most of its cases administered by ICDR personnel in the U.S. A Bogota-based secretary general heads IACAC's permanent staff.

In sharp contrast to most other international arbitration rules, the IACAC procedures can apply to a case even in the absence of party agreement. Petro Anderra and SAPET, for instance, had signed a letter of intent containing a clause that merely said: "*In case of discrepancies between the partners, it is agreed to request arbitration according to international laws of arbitration*."[3]

In other circumstances, this skeletal clause would have posed significant enforcement problems—what rules govern; will there be an administering institution and, if so, which; how will arbitrators be appointed; what will be the seat or the language of the arbitration? At best, it may have taken months for a judge or appointing authority to fill the missing terms in the clause and set the arbitration in motion. At worst, the clause may have been deemed incapable of being performed.

But Article 3 of the 1975 Panama Convention on International Commercial Arbitration—applicable under 9 U.S.C. § 301—came to the rescue. It provides, "*In the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission*." Relying on this language, Judge Solis, from the Northern District of Texas, granted SAPET's motion to compel arbitration under the IACAC procedures.[4]

> *"In sharp contrast to most other international arbitration rules, the IACAC procedures can apply to a case even in the absence of party agreement."*

### Of Note When Dealing with the Panama Convention

Under U.S. law, the Panama Convention governs international commercial arbitrations where a majority of the parties come from contracting states, which are the U.S. and 18 prominent Latin-American jurisdictions.[5] In practice, this means that a sizable number of cases falls within the scope of the Convention—in fact, since 2005, IACAC has administered at least 15 cases under Panama Convention's Article 3.[6]

Yet, Article 3 of the Panama Convention leaves questions unanswered: does it apply when the parties intended to exclude or did not expect IACAC; is Article 3 applicable when the parties chose in the clause a set of rules or an administering institution that no longer exists?

Also of significance, the application of Article 3 by U.S. courts has not always been straightforward. In 1999, Judge Rakoff, from the District Court for the Southern District of New York, granted a motion to compel arbitration filed by defendant BanColombia S.A. against plaintiff Bancol Y Cia S. En. C.[7] The parties were both from Colombia and their contract provided for arbitration as the dispute resolution mechanism, adding that "*as a last resort*" the Bogota Chamber of Commerce would appoint arbitrators.[8]

These circumstances called for the application of Article 3 of the Panama Convention, but the parties did not raise the issue at the beginning.[9] It was only after the motion to compel arbitration was granted that the plaintiff, moving for clarification, sought an order that the arbitration be conducted, and the arbitrators appointed, under

the IACAC Rules of Procedure, as made applicable by Article 3.[10] Judge Rakoff denied the motion for clarification, finding that, having granted the motion to compel, his authority to prescribe conduct concerning the arbitration was limited. It should be the arbitrators, he reasoned, who eventually determine the applicable rules.[11]

Doubtlessly, the Panama Convention should have been raised earlier, but the court's failure to apply it even at a later stage left the arbitration in a vacuum. Arbitrators were to be appointed, but under no specific rules, following a nondescript procedure, and subject (at the time of appointment) to no clearly defined standards on independence or impartiality, and thus on challenge.

## Another Gap-Filling Treaty—the 1961 European Convention

If treaties can be grouped into families, then the 1975 Panama Convention and the 1961 European Convention on International Commercial Arbitration are relatives: both were drafted to promote the use of arbitration in the wake of the 1958 New York Convention. Unlike the Panama Convention, however, the U.S. has not signed the European Convention, which is in force for 28 continental European states, plus (quite notably) Burkina Faso, Cuba, and Turkey.[12] (The European Convention applies only to cases in which all parties are from contracting states. Nonetheless, it is not infrequent to see U.S. counsel involved in proceedings falling within the scope of the European Convention.)

Like the Panama Convention, the European Convention also addresses clauses that provide for ad hoc proceedings and "*contain no indication concerning the organization of the arbitration*,"[13] but its approach to the matter is different from that of the Panama Convention's. Instead of referring the parties to a given set of institutional rules, the European Convention establishes an elaborate mechanism whereby particulars of procedure are ultimately established and default arbitrator appointments made by the president of the chamber of commerce of the defendant's seat or habitual residence, and failing all else, by a special committee, in whose establishment the ICC is involved.

Another significant difference is that while the Panama Convention was drafted mainly for states that had not yet signed the New York Convention—and for that reason it often simply reproduces its language—the European Convention assumes its member states are already parties to the New York Convention and elaborates on it.

An area where the European Convention significantly supplements the New York Convention concerns the enforcement of challenged awards. Under Article V(1)(e) of the New York Convention, a court seized with a foreign award enforcement action may deny enforcement if the award has been set aside or suspended in its country of origin. For matters falling with the scope of the European Convention, however, the setting aside of an arbitral award may lead to the denial of enforcement only when it stems from grounds essentially similar to those allowing for denial of enforcement under the New York Convention.[14]

## Latin American Treaties on Award Enforcement

The co-existence of treaties governing the enforcement of foreign awards is particularly remarkable in Latin America. The 1979 Montevideo Convention and the 1992 Mercosur Protocol of Las Leñas, for instance, are regional Latin American treaties not signed by the U.S. that address the enforcement of both court judgments and arbitral awards from one contracting state into another.[15]

Problematically, the grounds for denying enforcement under Montevideo and Las Leñas are better suited to court opinions than to arbitral awards. For instance, Montevideo and Las Leñas allow a court to deny enforcement of a foreign award if it has not been legalized, breaches public policy, or is not final. But they do not explicitly allow for enforcement denial if the award resolves a non-arbitrable matter or if the arbitration process has not been conducted in keeping with the clause or the applicable procedural law.

This, in practice, has led to significant uncertainty. Some authors argue that the references made to "awards" in Montevideo and Las Leñas are drafting mistakes and that the local courts should refrain from applying those treaties to arbitral matters.[16] Latin American courts, in the meantime, frequently scrutinize foreign awards at the same time under the New York Convention, the Panama Convention, and Montevideo or Las Leñas, even though these treaties are mutually exclusive.[17]

## Bilateral U.S. Treaties with a Bearing on Enforcement

It is not only foreign countries that are bound by a multiplicity of treaties addressing enforcement. In addition to the New York Convention and the Panama Convention, the U.S. itself has friendship, commerce, and navigation treaties—or FCNs—in force with a significant number of countries, including Belgium (1961), Germany (1954), Japan (1953), and Taiwan (1946), which contain provisions concerning the enforcement of foreign awards. The treaty with Taiwan specifically provides, at Article VI, that the award issued to resolve disputes between parties from the contracting states "*shall be accorded full faith and credit by the courts within the territories of the High Contracting Party in which it was rendered, provided the arbitration proceedings were conducted in good faith and in conformity with the agreement for arbitration*."[18] (Note that, for Article VI to apply, the place where the award was rendered seems immaterial.)

Provisions like this seldom come up in court but have generally been viewed as valid and allowing for enforce-

ment of a foreign award without the need of further legislative development.[19]

This is important for a variety of reasons. Taiwan, for instance, is not a party to the New York Convention, and as a result the U.S. does not apply the New York Convention to Taiwanese awards.[20] Assuming all other requirements for its application are met, could the Taiwanese FCN support an application to enforce an award when the New York Convention does not govern?

Another significant issue involves the compatibility of the FCNs with the New York Convention. The New York Convention does not leave the FCNs without effect, and in fact under Article VII(1), the Convention can be superseded and other treaties can be relied on for award enforcement purposes when those treaties are more favorable to enforcement than the Convention. The question then is: Do the FCNs offer more favorable grounds for enforcement than the New York Convention?

No party seems to have yet tried the argument in a U.S. court, even though the comparable argument has been brought in Europe with success. Consider a recent example. Belorussian arbitration law appears to require that all jurisdictional objections be addressed in a preliminary award, separate from the final award on the merits. A few years ago, Karlsruhe's Oberlandesgericht (Higher Regional Court) in Germany denied the enforcement of a Belorussian award that did not meet this requirement, and that rather ruled on jurisdiction and the merits together.[21] The Higher Regional Court held that the award was contrary to New York Convention Articles V(1)(d)&(e) in that it did not follow the applicable procedural (Belorussian) law.

On appeal, the German Federal Supreme Court (Bundesgerichtshof) reversed the Higher Regional Court by relying on the Belorussian-German (former USSR-German) bilateral enforcement treaty. The German Supreme Court held that the bilateral treaty was a more favorable instrument to enforcement, as it did not foresee failure to comply with the law of the seat as a reason to deny enforcement.[22] (The case, however, was remanded to Karlsruhe's Higher Regional Court to determine the validity of the arbitration agreement.)

## Conclusion

While the New York Convention is by far the best known and most frequently applied treaty in international commercial arbitration, a host of others treaties co-exist with it. These treaties offer challenges, solutions, and significant strategic opportunities for the litigator familiar with them.

## Endnotes

1. *See Anderra Energy Corp. v. SAPET Dev. Corp.*, No. 3:94-CV-2683-P (N.D. Tex. Sept. 29, 1995), *excerpts reprinted at* 22 Y.B. Com. Arb. 1077, 1077 (1997).
2. *See* http://www.sice.oas.org/dispute/comarb/iacac/iacac1e.asp.
3. *Id*. at 1080 (emphasis added).
4. *Id*. at 1084.
5. 9 U.S.C. § 305(1).
6. Source: unofficial information provided by the institution.
7. *Bancol Y Cia. S. En C. v. Bancolombia S.A.*, 123 F. Supp. 2d 771, 771-72 (S.D.N.Y. 2000).
8. *Id*. at 772 (emphasis added).

*"While the New York Convention is by far the best known and most frequently applied treaty in international commercial arbitration, a host of others treaties co-exist with it. These treaties offer challenges, solutions, and significant strategic opportunities…."*

9. *Id*.
10. *Id*.
11. *Id*.
12. *See* European Convention on International Commercial Arbitration (1961), *available at* https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&lang=en.
13. European Convention on International Commercial Arbitration, Article IV (1961).
14. *Id*., Article IX.
15. *See* http://www.oas.org/juridico/english/treaties/b-41.html, *and* http://www.parlamento.gub.uy/htmlstat/pl/protocolos/prot16971.htm.
16. Adriana Braghetta, *Polygamy of Treaties in Arbitration—A Latin American and MERCOSUL Perspective*, Liber Amicorum Bernardo Cremades 253, 259(2010).
17. *See, e.g.*, *Poligráfica v. Columbia Tecnología Ltda*, Colombian Supreme Court of Justice, Civil Chamber, Judgment of 19 November 2013.
18. Taiwan Friendship, Commerce, and Navigation Treaty (1946), *available at* http://tcc.export.gov/trade_agreements/all_trade_agreements/exp_005399.asp.
19. *See, e.g.*, *In re Fotochrome, Inc.*, 377 F. Supp. 26, 34 (E.D.N.Y. 1974), *and Oregon-Pac. Forest Products Corp. v. Welsh Panel Co.*, 248 F. Supp. 903, 910 (D. Or. 1965).
20. *Clientron Corp. v. Devon IT, Inc.*, 35 F. Supp. 3d 665, 677 (E.D. Pa. 2014).
21. *See* Bundergerichtshof, Germany, III ZB 50/05, 23 February 2006, *published commentaries on decision*, SchiedsVZ 2006, 161; NJW 2007, 772; IHR 2006, 125; International Arbitration Law Review 2006, 59.
22. *Id*.

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# DIFC Practice Direction No. 2: Converting Judgments into Arbitral Awards Enforceable Under the New York Convention

By Louis Epstein

On March 23, 2015, at a meeting the Arbitration Committee of the New York City Bar Association (of which the author is Chair), the guest speaker by videoconference from Dubai was Michael Hwang, Chief Justice of the Courts of the Dubai International Financial Center (the "DIFC Courts"). The DIFC Courts are a unique institution. The DIFC is a financial free zone occupying approximately 110 acres in the Emirate of Dubai. It is a common law and English language jurisdiction within Dubai whose courts system is largely modeled on the English Commercial Court.[1] Its judges include a number of eminent common law jurists from around the world.[2] The territorial jurisdiction of the DIFC Courts is limited to the geographical area of the DIFC. However, since October 2011, parties from anywhere in the world have been able to choose the DIFC Courts as the forum for resolution of their disputes.[3]

*"A desire to remove limitations on the enforcement of its judgments led the DIFC Courts in 2015 to issue Practice Direction No. 2, the intended effect of which is to permit conversion of DIFC Court judgments into arbitral awards, making them enforceable worldwide under the New York Convention."*

The topic of discussion at the March 23 meeting was what Chief Justice Hwang has described as "an experiment without parallel in arbitration history."[4] As he has observed: "One of the known limitations of state court judgments is that they are not normally enforceable outside of their home jurisdiction in the absence of either (a) some common law or international law doctrine of extraterritorial reach; or (b) a bilateral or multilateral treaty providing for reciprocal enforcement of judgments."[5] Concern about limitations on the recognition and enforcement of court judgments is one reason why parties to international commercial contracts frequently choose arbitration.[6] Under the New York Convention, an international arbitration award may be recognized and enforced in 152 countries around the world.[7] A desire to remove limitations on the enforcement of its judgments led the DIFC Courts in 2015 to issue Practice Direction No. 2, the intended effect of which is to permit conversion of DIFC Court judgments into arbitral awards, making them enforceable worldwide under the New York Convention.[8]

A draft of Practice Direction No. 2 was circulated for consultation on July 30, 2014.[9] After further consultation, including a public seminar held on November 19, 2014,[10] further drafts were issued and a second period of consultation was announced.[11]

Practice Direction No. 2 was officially issued on February 16, 2015.[12] Shortly thereafter, the Arbitration Committee invited Chief Justice Hwang to speak at its March 23 meeting. Based in part upon comments received at the meeting, Practice Direction No. 2 was further revised and an amended version was issued on May 26, 2015.[13]

Practice Direction No. 2 provides that if the parties to litigation before the DIFC Courts have entered into an arbitration agreement permitting them to do so, a judgment creditor, after obtaining a judgment in the DIFC Courts, may submit to arbitration a "Judgment Payment Dispute," which is defined in the Practice Direction as:

> any dispute, difference, controversy or claim between a judgment creditor and judgment debtor with respect to any money (including interest and costs) due under an unsatisfied judgment, including:
>
> (i) a failure to pay on demand any sum of money remaining due under a judgment on or after the date on which that sum becomes due under Rule 36.34; and/or
>
> (ii) the inability or unwillingness of the judgment debtor to pay the outstanding portion of the judgment sum within the time demanded,
>
> but excluding any dispute about the formal validity or substantive merits of the judgment;

The Practice Direction includes a suggested arbitration clause, which provides:

> Any Judgment Payment Dispute (as defined in DIFC Courts Practice Direction No 2 of 2015) that satisfies all of the Referral Criteria set out in the Practice Direction may be referred to arbitration

> by the judgment creditor,[14] and such dispute shall be finally resolved by arbitration under the Arbitration Rules of the DIFC-LCIA Arbitration Centre, which Rules are deemed to be incorporated by reference into this clause.[15] There shall be a single arbitrator to be appointed by the LCIA Court pursuant to Article 5.4 of the DIFC-LCIA Arbitration Rules. The seat, or legal place of arbitration, shall be the Dubai International Financial Centre. The language to be used in the arbitration shall be English.
>
> This agreement for submission to arbitration shall in all respects including (but not limited to) its existence, validity, interpretation, performance, discharge and applicable remedies be governed by and construed in accordance with the laws of the Dubai International Financial Centre.
>
> The judgment creditor may, before or after exercising its option to refer a Judgment Payment Dispute to arbitration as provided above, exercise all rights of enforcement of the judgment in a national court by way of execution on the assets of the judgment debtor, and the judgment debtor shall not be entitled to resist execution before any such national court on the grounds of this arbitration agreement, which is intended to provide a judgment creditor with additional, and not alternative, remedies for enforcement of its judgment.

In a recent article, Chief Justice Hwang summarized the effect of the Practice Direction as follows:

> The net effect of this initiative is that, following a money judgment of the DIFC Courts, the judgment creditor would be able to demand payment of the judgment sum and, if payment were not made pursuant to that demand for any reason, the judgment creditor would be able to consider that an enforcement dispute has arisen and could refer the dispute to arbitration at the DIFC-LCIA Arbitration Centre, or indeed any other arbitration centre…. This process is what we meant to encapsulate by the term "conversion" of a judgment into an arbitration award. But it is not a "conversion" in the strict sense of that word; the process enables a judgment creditor to have an additional option for enforcement of its judgment without losing its rights under the judgment in any way.

In his November 2014 lecture, in subsequent writings and through modifications of the Practice Direction, Chief Justice Hwang has addressed various concerns that were raised during the period of consultation.[16] Chief Justice Hwang expressed the view that the Practice Direction "could be a model for other countries to adopt so as to make state court judgments as enforceable as arbitration awards."[17] More recently, he has expressed his hope for the Practice Direction as follows:

> If our experiment subsequently proves successful, we will have developed an important tool to synthesize litigation and arbitration by giving concurrent remedies for enforcement and thereby resolved one of the great problems of international litigation which other jurisdictions can follow. This is because there is nothing in our protocol that changes the existing common law; indeed, our protocol builds on it. If we can develop a model for the rest of the common law world, civil law countries may also be able to adopt it because ultimately it is a question of persuading courts to interpret, not the national laws of any country, but the meaning of an "award" under the NYC, which is a matter of international, rather than domestic law. If our bold step proves successful, this would be the ultimate partnership between commercial courts and arbitration…[18]

One of the questions raised at the March 23 Arbitration Committee meeting was whether a mechanism like the DIFC Courts' Practice Direction 2 could be used to enhance the enforceability of New York judgments. New York is renowned for the quality of its courts and laws and for the experience and sophistication that its judges bring to complex international commercial matters.[19] One reason why parties may nevertheless be hesitant to choose courts in New York or elsewhere in the United States as the forum for resolution of their disputes is concern about the enforceability of any resulting judgment. Historically, the United States has not been inclined to enter into bilateral treaties providing for the reciprocal enforcement of judgments.[20]

In 2009, the United States signed the Hague Convention on Choice of Courts Agreement which provides for the international enforcement of such agreements and for the recognition and enforcement of judgments rendered by the chosen court.[21] However, ratification of that treaty by the Senate has been blocked for more than six years by a seemingly intractable dispute on whether the implementing legislation should be a federal statute or uniform state laws.[22] Hence, while there are some foreign jurisdictions that liberally recognize and enforce U.S. judgments,

there are a number of countries where U.S. judgments are for the most part given no effect.[23]

Meanwhile, other countries are moving forward with the Choice of Court Convention. On June 11, 2015, Latvia, on behalf of 27 of the 28 European Union countries, deposited the instrument of approval of the Choice of Court Convention, which means that the Convention will enter into force and take effect in those countries on October 1, 2015.[24] Singapore has recently signed the Convention and ratification there is expected to follow after it comes into force.[25]

*"The DIFC Courts Practice Direction Number 2 is an ingenious innovation."*

The consequence for U.S. judgments? As one commentator has observed: "With one stroke, U.S. litigation became less enforceable than either arbitration or U.K. litigation"[26] In the intense competition to be the venue of choice for international disputes, this is a clear disadvantage for the United States and for New York. The most straightforward and certain way for the United States to enhance the enforceability of its judgments would be finally to ratify the Choice of Court Convention. One would hope that this will soon occur.

The DIFC Courts Practice Direction Number 2 is an ingenious innovation. It provides a way to convert judgments into arbitral awards enforceable throughout the world, even in countries that have not yet ratified or acceded to the Choice of Court Convention. Although it is untested, Chief Justice Hwang argues persuasively that there is no reason why it should not work.[27] In light of the impasse regarding the Choice of Court Convention, New York courts and arbitral institutions may well wish to consider adopting a similar mechanism for conversion of New York judgments to awards.

## Endnotes

1. The DIFC Courts have been described by Chief Justice Hwang as "'a common law island in a civil law ocean' because UAE laws are based on the civil law, while the governing law in the DIFC are laws enacted specifically for the DIFC and based on common law…. Our legal system is based substantially on English law in codified form, but with civil law influences. Michael Hwang, "Commercial courts and international arbitration—competitors or partners?" 31 Arbitration International 193 (2015).
2. http://difccourts.ae/about-the-courts/courts-structure/judges/.
3. See Dubai Law No. 16 of 2011, Article (5) A 2 which granted to the DIFC Court of First Instance jurisdiction over "any civil or commercial claims or actions where the parties agree in writing to file such claim or action with it whether before or after the dispute arises."
4. 31 Arbitration International at 203.
5. Michael Hwang, "The DIFC Courts Judgment-Arbitration Protocol: Referral of Judgment Payment Disputes to Arbitration"(November 2014), http://difccourts.ae/difc-courts-chief-justices-explanatory-lecture-notes-referral-judgment-payment-disputes-arbitration-november-2014/.
6. See Queen Mary, University of London, "International arbitration: Corporate attitudes and practices (2006), p. 6 ( In a survey of corporate users of arbitration "enforceability of awards was ranked as the single most important advantage by the highest number of respondents….").
7. On October 8, 2014, Bhutan and Guyana became the 151st and 152nd parties to the New York Convention, http://www.newyorkconvention.org/news/bhutan-and-guyana-become-the-151st-and-152nd-state-parties-to-the-new-york-convention.
8. See "Amended DIFC Courts Practice Direction No. 2 of 2015—Referral of Judgment Payment Disputes to Arbitration" (May 27, 2015), http://difccourts.ae/amended-difc-courts-practice-direction-no-2-of-2015-referral-of-judgment-payment-disputes-to-arbitration/.
9. http://difccourts.ae/difc-courts-draft-practice-direction-referral-difc-court-judgments-difc-lcia-arbitration-centre/.
10. See DIFC Court's Lecture Series No. 5, November 19, 2014, Chief Justice Michael Hwang, "The DIFC Courts Judgment-Arbitration Protocol—Referral Of Judgment Payment Disputes To Arbitration," http://difccourts.ae/wp-content/uploads/2015/02/DIFC-Courts-CJ-Final-November-2014-Lecture-Notes.docx.
11. "Second Consultation for DIFC Courts Practice Directions on Referral of Judgments to Arbitration (Dec. 17, 2014), http://difccourts.ae/second-consultation-difc-courts-practice-directions-referral-judgments-arbitration/.
12. DIFC Courts Practice Direction No. 2 of 2015—Referral of Judgment Payment Disputes to Arbitration (Feb. 16, 2015)," http://difccourts.ae/difc-courts-practice-direction-no-2-2015-referral-judgment-payment-disputes-arbitration/.
13. Chief Justice Hwang has informed the author that the May 27, 2015 amendment of the Practice Direction was based on a comment made at the Arbitration Committee meeting. The comment was made by Richard Mattiaccio of Squire Patton Boggs, who kindly hosted the meeting at his office and provided the videoconferencing link.
14. In the February 16, 2015 version of the Practice Direction, this paragraph of the suggested arbitration clause began: "Any Judgment Payment Dispute (as defined in DIFC Courts Practice Direction No 2 of 2015) that satisfies all of the Referral Criteria set out in the Practice Direction *shall be referred to and be finally resolved by arbitration*…." The February 16 Practice Direction was also "cast in mandatory terms ('[a]ny enforcement dispute… *shall* be referred to and finally resolved by arbitration…."). Gordon Blanke, "DIFC Court Amends Practice Direction No. 2 of 2015 on Referral of Payment Judgment Disputes to Arbitration: Getting It Right…Finally!," Kluwer Arbitration Blog (July 16, 2015) http://kluwerarbitrationblog.com/blog/2015/07/16/difc-court-amends-practice-direction-no-2-of-2015-on-referral-of-payment-judgment-disputes-to-arbitration-getting-it-right-finally. At the March 23 meeting, Mr. Mattiaccio expressed concern that a judgment *debtor* could take advantage of this mandatory language to commence arbitration of a Judgment Payment Dispute for the purpose of obstructing or delaying recognition and enforcement of a judgment. In the amended version, both the Practice Direction and the suggested arbitration clause were changed to remove the mandatory language and to make clear that only the judgment creditor could choose to arbitrate a Judgment Payment Dispute.
15. The DIFC-LCIA Arbitration Centre, the institution referenced in the suggested clause, was established in 2008 by the DIFC and the London Court of International Arbitration. Both the Arbitration Centre and the DIFC Courts operate under the auspices of the Dispute Resolution Authority, which is headed by the Chief Justice.
16. For a summary of the concerns raised and the responses *see* Hwang, *supra* note 1, 2015 Arbitration International at 205-211.

17. See DIFC Court's Lecture Series No. 5, *supra* note 10, at p. 1.
18. See Hwang, *supra* note 1, 2015 Arbitration International, at 212.
19. See Final Report, New York State Bar Association Taskforce on New York Law in International Matters, http://www.nysba.org/internationalreport/, p. 24.
20. "The United States…has had [a] long history of avoiding entanglements in recognition treaties, indeed in treaties having anything to do with private international law," Samuel P. Baumgartner, "How Well Do U.S. Judgments Fare in Europe?," 40 Geo. Wash. Int'l L. Rev. 173, 227 (2008).
21. Hague Conference on Private International Law, Convention on Choice of Court Agreements (concluded 30 June 2005), http://www.hcch.net/upload/conventions/txt37en.pdf.
22. "Federal implementing legislation has been stalled by the "Uniform Law Commission's] objections to federalizing the law of foreign judgment recognition." John R. Bellinger and R. Reeves Anderson, "Tort Tourism: The Case for a Federal Law on Foreign Judgment Recognition," 54 Virginia Journal of Int. Law 501, 531, n. 142 (2015). As the authors observe, "The current law on recognition of foreign judgments in this country is governed by a patchwork of state statutes and common law principles." *Id.* at 502. See also Michael D. Goldhaber, "The Global Lawyer: A Lack of Judgment," The American Lawyer (July 8, 2015), http://www.americanlawyer.com/id=1202730102406/The-Global-Lawyer-A-Lack-of-Judgment.
23. Samuel P. Baumgartner, "Understanding the Obstacles to Recognition and Enforcement of U.S. Judgments Abroad," 45 N.Y.U. J. Int'l L. & Pol. 965, 967 (2013).
24. Choice of Court Convention, Art. 31(1).
25. Matthew J. Skinner and Zara Shafruddin, "Singapore Signs Hague Convention on Choice of Court Agreements" (April 8, 2015), http://www.jonesday.com/singapore-signs-hague-convention-on-choice-of-court-agreements-04-08-2015.
26. See Goldhaber, *supra* note 22: "The European Union's approval of the treaty on June 11, following on Mexico's (and also soon to be followed by Singapore's), will bring the Hague Convention on Choice of Courts Agreement into force on Oct. 1. It's probably only a matter of time before the rest of the world lines up for easy reciprocal enforcement with the nations of Europe. Once that happens, a court judgment from London is more valuable than one from New York. For if clients from Asia or Latin America can sue anywhere, which would they rather have in their back pockets? Deal lawyers drafting the dispute resolution clause in international contracts are sure to take note. And U.S. litigators, having spent the last decade watching their global business flow to arbitration, may be chagrined to see more of it diverted to the Royal Courts of Justice."
27. One member of the Arbitration Committee has expressed concern that the mechanism devised by the DIFC "could be misused by a country with unreliable courts to seek international influence through the New York Convention." To the author, the prospect of this occurring seems tenuous. While in the United States it is possible that an arbitral award will be recognized and enforced notwithstanding that it has been procured by corruption (e.g., BCB Holdings Ltd. v. Gov't of Belize, 2015 U.S. Dist. LEXIS 81824 (D.D.C. June 24, 2015) (rejecting the contention that enforcement of an award allegedly tainted by corruption should be refused on public policy grounds under Article V of the New York Convention), in other countries, such as Singapore, courts have held that enforcement of a foreign arbitral award procured by corruption may be refused on public policy grounds (e.g. Beijing Sinozonto Mining Investment Co Ltd v Goldenray Consortium (Singapore) Pte Ltd [2013] SGHC 248). So in many jurisdictions, there would be no clear advantage to converting a judgment to an award. Also, if the DIFC mechanism were adopted, conversion would require in every case the agreement of both parties to arbitrate judgment payment disputes. If either party were concerned about the integrity of the court, it would not have to agree to arbitration.

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# Working with Experts in International Arbitration: Four Practical Tips

By Alexandra Dosman

Expert witnesses can play an important role in international arbitration. As in domestic litigation, experts are often hired for their special knowledge of technical issues or in order to quantify damages. Parties engage experts either in a consultative role or with a view to having them testify at an eventual hearing. At the outset of an international commercial dispute, it is important to consider the ways in which working with experts in international arbitration may differ from domestic practice.

> *"For expert witnesses, however, proceeding directly to cross-examination can be ineffective."*

## 1. Clarify Applicable Disclosure Rules

Parties in international arbitrations may come to the process with different expectations as to what parts of their correspondence with experts will be disclosed to their counterparty. If possible, it is prudent to come to an understanding with opposing counsel at the outset about the scope of disclosure with respect to experts and expert-counsel correspondence prepared in connection with the arbitration.

The general practice in international arbitration is that communications between counsel and experts are not subject to disclosure.[1] This presumption against disclosure extends to drafts of an expert report exchanged with and commented on by counsel. As stated by the Chartered Institute of Arbitrators' Protocol for the Use of Party-Appointed Experts in International Arbitration (2007): "Drafts, working papers or any other documentation created by an expert for the purpose of providing expert evidence in the Arbitration shall…not be discloseable in the arbitration."[2]

There are several key categories of documents that do not fall under the general rule. Letters or other agreements setting out the scope and nature of the expert's engagement are generally disclosed to the counterparty and to the tribunal.[3] Some international arbitration counsel prefer not to have written engagement letters for this reason, especially if the scope of the engagement may later be modified.

Similarly, documents on which the expert relies in his or her report will be subject to disclosure.[4] However, the question is a closer one with respect to documents reviewed, but not relied upon, by the expert. These documents are not ordinarily discoverable as a class.[5] For example, a request for "any and all documents reviewed by" an expert is unlikely to find favor before an international panel. Of course, cross-examination on the issue of what documents the expert reviewed and why he or she did or did not rely upon those documents in his or her report is fair game (and indeed, to be expected).

## 2. Negotiate Manner of Testimony

As with witnesses of fact, an international arbitral tribunal will first encounter an expert in writing, in the form of one or more expert reports. This is a near-universal practice for fact witnesses: written statements will stand as direct testimony, and there will be no oral direct testimony aside from an introduction from counsel. The first substantive discussion with the fact witness will be in the form of cross-examination by opposing counsel.

For expert witnesses, however, proceeding directly to cross-examination can be ineffective. The tribunal will not have the benefit of hearing the expert's overall theory; rather, cross-examination will focus on more discrete areas that may be weaker or deemed more important by counsel. For this reason, counsel may agree in advance that each of their experts will be able to give a short oral direct testimony. This may even take the form of a presentation to the tribunal rather than traditional question-and-answer with counsel. Consideration should be given by counsel about whether the client's case would benefit from this kind of direct testimony, and if so should negotiate for its inclusion in the hearing schedule.

Another manner of expert testimony that has gained favor is "witness conferencing."[6] This refers to the practice of two or more experts from opposing sides testifying at the same time under questioning by the tribunal or one another. Counsel should carefully consider whether such a format would be an advantageous means of testimony, bearing in mind the experts and the issues.

## 3. Understand the Powers of the Tribunal

Tribunals have broad powers with respect to experts in the international arbitral process. There are no *Daubert* determinations; rather, the practice is to allow experts to submit reports and to testify, and for the tribunal to assess the weight of the evidence.

In addition, under leading arbitral rules, tribunals may appoint their own expert or experts.[7] When this occurs, parties frequently proceed to engage their own experts in order to comment on the tribunal-appointed expert, leading to increased costs and (perhaps) delay. One arbitrator has proposed a different approach. The

"Sachs Protocol," proposed by Dr. Klaus Sachs, would see parties providing short lists of acceptable experts and the tribunal selecting one expert from each list as the tribunal's "expert team."

Finally, under leading international guidelines, the tribunal may order that experts meet and confer, and that they attempt to narrow the issues in dispute: "The Arbitral Tribunal in its discretion may order that any Party-Appointed Experts who will submit or who have submitted Expert Reports on the same or related issues meet and confer on such issues. At such meeting, the Party-Appointed Experts shall attempt to reach agreement on the issues within the scope of their Expert Reports, and they shall record in writing any such issues on which they reach agreement, any remaining areas of disagreement and the reasons therefore."[8]

### 4. Remember That Credibility Is Everything

The source and content of an expert's ethical obligations is a subject of much debate and commentary. An expert is remunerated by a party and may enjoy privileged communications with that party's counsel: how does this reconcile with that same expert's obligations to be independent from the party and its counsel?[9]

From a practical perspective, the key point is that an expert who appears partial or who seems to be advocating for a party will lose credibility before the tribunal. In the words of a leading practitioner, the expert "must be—and come across as—unyieldingly scrupulous and trustworthy. The arbitrators will not be swayed, or amused, by an expert who clearly has shed his or her professional integrity for a large sum of money."[10]

> *"An expert who appears partial or who seems to be advocating for a party will lose credibility before the tribunal."*

## Endnotes

1. Paul Friedland & Kate Brown de Vejar, "Discoverability of Communications between Counsel and Party-Appointed Experts in International Arbitration," 28 Arbitration International 1 (LCIA: 2012) at 2-3 ("Friedland & de Vejar").
2. Article 5.2.
3. Friedland & de Vejar at 8.
4. Counsel should take care to understand what categories of documents the expert will need to prepare his or her report in formulating the party's position on the scope of disclosure in the arbitration.
5. Friedland & de Vejar at 8.
6. Pierre Bienvenu and Martin J. Valasek, "Witness Statements and Expert Reports," in *The Art of Advocacy in International Arbitration*, Doak Bishop and Edward G. Kehoe, Eds. (Juris) 235 at 272.
7. ICDR Rules, Art. 25; ICC Rules, Art. 25(4); LCIA Rules, Art. 21; *see also* UNCITRAL Arbitration Rules (2010), Art. 29.
8. IBA Guidelines on the Taking of Evidence in International Arbitration (2010), Art. 5(4).
9. IBA Rules on the Taking of Evidence in International Arbitration (2010), Art. 5(2)(c) (An expert's report shall contain "a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal.").
10. C. Mark Baker, "Advocacy in International Arbitration," in Lawrence W. Newman and Richard D. Hill, eds., *The Leading Arbitrators' Guide to International Arbitration*, 2nd ed. (Juris Publishing, 2008) at 395.

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# TTIP—A Boost for Arbitration and a More Balanced Multilateral Investment Regime?

By Thomas K. Mayr-Riedler

*The current Transatlantic Trade and Investment Partnership (TTIP) negotiations between the EU and the U.S. present a unique chance to reform the struggling international investment regime and set the stage for a multilateral framework on investment. The idea of a mega-regional treaty which bypasses the Global South to serve as a bridge towards multilateralism and a more balanced investment arbitration system prima facie appears to be counter-intuitive. However, if one takes into account the principles of the new Common European Policy on Investment along with the realities of global investment flows, chances are that TTIP may serve as a stepping stone for the consolidation and re-balancing of the international investment arbitration architecture.*

## Introduction

The public debate over TTIP has put investment arbitration (investor-state dispute settlement or ISDS) under the spotlight. ISDS enables foreign investors to bring a case against a state that hosts their investment before an international arbitral tribunal and seek redress for violations of their guaranteed investor rights. As the primary enforcement mechanism within the international investment framework, ISDS has been widely criticized for placing restrictions on host states' policy space. A number of cases with the International Center for Settlement on Investment Disputes (ICSID) and other investment dispute settlement fora in fact have showcased structural deficits of the investment regime which put host states' rights to regulate in jeopardy.

The structural imbalance between the principles regarding the protection of foreign investment on the one hand and non-investment policy objectives on the other is rooted in the historic North-South divide between the opposing interests of the capital-importing states of the South and the capital-exporting North. The competition among developing states for FDI led to a race to the bottom curtailing their policy space and casting a "regulatory chill" over domestic measures needed to achieve non-investment objectives.[1]

But with developing and developed states' interests aligned more than ever, the international investment regime stands a chance to end the "race to the bottom" and set a new balance between investor guarantees and policy space for host states.[2] This article aims to examine the deficits of the current investment framework entrenched in international investment agreements (IIAs), in particular with regard to ISDS, and to demonstrate how TTIP may contribute to overcome these difficulties by putting in motion a reform process that helps build a more inclusive investment arbitration architecture.

## State of Play

The international investment regime is undergoing serious questioning and finds itself in a "legitimacy crisis."[3] Even before TTIP, the recourse to investor-state arbitration had been criticized as constituting an "undemocratic delegation of authority to unaccountable bodies,"[4] thereby curtailing "the freedom of action of national law-making authorities,"[5] that such arbitral tribunals are "businessmen's courts"[6] which "overrule the will of parliament"[7] and pose "affronts to sovereignty"[8] threatening the rights of states to self-preservation and retarding the "development of regulatory initiatives that are the hallmarks of the mature social welfare state."[9]

The crisis of the international arbitration system is also evidenced by the withdrawal of several countries in Latin America such as Venezuela, Ecuador and Bolivia from the ICSID Convention while others such as South Africa have terminated their BITs; Australia has decided not to include arbitration clauses in any future BITs or free trade agreements (FTAs), and, most recently, Indonesia announced the termination of more than 50 BITs with countries such as China, France, the Netherlands, Singapore and the UK. Against this background and since the investment chapter in TTIP, and in particular the proposal to include ISDS, made its way into the media, the investment arbitration system has become the focus of a highly controversial political debate between a number of players, ranging from politicians, academics, law practitioners and NGOs to civil groups.

## Out of Balance

While the public debate has identified ISDS as the root of all evil, it is not so much the arbitral dispute settlement mechanism *per se* that creates the imbalance between foreign investors and host states. Instead it is the "*substance* of international investment law" based on which arbitrators may decide upon claims and which tend to create the imbalances gnawing away on the legitimacy of the entire framework.[10] The plethora of today's IIAs in force were drafted at the expense of governmental flexibility. A majority of IIAs fail to acknowledge *expressis verbis* the host states' "right to regulate" in pursuit of non-economic policy objectives or simply remain silent on how public policy issues, such as public health or environmental protection, are to be dealt with in relation to investment.[11]

Consequently, the relationship between the protection of foreign investment and the host states' right to regulate in such areas tends to be unclear and imbalanced.[12] Such imbalance has led to a series of awards that interpreted states' duties to foreign investors expansively and the exceptions to those duties restrictively.[13] This lack of inclusivity in terms of public policy interests makes it, at the very least, difficult for arbitrators to adequately consider non-investment-related aspects of a particular claim and to respect host state's responsibilities outside of investment treaties. Unbalanced IIAs therefore pose a threat to modern democracies and their ability to act in the public interest, as host states potentially refrain from enacting or altering legitimate legislation and regulation for fear of costly investment arbitration.[14]

Those advocating against the inclusion of ISDS in TTIP shall be reminded that the EU and the U.S. are already fully exposed to the risks emanating from investment arbitration as combined they are parties to some 1,500 BITs, all of which entail substantial investment guarantees, including the right to enforce such guarantees via ISDS. The non-inclusion of ISDS in TTIP therefore would be a pyrrhic victory. It would preserve the *status quo* along with its inconsistencies and deficiencies while missing the chance to move the international investment framework forward towards a more adequate and up-to-date dispute settlement system.

## Winds of Change

The central question with respect to TTIP hence is not whether to include ISDS or not, but to find ways to strike a better balance between investment protection guarantees and host state's policy space. The international investment framework used to be shaped by the interests of the capital-exporting developed countries making the protection and promotion of foreign investment the sole objective of IIAs, whereas non-economic objectives have not been considered.[15] Yet today developed countries are no longer exclusively capital exporting, but are importing ever increasing capital flows from developing countries.[16] This has caused developed states to understand better the concerns expressed by developing states as they came to see that "IIAs can only fulfill their promise to increase foreign direct investment (FDI) and contribute to economic development if they leave sufficient space to regulate in pursuit of policies beyond the protection of foreign investment."[17]

The international community finds itself at a political and economic junction where the gap of interests between developed and developing states has narrowed and developed states realize that bilateral treaty obligations are not a one-way street as they themselves have become host states to foreign investment—and in parts even defendants in arbitral proceedings—but reciprocal indeed.[18] This is the case even in traditional capital-exporting countries such as the U.S.—now a respondent in several NAFTA and ICSID cases—which for the last decade has placed national security, regulatory room for maneuver and developmental interests at the center of its international investment policy.[19] It appears thus that the interests of developed states today—more than ever—are aligning with those of developing states.

## The European Mission Statement

The European Union used to be a mere bystander in the emerging global competition of investment protection systems—gagged by its own treaties. It is since the entry into force of the Lisbon Treaty, which empowered the European Union to have exclusive competence on FDI, that the European Union stands at the forefront of a movement within the international investment arbitration community that pushes for a re-balancing of investment protection standards and non-investment objectives along with a reform of the ISDS mechanism.

The inclusion of FDI in the Common Commercial Policy (CCP) by Article 207 Treaty on the Functioning of the European Union (TFEU) ensures that the Common European Policy on Investment (CEIP) is conducted in the context of the principles and objectives of the Union's external action set forth in Article 21 Treaty on European Union (TEU).[20] Article 21 TEU assigns the EU's role of international cooperation to serve various objectives "in all fields of international relations," amongst them trade liberalization and sustainable development. This illustrates that the CEIP has not just a liberalization agenda but pursues a mission in favor of sustainable development, the incorporation of all countries into the world economy and the support of multilateral treaties.[21] The reform process started under the Lisbon Treaty in the field of FDI thus aims towards a more inclusive and sustainable investment framework—within the European Union and worldwide.

In its communication of 7 July 2010, the European Commission accentuates its intention to safeguard host states' regulatory space and to promote broader policy objectives on the same normative panel as trade and investment objectives in its future investment policy.[22] Accordingly, the Commission emphasizes the protection of the freedom of action of the contracting parties to investment treaties in regulating in the interest of non-investment objectives and the integration of these objectives in IIAs. The Commission argues that the CEIP has to "continue to allow the Union, and the Member States, to adopt and enforce measures necessary to pursue public policy objectives."[23]

As regards TTIP, the Commission is determined to achieve a solid balance between investment protection and the host states' right to regulate through clarifying and improving substantive investment protection provisions as well as reforming the arbitral dispute settlement mechanism. This can be derived from the documents

released by the Commission as part of the public consultation,[24] various documents leaked during past negotiations rounds,[25] and the investor protection clauses in the EU-Canada Comprehensive Economic and Trade Agreement (*CETA*), which serves as a model investment treaty for TTIP and benchmark for innovative ISDS-related procedural elements.

Also, the EU Commissioner on Trade, Cecilia Malström, released a concept paper in early May, which affirms the host states' right to regulate and renews the European Union's efforts to profoundly reform ISDS.[26] The totality of the European Union's principles, objectives and values of its external action all point towards one approach: To make "the Parties' right to regulate (…) a basic underlying principle" of the treaty text, so that arbitrators "have to take this principle into account" when assessing an investor-state dispute.[27]

## TTIP as the Pioneer

The aforementioned documents indicate that the EU will seek to introduce clear provisions specifically with respect to those investment protection provisions that have raised much concern in the past.[28] The Commission particularly aims to refine the substantive investment protection rules through interpretive statements to ensure that such rules are not interpreted expansively by arbitral tribunals so as to prohibit host states from pursuing legitimate policy objectives. This includes the clarification of the most controversial investor guarantees, namely fair and equitable treatment (FET) and protection against indirect expropriation to avoid expansive or unpredictable interpretations by arbitral tribunals.[29]

The re-balancing of the context in which investment protection standards are interpreted is an issue that has already been addressed in CETA through a reference in the preamble putting non-investment objectives on the same normative plane as the protection and promotion of foreign investment. While this reference marks an innovation as compared to the EU Member States' traditional approach in their BITs, TTIP is supposed to take the host states' right to regulate in the public interest one step further by introducing an operational provision, i.e., an Article, which will refer to the right of governments to take measures to achieve legitimate public policy objectives.[30] In addition, the Commission seeks to formulate necessary safeguards and exception/carve-out clauses providing host states with an escape route from investment guarantees in case other non-investment policy objectives such as public health, consumer protection or environmental protection are at stake.[31]

On a procedural level, TTIP aims to limit conflicts of interest for arbitrators by implementing a requirement that all arbitrators are chosen from a roster of qualified arbitrators pre-established by the parties to the agreement (the Parties). The European Union further plans to ensure full, mandatory transparency of treaty-based investor-state arbitration proceedings by incorporating the United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency.[32] These procedural measures may be accompanied by full access of NGOs and other stakeholders in ISDS to the arbitral proceedings by means of amicus briefs.

The concept paper also announced what would constitute the most procedural innovative feature of TTIP—the possible establishment of a permanent multilateral investment court and an appellate mechanism for the review of arbitral awards. As far as regards the relationship between domestic courts and ISDS, the concept paper calls either for a "fork-in-the-road" clause requiring investors to make a choice between ISDS and domestic courts at the onset of the proceedings or a "no u-turn" clause requiring investors to waive their right to seek redress before domestic courts once they submit a claim to ISDS—either way the EU proposal aims to prohibit parallel claims.[33] These clauses will be further amended by provisions to prevent legal "forum shopping" by investors.[34]

The treaty text may also contain provisions that allow for the Parties' intervention to explain how they want certain provisions to be interpreted and to issue binding interpretations as regards certain investment protection provisions. The Parties shall be enabled to control the interpretation of the treaty, and, where necessary, to influence the interpretation by the arbitral tribunal.[35] Additional procedural improvements include the implementation of a fast track mechanism for quick dismissal of frivolous and unfounded claims and the implementation of the so-called "loser pays principle" as it has been introduced in CETA.

It would go beyond the scope of this article to discuss the entirety of substantive and procedural investment-related innovations in TTIP as well as their likely impact on the international arbitration practice in more detail.[36] However, all measures cited raise expectations that TTIP may live up to the mission statement of the EU on foreign investment and pioneer in creating a more transparent, predictable, and balanced treaty than any other existing IIAs of the EU so far.

## Paving the Way

In the context of the current debate over ISDS in TTIP, some prominent scholars and practitioners have also echoed the need for certain changes and improvements to investment arbitration, adding to the momentum of change. It remains the question though whether and how TTIP may change the international investment framework given that the agreement represents only a single investment treaty among some 1,500 others concluded by the EU Member States and the U.S. and some 3,000 IIAs concluded worldwide.

With a multilateral investment agreement nowhere in sight, TTIP could be an intermediate step in establishing global investment rules. Especially as multilateral trade talks within the WTO have come to a halt with little appetite to incorporate investment into ongoing multilateral trade negotiations, mega-regional treaties such as TTIP could be a pragmatic approach to move multilateral negotiations forward. Because once two of the strongest economies and major trading partners harmonize their regulations, thereby creating a basis for the formulation of global investment standards, the path to a multilateral investment framework will be less rocky.

The pure size of investment volumes involved in TTIP raises expectations that the positive economic effects might stimulate the development of a multilateral investment arbitration architecture. TTIP's "critical mass" and associated systematic implications are projected to spur the integration of investment standards well beyond the confines of the Parties' jurisdictions as the economic power of a harmonized market will pose an incentive to non-members to strive towards greater convergence with EU-U.S. standards (domino effect).[37] Direct and indirect spillover effects could induce a regionalization and, ultimately, multilateralization of TTIP.

## Conclusion

The European Union's CEIP has a clear mission to place non-economic values such as sustainable development and international cooperation on the same normative panel as investment objectives. This is reflected in the European Union's primary law and, specifically in the concept papers, policy guidelines and documents available on the investment chapter in TTIP. The EU's active voice in favor of innovative substantial and procedural investment provisions aimed at increasing the host states' policy space and the modernization of the ISDS mechanism raises expectations that TTIP might serve as a catalyst for a reform process which balances the legitimate interests of foreign investors with the host states' right to regulate in pursuit of public policy objectives, thereby affording the entire investment arbitration system with the required legitimacy. Moreover, in light of the economic power of the EU and U.S. chances are that such reforms translate into a new gold standard leading to the convergence of investment protection standards at a multilateral level. This way TTIP could turn from a mere milestone into a stepping stone for a multilateral investment framework. In any case, TTIP will not be able to provide a quick fix to the deficits of the current investment regime or lead to a coherent global investment framework in the short term. The treaty may, however, lay the foundations for a multilateral consensus and, in the best case, provide a way forward to solve the crisis of the international investment framework.

## Endnotes

1. Cf Scott J. Basinger & Mark Hallerberg, *Remodeling the Competition for Capital: How Domestic Politics Erases the Race to the Bottom*, 98 (2) American Political Science Review, 261 (2004); David M. Konisky, *Regulatory Competition and Environmental Enforcement: Is There a Race to the Bottom?*, 51(4) American Journal of Political Science, 853 (2007).
2. Cf Scott J. Basinger & Mark Hallerberg, *Remodeling the Competition for Capital: How Domestic Politics Erases the Race to the Bottom*, 98(2) American Political Science Review 261 (2004); David M. Konisky, *Regulatory Competition and Environmental Enforcement: Is There a Race to the Bottom?*, 51(4) American Journal of Political Science 853 (2007); Thomas Pluemper, Vera E. Troeger & Hannes Winner, *Why Is There No Race to the Bottom in Capital Taxation?*, 53(3) International Studies Quarterly 761 (2009).

*"TTIP could turn into a stepping stone for a multilateral investment framework."*

3. Cf Julia Hueckel, *Rebalancing Legitimacy and Sovereignty in International Investment Agreements*, 61 Emory Law Journal 601 (2012); Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 George Washington International Law Review 107 (2009).
4. José E. Alvarez, The Public International Law Regime Governing International Investment 83 (2011).
5. Cf Jeffrey Atik, *Repenser NAFTA Chapter 11: A Catalogue of Legitimacy Critiques*, 3 Asper Review of International Business and Trade Law 215, 218-220 (2003).
6. Gus van Harten, Investment Treaty Arbitration and Public Law 153 (2007).
7. Alvarez, *supra* note 4, 83.
8. Gabriel Bottini, *Protection of Essential Interests in the BIT Era*, in Investment Treaty Arbitration 145, 145 (Todd Weiler ed., 2008); Cf also Craig Forcese, *Does the Sky Fall?: NAFTA Chapter 11 Dispute Settlement and Democratic Accountability*, 14 Michigan State Journal of International Law 315, 321-22 (2006).
9. Andre Newcombe, *Sustainable Development and Investment Treaty Law*, 8 Journal of World Investment & Trade 357, 394 (2007).
10. José E. Alvarez & Kathryn Khamsi, *The Argentine Crisis and Foreign Investors, A Glimpse into the Heart of the Investment Regime*, in The Yearbook on International Investment Law and Policy 379, 472 (Karl P. Sauvant ed., 2009) [emphasis added].
11. The right to regulate captures the fundamental concept under international law that a sovereign has the power and the freedom to choose its own domestic law and promulgate any regulations it perceives to be necessary to protect the public interest within its borders.
12. European Commission, Public Consultation on Modalities for Investment Protection and ISDS in TTIP, April 2014, available at http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf, accessed on 17 June 2015 [hereinafter *Public Consultation*].
13. *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, 274-5 and 280; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc v. The Argentine Republic*, ICSID Case No. ARB/02/1, 3 October 2006, 121-39; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award 28 September 2007, 298 and 303-4; *Enron Corporation and Ponderosa Assets L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, 259-68.
14. Suzanne A. Spears, *The Quest for Policy Pace in a New Generation of International Investment Agreements*, 13(4) Journal of International Economic Law 1037, 1039 (2010).

15. This is evident from the preambles of a number of IIAs that were concluded in the 1990s, such as the 1990 UK-Argentina BIT, the 1991 US-Argentina BIT or the 1994 UK-Ukraine BIT which refer exclusively to the economic imperative of promoting and protecting investments.
16. FDI outflows from developing countries reached a record level in 2014. Developing and transition economies together invested $553 billion, or 39 percent of global FDI outflows, compared with only 12 percent at the beginning of the 2000s. UNCTAD, World Investment Report ix (2014).
17. Spears, *supra* note 14, 1048.
18. This is further evidenced by the growing percentage of claimants from developing countries and an ever increasing number of developed states finding themselves in the role of the defendant. Developed states were respondent states in almost half the number of total cases filed. Cf UNCTAD, IIA Issues Note, Recent Developments in Investor-State-Dispute-Settlement (ISDS), (2014), available at http://unctad.org/en/publicationslibrary/webdiaepcb2014d3_en.pdf, accessed on 5 June 2015.
19. Louis T. Wells, *Preface* in The Evolving International Investment Regime: Expectations, Realities, Options xv, xvii-xviii (Josè E. Alvarez et al. eds, 2011). Reference is also made to the language of the 2004 U.S. Model BIT and the more recent 2012 U.S. model BIT.
20. Article 207 para 1 TFEU recalls that the objectives of the CCP cannot been seen in isolation and stresses that the "common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action."
21. Cf Wenhua Shan & Sheng Zhang, *The Treaty of Lisbon: Half Way toward a Common Investment Policy*, 21(4) The European Journal of International Law 1049, 1072 (2011); Angelos Dimopolous, *The effects of the Lisbon Treaty on the principles and objectives of the Common Commercial Policy*, 15(2) Foreign Affairs Review 153, 169 (2010).
22. European Commission, Towards a Comprehensive European International Investment Policy, COM(2010)343 final (July 7, 2010), para c, available at http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf, accessed on 14 June 2015 [hereinafter the *Communication*]; see also Council of the European Union, Conclusion on a comprehensive international investment policy (October 25, 2010), para 17, available at https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/117328.pdf, accessed on 21 June 2015.
23. Communication, *supra* note 22, para 3(c).
24. Cf Public Consultation, *supra* note 12.
25. The documents leaked include the negotiating mandate for the TTIP negotiations given by the Council of the EU to the Commission on 14 June 2013; a chapter on "Trade and services, investment and E-commerce" presented by the EU to the U.S. in July 201; and a concept note on ISDS from the same period used as a basis for an presentation during the negotiations in July 2013. The documents are available at http://eu-secretdeals.info/ttip/, accessed on 13 June 2015.
26. Cf Concept Paper, Investment in TTIP and beyond—the path for reform (May 5, 2015), available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF, accessed on 19 June 2015 [hereinafter the *Concept Paper*].
27. Cf Public Consultation, *supra* note 12.
28. Cf European Commission, Investment Protection and Investor-to-State Dispute Settlement in EU agreements (March 2014), available at http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152273.pdf, accessed on 21 June 2015; Public Consultation, *supra* note 12.
29. Cf Roland Klaeger, The Impact of the TTIP on Europe's Investment Arbitration Architecture, 2 ZDAR 68, 71 (2014).
30. Cf Concept Paper, *supra* note 26, 6.
31. Cf Public Consultation, *supra* note 12.
32. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, available at https://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html, accessed on 3 June 2015.
33. Cf Concept Paper, *supra* note 26, 11.
34. Cf Roland Klaeger, *supra* note 29, 71.
35. Cf Public Consultation, *supra* note 12.
36. For a more elaborate discussion of the substantive and procedural improvements see Christian Tietje et al., *The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership* (2014), available at http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2014/06/24/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip.html, accessed on 12 June 2015.
37. For a comprehensive study on the estimated cross-border effects of the Trans-Pacific Partnership (TPP) *see* Peter A. Petri et al., *The Trans-Pacific Partnership and Asia-Pacific Integration: A Quantitative Assessment*, 119 East West Center Working Papers (2011), available at http://www.usitc.gov/research_and_analysis/documents/petri-plummer-zhai%20EWC%20TPP%20WP%20oct11.pdf, accessed on 2 June 2015. Similar convergence effects may also be expected by TTIP. Cf Lucis Cernat & Nuno Sousa, *TTIP: A Transatlantic Bridge for Worldwide Gains*, 15(2) CESifo Forum 32, 33 (2014).

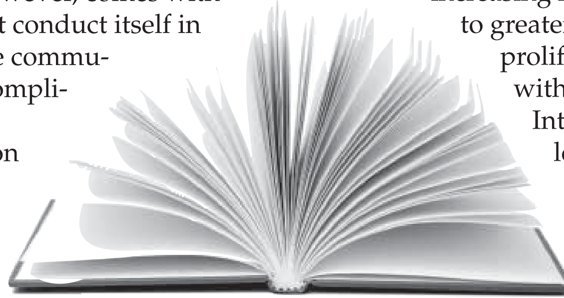
**Thomas K. Mayr-Riedler was an associate with the law firm Freshfields Bruckhaus Deringer LLP. He earned his J.D. in European and International Business Law at the University of Innsbruck School of Law in Austria and clerked with the Vienna Commercial Court. He also holds a Master's degree in International Economics and Business Studies from the University of Innsbruck School of Management and the University of Miami School of Business in Coral Gables.**

# Book Review

## *Ethics in International Arbitration*

By Catherine A. Rogers
(Oxford University Press, 2014)
Reviewed by Stefan B. Kalina

International arbitration is empowering. Parties may freely choose and implement methods best suited to resolve their disputes. Such power, however, comes with responsibility. Each participant must conduct itself in accord with the standards set for the community as a whole. Ethical rules, and compliance with them, are as crucial to the legitimacy of international arbitration as with any other voluntary "legal and political arrangement."



In her book, *Ethics in International Arbitration,* Professor Rogers "explores the professional obligations of the primary participants in international arbitration," including lawyers, arbitrators, experts and such institutional players as third-party funders. Many of these participants are readers of this *Journal* and, therefore, they would benefit from her clear and well-organized exposition on the subject. Specifically, Professor Rogers offers guidance on the source and scope of arbitrator, counsel, witness and funder ethics.

In addition, she also compares different national and cultural approaches to these ethical roles. Particularly useful is her focus on key conceptual language differences that participants may encounter in the course of their journey to understand ethics in international arbitration. As noted, "[t]he cross-cultural, inter-disciplinary analysis in this book necessarily implicates a number of terms that can have specialized meanings in different contexts." These differences are distilled down to their most significant aspects and presented "in a manner that will allow more systematic analysis" and, hence, practical application for practitioners and consumers of international arbitration.

Professor Rogers accomplishes much more than providing "meaningful answers to the most salient questions" regarding ethics in international arbitration. By addressing many of the unanswered questions, she illustrates how ambiguities in the current and competing sets of ethics rules pose a systemic challenge to the legitimacy of international arbitration itself. More importantly, she posits a well-developed and provocative proposal to meet the challenge and stabilize the legitimacy of international arbitration now and into the future.

Looking first at the historical backdrop to the problem, Professor Rogers explains how as a result of globalization, modern international arbitration "stands transformed" from its earliest incarnation. There are now an increased number of arbitrations taking place in an increasing number of jurisdictions. This has led to greater diversification of participants and a proliferation of arbitral institutions, each with its own legal and national culture. International arbitration is, therefore, no longer inhabited by a small community of practitioners and consumers nor is it "confined to the resolution of commercial disputes among commercial parties. "It is now "increasingly called on to resolve more complex disputes involving a wider range of parties, important national regulatory interests, and public policies."

This "growth in size, range, and complexity" has also led to greater ambiguity about the professional standards of conduct for participants who hail from disparate legal systems and cultures. The existing rules that currently apply to international arbitration and its participants are as varied as the ethical issues are complex. The current rules are also, possibly, outdated and they are certainly being out paced by the rate of emerging new issues.

Professor Rogers posits, therefore, that a so-called ethical "no man's land" now appears on the landscape of international arbitration. In it, arbitrators, counsel, experts and third-party funders alike find themselves increasingly unclear as to which competing ethical laws or rules apply. Professor Rogers explains how, for example, this may have an adverse effect on the fairness of a proceeding. If counsel conduct themselves according to rules that differ from the arbitrators' own "personal, nationally-derived ethical assumptions," then an imbalance may exist between the counsel's conduct and how it is evaluated by the arbitrators. Worse, the implicit assumptions at work may not be transparent to those involved. Such ambiguity presents very practical concerns for parties, their representatives and arbitrators. It may "foster conflict and confusion, create traps for the unwary, and provide opportunities for mischief for the unscrupulous." These issues destabilize the legitimacy of international arbitration.

At a very basic level, this book serves the useful function of creating sensitivity among arbitrators and counsel to these problems and enables them to bring clarity to potential confusion on their own accord to create a process that works. Beyond the immediate challenges such ambiguity brings to any one individual arbitration is the

growing concern among an ever-widening constituency (now consisting of the public, the business community and government officials) that international arbitration as a whole may be unable to continue to deliver fair and effective procedures. Professor Rogers contends that this current "diminution of confidence" haunts, if not threatens, the legitimacy of international arbitration.

Consequently, she calls for the "the installation of common and clear professional ethical standards and of reliable modes for their implementation" by the international arbitration community itself. Her call for "self-regulation" is the central thesis of the book. Professor Rogers states plainly that the "main purpose of this book…is to encourage a more systemic approach to professional self-regulation within international arbitration as means to increase its legitimacy, reduce disruptions, and stave off potential external regulation."

Professor Rogers contends that the communal nature of international arbitration and its continued, aspirational goal of creating a global, "feasible and reliable dispute resolution mechanism" with a shared professional ethos make it aptly suited to regulate itself. International arbitration is already a self-regulating regime that has greater "potency" to resolve disputes and enforce awards than "national litigation of international disputes." Moreover, arbitral institutions and organizations presently have the expertise to regulate and the necessary self-interest to safeguard the effectiveness of international arbitration in this regard.

Working with these attributes, Professor Rogers provides a "Functional Thesis" for developing "substantive standards" for international arbitration ethics that "avoids selection among national ethical rules" and that does not necessarily seek to harmonize national conflicts. Rather, the Functional Thesis is culturally neutral and takes as a starting point the legal culture, political values and adjudicatory goals of international arbitration itself. Profession Rogers acknowledges the difficulty in determining a fixed set of values and goals that apply uniformly to modern international arbitration. Therefore, she relies upon the normative goals of international arbitration, "distilled down to: transnational neutrality, effectiveness, and party autonomy" for her thesis. She further postulates that arbitral procedures exist to effectuate these normative goals and that a professional's role, in turn, is defined by these procedures.

The Functional Thesis is premised on the notion that ethical codes do not establish professional roles. Ethical rules, instead, "guide and facilitate" professional roles defined by procedures created to further the cultural and political values of an adjudicatory regime. In the case of international arbitration, those values are reflected in its normative goals. In sum, international arbitration procedures determine professional roles that, in turn, "determine a permissible range of ethical obligations to facilitate effective *performance* of these roles." Therefore, the Functional Thesis aims to create a coherent ethical framework by harmonizing arbitral procedures rather than by looking to national ethical rules.

The evident link between procedure, role and ethics subjects an ethics scheme to change. The Functional Thesis embraces such change as consistent with the goals of international arbitration. Accordingly, Professor Rogers contemplates a series of multiple menus tied to procedural options as potentially more appropriate than a single, uniform code of ethics for international arbitration. She further contends that where procedures deviate from those provided by existing rules, tribunals may make individualized, ad hoc determinations about appropriate standards.

Although highly theoretical, Professor Rogers' analysis provides a full complement of reference authorities and concrete examples to demonstrate how ethical rules apply generally and how the Functional Thesis applies in context. Towards this end, existing rules such as the IBA Guidelines on Conflicts are cited as an illustration of how such "procedural flexibility, shifting roles, and resulting changes in ethical obligations" are presently encapsulated. Looking ahead, Professor Rogers asserts that while developing such rules (or more individually tailored rules) may be challenging, international arbitration as a self-regulating regime should begin the process of achieving that goal rather than cede control over the process to external bodies such as national courts, legislatures or bar associations.

*Ethics in International Arbitration* effectively addresses many timely issues in a lively and accessible manner, including chapter-length discussions on the role of arbitrators and their duty of impartiality. Professor Rogers deftly combines historical background with a forward-looking theory that gives readers significant insight on the current state of international arbitration. This work may be used in practice and to achieve future reform. The blend of academic rigor and practical application brought to bear on solving specific ethical problems and systemic challenges merits inclusion of this volume in the libraries of all who have roles in international arbitration.

**Catherine A. Rogers is a scholar of international arbitration and professional ethics at Penn State Law, with a dual appointment as Professor of Ethics, Regulation, and the Rule of Law at Queen Mary, University of London, where she is also Co-Director of the Institute for Ethics and Regulation.**

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# Book Review

## *The Golden Age of Arbitration: Dispute Resolution Under Elizabeth I*

By Derek Roebuck

Reviewed by Edna Sussman

For those who have been waiting for the revelations about dispute resolution in the next period in history, Derek Roebuck's compendium on dispute resolution during Elizabethan times was published earlier this year. This book covers the reign of Elizabeth I, 1558-1603, and focuses on England with occasional journeys into Wales, the Channel Islands and Ireland. This book is the latest in Mr. Roebuck's series of books about arbitration at different points in history. His prior works include *Ancient Greek Arbitration* (2001), *Roman Arbitration* (2004), the *Charitable Arbitrator: How to Mediate and Arbitrate in Louis XIV's France* (2002), *Early English Arbitration* (2008), *Disputes and Differences: Comparisons in Law Language and History* (2010), and *Mediation and Arbitration in the Middle Ages* (2013).

The author of over forty books on law, legal history and language, Mr. Roebuck is a solicitor who has taught and practiced law in England, New Zealand, Australia, Papua New Guinea and Hong Kong. He served for many years as the editor of *Arbitration*, the journal of the Chartered Institute of Arbitrators, and is a senior research fellow at the University of London's Institute of Advanced Legal Studies.

Mr. Roebuck stated his purpose in embarking on his incredible historical journey on arbitration through the ages in his book on Greek arbitration: "History may be described as the 'intelligent reconstruction of the past' for some present purpose. The purpose of this history of arbitration is straightforward: to increase understanding of present systems of resolving disputes by showing how arbitration and mediation have operated and developed in other times and places. Understanding can be increased by comparing two or more contemporary societies or by comparing the same or different societies at different periods of history…. The study of these differences and similarities may be useful in increasing the understanding of present-day procedures and even in finding solutions to contemporary problems."[1] Indeed, much can be learned from our study of the past and the utilization of different dispute resolution processes in different cultures at different points in history.

As Mr. Roebuck's earlier books report, private arbitration was acknowledged by legal systems from the earliest times. Indeed, arbitration was cited by Demosthenes, the prominent Greek orator and statesman. Mr. Roebuck's books draw through the centuries on references to the law and dispute resolution from diverse sources including, law, history, politics and literature, producing a fascinating mosaic on the development and recognition of dispute resolution processes outside the courts.

While private arbitration co-existed, relatively little was recorded about how private arbitration was conducted in Elizabethan times. Because those in government at the time of Elizabeth I were diligent in recording almost everything, there is voluminous original archival material available relating to arbitration under Elizabeth I's government upon which Mr. Roebuck draws thoroughly with intelligence and wit in this latest volume. The book explores in depth dispute resolution under Queen Elizabeth I's scheme of public arbitration as recorded by her Privy Council ("Council"). The book is divided into six parts covering the background and sources, public arbitration, procedure, subject matter (commerce, international trade and foreign relations, marine insurance average salvage and prize, land, family and inheritance, and wrongs) and the law in the courts.

A few tidbits from the book to entice you: The word used by the Elizabethans for their process of dispute resolution was "arbitrement" spelled in different ways. This included every procedure or strategy at all stages once the parties had referred their dispute to others. Disputes were often referred by the Council to arbitration, usually in response to one party's petition for such an appointment. Arbitration versus mediation were not distinctly and separately defined and practiced as they are today and arbitrators were expected to "bring them [the parties] to some good composition with the consent of both parties,"[2] often by accepting a resolution suggested by the arbitrator. If the process failed to produce an agreed negotiated solution, wholly or in part, the arbitrator was usually authorized to continue his or her efforts to end the dispute by making a decision on outstanding issues or report back his or her opinion to the Council for it to take an order, often following the arbitrator's recommendation. Sometimes the Council referred a matter not to include a facilitated negotiation phase and to have the arbitrator act only as the decision maker. Often more than one arbitrator was appointed by the Council to conduct the arbitration.

Yes, you did see the word "her" in the prior paragraph. Mr. Roebuck devotes an entire chapter to the place of women in arbitration in Elizabethan England. He notes that there were occasional mentions of women as parties in private arbitrations, and "once as arbitrator,"[3] thus suggesting that women, while not precluded from serving as arbitrators, did not do so frequently. There was nothing in English law to inhibit the appointment of women arbitra-

tors. Mr. Roebuck reports on the choice of Mary Edgerton who was appointed as one of three arbitrators in a dispute among Cheshire landowners about the dower (portion of deceased husband's real property allowed to a widow for her lifetime for support) of one of her relatives, and Jane Mapples is recorded as a mediator in a dispute concerning an accusation of slander.

Many of the procedures reported are echoed today. The Council expected those they commissioned to act as arbitrators to serve with speed and efficiency and understood the importance of a speedy process for those with limited resources and for busy merchants. A month was usually considered ample time to hear the evidence and produce an award. The Council was alert to prevent parties from using delay as a tactic, used to cause the weaker parties with the stronger case to run out of money to pursue their rights. The arbitrators sometimes made orders for costs and could make payment of the expenses of the arbitration part of the award.

In the section on commerce, Mr. Roebuck reports that for those who had business in the major cities disputes were a normal part of the work. Merchants preferred to keep away from litigation which not only cost too much, but was too slow to provide a service. They set up their own arbitrations, but also took advantage of public schemes. The Council routinely commissioned London merchants to serve as arbitrators to assist the parties in achieving a mediated settlement.

The section on international trade and foreign relations suggest a system in which we would find close antecedents to today's process. Queen Elizabeth I's Government was assiduous in its concern for those who brought in trade to England and was happy to provide an attractive institution for dispute resolution.[4] Thus, if the dispute was between foreign and English parties, the Council would often appoint a mixed tribunal with some English and some foreign members. If the matter concerned a dispute between foreign merchants with no connection to England, while the Council might decide it, the dispute was referred to a foreign power if it were deemed more appropriate to do so. On the other hand, the Council sometimes insisted that English merchants abroad bring their disputes to the courts within Queen Elizabeth I's realm rather than pursue their claims in foreign courts.

While the work will be riveting for some, for others it will not be a beach read, but for all it will be absolutely fascinating. Just picking the book up and reading a few pages will delight and enrich the reader's day. Even more importantly a careful study of Mr. Roebuck's books may well, as he intended, assist "in finding solutions to contemporary problems" in dispute resolution.

## Endnotes

1. Derek Roebuck, Ancient Greek Arbitration, p. 3, publ. HOLO Books, Arbitration Press, 2001.
2. *Id.* at 5.
3. *Id.* at 153-154.
4. *Id.* at 202.

**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 concentrating in international and domestic commercial disputes and is 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 around the world and serves as the President-elect of the College of Commercial Arbitrators, on the board and the executive committee of the American Arbitration Association, and as the founding Vice Chair of the New York International Arbitration Center.**

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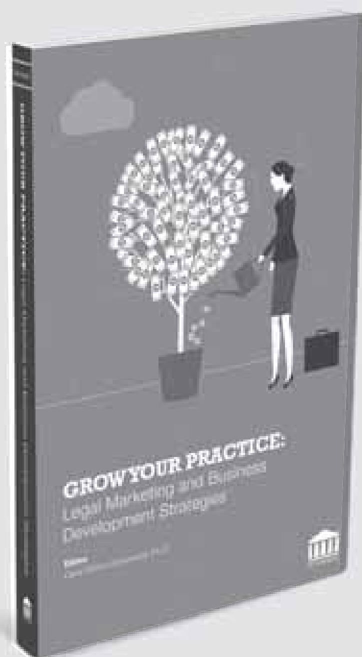


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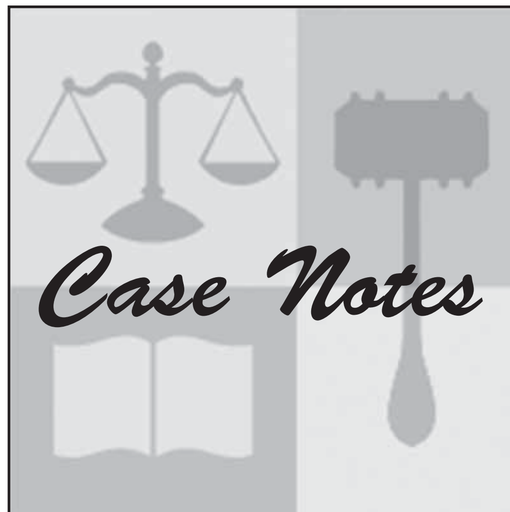
## *McKenna Long & Aldridge, LLP v. Ironshore Specialty Ins. Co.*, Civ. Nos. 14-cv-6633 (KBF), 14-cv-6675 (KBF), 2015 U.S. Dist. LEXIS 3347 (S.D.N.Y. Jan. 2, 2015)—non-signatories may be compelled to arbitrate under direct-benefit estoppel or third-party beneficiary theories

By Hui Liu




In *McKenna Long & Aldridge, LLP v. Ironshore Specialty Ins. Co.*,[1] Judge Katherine Forrest of the Southern District of New York held that plaintiffs could be compelled to arbitrate the defendant insurance company's claims against them even though they were non-signatories to the arbitration agreement contained in the underlying insurance policy. The court reached its holding under direct benefit estoppel and third party beneficiary theories.

### Factual Background

Plaintiffs in this case were the law firm McKenna Long & Aldridge, LLP and certain of its partners (collectively, "McKenna"), and Vincent W. Sedmak ("Sedmak"), the chairman and chief executive officer of Eidos, LLC ("Eidos"). Defendant was Ironshore Specialty Insurance Company ("Ironshore").[2] Eidos took out a loan of approximately $20 million from third-party Stairway Capital Management II LP ("Stairway") to fund a patent litigation program in which McKenna served as Eidos' counsel.[3] To satisfy a condition of the loan, Eidos obtained a contingent loss reimbursement policy ("Policy") from Ironshore.[4] The Policy designated Eidos and its affiliates the named insured and Stairway the loss payee. Neither McKenna nor Sedmak signed the Policy, even though they each signed certain other documents in connection with Eidos' application for the Policy.[5] The Policy contained an arbitration clause that required that "any controversy, claim or dispute arises in connection with this Policy" be arbitrated before the International Centre for Dispute Resolution ("ICDR").[6]

McKenna was paid approximately $11 million in legal fees in connection with the patent litigation program funded by proceeds of the Stairway loan.[7] Eidos used a portion of the loan to pay Sedmak a salary of close to $4 million and transferred $2 million in proceeds from the loan to another company owned by Sedmak.[8]

Eidos was unable to pay the principal from the loan at the maturity date so Stairway and Eidos demanded that Ironshore pay pursuant to the Policy.[9] Ironshore refused to pay, initiated an arbitration pursuant to the arbitration agreement contained in the Policy, and sought to add McKenna and Sedmak as respondents in the arbitration.[10] McKenna and Sedmak each filed a declaratory judgment action seeking a declaration that Ironshore's claims against them were not arbitrable.[11] The issue before the court was these parties' motions for summary judgment on their declaratory judgment claims.

### Analysis

The court first determined that the arbitrability question presented in this case was proper for judicial determination because both plaintiffs were non-signatories to the Policy which contained the arbitration agreement; as such, there was no clear and unmistakable evidence of an agreement to arbitrate arbitrability.[12] In addition, due to the lack of express arbitration agreement between the parties, the court further determined that its analysis of arbitrability must be guided by a presumption against arbitrability.[13] The court then examined five theories upon which a court may enforce an arbitration agreement against a non-signatory under the Second Circuit law: (1) incorporation by reference; (2) agency; (3) veil-piercing/alter ego; (4) direct-benefit estoppel; and (5) third-party beneficiary.[14]

The court quickly dismissed the first theory because there was no evidence that either plaintiff signed a later agreement with Ironshore that incorporated the arbitration agreement contained in the Policy.[15] As to the agency theory, the court first found that under the case law precedent, corporate agents were generally not bound by an arbitration agreement they signed only on behalf of the corporation.[16] The court also noted, however, the signing agent may use the arbitration provision to compel arbitration if other signatories of the agreement brought claims against him that were within the scope of the agreement.[17] In this case, the court found that neither McKenna nor Sedmak signed the Policy on behalf of Eidos and therefore neither plaintiff would be bound by the arbitration agreement under an agency theory.[18] The third theory, piercing corporate veil, was applicable only to Sedmak. The court found that due to the parties' material factual dispute as to this issue, a summary judgment was improper.[19]

The court's analysis was focused on the fourth theory, direct-benefit estoppel. It first determined that for the purposes of this theory, a benefit would be considered direct if it flowed directly from the agreement as opposed to being a mere consequence of the contractual relations embodied by the agreement.[20] The court noted that under the case law, a non-signatory could receive direct benefits from agreements under three circumstances: (1) the purported benefit to the non-signatory was specifically contemplated by the relevant parties; (2) the non-signatory itself admit-

ted to having directly benefited from the agreement by its own conduct, e.g., suing as a third-party beneficiary; and (3) if the agreement enabled the non-signatory to receive the tangible benefit.[21] In the case at bar, the court found that both the first and third circumstances were present: the $11 million in legal fees McKenna received from the proceeds of the loan flowed directly from the Policy, which was the condition precedent to the loan; and McKenna's legal fees were specifically contemplated by the parties to the Policy.[22] With respect to Sedmak, the court found that the loan enabled him to obtain a tangible financial benefit, i.e., his salary and funds transferred to another company owned by him.[23] Based on these findings, the court concluded that direct-benefit estoppel applied to both plaintiffs.

The court's analysis under the third-party beneficiary theory was similar to its analysis of the direct-benefit estoppel theory. The court first determined that this theory would apply if the non-signatory was "an intended beneficiary of the agreement and knowingly accepted the benefits of the agreement."[24] With respect to McKenna, because it was undisputed that the Policy was a condition precedent to the loan, the purpose of which was to fund the patent litigation program, including payment of legal fees, and it was undisputed that McKenna knowingly accepted proceeds from the loan, the third-party beneficiary theory applied to McKenna.[25] As to Sedmak, even though he did receive tangible benefits from the transaction, there was no evidence that the parties to the Policy intended for him to personally receive those benefits, so he was not a third-party beneficiary to the Policy.[26]

This case suggests that non-signatories to an arbitration agreement may nonetheless be compelled to participate in an arbitration under the agreement if they received direct financial benefits from the transaction underlying the arbitration agreement.

## Endnotes

1. Civ. Nos. 14-cv-6633 (KBF), 14-cv-6675 (KBF), 2015 U.S. Dist. LEXIS 3347 (S.D.N.Y. Jan. 2, 2015).
2. *Id*. at *1.
3. *Id*. at *3.
4. *Id*.
5. *Id*. at *4.
6. *Id*. at *4-5.
7. *Id*. at *5.
8. *Id*. at *5-6.
9. *Id*. at *6.
10. *Id*. at *7-8.
11. *Id*. at *9.
12. *Id*. at *15-16.
13. *Id*. at *16.
14. *Id*. at *17-32.
15. *Id*. at *17-18.
16. *Id*. at *18-19.
17. *Id*. at *21-22.
18. *Id*. at *22.
19. *Id*. at *23-24.
20. *Id*. at *24.
21. *Id*. at *24-25.
22. *Id*. at *28-30.
23. *Id*. at *30-31.
24. *Id*. *31.
25. *Id*. at *31-32.
26. *Id*. at *32.

**Hui Liu is a lawyer with the firm Mauriel Kapouytian Woods LLP. Ms. Liu's practice is focused on intellectual property litigation and alternative dispute resolution involving complex technological issues.**

* * *

## *PoolRe Ins. Corp. v. Organizational Strategies, Inc.*

By Ross Kartez

In *PoolRe Ins. Corp. v. Organizational Strategies, Inc.*,[1] the United States Court of Appeals for the Fifth Circuit upheld the District Court's decision vacating an arbitration award on the ground that the arbitrator exceeded his authority by disregarding the arbitrator selection clause and the forum selection clause. The action involved various contracts with two different arbitration clauses—the various parties involved had agreed to different arbitration procedures. The court held that, while the dispute should have been resolved through separate and different arbitrations, the arbitrator exceeded his authority by subjecting all of the parties to one arbitration clause, even parties that had agreed to an entirely different procedure.

### Background

The underlying disputes involved complex insurance agreements between several parties. Organizational Strategies, Inc. ("OSI")—a professional services firm—retained Capstone Associated Services, Capstone Associated Services (Wyoming) L.P., and Capstone Insurance Management, Limited (collectively "Capstone") to provide turnkey formation and administrative services for OSI's captive insurance companies.[2]

Based on the OSI-Capstone agreement, three captive insurance companies were formed (the "Captives") for the purposes of underwriting alternative-risk programs for their owner, OSI. The agreement contained an arbitration clause providing for arbitration under the Commercial Arbitration Rules of the American Arbitration Association ("AAA").

During the course of OSI and Capstone's relationship, the Captives contracted with PoolRe Insurance Corp. ("PoolRe")—a provider of reinsurance pooling services[3]

and an affiliate of Capstone—to reinsure OSI's policies. PoolRe entered into three separate reinsurance agreements with the Captives.[4] Under the PoolRe-Captives agreements, PoolRe and the Captives were subject to an entirely different arbitration process to be administered by the International Chamber of Commerce ("ICC") in Anguilla, British West Indies, with the arbitrator to be selected by the Anguilla Director of Insurance.[5]

During the course of the parties' relationship, OSI claimed it was overpaying its insurance premiums. Failing to resolve the dispute, OSI terminated its contract with Capstone, and in response, PoolRe terminated its reinsurance agreements with the Captives. In March 2013, Capstone filed a demand for arbitration with Dion Ramos ("Ramos") of Conflict Resolution Systems, PLLC ("CRS") in Houston, Texas, against OSI and the Captives claiming breach of contract, and requesting Ramos appoint an arbitrator. Ramos appointed himself arbitrator of the Capstone arbitration.

At the same time, PoolRe was in the process of seeking arbitration under its reinsurance agreements with the Captives. The PoolRe-Captives agreements required the Anguilla Director of Insurance to select the arbitrator, but as no such individual or position existed, PoolRe's inquiry was sent to the Director of Anguilla Financial Services Commission. The Director designated Ramos of CRS to appoint the arbitrator and administer the related arbitration proceedings. However, the Director failed to mention the arbitration requirements under the PoolRe-Captives agreements—including the applicability of the ICC rules. The Director instructed the parties that further contact should be made with Ramos in Houston.

OSI appeared in the Capstone arbitration on April 15, 2013, objecting to Ramos' authority. PoolRe intervened in the arbitration for the limited purpose of moving to appoint an Anguilla-based arbitrator. On April 29, 2013, Ramos issued a preliminary ruling finding: AAA rules applied; jurisdiction over the dispute was proper pursuant to the OSI-Capstone agreement; jurisdiction over PoolRe was proper based on the PoolRe-Captives agreements; PoolRe waived Anguilla venue by its limited appearance; and Houston, Texas was an appropriate place for the arbitration due to the broadly worded arbitration clause in the OSI-Capstone Agreement. OSI objected, arguing the ruling removed the PoolRe-Captives dispute from the ICC's jurisdiction as required by the PoolRe-Captives reinsurance agreements.

The arbitration proceeded in Houston, Texas, and on July 9, 2013, Ramos issued an award finding: OSI breached the OSI-Capstone agreement; PoolRe was properly joined in the arbitration; and Capstone and PoolRe were entitled to $451,244.44 in attorney fees, expenses, and costs "to be divided amongst the parties as they see fit."[6] Such fees included attorneys' fees from related litigations pending in other jurisdictions. Capstone and PoolRe filed a petition to confirm the award in the Federal District Court for the Southern District of Texas,[7] and OSI moved to vacate the award.

## The District Court Decision

OSI moved to vacate the award, arguing Ramos should never have allowed PoolRe to intervene, and the PoolRe-Captives agreements required arbitration under the ICC rules. PoolRe and Capstone argued that the Court should defer to Ramos' discretion because the decision of arbitrability was delegated to the arbitrator. While the District Court agreed with PoolRe and Capstone in principle, the Court specified that "[f]or the court to accept the arbitrator's assumption of jurisdiction, that arbitrator must be the actual decision[-]maker that the parties selected as an integral part of their agreement."[8] Neither PoolRe nor the Captives agreed to the arbitration procedure or the arbitrator-selection procedure as conducted. Further, PoolRe's involvement in the underlying arbitration tainted the entire proceeding as evidenced by Ramos' decision awarding attorneys' fees "to be divided amongst the parties as they see fit."[9] Thus, as the arbitrator lacked jurisdiction to hear the dispute involving PoolRe and the Captives, the Court vacated the entire award.

## The Court of Appeals Decision

In reviewing and affirming the District Court's vacatur of the arbitration award, the Court of Appeals separately evaluated the (1) arbitrator selection clauses and (2) the forum selection clauses.

The Court noted that the PoolRe-Captives' arbitrator selection clauses required ICC arbitration before an arbitrator selected by the Anguilla Director of Insurance. As no such individual or position existed, Ramos was not the actual decision-maker selected by the parties. Where an award is issued by an arbitrator the parties did not agree to, the award must be vacated.[10] The Court further noted that where there is a breakdown in the arbitrator-selection process for any reason (e.g., the decision-maker does not actually exist), Section 5 of the Federal Arbitration Act ("FAA") allows the disputing parties to move before the district court to appoint the arbitrator.[11] The parties never utilized Section 5 of the FAA; thus the Court properly vacated the award with respect to PoolRe.

In affirming the District Court's vacatur regarding forum selection, the Court found the PoolRe-Captives agreements clearly required ICC arbitration. The forum-selection is an integral part of the agreement; thus a court cannot compel arbitration in a substitute forum, even if the designated forum becomes unavailable.[12] As Ramos acted contrary to the forum agreed to by the parties—PoolRe and the Captives having selected ICC arbitration—Ramos exceeded his authority under the FAA.[13]

Capstone and PoolRe further argued in the alternative that even if Ramos exceeded his authority with respect to PoolRe, the District Court erred in vacating the entire award, and should have only vacated the award

with respect to PoolRe.[14] However, the Court of Appeals found that under the FAA, a district court "*may* make an order vacating [an arbitration] award" if "the arbitrators exceeded their powers."[15] Here, the District Court could have vacated the award in part as Capstone and PoolRe argued, but found PoolRe's involvement "tainted the entire process."[16] Thus vacatur of the entire award was necessary, and nothing under the FAA suggests a court errs by failing to vacate an award in part.[17] Therefore, the District Court did not err in vacating the award in its entirety.

## Endnotes

1. 783 F.3d 256 (5th Cir. 2015).
2. Captive insurance companies are created for the purpose of insuring its owner, similar to self-insurance; however, the captive insurance companies reinsure the policies.
3. Insurance pooling is the practice of relatively small companies working as a group, using the group's purchasing power to secure insurance at lower premiums.
4. It should be noted that Capstone and PoolRe had common ownership.
5. In reality, no such position or individual existed.
6. *Id*. at 261.
7. *PoolRe, Ins. Corp. v. Organizational Strategies, Inc.*, No. Civ.A. H-13-1857, 2014 WL 1320188 (S.D. Tex. Mar. 31, 2014).
8. *Id.* at *19, relying on *In re Salomon Inc. S'holderrs' Derivative Litig.*, 68 F.3d 554 (2d Cir. 1995); *Delta Queen Steamboat Co. v. AFL-CIO*, 889 F.2d 599 (5th Cir. 1989); and *Ranzy v. Tijerina*, 393 F.App'x 174 (5th Cir. 2010).
9. *Id.* at *19.
10. *PoolRe Ins. Corp. v. Organizational Strategies*, 783 F.3d 256, 263 (5th Cir. 2015).
11. *Id.* at 264.
12. *Id.* at 264-265.
13. *Id.* at 265.
14. *Id.*
15. *Id.*, citing to 9 U.S.C. § 10(a)(4).
16. *PoolRe, Ins. Corp. v. Organizational Strategies, Inc.*, No. Civ.A. H-13-1857, 2014 WL 1320188 at *19 (S.D. Tex. Mar. 31, 2014).
17. *PoolRe Ins. Corp. v. Organizational Strategies*, 783 F.3d 256, 265-266 (5th Cir. 2015).

* * *

## *Citigroup Global Markets, Inc. v. John Leopoldo Fiorilla*[1]

By Marcia Adelson

### Facts[2]

John Leopoldo Fiorilla filed a claim against Citigroup Global Markets, Inc. at FINRA for breach of fiduciary duty, negligence, gross negligence, failure to supervise and control, breach of contract and violations of federal and state securities laws as well as NYSE and NASD conduct rules. The causes of action relate to Royal Bank of Scotland stock. Prior to hearings on the merits, the Claimant, John Leopoldo Fiorilla ("Fiorilla") agreed to settle the matter in full for $800,000. Fiorilla's attorney informed FINRA in writing that the case had been resolved in full and asked for the Panel to be so informed.

Ten days after agreeing to settle the matter, Mr. Fiorilla attempted to repudiate the agreement. When his attorney refused to agree that the case had not in fact settled and to continue to proceed with the arbitration, Mr. Fiorilla discharged him and hired a new attorney who filed a motion to amend the Statement of Claim. The Panel granted the motion to amend the Statement of Claim. Citigroup filed a motion to dismiss based on the fact the case had settled but the Panel denied the motion with no hearings and no findings of fact. The Panel proceeded to hold hearings and awarded Mr. Fiorilla $10.8 million.

Citigroup then filed a petition to vacate, which was granted by the Supreme Court, New York County and upheld on April 9, 2015 by the Appellate Division, First Department.

### Discussion

On first impression, it might have appeared that the Supreme Court would be overturned. According to CPLR 2104, "An agreement between parties or their attorneys relating to any matter in an action other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered." Here, there was no signed formal settlement agreement. However, there are emails written by Fiorilla and his wife authorizing and acknowledging the settlement to all material terms. In *Forcelli, et al., v. Gelco Corporation, et al.,*[3] the Second Department of the Appellate Division held, "Accordingly, we hold that where, as here, an email message contains all material terms of a settlement and a manifestation of mutual accord, and the party to be charged, or his or her agent, types his or her name under circumstances manifesting an intent that the name be treated as a signature, such an email message may be deemed a subscribed writing within the meaning of CPLR 2104 so as to constitute an enforceable agreement.

In Citigroup's petition to vacate, Citigroup produced emails from Fiorilla and his wife, both sophisticated lawyers, of their authorizing and acknowledging the settlement terms and of their attorney having informed FINRA in an email that "the parties have resolved the matter in full. Please notify the Panel and make arrangements to return to the Claimant the remaining part of the refundable portion of his fee."

Judge Ramos, the Supreme Court, New York County judge who heard the motion to vacate, admonished the Panel for proceeding and choosing not to acknowledge the settlement even after being so informed. "The respondents (Fiorilla) may not succeed by arguing that public policy favors deference to arbitral awards. There can be no ***legitimate*** public interest in respecting arbitrations of

disputes that have already been settled—the argument turns public policy on its head" (emphasis added).

The public interest is in favor of the enforcement of settlement agreements and not as a path to further litigation.[4] If the Panel had acknowledged this matter as settled, then much needless litigation would have been avoided.

In vacating the award for manifest disregard, the Appellate Division reminded parties and arbitrators that "Although arbitrators have no obligation to explain their awards, when a reviewing court is inclined to hold that an arbitration panel manifestly disregarded the law, the failure of the arbitrators to explain the award can be taken into account."[5]

It is clear from both the Supreme Court and from the Appellate Division that the courts will look to uphold and to enforce settlement agreements to avoid needless, costly and wasteful litigation. Furthermore, as the courts have made clear, email exchanges confirming agreement as to settlement satisfy the writing requirement of CPLR 2104 and counsel and parties would be well advised to record the agreement in that manner until more formal and detailed documents are drafted.

## Endnotes

1. *Citigroup Global Markets, Inc. v. Fiorilla,* 2015 NY Slip Op. 3056 (N.Y. App. Div., 2015).
2. The Facts were derived from the submissions of the parties although not reflected in the Courts' decisions.
3. N.Y.S.2d 570, 575 (2d Dep't 2013 N.Y.).
4. *Matter of Olympic Tower Assocs. v. City of New York*, 81 NY2d 961, 963 (1993).
5. Citing *Matter of Spear, Leeds & Kellogg v. Bullseye Sec.,* 291 AD2d 255, 256 (1st Dep't 2002).

* * *

## *Mach Mining, LLC v. Equal Employment Opportunity Commission*, __ 575 U.S. __ (Apr. 29, 2015)

By Abigail Pessen

In a 9-0 decision, the Supreme Court ruled that the EEOC's obligation to conciliate before suing an employer is not exempt from judicial review, but the scope of review is very narrow.

In a nutshell, Title VII of the Civil Rights Act of 1964 requires that after finding probable cause of employment discrimination, the EEOC must try to remedy the discrimination by informal methods of conference, conciliation, and persuasion, before suing the employer; communications made in the course of those conciliation efforts are confidential and not usable in future proceedings. The EEOC sued Mach Mining and alleged compliance with the pre-requisite; Mach Mining denied it, contending that the EEOC had not negotiated with it at all, let alone in good faith. The EEOC contended that it has complete discretion with respect to its conciliation efforts. The issue thus was whether judicial review of the EEOC's conciliation efforts is permissible.

To borrow Justice Kagan's phrase, the answer is a qualified yes: only a "smidgen" of review is appropriate, i.e., courts may review only whether the EEOC did in fact "endeavor to conciliate"(which a sworn affidavit from the EEOC will suffice to prove, unless contested), but may not take a "deep dive" into the conciliation efforts to assess their sufficiency or good faith. Accordingly, the case was remanded for such review.

Mediators should be pleased by the Court's recognition that confidentiality is a key characteristic of conciliation efforts. One reason it gave for rejecting a broader standard of review was the disclosure of confidential conciliation-related communications that would necessarily entail, noting that "[c]onfidentiality promotes candor in discussions and thereby enhances the prospects for agreement." Query though whether the opinion casts doubt on legal claims that an adversary failed to mediate in good faith.

* * *

## *Mobil Cerro Negro, Ltd. et al. v. Bolivarian Republic of Venezuela*, No. 14-8163-cv (S.D.N.Y. Mar. 4, 2015)

By Andrew Riccio, Grant Hanessian and David Zaslowsky

Exxon Mobil ("Exxon") invested in Venezuelan oil fields in the mid-1990s during the "Apertura Petrolera," the opening of the formerly nationalized Venezuelan oil industry. A decade later, as tensions increased between the U.S. and Venezuela, Exxon restructured its Venezuelan investments to take advantage of a bilateral investment treaty between Venezuela and the Netherlands. In early 2007, Exxon's operations in Venezuela were nationalized. Following failed settlement negotiations, Exxon brought both a commercial arbitration against Petróleos de Venezuela ("PDVSA"), the Venezuelan state-owned oil company, and an arbitration against Venezuela under the Dutch-Venezuela BIT and the rules of the International Centre for Settlement of Investment Disputes ("ICSID").

Following an ICSID award of $1.6 billion in favor of Exxon on October 9, 2014, judgment was entered in the U.S. District Court for the Southern District of New York on February 13, 2015 in favor of Exxon against Venezuela in the amount of the award, plus interest as provided in the award: 3.25% interest compounded annually from June 27, 2007 until payment.

In *Mobil Cerro Negro, Ltd. et al. v. Bolivarian Republic of Venezuela*, No. 14-8163-cv (S.D.N.Y. Mar. 4, 2015), Venezuela sought to reduce the post-judgment interest rate provided in the judgment. Venezuela argued that, *inter alia*,

the post-judgment interest rate should be modified to reflect the rate provided under 28 U.S.C. § 1961 (hereinafter "§ 1961"), and not the higher rate of 3.25% compounded annually as provided in the ICSID award.

The court found Venezuela's requested relief "flatly precluded by the principles governing recognition of ICSID awards." Congress ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention") in 1966 and enacted the enabling statute, 22 U.S.C. § 1650a, which, the court stated, required U.S. courts "to recognize all aspects of awards issued by ICSID" and cannot "undertake substantive review of such awards." The court concluded that both the enabling statute and the ICSID Convention obligate the court to recognize all "pecuniary obligations" of an ICSID award, including an award of interest.

Venezuela also requested "clarification" of the award's interest decision. However, the court stated that there was nothing unclear about the award's granting of compound interest from the date of expropriation to the date of payment in full. If the court were permitted to modify the tribunal's award of interest, "[i]t would create the possibility, indeed the likelihood, of different interest rates applying in different countries in which an arbitral award creditor sought to recognize and enforce the same ICSID award." The court reasoned that the uniform enforcement of ICSID awards by all signatory countries, including the interest rate set by the tribunal, is necessary to avoid "incongruous, confusing, and potentially discordant" results.

Lastly, the court addressed Venezuela's reliance on cases applying § 1961 to Federal Arbitration Act ("FAA") arbitration awards. The court first cited the enabling statute which prohibits application of the FAA to enforcement of ICSID awards, and noted that the statute does not provide for any substantive review or amendment of an award. The court concluded by admonishing Venezuela for arguing against application of the same arbitral rules it chose to resolve this dispute.

**Andrew Riccio, Grant Hanessian and David Zaslowsky are attorneys with the firm of Baker & McKenzie in New York City.**

* * *

## Second Circuit Refuses to Enjoin an Arbitration Based Upon All Writs Act and an Allegation That It Was Precluded by the District Court's Confirmation of a Prior Arbitration Award: *Citigroup, Inc. v. Abu Dhabi Investment Authority*

By Conna A. Weiner

In *Citigroup, Inc. v. Abu Dhabi Investment Authority*,[1] the Second Circuit wrestled with the following question: whether the All Writs Act, which permits federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions…,"[2] could be used to enjoin an arbitration ("Arbitration 2") based upon the allegedly claim-preclusive effect of the District Court's confirmation of an arbitration award issued in a prior arbitration ("Arbitration 1").

The Court noted that the facts presented required an examination of the "competing considerations" of, on the one hand, (a) the national policy favoring arbitration under the Federal Arbitration Act ("FAA"),[3] and the FAA's authorization of federal courts to conduct only a limited review of discrete issues before compelling arbitration, leaving resolution of all other disputes to the arbitrators, and, on the other hand, (b) the "weighty practical concern" for the integrity of federal judgments that could arise if parties felt free to re-litigate in arbitration proceedings claims previously resolved by a federal court.[4] Striking a balance between these considerations required the Court to conduct a detailed review of a number of its own precedents as well as authority in other circuits.

The Second Circuit ultimately affirmed the District Court's refusal to enjoin Arbitration 2, reasoning from its prior decisions "that the determination of the claim preclusive effect of a prior federal judgment confirming an arbitration award is to be left to the arbitrators,"[5] and further holding that:

> …when the prior federal judgment merely confirmed an arbitration award through a limited procedure that did not involve consideration of the merits of the underlying claims, the FAA's framework favoring the submission of disputes to arbitration and our precedents in cases addressing comparable issues preclude a district court from using the All Writs Act to enjoin a subsequent arbitration of claims that one party asserts are barred by the prior arbitration.[6]

As described by the Court,[7] in Arbitration 1, Claimant Abu Dhabi Investment Authority (ADIA) asserted that Citigroup had diluted a significant ADIA investment in Citigroup by issuing preferred shares to other investors. The relevant investment agreement between the parties contained a broad arbitration clause requiring that "'any dispute that arises out of or relates to the [Agreement], or the breach thereof…'" would be decided through arbitration. The arbitrators rejected ADIA's claims (consisting of securities fraud, breach of contract, breach of the implied covenant of good faith and fair dealing and other theories) and issued an award in favor of Citigroup. This award was confirmed by the District Court in the face of ADIA opposition based upon choice-of-law and certain evidentiary rulings by the arbitration panel that ADIA claimed were made in "manifest disregard of the law" and resulted in ADIA's inability to present its case. The

Second Circuit affirmed the confirmation of the Arbitration 1 award.

While its appeal of the Arbitration 1 award confirmation was pending, ADIA filed Arbitration 2, asserting breach of contract and breach of implied duty claims that Citigroup stated were or could have been raised in Arbitration 1. Citigroup sought to enjoin Arbitration 2 by invoking the District Court's authority under the All Writs Act, urging the District Court to protect the integrity of its judgment confirming the Arbitration 1 award and characterizing the filing of Arbitration 2 as an "assault" on that judgment.[8]

In explaining its decision to affirm the District Court's refusal to enjoin Arbitration 2, the Court relied upon what it characterized as the body of substantive law and the procedural framework established by the FAA pursuant to which most disputes between parties to a binding arbitration agreement are arbitrable, meaning that they are to be decided by the arbitrators, not the courts, the "one exception to this general rule" being that questions of arbitrability are for the courts to decide unless the parties unmistakably provide otherwise.[9]

The Court also discussed and distinguished its previous holding in *In Re Am. Express Fin. Advisors Sec. Litig*.[10] There, the Second Circuit upheld an All Writs Act injunction of an arbitration of investor claims against a financial services company that the investors previously had released in a settlement of federal class action securities claims. Unlike the case at bar, the Court noted, in *American Express*, the company had in effect withdrawn its consent to arbitrate the claims released by the investors and, importantly, the district court had retained exclusive jurisdiction over the settlement agreement itself; the district court's authority to enjoin the arbitration "flowed from" its retention of jurisdiction over the settlement agreement.[11] The Court noted that its *American Express* decision "left unanswered" the question of whether an All Writs Act injunction prohibiting arbitration to prevent re-litigation would be proper without the exclusive jurisdictional retention present in that case.[12]

The Court went on to apply to the *Citicorp* context its reasoning in two additional prior Second Circuit cases, *National Union Fire Insurance Co. of Pittsburgh, PA v. Belco*[13] (finding that the claim-preclusive effect of an arbitration award confirmed by a state court was for the arbitrator to decide, not a court, noting that claim preclusion is not a question of arbitrability because it was an affirmative defense to the opposing party's claims and thus a component of the dispute on the merits) and *United States Fire Ins. Co. v. National Gypsum Co.*[14] (applying *Belco's* reasoning to issue preclusion/collateral estoppel in connection with issues resolved during a previous litigation resulting in a federal judgment). The Court found that it was a "simple intuitive step" from its holdings in *Belco* and *National Gypsum* to conclude that arbitrators should also decide the claim-preclusive effect of a federal judgment confirming an arbitral award, especially in light of the broad arbitration clause covering all disputes under the investment contract between Citigroup and ADIA.[15] The Court also expressed a concern that, were it to agree with the Citicorp position that the preclusive effect of federal confirmation judgments should be decided by the federal courts, it would be creating an inconsistency between the treatment of the preclusive effect of state court confirmation judgments (to be decided by arbitrators under *Belco*) and federal court confirmation judgments.[16]

Stressing the limited role of a court in confirming an arbitration award, the Court characterized an award confirmation as ordinarily a "'summary proceeding that merely makes what is already a final arbitration award a judgment of the court'"[17] and does not explore the underlying merits of the arbitrators' decision. Distinguishing authorities cited by Citigroup in which "courts had sanctioned the use of the All Writs Act to enjoin arbitrations that threaten federal judgments,"[18] the Court stated that:

> The relevant judgments given preclusive effect via the All Writs Act in those cases followed from federal judicial proceedings addressing the merits of the underlying claims. Thus, in the cases on which Citigroup relies, the main justification given for resorting to the All Writs Act is that the district court that resolved the merits of a case is in the best position to protect its judgment because it is the most familiar with what it considered and decided in the proceedings leading to that judgment.[19]

The Court clarified that it had expressed no opinion on the issue of whether or not the All Writs Act would authorize a district court to "enjoin an arbitration that threatens to undermine the district court's resolution" of issues actually decided by the district court (here, the determination that panel's decision in Arbitration 1 did not violate the FAA).[20]

The *Citigroup* discussion and holding highlight the potential complexities for prevailing parties in arbitration arising from the intersection of limited federal court involvement in arbitration awards via the confirmation process and arbitral authority over the preclusive effects of the award, including its confirmation, on subsequent arbitration proceedings. The practical effect of the *Citigroup* decision is to permit the losing party in Arbitration 1 to begin a new arbitration proceeding before a newly selected arbitration panel. Citigroup will be able to raise arguments regarding the preclusive effect of the Arbitration 1 award confirmation, as well as the award itself, but also potentially risks a re-litigation of the underlying factual and legal issues.

## Endnotes

1. 776 F.3d 126 (2d Cir. 2015).

2. 28 U.S.C. § 1651 (a).
3. 9 U.S.C. §§ 1 *et seq.*
4. 776 F.3d at 129.
5. *Id*. at 131.
6. 776 F.3d at 134.
7. *Id*. at 127 (citations omitted).
8. *Id*. at 127-8.
9. *Id*. at 129-30 (citations omitted).
10. 672 F.3d 113 (2d Cir. 2011).
11. 776 F.3d at 130 (citations omitted).
12. *Id*. (citations omitted).
13. 88 F.3d 129, 135-36 (2d Cir. 1996).
14. 101 F.3d 813, 816-17 (2d Cir. 1996).
15. 776 F.3d at 131.
16. *Id*. at 133.
17. *Id*. at 132 (citing *D.H. Blair & Co., Inc. v. Gottdiener,* 462 F.3d 95, 110 (2d Cir. 2006) (internal quotations omitted).
18. *Id*. at 131.
19. *Id*. 132 (citations omitted).
20. *Id*. at 134 n. 6.

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* * *

## *Larry Whitt v. Prosper Funding LLC et al.*, Southern District of New York, Civil Action no. 1:15-cv-136, Memorandum Opinion and Order, July 14, 2015

By Sherman Kahn

In a recent decision, Judge Gregory H. Woods of the Southern District of New York dismissed an action claiming discrimination under the Americans with Disabilities Act ("ADA") based upon a finding that the plaintiff had agreed to binding arbitration through a "click wrap" agreement. The decision also found that the JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness ("JAMS Consumer Standards") preempted and replaced terms regarding fee shifting in the arbitration agreement that were inconsistent with the standards.

Plaintiff Whitt alleged that he had sought to apply online for a loan on defendant Prosper's peer-to-peer lending service but was unable to complete the transaction due to a failure by Prosper to reasonably accommodate Whitt, who is deaf.[1] Prosper moved to dismiss the action on the ground that Whitt had agreed to arbitrate when Whitt applied for the loan on Prosper's website.[2] The court found that the evidence showed that the website required all applicants to click a box adjacent to bolded text stating "[c]licking the box below constitutes your acceptance of the borrower registration agreement."[3] The language "borrower registration agreement" was hyperlinked to the agreement, which included an arbitration clause.[4] Applicants using the website could not complete the loan application without clicking the box demonstrating acceptance of the agreement.[5]

The arbitration agreement gave either party to a dispute the option to resolve the dispute through binding arbitration administered by the American Arbitration Association or JAMS under the applicable rules of the relevant administrator at the time the claim was filed.[6] The arbitration agreement further provided that Prosper would pay all filing and administrative fees charged by the administrator and arbitrator fees up to $1000 and that Prosper would consider the loan applicant's request to pay additional arbitration fees.[7]

After Whitt filed his complaint in the Southern District of New York in January 2015, Prosper elected to arbitrate the claim through JAMS and moved to dismiss or stay Whitt's action.[8] Whitt argued in response that he did not accept the arbitration agreement and that, even if he did, the costs of the arbitration would be so excessive as to render the agreement unconscionable.[9]

The court held that whether the parties have agreed to arbitrate is a question of state contract law and that under New York law a party seeking arbitration need only prove the existence of an arbitration agreement by a preponderance of the evidence.[10] The court went on to hold definitively that by clicking the box accompanied by a hyperlink on Prosper's website, Whitt had demonstrated that he had at least constructive knowledge of the terms of the agreement and that he had consented to those terms and that therefore Prosper had demonstrated that Whitt had accepted the agreement.[11] The court rejected an argument by Whitt that he was not constructively aware of the agreement because it was viewable only through a hyperlink; finding that an abundance of authority supports the proposition that a reasonably prudent website user has sufficient notice of the terms of an agreement viewable through a conspicuous hyperlink.[12]

The court also rejected Whitt's argument that the terms of the arbitration agreement, which gave Prosper discretion whether to bear costs of arbitration over $1,000, were unconscionable.[13] The court found that Whitt had not demonstrated that the costs of arbitration would likely be substantially more than the costs of court.[14] More interestingly, however, the court pointed to the JAMS Consumer Standards, which provide that where a

consumer files suit against a company that systematically places an arbitration clause in non-negotiated agreements with individual consumers, the consumer need only pay $250, approximately equivalent to court filing fees, and that the company will be required to pay all other costs.[15] The court found that while there was "tension" between the JAMS standard and the agreement's provision that Prosper would "consider" cost shifting after the first $1000, this "tension, however, cannot be resolved in favor of the Agreement if arbitration is to proceed through JAMS."[16] The court found that, under the JAMS Consumer Standards coupled with the agreement to pay costs up to $1000, Prosper would be required to pay *all* fees and costs of the arbitration, precluding a finding that the arbitration could be prohibitively expensive.[17] Accordingly, the court dismissed the action in favor of arbitration.[18]

The court's finding with respect to the enforceability of "click-wrap" arbitration agreements is an important addition to the developing case law in that area. The court's decision to apply the JAMS Consumer Standards to modify the terms of the arbitration agreement is perhaps more interesting as it demonstrates that institutional rules, at least in the context of non-negotiated agreements, can limit or vary the terms of arbitration agreements.

## Endnotes

1. *Larry Whitt v. Prosper Funding LLC et al*, Southern District of New York, Civil Action no. 1:15-cv-136, July 14, 2015, pp. 1-2.
2. *Id.*
3. *Id.* at 2.
4. *Id.* at 2-3.
5. *Id.* at 2.
6. *Id.* at 2-3.
7. *Id.*
8. *Id.* at 3.
9. *Id.* at 3-4.
10. *Id.* at 5.
11. *Id.* at 6.
12. *Id.*
13. *Id.* at 9-12.
14. *Id.* at 10.
15. *Id.* at 11.
16. *Id.* at 11.
17. *Id.* at 10-11. There could be an argument that the agreement and the JAMS Consumer Standards interpreted together require Whitt to pay the $250 called for in the JAMS standard, but the court found otherwise.
18. *Id.* at 12.


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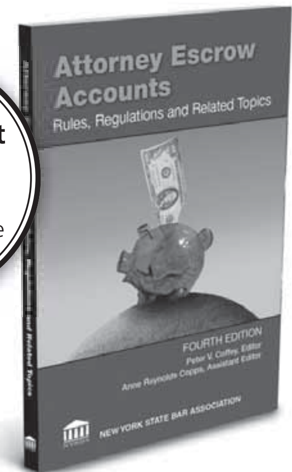


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