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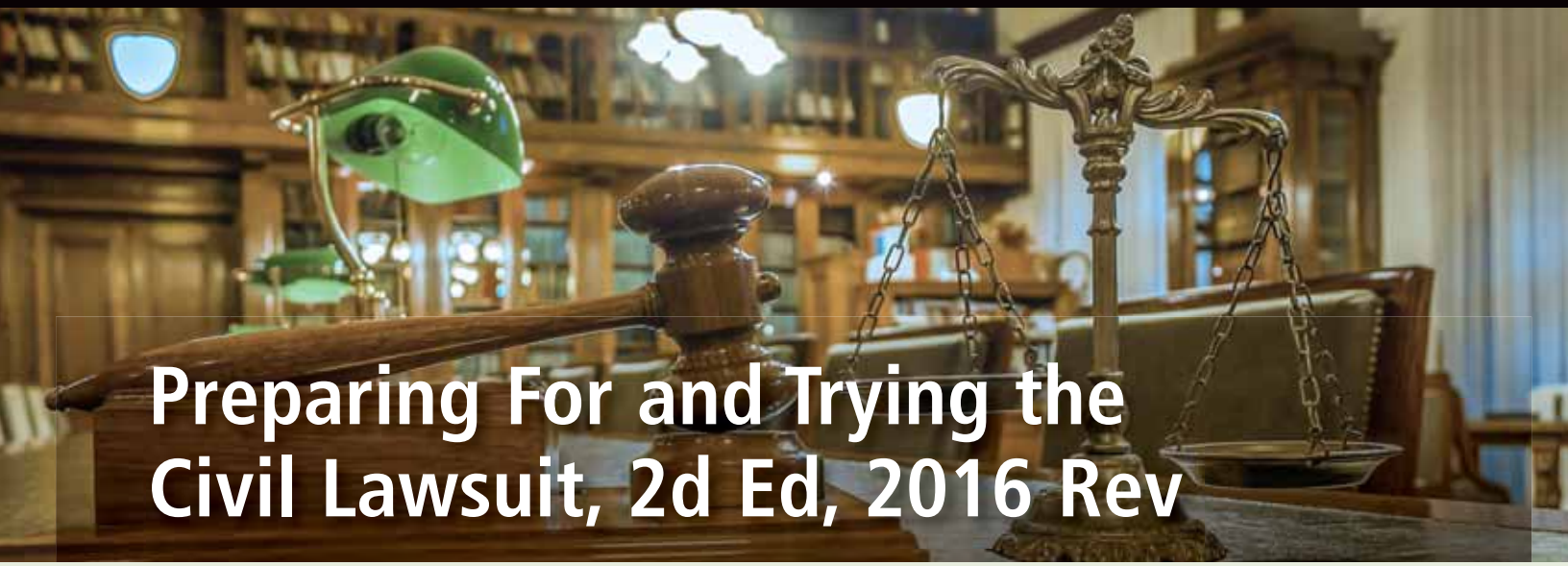

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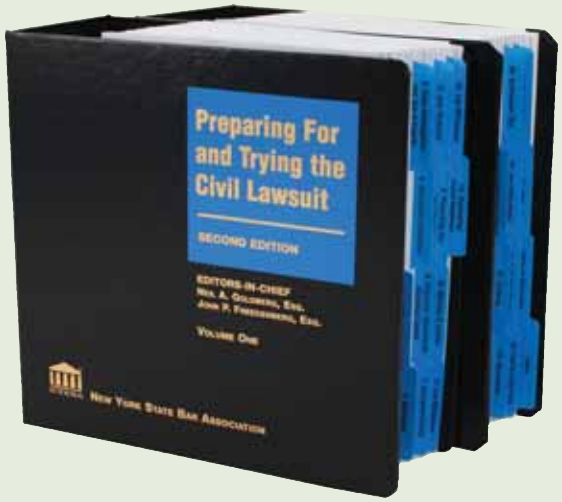

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Message from the Chair

Abigail Pessen

This being an election year, I was reminded of President Obama's comment during one of the 2012 Presidential debates that wars are no longer fought with horses and bayonets. A similar observation could be made as to legal wars: are we approaching the day when civil trials as the means of winning legal battles are quaint artifacts of bygone times? Or has that day already arrived; a New York County Commercial Division judge recently noted that he had conducted a total of three trials in the past year.

Of course, our courts will always be essential for developing the common law, protecting civil liberties, and settling the great issues of the day; think *Brown v. Board of Education, Roe v. Wade, Bush v. Gore, National Federation of Business v. Sibelius, Obergefell v. Hodges*. For garden-variety disputes though, traditional trials are dwindling, and their decline may be attributable to the growth of mediation and arbitration.

Mediation continues to grow in popularity, as clients chafe at unsustainable litigation costs and lawyers recognize the vital and rewarding roles they play as advisors and strategists in mediation. The Supreme Court, New York County has just expanded its mediation program to cover commercial cases pending outside the Commercial Division. Under a new Protocol in the New York real estate industry, some 80,000 members of Local 32B are now required to mediate employment discrimination claims that their union has declined to pursue. The concern that many lawyers expressed in the past, that suggesting mediation would be seen as a sign of weakness, has mostly evaporated, as both sides perceive how much easier it is to negotiate a settlement with the help of a "middle person." As mediation becomes mainstream, questions of when to mediate, and whether to mandate mediation, continue to be controversial.

As for arbitration, it too has reduced resort to the courts, particularly in the consumer context, but the fairness and wisdom of this development is the subject of heated debate. Over the past year, the *New York Times* published a series of articles harshly criticizing the mandatory predispute arbitration clauses that are ubiquitous in consumer contracts; the federal Bureau of Consumer Financial Protection recently proposed a rule limiting mandatory arbitration in the financial services industry. Depending on which candidate wins the presidency and chooses Justice Scalia's replacement on the Supreme Court, class action waivers and mandatory employment arbitration may no longer be held enforceable under the Federal Arbitration Act. Should that occur, such waivers and the compulsory arbitration protocols that are now a condition of employment at many companies may be re-visited. And while employees' attorneys have railed against mandatory employment arbitration ever since it was validated by *Circuit City Stores Inc. v. Adams* in 2001, it will be interesting to see whether some of them have been converted in the intervening years. Meanwhile, genuinely bargained for arbitration in commercial cases continues to be deservedly prized and praised for the privacy, speed, flexibility, and efficiency it affords, but the onslaught of blunderbuss attacks on arbitration may unfairly tarnish commercial arbitration as well.

With these important developments on the horizon for mediation and arbitration, I'm looking forward to a vibrant year, working together with neutrals and advocates in arbitration and mediation to improve our skills, encouraging continued debate on mandatory arbitration's effect on our society and on our profession, and urging us all to heed the advice of President Lincoln:

> Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.

Abigail Pessen

Message from the Co-Editors-in-Chief


Edna Sussman


Sherman Kahn


Laura A. Kaster

We begin the new leadership year under the able guidance of Abigail Pessen as our Chair. Abigail has been an active contributor to and leader of this Section since its inception in 2008. The Section is young but its work has been rich and its achievements very significant, including the Section's important involvement in the creation of New York International Arbitration Center (NYIAC) and the promotion of New York as a hub for Alternative Dispute Resolution. We have had seven other Chairs: Simeon Baum, Jonathan Honig, Edna Sussman, Charles Moxley, Jr., Rona Shamoon, John Wilkinson, Sherman Kahn, and David Singer. Each of them continue to make major contributions to the Section and to the ADR profession. This year, Abigail is the leader of the Section and Claire Gutekunst, a former vice-chair of this Section, is the Chair of the entire New York State Bar Association. It would be natural to suppose that the contribution of women to our organizations would be mirrored in the wider world of ADR. Sadly, it is not.

In the Spring of 2012, this *Journal* coordinated with the AAA, CPR and the ABA to publish articles by and about women in ADR. At that time, Barbara Mentz reported statistics showing that in international arbitration approximately 4% of the arbitrators were women.[1] Today, the percentages have increased only slightly. Law.com reports that in international arbitration, the percentage of women being appointed is up to 10%-15% but the majority of the appointments are going to two women arbitrators.[2] This is not the progress we had hoped for given the increased pool of established and talented women arbitrators. A proactive reaction has started in London. The Equal Representation in Arbitration Pledge has been launched. A month after its inception, it already has about 1,000 signatures, including a growing list of U.S. firms, institutions and companies. Firms signing include Freshfields Bruckhaus Deringer, and Sylvia Noury of Frieshfields was instrumental in driving the effort. Law.com quoted her as saying "this is just wrong, there's something broken with the system. . . .There are lots of qualified women who aren't being considered." Other firm signatories include Clifford Chance as well as Andrews Kurth; Dechert; Debevoise & Plimpton; Dentons; DLA Piper; Hogan Lovells; Hughes Hubbard & Reed; Quinn Emanuel Urquhart & Sullivan; Squire Patton Boggs; and White & Case, among others. Several energy companies, such as BP PLC, ConocoPhillips Co., General Electric and Shell International Ltd. have also signed on. Arbitral institutions and associations signing include JAMS, London Court of International Arbitration (LCIA), International Centre for Dispute Resolution (ICDR), ICC International Court of Arbitration and the Silicon Valley Arbitration and Mediation Center.

Here is the pledge—it applies to arbitrators as well:

> As a group of counsel, arbitrators, representatives of corporates, states, arbitral institutions, academics and others involved in the practice of international arbitration, we are committed to improving the profile and representation of women in arbitration. In particular, we consider that women should be appointed as arbitrators on an equal opportunity basis. To achieve this, we will take the steps reasonably available to us—and we will encourage other participants in the arbitral process to do likewise—to ensure that, wherever possible:

- committees, governing bodies and conference panels in the field of arbitration include a fair representation of women;
- lists of potential arbitrators or tribunal chairs provided to or considered by parties, counsel, in-house counsel or otherwise include a fair representation of female candidates;
- states, arbitral institutions and national committees include a fair representation of female candidates on rosters and lists of potential arbitrator appointees, where maintained by them;
- where they have the power to do so, counsel, arbitrators, representatives of corporates, states and arbitral institutions appoint a fair representation of female arbitrators;
- gender statistics for appointments (split by party and other appointment) are collated and made publicly available; and

- senior and experienced arbitration practitioners support, mentor/sponsor and encourage women to pursue arbitrator appointments and otherwise enhance their profiles and practice.[3]

We should all do what we can to improve the profile and diversity of the profession.

This Issue

We continue with our effort to address the entire spectrum of ADR: domestic and international arbitration, mediation and collaboration, and to bring to you significant books and cases and, of course, our regular column on Ethics in ADR. In this issue one point of particular interest may be the statistics brought to us by Jennifer Shack, Director of Research at Resolution Systems Institute. The statistics presented in her article support the proposition that the belief held by many that court-ordered mediation is likely to be less successful than voluntary mediation is mistaken and that, also contrary to the received opinions of many participants in the process, success is less, not more, likely as more discovery is undertaken. We are also pleased to bring you the transcript of the Inaugural Judith S. Kaye Arbitration Lecture, which will be presented each year by the New York International Arbitration Center in Judge Kaye's honor. This year the lecture is in the form of a very entertaining conversation with noted arbitration authority Gary Born.

We look forward to another productive year for the Section and for all of us.

Endnotes

1. Barbara A. Mentz, *Women in Law and Arbitration: Running in Place or Sliding Backward*, NY Dispute Resolution Lawyer, Vol. 5 No. 1, 21 (Spring 2012).
2. Christine Simmons, Pledge to Name More Women as Arbitrators Reaches U.S. Firms, http://www.law.com/sites/almstaff/2016/06/21/pledge-to-name-more-women-as-arbitrators-reaches-u-s-firms/?cn=20160622&pt=Newswire&src=EMC-Email&et=editorial&bu=Law.com&&slreturn=20160525125401.
3. http://arbitrationpledge.com.

Laura A. Kaster, Edna Sussman and Sherman Kahn

The Power of Empathy

By Professor Elayne E. Greenberg

Elayne E. Greenberg

As colleagues in the dispute resolution field, we have likely participated in the ongoing, often heated debate about the role, if any, of empathy in dispute resolution. There are those colleagues who believe that empathy will only muck up what is really important, the bottom-line number and your evaluation about how to get there. On the other side of this controversy, there are seasoned colleagues who regularly use empathy as dispute resolution currency, often at the risk of being marginalized as "touchy feely" by those who don't understand its value. To help us get past each other's anecdotal justifications and shift to a more objective focus, I offer this column, highlighting objective research about the value of empathy in dispute resolution.

The research illuminates that empathy in dispute resolution offers three primary values. First, even-handed empathy for both parties enhances the ethical objectivity of mediators, arbitrators and advocates. Second, empathy helps satisfy participants' procedural justice needs for fair and just dispute resolution processes. Third, empathy in dispute resolution enhances the perceived integrity of our broader legal system. Our discussion begins with an explanation of empathy as a conflict resolution resource before continuing with highlights from research that validate empathy's benefits.

Empathy Is a Conflict Resolution Resource[1]

Empathy as a conflict resolution resource has traditionally been shorthand for "putting yourself in the other's shoes." However, empathy is actually comprised of three components: cognitive, emotional and behavioral. The cognitive component of empathy is the recognition of the emotions and thoughts the other is feeling.[2] The affective or emotional component of empathy is actually the *emotional response* to the thoughts and the feelings of the other so that the other feels "got" and "understood." Put together, the cognitive and emotional components are familiar to many as "perspective taking."

What distinguishes perspective taking from empathy is the third component, the behavioral component. The behavioral component of empathy is the integration of both the cognitive and emotional components into an action that indicates to the other that the other's experience is fully understood.[3] As a conflict resolution resource, empathy can be viewed as perspective taking on steroids. Empathy not only includes an understanding of the other person, but it also includes the affirmative actions, be it verbal or gestures, that demonstrate an understanding of the other's experience.

Mediators' interventions provide us rich examples of empathy in action. As one illustration of the value of empathy in a mediation, an otherwise sophisticated business investor is livid that he was sold cases of wine that weren't what they were purported to be. Although the lawyer representing the wine dealer who sold the fraudulent wine kept talking about the restitution number that would resolve this dispute, the sophisticated business investor instead kept expressing with increasing volume his rage at being duped. The mediator intervened at appropriate times with an empathic support to each side. To the wine dealer, the mediator empathized, *"You are confused and frustrated, because you don't know what this customer wants. You keep offering to make him financially whole, and he keeps getting angrier and angrier."* To the disgruntled investor, the mediator empathized, *"You are livid that the wine distributor thought it could sell you fraudulent bottles of wine and get away with it. You are saying that, for you, this is not just about the money, but it is about them taking responsibility for what you view as a reprehensible action."* The mediator's empathetic support helped each of the parties' feelings and perspectives be heard and understood by the other. It also allowed the wine dealer to begin to more effectively respond to the businessperson's true interests and the investor to begin listening to what the wine dealer was offering. Yes, empathy used properly is a powerful conflict resolution resource.

The good news is that we all have empathy in varying degrees. The better news is that we can always expand our capacity to empathize. Mediation training, which focuses on expanding our perspective-taking ability, has been shown to increase our empathic abilities.[4] Even reading books about stigmatized groups such as *One Flew Over the Cuckoo's Nest* can also help us expand our range of empathic responses.[5] And for those who need a quick empathy fix, there is even an empathy app to guide those empathically challenged into offering more empathic responses.[6]

Empathy Assists Arbitrators, Mediators, and Advocates to Maintain Their Objectivity

Empathic responses are one way for arbitrators, mediators and advocates to maintain their ethical obliga-

tion to remain objective. At a time when arbitrators,[7] mediators[8] or advocates[9] in dispute resolution are reminded by our respective ethical codes about the importance of objectivity, at the same time we are also provided with conflicting and oft times dizzying messages that remind us that it is impossible to be objective because we are all influenced by our cognitive distortions and implicit biases, whether we like it or not. Help! In the midst of our angst, the research on empathy offers a life preserver, showing how empathy might actually help us maintain our objectivity by allowing us to fully understand each party's perspective.

In Rebecca K. Lee's research, she explains how expressing empathy for each side, also known as evenly applied empathy, can actually help reinforce objectivity.[10] By empathizing for each side, an arbitrator or lawyer can develop a deeper understanding of the presenting problem, an appreciation of what each party has experienced and bring greater objectivity in their decision making about how to resolve the matter at hand. In the area of arbitration, arbitrators could demonstrate their objectivity in their decision making by including in their reasoned awards an empathetic description of each party's perspective about the case.

In another example, my esteemed colleagues Frenkel and Stark conducted in-depth social research about the value of Consider the Opposite prompts (hereinafter CTO), also known as perspective-taking, as a tool to train lawyers. Frenkel and Stark extol the value of CTO prompts to help lawyers maintain a more objective perspective, be more effective advocates and achieve better outcomes.[11] For example, CTO prompts can help advocates overcome such cognitive biases as optimistic overconfidence and instead allow the advocate to make a more balanced assessment of his or her case.[12] Moreover, CTO prompts also help advocates weaken the pulls of an opponent who tries to gain an advantage by anchoring with a first number, by in turn responding with more reasonable alternate numbers and accompanying rationales that were considered because of their broader perspective.[13] Finally, CTO prompts can minimize the partisan viewpoint that blinds some advocates to see only evidence that confirms their point of view and can instead broaden the lawyer's information processing.[14]

In another series of experiments, a team of researchers showed how assisting a party to take perspective can actually de-bias the biased individual and allow him or her to feel empathy for the previously implicitly discriminated against person.[15] In these experiments, perspective takers where asked to write a variety of perspective-taking essays such as a day-in-the-life of a targeted outgroup such as blacks or Latinos.[16] These perspective-taking activities resulted in whites having less bias and more relatedness to the targeted groups.[17] Applying these findings to dispute resolution processes, we may mitigate some of the influences of our implicit biases or assist the parties by engaging in perspective taking.

Empathy Enhances Parties' Perception of Procedural Justice in Dispute Resolution Processes[18]

An important by-product of including empathic responses in dispute resolution is that it enhances participants' perception that they have received procedural justice in that dispute resolution process. When parties opt for a dispute resolution process, they expect and deserve a fair and just process. In fact, even when the outcome does not go the way a party had wished, they are more likely to be satisfied with the process if they perceive they have received their procedural justice. Participants in dispute resolution use four criteria to assess if the dispute resolution process is a fair and just one. First, parties want an opportunity to tell their story and be heard.[19] Second, parties want to know that the neutral is making decisions in a fair and impartial way.[20] Third, parties want to know that their neutral is trustworthy and desires to do the right thing.[21] Fourth, parties want to be treated with respect by the neutral and all who administer the dispute resolution process.[22]

Therefore, when advocates and neutrals empathize, participants are more likely to satisfactorily experience all four components that contribute to their assessment of procedural justice.

Empathy Enhances Participants' Perceived Legitimacy of the Rest of the Legal System

Another important by-product of including empathy in dispute resolution processes is that it enhances the perceived legitimacy of our entire legal system.[23] Yes, our dispute resolution programs are actually adjuncts to our legal system. Participants' satisfaction with the quality of dispute resolution programs affects their perception of our legal system. Thus, if empathic supports cause greater participant satisfaction with dispute resolution processes, participants are also likely to have greater confidence in our legal system.

Conclusion

Returning to where we began, arbitrators, mediators and advocates cannot ignore the research that demonstrates the importance of empathy in our work. To those who question the role of empathy in dispute resolution, *You are concerned that empathy will detract from participants' real reason for using dispute resolution: to resolve the case at the right number. Besides, you're not a psychologist and don't think it is your role to deal with emotions.* To those who already include empathy in their dispute resolution processes, *You do not want to be marginalized because you*

include empathy in dispute resolution. You regularly see the benefits of empathy and want to see those benefits legitimized.

Empathy is a powerful conflict resource that has a positive ripple effect on the neutrals, advocates and participants. For advocates, arbitrators and mediators who strive to ethically achieve that ofttimes elusive goal of objectivity, even-handed empathy toward both parties is an effective de-biasing tool. As a de-biasing tool, empathy helps us make better deals because we can[24] then garner quality information less shackled by cognitive biases. For participants in dispute resolution processes, empathy enhances their perception of procedural justice, their perception of the legitimacy of the process and their esteem for our legal system as a whole. Now that the value of empathy is undisputed, let's go forward and include this conflict resolution resource in our work, our trainings and our professional education.

Endnotes

1. Simon Baron-Cohen, The Science of Evil 183 (Basic Books, 2011).
2. *Id.* at 16.
3. *Id.*
4. *See, e.g.*, Douglas N. Frenkel & James H. Stark, *Improving Lawyers' Judgement: Is Mediation Training De-Biasing,* 21 Harv. Negot. L. Rev. 1 (2016); *see also* Leslie Jamison, The Empathy Exams (Graywolf Press, 2014).
5. *Id.*
6. iTunes Preview, https://itunes.apple.com/us/app/peace-process/id572130315?mt=8 (last visited June 12, 2016).
7. *See, e.g.*, The Code of Ethics for Arbitrators in Commercial Disputes Canon 1 (2004), available at http://www.americanbar.org/content/dam/aba/migrated/dispute/commercial_disputes.authcheckdam.pdf ("Canon I: An arbitrator should uphold the integrity and fairness of the arbitration process.").
8. *See, e.g.*, Model Standards of Conduct for Mediators Standard 2 (2005), available at https://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTG_010409&revision=latestreleased ("A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.").
9. *See, e.g.*, N.Y. Rules of Prof'l Conduct: Conflict of Interest: Current Client Rule 1.7; N.Y. Rules of Prof'l Conduct: Advisor Rule 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, psychological, and political factors that may be relevant to the client's situation.").
10. Rebecca K. Lee, *Judging Judges: Empathy as the Litmus Test for Impartiality,* 82 U. Cin. L. Rev. 145, 167–170 (2013).
11. Douglas N. Frenkel & James H. Stark, *Improving Lawyers' Judgment: Is Mediation Training De-Biasing,* 21 Harv. Negot. L. Rev. 1, 34 (2015) (explaining that although they say the terms empathy and perspective-taking are used interchangeably, they consider empathy is more heartfelt and perspective-taking is more cognitive).
12. *Id.* at 21.
13. *Id.* at 40.
14. *Id.* at 33.
15. *See generally* Andrew R. Todd, Galen V. Bodenhausen & Adam D. Galinsky, *Perspective taking combats the denial of intergroup discrimination,* 48 J. of Experimental Soc. Psych. 738 (2012).
16. *Id.*
17. *Id.* at 723.
18. *See generally* Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution,* 2011 J. Disp. Resol. 1 (2011).
19. *Id.* at 5.
20. *Id.* at 5.
21. *Id.* at 5.
22. *Id.* at 6.
23. *See, e.g.* Nancy Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 Wash U. Q. 787 (2001).

Professor Elayne E. Greenberg is Assistant Dean of Dispute Resolution, Director of the Carey Center for Dispute Resolution and Professor of Law at St. John's Law School. Nicolas Berg (St. John's Law '17) assisted with the completion of this column.

In January 2016, the New York legal community lost a visionary leader: the Hon. Judith S. Kaye. In addition to her twenty-five years of service on the New York Court of Appeals, Judge Kaye was the Founding Chair of the New York International Arbitration Center (NYIAC). To honor her, the NYIAC Board of Directors has established an annual Judith S. Kaye Arbitration Lecture.

On May 18, 2016, the inaugural Judith S. Kaye Arbitration Lecture was given by Gary Born, Chair of the International Arbitration Practice Group at Wilmer Hale, in the format of a conversation with Aníbal Sabater (Chaffetz Lindsay LLP) and Claudia Salomon (Latham & Watkins LLP). The event was introduced by NYIAC's incoming Chair, James H. Carter.

Inaugural Judith S. Kaye Arbitration Lecture

MR. CARTER: I am Jim Carter, and it is my pleasure to introduce the Judith S. Kaye Inaugural Arbitration Lecture. John Gardiner has spoken eloquently about our Founding Chair, Judge Kaye, and her contributions to New York and to the international arbitration community in New York, and we think of her in that regard, of course, as the founder of NYIAC and as having brought about this organization.

But I would mention one other aspect as well: New York is chosen for international arbitrations, in substantial part because of agreements governed by New York law, and Judge Kaye, for 25 years, helped shape that law with a mind toward the needs of commercial parties as well as others and has left us with a body of New York law that we can be justly proud of, and that has contributed, in addition to other things, to New York's role in international arbitration.

This is the inaugural lecture, but it's truly going to be more of a conversation, so you won't be lectured at—people will discuss for you—and so I will introduce the two "interrogators" and then our lecturer. On my immediate left is Claudia Salomon from Latham & Watkins, where she is the global co-chair of the firm's international arbitration practice. She's the U.S. member of the ICC International Court of arbitration. She's co-chair of the ICC Task Force on Financial Institutions and International Arbitration. She's an author and the co-editor of *A Choice of Venue of International Arbitration*, and I'm happy to say also a chapter author for *International Commercial Arbitration in New York*, a book I recommend highly to you.

On the far end is Aníbal Sabater, who is a partner at Chaffetz Lindsay here in New York. He's a lawyer in various U.S. jurisdictions and also in England and Wales and Spain, where he practiced before practicing in Houston and now in New York. He's the chair, as you've heard, of the New York International Arbitration Center Program Committee that's responsible for our program this evening, and he's one very good arbitrator trainer, which I know because I've worked with him in training arbitrators for the AAA.

And our lecturer, Gary Born, is our leader at Wilmer-Hale as the Chair of our international arbitration practice. Gary has set all kinds of records including counsel in more than 650 arbitrations and arbitrator in more than 200. He's a professor in various places, including St. Gallen in Switzerland, Tsinghua in Beijing, and guest lecturer and speaker at universities in every hemisphere.

In addition to everything else, he has not so long ago taken on the role of President of SIAC, the Singapore International Arbitration Center.

And, of course, he's an author. He's an author of many books, but you know him well as the author of those three volumes, *International Commercial Arbitration*, known just as "Born," the book that's quoted by judges and arbitrators on every imaginable topic. And it's so comprehensive that it will keep your door closed if you use it as a doorstop even in a hurricane.

(Laughter.)

MR. CARTER: And he's the world's leading authority. It says so in his book, and he actually is. He's the world's leading authority on international arbitration, without any debate. His book takes the form of not only telling you everything there is to know about every topic that might be of interest to you, but typically each section ends with a discussion of future directions. Gary doesn't just tell you what the law is, he tells you what he thinks it ought to be. So he's here tonight to tell you what he thinks it ought to be in this lecture.

(Applause.)

MS. SALOMON: Well, just to kick things off today before we talk about what the law ought to be, I thought it would be interesting for the audience to just hear a little bit about your experience, and to start off at the very beginning, which is: What was your first arbitration?

MR. BORN: As you can tell, we haven't practiced this. Actually, we haven't practiced it, so I would like to start actually before I answer the question with some future directions—actually not.

MR. BORN: I would like to start with a "thank you" to the New York International Arbitration Center and also to Judge Kaye. It's a real honor. I didn't know Judge Kaye

well, but I had the pleasure and the honor to meet her a year and a half ago or so, and needless to say it's a huge honor and distinction to be able to give this first lecture—it's actually not a lecture at all, but a conversation, but it's a huge honor to be able to give the first lecture, and I'm touched by the invitation. Thank you, and thank you all for coming.

In answer to the question, the first arbitration that I ever worked on actually was a little bit different than almost anything I've done subsequently, and it's little bit different than anything my law firm usually did.

Greenpeace, the environmental protest group, came to us in I guess it was the 1980s at this point, and said "Lloyd"—it was not me, of course; I was a baby associate—it was my first arbitration, "Lloyd" as in Lloyd Cutler—"our boat's been blown up, the Rainbow Warrior has been destroyed mysteriously in Auckland harbor just as it was about to head out on a protest mission to try to interfere with French nuclear testing in Mururoa. The only people in the world that would have been stupid enough to do this thing would be the CIA, so we need some Washington lawyers. Would you help us?" And Lloyd, of course, said, "Yeah, definitely."

It transpired, of course, that the CIA hadn't done that. Instead, the French intelligence service had done it. I had the pleasure to speak last year actually on the 30th anniversary of this in New Zealand and received first hand accounts of how the French agents were apprehended in this, and it's a fairly extraordinary set of mishaps.

But in any event, the French were ultimately tagged with this particular wrongdoing, and to atone, they agreed to arbitrate the dispute and the issue in the arbitration, and this was my first arbitration, the first arbitration agreement that I ever negotiated. It was a submission agreement. The French agreed to submit the question of the amount of their financial responsibility for what they called the incident in Auckland harbor on the night of, I think, June 12th, 1985, to an arbitral tribunal.

And we constituted a tribunal that was seated in Geneva. They insisted for a long time that it be seated in Paris, and I had to do research into whether that would be such a good idea, and we ultimately concluded not, but we then conducted against the French Republic on behalf of Greenpeace a five-day arbitration that resulted in a very nice award that enabled Greenpeace to buy a new Rainbow Warrior II. And for me, it was always a good example of how even in the most contentious and most unusual circumstances arbitration can provide a means for ensuring that, even when it starts out looking like it's the law of the jungle, the rule of law can prevail.

MS. SALOMON: So, what was it about arbitration that got you hooked?

MR. BORN: That—and I think for any of us, arbitration is a little seductive in the sense that you're presented with just the most extraordinary array of problems. To some extent you've heard about it in the previous panel, which was very well done, but you had the opportunity—and it really is an opportunity to think about disputes from every part of the world from every legal culture in every industry with people of every sort with every motivation, and to come up often without a whole lot of either legal or cultural restraint with the most sensible and most effective means for resolving those disputes.

As counsel, obviously, you approach the case with a particular perspective, but as arbitrator also you approach the question of dispute resolution with a particular perspective. And whatever your role in the process, you have huge flexibility to try to resolve the dispute most fairly and most efficiently. And at least for me, the challenges and the opportunities of being able to do that in such a diverse range of circumstances are, as I said, very seductive.

MR. SABATER: Gary, we know you're from the U.S., your office with the firm is in London, home is somewhere in between Berlin and Singapore. You're the President of the Singapore International Arbitration Center. We're not going to ask you to tell us what your favorite place to arbitrate is, whether it's London, Singapore, New York or Dublin.

But is this a choice that still matters? You were just telling us about the Greenpeace case and the parties disagreeing at some point over whether it should be Geneva or Paris. Are there still any such big differences at least among the big top tier arbitration seats in the world?

MR. BORN: I think one has to be very cautious about the remarks. One sometimes hears that the seat of the arbitration isn't anymore so important. I think as my inadvertent reference to the importance of the seat in Greenpeace suggests, the seat really is still important. On the one hand, you can compare the leading arbitral seats and perhaps ask yourself how important is London versus New York, and I will say something about that in a moment.

But if your choice is between, for example, Beijing on the one hand and London or Paris on the other, there really is an important difference between those seats. And for Beijing, you can substitute any number of hundreds of other places, whether it's Hanoi or Rio de Janeiro or lots of other locations that one might think of. And I think clearly choosing the seat in those instances is of critical importance. The annulment authority of courts in the seat, the power to remove arbitrators potentially—those sorts of supervisory powers are hugely important still.

I also think that even in choosing between the first tier seats, if one can put it that way, if you look down the list of the top ten seats or the top five seats in the SIAC or ICC statistics, one sees very real differences in particular cases. The sort of arbitral tribunal you will get in an arbitration seated in Paris versus London versus New York can be

quite different, and the outcome in particular cases as a consequence potentially is quite different.

I guess I push back a little bit on the notion that the most important choice in any arbitration is the choice of the arbitrators. I think before you even get to that choice, the choice of the arbitral seat is often, in fact, the most important choice in an arbitration.

There may be lots of arbitrations where it ends up the same. It's resolved similarly in New York as it would be in Zürich or Geneva or what have you, but that doesn't change, I don't think, the fact that potentially the legal framework of the seat, the supervisory powers of the courts, and also the cultural penumbra of the legal culture of the seat is just hugely important in any case.

"Manifest disregard … is not, in fact, a reason to decline to arbitrate in the United States. And at the end of the day, the U.S. approach towards substantive review is not, in fact, very different from that in other leading jurisdictions."

MS. SALOMON: Well, we're in New York, but we have to ask: Why Singapore?

MR. BORN: Do you really want to ask that? Singapore, as you probably saw from the case statistics that we released last month, had a spectacular last year. Our numbers were up 20-25 percent. And I'm happy to report that although mid-year numbers are often a little misleading, knock on wood, will be up another 25 percent this year.

I believe in part that's because—this wasn't practiced either—in part, that's because of the rising economic importance of Asia, in part also, though, it's because of a very deliberate government policy in Singapore both in adopting the UNCITRAL Model Arbitration Law and then appointing a pro-arbitration judiciary which has been extremely conscious of the needs of the arbitral process, a very international legal community which demographically looks a lot like the U.S. legal community, I think, has also played an important role.

So, I think when one thinks about Singapore, one thinks about SIAC not being an Asian arbitral institution, but instead being a global arbitral institution, which together with New York and London ought to be at the top of any company's list in choosing a place to resolve its international disputes.

MR. SABATER: Now, you were discussing the case of Singapore that has recently changed its Arbitration Act to make more arbitration laws and to make them more arbitration friendly. The opposite scale of the spectrum is the U.S. where the Federal Arbitration Act has been in force for about a century now, and it remains that at least in New York and other big cities are very friendly arbitration centers.

However, especially when you're discussing with lawyers outside the U.S., the question still comes up, well, it's manifest disregard of the law except for a special set aside ground in the U.S. Is this relatively ongoing bad rap that the U.S. gets warranted, or is it more part of the dark legend?

MR. BORN: I think that's a leading question.

MR. SABATER: We wanted to make sure you spoke on the record.

MR. BORN: And that you got the right answer. I think the concerns about manifest disregard are probably overblown. I would be the first to defer to the many exceptional New York lawyers in the audience, but I think one first has to confront the question of whether manifest disregard still is an exception, a basis for set-aside in the United States—assuming, though, just for the sake of argument, from the studies that I have seen of the likelihood of manifest disregard being used actually to vacate an award are, especially in an international context, indicative that it is a highly remote possibility.

In my own research into the way that annulment is applied in other jurisdictions, one often sees notions of public policy being used sometimes a bit creatively to reach much the same result that even a robust application of manifest disregard would get you to in the United States context.

I think, for the most part, manifest disregard is a bit of a boogeyman that hides underneath the bed and people, because we're lawyers, worry about, but which, in fact, hardly ever comes out. I think that's probably a good thing because I think, for the most part, the arbitral process, unhindered by any substantive review by courts in the seat, is the best way to resolve disputes and what parties more importantly bargained for when they agreed to arbitrate.

So, I think the short answer to your question is that manifest disregard isn't, although perhaps we would all rather it not to exist at all, it is not, in fact, a reason to decline to arbitrate in the United States. And at the end of the day, the U.S. approach towards substantive review is not, in fact, very different from that in other leading jurisdictions.

MS. SALOMON: I think that really leads us to the topic of Lord Thomas's comments in England and Wales, calling for greater court scrutiny of international arbitration. It's interesting you commented that in Singapore there is a pro-arbitration judiciary. I think we're quite lucky in New York that we have the former Chief Justice of the New York Court of Appeals, pro-arbitration, promoting New York and promoting arbitration, and we view the New York courts as pro-arbitration.

And here we have the Chief Justice of England and Wales worried that international arbitration and arbitration generally is having a negative impact on the development of common law. Just on Monday, Bill Rowley published a long op ed piece in *Global Arbitration Review* responding to that concern, and so we're really interested in your response and perspective on this issue.

MR. BORN: I think my views on this will hardly come as a surprise to most in this audience. I thought it was remarkable that Lord Thomas would suggest that international commercial arbitration was interfering with the development of the common law and that the right approach towards the development of commercial law would be to subject arbitral awards to increased judicial scrutiny on the merits.

England, after very careful consideration—Mark Saville's report in the 1990s—concluded, consistent with the approach of the UNCITRAL Model Law and international commercial arbitration that, at least for international arbitrations, very reduced—not eliminated entirely, but very reduced—judicial scrutiny of the substance of arbitrators' decisions was appropriate and desirable. I think that that was the right decision, one that is consistent with international approaches, the approach recommended by UNCITRAL; and I think also consistent with the doubts about manifest disregard that have followed on the heels of the *Hall Street* case in this country.

I have to say I'm highly skeptical about Lord Thomas's suggestion that international arbitration impedes the development of commercial law. I suspect that comes as a particular surprise to the 4 or 5 billion people that live in civil law jurisdictions and where commercial law works perfectly well with a code-based system. I would have thought that one doesn't need to feed the furnace of judicial precedent-making with every single possible dispute that one can find in order to find a satisfactory legal system, which seems to be Lord Thomas's premise.

I have had occasion to look at the caseloads in the English courts, both the Court of Appeals and lower courts, the first instance courts, and those courts' loads haven't fallen since 1996, and the English Arbitration Act of 1996; instead, they've increased. So, presumably, there are still enough cases to allow English judges to continue to make precedent.

I worry about the notion that disputes are there to make law as opposed to law being there to resolve disputes. I'm reminded a little bit of Owen Fiss's article 25, 30 years ago, against settlement which proceeded from the premise that actually parties shouldn't be permitted to settle cases because in settling disputes they deprive courts and, therefore, the public generally of the benefit of judicial resolution of those disputes. I subscribe to the notion that law is there to enable parties to resolve their disputes, and the best way to resolve disputes is to resolve them consensually; and that arbitration, at the end the day, is first and foremost a consensual means of dispute resolution.

I worry about the notion that, especially in an international context, national judiciaries provide the best means to develop the law. I think, in fact, international tribunals provide in an international context a better way to ultimately develop the law of international commerce.

I think it's interesting when one looks at the authorities that are available under the Convention on the International Sale of Goods, that the majority of the decisions that are available under the CISG are, in fact, arbitral awards, interpreting—not surprisingly—an international instrument. I think that's a good thing and not a bad thing, and that re-nationalizing international arbitration through the guise of judicial review of arbitration awards is a very bad idea.

It's probably, to be honest, a good idea for New York and Singapore for Lord Thomas to do this because the surest way to make sure that English courts don't get decisions by which they can remake the law of contract is to put them in a position to do so. The result of that ultimately will be the parties will come here and to Singapore to arbitrate rather than to go to London, and we won't, therefore, need any more to worry about the Anglicization of international arbitration because it won't have anything more to do with arbitration.

MS. SALOMON: So, let's step aside from Lord Thomas's reason—or at least stated reason—for considering expanded review as desiring the development of common law and then just taking the issue of review of arbitration decisions. And for certainly the parties that have lost an arbitration award, they may be looking for greater review. Finality is always a two-edge sword. We hear from parties that one of the reasons they are hesitant on arbitration is that there is no appeal. We know the AAA has adopted appellate rules so that there is a specific way in which the parties can have appeals or second review by an arbitration tribunal, although they could have always drafted that themselves.

So, what should be the scope of review? Should there be an appeal, or is finality really at the essence of arbitration and something that we need to hold to?

MR. BORN: So this isn't Lord Thomas. This is Baroness Salomon. Lord Thomas, of course, didn't predicate his criticism on outcomes in particular cases, "Was this a right decision? Was this a wrong decision?" His was a systemic view, "We want to make better law." And Baroness Salomon suggests that we need to have judicial review in order to get the right result. It's not okay to just have the final result; we need the right result.

And I actually take a different view to that. I think that the most important determinant in answering that question should firstly be the parties' intention: What do businesses want? And I think that what businesses want when

they arbitrate in an UNCITRAL model law jurisdiction or in the United States, given the diluted form of manifest disregard that exists, or in most other jurisdictions, is a final and binding decision that ends their dispute once and for all. They don't want judicial second guessing, particularly in an international context, but the judiciary is necessarily national.

Putting aside the overriding importance of parties' intentions when talking about arbitration, I think businesses are also right to want that. The reason I think businesses are right to want that is that international arbitration, including for the most difficult cases, the larger cases, actually provides a superior means for getting the right result than national court proceedings. The reason that arbitration provides a superior means is that it brings together a variety of procedural innovations, many of which you've heard about in the preceding panel, that enables you to get to the right result.

I think in particular that the combination of a three-person tribunal with two-party nominated arbitrators provides a better mechanism for getting to the correct result than an individual trial judge followed by an appellate procedure. The reason I think that is, when you have two-party nominated arbitrators—and with the greatest of respect to my English arbitrators, party-nominated arbitrators never forget who nominated them—two-party nominated arbitrators who go into the proceeding remembering who nominated them, with a powerful personal incentive while being independent and impartial, also to make sure that every argument put by the party that nominated them gets carefully considered, you get a process in which fact and law are both developed in an integrated way in the same proceeding that enables one to get to a more nuanced, better application of the law, better understanding and interpretation of the law, and in its application to a factual record as it's developed in a particular case than you do when you have a very inevitably overworked individual trial court judge or lay jury followed by an appellate tribunal looking at specific issues of law.

Obviously, there's room for lots of debate about which procedure works better, but at least in my experience the three-person tribunal with two-party nominated arbitrators making the final decision provides a more reliable and better way to get to the result.

And for all those reasons, having instead a sole trial judge and three appellate judges re-examine the questions the tribunal decided is actually a really bad idea.

MR. SABATER: We have been talking about a judicial review and how limited it is. It sometimes, however, leads to the annulment, the set-aside of the award. And we will not touch on specific cases, but this is obviously a very current topic for a variety of reasons, and you've talked about it recently in different fora.

What's the narrative in terms of the case law and what's your view on the application of Article 5(1)(e) of the New York Convention, by now the so famous enforcement of the foreign award may—not "shall," but "may"—be refused upon evidence that it was set aside in the home jurisdiction?

MR. BORN: I'm sure that's a question you're all just dying to have us address. So, of course, notwithstanding all of my praise of the arbitral process, one occasionally gets awards that are set aside in the seat, that more frequently seems to be the case in places like Egypt when one thinks of Chromalloy; Colombia, when one thinks about other cases that have arisen in this country; most recently, I guess, in Mexico City. My view is that—and this won't, again, come as a surprise, I don't think, to anyone in this audience—my view is that, when Article 5(1)(e) permits awards to be denied recognition under the New York Convention because they have been set aside or suspended in the place where the award was made, that is, indeed, optional, as is confirmed most specifically by Article 7 of the New York Convention. Article 7 of the New York Convention, although sometimes overlooked or dismissed as boilerplate, is, in fact, fundamentally important to the architecture of the Convention.

Article 7(1) provides that nothing in the Convention will operate to deny a party of rights that it might have with regard to recognition of an award under the law in the place where the award is sought to be recognized. As a consequence, it is quite clear that all of the exceptions in Article 5(1) and 5(2) of the Convention are permissive grounds, as the "may" in Article 5 suggests, and the Convention doesn't mandate non-recognition of an award simply because non-recognition would be permitted. The Convention, if I could put it this way, sets a floor, not a ceiling, on recognition.

And I think that is a good thing, and I also think it is, as the *Chromalloy* decision, the first U.S. decision ever to examine this issue, concluded the authority to recognize an award that has been annulled in the arbitral seat is actually an important authority and one that U.S. courts shouldn't hesitate to exercise. In *Chromalloy*, an award made in favor of a U.S. company in Egypt against an Egyptian State-owned company, was subsequently annulled by an Egyptian court after it had conducted what amounted to a de novo review of the facts and issues in the arbitration. The U.S. Court in the District of Columbia nonetheless recognized the annulled award on the basis that to conduct a de novo review was inconsistent with the basic purpose and intention of the parties' arbitration agreement and also inconsistent with the U.S. approach towards arbitration as reflected both in ratification of the New York Convention and the Federal Arbitration Act. I think that was the right approach.

That's not to say that annulment decisions are to be completely disregarded. If an annulment decision rests on one of the other grounds in the New York Convention—

Article 5(1)(a), no arbitration agreement; Article 5(1)(b), denial of an opportunity to be heard—I think the factual conclusions and, in some circumstances, holdings of the annulment court, can properly be looked to by the U.S. court. But where you have essentially de novo review by the annulment court of the merits of the parties' dispute, and frequently in cases where you have decisions based on local public policy or non arbitrability rules, U.S. courts shouldn't hesitate to give effect to the parties' arbitration agreement as Article 2 of the New York Convention requires, as opposed to some local, often idiosyncratic, rule of public policy in the arbitral seat.

"Investment arbitration also isn't perfect. It is dismaying, though, that the portrait that has been painted of investment arbitration by its critics, including critics who really ought to know better, has been so wildly distorted."

MR. SABATER: Now that we are here, and I hear you speak about 5(1)(e), do you think that the New York Convention should be amended and the effort should be made to bring all the signatories to the table to come up with an "NYC 2.0" and, among other things, dispense with 5(1)(e)?

MR. BORN: My colleague, Jim Carter, very kindly pointed out how it took me three volumes to talk about the New York Convention. Much of that is most useful as a doorstep or sleep aid, I have been told by others. In fact, what it took me three volumes to say, Steve Schwebel, the former President of the International Court of Justice, said in two words: "It works."

MR. BORN: If it works, I wouldn't fix it. If it's not broken, don't fix it. I would hesitate to amend the New York Convention. It is something that works. It is something, I think, that has played a hugely important role in the growth of international arbitration over the past 40 years. It's been an organic process, in a sense.

We sometimes forget this today because there are 156 Contracting States around the world. It's essentially a global convention, just like SIAC is a global arbitral institution. It's a global convention. But it wasn't always a global convention. It took a long time before many countries began to ratify the Convention. We, in this country, didn't do so until the 1970s—1970, I think. The first States to ratify were Israel and Egypt and Jordan in the early years after the Convention was negotiated in 1958. But there wasn't a rush to sign on to the Convention.

The Convention is drafted almost like the Federal Arbitration Act or the U.S. Constitution in very broad terms that I think has left a huge amount of leeway to national courts who have, I think, developed a very robust and effective set of interpretations of the Convention that have ensured that international arbitration agreements are enforceable around the world and that international arbitral awards are also enforceable around the world. I worry very much that efforts to improve on that collaborative organic process by which national courts from every part of the globe have developed an effective and workable legal regime. I believe that would be retarded, not benefited, by a revised legislative attempt.

I have greatest of respect for UNCITRAL, but when you look at their efforts to improve on the original UNCITRAL Model Law from 1985 in the 2006 amendments, Article 17 with its sort of very EU approach towards drafting in its provisions regarding provisional measures, I think, sort of moves things backwards, not forwards, and I can only think what the New York Convention would begin to look like if you let legislative draftspeople put pen to paper.

So, going back to the question of should there be a "New York Convention 2.0," I would say no. In fact, the New York Convention is, in fact, a living organic creature that has been developing very happily, and I think a 2.0 would interfere with that development quite substantially.

MS. SALOMON: So, on the theme of "if it ain't broke, don't fix it," let's shift to the discussion of the criticisms of investor State arbitration. Is it a system that works? And what do you say to the litany of criticisms we hear about transparency, the inconsistencies, the legitimacy, the two-path problem?

MR. BORN: Again, my views won't come as a surprise. I think the investor State system does work. The investor State dispute resolution system does work. It's not perfect. Arbitration is not perfect. No form of dispute resolution is going to be perfect. You, by definition, have two parties that haven't been able to reach their agreements, haven't been able to resolve their disputes, and in most cases whose primary objective in a particular proceeding is to make life as horrible as possible for the other party. A mechanism that nonetheless resolves that dispute won't necessarily be perfect, and international commercial arbitration isn't perfect. Investment arbitration also isn't perfect. It is dismaying, though, that the portrait that has been painted of investment arbitration by its critics, including critics who really ought to know better, has been so wildly distorted.

If one takes a step back from investment arbitration and our world of arbitration specifically, and looks at the development of international law over the last three or four decades, I would say that one would have to conclude that the investment arbitration is, in fact, the best single example of international law actually working and ensuring that the rule of international law prevails in contemporary affairs. I would say in today's world, the world that we have seen over the last three or four years, a mechanism that advances the rule of law, the rule of

international law, is something we ought to be really pleased to see, and that all of us, including lots of people who end up being critics of investment arbitration, ought to be embracing instead of slandering.

I think specifically the criticisms that one hears of investment arbitration are so wildly distorted that it's odd that one even has to respond to them. When one hears claims that investment arbitration isn't transparent, you really have to scratch your head. After the amendments to NAFTA, the amendments to ICSID, the Mauritius Convention, the UNCITRAL Transparency Rules, the practice of investment arbitrations being Webcast live, the availability of ICSID/other investment arbitration awards on the Web, on ICSID and other Web sites, the notion that investment arbitrations aren't transparent is really stunning.

More importantly, in a sense as well, as far as one wants investment arbitrations to be more transparent, then the answer is to make them more transparent, not to attack the system as fundamentally flawed.

I should say in that respect that not all countries share the United States' and Canada's passion for transparency in dispute resolution. Many countries, for public policy reasons of their own, which I think at least in some cases are quite legitimate and understandable public policy reasons, prefer their investment disputes not to be public, and the policy choices that U.S. and Canadian and some European States make with regard to their disputes are legitimate, certainly, ones that the investment arbitration mechanism has rightly been responsive to, but the notion that those are necessarily global or universal solutions, I think, is one that one has to have very grave doubts about.

Investment arbitration is also described particularly in some European circles as inevitably tilted against the host State, producing outcomes that favor the investor in a substantial majority of cases and involving arbitrators who are inevitably from corporate law firms on the one hand or on corporate boards on the other hand. I think both of those criticisms also are wildly wrong. I think if you look at the work that Susan Frank and others have done empirically with regard to the outcomes in investment arbitrations, they not surprisingly, to oversimplify, show that about a third of all disputes are resolved by having the investor's claim rejected entirely. About a third of all disputes have the investor's claim upheld, but often only in part and sometimes only in small part.

And, finally, the last third is about a third of all disputes are resolved consensually.

I don't think that that's a picture, just looking at it in very broad terms. It suggests that investment arbitration is pro investor. I think if you talk to a fair number of investors, it's actually one that's totally against them—maybe not quite as much against them as the historic process of espousing claims, but nonetheless one that certainly doesn't give them a stacked deck in their favor.

For me, the most important of those various categories is the 30 percent of all cases that are resolved consensually after an investor is able in a neutral forum to present what its claims are—the State voluntarily resolves the dispute, settles the claim—recognizes that the investor is entitled to something. I think a system that ensures, with all respect to Owen Fiss, that ensures consensual resolution of a third of all cases is actually a system that looks like it's working, not like it's not working.

It's hardly surprising, therefore, that I also don't accept the notion that arbitral tribunals are somehow tilted against host States. In fact, host States have—whether it's Brigitte Stern or Toby Landau or Chris Thomas—found a very able set of arbitrators who they appoint frequently in cases and who are highly experienced. The obligations of independence and impartiality that we've heard apply to all the arbitrators, and ICSID and the other appointing institutions, we all know from experience, take extraordinarily seriously their responsibility both to appoint arbitrators, whether as presiding arbitrator or otherwise, who are independent and impartial; and, therefore, I think that the criticisms that one hears about the composition of tribunals are also very far from the mark.

I think with regard to the alleged inconsistency of results, that too isn't right; and, to the extent that there is some force to the criticism, it's important to look at the context. José Alvarez has done a very interesting study about the Argentinian investment arbitrations and concluded that, in very large part, the results in all of the investment arbitrations involving Argentina are highly consistent. In my own experience, although one can certainly find on a few issues divergences in opinion—is a cooling off period jurisdictional or non-jurisdictional, what exactly does fair and equitable treatment mean—in the overwhelming majority of cases, there is a high degree of consistency between investment arbitral awards, which is not surprising, given the frequency with which those awards are cited in the investment arbitrations; and, as the comments previously about Gabrielle Kaufmann Kohler's view of precedents suggest, the importance that those awards have in decision making. Parties don't cite investment arbitration awards for no purpose or to no end. It's because investment tribunals pay a lot of attention to what prior tribunals have decided.

Are there some issues on which there are divergences? Yes, but that's hardly surprising in a system which is, to some extent, common law in its structure of a system where you have an organic development of a series of precedent. And with regard to issues where States want clarity, they have been amending their BITs, coming out with new model bilateral investment treaties that resolve these questions, treat cooling off periods in one way or another way, define fair and equitable treatment more specifically—which makes perfect sense. That's exactly how the law ought to evolve.

So, taking a step back from all of this, I think that most criticisms of investment arbitration are not just wrong but wildly wrong, and I think those who make those criticisms, those who would tear down the system of investment arbitration actually do international law—do the world we live in—a huge disservice. The rule of law is fundamentally important to the world we live in, especially today, and many of those who attack investment arbitration, I think, would do well to take a step back and think about how a world would look without neutral and independent application of legal rules because that is the direction that their criticisms take our world.

MR. SABATER: You started your remarks by saying the investment arbitration system is not perfect; they don't share that criticism. What would it take in the investment arbitration system, what do you think are the real areas that merit reconsideration and reform?

MR. BORN: I think that the cost of arbitral proceedings in investment arbitration is a real issue; and, to the extent this system had been moving in this direction, I think there ought to be more aggressive use of cost saving mechanisms and more robust use of tribunals' authority to award costs in both directions.

I think it's interesting because one frequently hears criticisms of costs, yet every time you get to an individual investment arbitration or, frankly, other arbitrations, the individual parties in that case, even though States generally might bemoan the cost of investment arbitration or companies might generally urge for more efficient arbitral proceedings, when you get to any particular proceeding, the two parties in that case never seem particularly concerned about costs. To stay in the investment arbitration context for a moment, States never fail to take every jurisdictional objection, no matter how unlikely it is that it will prevail. Claimants never fail to seek to go after every possible request for document disclosure, no matter how unlikely it will be granted. And I think tribunals could and should do more than to try to ensure proceedings are more efficient and more expeditious.

This doesn't apply quite so specifically to investment arbitration, but one innovation in the SIAC Rules, the Singapore International Arbitration Centre Rules, that I think other institutions might give a careful consideration to is our expedited procedures for disputes under a specified dollar amount on the one hand or disputes determined to be of exceptional urgency on the other hand. The institution has the authority to require a sole rather than a three-person tribunal, irrespective of the parties' arbitration agreement; and a six month proceeding from the constitution of the tribunal—that means appointment of the sole arbitrator—to a final award. That isn't necessarily a procedure that will have all the bells and whistles that litigators might desire in every case, but it is a procedure that I think does give businesses what they are looking for in disputes of that category. And I think other institutions would do well to look at that sort of means of ensuring efficiency.

I'm sure there are suggestions for improvement.

One area where I don't think improvement would make sense at this point is counsel ethics. I have hesitation about arbitral institutions imposing uniform rules of counsel ethics in all arbitrations under a particular institution's rules. I think questions of ethics are complicated. I think our current system, although certainly one can find cases where things go awry, our current system of regulation basically by counsel's home jurisdiction largely works. And to go back to something we said before, if it's not broken, don't fix it.

MR. SABATER: I think all of us in this room answer to at least one higher authority, which is Alexandra Dosman in this case. Are we to open the floor now, Alex? I think the short answer is "yes", right? So, any questions that you may have for Gary Born are welcome in this opportunity. He won't be charging for his answers. At 7:45, then his usual rate applies.

(Laughter.)

QUESTIONS: You haven't gotten a chance to speak about the future yet, so tell us what you're looking forward to in the future of arbitration.

MR. BORN: Well, next year is going to be an awesome year for Singapore.

(Laughter.)

MR. BORN: I had occasion to use this line recently in another forum, but I will reuse it because at least there it got a good reception: "Winter is coming." We've all seen or at least heard about "Game of Thrones." And I hope I'm wrong about this, but we've had a long, mellow, productive summer. International arbitration has flourished. You look at the caseloads of every institution, it's not just SIAC that went from, I don't know, 25 cases 20 years ago to more than ten times that now. It's not just ICSID that went from[3] cases a year to a hundred times that or whatever. It's not just that regional institutions have begun to flourish. It's not just that arbitration is now being used to resolve disputes in the field of sports and bilateral tax treaties and financial services transactions where historically it wouldn't have been used, or intellectual property disputes whether under the auspices of WIPO or otherwise.

I think in many ways, although we know all those individual datapoints, when you step back and look at the picture over the last 30 years, it really has been like in the Seven Kingdoms in the "Game of Thrones": a long golden summer when everything went right under the umbrella of the New York Convention in a sort of public-private partnership where the driving force was business and the legal community, to a large extent, trying to come up with the most efficient, the most sensible, most neutral means of dispute resolution. The public part of that equation was

at least as important and fully supportive courts, whether you think back to U.S. decisions like *Alberto Culver* versus *Scherk* and *Mitsubishi Motors* to decisions in other countries, *Dalico* in France, recent decisions of the Indian Supreme Court in *BALCO*, have all made the last 30 years a really exceptional time for international arbitration.

But, as I said, winter is coming. On the other side of the wall an army of undead would both tear down the wall and destroy everything that has so harmoniously been created. And the essential message, the essential theme of the criticisms that I've outlined for investment arbitration, I think, are coming to international commercial arbitration, and one hears the first stirrings of those—maybe not even the first stirrings—in Lord Thomas's criticisms, the notion that, at the end of the day, the State and State-selected decision makers are the only real way to properly resolve disputes. I think one will begin to see that again.

It's, of course, not a new view. If you go back to Joseph Story's critiques of arbitration in the 19th Century, arbitration was a form of rough justice administered by men—that's who they were then—who couldn't really be trusted to apply law the way that a national court judge could. That same criticism lies at the heart in many ways of the critiques of investment arbitration. And just as it can be applied there, it can be applied to international commercial arbitration, as well.

What are we to do, given that winter is coming? We don't know the answer yet, right? Season 7 is still coming, so we don't know what answer the "Game of Thrones" holds for us. And so, if the "Game of Thrones" doesn't tell us the answer, where else can we look? I think we could look to the "House of Cards."

(Laughter.)

MR. BORN: Where else, right? When we look to the "House of Cards," what do we find there?

MS. SALOMON: Machiavelli.

MR. BORN: I think that the real person who could speak to us there is Frank Underwood, and what does he tell us? He tells us that in life there is only one rule, and that rule is "hunt or be hunted." I think we should stop being hunted. I think we should stop always defending international arbitration. We defend it against not being transparent, we defend it against being pro investor, we defend it against being inconsistent. I think we need to look at the world the other way around. I think we need to look at where the critiques of international investment and commercial arbitration come from, where they trace their intellectual underpinnings to.

And I think where those critiques ultimately find their home, where they find their sort of intellectual domicile, is back in the Napoleonic Code and in the developments subsequent to the Napoleonic Code. One of the golden moments of arbitration generally was in the Constitution of Year 1 of the French Republic, when one of the constitutional rights that was guaranteed was the right to arbitrate, the right of citizens to resolve their dispute before arbitrators that they chose. And I think that was, not surprisingly, in a constitution that was key to the recognition of human rights. I think that was a recognition of the fundamental importance of parties' choice in how they resolve disputes.

We recognize the freedom of private parties to choose how they'll contract, whom they will contract with, how they will worship, how they will marry, who they will marry, and how they will resolve disputes, how they will resolve disputes arising out of the relationships that they create.

Napoleon would have no part of that, of course. He had a different view of the world, not a world in which free individuals, exercising their civil rights, chose how to resolve their disputes, how to mend the relationships that they had created. He saw a world in which state judges, "the State," would resolve everything, and that ultimately isn't so different from the critics of international arbitration.

It's also not so different from a set of guidelines that the National Socialists in Germany adopted in the 1930s. In the 1930s, confronted with a robust arbitration culture, the Nazis adopted the so called "guidelines on arbitral tribunals." Those guidelines provided that arbitration shouldn't be encouraged. It shouldn't ever be used by the State, and it shouldn't be used by private parties, either, because arbitral tribunals undermine the National Socialists' view of the State; the liberal tendencies of arbitral tribunals undermine the State. That same vision of State domination of law aspects of human life is what at the bottom, I think, underpins many of the criticisms of arbitration, both investment arbitration and commercial arbitration. I don't think we should be embarrassed about saying that. I think we should be proud of how arbitration furthers the rule of law in our context: The rule of international law.

I think a vision of a world in which the State is responsible for everything is one that's antithetical to what international law has taught us over the last 40 years. And I think, instead of being hunted in defending arbitration, we ought to hunt a little bit. Happy hunting.

(Applause.)

Endnote

1. Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 125 F.Supp.3d 449 (S.D.N.Y. 2015) ("Brady SDNY"), rev'd & remanded, 2016 WL 1619883 (2d Cir. Apr. 25, 2016) ("Brady 2d Cir.").

Discourse and Dialogue: New York Attorneys Speak Candidly About the Arbitral Process, Large, Complex Cases, and the AAA.

By Rekha Rangachari and Jeffrey T. Zaino

On April 27, 2016, the American Arbitration Association (AAA) hosted a roundtable meeting in New York with fourteen attorneys from law firms and companies, all of whom regularly arbitrate large, complex cases.

The purpose of the roundtable was to solicit user perspectives regarding how to improve arbitration as a method of resolving large, complex cases in a way that is consistent with the basic tenets of arbitration—to provide a fair, economical, and efficient process. It should be noted that the views expressed at the roundtable did not necessarily reflect either the views of the AAA or a consensus of the entire group.

"Dispositive motions need to be dealt with right away, and not considered at the time of the hearing on the merits."

To solicit feedback, the AAA prepared in advance several questions for the roundtable. This article will go through each question and provide a summary of the discussions with some direct quotes without attribution. The direct quotes are highlighted and italicized.

Q. Do you prefer resolving commercial disputes in court or arbitration?

A. Some participants spoke to the different approaches when comparing international against domestic arbitration. For example, there is more uniform support for arbitration in the international arena, particularly where an aversion to American-style litigation exists. One participant suggested that domestically, some prefer arbitration to avoid the vagaries of litigation in certain jurisdictions or with juries. Conversely in the domestic setting, some suggested that litigation could offer an advantage where clear rules on dispositive motions were available, or where a jury waiver could be included.

One participant noted that the starting question to any client is, "What do you want?" If the reply is, "I want a good arbitration clause" or "I want a good litigation clause," then there is a need to investigate further to ensure client satisfaction, delving into how the client understands the processes at play and considers how a dispute may unfold. Included in this exploratory exercise is assessing the preferred venue or seat of arbitration – critical to determining which avenue of dispute resolution is most successful (and thereby preferred) in both international and domestic settings.

Q. Do you advise clients to include arbitration clauses in commercial agreements?

A. The participants generally agreed that they advise arbitration where a client seeks a reasonably fast, efficient, and private proceeding—and especially in intellectual property and patent matters where confidentiality is a large concern. Hand-in-hand with any pro-arbitration approach is a focus on education regarding effective arbitration agreements, to avoid drafting inefficient or pathological clauses.

> *There has definitely been increased creativity in clauses that hasn't necessarily helped the process, prolonging contract negotiations and allowing more items to get through [into the clause], which we have to later act on, which is difficult.*

Some noted that simply denoting "arbitration" without further defining the process is too general and could result in inefficiencies. Also cited as problematic were clauses that are too complex, especially where they establish significantly abbreviated timeframes without enough contemplation. In addition, participants spoke to the problems of including boilerplate clauses from prior transactions that might be more easily accepted because they alleviate the need for negotiation.

> *Interesting challenges for law firms exist in terms of sensitizing the lawyers actually drafting agreements. By and large, transactional lawyers need to be sensitized and trained to speak with their arbitration specialists to save a lot of heartache in terms of the drafting of the clause.*

Several participants noted the importance of identifying desired attributes in arbitrators (e.g., expertise, number of years in a particular practice, etc.) in the clause. Some suggested drafting mediation as a precursor to arbitration. One participant noted that in the insurance/reinsurance context, mediation has gained momentum as a pre-arbitration step in both the domestic and international arenas.

Institutions, including the AAA, have introduced mediation as a mandatory process (R-9 of the AAA Commercial Rules) when arbitrating a commercial matter with claims above $75,000. Many found the introduction of mandatory mediation procedures via institutional rules useful, particularly where a mediation provision was not included in the contract. Others noted that the ability of any party to unilaterally opt out of mediation makes it all too easy to bypass the mediation process.

Participants also appreciated the flexibility that arbitration affords, while permitting access to courts for a narrow range of issues including emergency or interim relief, in addition to the option of obtaining such relief within the arbitral forum through AAA's and ICDR's Rules. One participant also cited to the use of asymmetric or hybrid arbitral clauses (i.e., where the clause provides for one method of dispute resolution but also gives one or both parties the right to elect a different dispute resolution forum), which can increase a party's support and use of arbitration, particularly where the party has greater exposure to risk, and can access the benefit of both worlds.

Q. Is the use of arbitration growing at your law firm/company?

A. The general consensus was yes, that the use of arbitration is growing. However, participants also candidly shared concerns about inefficiencies in the arbitration process that result in frustrations that may impede increased growth in the use of arbitration.

"I've found often there can be more mischief in ad hoc arbitrations, where someone doesn't want the dispute speedily resolved, and you end up fighting about things and it takes a lot of time."

Many cited to the woes of scheduling and expense with a three-person tribunal. For example, the exponential increase in time to select a three-person tribunal as against a single arbitrator. Participants also offered examples of large time gaps between the first and second set of hearings. Others acknowledged that flexibility within arbitration can be a downside, with the tribunal bending backwards to allow amendments and changed theories of the case as opposed to enforcing scheduling deadlines. Finally, some cited to the pool of arbitrators, in certain contexts, being viewed as a club, and the need for additional people to the pool of arbitrators.

One participant acknowledged that when looking at the cost of a three-person tribunal when compared against what counsel charge the client, the tribunal cost is not so problematic. The greater concern is that a single adjudicator can get it wrong, and with a three-person approach, there are fewer risks of one individual misapprehending the law or facts. Another example offered against time and cost with a sole arbitrator was a matter where it is taking over six months to select a sole arbitrator.

There was also debate as to whether parties should have access to an arbitrator's redacted decisions. On one hand, some participants felt that understanding the manner in which an arbitrator thinks and rules is an added advantage in the arbitrator selection process. On the other hand, other participants focused on an arbitrator's expertise and noted that they would not want to use arbitrators whose decisions are regularly published, particularly where their clients value the privacy of arbitral decisions.

Q. What role should an institution or provider play with respect to policing specific aspects of the arbitral process (e.g., monitoring arbitrator billing, determinations, etc.)?

A. There were varying opinions regarding the degree to which institutions should monitor or question arbitrator bills**.** One participant acknowledged that when parties constitute a tribunal, time is spent customizing, which includes reviewing arbitrator rates and billing practices. Another participant noted that attention must be given to who is complaining. Often, the loser complains about fees (in the context of fee-shifting). Conversely, one participant readily noted reviewing an arbitrator's bills and costs, flagging excessive hotel or meal costs. It was pointed out that arbitrators serving on AAA matters must adhere to specific billing guidelines. Another participant expressed the view that institutions should explore the feasibility of providing arbitrator billing statistics (e.g., average billing per matter, average number of hearing days per matter).

Some suggested the need to patrol arbitrator timelines. Participants cited examples where an arbitrator embraces a laissez-faire attitude towards the longest common denominator, extending deadlines and allowing for amendments of pleadings to get confirmation of the Final Award.

When further asked to compare ad hoc arbitration against institutional arbitration, the participants overwhelmingly supported institutional arbitration, because of the institutional assistance in dealing with arbitrator disclosures and removal, finances and scheduling.

I've found often there can be more mischief in ad hoc arbitrations, where someone doesn't want the dispute speedily resolved, and you end up fighting about things and it takes a lot of time.

Q. What are your views on an appellate arbitration process?

A. Most believed having an arbitral appellate process could be helpful in limited circumstances. One participant noted the influence of selecting a single arbitrator over three where appellate rules are in play as a fail-safe.

> *[Appellate arbitration] is an extra procedure to allow for protection of the process, particularly with the increasing use of interlocutory and dispositive motion practice in arbitration.*

Q. What within the arbitral process needs the most improvement?

A. Some spoke to the lack of a uniform standard for conflict checks and the lack of time markers (e.g., 10 years) to assess and investigate relevant conflicts—all of which can impact later arguments as to award enforceability.

> *Conflicts are the major problem, but it starts with having some check-off as to what we're able to get and to discuss with the arbitrators.*

Others raised caution when dealing with substantive disclosure standards in international arbitration. Others acknowledged that where standards are amorphous, whether in the domestic or international arena, delay is the inevitable result as parties and counsel get more information from arbitrators, thereby extending deadlines and timelines.

> *The level of disclosure varies widely from nothing to tedious. There's definitely information I'd like to have. I'm not going to pick someone that I've been in front of, and I don't want opposing counsel to do it either, and arbitrators don't always disclose this. Sometimes the standard of what is a conflict to remove an arbitrator vs. having an arbitrator reaffirmed is very amorphous to me.*

It was pointed out that many institutions, like the AAA, provide Disclosure Guidelines to arbitrators in advance of any disclosures. .

Q. Is there a need to modify institutional rules or procedures to manage domestic LCC cases?

A. Some participants encouraged increased procedural guidance and requirements to regulate motion practice, simultaneously raising an eye of caution to "judicializing" arbitral proceedings. Frank comments ensued as to the use of court trial practices that could be similarly effective in arbitration (e.g., pre-motion conferences, short summaries). Dispositive motions in arbitration reigned center stage in commentary—of a recent vintage within institutional rules are procedures that specify the circumstances in which dispositive motions may be granted (e.g., the AAA's Commercial Rules as of October 2013). One participant provided an example of a case where institutional rules did not provide guidance as to dispositive motions. Multiple rounds of dispositive motions with multiple respondents and massive motions to dismiss ensued, with additional rounds of summary judgment motions. The process became much more expensive than in anyone's wildest dreams, taking four years to issue a Final Award. In theory, such motion practice was included to reduce costs.

> *Are there ways to make dispositive motions more predictable—interim fee-shifting to prevent frivolous filings, timing, threshold, etc.?*

A number of participants felt that it would prove useful to include a discussion of dispositive motion practice during the preliminary call with the tribunal, and even to include reference to such motion practice in preliminary conference checklists (e.g., within P-2 of the AAA Commercial Rules). The general sense was that if interim fee shifting existed, an institution's dispositive motion rule would have greater impact toward efficiency.

> *Dispositive motions need to be dealt with right away, and not considered at the time of the hearing on the merits.*

Other participants acknowledged that they prefer fewer rules, with a focus on discussion as between the tribunal and counsel, with party assent and agreement towards workable procedures. One participant cited a case in which dispositive motion practice put in place by the tribunal and the parties despite the absence of institutional rule, helped reduce timelines with increased client satisfaction.

> *My experience in recent years regarding dispositive motions (with New York as the seat) is there is much greater openness on the part of arbitrators to grant dispositive motions where the case is significantly limited in scope (e.g., non-signatory parties to the agreement, statute of limitations, and release regarding breach of a settlement agreement). There must be clear, practical impact on proceedings.*

Q. What do you think the future will be like five to ten years from now?

A. One participant was eager to see online dispute resolution become a reality, making headway similar to its appearance in some consumer arenas and stressed that online dispute resolution would be valuable for

improving time/cost/efficiency for smaller commercial disputes.

> *I can imagine the day when "live" (as in everybody in the same room) arbitrations will be the exception, because the technology of remote participation is so easy and cheap. That means, among other things, that the calculus of expert neutrals and the cost of hearing changes, because you could have a terrific expert neutral, in a distant location, at no additional cost.*

Others spoke to easily accessing information on arbitrators through searchable databases complete with pictures and even personal data.

Conclusion

This was the first of many roundtables the AAA initiated this year in an effort to solicit input from those active in the process as to how best to improve the handling of large, complex arbitration cases. A number of additional roundtables are scheduled across the nation throughout the remainder of the year to provide additional insight and obtain more information and feedback from end users in various locales. As a follow-up to this series of roundtables later this year, the AAA will issue a survey to hundreds of attorneys that handle large, complex arbitration cases in order to obtain additional feedback and data. It is our hope that collectively we can apply the feedback in meaningful ways to improve the state of dispute resolution and expand its use across the globe.

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Civility—and the Quaker History of Arbitration: An Interview with F. Peter Phillips

Interviewed by Laura A. Kaster

LK: I know you are doing work on the connection between the early Quaker practice of arbitration and the development of arbitration in the U.S. Can you tell us something about what led you to this topic?

Peter: Sure. I am a Quaker myself, and I contribute time to both my local Monthly Meeting and the New York Yearly Meeting—the body that periodically gathers all of the 90 or so meetings in New York State and parts of Connecticut and New Jersey. Like all congregations, Quaker Meetings experience internal conflict from time to time, and I joined a standing committee within the Yearly Meeting to assist local Meetings who were experiencing difficulties they could not immediately manage. Pretty soon I became curious about the traditions and practices of Quakers in this respect from their founding in 1647 up to now. As so often happens, the more time I spent the deeper I got into it, and the more interesting it became.

LK: What was the underpinning—if you will, the origin story—of Quaker arbitration?

Peter: Well, the early Quakers had a vision of a peaceable kingdom—a way of living with integrity as a "covenanted community" where their lives would be conducted as a testimony to their beliefs. Simplicity, for example—plain dress and plain speaking. Integrity—not taking oaths in court because there was no distinction in speaking truth at all times. Equality—not doffing your hat to those of a higher class, women and men having equal voice in the affairs of the church, and so on. A critical part of this "covenanted community" was that conflicts that arose within the group should be handled within the group, and quickly, so that peace would be restored. That meant not going to law, for example—if someone encroached on your land or refused to pay a debt, you were to go directly to that person and work it out. That failing, you approached a second time with a few other Quakers joining you as mediators. That failing, you took it to the church for adjudication. But you never, never went to the courts—at least not unless the Meeting itself said it was okay to do so. (By the way, this three-step process is found in Matthew 18:15-17, and weirdly is reflected to this day in many companies' employment dispute management programs. Who says the past is not prologue?)

LK: So a primary reason for the creation of this remedy was to maintain group cohesion or relationships and avoid the antagonism created by a long litigated dispute?

Peter: More the first than the second, I would say. Litigation was out of the question, really. Litigating was like saying, "I don't care about my community and I'm not accountable to the rest of my Quaker brethren, I'm just gonna sue." It just wasn't done. And if it happened—or if the matter went to arbitrated adjudication within the Meeting and a party refused to abide by the Meeting's final award—the member was "disowned," which is Quaker-speak for being shunned or kicked out.

LK: How was this process to be achieved?

Peter: The Quaker Books of Discipline that were promulgated by the various Yearly Meetings in the late 1600s and early 1700s, to guide the various constituent Monthly Meetings, had a provision usually called something like "Disputes and Arbitrations," and it set forth the three-step practice, sometimes in colorful detail.

LK: When does this practice begin and how much do we know about its success?

Peter: The earliest example of the guidance that I found was the London Yearly Meeting's publication, which was dated 1692. As far as actual arbitrations go, if you look up the proceedings of Monthly Meetings on microfilm in the Quaker Library at Swarthmore College, you can find lots of examples of arbitrations that were conducted in American Meetings during the 1700s. And they are fun to read, with all the weird spelling and so on. Just about every one follows a similar story—Friend Nathanial So-and-So reports that Friend Sheldon This-and-That has refused to tend his horses as promised, and efforts to persuade him of his error have been unavailing, and Friends have labored and intervened between them without success, and therefore A, B, C, D and E are hereby appointed to hear this dispute and finally determine it, and Friend Nathanial and Friend Sheldon acknowledge and accept their appointment and promise to abide by their decision. Or words to that effect. One of my favorites involved somebody losing his temper and throwing his neighbor in the lake, and he wouldn't make amends because the neighbor deserved it, dammit. And this was the way it was for a long, long time. The Book of Discipline for New York Yearly Meeting had a section on "Arbitration" until 1950—though I didn't find a lot of examples of its actually being used after the early 1800s or so.

LK: Do we know whether the Quaker practice of arbitration actually impacted the adoption of arbitration in the wider commercial community and eventually into statutory law?

Peter: Oh, I think it undoubtedly did, at least from what I've read. There's a scholar at the University of Missouri named Carli Conklin who has written one of these excruciatingly detailed law review articles that suggests very strongly that state arbitration statutes in New Jersey, Pennsylvania and New York were enacted pretty much with the sole intent of assuring the integrity and enforceability of Quaker arbitration decisions. Mind you, in the early 19th century Quakers were a dominant influence in these jurisdictions –very influential farmers, manufacturers and traders—and had been since colonial times.

LK: Were the goals of early business guilds and communities similar to those of the Quakers?

Peter: Well, here is where it really gets interesting—at least for me. This practice of private commercial dispute resolution goes back centuries before the Quakers. You attend a performance of Wagner's *Die Meistersinger* and here in 1500s Nuremberg come the cobblers, the bakers, the wool-makers… When someone had a problem with his shoe, he went to the shoemaker. And if he didn't obtain satisfaction he took it to the shoemaker's guild. The guild members wanted to ensure a certain quality of shoes and a certain reliability of trade, and if a shoemaker messed up, he either made good on it or risked being tossed out of the guild. And who would buy a shoe from someone who got kicked out of the guild? So it was mercantile and commercial pressure that encouraged the development of arbitration (while at the same time keeping up a high standard for shoes, by the way). The law followed, almost an afterthought. A Quaker, a dressmaker, a gold-dealer, a cotton merchant, a tailor—all brought disputes to the respected elders in their fields, who knew the craft and knew the people involved and decided the matter once and for all in a few hours. (Tom Stipanowich at Pepperdine is a real expert on this guild-pressure-arbitration history, by the way.)

LK: Do you believe that today many business clients have the same goals?

Peter: Now, now, Laura. Up to now there have been no loaded questions. But let me try this out on you: Until the mid-1800s, injecting a lawyer into a commercial matter was broadly disapproved. Lawyers were held in low esteem. They were seen as stirring up trouble, adding costs, telling lies, and so on. After the mid-19th century, though, something changed about the law, or lawyers, or clients, or something, because now—at least in the United States—you no longer have a shoe that doesn't fit well, you have a legal claim. In my personal experience, this is in large part a cultural thing. For example, about 10 years ago I spent a morning in a resort outside of Geneva, talking to a group of about 30 high-powered insurers and reinsurers about building mediation protocols into their agreements, and after lunch they pretty much went home from boredom. "We don't need mediation," they said. "If there's a problem that our claims people can't solve, we meet each other for lunch and work something out. I put it in my black book and next time they owe me. We've done business with each other for centuries that way." Imagine American companies acting that way with each other—or their lawyers allowing them to do so. Whether that difference in attitude is because of lawyers, or lawyers are because of the change of attitude, I think neither Warren Burger nor I could guess.

LK: How can advocates in arbitration best serve their clients' needs in these respects?

Peter: Well, here we come to the nitty-gritty. If you take the history of arbitration at face value, it arose from a desire of a small group with shared values to address and promptly resolve disputes. Jewelers resolved jewelry disputes, Quakers resolved Quaker disputes, and so on. If that concept still has meaning, then advocates in arbitration are there to assist their client to get a prompt and final resolution without the impediments of legal process, and within the standards of the group rather than the law. And that's it. Now, I admit that this is the vantage point of an idealist or an academic. But then again I am idealistic, and I am an academic, so why not? If you accept the paradigm I've outlined, then the lawyer's proper role in commercial arbitration, at the core, is not to argue that there should be no arbitration, or that the arbitrator is unsuitable, or that the arbitration needs to await court proceedings, or that the award is unenforceable, or that the arbitrator got it wrong, or any of the stuff we learned to do as litigators and that the FAA permits (perhaps encourages?). Were we true to the process, then we lawyers are there so that our merchant client gets a commercially rational decision quickly, clearly and fairly, and can go on her merry way and make more money. She sure isn't making money spending her day reviewing a brief to vacate before a Circuit Court of Appeals, two years after issuance of an arbitrator's award.

LK: And where does civility come into this?

Peter: I hope it's plain on its face. Arbitration doesn't just value civility among the participants—it relies upon it. Civil conduct is the only way to conduct a private resolution process consistent with its goals. Here's where the marriage of ADR and civility comes in. It's a shotgun marriage really—you don't do it because it's nice; you do it because it's the only way to get the job done. This thrashing about and insulting people during five-day depositions and so on, it just has no place in commercial arbitration—or should I say it didn't until relatively recently. And we all know it, intuitively. Any arbitrator who has listened to a snarky or aggressive or caustic lawyer during a hearing—I don't know, it just comes across so poorly, so cringe-worthy. I believe the reason is that, somewhere, in some vestigial place in our collective memories, we know that we are in this room to resolve

a problem between two merchants, not to show off how cool our lawyer skills are.

LK: And what about arbitrations involving non-merchants, like employees and consumers and….

Peter: Please, Laura. Please.

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Court-Related Mediation—Early and Flexible Leads to Success

By Jennifer Shack

"Mediation would be a waste of time. This case will never settle." "It's too soon to mediate. We need more information." These, or similar statements, are common in courtrooms around the country. On the surface, it may seem that the lawyers making those claims would know best. Sometimes they do. But, it is also clear from research that lawyers may do well to become more flexible in determining whether and when to mediate. Perhaps most of all, lawyers should become proactive in deciding early what is best for each particular case.

"[C]ases ordered to mediation may be as likely to settle as those in which the parties request mediation."

Studies of court-connected mediation programs have found that those cases ordered to mediation may be as likely to settle as those in which the parties request mediation, indicating that even when lawyers and their clients are disinclined to mediate, mediation can result in settlement as often as when they agree that mediation would be helpful. Other studies that looked at the effect of timing of mediation have found that early mediation is more likely to result in settlement, and may well reduce litigation costs. The additional benefits of mediating early, according to those who regularly implement early dispute resolution, are reduced exposure, greater control over the dispute and better relationships with their counterpart.

The Effect of Mandating Mediation

Most experienced mediators have stories of successful mediations in which the attorneys told them at the outset that there was no way the case was going to settle, that mediation would be a waste of time. These stories, and related research, indicate that lawyers are not always correct in their assessments of the amenability of a case to mediation. While it might make sense that parties are less motivated to settle if they are being ordered to mediate, research has not borne this out. A review of studies comparing the probability of settlement found that, at least in programs in which some cases were ordered into mediation, there was no difference in settlement rates between those cases ordered to mediation and those programs in which mediation was requested.[1] A study of civil case programs in Ohio likewise found that cases ordered to mediation by the judge were no less likely to settle in mediation than those in which the parties requested it.[2] A study of five pilot programs in California noted that mandatory programs had lower settlement rates than voluntary ones, but that those differences faded when the procedure for mandatory referral was by order of the judge rather than automatic for all cases.[3]

The similar settlement rates between mandated and voluntary mediation may be due to parties being motivated to settle because they believe the judge wants them to. It is also possible that the ordered parties are already motivated to settle. It also may be that the order to mediate reduced or eliminated the lawyers' fears of looking weak if they suggested mediation. Or it may be some combination of these.

In addition, mandating mediation does not appear to have an effect on the parties' perception of the mediation. In Ohio, parties who were randomly assigned to mediation or ordered in by the judge were as likely to view the process as fair as those who requested mediation on their own.[4] This supports the findings of two previous studies, which found that whether the parties requested mediation or not did not have an effect on the parties' perceptions of the mediation as fair.[5]

"Three empirical studies have all found that mediating early is more likely to result in settlement than waiting to mediate later in the litigation process. Conversely, no study has found settlement to be more likely if mediation occurs late in the case."

The lesson from these studies appears to be that judges should not be shy about ordering cases to mediation if they think it appropriate. Ordering mediation can provide attorneys who are open to mediation, but cautious about tipping their hand, the "cover" they need to get the case to mediation and, hopefully, find resolution. An additional lesson from the study is that lawyers should remain open to giving mediation a real try when the judge orders their cases to mediation by preparing thoroughly and being a willing and active participants in the process.

Timing of Mediation

Although mediation is commonly used to resolve civil disputes, the tendency is to use it during the later stages of litigation. Fear of being seen as weak, concern about negotiating without having conducted considerable discovery and, perhaps, just general inertia keep counsel from adopting early mediation. Despite this reluctance to mediate early, research shows that doing so enhances the desired benefits of mediation.

Three empirical studies have all found that mediating early is more likely to result in settlement than waiting to mediate later in the litigation process. Conversely, no study has found settlement to be more likely if mediation occurs late in the case. A study of civil cases in Ohio found that cases that were mediated within six months of filing were more likely to settle, and that those cases that were mediated more than a year after filing were less likely to settle than those mediated between six months and a year after filing.[6] Another study of an early mediation pilot program in California found that those cases that went through the pilot program were 30% more likely to settle than those cases that participated in mediation later in the litigation process.[7]

The third study, which looked at cases in Slovenia, found that cases mediated before the first court hearing were 170% more likely to settle before that hearing than similarly-situated cases that did not mediate, while those that were mediated more than 500 days after filing were only 70% more likely to settle. The trend toward lesser likelihood of settlement through mediation continued as the case progressed. Those cases that waited to mediate 800 days or more from filing were less likely to settle than those that did not mediate.[8] These results indicate that mediation may have its greatest impact on settlement prior to going to court. Mediation may also save on litigation costs. In the California study, lawyers who mediated early estimated greater savings than those who mediated at the usual time in the case.[9]

The effect of general timing of mediation on the probability of settlement is most likely related to the progress of the case. That is, it is not the elapse of time that correlates with whether the case settles or not, but what occurs in that time period. For example, when attorneys do not have critical information, settlement is less likely, so mediation before any discovery has been done could well be premature and unsuccessful. Additionally, studies suggest that when dispositive motions are pending, attorneys are less likely to settle. In a study of 152 civil cases filed in Georgia, 81% settled if the mediation occurred after the motion was decided, while only 19% settled when the motion was still pending.[10] Data from a second study, of civil cases under $25,000, also suggests that it makes sense to wait for a pending motion to be decided.[11] On the other hand, it is clear that waiting to mediate until all discovery is completed is not helpful to settlement and likely adds to the overall litigation costs.

Planned Early Dispute Resolution

The positive impacts of early mediation can be enhanced through planned early dispute resolution (PEDR). Generally used by in-house counsel, but worth considering more broadly, PEDR treats disputes systematically at the early stages, rather than depending on an ad hoc approach. While PEDR as used in-house is not confined to mediation, it commonly relies on it as an essential component. The corporations that have developed PEDR programs report savings in litigation costs and management time, as well as greater control over the dispute and its outcome, and better relationships with the other disputant.[12]

Whether part of a planned program or decided upon ad hoc, early mediation requires early case assessment. In interviews with researchers John Lande and Peter W. Benner, in-house counsel for corporations that instituted early dispute resolution programs said early case assessment was essential to the success of their programs.[13] It leads to better understanding of parties' needs and options, which, in turn, increases the probability of early settlement. Early case assessment is also used for individual cases even when PEDR is not in place. This allows counsel to approach conflict proactively, rather than reactively, and ensures that disputes are handled according to the company's business goals.[14]

Mediating early has benefits that lawyers should consider at the outset of each case, whether as part of an overall PEDR program or as part of an individualized case assessment. A proactive approach to mediation may not only enhance the possibility of settlement and save in litigation costs, but can also increase the lawyer's control over the case.

Conclusion

Lawyers who consistently object to orders to mediate and wait to mediate until discovery is substantially completed may be doing a disservice to their clients. Settlement in the end appears to be dependent upon the individual parties and their counsel, and not on whether parties are required to mediate. Parties also do not appear to view mediation differently if they have been ordered to participate. Whether mandated or not, they believed the process was fair. Thus, by participating fully in mediation, lawyers provide their clients with a fair process that may well lead to earlier settlement and lower costs. This is particularly true when mediation is conducted early in the case. Settlement is more likely, litigation costs may be saved and litigators maintain more control over the dispute when mediation happens early. Adopting a systematic approach to early dispute resolution can enhance these effects. Though there are reasons not to mediate a case early, waiting to mediate should not be the default option.

Endnotes

1. Roselle Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 Ohio St. J. on Disp. Resol. 641, FN 137 at 677 (2002). Two of the four studies reviewed found no difference in settlement rates between those referred automatically or ordered individually to mediation and those who requested it. Two others found that cases randomly assigned to mediation were less likely to settle than those who voluntarily entered it. It should be noted that differences between comparison groups may have confounded the findings.
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3. Heather Anderson & Ron Pi, Judicial Council of California, Administrative Office of the Courts, *Evaluation Of The Early Mediation Pilot Programs*, at 38 (2004), available at http://www.courts.ca.gov/documents/empprept.pdf.
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8. Peter Grajzl & Katarina Zajc, Litigation and the Timing of Settlement: Evidence from Commercial Disputes (CESifo, Working Paper Series No. 5520, 2015), available at http://ssrn.com/abstract=2676011.
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10. Naman L.J. Wood, *Can Judges Increase Mediation Settlement Rates? Of "Coase" They Can*, 26 Ohio St. J. on Disp. Resol. 683 (2011).
11. Michelle Hilliker, Michigan State Court Administrative Office, Office of Dispute Resolution, Mediation After Case Evaluation: A Caseflow Study of Mediating Cases Evaluated Under $25,000, at 7 (2011). The data in this study suffered from a small sample rate, making it impossible to draw definitive conclusions.
12. John Lande & Peter W. Brenner, Why and How Businesses Use Planned Early Dispute Resolution (University of Missouri School of Law Legal Studies Research Paper No. 2016-03), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2722664.
13. *Id.*, at 31.
14. *Id.*

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Technology in Court-Annexed Mediation: Policy and Praxis

By Dean W. M. Leslie

Recent developments in technology pose special challenges to, and provide unprecedented opportunities for, court-annexed mediation processes. The true administration of justice raises legitimate philosophical questions for unearthing the conjunction of theory and practice (the praxis) in applying the latest, and even the more prosaic, technologies.

"The problem arises that practitioners, judges, and the public not only have differing understandings and expectations around mediation, but also around what constitutes court-annexed mediation."

The areas of consideration can, and should, include mediation policy, preparation for mediation, the mediation process, the conclusion of mediation that is running in parallel with litigation, and the prognosis for the integration of those considerations in the future. This article will focus primarily on the first of these areas, to wit, the policy questions behind integration of technologies into court-annexed mediation, their relationship to the expectations of the public, the bar, and the judiciary, and recommendations for the development, dissemination, and praxis in connection with cohesive policy.

What Are We Talking About?

It is critical to understand what is meant by court-annexed mediation. There are any number of different, equally plausible answers to this question. Those answers can lead to drastically differing policy positions. In a lay context, mediation means "the act or process of mediating; especially intervention between conflicting parties to promote reconciliation, settlement, or compromise."[1] In popular legal parlance, mediation refers to "nonbinding intervention between parties to promote resolution of a grievance, reconciliation, settlement, or compromise."[2] However, both of these definitions are slightly off the mark. For instance, in a court context, there are separate and distinct meanings and processes related to "mediation," "conciliation," and "settlement."[3] While mediation, with a lower case "m," may include all of those meanings and processes, mediation, with an upper case "M" may mean something quite different, for example, the methods delineated in the Uniform Mediation Act (UMA).[4]

The problem arises that practitioners, judges, and the public not only have differing understandings and expectations around mediation itself, but also around what constitutes court-annexed mediation.[5] As an additional complication, some courts in New York do not even have voluntary court-annexed mediation,[6] while others have recently expanded mandatory programs.[7]

Who is mediating can also have a direct effect on the mediation experience for the parties. For instance, while a judge, versed in settlement conferencing, might balk at the dreaded "ex parte" communication during a mediation, that very form of communication is the cornerstone of Mediation. Moreover, while it might occur to a judge or judicial referee to create so-ordered interim stipulations as the parties agree to dispense with various aspects of a dispute, most versions of the UMA specifically prohibit a mediator from making a "report, assessment, evaluation, recommendation, finding, or other communication regarding a mediation to a court, administrative agency, or other authority that may make a ruling on the dispute that is the subject of the mediation."[8]

Compounding the practical definitional problem with mediation is the open question of the theoretical expectations of "court-annexed" mediation. For example, one scholar describes court-annexed mediation as one of three things: (i) mediation that has been specifically ordered by a court; (ii) mediation that occurs per general court orders (e.g., standing orders that all family law cases will be mediated before a trial date is set); or (iii) mediation of any and all matters that will of necessity be litigated (e.g., damage awards to minors, divorce actions).[9] This understanding of mediation is not complete, as many courts, for example the United States Court of International Trade (USCIT), have mediators or judges that serve in a mediation capacity within the court. Under USCIT rules, "[a]ny judge may [refer a matter to a Judge Mediator for] Court-Annexed Mediation...in response to a consent motion from all the parties which requests mediation, in response to a motion from one or more parties, or...sua sponte...."[10]

Another approach to the definitional problem is offered by the German experience with its Draft Mediation Act (DMA). The DMA sets the categories of mediation, which include mediation independent of any pending judicial proceedings (*außergerichtliche* Mediation), mediation that occurs during pending judicial proceedings but outside the court (court-annexed mediation, or *gerichtsnahe* Mediation), and mediation carried out by judges during a pending court matter, but outside their capacity as judges (court-integrated mediation, or *gerichtsinterne* Mediation).[11]

Given these complexities, the expanded role of mediation within the courts, including by court-affiliated persons, and the potential adoption of the UMA in New York,[12] New York courts must eventually send clear signals to practitioners and laypersons as to what is meant by court-annexed mediation, and what policies are being

addressed. In addition, as mediation within the courts develops, special attention must be given to the parallel track of justice, and the conception of justice that is attributable to stakeholders; after all, most courthouses offer promises, in rock, on their facades, about the preservation and protection of justice. Court-annexed mediation policy must, therefore, be responsive to such promises, and development of policy in the area must, by definition, include consideration of these granite-engraved pacts with society.

To Automate or Innovate? That Is the Question.

It has been suggested that many studies of alternative dispute resolution (ADR) are outdated, and founder in the face of the growth of court-affiliated ADR in the 21st century. One commentator notes that "[t]he second generation of ADR research should focus not on whether courts should use ADR, but on how mediation and other ADR processes should be conducted."[13] Although referring to Canada, another commentator cited Ontario Former Chief Justice Winkler in asserting that "we have entered the 'Enlightened Age of Mediation[, and] Mediation is the cornerstone of the justice system . . . . Mediated settlements, not trials and appeals, not even summary judgment motions, have become the most likely way to resolve a dispute."[14] The question of how to integrate technologies into mediation, and, indeed, jurisprudence, presents the age-old policy dilemma of choosing the correct mixture of automation and innovation.

"… the admonition not to 'pave the cow path' reminds us not to indolently automate by adapting technologies to traditional methods, but to diligently innovate by adopting new methods."

The policy dilemma related to automation is encapsulated nicely in a poem written by Sam Walter Foss (1858-1911), originally of New Hampshire, called "The Calf-Path."[15] The poem, perhaps apocryphally, refers to the street plan of Boston, Massachusetts. The story goes that when the city of Boston was new and unpaved, the civil engineers decided against laying out a new street plan, but instead chose to simply pave the paths that had been worn by cattle. As anyone who has had occasion to drive in Boston will attest, the result was a somewhat incomprehensible street plan that generates significant traffic. Thus, the admonition not to "pave the cow path" reminds us not to indolently automate by adapting technologies to traditional methods, but to diligently innovate by adopting new methods.

A straightforward example of how courts may be missing this point is the widespread translation of the same do-it-yourself forms created 50 or 75 years ago, into electronic formats. Such reliance on pure automation is not only unlikely to offer the best outcomes, but will ultimately fail to capture the best capabilities of new technologies. It may be more effective to engage fundamental innovations, such as report generation programs, to evolve forms rather than enshrine them. Given the technologies of today, few persons would design judicial procedures that bear any resemblance to the current ones; yet, as creatures of habit, courts cling to automation.

In order to extract the maximum benefits of new technologies, judges and judicial representatives must partner with technology firms and providers. An example of the power of innovating over automating, and fostering partnerships between the courts and the private sector, is given by the recent projects of the Hague Institute for the Internationalisation of Law (HiiL), a not-for-profit foundation based in The Hague that focuses on creating new procedures to address justice-related problems in areas such as divorce and landlord-tenant disputes.[16] HiiL is now partnering with the Swedish Embassy in Uganda and The Hague Institute for Global Justice to develop the Justice Needs and Satisfaction tool, which provides data about the justice needs of citizens and data on the quality of their justice journeys. In addition, HiiL is bringing its technology to British Columbia in order to provide access to a range of new tools to resolve their legal problems.[17] The Dutch Legal Aid Board is also working on developing an interactive diagnosis and triage website, originally launched in 2007, to innovate online dispute resolution.[18]

Why Not Let the IT Professionals Handle Everything?

While is easy enough to say that we must innovate and not simply automate, innovation is fraught with potential missteps because the persons who are best suited to innovate (the IT professionals) are not necessarily the same ones who are acquainted with the nuance and history of justice (judges and lawyers). As such, courts must set clear parameters for the integration of technologies, which should include, at a minimum, attention to four components of justice: distribution, procedure, retribution, and restoration.

Distributive justice, often cited as a component of egalitarianism and utilitarianism, concerns the allocation of the fruits of society through attention to equity, equality, power, need, and responsibility.[19] Procedural justice addresses fairness in dispute resolution and resource allocation. In *A Theory of Justice*, the philosopher John Rawls distinguished perfect procedural justice (encompassing not only independent criteria for a fair outcome, but the method of achieving that outcome), imperfect procedural justice (which only encompasses the independent criteria for a fair outcome), and pure procedural justice (which only encompasses the method of achieving the outcome).[20] Retributive justice, with underpinnings of deterrence, concerns itself with the punishment of offend-

ers rather than on rehabilitation, and rests on the principles that criminals deserve punishment, from a legitimate punisher, in proportion to the wrong committed.[21] Finally, restorative justice, which attempts to identify and address the root causes of crime, focuses on the rehabilitation of offenders through reconciliation with victims and the community at large.[22] Individuals and groups may have differing aims and orientations with regard to these aspects of justice, and these differences may confound or create support for policy decisions.

"…the bar, the courts, and the public all have critical roles to play in the development of effective and long-lasting policy in the area of court-annexed mediation in particular, and in the area of the integration of technology into jurisprudence in general."

Against the backdrop of the aims of justice, the stakeholders in the process of formulating policy for the integration of technology into areas such as court-annexed mediation may have additional concerns. Courts may also want to address issues of the transparency of the mediator's procedures, the independence of the mediator from decision-makers within the same court, and impartiality. At the same time, the mediator within the court must avoid the moral hazard presented by self-imposed, or administratively levied, pressure to be effective in resolving cases, as well as the ethical dilemmas that may arise from working within the courts and maintaining confidentiality. Moreover, the bar and the public will be sensitive to issues of due process, equal protection, accessibility, flexibility, affordability, and general fairness.

At a recent presentation on Technology in Alternative Dispute Resolution, one practitioner expressed concern that rapid development of technology is leaving jurisprudence and traditional mediation behind. However, the confluence of these areas of jurisprudential concern, which can only truly be understood by legal practitioners, should remove all doubt that the bar, the courts, and the public all have critical roles to play in the development of effective and long-lasting policy in the area of court-annexed mediation in particular, and in the area of the integration of technology into jurisprudence in general.

What Is Happening with ADR in New York?

The State Supreme Court for New York County (NYSSC) maintains a roster of neutral mediators to whom commercial cases may be assigned on a mandatory basis. The first four hours of the mediation are at no cost to the parties; however, if the parties so desire, they may continue the mediation at their own expense in pursuit of settlement. In addition, NYSSC maintains a number of court-connected programs in support of ADR including the Community Dispute Resolution Centers Program, the Attorney-Client Fee Dispute Resolution Program, the Collaborative Family Law Center,[23] a Judicial Mediation Part, and a Non-Jury Post-Note-of-Issue Part.[24]

Legislatively, a bill is before the New York Senate (S4026) seeking to establish the UMA in New York, with special attention to the issues of privileged communication in mediation, the prohibition on certain reports by mediators, and the disclosure of conflicts of interests. The bill would add an Article 74 to the Civil Practice Laws and Rules creating such a privilege against the disclosure of communications, creating a baseline presumption of confidentiality for such communications, setting forth definitions, scope, exceptions, and waivers, and delineating what a mediator may and may not disclose. In addition, the new CPLR article would set requirements for the disclosure of conflicts of interests before accepting a mediation, and attorney representation in mediation. The UMA would also have due consideration for uniformity among the States, and provide for severability.

Why Is this Urgent?

It is fair to ask whether there is any particular urgency around the issue of developing a cohesive policy for innovating court-annexed mediation. After all, there are any number of initiatives under way, and the slow integration of technologies may be a good thing: change for the sake of change is likely to be wrong-headed. This argument ignores the need to get change right the first time. A worst-case scenario is making changes that have deeper implications without recognizing them…this is why practitioners, who understand what due process looks like, who innately appreciate when equal protection is at risk, and who know the purposes and thinking behind court procedures, are so critical to innovation.

One example of a technology that is already in widespread use, which will undoubtedly become part of typical court proceedings, is telepresence. Telepresence refers to a set of technologies which allow persons to feel as if they are present, and to give the appearance of being present, sometimes via telerobotics, at a place other than their true location. Not only will telepresence eventually provide the user's senses with such stimuli as to give the feeling of being in that other location, haptics[25] will soon give the user the ability to directly effect the remote location.

Using telepresence, in a military investigation in State of North Carolina, Afghan witnesses have testified via videoconferencing.[26] In Hall County, Georgia, Southern Business Communications created a customized videoconferencing system for initial court appearances. The system links jails with courtrooms, reducing the expenses and security risks of transporting prisoners.[27] The US

Social Security Administration (SSA), which oversees the world's largest administrative judicial system under its Office of Disability Adjudication and Review (ODAR), uses videoconferencing to conduct hearings at remote locations. In 2009, the SSA conducted 86,320 videoconferenced hearings, a 55% increase over 2008. In August 2010, the SSA opened its fifth and largest videoconferencing-only National Hearing Center (NHC), in St. Louis, Missouri. Since 2007, the SSA has also established NHCs in Albuquerque, New Mexico, Baltimore, Maryland, Falls Church, Virginia, and Chicago, Illinois.[28]

Despite this widespread use, which is poised to continue, there are jurisprudential issues that remain unaddressed. Putting aside the obvious Sixth Amendment issue of the right to confront one's accusers, practitioners have already identified technical issues with eye contact, appearance bias, and signal latency.[29] With regard to eye contact, while traditional telephone conversations give no eye contact cues, videoconferencing systems may create the latent, and potentially incorrect, impression that the party being viewed is avoiding eye contact, and being dishonest. Moreover, the party viewed may compound the impression of being untruthful due to the self-consciousness of being on camera. Finally, signal latency may exacerbate the impression, due to the failure of the party to answer questions promptly.

Where Do We Go From Here?

It is often said that the first step to finding a cure is recognizing the illness. New York faces the reality of being the locus, on average, of three to four times as many filings in its courts as in the whole federal system.[30] As noted by Hon. John T. Broderick, former Chief Justice of the Supreme Court of New Hampshire, "[i]nnovation is no longer just a good idea[, i]t is a prerequisite to survival."[31] Along with the high number of filings, disputes continue to increase in complexity. In such a climate, courts will increasingly be forced to rely on special mechanisms, such as court-annexed mediation, to manage the workload.

In order to be successful in creating effective and nuanced court-annexed mediation, courts will have to tackle the issue of defining court-annexed mediation to comport with the expectations of the public, practitioners, various courts, as well as fellow judges and judicial representatives. In making policy based upon those definitions, courts will be challenged to attract the best private and public partnerships to design programming that embraces technology, and, at same time, serves the needs of the public, engages the most suitable technologies, promotes innovation over automation, and protects prevailing notions of justice. In order to vet that policy and programming, evaluation mechanisms must be established in cooperation with practitioners and the public to foster transparency, the access to, and quality of, justice, and confidence in the courts, as well as in any annexed mediation mechanisms. In approaching these tasks we should not be daunted by their magnitude, but heartened by the words of Mother Teresa: "[w]e ourselves feel that what we are doing is just a drop in the ocean. But the ocean would be less because of that missing drop."

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Endnotes

1. Merriam-Webster.
2. *Id.*, "legal definition."
3. See, e.g., http://legal-dictionary.thefreedictionary.com/Federal+Mediation+and+Conciliation+Service. Definitions offered by the Federal Mediation and Conciliation Service distinguish between mediation (a voluntary, nonbinding form of dispute resolution in which the mediator meets with the parties), and conciliation (a form of dispute resolution in which the conciliator acts as a neutral third party, but typically will not participate in any joint meetings between the parties).
4. The Uniform Mediation Act (UMA) was officially adopted by the full National Conference of Commissioners on Uniform State Laws at its August 2001 meeting in West Virginia. The American Bar Association House of Delegates then voted to endorse the Act at its February 2002 meeting, with only a handful of opposing votes. The UMA has been adopted by the District of Columbia, Illinois, Indiana, Iowa, Nebraska, New Jersey, Ohio, and Washington. In addition, the UMA, a version of it, or similar legislation, is under consideration in Connecticut, Delaware, Florida, Massachusetts Minnesota, Montana, Nevada, New Mexico, New York, Oregon, Vermont, and Wyoming.
5. See, e.g., Committee on Federal Courts Association of the Bar of the City of New York, Court-Annexed Mediation Programs in the Southern and Eastern Districts of New York: The Judges' Perspective (August 2004) at 6 ("[c]ourt-annexed mediation in the Southern District, pursuant to Local Civil Rule 83.12, is very similar to court-annexed mediation in the Eastern District, but there are four significant differences").
6. See New York Law Journal, *Task Force Develops Mediation Program Proposal*, January 25, 2016 ("[a]t its meeting on Nov. 6, 2015, the Executive Committee of NYSBA adopted a proposal mandating that a voluntary court-annexed mediation program be adopted by each New York State court [civil]. The proposal states: "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").
7. See Administrative Order in the First Judicial District, Supreme Court, Civil Branch, of January 28, 2016 (http://www.nycourts.gov/courts/comdiv/NY/PDFs/AO-ADR22016.pdf), supplanting the scheme under which one-in-five commercial cases were subject to mandatory mediation with one where every commercial case is subject to referral to mandatory mediation.
8. See, e.g., UMA, Section 7, http://www.mediate.com/articles/umafinalstyled.cfm.
9. Stephen R. Marsh, http://adrr.com/adr2/essayq.htm.

10. See Guidelines for Court-Annexed Mediation, United States Court of International Trade, http://www.cit.uscourts.gov/Rules/Rules_Forms%20Page/Rules_Forms_Guide_AO%20Page/Rules_Forms_Guide_AO%20PDF's/Guidelines_Mediation.pdf.
11. See http://www.disputeresolutiongermany.com/2011/11/mediation-court-annexed-mediation-and-judges-as-mediators/#sthash.0ABnqmP9.dpuf.
12. See https://www.nysenate.gov/legislation/bills/2015/s4026.
13. *What We Know and Need to Know About Court-Annexed Dispute Resolution*, Deborah Thompson Eisenberg, South Carolina Law Review, Vol. 67:245 at 247.
14. Igor Ellyn, QC, April 2003, *Persuasive Pleadings Promote Satisfying Settlements Sooner (or Drafting Pleadings with Mediation in Mind)*, discussed in Litigating in the Enlightened Age of Mediation in Ontario, Canada: Drafting Pleadings, https://www.hg.org/article.asp?id=7844.
15. See http://www.thepastwhispers.com/Calf_Path.html.
16. See http://www.hiil.org/.
17. See http://www.hiil.org/projects/?type=current.
18. The Rechtwijzer 2.0 application was initially designed to support people with divorce-related issues in The Netherlands. An English version of this module was scheduled to go live in British Columbia and England, and Dutch landlord-tenant and employment modules were scheduled to go live in The Netherlands, in 2015. For more information, see http://www.hiil.org/project/rechtwijzer; see also http://rechtwijzer.nl/.
19. See Forsyth, D. R., Group Dynamics (5th Ed.), pp 388-389, Belmont: CA, Wadsworth, Cengage Learning.
20. See Rawls, John, A Theory of Justice, Chapter II, Section 14, Oxford: Oxford University Press 1999.
21. See Walen, Alec, Zalta, Edward N., ed., Retributive Justice.
22. For a fuller discussion of restorative justice, see Braithwaite, J., Restorative Justice & Responsive Regulation, at 249, Oxford University Press 2002.
23. See http://www.nycourts.gov/ip/adr/Info_for_parties.shtml#courtbasedprograms.
24. See http://www.nycourts.gov/courts/1jd/supctmanh/news_&_announcements.shtml.
25. From the Greek haptein meaning "to fasten," haptics is the science of applying touch (tactile) sensation and control to interaction with computer applications. For more information, see http://www.gizmag.com/haptic-tech-vr-wearables-games-sightlence/35616/.
26. See http://www.networxsecurity.org/members-area/glossary/v/videoconferencing.html.
27. See https://www.lifesize.com/~/media/33E0CAA292494823B530697056BD4894.ashx.
28. See https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-11-11147.pdf; see also https://oig.ssa.gov/sites/default/files/audit/summary/pdf/Summary%2011147.pdf.
29. See http://ldims2009.blogspot.com/2011/04/video-conferencing.html.
30. See https://www.nycourts.gov/reports/annual/pdfs/ar20-1fin.pdf; see also http://litigation.findlaw.com/legal-system/federal-vs-state-courts-key-differences.html.
31. See The Changing Face of Justice in a New Century: The Challenges It Poses to State Courts and Court Management, reproduced in the National Center for State Courts, Future Trends in State Courts (2010), http://cdm16501.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/1631.

Transforming a Fractured Industry: Employing ADR Techniques to Improve Collaboration in the Construction Industry

By Nancy Greenwald

"There's so much finger-pointing in this industry that it's hard to do the job you were trained to do."
Senior Project Engineer

"The contracts, not best practices, dictate how we are sharing the [Building Information] Model."
Project Architect and BIM Manager[1]

Introduction

Given what is known about the costs and causes of construction disputes, the collective failure of the industry to do better seems inexcusable. The primary causes of problems in the industry are process, information, and communication issues. Solutions based on more collaborative project delivery methods like design-build, integrated project delivery (IPD), or Lean project delivery, and on integrative information technologies like Building Information Modeling (BIM) have provided measureable, but incomplete, relief. Changing the ways participants in a construction project approach communication is the key to transforming the industry. This article argues that Alternative Dispute Resolution (ADR) techniques can and should be employed project-wide and from the inception of a construction project to create reliable systems of information exchange and communication, regardless of project size, delivery method, or choice of contract forms, to improve the process and reduce risk and conflict.

We Understand the Enormous Cost of Conflict in the Construction Industry

Observing that the construction industry is fraught with conflict is nothing new. Yet the costs of construction conflict continue to be staggering. The global average dollar value of construction claims in 2015 was $46 million.[2] The National Research Council reports that the transactional costs for resolving disputes on construction projects ranges from $4 billion to $12 billion each year.[3] The indirect costs can include the loss of quality in the project, loss of timely use of the project, the loss of productive time for individuals involved in the dispute process, poor working relationships among parties who might otherwise profit from continued long-term working relationships, and poor performance over the life of the facility. Unacceptable is too weak a word for the situation.

We Know the Root Causes

Without exception, and year after year, the primary avoidable causes of problems in the industry are process, information, and communication issues.[4] The 2016 Arcadis Global Construction Disputes Report lists the five most common causes for construction disputes. Each involves a failure of communication: (1) failure to properly administer the contract; (2) poorly drafted or incomplete and unsubstantiated claims; (3) errors and/or omissions in the contract documents; (4) incomplete design information or employer requirements; and (5) employer/contractor/subcontractor failing to understand and/or comply with its contractual obligations.[5] A recent review of the research literature similarly concluded that the principal causes of conflict in the industry are poor communication among the project team, contractual problems including unclear terms, and technical problems caused, among other reasons, by late arriving design instructions.[6]

"The transfer of information is impeded by poor communication systems and the risk aversion of participants as written into construction contracts."

Every construction project involves a complex system of information creation and exchange among a changing cast of characters engaged in crafting a unique product. It would be easy to conclude that failures in information processing are inherent in the process. They are not. The transfer of information is impeded by poor communication systems and the risk aversion of participants as written into construction contracts.

We Know the Answer: Communication and Collaboration

As long ago as 2009, a special committee of the National Research Council published a study "Advancing the Competitiveness and Efficiency of the U.S. Construction Industry." It concluded that the best way to effect change was to "drive change strategically through collaboration."[7] The rise in the types and use of alternative project delivery methods has been motivated by this understanding. Case after case, study after study, demonstrates that the per project savings of adopting collaborative delivery processes as early as possible are measured in the millions to tens of millions of dollars and the time savings in months if not years. Concurrently, the industry has begun to employ Alternative Dispute Resolution techniques to resolve disputes earlier and earlier. Along with the increase in the use of mediation to resolve disputes,[8] methods like Early Case Assessment, Early Neutral Evaluation, Planned Early Dispute Resolution and other

variations on dispute resolution techniques are increasingly being used to resolve disputes. According to the 2016 Arcadis Global Construction Disputes Report, the one part of the globe where both the cost and duration of construction disputes decreased relative to the prior year is North America, and the report attributes that decrease to early resolution of disputes. "We expect that the decline in duration and value will continue into 2016 as the industry continues to recognize the importance of addressing disputes early in their lifecycle, and contracts are written with provisions giving strict instruction on how and when to address disputes."[9]

Why Aren't We There Yet?

Despite what we know about the problems, the causes, and the solutions, we have not made significant progress in solving the industry's problems. First, the current solutions are not comprehensive or not (yet) widely adopted. Integrated Project Delivery (IPD) is the closest to providing a project-wide solution to communication, collaboration, and disputes. However, the industry has been slow to adopt IPD and some owners believe that IPD should only be used for large, complex projects, making the benefits unavailable to many projects.

"The question is not which delivery method we should choose, the question is how we can achieve effective communication and forward thinking collaboration regardless of the project size or type and regardless of the underlying number or system of contracts."

More significantly, each project delivery system and integrative information technology looks to increase the efficiency of the project using different tools without a sufficient focus on the core issues: communication and collaboration. The conclusion of a 2014 study on integrated project delivery systems is telling. It concluded that the specific delivery system is not the driver in construction project success. The driver of success is "highly integrated teams engaged in practices that brought individuals together, in multidisciplinary interactions."[10] This is a game-changing conclusion. The question is not which delivery method we should choose, the question is how we can achieve effective communication and forward thinking collaboration regardless of the project size or type and regardless of the underlying number or system of contracts.

What Do ADR Techniques Have to Do with Solving Industry Communication Issues?

Employing ADR techniques to create project-wide communication systems may seem at first like the tail wagging the dog. However, at their core, dispute resolution techniques are communication and problem solving techniques. A project-wide communication and dispute resolution protocol that can overlay different project delivery methods and contractual arrangements is a logical tool for creating communication systems. The parties do not need to sign on to a fully integrated set of documents to do so.[11] There is precedent for parties signing a joint protocol. This regularly occurs in projects employing BIM, in form of the BIM protocol, which contains flow down provisions that make it applicable to all those who participate in developing the model. Creating overarching contracts that focus on project-wide communication, problem solving, and dispute resolution is the key to transforming the construction industry. As experts in communication and problem solving, with a broad viewpoint on industry problems, ADR practitioners are uniquely qualified to take on this challenge.

Endnotes

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Counsel Ethics and the Choice of Arbitral Seat

By Klaus Reichert SC

This article explores an often-overlooked issue, namely the consequence of ethics rules applicable to counsel admitted at the place of arbitration.

It is probably reasonable to assume that contract drafters give little, or indeed any, time to considering the ramifications of the applicable ethical rules attaching to lawyers admitted to the bar at the seat chosen for any arbitration. Undoubtedly far more time is, one assumes, spent on matters such as the choice of arbitral rules, number of arbitrators, choice of governing law, methods of appointment of arbitrators, and the actual identity of the seat itself, and rightly so. This article is not an exercise in ethics narcissism for the purpose of the conference topic which caused its authorship. However, as will be developed later, the ethical rules attached to counsel admitted at the seat of the arbitration may well have a practical impact in a way not necessarily obvious to all concerned.

When parties choose arbitration their intention is to have a binding determination of any dispute outside a national courtroom. So far so good one might say; or perhaps, stating the blindingly obvious might also apply to the foregoing. However, for the unwary or willfully blind, the courts at the seat of arbitration have the *potential* for any number of particular and delineated roles to play. A quick perusal of the UNCITRAL Model Law on International Commercial Arbitration bears this out; there is a role for the designated national court at the seat to:

1. decide to stay any litigation if it is the subject of an arbitration agreement (Article 8);
2. have interim measures requested from it (a combination of Article 9 and Article 17J);
3. assist with the formation of the arbitral tribunal in certain specified circumstances (Article 11);
4. decide on a challenge to an arbitrator after any agreed procedures have been exhausted (Article 13);
5. decide on the termination of a mandate in the event of a failure or impossibility to act on the part of an arbitrator (Article 14);
6. decide on a jurisdiction challenge (Article 16);
7. recognition and enforcement of interim measures (Article 17H), and deciding whether to refuse such recognition and enforcement (Article 17I);
8. assisting with the taking of evidence (Article 27);
9. setting aside an award (Article 34); and
10. recognition and enforcement of an award (Article 35), and deciding whether to refuse such recognition and enforcement (Article 36).

In many, if not most, of the major arbitral venues, lawyers from anywhere in the world can, and do as a matter of regular and unremarkable practice, appear as counsel in arbitrations and are not themselves admitted to the bar of the seat. However, if it becomes necessary to make an application to the courts at the seat (and the foregoing UNCITRAL Model Law list of possibilities shows that these is not simply an ultra-narrow, hypothetical set of circumstances), it is usually the case that locally admitted counsel are required. It is at this precise juncture that the question of ethics of the locally admitted counsel can play a role in the arbitration. Taking the specific example of the jurisdiction where this author has his principal place of practice, England and Wales, there are mandatory rules[1] applicable to members of that Bar, namely:

> Honesty, integrity and independence
>
> • rC8 You must not do anything which could reasonably be seen by the public to undermine your honesty, integrity (CD3) and independence (CD4).
>
> • rC9 Your duty to act with honesty and integrity under CD3 includes the fol lowing requirements:
>
> •.1 you must not knowingly or recklessly mislead or attempt to mislead anyone;
>
> •.2 you must not draft any statement of case, witness statement, affidavit or other document containing:
>
> •.a any statement of fact or contention which is not supported by your client or by your instructions;
>
> •.b any contention which you do not consider to be properly arguable;
>
> • .c any allegation of fraud, unless you have clear instructions to allege fraud and you have reasonably credible mate rial which establishes an arguable case of fraud;

- .d (in the case of a witness statement or affidavit) any statement of fact other than the evidence which you reasonably believe the witness would give if the witness were giving evi dence orally;
- .3 you must not encourage a witness to give evidence which is misleading or untruthful;
- .4 you must not rehearse, practise with or coach a witness in respect of their evidence;

……

- .7 you must only propose, or accept, fee arrangements which are legal.

This is not the occasion to dwell upon each of these requirements applicable to members of the English Bar, but one is highlighted for present purposes, emphasis added:

> …you must not draft any statement of case, witness statement, affidavit or other document containing…any allegation of fraud, unless you have clear instructions to allege fraud and you have reasonably credible material which establishes an arguable case of fraud.

This is a restriction which may well not be applicable to the counsel, not admitted to the English Bar, but undertaking an arbitration in London. To this author's knowledge, it is not an ethical restriction commonly found globally. However, if an application was to be made to the English Courts where fraud or corruption is advanced for whatever reason, and as might be expected, Counsel admitted in England were retained to prepare the relevant court documents, the ethical rule described above would then be applicable. Thus, through a circuitous route, this ethical rule applicable to counsel admitted at the seat (in this instance, London) would come into play in the dispute.

This is but one example of the potential counsel-ethics ramifications of the choice of a seat for an arbitration, and it matters naught whether one considers the specific rule to be attractive or otherwise; rather, it is presented to the reader as something to borne in mind when choosing London as a seat. One can never say that recourse to the courts at the seat will never happen in a particular arbitration. That would be wishful thinking, putting it most benignly, or naïve, or just silly. Thus, one should bear in mind in full what one is buying into, both as to the content of the arbitration law of the seat, and also the nature of the ethical rules of the local counsel who would be necessarily retained to make any local court applications.

Endnote

1. These are quoted from the Bar Standards Board Handbook, Second Edition, April 2015.

Klaus Reichert SC is a barrister in practice from Brick Court Chambers in London. He has acted as advocate or arbitrator in over 300 international arbitrations across a wide range of subject matters, applicable laws, institutional rules, and venues. In 2010 he was called to the Inner Bar ("Silk") in Dublin, having undertaken many years of commercial litigation before the Irish Courts. He chaired the Host Committee for the 2008 ICCA Conference in Dublin, and was a founding member of Arbitration Ireland—the Irish Arbitration Association. He played a leading role in the preparation of the Arbitration Act 2010 in Ireland. A member of the Governing Board of ICCA and the Council of the Legal Practice Division of the IBA, he also serves with the Court of Arbitration for Sport and the Basketball Arbitral Tribunal.

Istanbul Arbitration Centre Opens its Doors

By Ayça Aydin

A new arbitration institution opened its doors and has already started to register its cases in Istanbul. The Istanbul Arbitration Centre (ISTAC) has been operational since the third quarter of 2015 and has published its set of arbitration and mediation rules, along with emergency arbitrator and Fast Track Arbitration rules. ISTAC is anticipated to fulfill needs in Eastern Europe, central Asia, Middle East and North Africa, while still attracting applications from elsewhere.

Increasing the awareness and knowledge of international and domestic arbitration is a priority in Turkey. These efforts include close contact with bar associations for vocational training of attorneys on arbitration, attempts to unify the Turkish Court of Appeal's chambers reviewing appeals of challenges to arbitral awards, and studies to unify the Turkish legislation on domestic and international arbitration for ease of reference and application. These are similar but regulated under two different pieces of legislation.

Young ISTAC

ISTAC also provides a forum for active and early involvement in the field of alternative dispute resolution for practitioners under 40: Young ISTAC. Young ISTAC, also established in 2015, is a platform that welcomes young individuals engaged in arbitration and mediation from Turkey and beyond. Young ISTAC, with over 1,400 members so far, attaches particular importance to creating an effective bridge between young and more experienced practitioners through the events it organizes and by encouraging and training members on the ISTAC Rules and other alternative dispute resolution procedures. Young ISTAC members gather monthly, in order to put into practice its initiatives and provide an opportunity for networking and the sharing of experiences among members. Each gathering encompasses a brief lecture, presentation or panel delivered or chaired by preeminent representatives of alternative dispute resolution practice from Turkey and abroad. Young ISTAC will organize moot arbitration competitions annually, at least one of which will be conducted in English, and will provide internship and secondment opportunities for members.

ISTAC Rules

The ISTAC Arbitration and Mediation Rules (the "Rules"), as well as Fast Track Arbitration Rules and Emergency Arbitrator Rules, may be obtained online at www.istac.org.tr. The Rules are available in English and Turkish. An effort is being made to provide the Rules in several other languages, including French and German, in the near future. The Rules were developed carefully to be consistent with internationally accepted sets of arbitration and mediation rules utilized by established international arbitration institutions. Making the Rules easy to understand for the alternative dispute resolution community was a priority in drafting the Rules, and many prominent international practitioners participated.

The Rules offer parties choices. An arbitration can be started with a request for arbitration or a statement of claim. As to enforcement, if parties are not residents of Turkey they can exclude the jurisdiction of the Turkish courts. If one or both of the parties are residents, awards can be enforced as domestic awards, without an enforcement decision and without further court fees.

Since ISTAC is a new institution, it was possible to adopt innovations that have been adopted by other institutions such as fast track arbitration and emergency arbitrators.

Fast Track Arbitration Rules

Unless agreed otherwise by the parties, Fast Track Arbitration Rules apply to disputes where the total sum of the claims and any counterclaims do not exceed TRY 300.000 (approximately Eur 94,000 or approximately USD 101,000). The parties may also agree that the Fast Track Arbitration Rules shall apply where the amount in dispute exceeds this sum. Disputes subject to Fast Track Arbitration are in principle resolved by a sole arbitrator, within three months of the transmission of the file to the sole arbitrator.

Emergency Arbitrator Rules

Emergency arbitrator rules aim at providing provisional remedies (interim measures) to alleviate urgent needs of applicants. Parties to an arbitration agreement may opt out of the applicability of emergency arbitrator rules by so stating in their arbitration agreement. The requirement to submit a Request for Arbitration, Statement of Claim, Answer to the Request for Arbitration, or Statement of Defense is not required for the party requesting the appointment of an emergency arbitrator. An emergency arbitrator is appointed within two working days of the Secretariat's receipt of the application, and the interim measure decision is to be issued within seven days as of receipt of the file. An emergency arbitrator's interim measure decision is binding on the parties, but is not binding on the later constituted sole arbitrator or the arbitral tribunal.

Costs and Fees

The Appendix to the Rules deals with regulating the arbitrator's fees and the costs of arbitration conducted in accordance with the ISTAC Arbitration Rules or the costs of arbitration where ISTAC plays a role as the appointing authority, and the costs of mediation conducted in accordance with the ISTAC Mediation Rules. Scales of registration fees, administrative costs and arbitrator fees may be found within such Appendix and the website of ISTAC provides a cost calculator to enable users to anticipate costs and fees. The arbitrator's fees are based on the amount in dispute

Acceptance to Date

The rapid adoption of the Rules and of the new Istanbul Arbitration Centre as the administering insitution has exceeded expectations. They have already been adopted for major projects. For example, the contract to construct Istanbul's third airport—set to be the biggest in the world—contains an ISTAC arbitration clause. Similarly, a new water supply agreement between Turkey and Northern Cyprus formed in March includes such a clause. The ISTAC has also been included in the dispute resolution clause in an infrastructure tender agreement for a project for the greatest monetary value in the history of the Republic of Turkey.

It is hoped that the Centre will fulfill its objective of providing a sound and predictable avenue for the resolution of disputes in Eastern Europe, central Asia, Middle East and North Africa. It is well on its way to meeting that objective.

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The Court of Innovative Arbitration (COIA): An Attractive Alternative in International Arbitration

By Dirk-Reiner Martens and Lucian Novacescu

Introduction

The expansion and globalisation of cross-border investment and trade has led to increased and ever more complex commercial relationships between businesses, investors and states. In anticipation of the fact that some of those relationships will inevitably break down, parties need to consider in advance the best means of resolving any disputes which may arise.

Over the last decades, commercial arbitration has been increasingly embraced by the international community as the primary means of resolving transnational commercial disputes.

However, often enough, the parties of an international commercial contract have trouble agreeing on two points: the place of jurisdiction and the applicable law, because choosing the law and jurisdiction of the country of one of the parties may be perceived to be prejudicial to the other. At the same time, choosing a third legal system, with which neither party is familiar, may prove impractical, as would a combination of the jurisdiction of one party and the legal system of the other.

"The objectives of COIA are in essence designed to provide parties with a dispute resolution system that is simple and, above all, significantly cheaper and less time consuming than 'classic' institutional arbitration."

This article aims to present a proposal for the solution to these widespread difficulties: the Court of Innovative Arbitration (or COIA) [www.coia.org].

The Idea Behind COIA

The 2015 edition of the International Arbitration Survey,[1] conducted by Queen Mary University of London (page 7), identified the main problems that confront parties to arbitration proceedings: high cost is, according to 68% of all participants, the worst characteristic of international arbitration. 36% of the participants also mentioned lack of speed as another of the worst features. The survey shows that international arbitration is becoming the exact opposite of what it started out as: an inexpensive and swift tool for dispute resolution.

While many of the international arbitral institutions have been attempting to improve both the time- and cost-effectiveness of arbitration proceedings through the introduction of expedited procedures and, to some extent, the use of sole arbitrators, time and cost continue to be a significant disincentive for the use of arbitration.

The objectives of COIA are in essence designed to provide parties with a dispute resolution system that is simple and, above all, significantly cheaper and less time consuming than "classic" institutional arbitration.

The Structure of COIA

COIA is a court of arbitration under Swiss law acting through a subsidiary of the Munich-based law firm Martens Rechtsanwälte, which has extensive experience in the field of international arbitration.

It is noteworthy that a similar project introduced by Martens Rechtsanwälte, the Basketball Arbitral Tribunal (BAT),[2] enjoyed great success in solving financial disputes in the world of international basketball, as was highlighted by an article published in 2011 in the *New York Times*.[3] Since its creation in 2007 the BAT has dealt with more than 800 cases and it continues to receive around 150 new requests for arbitration per annum. The value of BAT cases ranges from small claims of €10.000 to 20.000 to large multi-million Dollar claims.

The team that has been running the BAT Secretariat in more than 800 cases over seven years will also be in charge of COIA. The position of COIA President is held at present by Professor Bruno Simma (who is, among other roles, Professor of Law Emeritus at Munich's Ludwig Maximilians University, visiting Professor at University of Michigan Law School, judge at the Iran-US Claims Tribunal, former judge at the ICJ, and a very active arbitrator). Under his guidance, attorneys and assistants from Martens Rechtsanwälte manage COIA on a day-to-day basis.

The Main Features of COIA

As previously mentioned, COIA seeks to address the issues that both delay the arbitration process and increase its costs, *inter alia,* the sometimes lengthy process of panel constitution, as well as an excessive exchange of written submissions.

The essential aim of COIA is to reduce time and cost while maintaining a high level of quality in its awards. COIA attempts to achieve that goal by applying the following features:

- A sole arbitrator appointed through a swift procedure from a closed list of currently eight highly experienced arbitrators decides all cases. The parties

agree on an arbitrator from the list within a short time limit or if they fail to agree, the appointment is made by the COIA Secretariat.

- The COIA Arbitration Rules provide for one single exchange of submissions. The arbitrator can invite the parties to make further written submissions, if he or she considers this to be necessary.
- A hearing will take place only if both parties so request or if the arbitrator deems it necessary.
- The arbitral procedure is purposely not regulated in too much detail, so that the arbitrators have the freedom to adopt the procedure that they find suitable for each case.
- The procedural time limits are as short as reasonably possible. Under the COIA Arbitration Rules the parties commit themselves to appoint only counsel who are able to comply with short time limits.
- There is no document production phase unless ordered otherwise by the arbitrator.
- The claimant has the option of further streamlining the proceedings by requesting an award without reasons in the event that the respondent fails to pay its share of the advance of costs.
- The language of the arbitration is English only, unless agreed otherwise by the parties, the arbitrator and COIA.
- The arbitration procedure is paperless to the greatest extent possible.
- Apart from exceptional circumstances, the arbitrator will deliver the final award within six months of receipt of the full advance on costs.

Ex Aequo et Bono—A Special Feature of COIA Arbitration

From its very beginning in 2007 the arbitrators in BAT proceedings delivered their awards *ex aequo et bono*, i.e., not on the basis of a national law but rather by applying article 15.1 of the BAT Arbitration Rules.[4] This rule was triggered by the conclusion that in international arbitration the arbitrators frequently need to apply a legal regime with which they are not familiar, which, in turn, delays proceedings and often requires obtaining an expert opinion on the law applicable to the case and thereby further causing delay of the proceedings.

The foregoing thought caused the founders of COIA to encourage (future) users to agree—if they so wish—on proceedings *ex aequo et bono*. Critical comments were quick to come: is it not true that turning away from a national law renders the outcome of COIA proceedings too unpredictable? At first sight this concern appears to have merit, as the reference to concepts of fairness and justice seems fairly vague and unpredictable. However, the BAT experience from more than 800 cases shows that lack of predictability of *ex aequo et bono* proceedings is no more and no less of a concern than in "ordinary" arbitration, for the following reasons:

- No matter whether the arbitrator decides *ex aequo et bono* or on the basis of national law, he will have to apply first and foremost the contract of the parties. This is precisely what arbitrators did in nearly all BAT cases: they interpreted and applied the parties' agreement. Only in rare cases, where the result so found was grossly unfair, would the arbitrator be in a position to deviate from what the parties agreed on. Arguably, in these exceptional circumstances the national law in most countries would mandate a similar result.
- In international arbitration, more often than not at least one of the parties is unfamiliar with the applicable legal regime. This can lead to unpleasant surprises if such regime provides for rules which were not foreseen by the parties and which deviate from what they wanted to stipulate and believed to have agreed.
- Arbitrators in international arbitration are frequently not familiar with the law applicable under the parties' contract. Experience shows that in these cases the arbitrator will often seek a fair and reasonable solution as long as the same is not in obvious contrast with what he believes the applicable law provides. If this is so, the outcome of proceedings *ex aequo et bono* is no more and no less predictable than in cases where a national law is applied. There is, however, one significant difference: in cases of *ex aequo et bono* proceedings the parties can save themselves making voluminous submissions on a national law and the arbitrator can do away with reviewing these submissions or even obtaining a legal opinion on the applicable national law.

Looking to the Future of COIA

COIA aims to become an attractive alternative to national courts in any legal system and to "classic" international arbitration institutions.

To that end and as a further step towards finding a place in the worldwide alternative dispute resolution market, in April 2016 COIA entered into a partnership with the Indian National Bar Association (INBA), offering both Indian and foreign parties speedy and cost-efficient dispute resolution through a specific approach to administering and conducting commercial arbitration.

Through the cooperation with the INBA, COIA gives Indian parties an opportunity to provide, in their contracts with their foreign partners (or agreeing to it subse-

quently), for institutional arbitration of disputes, under the administration of COIA and according to the COIA Rules, i.e., essentially, with a sole arbitrator, selected from among COIA's public list of arbitrators, and—if parties so wish—under *ex aequo et bono* principles.

In addition, the COIA team will assist INBA in its efforts to establish a control of arbitration in India for the resolution of national commercial disputes applying the *ex aequo et bono* principles. Similar cooperation is envisaged by COIA with Iran and Croatia.

Obviously, COIA's main target remains the general international commercial market attempting to convince the arbitration community of the benefits of the COIA system including—if parties so wish—*ex aequo et bono* proceedings.

Conclusion

Time and cost-effectiveness have originally been two of the main goals of parties resorting to arbitration as an alternative dispute resolution system. However, nowadays the duration and cost of arbitration proceedings are in fact regarded as disadvantages rather than advantages of international arbitration.

With the number of worldwide commercial arbitration proceedings ever increasing, it is becoming clear that only by means of true innovations can arbitration "return to its roots" and silence its current critics. COIA represents a step forward and through its promotion of the *ex aequo et bono* decision making process, along with other cost- and time-reducing features, it should be able to play a role in the future development of international commercial arbitration.

Endnotes

1. The International Arbitration Survey conducted by White & Case LLP for Queen Mary University of London, School of International Arbitration, 2015 Edition www.arbitration.qmul.ac.uk/docs/164761.pdf.
2. The official website of the Basketball Arbitral Tribunal is http://www.fiba.com/bat.
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4. Article 15.1 of the BAT Arbitration Rules defines *ex aequo et bono* as "general considerations of justice and fairness without reference to any particular national or international law".

Dr. Dirk-Reiner Martens founded Martens Rechtsanwälte in 2009, after being a partner of a major international commercial law firm for over 35 years. His special interest is national and international arbitration: since 2000 he has acted in more than 150 proceedings relating to commercial law or sports law, either as a party-appointed arbitrator or President of the tribunal. He can be reached at r.martens@martens-lawyers.com.

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Binding Mediation: A New Form of Amiable Composition

By Joe Tirado

Much has been written in recent years on the subject of mediation-arbitration or "Med-Arb." Rather less has been written on amiable composition, although it is frequently used in some civil law jurisdictions. Binding mediation is similar to Med-Arb, but it also has many similarities to amiable composition. This article considers these similarities and key differences.

Med-Arb

Med-Arb is a hybrid dispute resolution process that seeks to combine the benefits of mediation and arbitration including providing the parties with autonomy, control of the process, flexibility, confidentiality, interest-based solutions and a final determination in the event of no settlement between the parties.

It can be used where mediated negotiations do not lead to a settlement. In these circumstances the parties can agree that the mediator becomes the arbitrator and renders a final and binding award on the outstanding matters.

It can also occur within the framework of arbitration, with the parties being encouraged to explore mediation at appropriate stages of the arbitration. Typically, should the parties go to mediation, the arbitration proceedings will be stayed pending the outcome of the mediation or a "Mediation Window" provided for in the procedural timetable.

Generally, Med-Arb will involve the same third-party neutral acting as both mediator *and* arbitrator. Adopting such a combined role may offer advantages since it avoids the need to educate two different people on the same facts and legal submissions. This increased efficiency may provide the parties with significant time and cost savings. This is certainly true if the parties reach a partial agreement where they dispose of factual or legal issues during the mediation part of the proceedings.

Where the arbitration focuses on the parties´ future commercial relationship, Med-Arb´s efficiency becomes even more crucial to the parties. In the arbitration phase of the process, the Med-Arbitrator will use his or her understanding of the relationship between the parties during the mediation phase, or use his or her prior knowledge of their respective underlying interests to find an adequate resolution that the parties may find more acceptable.

The prospect of the same mediator becoming the arbitrator (or vice-versa), however, may cause some to be concerned that this dual role risks undermining the benefits of mediation and arbitration. For example, it may inhibit the parties in engaging in full and frank discussions with the mediator if there remains the possibility that he/she may later become the arbitrator who will determine the dispute. It may also risk exposing the arbitrator and the award to challenge on ethical and due process grounds.

It is a fundamental principle in international arbitration that an arbitrator must be and remain impartial and independent. Not surprisingly, the predominant concern of arbitration specialists is that, as a result of his or her active involvement in both the mediation and the arbitration phase of the process, the mediator-arbitrator may lose his or her impartiality by becoming privy to information regarding the motivations and interests of the parties that would otherwise be privileged and/or confidential, and/or that might separately influence an arbitrator´s judgment in considering the terms of the award.

Some might argue that an arbitrator (like a judge) can close his or her mind to information acquired while wearing the mediator´s cap when determining an issue as arbitrator and wearing the arbitrator´s cap. The reality, however, is that is quite difficult (if not impossible) to do. For example, parties often provide a mediator with both the strengths and weaknesses of their positions, so as to give the mediator the best possible assessment of the case in brokering a realistic settlement. Indeed, such information will be provided as a result of the mediator having worked hard to win a party´s confidence to make such full and frank disclosure. Parties, rarely, if ever, provide this same level of candour to an arbitrator who has authority to decide the merits of the case.

A clear tension exists, therefore, where one person assumes the role of both the mediator and arbitrator.

Amiable Composition

Amiable composition, also known as ***ex aequo et bono or*** *amiable compositeur*, is a concept that is known to numerous systems of law and arbitration. It nonetheless remains relatively little used in practice and is often poorly understood.

A number of reasons can be identified for this. The first might be that it could open the floodgates to an overly subjective approach by arbitrators. A second is that it could be argued to be futile, to the extent that arbitration intrinsically is a system which involves the application of good commercial sense and common practice in the resolution of disputes.

This argument is strengthened by the development of the *lex mercatoria* which, through submitting a dispute to

internationally recognized rules and principles, purports to be the very expression of equity.

Despite its general lack of popularity, amiable composition endures. This perhaps demonstrates that the criticism directed against it may not be well-founded, or that it is articulated with insufficient precision. In any event, such criticism presents an obstacle to fully understanding what is amiable composition.

Amiable composition imposes on an arbitrator the task to give a solution to a dispute that may be based in law but that in all cases is consistent with equity. When parties have not chosen a system of law to be apply to their contract, the arbitrator chooses the rules of law that he or she deems appropriate. This may include the *lex mercatoria* whose flexible nature permits a wide latitude to apply a rule which is apt to produce the desired result. The arbitrator to a certain extent can choose the rules of law in such a way that they coincide with the solution to the dispute in equity.

Where, on the other hand, the parties have made a choice of the rules of law applicable to the dispute the arbitrator is bound to follow this choice. However, he or she is free to interpret these rules in such a way that the equitable solution that he or she gives to the dispute is presented as being based in law.

Failure to render an award that is not found in equity may mean that the arbitrator has not fulfilled his or her duties and thus risk rendering the award *ipso facto* voidable by an action for avoidance.

Binding Mediation

While binding mediation has all of the characteristics of Med-Arb in that a final decision is made by the neutral if no agreement is reached, the essential difference is that there is no final award that is rendered that is capable of enforcement under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Instead, it is a decision that is made subject to contract, such that failure to comply with the decision would be actionable as a matter of breach of contract.

The principal similarity with amiable composition is that the decision is reached on the basis of information provided during the mediation phase that perhaps would not otherwise have been provided by the parties. Thus, then allows the arbitrator to make a more informed, and thereby just and equitable, decision.

If the parties wish to combine the virtue of all of these processes and obtain an award that should be enforceable, an agreement can be reached to conduct a med-arb, with the arbitration phase, if necessary, to be decided based on the principles of amiable composition. An arbitration process based on that agreement should obviate many of the objections that have been raised to having the mediator serve as the arbitrator. Those objections arise in the context of a strictly law-based arbitration and would be largely irrelevant if the parties agreed to an amiable composition.

Conclusion

While Med-Arb, amiable composition and binding mediation continue to be relatively uncommon in common law jurisdictions in particular, there is certainly scope for their far greater use in the future. Creative counsel and parties should seize the opportunity to consider employing more innovative approaches to combining these existing process models to achieve a just and more efficient resolution of their disputes.

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BOOK REVIEW
The Newest One-Stop Introduction to ICC Dispute Resolution: *ICC Arbitration in Practice*, 2d ed.

By Herman Verbist, Erik Schäfer and Christophe Imhoos
Reviewed by Victoria R. Orlowski

The recently released second revised edition of *ICC Arbitration in Practice* is the newest guide to ICC arbitration on the market. *ICC Arbitration in Practice* professes to set itself apart from other guides to the ICC Rules because it is "*intended above all for readers who are unfamiliar with international arbitration and the ICC rules of 2012 and wish to be able to access the pros and cons of entering into an arbitration clause referring to the ICC rules and to know how to proceed in a given situation*" (page xvii). This review aims to arm you with the facts you need to determine whether *ICC Arbitration in Practice* is the right ICC guide for you—or at least a worthy addition to your bookshelf.

ICC Arbitration in Practice was first published in 2005. While following the same general format as its first edition, in this second edition the authors have updated it to address all of the newest ICC Rules—the 2012 ICC Rules, 2014 ICC Mediation Rules, 2015 ICC Expert Rules and 2015 ICC Dispute Board Rules. The authors of *ICC Arbitration in Practice* draw upon the insights they gained into the workings of the ICC Court while at ICC Court's Secretariat and on their experience from years practicing as counsel and arbitrators in international arbitration based in Belgium, Germany, and Switzerland. The authors' civil law backgrounds are pervasive in this volume—from Germanic turns of phrase to basic assumptions and legal focus.

The meat of *ICC Arbitration in Practice* is contained in 293 pages, which are divided into eight chapters. The six main chapters contain: a brief introduction to international arbitration (Chapter 1); a short description of the ICC and the ICC International Court of Arbitration (Chapter 2); a general guide to arbitral proceedings under the ICC Rules (Chapter 3); a look at drafting ICC arbitration clauses (Chapter 4); an overview of time limits under the ICC Rules of Arbitration (Chapter 5); and a walk-through of the ICC's other dispute resolution rules (Chapter 6). Those main chapters are followed by two pseudo-chapters, one containing tables of ICC statistics (Chapter 7) and the other containing a bibliography on ICC Arbitration (Chapter 8). The other half of *ICC Arbitration in Practice* is a veritable one-stop shop of ICC Rules, forms and notes which span a whopping 29 appendices—from the 2012 ICC Rules of Arbitration themselves to the ICC's recommended Dispute Board Clauses. However, *ICC Arbitration in Practice* does not contain model pleadings or other precedents.

Chapter 5 is of particular interest because it focuses exclusively on time limits—a specific focus largely missing from other existing guides. Chapter 5 provides a helpful five-page compilation of the provisions in the ICC Rules that relate to time limits. It also provides valuable, easily accessible guidance on the ICC Secretariat's practices regarding time limits that are not contained in the ICC Rules. Indeed, the authors may wish to consider beefing up this chapter in the next edition of their book to provide additional guidance, such as the essential caveat that parties can agree to modify many time limits in the ICC Rules and the ICC Court's practice of requiring arbitral tribunals to submit draft awards within specific time limits (as described in Appendix 9).

Chapter 6 also is unique because it focuses on the ICC's other dispute resolution services, which some well-known guides on ICC arbitration do not address. Chapter 6 begins by introducing the potentially helpful, yet seldom-used Pre-Arbitral Referee Procedure. The Pre-Arbitral Referee Procedure differs from the Emergency Arbitrator procedure introduced in the 2012 ICC Rules, particularly because the Pre-Arbitral Referee Procedure can be conducted separately from an ICC arbitration, while the Emergency Arbitrator provisions require that an ICC arbitration be commenced within 10 days. Chapter 6 then presents a useful description of ICC Mediation. However, those unfamiliar with mediation should exercise caution regarding the authors' suggestions concerning arbitrators acting as mediators (and vice-versa), the possibility of converting a mediation settlement into an arbitration award or arbitrators sharing provisional views with the parties, which—as the authors acknowledge—are practices not universally encouraged or accepted. This chapter also introduces the ICC's new ICC Expert Rules, which were launched last year in three parts—adminis-

tered expert proceedings, appointment of experts and proposal of experts. Finally, Chapter 6 introduces the ICC DOCDEX Rules, which are specific to disputes stemming from documentary instruments in the international banking context, and the ICC Rules for Dispute Boards, which are designed for use in infrastructure projects.

Chapters 1 and 2, which respectively contain short introductions to arbitration and the ICC Court and its Secretariat, are also worthwhile reads. Readers unfamiliar with ICC arbitration would benefit from taking the time to review Chapter 2 in particular, as it describes the crux of ICC arbitration—the benefit of the ICC Court's experience and careful work of its Secretariat. Chapter 2 sets the stage for the ICC Rules, which are introduced in Chapter 3, because an understanding of how the Court and its Secretariat operate is a necessary prerequisite to understanding the ICC Rules and how they differ in operation from the rules of other arbitral institutions. Chapter 2 also introduces the ICC Centre for ADR, which administers the ICC's other dispute resolution rules detailed in Chapter 6.

The real meat of *ICC Arbitration in Practice's* discussion of ICC arbitration comes in Chapter 3. It follows the traditional format of ICC guides by providing an article-by-article introduction to the ICC Rules of Arbitration. The authors intersperse snippets of useful advice with rather rote recitations of the ICC Rules. Considering its professed focus on being useful for those who are not well versed in ICC Arbitration, *ICC Arbitration in Practice* provides less commentary and guidance than other guides on ICC arbitration.

Chapter 4 focuses on drafting ICC arbitration clauses. Common law lawyers likely will find that its introduction focuses heavily on civil law concepts, with emphasis on examples from German, Belgian and Swiss law, where the authors practice. However, Section C(5) has a short, helpful rundown of useful standard additions to the ICC's recommended arbitration clause that would be good to flag and would best be read before the balance of Section C, which contains a description of other more complex additions to the standard ICC arbitration clause.

In short, *ICC Arbitration in Practice* provides a basic overview of all the dispute resolution services currently offered by the ICC. For those who dislike unnecessary clutter, *ICC Arbitration in Practice* may also be a practical purchase so that they can trade in their accumulated ICC Rule pamphlets and notes for the convenient one-stop shop of *ICC Arbitration in Practice's* appendices.

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Book Review
Negotiating the Nonnegotiable: How to Resolve Your Most Emotionally Charged Conflicts
By Daniel Shapiro (New York: Viking, 2016)
Reviewed by Conna Weiner

The field of negotiation and conflict resolution theory grows more interesting, complex and interdisciplinary with every passing year, with contributions influenced by law, psychology, sociology, political science, economics, anthropology and other areas.[1] As Carrie Menkel-Meadow outlined in *Chronicling the Complexification of Negotiation Theory and Practice*,[2] however, there is no "unified field" theory of negotiation and conflict resolution.[3] Negotiators and students of negotiation should be prepared to read widely and take a critical, individualized approach to sorting through the various theories. We must each assess for ourselves what resonates and will be the most useful.

In his latest contribution to the field reviewed here,[4] Daniel Shapiro—an associate professor in psychology at the Harvard Medical School/McLean Hospital and the founder/director of the Harvard International Negotiation Program—explores the psychological bases of conflict, focusing on the role of identity, tribalism and emotion. Although an appreciation of the importance of these issues to assessing and mapping conflict is not new, the book sets forth a number of systematic, thought-provoking concepts and methods that Shapiro believes are important to better assess and manage highly charged conflicts. Shapiro illustrates his points with vivid stories drawn from diverse work with couples in crises to world leaders.

In order to appreciate the foundations and certain core concepts of this new work, however, it is important to take a very quick look at two of Shapiro's earlier, relat-

ed writings. In 2005, Shapiro and Roger Fisher (of *Getting to YES* fame), identified a gap in that groundbreaking work: *Getting to YES* did "not spend much time addressing emotions and relationship issues in our toughest negotiations."[5] The authors acknowledged that "[n]egotiation involves both your head and your gut—both reason and emotion,"[6] but cautioned that negotiators should not get caught up in every emotion. Instead, they counseled negotiators to deal effectively with the "core concerns" that stimulate many emotions by expressing appreciation, building affiliation, respecting autonomy, acknowledging status and choosing a fulfilling role.[7]

Shapiro later expanded upon the needs for both autonomy and affiliation and how they influence conflict in his 2010 article in *American Psychiatrist* entitled "Relational Identity Theory: A Systematic Approach for Transforming the Emotional Dimension of Conflict" ("RIT Article").[8] In this piece (which is well worth reading in and of itself, especially before moving on to the more involved *Negotiating the Nonnegotiable*), Shapiro clearly outlines the pioneering, interdisciplinary scholarly work upon which many of Shapiro's core ideas are built.[9] He also concisely describes several concepts that are at the core of the new work, such as "relational identify theory" ("RIT") and the role of a broadly defined notion of "tribes" and the "tribes effect" in understanding conflict. As he pithily concludes:

> Dealing constructively with the emotional dimension of intergroup conflict is critical to sustainable agreement and long-term positive relations. RIT, a model for addressing the emotional dimensions of conflict, posits that conflict is often motivated by factors beyond social categorization or objective resource disparities. It suggests that destructive conflict is likely when a group perceives that their relational identity concerns for affiliation and autonomy are left unaddressed. The emotional complexities of intergroup conflict are best understood through the lens of tribes, a broad term describing groups whose members are connected through kind, kin and emotional investment. When a tribes' relational identity concerns are undermined, the resulting negative emptions may stimulate what I term the tribes effect. This dynamic rigidifies the tribe's relational identity, increasing the likelihood of intergroup polarization and conflict escalation. Therefore, the future of global security hinges in part on addressing groups' relational identity concerns and mitigating the tribes effect.[10]

Shapiro goes on to describe useful ways to respect a tribe's autonomy and build affiliations that can reduce the likelihood of this outcome.

In *Negotiating the Nonnegotiable*, written for a broader audience, Shapiro elaborates and expands upon this framework and other concepts discussed in the RIT Article. In an introductory section, he states that his book introduces:

> …a new paradigm for resolving conflict – one that speaks as much to the heart as to the head. Just as scientists have discovered the inner workings of the physical world, my research in the field of conflict resolution has revealed emotional forces that drive people to conflict….Unless we learn to counteract such forces, we will tend to engage repeatedly in the same frustrating conflicts, with the same frustrating results. This book provides the necessary tools to overcome these dynamics and foster cooperative relations, turning the most emotionally charged conflict into an opportunity for mutual benefit.[11]

Shapiro then describes a World Economic Forum (Davos, Switzerland) application of the use of his group exercise in conflict resolution, the "tribes exercise."[12] Participants were assigned to six groups and instructed to define the key qualities of their "tribe" by answering questions such as "Does your tribe believe in capital punishment?" and "Does your tribe believe in abortion?" At the 50-minute mark, a costumed alien enters the room and tells the teams that unless the teams can negotiate to choose one tribe for everyone, the world will be destroyed. Shapiro explained that over the many times that he had performed the tribes exercise, the world has exploded in all but a handful of cases.[13]

Shapiro suggests that the result might have been better if the exercise participants had sought to address the "key dimensions of conflict resolution": rationality, emotions and identity. In particular, Shapiro emphasizes the need to focus on identity, since "an emotionally charged conflict gets its 'charge' because it implicates fundamental aspects of one's identity: who you are, what you hold important and how you conceive of meaning in your life."[14] Shapiro turns again to the importance of "relational" identity issues, noting that "the core relational challenge is to figure out how to satisfy your desire to be simultaneously one with the other party (affiliation) and one apart from (autonomy) the other party."[15] Bridging the toughest emotional divides, he says, requires learning how to navigate this relational space between individuals and groups.

He now characterizes relational identity theory as a method which features practical steps that produce

dynamic effects, and confirms his view that the single greatest barrier to conflict resolution is the tribes effect, a neuroscience threat response that is an adversarial, self-righteous, closed mindset resulting from a threat to a very meaningful aspect of our identity. Shapiro goes on to suggest a way out of the tribes effect by seeking to counteract the what he calls the "Five Lures of the Tribal Mind," emotional forces that shape your relations as adversarial, drawing you toward the tribes effect or pulling you deeper into an identity-protective mindset that diminishes the prospects for collaboration.[16] Countering the tribes effect involves cultivating positive relations through what Shapiro terms "integrative dynamics." However, Shapiro also warns that you will confront unavoidable tensions—"relational dialectics"—that threaten to make your conflict feel like a no-win proposition.

The remainder of the book expands upon and relates these concepts as Shapiro attempts to map the way past these apparently nonnegotiable obstacles: the tribes effect, the five lures of the tribal mind, integrative dynamics and the management of dialectics. Shapiro seeks to help his readers by providing a literal map in matrix form summarizing the relationship of all of these ideas, as well as the underlying core concerns of affiliation and autonomy, with arrows showing tendencies towards a "tribes effect" or its opposite, a "communal mindset."[17]

In Chapter 3, "A Way Forward," Shapiro outlines the tribes effect triggered by threats to our identity in some detail and introduces the five lures: (a) vertigo (a warped state of consciousness in which a relationship consumes your emotional energies) (b) repetition compulsion (a self-defeating pattern of behavior you feel driven to repeat, (c) taboos (social prohibitions that hinder cooperative relations, (d) assault on the sacred (an attack on the most meaningful pillars of your identity) and (e) identity politics (the manipulation of your identity for another's political benefit).

After elaborating upon these concepts and suggesting ways to counteract them, Shapiro then introduces his four-step method of "integrative dynamics," as way to reconcile strained relations by summoning the powers of emotional forces that pull one toward greater connection, with the most stable being "transcendent unity." In an endnote, Shapiro sets forth his view that traditionally, the field of negotiation has focused on "discrete elements," such as "interests, options, legitimacy, commitments, alternatives, relationship and communication" identified in the work of his mentor, Roger Fisher. If these elements were considered the organs of the human body, then, Shapiro states, his notion of integrative dynamics would be the interactive dynamism among these organs, ultimately calling attention to each party's relational identity.[18] Ultimately, he believes that what he describes as the "traditional methods of conflict resolution"—positional bargaining and problem-solving—are insufficient to achieve transcendental unity in an emotionally charged conflict.[19]

Overall, Shapiro urges participants in such conflicts to strive for harmony and co-existence, not victory. He then introduces four additional concepts that provide the method of his integrative dynamics framework to help achieve these aims and move away from a tribal mindset towards a community mindset: (a) uncovering each side's mythos of identity—the core narrative that shapes how you see your identity in relation to that of the other side—through techniques such as "creative introspection," (b) working through emotional pain, (c) building cross-cutting connections and (d) reconfiguring relationships.[20]

For "solving problems without compromising one's core identity," we are provided another conceptual framework, the "SAS System" for achieving co-existence: separating, assimilating and synthesizing identities.[21] Shapiro suggests the need to shift one's objective from winning an identity battle to reconfiguring the relationship so that each side's core identity can at least co-exist or, in order to truly resolve identity-based divisions, to reframe the conflict as a quest for "harmonious co-existence."

Finally, Shapiro warns us to be aware of and strive to manage the inescapable "dialectics" he has defined and identified in the emotional world of conflict : the desire for acceptance versus change, redemptions versus revenge and, once again and most importantly, autonomy versus affiliation, with advice and suggestions about how to handle each.[22] (In discussing revenge, he makes an observation interesting to mediators everywhere, that a "massive" body of scientific evidence has demonstrated that venting anger actually backfires: The more you vent, the stronger your desire for revenge.)[23] Shapiro suggests that focusing on these dialectic management techniques is the "path to reconciliation."[24]

This review is a highly abbreviated outline of the foundations of and basic concepts discussed in *Negotiating the Nonnegotiable*. Shapiro's perspectives are perceptive and interdisciplinary. This is an informative read and a welcome addition to the negotiation and conflict resolution literature.

Endnotes

1. See description for October 2016 symposium, Moving Negotiation Theory From the Tower of Babel Toward a World of Mutual Understanding, http://law.missouri.edu/faculty/event; Lande, J., Overview of Negotiation Techniques Generally, Ch. 5 in Lawyering with Planned Early Negotiation, 2d ed., American Bar Association, 2016; Menkel-Meadow, C. *Chronicling the Complexification of Negotiation Theory and Practice*, 25 Negotiation J. 415-429, 2009.
2. *Id.* at 420.
3. *Id.*

4. Shapiro, D., Negotiating the Nonnegotiable: How to Resolve Your Most Emotionally Charged Conflicts, New York, N.Y., Viking 2016.
5. Fisher, R. and Shapiro, D. Beyond Reason: Using Emotions as You Negotiate. Viking Penguin 2005 at xii. See Fisher, R. and Ury, W. Getting to YES: Negotiating Agreement without Giving In, Boston: Houghton Mifflin, 1981.
6. *Id.* at 4.
7. *Id.* at 15-17 and throughout.
8. Shapiro, D., *Relational Identity Theory: A Systematic Approach for Transforming the Emotional Dimension of Conflict*, American Psychiatrist 65, no. 7 (2010), 634-45. Additional page citations are to a reprint of the article purchased online.
9. *Id.* at 3 and 4 (citations omitted). Of particular interest given Shapiro's emphasis on the concept of "tribes" is social psychiatrist Henri Tajfel's groundbreaking work on the cognitive aspects of discrimination and social identity theory. Among other things, Tajfel performed "minimal group" experiments demonstrating the rather alarming result that merely dividing people into groups based upon arbitrary and meaningless distinctions such as preferences for certain paintings or colors can trigger a tendency to favor one's own group at the expense of others. E.g., Tajfel, H. *Experiments in Intergroup Discrimination*. Scientific American 223, no. 5 (1970): 96-103, cited in Select Bibliography for Negotiating the Nonnegotiable. See also Shapiro's discussion of Freud's concept of the "narcissism of minor differences," at 8.
10. RIT Article at 14.
11. Negotiating the Nonnegotiable, p. xi
12. A shorter, less colorful description of this exercise, which Shapiro has been developing and using for over 20 years, also appears in the RIT Article. RIT Article at 1-2.
13. Negotiating the Nonnegotiable, pp. 3-6.
14. *Id.* at 6-9., and generally on identity Chapter 2, pp. 22.
15. *Id.* at 21.
16. *Id.* at xv for general outline of concepts involved in "The Method"; 24-26
17. *Id.* at 27.
18. *Id.* at 241, endnote; see generally Ch. 9, pp. 132-138 on integrative dynamics.
19. *Id.* at 132.
20. *Id.* at Chapters 9-13.
21. *Id.* at 192-193 and Chapter 13 generally.
22. *Id.* at Chapter 14.
23. *Id.* at 215-216.
24. *Id.* at 225.

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Book Review
Arbitration and Mediation

A Review of New York Lawyers' Practical Skills Series 2015-2016
By Joseph A. DiBenedetto and Leona Beane
Reviewed by Deborah Masucci

Every arbitration and mediation must start with the foundational warp. This book is a practical and thorough outline of the basic threads necessary for weaving solutions in any subject matter area. It is particularly helpful that the sections also weave in New York law through statutes and case law—a very important starting point. Critical forms are provided so the practitioner can have a model and doesn't need to create everything from scratch.

The book is broken down into two sections. The first section deals with arbitration and covers how to get to arbitration. Here the material reflects the major considerations that New York courts consider when deciding whether to enforce an arbitration agreement and against whom it may be enforced, including when non-signatories may benefit from an arbitration agreement. The author of this section, Joseph DiBenedetto, identifies pitfalls that may lead the court to deny enforcement of New York agreements under certain very specific circumstances but also show how U.S. Supreme Court decisions might alter state court decisions. For example, New York cases refusing to enforce arbitration of punitive damages and statutory rights are trumped by the Federal Arbitration Act under certain circumstances. The cases that may supersede state law are cited in detail as appropriate.

Clients often have procedural questions about enforcement of arbitration agreements and awards. The arbitration section can be used by practitioners to explain to clients in plain English the hurdles that may need to be jumped. The form of motions and other court forms that are part of the book and the companion CD disk are valuable tools.

The second part of the book deals with mediation. The role of mediation and the mediator is contrasted with the court settlement conference to help the reader distinguish the different approaches and to evaluate which approach might provide the best value. These differences are often misunderstood even by the most seasoned lawyer but, here the author of this section, Leona Beane, sets the tone and explains the process in practical terms.

Indeed, the mediation section explains the expansion and support of mediation by the courts and the role of the judiciary and bar in promoting the process. The major benefits of mediation, including confidentiality, neutrality of the mediator, ability to foster communication between disputing parties, and the ability of the parties to frame the outcome enhance the value of the process. Again, New York Statutes and case law are intertwined to demonstrate support for the tool.

Mr. DiBenedetto and Ms. Beane succeed in offering a book that is practical and helpful to lawyers and their clients. The book covers substantive and procedural aspects that provide a starting point for lawyers faced with some thorny issues in arbitration and mediation. The dispute resolution practitioner benefits from the experience of these talented authors.

Deborah Masucci is a full-time mediator and arbitrator who resolves domestic and international disputes involving insurance coverage, employment, commercial business, and securities. She also is the Vice Chair for the NYSBA Dispute Resolution Section, Chair of the International Mediation Institute, and past Chair for the ABA DR Section.

Beverly v. Abbott Labs—The Seventh Circuit Enforces Mediation Settlement Term Sheet

By Laura A. Kaster

It has become a basic teaching of mediation practice that if the parties reach agreement, there should be a written term sheet at the end of the process. By the same token, advocates and mediators should be aware that if that term sheet reflects the material terms of agreement—however skeletal—it may be sufficient to constitute an enforceable settlement agreement.

In Beverly v. Abbott Labs,[1] an employment dispute, the mediation session of represented parties lasted approximately fourteen hours. Prior to the mediation, AbbieVie (the employer, which had spun off from named party, Abbott Laboratories) had sent the plaintiff a draft agreement without the monetary terms. Near the end of the session, the parties and their counsel signed a handwritten agreement that stated:

> I Jon Klinghoffer will commit that my client will communicate to its internal business client the fact that Abbott/AbbVie has offered $200,000 + Abbott/AbbVie pays cost of mediation to resolve this matter and that Martina Beverly has demanded $210,000 + Abbott/AbbVie pays cost of mediation to resolve this matter. Both parties commit [sic] that their offer and demand will remain open until Tuesday, July 22, 2014, 3:00 PM central.

On the following day, Abbott's counsel emailed Beverly's counsel, stating: "My client has accepted Martina Beverly's demand to resolve her claims in the above referenced matter for $210,000 plus the costs of yesterday's mediation. I have attached a draft settlement agreement for your review." This draft was largely identical to the template settlement agreement sent to the claimant before the mediation, with three exceptions: (1) the replacement of "Abbott" with "AbbVie"; (2) the inclusion of the precise dollar amounts to be paid to Beverly ($23,000 for damages, $23,000 for back pay) and to her attorneys ($164,000); and (3) the exclusion of a provision preventing Beverly from disparaging Abbott or AbbVie.

Beverly contended that the terms contained in the longer draft were material and precluded enforcement of the term sheet. However, the district court found there was a binding settlement agreement and the Seventh Circuit affirmed. The Seventh Circuit held that under any standard of review, the offer "to resolve" the matter, even if inartful, implied a willingness to dismiss the claim and release the defendant in return for the payments specified, the defendant responded within the time specified in the offer, and the payment terms were definite and clear. Beverly objected to the handwritten paper, but the court found no basis to distinguish oral or typewritten agreements from handwritings. The fact that the parties anticipated a more complete writing did not establish that the term sheet was conditioned upon that or incomplete as an agreement.

The court suggested that once a settlement had been reached, the parties might record discussions about the content of the agreement; better counsel may be to specifically state if there are conditions to agreement and what they are. Writing is important and avoiding a hearing about confidential mediation discussions is part of its importance. *Cf. Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C.*[2] (The New Jersey Supreme Court, applying the Uniform Mediation Act, held that a mediation is not completed and there is no settlement unless there is a writing; no testimony will be permitted about the mediation dialogue unless both parties and the mediator waive the mediation privilege). But advocates and mediators may want to assure that all terms material to their client are reflected in the term sheet because it may be a binding agreement.

Endnotes

1. Beverly v. Abbott Labs., 817 F.3d 328, 331-32 (7th Cir. 2016).
2. 215 N.J. 242 (2013).

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Geier v. M-Qube Inc., 2015 U.S. App. LEXIS 9640 (9th Cir. 2016)

By Sherman Kahn

In this short *per curiam* opinion, the Ninth Circuit held that unnamed third party beneficiaries of a contract were entitled to invoke the contract's arbitration clause. *Geier* arose from the marketing by content providers of services (here a type of game) for mobile phones through subscriptions implemented through text messages. The defendants in *Geier* were connection and billing aggregators, businesses that act as intermediaries between wireless carriers and content providers.

Plaintiff Richard Geier alleged that his wife had unwittingly subscribed to a "reverse auction" game called "Bid and Win" published by a content provider by the name of Pow! Mobile. Geier sought to initiate a class action against two aggregators, but not against Pow! Mobile itself, alleging that the aggregator defendants had engaged in a scheme that causes mobile phone subscribers to unknowingly and unwittingly subscribe to premium text message services.

The aggregator defendants argued that when Geier's wife allegedly subscribed to the game, she accepted Pow! Mobile's terms and conditions which included a clause compelling arbitration of "any controversy. . . arising out of or relating to" the service agreement between Pow! Mobile and the subscriber.

Geier argued that the aggregator defendants, which were not parties to the service agreement, were not entitled to enforce the arbitration clause because they were not intended third-party beneficiaries of the clause. The Ninth Circuit reversed the district court's denial of the defendants' motion to compel arbitration.

The Ninth Circuit focused on language in the service agreement providing that the subscriber agrees to waive all claims "against [his] wireless carrier, any of Company's suppliers, or anyone other than Company relating to the Service." The Ninth Circuit held that this waiver language created a direct obligation by the subscriber to Pow! Mobile's "suppliers" and thereby made such suppliers third-party beneficiaries of the agreement that were entitled to enforce the arbitration clause.

The Ninth Circuit remanded the case to the district court to determine whether the plaintiff had assented to the service agreement and whether the aggregator defendants could be properly characterized as Pow! Mobile's suppliers.

Under *Geier,* non-parties to an arbitration agreement may be able to compel arbitration if they can demonstrate that the agreement creates a direct obligation by a party to the agreement to the non-party seeking to invoke the arbitration clause.

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Sgouros v. TransUnion Corp., 817 F.3d 1029 (7th Cir. 2016)

By Sherman Kahn

In this case the Seventh Circuit has added its voice to the increasing number of cases regarding the enforceability of arbitration clauses in website terms of service. In line with previous authority, the Seventh Circuit holds that an arbitration clause in website terms of service cannot be enforced unless it is clear that the website user understands that the terms of service apply and has manifested consent to the applicability of the terms of service.

In *Sgouros,* the plaintiff, Gary Sgouros, had purchased a credit score package from *TransUnion* and tried to use the score to obtain a loan in connection with the purchase of a car. At the car dealership, Sgouros discovered that the scores used by lenders differed from the scores provided by TransUnion to consumers. Sgouros filed a lawsuit on behalf of himself and a class alleging that TransUnion had violated a variety of consumer protection statutes by misleading consumers in failing to inform them that the credit score provided to consumers was different from the score used by lenders.

TransUnion moved to compel arbitration based upon an arbitration agreement (and class action waiver) contained in the terms of service on the website where Sgouros had purchased the credit score. The district court held that no contract had been formed under the terms of service and the Seventh Circuit affirmed.

The TransUnion website's purchase process had three steps, each of which was on a separate web page. In the first step, the consumer provided certain identifying information and stated whether he or she agreed to accept offers from TransUnion and its marketing partners. At the second step, the consumer created a user name and password and entered credit card information. Also at the second step, below a yes/no button to confirm whether the consumer's home address is the same as the credit card billing address, the TransUnion site displayed a scroll window that showed the first two-and-a-half to three lines of a "Service Agreement" which, in the printable version, runs ten pages (with the arbitration agreement on page 8). Below the scroll box, the TransUnion website set forth the text below:

> You understand that by clicking on the "I Accept & Continue to Step 3" button below, you are providing "written instructions" to TransUnion Interactive, Inc. authorizing TransUnion Interactive, Inc. to obtain information from your personal credit profile from Experian, Equifax and/or TransUnion. You authorize TransUnion Interactive, Inc. to obtain such information solely to confirm your identity and display your credit data to you.

Below this language was the "I Accept & Continue to Step 3" button.

Applying Illinois law, Seventh Circuit held that the TransUnion website did not create an enforceable arbitration agreement because clicking the "I Accept and Continue to Step 3" button did not clearly inform the web site user that he was agreeing to the terms and conditions of sale and did not contain any clear statement that the sale was subject to any terms and conditions at all. Moreover, the Seventh Circuit held that the language quoted above, by linking the "I Accept and Continue to Step 3" button only to an agreement to use personal information, actively misled website users into believing that the button only applied to personal information and not to terms and conditions.

The Seventh Circuit concluded the opinion by suggesting that a website can bind a user to a service agreement by placing the agreement, a scroll box containing the agreement, or a clearly labeled hyperlink to the agreement next to an "I accept" button, that unambiguously pertains to the agreement. But because TransUnion's web site failed to do that (or something else that would unambiguously inform the web site user that he or she was entering an agreement), the Seventh Circuit affirmed the district court's denial of TransUnion's motion to compel arbitration.

Sgouros adds to the increasing body of authority holding that agreement to arbitration in website terms of service must be clear and unambiguous.

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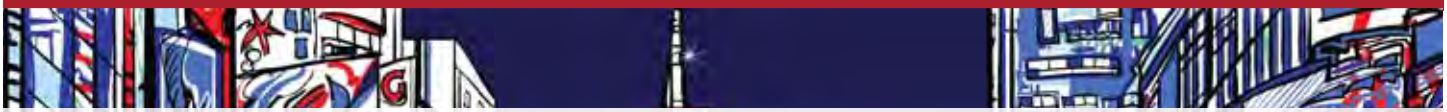

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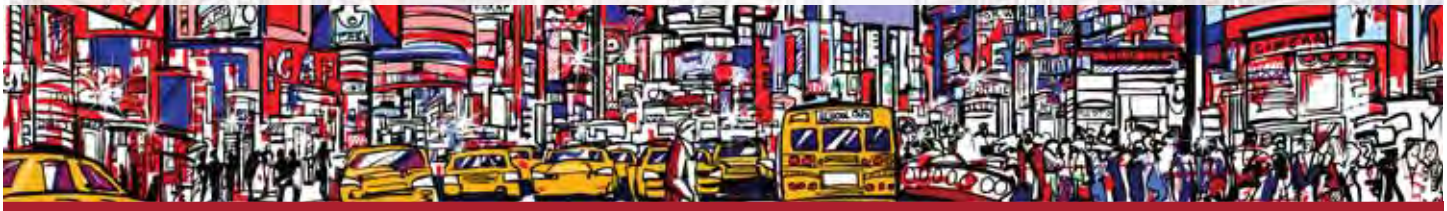

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