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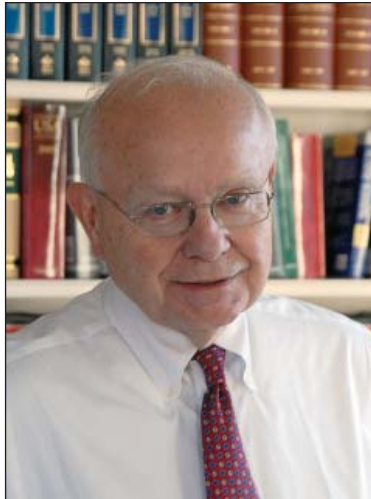
A publication of the Dispute Resolution Section
of the New York State Bar Association



www.nysba.org/DRS

Message from the Chair

Although it has been gradual, we have for some time been living through a period of significant change in how civil disputes are resolved in the United States. Beginning in the 1930s the resolution of such disputes came to be driven primarily by the belief that before resolution, whether by trial or settlement, all relevant facts should be discovered. Counsel were trained to see it as their duty to unearth all facts. For many years, they took it as their job in the service of their client to limit the client's disclosure. Judges carefully tailored their decisions and avoided early dispositive decisions to allow for full discovery. The paramount idea was that if all facts were known then a reasonably fair resolution could be based on truth, or something close to it.



Daniel Kolb

Although for many years that "ideal" drove the process, over time the mounting costs of dispute resolution that resulted increasingly made the ideal unattainable in too many cases. Instead of knowing the facts leading to fair resolution, the expense and length of the process itself was what too often actually led to resolution. The parties did not benefit from an efficient system and often they also went without all the facts.

Awareness of the problem has been leading to important and beneficial changes. Federal and state procedural rules and the rules of providers of arbitration services have in recent years been modified to emphasize proportionality in discovery. Counsel have been reminded more frequently that their clients will benefit from an efficient resolution and that working together to exchange relevant facts is in most cases preferable

to fighting every disclosure. Courts have been adopting measures to streamline the process, among other things emphasizing mediation as a good step even before formal discovery. The high percentage of cases settled early and quickly through mediation—often over 50 percent—speaks for itself. Very often, even if mediation does not result in immediate settlement, by bringing the parties together it will promote a more efficient exchange of relevant facts than can be achieved through the formal court process. In addition to embracing mediation, judges also increasingly see it is helpful to make early decisions on key motions and direct the parties to focus their discovery on what is truly relevant.

While old habits—especially those resulting from belief in what was seen for years as an ideal—die hard, the benefits of change are in this case evident. It is very important that progress continues with all stakeholders embracing and building on the changes. Clients should want litigators and counselors who understand the benefits to the clients of a cost-efficient process; advocates should see cost-efficient resolution as the best way to serve the client and keep the clients coming back; and judges and arbitrators should use their roles to promote efficient decision making and resolution. Some cases do need to be tried but many others don't, and the costs need not be so exorbitant that they distort the process. In many cases getting to the relevant facts is important but that need not cost so much as to defeat the process.

For those in our Dispute Resolution Section, it is time to change to a new ideal: the efficient resolution of disputes.



SAVE THE DATE
Dispute Resolution Section Fall Meeting
Brave New World in Dispute Resolution
Thursday, October 26, 2017 | New York Law School

NEW YORK STATE BAR ASSOCIATION
DISPUTE RESOLUTION SECTION
NYSBA

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Message from the Co-Editors-in-Chief

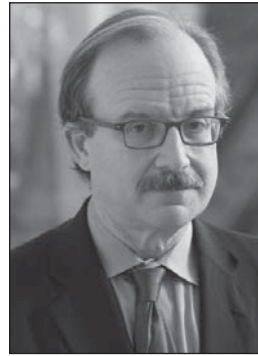
The Dispute Resolution Section has been lucky to have a very deep bench. Our new Chair, Daniel Kolb, has been an active member and a prior co-chair of the Section's Diversity Committee. He follows nine other Chairs, all of whom remain active contributors to the vitality of the Section: Simeon Baum, Jonathan Honig, Edna Sussman, Charles Moxley, Jr., Rona Shamoon, John Wilkinson, Sherman Kahn, David Singer and Abigail Pessen. Given Daniel's Diversity Committee background, it is no surprise that our fall meeting will include a focus on the ongoing challenges faced by the ADR profession in meeting our diversity commitment. The problem has been intractable and a focus of this journal. We hope that a collective effort may help us get beyond the unconscious impediments that affect us all, including those who are diverse and those who have a strong conscious commitment to change. It is time to focus on practical solutions.

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 we introduce new ideas on hybrid approaches to arbitration and try to provide new



Edna Sussman



Sherman Kahn



Laura A. Kaster

transparency from the American Arbitration Association on issues such as disqualification motions and the number of cases pursued to hearing in arbitration that result in no recovery—again disposing of the “split the baby” myth. We also present data developed by the research firm Micronomics showing that arbitration really is faster and more efficient than litigation in court. In addition, in this issue we have specifically addressed some business issues for neutrals. We are seeking to provide the information you want to receive. Please let us know if there are topics or issues you want addressed.

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

NEW YORK STATE BAR ASSOCIATION

Request for Articles

If you have written an article you would like considered for publication, or have an idea for one, please contact the Co-Editors-in-Chief:

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Articles should be submitted in electronic document format (pdfs are NOT acceptable), along with biographical information.



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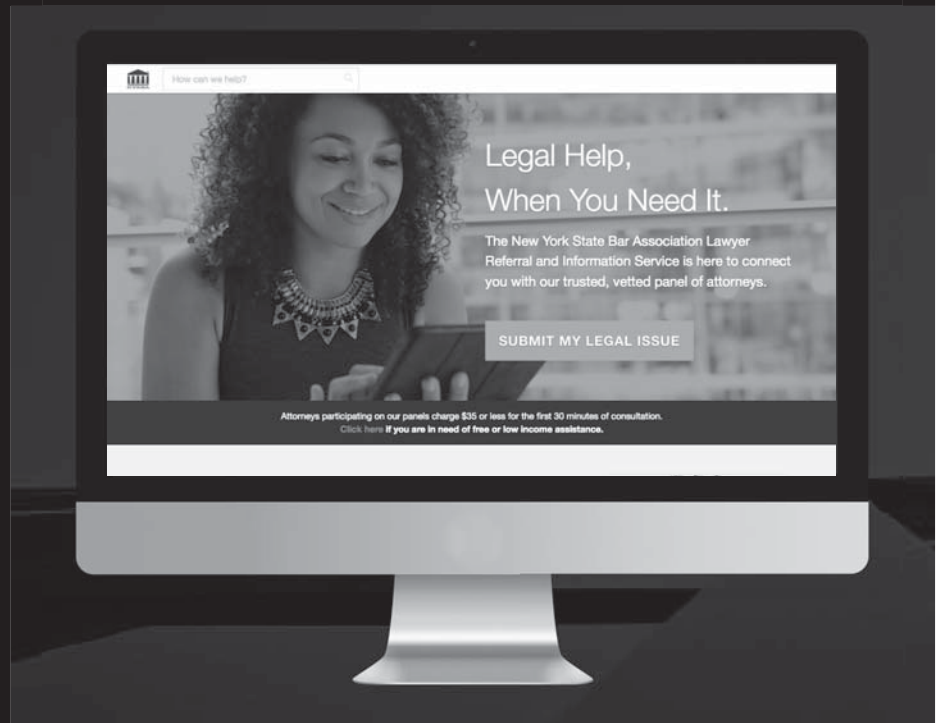
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When Worldviews Collide—Strategic Advocacy v. a Mediator’s Ethical Obligations

By Professor Elayne E. Greenberg

Introduction

The provocative headline “*Judge Orders Preservation of Mediation Notes In Gender Bias Suit Against Proskauer*”¹ sparks the topic of this Ethical Compass discussion. What should be done when a lawyer’s litigation strategy collides with a mediator’s ethical standards of practice? There is growing concern by dispute professionals, including this author, that this collision is diluting the benefits of mediation and re-shaping mediation into quasi-adjudicative dispute resolution procedure.² Others hear this as a clarion call from litigators to the mediation community to realize that mediation ideals are just that, and will not deflate litigation advocacy strategies. These polarized perspectives present an opportunity for dispute resolution professionals to pause and rethink what the dispute resolution professional might do to realistically align litigator’s interests with mediator ethics. This is a particularly timely discussion as the ABA Section of Dispute Resolution Ethics Committee and Committee on Mediation Guidance consider revisions to the 2005 Model Standards of Conduct for Mediators.³

I will continue this discussion in three additional parts. Part One discusses the specific colliding of ethical issues raised by the *Jane Doe v. Proskauer LLP* case. Part Two highlights the broader value conflicts that this case also raises. In this part, I illustrate how the different perspectives held by litigators and mediators regarding mediation increase the likelihood that a litigator’s litigation strategy will collide with a mediator’s ethics. Then, in Part Three recommendations are suggested about how to begin to address this inevitable collision.

The Specific Ethical Issues in the *Jane Doe v. Proskauer Rose, LLP Mediation*

The Salient Facts of the Case

The salient facts for the purpose of this column are as follows. Jane Doe, a partner in Proskauer Rose’s D.C. office, and Proskauer were at mediation ostensibly to try to resolve Doe’s allegations that Proskauer had sexually and economically discriminated against her. Proskauer denied the allegations. Doe alleges that during the March 23 mediation, a Proskauer attorney allegedly stated, “You need to understand...you are going to be terminated. Your complaint upset a lot of people.”

Doe allegedly heard that statement as a threat and on May 12, 2017 filed a complaint in the United States District

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Please share your comments about this column with her at greenbee@stjohns.edu. She thanks Michael McConnell(’18) for his research assistance.



Court for the District of Columbia⁴ and asked the court to subpoena the mediator’s notes as proof that Proskauer had threatened her with retaliation.⁵ The federal judge responded by issuing an emergency order directing that the mediator preserve the mediation notes.⁶ On May 23, 2017, JAMS, the global dispute resolution provider that had administered the mediation, and Carol Wittenberg, the Mediator, submitted to the court that they had previously told Doe in writing, that they were preserving the mediation notes.⁷ Two days later on, May 25, 2017, the judge vacated the preservation order, stating there was “no longer any emergency warranting relief.”⁸

The underlying litigation has not had sufficient time to play out but in relying on the alleged mediation statement, the claim necessarily raises challenges to the Model Standards of Conduct for Mediators ethical standards regarding party self-determination and confidentiality. As you read the implicated standards delineated below, you will notice the tensions that exist among the mediator’s ethical obligation to promote party self-determination, provide a quality process in accordance with the Standards, and maintain mediation confidentiality. The tensions are created, in part, by the ambiguity about how to prioritize self-determination, ethical mediation practice and confidentiality and the precise ethical parameters of each of these three tenets. Moreover, these tensions are exacerbated when a mediator’s ethical obligations collide with a lawyer’s litigation strategy.⁹

Specifically, the Model Standards of Conduct for Mediators, Standard I: Self-Determination provides in relevant part:

- A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.
 - 1. Although party self-determination for process design is a fundamental principle of mediation, a mediator may need to balance such party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards.¹⁰

Regarding confidentiality in mediation, Model Standard V states in relevant part:

- B. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.
 - 1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.
 - 2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.
- C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.
- D. Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.¹¹

How Can a Mediator Discern if a Mediation Statement Is a Threat That Does Not Warrant Confidentiality Protection or an Animated Venting That Is Confidentially Protected?

Unlike, the Model Standards of Practice for Family and Divorce Mediation that expressly remove confidentiality protection from realistic threats,¹² the Model Standards of Conduct for Mediators implicitly does so.

According to the Model Standards, actual threats that are part of a mediation, and that threaten the safety and respect of another participant, are violative of mediation ethics. Specifically, Standard VI, Quality of Process, in relevant part prescribes:

- A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, *safety*, presence of the appropriate participants, party participation, procedural fairness, party competency and *mutual respect among all participants* (emphasis added).
- B. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.
- C. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

However, it may be difficult to discern if the mediation statement in question was a threat or just venting: "You need to understand...you are going to be terminated. Your complaint upset a lot of people." As mediators, advocates and parties in mediation, we understand that the purpose of mediation confidentiality is to promote candid and, at times, uncensored communication. We also understand that statements made at the beginning of a mediation may change and have little relevance or accuracy as the mediation progresses. Moreover, we also all appreciate that mediation parties often hear communications from each other through their own biased lens, convinced that any statement the other makes could only be negative and harmful to them.

We also know that when impasse-creating statements are made in mediation, skilled mediators allied with settlement-focused lawyers, can constructively address those statements to the satisfaction of both parties. However, if a litigator is intent on using mediation to advance his litigation strategy, can the statements be used as fodder to bolster his litigation? If so, litigation strategy clashes with a mediator's obligation to ensure mediation communications remain confidential.

Should the Mediator Testify in Litigation?

This case may enliven the age-old debate about whether mediators should testify in court about what transpired in mediation if one, or both, parties waive mediation confidentiality, or should mediators seek to protect the confidentiality of the process.¹³ Like many philosophical questions, this provokes interesting debate without one correct resolution. The debate pivots on how

mediators interpret the ethical obligation for party self-determination and confidentiality. Some mediators may argue that mediators should testify rather than stymie parties' right to self-determination. Others will insist that there is no self-determination in litigation, and that one party is just trying to gain a tactical advantage in litigation by forcing the other party to also waive mediation confidentiality. After all, if one party volunteers to waive mediation confidentiality and the other party resists, the judge may draw a negative inference and assume the resisting party has something to hide.

The Broader Ethical Issues Raised by *Jane Doe v. Proskauer* That Are Symptomatic of the Larger Problem

The *Jane Doe* case is just one symptom of a larger problem. The mediation and litigation communities often have different worldviews regarding what legal conflicts are actually about and what the best way is to resolve them. Mediators often view the presenting legal conflict in a broad context, not just as a legal conflict, but also as a conflict that may also have economic, emotional, political, and moral dimensions that are relevant when considering viable resolutions. Thus, for many mediators, legal conflict presents an opportunity to work with the parties to help them understand why the dispute occurred in the first place, and given that understanding, consider resolutions beyond just legal ones. With a different perspective, litigators view legal conflicts as just that, legal conflicts with a binary options for resolutions: one side wins and the other side loses. Litigators often have a reductionist mindset that considers only whether facts exist that support or detract from establishing the elements of a claim. Factors such as emotions, social relationships, and morality are deemed irrelevant because they have no bearing on a legal claim's viability.

If we wonder why litigators and mediators have such different optics, we just have to look at the ethics and values inculcated in the education and training each group receives. Litigation, the default approach in much of legal education, reinforces that justice for your client is defined by the law, and the law is the arbiter of justice. Yes, many mediators are also trained lawyers. However, their mediation training provides a different lens through which mediators see legal conflicts. Mediation training encourages acceptance of different perspectives and regards the law as just one measure of justice. Different training, different values, different ethics.

Given these contrasting worldviews, mediation professionals and litigators often talk at each other, each believing they know which is the better practice for the other. While dispute resolution professionals are extolling the relationship and creative resolution benefits of mediation, some litigators are trolling for mediators who will direct a settlement towards the litigator's client or pre-determined amount. Attempting to advocate for the

client, litigators may seek out mediators who may share their legal view of the case by, for example, selecting a former judge, now mediator, who has written on similar cases. More mediation-supportive litigators may appreciate the value of having a creative mediator who hears both sides and still expresses a fair point of view, ideally in the litigator's direction.

If litigators are compelled to mediate because of a judge's strong recommendation or a court rule that dictates such a referral, then those litigators who question the wisdom and/or timing of such a referral may use mediation as a strategic game of chess to help advance their litigation strategy. Such litigators might then regard mediation as an opportunity for free discovery, while at the same time safeguarding their client's information until their case returns to court. Understandably, these different expectations held by mediation professionals and litigators about mediation inevitably create a collision of values and ethics. And understandably, collisions such as the one in the *Jane Doe* case mentioned above, will keep happening unless we—the mediation profession—take steps to minimize such occurrences.

How Should We Proceed?

As you may already appreciate, value conflicts such as the one highlighted in this column, are especially difficult to resolve. However, as a profession we can take steps to minimize their occurrence, and when they do occur, lessen the deleterious impact of such collisions on the mediation process. An important first step is awareness that this is potentially a problem. That is what this column is about.

Second, with this awareness, it is important for litigators and mediators to use the pre-mediation phase to align their expectations regarding participation mediation and the parameters of mediation confidentiality by entering into a clear written confidentiality agreement.¹⁴ As a mediator, I ask attorneys in the pre-mediation phase if they are serious about trying to resolve the case in mediation or are they intent in litigating the case to its conclusion. To the surprise of many, I have found that litigators will candidly disclose their intent when asked during our pre-mediation confidential meeting. Such conversations help mediators ferret out the cases that are more likely to engender ethical collision. Furthermore, such alignment conversations also help decrease the likelihood that litigators will misuse mediation as a litigation strategy in which they abruptly end the mediation at their chosen point and leave the other mediation party feeling duped.

Third, the Model Standards of Conduct for Mediators, when read with care, provide elasticity for interpreting confidentiality and self-determination. As one example, Standard V(d) recognizes that parties may have different expectations of confidentiality regarding media-

tion confidentiality and allows parties to then make their own rules that comport with such expectations.¹⁵ However, this needs to be discussed and anticipated upfront during the pre-mediation phase and continuing throughout the mediation.

As written in an earlier column in 2013 on how to safeguard mediation communications,¹⁶ lawyers, clients and mediators should also talk during the pre-mediation phase about their mediation confidentiality expectations. When confidentiality expectations differ, these differences should be addressed and resolved before the parties go forward and mediate. The negotiated confidentiality expectations should be memorialized in a clearly written confidentiality agreement that is entered into by the mediator and all mediation participants. Even if your jurisdiction has a governing statute or rule that allows the mediator to assert confidentiality, the mediator should also have a written confidentiality agreement. Unfortunately, too many lawyers and parties make the mistake of considering the mediation confidentiality agreement to be a boilerplate agreement that can't be modified. Rather, lawyers, parties and the mediator should customize the agreement to reflect their agreed-upon mediation confidentiality expectations to help avoid ethical collisions concerning confidentiality as the mediation progresses.

Fourth, it would be a welcome addition to the Model Standards of Conduct for Mediators if, as an addendum to the ethical standards, there would be commentary that provided suggestions about how to ethically handle these inevitable ethical collisions.

As we conclude, it may be helpful to appreciate the irony in this discussion. The art and skill of being a mediator is helping parties with different perspectives understand and appreciate the other's point of view. However, in this discussion about how to resolve the ethical collision between mediators and litigators, mediators are significantly more challenged because the dispute they are trying to mediate is their own. The optimistic me believes that as a profession, we can at least try to meet this challenge. Even though the *Jane Doe v. Proskauer* case that began this column may have caused many of us to wince and wonder, "How can that be?," our more centered reaction understands how that case came about. And, now we also understand affirmative steps we might consider to help avert its reoccurrence.

Endnotes

1. Stephanie Russell-Kraft, *Judge Orders Preservation of Mediation Notes in Gender Bias Suit Against Proskauer*, Bloomberg Law (May 19, 2017), <https://bol.bna.com/judges-orders-preservation-of-mediation-notes-in-gender-bias-suit-against-proskauer/> (last visited on 6.9.2017).
2. See, e.g., Jackie Nolan-Haley, *Mediation: The New "Arbitration,"* 17 Harv. L. Rev. 61 (2012).

3. American Arbitration Association, Model Standards of Conduct for Mediators, 17 J. Nat'l Ass'n Admin. L. Judges (1997), <http://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1416&context=naalj>.
4. Complaint, *Doe v. Proskauer Rose, LLP*, No. 1:17-cv901 (D.D.C May 12, 2017)(ECF No. 4), <https://sanfordheisler.com/wp-content/uploads/2017/05/Jane-Doe-v-Proskauer-Rose-complaint-filed.pdf> (last visited on 6.9.2017).
5. Complaint, *Doe v. Proskauer Rose, LLP*, No. 1:17-cv901 (D.D.C May 12, 2017)(ECF No. 1).
6. Emergency Motion, *Doe v. Proskauer Rose, LLP*, No. 1:17-cv901 (D.D.C May 18, 2017)(ECF No. 7).
7. Memorandum in Opposition *Doe v. Proskauer Rose, LLP*, No. 1:17-cv901 (D.D.C May 23, 2017)(ECF No. 10).
8. Minute Order, *Doe v. Proskauer Rose, LLP*, No. 1:17-cv901 (D.D.C May 25, 2017).
9. See, e.g., Omer Shapira, *A Critical Assessment of the Model Standards of Conduct for Mediators (2005); Call for Reform*, 105 Marquette L. Rev. at 101 (2016). Suggests a revision of the standards to address how to proceed when there are conflicts between standards.
10. ABA model standards of conduct for mediators standard I Self-determination (Am. Bar Ass'n 2005).
11. ABA model standards of conduct for mediators standard v confidentiality (Am. Bar Ass'n 2005).
12. *Id.* at STANDARD VII MODEL FAMILY AND DIVORCE MEDIATORS.

A family mediator shall maintain the confidentiality of all information acquired in the mediation process, unless the mediator is permitted or required to reveal the information by law or agreement of the participants. (D) The mediator shall disclose a participant's threat of suicide or violence against any person to the threatened person and the appropriate authorities if the mediator believes such threat is likely to be acted upon as permitted by law.

13. See, e.g., Laura A. Kaster, *The New Jersey Supreme Court Focuses on Mediation Privilege in Willingboro Mall v. Franklin Ave*, New York Dispute Resolution Lawyer, 57 (NYSBA Fall 2013). But c.f. Staff of S. Comm. on Alternative Dispute Resolution, NYSBA, on The Uniform Mediation Act and Mediation in New York (N.Y. 2002), <http://www.nysba.org/workarea/DownloadAsset.aspx?id=26854>, which questions whether the UMA actually protects confidentiality. Consequently, New York has not adopted the UMA.
14. Elayne E. Greenberg, *Starting Here, Starting Now: Using the Lawyer as Impasse Breaker During the Pre-mediation Phase*, in *Definitive Creative Impasse-Breaking Techniques in Mediation* (Molly J. Klapper ed., NYSBA 2011). See also Elayne E. Greenberg, *Confidentiality: The Illusion and the Reality—Affirmative Steps for Lawyers and Mediators to Help Safeguard Their Mediation Communications*, NYSBA Dispute Resolution Lawyer, Vol. 6, No. 1 (2013).
15. ABA MODEL STANDARDS OF CONDUCT FOR MEDIATORS STANDARD V CONFIDENTIALITY (Am. Bar Ass'n 2005).
16. Elayne E. Greenberg, *Confidentiality: The Illusion and the Reality – Affirmative Steps for Lawyers and Mediators to Help Safeguard Their Mediation Communications*, NYSBA Dispute Resolution Lawyer, Spring 2013, Vol.6, No. 1 (2013).

The American Arbitration Association’s Administrative Review Council

Arbitrator Disqualification Requests—An Overview of Issues, Outcomes and Illustrative Cases

By Eric Tuchmann, Sasha Carbone, Tracey Frisch, Simon Kyriakides

A key expectation for parties, arbitrators, and the American Arbitration Association (“AAA”) itself is that all appointed arbitrators will manage and decide cases with complete independence and impartiality. Independence and impartiality are requirements reflected in the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes¹ as well as the AAA’s rules. To further these requirements, the AAA’s rules and procedures provide an extensive process to prompt arbitrator disclosures of circumstances that may give rise to doubts about the arbitrator’s impartiality or independence, and to allow parties to object to an arbitrator’s appointment or continued service.²

To resolve objections to arbitrators’ appointments in large complex cases, the AAA created the Administrative Review Council (ARC) in 2013 to promote greater consistency and improved decision-making with regard to party requests to disqualify arbitrators in large, complex cases. More detailed information about the guidelines, procedures, composition of ARC and the standards that guide ARC’s decision-making process are publicly available on the AAA’s website.³

“From this ARC data, claimants and respondents file arbitrator disqualification requests in close to equal numbers, and those requests are granted (45 percent) slightly less frequently than requests that are denied (55 percent).”

The purpose of this article is to provide parties, and others who may be interested, additional details: about the types of disclosures that are made by arbitrators; the most common categories of disclosures and relationships that give rise to arbitrator challenges in cases decided by ARC; and the results of the challenges. In addition, a number of illustrative arbitrator removal requests are included.

Arbitrator Challenges Decided by the Administrative Review Council

The sample of cases that were reviewed in connection with this summary consisted of all arbitrator disqualifi-

cation requests decided by ARC from January 1 through September 30, 2016, and largely consist of large complex cases in domestic commercial and construction arbitrations. Materials reviewed consisted of party submissions to ARC in connection with challenges, including all relevant arbitrator oaths containing disclosure checklists, any other communications or documentation related to an arbitrator’s disclosure, supplemental disclosure, and allegations of any failure to disclose relevant information. Once an arbitrator makes any disclosure, if a party alleges that an arbitrator failed to make a disclosure, or a party alleges an arbitrator should be disqualified for any other reason allowed in the applicable AAA rules, the AAA requires that all parties to the arbitration are provided with copies of those communications and that they are provided with the opportunity to comment on the issues presented. All such party and arbitrator communications were also reviewed.

Accordingly, the following profile of arbitrator removal requests emerged from the sample of cases that were reviewed:

Total Number of Arbitrator Disqualification Requests for All Cases Submitted to ARC:		
(In some cases, multiple disqualification requests were made.)		
Claimant(s) Requests for Arbitrator Disqualification:		44
Respondent(s) Requests for Arbitrator Disqualification:		41
Third Party (sought to be joined as a party) Requests for Disqualification		1
	Number	Percent
Disqualification Requests Granted	39	45%
Disqualification Requests Denied	47	55%
Number of Cases Containing Disqualification Requests Submitted to ARC:		
65		
In some cases with three arbitrator tribunals, disqualification requests were submitted for one or more arbitrators as follows:		
Requests to Disqualify One Arbitrator:		47
Requests to Disqualify Two of Three Arbitrators:		15
Requests to Disqualify Three Arbitrators:		3
Disqualification(s) Requested by Claimant:		30
Disqualification(s) Requested by Respondent:		27
Disqualification(s) Requested by Both Claimant and Respondent:		8
Categories of Arbitrator Disclosures/Non Disclosures Cited in Disqualification Requests (Arbitrator challenges frequently assert more than one reason to support disqualification.)		
	Number	Percent
Relationships with Lawyers/Law Firms in the Arbitration	37	35%
Relationships with Parties to the Arbitration	30	28%
Relationships with Experts or Witnesses	10	9%
Arbitrator Qualifications	8	8%
Life Experience/Personal Background Related to the Arbitration	4	4%
Other (e.g., relationship between arbitrators)	17	16%

From this ARC data, claimants and respondents file arbitrator disqualification requests in close to equal numbers, and those requests are granted (45 percent) slightly less frequently than requests that are denied (55 percent).

Also notable was that in more than 25 percent of the cases, an objecting party sought the disqualification of two or three arbitrators in cases to be heard before three-arbitrator tribunals, and parties frequently asserted multiple reasons for disqualification. The most common reasons for arbitrator disqualification requests result from the arbitrator's relationships with lawyers or law firms involved in the arbitration (asserted in 35 percent of disqualification requests) and arbitrator's relationships with parties to the arbitrations (asserted in 28 percent of disqualification requests).

Disqualification Request Descriptions and Examples

The following are examples of the types of arbitrator disqualification requests that arose in large, complex cases that were considered by the AAA's Administrative Review Council. These examples were selected because they are representative of the five main categories of challenges that are brought before the Administrative Review Council: relationships with lawyers/law firms in the arbitration; relationships with parties to the arbitration; relationships with experts or witnesses; arbitrator qualifications; and life experiences/backgrounds related to the arbitration. Although these summaries are illustrative of matters that were considered by ARC, the facts and other characteristics of the case examples have been modified significantly to protect confidentiality. In addition, each determination was made on a case-by-case basis after considering the information and arguments presented to it in writing by the parties themselves. As a result, while the summaries are intended to be illustrative, actual outcomes in cases considered by ARC could be different from those described here for any number of reasons. Accordingly, these summaries are not any kind of precedential authority in any cases administered by the AAA or considered by ARC.

Disclosure Issue: Relationships With Lawyers/Law Firms in the Arbitration

Scenario 1

Respondent objected to Claimant's neutral party-appointed arbitrator on the grounds that the arbitrator served as an attorney for Claimant's law firm. The arbitrator's disclosure did not disclose the nature or the length of their attorney/client relationship. In addition, the arbitrator's son had previously been employed as an associate at Respondent's law firm for almost six years. Claimant opposed the challenge on the grounds that the arbitrator's familial relationship should not be grounds for removal because the arbitrator's son never worked on matters related to Respondent. With respect to the arbitrator's relationship with Claimant's law firm, the

Claimant argued that the arbitrator's representation took place decades ago, was not analogous to the arbitration, and therefore did not warrant disqualification.

ARC disqualified the arbitrator.

Scenario 2

Respondent objected on the basis of the arbitrator's disclosure involving prior retentions of the arbitrator and the arbitrator's firm by Claimant's counsel within the past few years. The first incident involved retention by Claimant's counsel to represent a company during a period when Claimant's counsel served as General Counsel of that company. The lawsuit was pending, but Claimant's counsel was no longer with the company. The second involved retention of the arbitrator and the arbitrator's firm to represent another entity from the same industry as the parties to the arbitration.

"The Claimant objected to the appointment of the Respondent's party-appointed arbitrator based on the previous representation of the Respondent and the relationship with the other arbitrator."

Claimant responded that the arbitrator had accurately disclosed the prior matters, and provided added information, specifically that when the arbitrator was retained by Claimant's counsel to represent the entity at which the arbitrator was General Counsel, the matter was handled by an associate from the arbitrator's firm, and that there was no interaction between Claimant's counsel and arbitrator during the representation. As to the retention by Claimant's counsel of the arbitrator and the arbitrator's firm, the Claimant argued that it involved a one-time retention in 2014 that lasted 2½ months, and the arbitrator's participation was limited to a brief phone conference. Claimant viewed these as minimal contacts that did not warrant removal.

ARC disqualified the arbitrator.

Scenario 3

Respondent objected to Claimant's second neutral party-appointed arbitrator on the grounds that Claimant's counsel previously worked for the arbitrator as a law clerk for a year, and the arbitrator was currently serving as an expert in a case involving Claimant's counsel in an ongoing matter. The arbitrator's disclosure did not initially indicate the nature of the matter or any other details involving service as an expert. The arbitrator provided additional detail after the AAA requested further information. Claimant opposed the objection on the grounds that Claimant's counsel's service as law clerk was remote in time since it occurred 10 years previously,

and was only for a one-year period. With respect to service as an expert, the Claimant argued that the arbitrator was retained by an unrelated law firm for that engagement and received no compensation from Claimant's law firm or otherwise had any substantive contact with the law firm on that matter.

ARC disqualified the arbitrator.

Disclosure Issue: Relationships With Parties to the Arbitration

Scenario 4

This was an objection by Claimant to Respondent's neutral party-appointed arbitrator. Claimant argued that the arbitrator's long-standing friendship with the Respondent CEO's spouse was grounds for removal. In addition, the arbitrator and the CEO's spouse also served as co-counsel in several cases. Based upon these personal and professional ties, the Claimant argued that the arbitrator should be disqualified. The Respondent opposed Claimant's challenge on the basis that the CEO's spouse is a third party with no direct relationship to the matter. In addition to its objection based upon a party relationship, Claimant objected to the arbitrator on the grounds that the arbitrator had a professional relationship with Respondent's counsel or the firms for which they work based upon the arbitrator's disclosure of involvement in a lawsuit more than 10 years ago in which Respondent's counsel represented one of the parties.

ARC disqualified the arbitrator.

Scenario 5

The Arbitrator provided a disclosure that the arbitrator represented a general contracting firm in a construction project in which Claimant was a subcontractor, and that Claimant gave the arbitrator's client a discount because Claimant could not obtain a work bond.

Respondent challenged the arbitrator, alleging that the arbitrator's client had been directly impacted by an element of damages which Claimant attributed to Respondent—specifically Claimant's lack of bonding capacity, and that a finding in Claimant's favor could theoretically benefit the arbitrator's client by restoring the bonding capacity.

Claimant conceded the discount received was part of the damages in the instant arbitration, but asserted that the disclosure was not substantial and involved a single and minimal connection and was not a basis to remove the arbitrator.

ARC disqualified the arbitrator.

Scenario 6

Claimant objected to Respondent's party-appointed neutral arbitrator based on the arbitrator's past professional and social relationship with Respondent. Approxi-

mately 10 to 15 years prior to the arbitration, the arbitrator was General Counsel of a parent company with many different subsidiaries. At the same time, Respondent worked for several of the subsidiaries. While working at the parent company, the arbitrator also socialized with Respondent.

ARC disqualified the arbitrator.

Scenario 7

In the notice of appointment, the Respondent's party-appointed arbitrator disclosed representation of the Respondent's business in a litigation decades prior to the arbitration. The arbitrator also disclosed a relationship to another member of the panel—previous selection of another member of the three-arbitrator tribunal to serve as a mediator, and social connections—attending sporting events with one of the other arbitrators within the past two years. The arbitration agreement was silent regarding the neutrality of the party-appointed arbitrators, and accordingly the provisions of the AAA's Commercial Arbitration Rules requiring that arbitrators act in an impartial and independent manner applied equally to all arbitrators, including party-appointed arbitrators.

The Claimant objected to the appointment of the Respondent's party-appointed arbitrator based on the previous representation of the Respondent and the relationship with the other arbitrator.

The Respondent opposed the disqualification of the arbitrator and argued that the standard for arbitrator disqualification had not been met based on a prior representation, which they stated had taken place more than 35 years earlier. Further, Respondent argued that whatever business or social relationship might be reflected among two arbitrators through the attendance at sporting events or the retention of one by the other in an unrelated and concluded matter was not a basis to disqualify an arbitrator.

ARC reaffirmed the arbitrator.

Disclosure Issue: Relationships With Experts or Witnesses

Scenario 8

The challenged arbitrator was appointed as a replacement arbitrator on the panel when one of the arbitrators resigned. One of the Respondents objected on the grounds that the arbitrator had an attorney/client relationship and professional relationship with the Claimant's testifying expert.

The Respondent argued that the arbitrator's representation of the expert created a conflict of interest due to the attorney client fiduciary relationship. Through that relationship, the Respondent argued, the arbitrator had learned facts about the expert that are confidential and not subject to cross examination. The Respondent con-

cluded that the arbitrator would be forced to weigh the credibility of the former client (the expert), which would create an unavoidable specter of partiality. Respondent also based its objection on the arbitrator's disclosure of having retained the services of the expert, which the Respondent argued created an inherent bias in favor of the expert.

The Claimant responded to the challenge by arguing that nothing in the arbitrator's disclosures indicated any direct, continuing, substantial or recent contact with the expert that would warrant disqualification.

ARC disqualified the arbitrator.

Scenario 9

In this multi-party arbitration, all parties mutually agreed to the appointment of an arbitrator without the involvement of the AAA. The subject matter of the arbitration was highly technical, and the arbitrator had been selected based on background, expertise and experience. In the disclosure checklist, the arbitrator made extensive disclosures, including those relating to service as counsel in numerous cases where law firms in the arbitration served as opposing counsel, and of serving as counsel in unrelated arbitrations and mediations where some attorneys in the present arbitration were appointed as an arbitrator or mediator. Finally, the arbitrator disclosed that an ex-spouse's nephew had been designated as an expert witness by one of the parties to the arbitration. In addition, the same expert witness had been retained in several matters by the arbitrator's law firm over the prior ten years.

After receiving the arbitrator's disclosures, one of the Respondents objected to the arbitrator's appointment. However, despite the significant number of prior professional relationships between the arbitrator and many of the attorneys in the arbitration, the sole basis for the Respondent's objection was the nephew of the arbitrator's ex-spouse serving as an expert witness in the arbitration. The Respondent argued that the relationship between the arbitrator and the expert witness, whether good or bad, provided a serious question about the appearance of impartiality and independence that would be very difficult to evaluate. The other Respondents joined in the objection to the arbitrator's appointment. A number of the Claimants argued that the arbitrator's personal relationship with the expert witness was not a basis for the arbitrator's disqualification.

ARC disqualified the arbitrator.

Disclosure Issue: Arbitrator Qualifications

Scenario 10

Both parties objected to the other's neutral party-appointed arbitrator on the basis that the arbitrator lacked the qualifications set forth in the parties' agreement. The

agreement called for the arbitrators to have ten years' experience arbitrating claims in a specific subject area. Claimant's neutral party-appointed arbitrator disclosed service as an arbitrator for over 10 years but did not attest to how much arbitration practice focused on the subject area in question. Respondent's neutral party-appointed arbitrator certified over 20 years' experience as a judge and more than ten cases in the subject area. In addition, since retiring from the judiciary, the Respondent's arbitrator arbitrated two cases involving the subject area and mediated several cases in the subject area.

ARC reaffirmed the Respondent's neutral party-appointed arbitrator and removed Claimant's neutral party-appointed arbitrator.

Disclosure Issue: Life Experience/Personal Background Related to the Arbitration

Scenario 11

Respondent's objection to the arbitrator was not based upon a disclosure but upon their discovery that the arbitrator was currently serving as Chief Legal Officer to an insurance broker. This information was not on the arbitrator's resume originally furnished to the parties, but came to Respondent's attention when they were provided with an updated resume for the arbitrator in a subsequent arbitration. Respondent asserted that as Chief Legal Officer for an insurance broker, the arbitrator would have a presumed bias in favor of insurance brokers, and the arbitration involved a dispute between a Claimant insurance brokerage and a Respondent insurance company. Claimant responded that the arbitrator's service as a Chief Legal Officer at a non-party insurance broker did not give rise to justifiable doubt regarding the arbitrator's impartiality, and that the objection was trivial. It also noted the original resume for the arbitrator demonstrated previous representation of insurance brokers and insurance companies on various legal matters and that Respondent was thus on notice from the outset.

ARC reaffirmed the arbitrator.

Disclosure Issue: Other (Arbitrator Competency)

Scenario 12

Claimant's counsel sought to disqualify the arbitrator based on Claimant's past experience using the arbitrator as counsel. Claimant's counsel argued that Claimant had retained the arbitrator as counsel in a separate matter and the arbitrator had drafted, in Claimant's counsel's estimation, a contract that was below industry standards. Therefore, Claimant's counsel objected to the arbitrator on the grounds that because the arbitrator was incompetent as an attorney, the arbitrator should be removed from serving on the current matter. Respondent did not object to the arbitrator's service.

ARC reaffirmed the arbitrator.

The purpose of the Administrative Review Council is to help to resolve critical administrative issues such as arbitrator disqualification requests in an expeditious and considered manner. As demonstrated by the ARC data, the most frequent reasons for arbitrator disqualification requests result from either relationships with lawyers or law firms representing a party or an arbitrator's relationships with parties to the arbitration. The data also show that both claimants and respondents are making these disqualification challenges to ARC, and that those requests are being granted slightly less frequently than the requests are denied.

Critical to ARC's function is careful consideration of the parties' contentions in conjunction with the Council Guidelines and Council Standards, which are made available to the parties. Therefore, it is important that both parties and arbitrators have a solid understanding of the rules governing arbitrator disclosure requirements, the relevant administrative rules on arbitrator disclosure, and the guidelines that are used to assess arbitrator disqualification requests. The more that arbitrators and parties are educated on issues of arbitrator disclosure obligations and standards, the better it is for the arbitration process. By providing data on the ARC determinations and providing the Council Guidelines and Standards to users and arbitrators, it is the AAA's goal to provide clear guidance as to the factors that AAA considers when evaluating arbitrator disqualification requests.

Endnotes

1. See The Code of Ethics for Arbitrators in Commercial Disputes, effective March 1, 2004, https://www.adr.org/sites/default/files/document_repository/Commercial_Code_of_Ethics_for_Arbitrators_2010_10_14.pdf.
2. See, e.g., Rule 18—AAA Commercial Arbitration Rules, https://www.adr.org/sites/default/files/Commercial_percent20Rules.pdf.
3. The ARC homepage on the AAA's website is available at <https://www.adr.org/arc>.

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Arbitration Predominates for Dispute Resolution Among Participants in the Health Care Industry

By Katherine Benesch

Arbitration has become the predominant mechanism to resolve health care business-to-business disputes. Most of these cases do not enter the courtroom because the contracts between health care parties contain mandatory binding arbitration clauses. Some provide for a two-step mediation/arbitration process. Many require arbitrators with expertise in specialized aspects of the health care industry. In addition to business-to-business disputes, business-to-consumer disputes in nursing homes and post-acute care facilities commonly have been submitted to arbitration. This has led to state statutes restricting arbitration, but these have been held to be preempted by the Federal Arbitration Act (FAA).

Arbitrator Selection in Health care Cases

Often, arbitrators in large health care disputes are specially selected for the case. In addition to requesting arbitrator candidates selected from the Health care Panel of the American Arbitration Association (AAA) or from the Panel of Arbitrators or Mediators of the American Health Lawyers Association (AHLA), parties in highly specialized health care cases often submit subject-matter questionnaires to potential neutrals, and/or interview arbitrators in advance of making their selection of a sole arbitrator or a member of a three-member panel. This enables a more targeted selection process to identify a dispute resolver with appropriate expertise. For example, a dispute involving Medicaid reimbursement under a contract with the federal government may require knowledge of the rules and regulations on termination for convenience under the Federal Acquisition Rules (the FAR), as well as knowledge of Medicaid program regulations. Disputes over the intricacies of managed care contracting and financing (whether under Medicaid or private insurance) also require specialized expertise. Disputes over what rules to apply to set reimbursement rates for experimental new drugs that have not yet been evaluated by Medicare (often the setter of base rates) require knowledge of the rate-setting process.

Parties and Types of Disputes in Health Care Cases

Parties involved in health care disputes include, among others, health systems, hospitals, physicians and medical groups, insurance carriers, state governments, practice management companies and billing and collection services, managed care plans and Affordable Care Organizations (ACOs), laboratories, large and small pharmaceutical companies, durable medical equipment companies, contract research organizations, nursing

homes, assisted-living and residential care facilities. Some disputes are disagreements between payors and providers of care and treatment modalities. Increasingly, however, health care cases in arbitration involve disputes with third-party vendors of back-office services to states, pharmaceutical companies, multi-party health care systems and/or insurance plans. Disputes with vendors raise issues such as: billing and collections under Medicare/Medicaid and private insurance mechanisms, development of payment algorithms for services/providers paid for performance outcomes, and development of IT and data collection systems to measure utilization, drug trials and analyze medical records.

Particular types of frequently arbitrated health care disputes include:

1. Managed care disputes between payors and providers involving contract interpretation, payment rates, risk sharing, insurance, reimbursement and/or administrative issues;
2. Employment contract disputes between physicians and medical groups, or physicians and hospitals (including disputes arising out of covenants not to compete);
3. Medical staff, credentialing and peer review disputes;
4. Shareholder disputes with physician practices or health care entities;
5. Contract and reimbursement disputes involving health care joint ventures;
6. Disputes involving management services companies and third-party vendors with providers, governments and insurance carriers over development of billing, collection and data tracking systems, other IT, medical record and data management issues;
7. Clinical trial disputes between pharmaceutical researchers and manufacturers and contract research organizations (CROs); and
8. Disputes involving consumers' allegations of liability in nursing homes and other post-acute care facilities.

Recent Developments

Health care arbitration cases are testing many interesting principles of jurisprudence. The intersection of dispute resolution with regulatory obligations has led to

challenges to awards. In *Jupiter Med. Ctr., Inc. v. Visiting Nurse Ass'n of Fla, Inc.*,¹ a hospital sought vacatur of an award as it strongly believed that the arbitrator interpreted the contract and discharge planning procedures in a manner that rendered them illegal if enforced because the hospital could be required to violate Stark, Anti-Kickback and Medicare laws and regulations. The Florida Supreme Court found that the Federal Arbitration Act (FAA) precluded it from vacating an arbitration decision that enforced a contract between a home health care agency (VNA) and a hospital (Jupiter Medical Center). After the arbitration panel awarded damages and fees for breach of contract, Jupiter Medical Center filed a motion to vacate the award because it either mandated illegal conduct or imposed damages for a party's failure to engage in such conduct. There was a provision in the contract that required it to be construed in accordance with all laws, and in particular, to comply with the Anti-Kickback Statute. After a long and complex procedural course, the case was decided by the Florida Supreme Court. In deciding the case, the Florida Supreme Court first considered whether the FAA applied to the case, as both parties to the contract were Florida companies. However, because the case involved referral of Medicare patients, the court concluded the transaction involved interstate commerce, and the FAA applied. The Court then reviewed the United States Supreme Court decision in *Hall St. Assocs., L.L.C. v. Mattel, Inc.*,² which determined that the FAA bases for vacating or modifying an arbitral award are limited (at 9 U.S.C. §§ 10 and 11), and alleged illegality of the contract is not one of the bases for vacatur.

"Arbitration of health care cases is a dynamic and challenging endeavor."

A variety of states have sought to limit pre-dispute arbitration clauses in agreements between consumers and nursing homes or other post-acute care facilities. Whether these state laws are preempted by the FAA has been questioned repeatedly. Pre-dispute arbitration agreements in post-acute care facilities have been a subject of much litigation over the past few years.³ In a recent victory for arbitration in general, related to post-acute care facilities, the United States Supreme Court, on May 15, 2017, struck down a decision by the Kentucky Supreme Court, which had invalidated nursing home residents' agreements to arbitrate.⁴ The issue in the case was whether the FAA preempts a state-law contract rule that requires a document appointing a power of attorney to refer explicitly to arbitration, before the attorney-in-fact can waive the individual's right to a jury trial by signing an arbitration agreement. In a 7 to 1 decision analyzing the purpose of the FAA, the Supreme Court declared that if a state law treats arbitration differently—either overtly or covertly—from other kinds of contracts, then the FAA will preempt that law. The FAA prohibits state rules that place arbitration agreements on a different footing from other con-

tracts. This decision is consistent with the U.S. Supreme Court's prior decisions invalidating rules that obstruct the FAA's objective of promoting arbitration.

On June 2, 2017, the Department of Justice filed an unopposed motion to dismiss its challenge to a decision that had enjoined a rule barring nursing homes from requiring residents to enter into agreements containing pre-dispute arbitration clauses. The motion was granted by the U.S. Court of Appeals for the Fifth Circuit.⁵ This challenge arose after the Centers for Medicare and Medicaid Services issued an extensive nursing home regulation that became final in September 2016. The regulation, promulgated by the Obama administration, included a ban preventing nursing homes from enforcing pre-dispute arbitration clauses in their residents' contracts. The U.S. District Court for the Northern District of Mississippi blocked the rule from taking effect nationwide in November 2016. As a result of the withdrawal of this appeal, nursing homes may once again require residents and their families to enter into contracts that include clauses for mandatory binding arbitration of disputes with the facility. Consumer groups, however, have indicated that they intend to file a motion to intervene in the proceedings. Thus, this case may reappear.

Conclusion

Arbitration of health care cases is a dynamic and challenging endeavor. The matters discussed above present only a few of the exciting issues that arise every day in this fast-paced field of changing law and fact. Health care contracts intersect with convoluted, complex and constantly changing regulatory schemes. It is for this reason that parties seek neutrals, who are knowledgeable not only in arbitration techniques but also in state and federal health care and insurance regulation, as well as industry practices and payment mechanisms.

Endnotes

1. 154 So.3d 1115 (2014) (*review denied*, U.S., No. 14-944 5/4/15).
2. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).
3. *See, e.g., Richmond Health Facilities-Kenwood, LP v. Nichols*, 811 F.3d 192 (6th Cir. 2016); *Barrow v. Dartmouth House Nursing Home*, 88 Mass. App. Ct. 128, 14 N.E.3d 318 (2014); *Gross v. GGNSC Southaven, LLC*, No. 15-60248 (5th Cir Mar. 14, 2016).
4. *Kindred Nursing Ctrs., L.P. v. Clark*, 581 U.S. ____ (2017).
5. *Am Health Care Ass'n v. Price*, 5th Cir., No. 17-60005, *dismissed* 6/2/17.

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Making Arbitration More Appealing

By Michael A. Lampert

Introduction

Businesses anywhere in the world with a dispute seek “to secure the just, speedy, and inexpensive determination of” that dispute, as the language of US Federal Civil Rule 1 puts it. Put another way, parties hope for “a plain, speedy and efficient” resolution (Tax Anti-Injunction Act. (28 U.S.C. §1341)). In England and Wales Civil Practice Rule 1.1 states: “These Rules [have] the overriding objective of enabling the court to deal with cases justly and at proportionate cost.”

“[D]rafting an arbitration clause that permits review of an arbitration award after it is rendered will promote speedier, cheaper, and more efficient results in the average case.”

Given the lengthy delays in trial of civil cases in court, (median US federal time to trial is 25 months), parties often turn to Alternate Dispute Resolution.¹ One common ADR method, arbitration, sometimes leaves participants feeling the process was not as speedy, efficient or inexpensive as they had hoped.² The efficiency of the process (described as the time/cost to achieve outcome) is the single greatest priority of dispute resolution participants according to the interim 2016 results of the Global Pound Conference Series.³

Counterintuitively, the view of this article is that drafting an arbitration clause that permits review of an arbitration award after it is rendered will promote speedier, cheaper, and more efficient results in the average case. Specifically, greater review than allowed domestically by the Federal Arbitration Act (FAA) (and many similar state statutes), or internationally by the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards—simply stated, by providing for an “appeal” in arbitration—will improve arbitration. Why?

Adding the Safety Value of an Arbitral Appeal Permits Efficiencies at First Hearing

The reason for this apparently counterintuitive result, that adding a new layer makes the overall process more efficient, is that the presence of enhanced review of an award empowers parties to choose a single arbitrator instead of a panel of three to hear the matter more often. A single arbitrator’s fee instead of three is obviously smaller. Perhaps more importantly, having to accommodate the schedule of just one busy arbitrator instead of three increases the chances of a speedy hearing. This furthers a disposition of the matter in one continuous ses-

sion followed promptly by an award. Speedy processes also should reduce the attorneys’ fees (lawyer’s fees often expand to fill the time available) and the period of distraction for the business people involved in resolving the dispute instead of running the business.

Given these advantages, why do parties prefer three member panels? If, as we learn growing up, two heads are better than one, three are even better. Two might tie, but three won’t.

Central to the thesis of this article, parties choose three because three reduces the chances of a wrong result and even more strongly reduces the chances of the rare but dreaded bizarre result. No business professional wants to explain to their superior or a business leader, effectively the client, that to save some money and time they agreed to a procedure that produced a bizarre result. Much less that the result can’t be undone, given the narrow scope of judicial review found in treaty (New York Convention) and most statutes (FAA and many similar state statutes).

In a study of 46 large countries, the US Bureau of Justice Statistics found that internationally about one-third of civil trial judgments were reversed on appeal.⁴ On its face, this implies that trial courts reached the wrong result in about one third of the cases in the 46 countries studied (although it is possible the appellate court and not the trial court that got it wrong). In light of these judicial statistics it seems unlikely that arbitrators get it wrong in less than 15-20 percent of the cases. Even if one assumes that arbitrators are less likely to err (in part because they are specifically selected for the case and often have more background in the subject matter of the dispute than a randomly assigned judge) wrong half as often seems likely. That percent is big enough to include more than a few bizarre results that are not just wrong, but badly so.

In general terms the grounds to overturn an award are procedural: an award in excess of arbitral power, bias, prejudice, or material procedural unfairness. Error of law or fact, even when obvious, plain, clear or indisputable, is not usually sufficient to vacate an award.

A panel of three thus seems required to reduce the chances of the bizarre. But it is a protection that comes at a price.

Significant extra costs in time and money, described above, are incurred in most cases, all to protect against the extraordinary bizarre in a very few. Depending on the arbitral forum, fees for three arbitrator panels are between \$48,000 and \$115,000 greater than for single arbitrators. The London Court of International Arbitration (LCIA) and the Stockholm Chamber of Commerce (SCC)

report that the median duration of three arbitrator cases is respectively four months and 5.5 months longer than for a single arbitrator.⁵

In most cases a single arbitrator will get it right, and certainly most cases will not result in a bizarre result. In several countries, most trial courts sit with a single judge. In many cases, a single arbitrator will produce the same award as three would have (consider the rarity of arbitral, or even judicial, dissents), and at significant savings of time and money.

But the presence of some enhanced “appellate” review protects against the wrong or bizarre result. In those rare cases of error, providing one of the three relief valves discussed below can prevent disaster. Even when appellate review confirms an award, review by a panel of three on the record created before a single arbitrator is likely less costly and time consuming than a full hearing on the merits before three arbitrators from the start would have been. When there has been some arbitral “appellate” review, the likelihood a court would vacate the award goes down as well. Not often will a court be persuaded that a single trial arbitrator and three appellate arbitrators got wrong an issue that permits vacating the award under the narrow statutory or treaty standards.

Thus, the cumulative cost, after hearing and appeal, while greater than a three member panel to try the case, is not likely to be *materially* greater because the actual taking of live testimony, as opposed to reading a transcript or record on appeal, is materially slower and costlier when done in front of three instead of one.

Participants in ADR believe that the outcome of commercial disputes is primarily determined by the rule of law: findings of fact, and law or other norms. Global Pound Conference Interim Report, Session 2, Question 2. Appeal promotes assurance that an arbitral outcome has been determined by the rule of law.

The Narrow Scope of Judicial Review

Absent implementation of one of the techniques described below, Article V of the New York Convention only permits the courts of any of its about 160 signatory nations to refuse enforcement of an international arbitral award on five grounds.⁶ Section 10 of the FAA permits vacating a domestic US award on four grounds.⁷ The US Supreme Court has held those grounds cannot be expanded even by consent of the parties. (*Hall Street Associates. v. Mattel*, 552 U.S. 576 (2008)). The English Arbitration Act of 1999, §68 has similar procedural grounds for domestic UK awards, but §69 permits an appeal on a material point of law if all parties agree.

How Can Parties Get the Safety Value of Wider Judicial Review of the Award?

There are three ways to expand the default legal standard of review described above:

1. Choose an arbitral forum with rules that allow for an appeal to a panel of three arbitrators or draft such rules in the arbitration agreement.
2. Choose to invoke the local law of a jurisdiction that allows enhanced review and explicitly exclude the FAA or the New York Convention.
3. Draft the arbitration clause in a way that limits the *power* of the arbitrator to enter an erroneous award.

Let’s look at each structure in turn.

Arbitral Appellate rules. Several of the major arbitral forums, CPR⁸, JAMS⁹ and AAA/ICDR¹⁰ (ICDR is the international affiliate of AAA) each have an optional appeal procedure that the parties can invoke in their agreement to arbitrate. ICSID, an affiliate of the World Bank for investor-state disputes, provides an optional appellate body¹¹ as does the World Trade Organization.¹² On the other hand, UNCITRAL, the Chartered Institute of Arbitrators, the London Court of International Arbitration, the World Intellectual Property Organization, and the International Chamber of Commerce do not have rules permitting arbitral appellate practice.¹³

Arbitration is voluntary; it requires the agreement of the parties to a dispute to be invoked. As noted above, if the parties want an appeal, the safest of the three courses advocated in this Article is for them both to choose an arbitral forum with appellate rules and specifically invoke those appellate rules. Each organization that has appellate rules requires specifically invoking the appellate process in addition to the arbitral process. Each has some difference in the degree to which the default rules can be varied by party agreement. Further, each imposes slightly different standards to undo the award. For example, CPR provides that in addition to the grounds found in the FAA Section 10, it is grounds to overturn the award if it “(i) contains material and prejudicial errors of law of such a nature that it does not rest upon any appropriate legal basis, or (ii) is based upon factual findings clearly unsupported by the record.”

The others differ in detail, and therefore the parties should choose the forum with care. But whatever the differences in detail, each set of appellate rules provides an effective remedy against a bizarre result by a single arbitrator.¹⁴

In principle, the parties could lay out the details of an appeal process in their arbitration agreement, including scope of review and process. The advantage is this maximizes the ability to tailor the process to what they want. The disadvantage is this is most likely to lead to mischief. The rules have been vetted by committees of experienced

practitioners, may have some precedent on interpretation and the staffs of the arbitral forums have experience with them. A bespoke provision may have a problem that the parties didn't see and it lacks familiarity to the other players (arbitrators and staff).

Local law. When drafting an agreement that provides for arbitration, it is likely the parties will also choose the law of some jurisdiction to apply to the agreement. It is perfectly permissible for parties to choose the law of different jurisdictions to apply to different parts of the agreement. Thus the substantive provisions of the agreement can be governed by one jurisdiction's law and the dispute resolution provisions by the law of another jurisdiction entirely. Indeed, it is even perfectly possible to have the procedure to be followed during the dispute resolution process governed by one jurisdiction's law, and the enforcement process for the outcome of the dispute resolution process governed by another jurisdiction's law.¹⁵

The consequence of these principles is that the parties, if they desire more extensive review than the New York Convention's or the FAA's limited review described above, can choose to exclude those laws and have the review subject exclusively to the law of a jurisdiction that provides wider review. This should be possible both domestically in the U.S. and internationally.

In the United States, at least California, Texas, Alabama, New Jersey, Connecticut, Pennsylvania, Rhode Island and New Hampshire have cases allowing broader judicial review than the FAA or the New York Convention.

For example, in *Cable Connection v. DirectTV*, 44 Cal. 4th 1334 (2008), the California Supreme Court concluded that the US Supreme Court's *Hall Street* decision (cited above) did not preclude it from interpreting the California Arbitration Act differently. It went on to do so, and concluded that the CAA's standards of judicial review of awards (identical with the FAA's) were not exclusive. The Court held the CAA did not preclude the parties from choosing a broader scope of judicial review where the CAA is governing law. It therefore sent the case back to the trial court to apply the parties' agreed standard of review to the award. Later cases suggest California does not believe that its common or statutory law creates a standard of review different from the FAA, only that it permits the parties contractually to choose a different standard of review.

Texas seems to follow the same rule, *Nafta Traders v. Quinn*, 339 S.W.3d 84 (Texas 2011) and that decision notes that Alabama, New Jersey, and Connecticut also do (at fn. 62).

Rhode Island has interpreted "manifest disregard" (a standard explained below) much more broadly than other courts that have accepted that standard and thus

has broader review than the FAA. *Nappa Construction Management, LLC v. Caroline Flynn*, 2017 WL 281812.

Pennsylvania, in certain instances, allows setting aside an award any time a court would enter judgment notwithstanding a jury verdict. *Trombetta v. Raymond James Financial Services, Inc.*, 907 A.2d 550 (Pa. Super. 2006) (holding parties' agreement to use de novo review of JNOV invalid).

New Hampshire seems to go further and hold that its state law is not preempted by the FAA, and that state common law permits review of an award for "plain mistake" even if the parties' agreement only invokes New Hampshire law and is silent on scope of review (*Finn v. Ballentine Partners*, 169 N.H. 128 (N.H. 2016)).

As noted above, §69 of the English Arbitration Act (1999) permits the parties to empower the court to review an award for errors of law. English law permits invocation in commercial transactions even when the transaction has no connection to England.

The question of whether a contract that had no contact with one of these broader review jurisdictions could none the less invoke the law of that jurisdiction is complex and beyond the present scope of this article— some jurisdictions allow that, some don't. But when the parties can find a connection (perhaps even agreeing the actual arbitration hearings will be held within such a jurisdiction) or comfort themselves that, like England, the law of those jurisdictions can be invoked even if there is no other connection,¹⁶ they surely should consider the question of expanding the scope of review to facilitate a single arbitrator hearing and deciding at first instance.

"Agreement by the parties to some form of review of an arbitral award greater than the extremely limited scope in the New York Convention, the FAA or similar sources, promotes the ability of the parties to have the case heard by a single arbitrator."

None of these cases deal with the law of a jurisdiction preempting the New York Convention instead of the FAA, but the same result may follow – particularly in the U.S. where the Convention is implemented by the FAA.

Careful drafting. The FAA, and the New York Convention, recognize that arbitration is a creature of party consent and the only source of power for the arbitrator is the parties' agreement. Awards have been set aside as in excess of the arbitrators' power.

Suppose, then, that the parties agree that the arbitrator is not empowered to render an award that is contrary to the law of a chosen jurisdiction. (Or alternatively only

empower the arbitrator to render an award that is consistent with a jurisdiction's law). Or to render an award contrary to the manifest weight of the evidence.

A simple error of law is not grounds for vacation of an award under either the FAA or New York Convention. Whether "manifest disregard of the law" (which at least requires that the law have been drawn to the arbitrator's attention by the party now aggrieved, that the law be clear, and that the award could not have been reached except by ignoring the clear law drawn to the attention of the arbitrator) can lead to vacating an award is a question the US Supreme Court has expressly deferred to the future.

But if the parties say the arbitrator is not empowered to render an award contrary to law, or must render one in conformity with law or the facts, are they limiting the arbitrator's power or expanding the scope of review? A court is not being asked to expand grounds for review; it is using the familiar "power" ground in a new way. This analysis is suggested by the Texas Supreme court decision in *Nafta Traders v. Quinn*, 339 S.W.3d 84 (Texas 2011).

Whether this talismanic use of the power concept or word will change the result in any place other than Texas is an untested question.

Conclusion

Agreement by the parties to some form of review of an arbitral award greater than the extremely limited scope in the New York Convention, the FAA or similar sources, promotes the ability of the parties to have the case heard by a single arbitrator. Because expanded review provides comfort against seriously erroneous results, there is no need for two additional arbitrators in every case to prevent serious error. Shifting to a single arbitrator, as the LCIA and SCC data show, produces a speedier and less expensive result on average: time and money often correlate in dispute resolution. Thus, providing for an appellate process in drafting the arbitration agreement with a single arbitrator at first instance is likely to promote the parties' shared goal of securing a "just, speedy, and inexpensive determination of" their dispute.

Author's Note:

Since the article was originally written, the AAA has produced a study with much more detail about the economics of court versus arbitrator: Measuring the Costs of Delays in Dispute Resolution, <http://go.adr.org/impact-sofdelay.html>. And an English law firm has produced a piece about one versus three arbitrators: <https://www.ashurst.com/en/news-and-insights/legal-updates/one-arbitrator-or-three/>.

Arbitration Clause With Appellate Option [CPR]

Any dispute arising out of or relating to this contract, including the breach, termination or validity thereof, shall be finally resolved by arbitration in accordance with the International Institute for Conflict Prevention and Resolution ("CPR") Rules for Administered Arbitration (the "Administered Rules" or "Rules") by a sole arbitrator designated by [CPR] [the parties] under the Rules. The arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq., and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The place of the arbitration shall be (city, state).

An appeal may be taken under the CPR Arbitration Appeal Procedure from any final award of an arbitral panel in any arbitration arising out of or related to this agreement that is conducted in accordance with the requirements of such Appeal Procedure. Unless otherwise agreed by the parties and the appeal tribunal, the appeal shall be conducted at the place of the original arbitration.

Appellate Clause Assuming Standard Arbitration Provision in Place [AAA]

Notwithstanding any language to the contrary in the contract documents, the parties hereby agree: that the Underlying Award may be appealed pursuant to the AAA's Optional Appellate Arbitration Rules ("Appellate Rules"); that the Underlying Award rendered by the arbitrator(s) shall, at a minimum, be a reasoned award; and that the Underlying Award shall not be considered final until after the time for filing the notice of appeal pursuant to the Appellate Rules has expired. Appeals must be initiated within thirty (30) days of receipt of an Underlying Award, as defined by Rule A-3 of the Appellate Rules, by filing a Notice of Appeal with any AAA office. Following the appeal process the decision rendered by the appeal tribunal may be entered in any court having jurisdiction thereof.

Appellate Clause Assuming Standard Arbitration Provision In Place [JAMS]

The Parties adopt and agree to implement the JAMS Optional Arbitration Appeal Procedure (as it exists on the effective date of this Agreement) with respect to any final award in an arbitration arising out of or related to this Agreement.

Endnotes

1. The median time to resolve US federal civil cases is about 8.5 months but this includes defaults, motions and other early resolutions. Nearly 15 percent of federal civil cases last more than three years. Federal Court Management Statistics, www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0630.2016.pdf. For those cases that actually get tried, the median time to begin a trial is 24.9 months. www.uscourts.gov/sites/default/files/data_tables/C05Sep15.pdf. A 1999 World Bank Publication, Court Performance Around the World (at 18) reports Germany among the speediest internationally at five months. <http://siteresources>.

worldbank.org/BRAZILINPOREXTN/Resources/3817166-1185895645304/4044168-1186404259243/14pub_br176.pdf. France and Singapore are speedy, while Panama, Ecuador and Chile are slow, per the World Bank.

2. On the virtues of arbitration generally, see, e.g., Sussman and Wilkinson, *Benefits of Arbitration for Commercial Disputes* (2012). www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/March_2012_Sussman_Wilkinson_March_5_authcheckdam.pdf.
3. In 2016-17 a global series of meetings—the Global Pound Conference—is soliciting opinions of clients, neutrals, advocates and academics on dispute resolution. The interim results as of yearend 2016 have been published as of the date of this writing.
4. www.globalpoundconference.org/Documents/Aggregated%20Data%20Report%20GPC_28Dec.pdf?mkt
5. Tables in *Costs and Duration of Arbitration – A Survey of the SIAC, HKIAC, LCIA and SCC Case Statistics*. <https://globalarbitrationnews.com/costs-duration-arbitration-survey-siac-hkiac-lcia-scc-case-statistics/>. SIAC data suggest only half a month longer; no explanation is apparent for this outlier.
6. Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

7. In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where

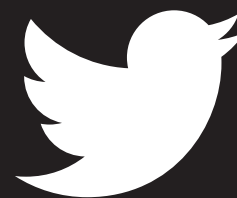
the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. [Note Author: Another sidebar – this info will look better in layout (and likely read) as a sidebar -TA]

8. www.cpradr.org/resource-center/rules/arbitration/appellate-arbitration-procedure.
9. www.jamsadr.com/appeal/.
10. www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTAGE2016218.
11. <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partFchap07.htm>.
12. www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm.
13. See generally, Robertson, Carson and Harrell, *Appealing an International Arbitration Award*, *Corporate Counsel* (July 2015).
14. Parties can provide for three arbitrators and then an appeal, but that seems only to add delay and expense with little reason to expect it will produce a better result.
15. *Smith Barney Shearson Inc. v. Sacharow*, 91 N.Y.2d 39 (1997) (esp. Section IV).
16. New York also allows invocation of its law without contact for large commercial matters (see NY GOL 5-1401) but it has not yet permitted expanded review of awards.

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The Arbitrator's Proposal

By Stephen P. Gilbert

The First Proposal

I'm going to ask both sides a question concerning the arbitration and after you hear it, please don't immediately answer. I will ask you to eventually answer the question, but only after you've conferred with each other without me being present. Is this OK with you?

Both sides said yes.

All right. Here's the question and, again, please do not answer. Would you be interested in hearing my impressions regarding the evidence I've read and heard so far?

I had already reviewed all the documentary evidence and heard about half a dozen witnesses. Because of scheduling issues, the last witness could not testify for another two weeks and, according to the side offering the witness, he was going to confirm what other witnesses for that side had already said and not add anything new (I admittedly did not know what would be elicited from him during cross-examination).

Here's the basis on which I would give you my thoughts. First, I have not yet heard all the evidence or received any post-hearing briefing, so my mind is completely open on all issues and I would not be conveying any decision on any issue. Second, everything I say would be completely off the record. That means nothing I say would ever appear in, be referenced in, or even be alluded to in any papers filed in, or be told to, any tribunal, court or otherwise—again, this would be completely off the record. Third, I know I'm suggesting you buy a pig in a poke because you don't know what I'm going to say. However, I can promise you that nothing I say will violate any ethical obligations or otherwise be improper. Finally, the only way I would do this is for both sides to agree I should. I'm going to take a walk now and when I come back in ten minutes, if both sides are agreeable, just say "Yes." If one or both sides don't want to hear my thoughts, just say "No." I don't want to know who said "No"—it obviously could be just one side or it could be both sides. My feelings will not be hurt if the answer is no and it will have no effect on the outcome of the arbitra-

tion. Is the decisional procedure understood and acceptable to you?

The two sides agreed it was, and I left the room.

It was a self-administered arbitration of a professional partnership dispute, and I was sole arbitrator. Claimant had been a high-ranking, longtime partner of the Respondent law firm, which he had left after many years to join a larger law firm. Each side had alleged numerous wrongs by the other, but they boiled down to Claimant saying he had not been paid all the money he thought Respondent owed him and Respondent saying Claimant had breached fiduciary obligations Claimant owed it. Claimant was represented by litigation counsel; Respondent, a general practice firm, was representing itself. Both sides were smart: smart parties/party representatives and smart counsel.

At the preliminary hearing, both sides had requested a reasoned award. I suggested they reconsider, noting that I didn't know who was going to win or lose, that the unhappy party might move to vacate the award, that Exhibit No. 1 to a motion to vacate in court would be the written award itself, that in a reasoned award, I would have to discuss the claims and allegations each side was making, that there was a reasonable possibility the written award would become publicly available (perhaps even on the internet) since a court's sealing it was unlikely, that the internet was "forever," and that they should think about whether they wanted the allegations (regardless of how I ruled on them) to be read by clients, potential clients, colleagues, adversaries, judges, etc. I said the decision was theirs and I would, of course, abide by it. A few days later, the parties agreed a simple award was preferable. We all also agreed an official transcript of the proceedings was not necessary.

During the hearing, unrebutted evidence suggested Claimant had not left the Respondent firm because he wanted to (he had been a partner there for years and was still respected and liked by many of its partners) but rather because he had to some extent felt forced out by newer lateral partners—firm culture was changing. He had a solid client base, and high-ranking executives of several clients had testified for him. Respondent's witnesses testified regarding its partnership agreement and long-standing financial policies/procedures, including when and the circumstances under which monies were distributed to partners.

I returned to the hearing room. I asked the two sides for their joint decision, again reminding them it was to be just a "Yes" or a "No." They said "Yes," so I started.

At the outset, I want to say I respect all of you and would be happy to have any of

you represent me. I think you've all conducted yourselves well in this difficult situation. Notwithstanding this dispute, it is evident Claimant still has great affection and respect for those from Respondent in this room and vice versa.

We still have one witness to be heard, and that is two weeks away. I again note that my mind is still open on all the issues.

Claimant asserts monies are owed to him. He says he should have received various sums for the period in question. Respondent says the amount and timing of each distribution to each partner over this period were completely discretionary and that if the firm had known Claimant was planning to leave, it would not have made any distribution to him. Respondent has adduced documentary evidence and witness testimony to that effect.

Respondent says that before Claimant gave notice and departed, he made questionable statements to clients about Respondent, took clients with him he would not have otherwise been able to take if he had not made those statements, and billed for work at his new firm that was done before he left Respondent. Executives of all the clients in question testified Claimant had never badmouthed Respondent to them, that their allegiance was to him, and that they would have followed him anywhere. Claimant also offered witnesses and records to show that the relevant bills of his new firm covered only work done after he had joined the new firm and that all of his time while he was still at Respondent had been billed out by Respondent. The Chair of Claimant's new firm testified as to what Claimant said, did, and did not say or do before Claimant joined the new firm.

I'm not telling you how much weight I place on any of the evidence, just that it's there. You all heard it. And we don't know—or at least I don't know—what the last witness will say. I again stress that my mind is open on all the issues. I will timely make a definitive decision on each issue—that's my job, which I take quite seriously.

I finished by saying

I am holding substantial amounts of money from each side. Is there anything either side would rather do with that money than pay me?

Both sides thanked me for what they characterized as "a balanced presentation" and said they would carefully consider what had been said.

The day before the hearing was to resume (for examination of the last witness and to set the post-hearing schedule), I received a cordial email on behalf of both sides again thanking me, saying the matter had been settled, and directing disposition of the unencumbered funds I was holding.¹

The Second Proposal

About a year later, I was again sole arbitrator in a law firm partnership dispute (a former partner against his prior firm), and this arbitration was being administered by a provider organization. There were numerous allegations of breaches of the partnership agreement, violations of fiduciary obligations, interference with contract/prospective economic advantage, unpaid monies, defamation, significant personal and professional harm, and worse. Thirteen fact and expert witnesses testified at the hearing, and there were about 400 exhibits. Each side was quite angry with the other; each side insisted on a reasoned award.

The potential reputational and other damage to the loser (whoever that was going to be) was significant (given the allegations and likelihood the loser would move to vacate the award), and the parties' post-hearing expenses (e.g., briefing) were not going to be insignificant. I wondered if the thinking of the two sides had evolved as a result of the evidentiary hearing.

My internal dialogue went back and forth on whether making the same type of proposal to these combatants as I had made in the earlier arbitration would be helpful to them. On balance, it seemed the procedure might be helpful in this case without any significant downside, so I discussed it with the case manager; she expressed interest. I gave her and an officer of the provider organization an outline of what I would say to the parties, and I was given a green light.

I made the proposal to the two sides before lunch, and they listened politely. I asked them to convey their decision to the case manager.

After lunch, before I entered the hearing room, the case manager told me the answer was no. When I entered the hearing room, I told the parties I had received their joint answer from the case manager and thanked them for their consideration. Thereafter, neither the parties nor I alluded to the proposal or its rejection.

I later rendered a lengthy reasoned award, finding in favor of one party on all issues. After a suitable time had passed, I was told by the case manager that one side had been in favor of accepting my offer, but I was not told which side.

In Retrospect

Several questions grew out of these experiences:

1. “Was it a good idea to make the proposal in each of those cases or use the process in the first case?” which morphed into “Is it a bad idea to make the proposal or use the process?”
2. “Why did the parties in the first case—but not the second case—agree to the process?”
3. “Of what potential benefit, if any, is the process?”
4. “What indicia (if any) will suggest the proposal should or should not be made in a given arbitration?”
5. “If the process is going to be suggested, when should the suggestion be made?”
6. “When are parties likely to say yes to the process?”
7. “Will I keep the process in my tool kit?”
8. “If I do keep the process in my tool kit, how can the entire procedure be improved?”

Is It a Bad Idea to Make the Proposal or Use the Process?

Subsumed within this question are at least the following issues: whether the procedure violates ethical rules, whether the award is put in danger (e.g., under 9 U.S.C. § 10(a)) by either the proposal or the process, and whether (even if there is no ethical violation or danger to the award) the proposal or the process somehow hurts arbitration, the parties, or counsel.

- Does Making the Proposal or Conducting the Process Violate Ethical Rules?

The American Arbitration Association/American Bar Association’s 2004 *Revised Code of Ethics for Arbitrators in Commercial Disputes* (“Revised Code”) contains several relevant passages (*italics added*).

Canon I

An Arbitrator Should Uphold the Integrity and Fairness of the Arbitration Process

- A. An arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved....

- D. Arbitrators should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, public clamor, and fear of criticism or self-interest. They should avoid conduct and statements that give the appearance of partiality toward or against any party.
- F. An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision....

Comment to Canon I

During an arbitration, the arbitrator may engage in discourse with the parties or their counsel, draw out arguments or contentions, *comment on the law or evidence*, make interim rulings, and otherwise control or direct the arbitration. *These activities are integral parts of an arbitration. Paragraph D of Canon I is not intended to preclude or limit either full discussion of the issues during the course of the arbitration or the arbitrator’s management of the proceeding.*

Canon IV

An Arbitrator Should Conduct the Proceedings Fairly and Diligently

- A. An arbitrator should conduct the proceedings in an evenhanded manner....
- F. Although it is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement or the use of mediation, or other dispute resolution processes, *an arbitrator should not exert pressure on any party to settle or to utilize other dispute resolution processes.* An arbitrator should not be present or otherwise participate in settlement discussions or act as a mediator unless requested to do so by all parties.

Canon I, Paragraph D, proscribes “conduct and statements that give the appearance of partiality,” and Canon IV, Paragraph F, prohibits an arbitrator from “*exert[ing] pressure on any party to settle or to utilize other dispute resolution processes.*” Those highlight two potential pitfalls of making the proposal or conducting the process, namely, doing or saying anything that gives the appearance of partiality or that exerts pressure on the parties to settle or use another ADR process. It should be possible for a careful arbitrator to avoid those hazards when suggesting the process and going forward with it if the parties agree.

Canon I, Paragraph A, notes that the “arbitrator has a responsibility not only to the parties but also to the process of arbitration itself,” and Paragraph F requires the arbitrator to “conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision.” The Comment to Canon I notes that the arbitrator may, among other things, “comment on the law or evidence,” that doing so is an “integral part[] of

an arbitration,” and that Paragraph D is not intended to preclude or limit full discussion of the issues.

At a theoretical level, ethical considerations do not seem to bar making the proposal or conducting the process if the parties agree to it.

At a practical level, if the process is to be suggested to the parties, permission to conduct it must be sought in a neutral, unpressured way (e.g., the arbitrator obviously should not say to the parties “You *should* do this”), and if the parties’ joint answer is no, it must be respected by the arbitrator. The method for receiving the parties’ joint answer to the proposal must be engineered so the arbitrator does not know if just one of the parties said no (and, if so, which party).

“[T]he arbitrator’s carefully and neutrally sharing his/her thoughts regarding the evidence after the testimony has been presented is properly part of the arbitration process.”

Adjectives that suggest how the arbitrator views any witness (e.g., “forthright,” “unbelievable”) or views the evidence (e.g., “overwhelming”) should be avoided when proposing or conducting the process because their use may suggest a closed mind or bias. On the other hand, saying something like “This is not a slam-dunk for either side” (assuming that is the arbitrator’s honest assessment) does not seem inappropriate.

- Does Making the Proposal or Conducting the Process Put the Award in Danger?

Focusing on 9 U.S.C. § 10(a) (emphasis added):

- (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
- (1) where the award was procured by corruption, fraud, or undue means;
 - (2) *where there was evident partiality* or corruption in the arbitrators, or either of them;
 - (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of *any other misbehavior by which the rights of any party have been prejudiced*; or
 - (4) *where the arbitrators exceeded their powers*, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

If carefully suggested to the parties and carried out (if they agree to it), the process does not seem to put the award in danger under 9 U.S.C. § 10(a) because there is no, and will be no evidence of, evident partiality; there will be no misbehavior prejudicing the rights of any party, and the arbitrator will not have exceeded his/her powers. The Revised Code specifically allows the arbitrator to “comment on the law or evidence” (Comment to Canon I), and there’s no harm in carefully asking the parties if they are interested in the process, which will not be conducted unless both parties consent.²

- Does the Process or Suggesting It Somehow Hurt Arbitration, the Parties, or Counsel?

Broadly speaking, parties involved in most commercial arbitrations have bargained for a decisional process in which the arbitrator will decide the case by applying the appropriate rules of decision to the evidence (putting aside *amiable compositeur* and *ex aequo et bono*³). Accordingly, one might ask if it is appropriate for an arbitrator to vary the arbitral process for which the parties bargained. But I would disagree with the premise of the question. First, in view of precepts in the Revised Code (“[a]n arbitrator has a responsibility not only to the parties but also to the process of arbitration itself,” “[a]n arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision,” and “the arbitrator may ... comment on the law or evidence”), I believe the arbitrator’s carefully and neutrally sharing his/her thoughts regarding the evidence after the testimony has been presented *is* properly part of the arbitration process. Second, to the extent the suggested process could in any way be viewed as varying the bargained-for arbitration process, the arbitrator would not be varying it without the prior agreement of both sides.

Use of the process in an appropriate situation does not hurt arbitration or the parties and, in fact, may be helpful. The Revised Code says “[a]n arbitrator should conduct the arbitration process so as to advance the fair and efficient *resolution* of the matters submitted for decision” (Canon I.F. (emphasis added)). It says “resolution”; it does not say every arbitration must end with the rendering of an award.⁴ Nor does the Revised Code (or the suggested process) interfere with party autonomy, which is a key principle of ADR. If the parties by mutual agreement wish to hear the arbitrator’s thoughts on the evidence and thereafter decide to postpone or withdraw resolution of some or all of the dispute from the arbitrator (e.g., for settlement purposes), they have every right to do so.

Canon I.A. of the Revised Code specifies that “[a]n arbitrator has a responsibility not only to the parties but also to the process of arbitration itself.” If the parties agree they no longer want an award, then it advances the process. Failing to make a proposal in the right circumstances might be viewed as retarding “the fair and efficient *resolution* of the matters submitted for decision.”

Finally, each side may well be interested in whatever thoughts about the evidence the arbitrator wishes to share because, in addition to the potential to foster settlement, any insight gleaned from those thoughts could suggest to a side that its post-hearing argument and/or briefing should further explain evidence the arbitrator might not have fully appreciated and/or that it should emphasize arguments/evidence the arbitrator might have specifically cited (and, therefore, that might have resonated with the arbitrator). Of course, whether the process is conducted by the arbitrator is solely the parties' joint decision.

Why Did the Parties in the First Case—but Not the Second Case—Agree to the Process?

The First Case

At the hearing, each side presented more and more evidence that seriously called into question the soundness of the other side's claims, and neither side was able to do any real damage (e.g., on cross-examination) to the other side's evidence. As the hearing progressed, my feeling grew from what was said (and what was not said) by the party representatives and counsel that each side was thinking it might have been mistaken about the actions of the other side and that each side was becoming less certain of prevailing on its claims. Admittedly, because neither side made any clear admission of any of this, my "feeling" could certainly have been wrong.

I don't recall having any prior knowledge of the process I suggested, although at some earlier time I might have heard of others using it or something like it. The situation may have reminded me of that point in some mediations I have conducted when it becomes apparent that one side has significantly misjudged the other side's motives/actions: my experience is that settlement becomes substantially more likely once those misconceptions—and the often accompanying feelings of hurt, anger, being disrespected, etc.—are dealt with. The idea for the process may have flowed from my awareness at the time of other ADR processes such as early neutral evaluation and med/arb and its variations.

Whatever the genesis, I felt the wounds to each side's case in the hearing were similar enough so that such a review would be less likely to be experienced by them as indicating bias for either side. My proposal likely was accepted because the two sides recognized that my sharing a neutral view of the evidence at this point—before their investment of further time and money (e.g., the cost of post-hearing briefing, oral argument, award preparation (even of a simple award), and possible motion to vacate/confirm)—might lead to settlement.

The Second Case

A reasonable assumption is that the party saying no did not think there was sufficient value to engaging

in the process (i.e., any possible value did not outweigh the possible downside). I strongly suspect (but do not know) that the party rejecting the offer was the party that ultimately prevailed (in the award) on all issues. Perhaps it did not want put at risk what it was sure would be an award in its favor. Or it may have thought I was at some level trying to encourage settlement and it did not want to settle. The list of possible reasons for that party saying no is long and, of course, this speculation may not be helpful in informing an academic consideration of the process because it may have been the party that ultimately lost that said no and, in any event, it ultimately is just speculation.

Of What Potential Benefit, if Any, Is the Process?

There is obviously a significant cost benefit to earlier resolution by settlement, which may be prompted by this process.

Counsel and parties may appreciate insight into the arbitrator's thinking so they can craft post-hearing oral and written argument on any issues they believe the arbitrator may have misapprehended and to emphasize those that stayed with the arbitrator.

Counsel for a side may think its client needs to hear what counsel believes the arbitrator is likely to say because the client has not been listening to counsel. In those circumstances, to try to sell the process to its client, counsel could emphasize the value of getting "free discovery" regarding the arbitrator's thinking.

From an arbitrator's perspective, perhaps the principal reason to suggest the process is to give counsel/parties the arbitrator's version (carefully constructed and delivered and stopping well short of forecasting or recommending any outcome) of a "mediator's proposal": an arbitrator may believe an appropriate statement of how he/she perceives the evidence could end the hostilities sooner and save the parties substantial sums (Canon I, Paragraph F, requires the arbitrator to "conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision"). Also possible in some cases is that an arbitrator may believe providing his/her views before oral argument and briefing will help counsel better focus those oral and written offerings, which in turn may facilitate the arbitrator's analysis and decisional process.

If properly suggested and conducted, the process potentially helps all concerned.⁵

What Indicia (if Any) Will Suggest the Proposal Should or Should Not Be Made in a Given Arbitration?

There is no simple, unfailingly correct test that can be employed in all arbitrations for deciding whether to suggest the process to the parties. If one side has a significantly stronger case than the other side, an arbitrator

may be less likely to suggest the process (unless perhaps the arbitrator comes to believe that the reality potentially provided by a careful neutral summary of the evidence would be helpful). If the two cases are equally strong (or weak), an arbitrator may be more inclined to suggest the process, since a careful neutral summary of the evidence may suggest to the two sides that the final outcome is uncertain. If there is substantial overt anger by one or both sides against the opposition, an arbitrator may be less inclined to suggest the process because an angry party is less likely to hear, digest, or dispassionately assess the arbitrator's remarks. Other factors that suggest making or not making the proposal are discussed elsewhere in this article.⁶

If the Process Is Going to Be Suggested, When Should the Suggestion Be Made?

Receipt of the evidence should be complete or virtually complete before suggesting the process. There are several possible problems if the procedure is used any sooner. First, what the arbitrator says may be given little weight by the parties because the arbitrator has not heard all the evidence. Second, even with a disclaimer (e.g., "Please note that my mind is open on all the issues"), what the arbitrator says may be perceived by the parties as indicating the arbitrator has a closed mind or is biased. Third, sophisticated parties may be worried about possible "anchoring" inuring to their detriment if the arbitrator presents his/her views of the evidence before the arbitrator has heard all of it.

A good time to suggest the process may be after all the evidence has been received but before the arbitrator could possibly have studied it in detail, which will bolster the arbitrator's assertion of not yet having reached a decision.⁷ That is probably also a good time for the parties economically because post-hearing costs, which can be substantial, have not yet been incurred (e.g., the attorney cost for reviewing the record and preparing briefs and the arbitrator cost of reviewing the record and preparing an award, particularly if it is to be a reasoned award).

When Are Parties Likely to Say Yes to the Process?

It is difficult to predict in any given case whether both parties will say yes to the arbitrator's proposal.

If one side is sure it is going to win, it may not say yes unless there is a reason for it to try to stop the arbitration (e.g., it wants to conserve or redirect the resources it is expending on the arbitration). If one side wants an award, e.g., because it needs a written award for collateral estoppel or another legal or business reason (e.g., to show its insurance carrier), it may not say yes. If a side's goal is to punish the other side (e.g., by causing the other side to continue to expend time and money on the arbitration), it

may not say yes. If one side is so in love with its case that it cannot imagine there is any substantial evidence against it and, therefore, that the process would be a waste of time, it may not say yes. The list of reasons for saying no is long.

However, even then, a party may say yes so it can hear the arbitrator's thoughts (assuming the other side agrees) to help that party sharpen its post-hearing arguments and briefing. And, of course, a party may say yes to try to promote settlement.

Will I Keep the Process in My Tool Kit?

I will keep this process in my tool kit because properly conducted, it is not unethical, does not imperil the award, can be useful to the parties and counsel, and helps foster the ideal of "conduct[ing] the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision."

I do not know how often in the future I will propose the process or receive permission by the parties to use it. The circumstances in the first case (or similarly propitious circumstances) that sparked my proposal and caused the parties to agree to the process (and then settle) do not seem to occur that often.⁸

How Can the Entire Procedure Be Improved?

Assuming those charged with administering arbitrations and regulating the conduct of arbitrators do not bar use of the process (and two data points so far suggest that at least some administrators will not bar the process), I and perhaps others will in the future suggest it to arbitration parties. The question then is how to improve upon what has been described here for future use.⁹ Certainly, one issue is how to improve the method by which the arbitrator decides whether to suggest the process to the parties. Another is when to suggest it. Another is what to say when suggesting it. And finally, how to conduct the process itself, including what to say and what not to say. At this time, I don't have any concrete suggestions beyond what is in this article.

Conclusion

After hearing the evidence, if the arbitrator believes the process might be helpful to the parties, I believe there is no harm—and there may be substantial benefit—in carefully suggesting the process and then, if the parties consent, carefully conducting it.¹⁰

Postscript

After I submitted my manuscript to the editors of this journal, they forwarded to me several articles concerning processes used in other countries (e.g., China, Germany) in which arbitral tribunals take a more active role in bringing about resolution of the dispute without rendering an arbitral award. I now regard the process I describe in this

article as dipping one arbitral toe into the non-award dispute resolution lake. I did not expressly evaluate any claims, engage in conciliation, or conduct anything akin to med/arb, arb/med, etc. Perhaps it is time for U. S. arbitrators to give more thought to the Revised Code's precept of Canon I.F: "An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision."

Endnotes

1. This description of the dispute, the arbitration, and what was said and done, is simplified and excludes details possibly antithetical to confidentiality; the same is true for the description of the second dispute etc. (set forth below).
2. I have not surveyed the laws of all 50 states to determine if the process, or even proposing it, might run afoul of any of their laws even though there does not seem to be a problem under 9 U.S.C. § 10(a).
3. See, e.g., the ICDR's *International Dispute Resolution Procedures*, Article 31 (Applicable Laws and Rules), paragraph 3 (italics in original): "The tribunal shall not decide as *amiable compositeur* or *ex aequo et bono* unless the parties have expressly authorized it to do so."
4. Consistent with this, when the American Arbitration Association revised its *Commercial Arbitration Rules and Mediation Procedures* (effective October 1, 2013), it added Rule 9 to the arbitration rules, which Rule 9 (broadly speaking) provides that in any case valued at over \$75,000, "the parties shall mediate their dispute" unless they opt out of mediation.
5. Even if the parties agree and the process goes forward, there still may be no readily discernible benefit (e.g., no settlement of any or all of the issues). For example, a side may have substantially different views of the evidence than the arbitrator expresses to the parties during the process and may believe it will prevail as a result of briefing/argument after the arbitrator "digs in" (and, thus, that there is no need to even broach the possibility of settlement talks).

6. There is nothing stopping either or both parties from asking for the arbitrator's views after presentation of all the evidence and before briefing/argument, although (at least as of now) it is exceedingly unlikely any counsel/parties would think of doing so. Of course, counsel's asking for the arbitrator's views raises another set of issues (e.g., what if one party asks and the other party disagrees, what if the arbitrator knows their disparate views, what if both parties ask but the arbitrator believes it would be inappropriate or not helpful to conduct the process).
7. Even if the arbitrator has not studied all of the evidence, it is more often than not the case that the arbitrator has thoughts about the testimonial evidence he/she has heard and about the documents that were specifically called to his/her attention up through close of testimony.
8. After receiving permission to do so from an institutional arbitral administrator, I recently suggested the process in a patent arbitration, and the parties agreed to it. Preliminary feedback (at the hearing and in post-hearing activities) was that the process was helpful, but further discussion of that case at this time is not possible.
9. There is no question the process can be improved because there is essentially no human endeavor that cannot be.
10. This article deals with one-arbitrator proceedings. Having more than one arbitrator complicates matters, e.g., how does a three-arbitrator tribunal decide whether to suggest the process and then use it if the parties consent. The issues raised by having a tripartite panel are left for another day.

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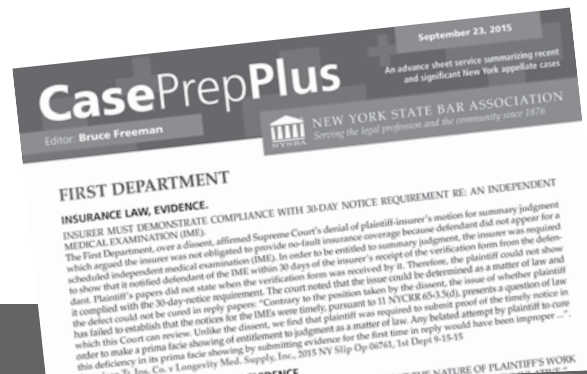


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Arbitration on Television: My Experience on *The People's Court*

By David J. Hoffman

"HE'S ACCUSED OF DOGNAPPING!" said the booming announcer's voice over the familiar da-DUN-DUN of the theme music as I took my place behind the defendant's podium. After administering an oath, Bailiff Douglas McIntosh announced, "The parties have been sworn, Your Honor." As she slid into position, Judge Marilyn Milian responded with her usual, "Tha-a-ank you, Douglas." Here I was, a party to an arbitration unlike any I had participated in before, administered by *The People's Court*.¹

The People's Court began in 1981 with former Los Angeles County Municipal Court Judge Hon. Joseph A. Wapner presiding. The grandfatherly and mild-mannered Judge Wapner passed away on February 26, 2017, just a few weeks after I had taped my episode, at the age of 97. Watching a few of the old Wapner-era episodes transported me into a different world, as Judge Wapner patiently explained the meaning of hearsay or the basics of contract law to respectful Joe Sixpacks and bouffant 1980s Soccer Moms *avant la lettre*. In contrast to Judge Wapner's placid style, today's audiences are treated to reality-TV-flavored antics from their TV arbitrator-judges.

Judge Wapner was succeeded by former New York City Mayor Ed Koch, then Jerry Scheindlin, the husband of the reigning queen of TV arbitration, Judge Judy. In 2001, the show's producers selected the currently presiding Judge Marilyn Milian, former prosecutor and Florida state appeals court judge, to preside over the show.

The People's Court and other judge shows are arbitrations as a formal legal matter, backed by a signed agreement. There are some unusual features of the agreement, in that the show's producers agree to pay the amount of any award up to the small claims court limit of the state where the case was originally filed. The show establishes a minimum fund of \$500 to be split by the litigants (with any award below \$500 being first paid out to the prevailing party). So, where no award is made, each party receives \$250. Despite the fact that the show left its long-time New York home for Connecticut some years ago, the contract still provides that it is governed by New York law and an exclusive venue provision in favor of New York County. The contract names the arbitrator—Marilyn Milian—and contains other provisions releasing the arbitrator and the parties from defamation and the like.

The amounts involved are small, so these agreements have not been subject to all that much scrutiny by the courts, but there have been some decisions touching

on them. Although neither decision came in the context of a direct challenge to the award, two decisions of the New York City Civil Court reached opposing conclusions as to whether or not *The People's Court's* contract constitutes an agreement to arbitrate under Article 75 of the CPLR. In a 1998 case², the court decided that because *The People's Court* provided for payment by a third-party rather than the opposing litigant, *The People's Court* was "not a form of arbitration recognized in New York State and the rights and protections afforded persons who engage in arbitration are not available to participants in that program." Two years later, in a case³ alleging defamation against the then-presiding former Mayor Edward I. Koch, a different judge held the contrary, declaring that "[t]he agreement to arbitrate before... [The] People's Court is subject to CPLR Art. 75." Neither case analyzed the enforceability under the Federal Arbitration Act or discussed the conflict presented by the fact that the producers are paying both the arbitrator and the award. In at least one case,⁴ the *New York Law Journal* reported that a Family Court decision found that Judge Judy—herself a former New York Family Court judge—had overstepped her bounds in deciding certain child visitation issues during the course of a show. Consistent with the limitation of arbitration to commercial matters, the court there found that the arbitration agreement could only cover "civil property issues" and could not reach the visitation issues as a matter of public policy.

A few months before the episode was taped, a producer from *The People's Court* contacted me at my desk and informed me that I was being sued in New York County Small Claims Court. It was the first I'd heard of it, but I listened to her and read the brochure sent along for information. I was being sued by my ex-girlfriend, for whom I had purchased a Yorkiepoo puppy as a gift a few years prior. Later, she had left the dog behind at a friend's house. The friend sent the dog to me, and now, almost one year later, my former girlfriend claimed that I had stolen the dog.

I had hemmed and hawed, but on the eve of the court date gave in to the second of Gore Vidal's imperatives and signed on for the show. The producers took my statement over the telephone, asked me a few questions about my case—clearly a case of abandonment, I thought—and filed a stipulation of discontinuance with the court. The producers encouraged me to submit any evidence that I might have. On the appointed date, a car service picked me up at 8 a.m. to take me from Manhattan to the studio in Stamford, Connecticut.

After arriving at the studio, I was escorted to the defendants' "green room." The first of many things that I signed was narrative that the announcer reads while your adversary takes his or her position in the courtroom. The producers had assembled this from our previous telephone conversation. They had tried to punch my story up, to make it a bit more confrontational. There were some more sensational aspects that were part of the narrative, but not really relevant to the ultimate issue of the dog's ownership. I had resolved to be as gentlemanly as possible and toned down the statement in a few places.

Various producers entered the room to sign various documents, escort me to makeup (just a little to cut down glare) and to orient me in the courtroom. In the courtroom, a set inside a larger studio, the producer instructed me not to push the swinging doors, as they were not actually made out of wood. She also told me, refreshingly, that, "the judge has read everything, but tell her like it's the first time she's heard it." She showed me the little feet to stand on during my exit interview with Doug Llewellyn, who was part of the original cast in the 1980s and recently returned to his original role. After that, I took a selfie in front of the portraits of Judge Wapner and Rusty the Bailiff which hang in the ersatz vestibule.

When my case was called, I assumed the defendant's position as the introductions were read. The case proceeded in the usual fashion for *The People's Court*. Judge Milian allowed my ex-girlfriend to tell her story for several minutes, occasionally interjecting with questions that showed that Judge Milian was indeed prepared for the case. After that initial exchange, Judge Milian turned to me and allowed me to recite my position. I never had the sense of being on television. A couple of more rounds of exchanges followed and then Judge Milian rendered her decision.

I won. The judge told my disappointed ex-girlfriend that "the scenario I'm hearing is not him stealing the dog; it's him saving the dog that you abandoned." After that, each of us was interviewed briefly in turn by Mr. Llewellyn and we were hustled out of the studio separately.

When the show aired on May 3, 2017, it was quite an experience. Mine was the featured case leading off the broadcast; almost the entire 20 minutes or so that were taped were used. On *The People's Court* Facebook page,

the episode attracted a number of comments. Seeing my picture there, one commenter volunteered: "He looks guilty as charged. Can't wait to see this one." (I confess that I did look a bit swivel-eyed in the still shot.) Several people managed to find my Facebook profile and messaged me with encouraging words.

Judge Milian tries to put the case in a larger human context and often tries to find a moral thread to the story. I had watched several episodes in preparation, so I learned that even in the driest commercial situations—a claimed botched home improvement for example—Judge Milian wants to know how the parties met, some history of their relationship, and so on. Often, her awards are accompanied by a bit of homespun wisdom for the parties, often beyond the limited scope of the matter *sub judice*, and my case was not an exception. I have read some hand-wringing articles about the nefarious influence of the TV arbitrator-judges, but I cannot complain about the quality of the justice. Judge Milian was very well prepared for the case and understood the applicable legal principles. In the many episodes that I watched in preparation, I do not recall too many decisions that I disagreed with. Furthermore, the critics often compare the antics of the TV arbitrator-judges to some abstract standard, not acknowledging that often our real judges often fall short of those standards, too.

I was satisfied with my experience and took a couple of lessons away. One is that, as advocates, we should try where possible to boil our case down, to make it snappy, like the introductions on *The People's Court*. Also, teasing out a moral arc to give our case some structure and drama, as Judge Milian does, may help maintain the attention of an arbitrator as it does for the viewing public.

Endnotes

1. The episode is entitled "My Ex Stole My Dog," Case No. 26-361.
2. *Doo Wop Shoppe v. Ralph Edwards Prods.*, 180 Misc.2d 907, 913, 691 N.Y.S.2d 253 (Civ. Ct., Richmond Co.1998).
3. *Kabia v. Koch*, 713 N.Y.S.2d 250 (Civ. Ct., New York Co. 2000).
4. *B.M. v. D.L.*, V-17914/99, as reported in the *New York Law Journal*, March 17, 2000.

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Why Do Some Claimants Pursue Losing Claims in Arbitration?

By Dwight James

Each year, thousands of business-to-business (B2B) claims in arbitration are filed with the American Arbitration Association (AAA). Presumably, the bulk of these claims are filed by legitimately aggrieved parties. A majority of these parties at some point settle or withdraw their claims and in most others, claimants prevail on some, if not all, of their claims. However, in over 15 percent of cases where an award was issued, claimants won *zero* dollars.

"[R]oughly two-thirds to more than three-quarters of a billion dollars were consumed in the awarding of just \$30 million—all from counterclaims."

Consider the following: A business, perceiving itself harmed by the actions of another, consults a lawyer. A claim is acknowledged and arbitration is demanded. Documents are produced and exchanged. Mediation is eschewed. Arbitrators are appointed and hearings held—and an award is issued. And through all of this, the claimant remains convinced that the facts, the evidence, and quite possibly the law, are on their side. Yet almost one in six award recipients win absolutely nothing on their claims.¹

The Costs of Fruitless Arbitrations Are Substantial

By our best estimates, these parties spent between \$642 million and \$795 million in 2015 alone pursuing and defending nearly \$1.4 billion of worthless claims—and pursuing and defending another \$247 million in counterclaims on those cases, of which only \$30 million were eventually awarded.² That is, roughly two-thirds to more than three-quarters of a *billion* dollars were consumed in the awarding of just \$30 million—all from counterclaims. And those respondents who did prevail on their counterclaims gave all \$30 million of it to their lawyers.³ The claimants on these cases fared much, much worse. What, exactly, are company shareholders to make of this?

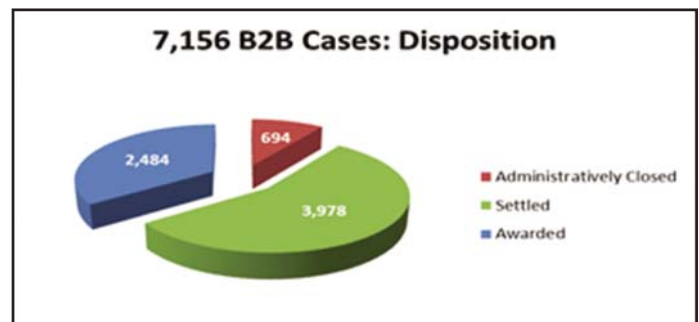
Why Focus Exclusively on Claims Ultimately Deemed Worthless? They Show "Split the Baby" Is Not an Operative Principle

Reasonable people may disagree about the strength of these failed claims. Whether the difference between the claimants' expectations and the award is the result of inflated claims, disputed facts, interpretation of contract

language or laws, or something else entirely, is rarely discussed by counsel. What we do know is that it is *not* the result of splitting the baby. Looking solely at these worthless claims, we can rule that explanation out. Clearly, the denial of any award is not a compromise award. Moreover, the reasons that claimants were unsuccessful in these cases may cast new light on the reasons that may cause a lower award in cases where claimants win but receive less than argued.

But First, Some Good News: A Majority of Cases Settle

Before getting into the details of who's losing what and why, it is worth noting that of the 7,156 B2B cases originally filed as arbitrations with the AAA that concluded in 2015, 60 percent (3,978) settled or were withdrawn, after accounting for the 694 cases closed on administrative grounds.⁴ Employment contracts and international cases set the pace at 74 percent and 72 percent settlement rates respectively.⁵



Of the remaining 2,484 B2B cases awarded in 2015, most claimants prevailed on some, if not all, of their claims.⁶ However, in 383 cases (comprising 387 claims)—or about one in six of those awarded—claimants won nothing.⁷

Maybe Only Legitimate Claims Settle...

Interestingly, of the 383 cases detailed above, in only two had the parties attempted mediation through the AAA.⁸ While neither of these cases was entirely resolved in mediation, the parties may have at least narrowed the issues or resolved parts of their cases, thereby potentially netting some savings in legal and forum costs. Also unknown is the extent to which any of the parties in the other 381 cases that resulted in zero damages may have mediated outside of the auspices of the AAA, either before or concurrent with the arbitration.

There is a possibility that if a party refuses mediation it might be prudent to reevaluate your position, to have an objective evaluation of the facts and law that can counter any cognitive bias; better that any claim lacking merit be withdrawn in the early stages of the process, before costs escalate.

The Best Defense Is a Good Offense?

A discussion regarding claims ultimately deemed worthless in the arbitrations must address the issue of counterclaims and the degree to which they may factor in the loss ratio of claims. Sometimes claimants are claimants in name only. Sometimes the counterclaims represent the more substantive issues in dispute, and may have been filed as claims had the claimants not filed first.

In nearly a third of these cases, a counterclaim was indeed filed and in nearly two-thirds of those cases, respondents prevailed on some, if not all, of their counterclaims.⁹ In fact, of the 119 counterclaims filed, 20 were awarded 100 percent of their counterclaim and an additional 16 were awarded at least 70 percent of their counterclaim.¹⁰ In these cases, the claimant not only failed to prevail but paid for filing its claim.

What Caused the Losses?

Of course, not all claims prevail. But why, in these 383 arbitrations, did the 387 claims not just fall short of demands, but fail to substantiate even a single dollar of damages?

In many circumstances, the award provides the answer. In others, it was apparent that if a claimant had a legitimate case to make, it wasn't made in the arbitration in such a way as to result in the desired outcome. Some of the challenges we identified in these cases involved matters of contract, others involved questions of law. Some were issues of facts, others of proving damages. And in a significant number of cases we found more evidence supporting disproof of the claims than favoring them.

As one might expect, most losing cases suffered multiple problems—any number of which may have dealt a fatal blow. In total, we identified 829 discrete issues in these 383 cases.¹¹ However, a majority of cases hinged on just one or two issues.¹²

A matter of standing, a statute of limitations, or a question of arbitrability ends a case rather abruptly. Similarly, the absence of facts, the wrong case law, or insufficient evidence—or in some cases a failure to refute unfavorable evidence—could also be enough to cause the loss.

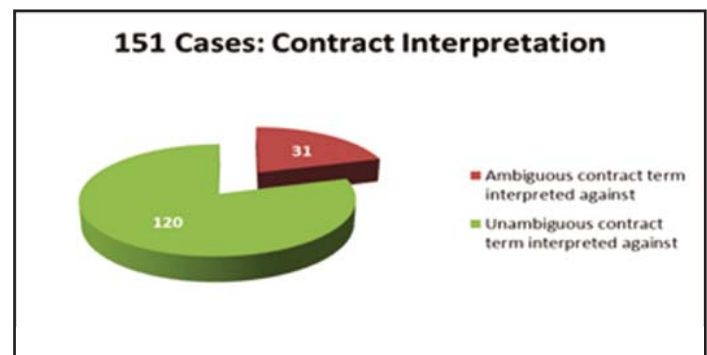
Failures of Proof

Evidence—or lack of it—accounted for more than half (55 percent) of all 829 issues identified in cases involv-

ing worthless claims, and was by far the most frequently recurring weakness, impacting 348 (91 percent) of these cases.¹³ Despite an inability to present sufficient evidence, or in some cases subject to evidence to the contrary, or both, claimants continued to pursue these cases all the way into *evidentiary* hearings.

A Creature of Contract...

Apparently, in these 383 cases, contract interpretation was left to arbitrators almost 40 percent of the time, in 151 cases.¹⁴ Ambiguous contracts can end up in arbitration, and it should come as no surprise that sometimes ambiguity is interpreted against claimants. But what might be surprising is that *unambiguous* contract terms represented nearly 80 percent of all contract terms interpreted against claimants.¹⁵



Remember, claimants brought these cases, and of the 151 cases where arbitrators interpreted the contract terms against those claimants, four out of five were based upon unambiguous terms.

Is the Law the Problem?

Murky law is not the culprit here. Of these 383 cases, almost one-fourth of them relied upon settled legal principles.¹⁶ Of those 93 cases, only three were subject to interpretations of unclear law that resulted in an unfavorable outcome for claimants.¹⁷ The other 90 cases involved *clear* law interpreted *clearly* in claimant's disfavor.¹⁸

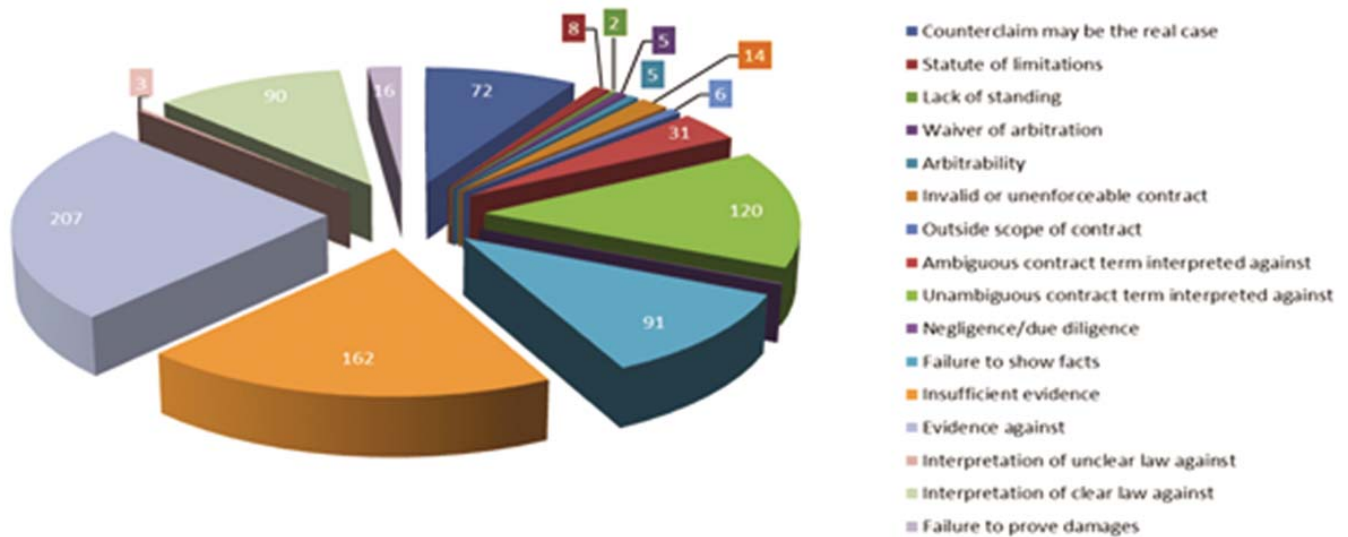
So again, *claimants* brought these cases—93 of which relied upon some legal interpretation. In 90 of those, arbitrators enforced clearly established law *against* claimants.

Lessons Learned...

What is described in detail above accounts for 778 (94 percent) of the 829 issues present in the 383 B2B arbitrations where we estimate parties spent between \$642 million to \$795 million pursuing and defending what were ultimately determined to be worthless claims and counterclaims ultimately worth only \$30 million.

Other common issues impacting these cases include failure to prove damages (16 cases), invalid or unenforce-

383 B2B Cases: 829 Issues



able contracts (14 cases), statute of limitations (8 cases), and arbitrability (6 cases). The full spectrum of issues appears in the corresponding chart.

There is no question that some of these issues are nuanced, but others are not. For example, while you can see what evidence you have to support your claims, it may be difficult to surmise the objective weight of the evidence the other side has against them. Luckily, there is somewhere you can go to find out: Mediation.

But in the final analysis, good professional judgment includes assessing when not to bring a case at all.

Endnotes

1. Per American Arbitration Association case filing and awards statistics from 2015. A total of 383 awards out of 2,484 B2B cases were for \$0.00, which is 15.42%, or every 6.49th award.
2. *Id.* Total administrative costs of \$2,856,337 plus arbitrator and mediator compensation of \$12,295,157, plus 2 (average number of parties) times the total of the actual awarded legal costs of \$47,753,220, plus imputed legal costs (where not actually awarded) based on the awarded legal cost per dollar of claim at the median (\$0.25) of \$265,940,814 or the mean (\$0.32) of \$341,786,964.
3. *Id.* Total actual awarded legal costs plus imputed legal costs on prevailing counterclaims was \$27,226,580 (at the median) or \$32,955,091 (at the mean).
4. *Id.*
5. *Id.* After reducing a total of 374 employment contract cases by 40 cases closed administratively it leaves 334 cases of which 246 settled or were withdrawn, or 74 percent. Similarly, after reducing a total of 755 international cases by 44 cases closed administratively it leaves 711 cases of which 511 settled or were withdrawn, or 72 percent.
6. *Id.* A total of 2,484 B2B cases awarded, of which 383 were awarded nothing, leaving 2,101 cases awarded some, if not all, of their claims.
7. *Id.* These cases involve strictly monetary claims. Those cases involving non-monetary claims have been removed for the purposes of calculating costs against total claims.
8. *Id.*
9. *Id.* A total of 119 counterclaims were filed on 383 cases, or 31 percent, of which 74 counterclaims, or 62 percent, were awarded some, if not all, of their counterclaims.
10. *Id.*
11. *Id.*
12. *Id.* Out of a total of 383 cases, 117 had just one issue and another 142 had just two issues—for a combined 259 cases—or 68 percent.
13. *Id.* Out of a total of 829 issues, 460 involved lack of evidence (including supporting facts) or evidence to the contrary, or any combination thereof, for a total of 55 percent.
14. *Id.* Out of a total of 383 cases, there were 151 contract interpretation issues, or 39 percent.
15. *Id.* Of the 151 contract interpretation issues, 31 involved ambiguous contract terms; 120 involved unambiguous contract terms, or 79 percent.
16. *Id.* Out of a total of 383 cases, 93 had some kind of a legal interpretation issue, or 24 percent.
17. *Id.*
18. *Id.*

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Arbitration Offers Efficiency and Economic Benefits Compared to Court Proceedings

By Roy Weinstein

While arbitration was thought for many years to offer a speedier and more efficient process than court proceedings, in recent years questions have been raised as to the accuracy of that presumption. In order to test the accuracy of the longstanding presumption, the economic research firm Micronomics conducted a study to compare the length of time to trial and through appeal in civil court proceedings in the U.S. federal courts against commercial arbitrations at the American Arbitration Association in which final awards were issued.¹ This article reports on the results of that study.² The full study is available at <http://go.adr.org/impactsofdelay>.

While it may be that certain arbitrations (which are ultimately controlled by the parties based on the fundamental principle of party autonomy in arbitration) may take as long as a court proceeding, the study firmly established that generally, arbitration provides a much speedier and more efficient process. In light of this finding, the study further assessed the economic consequences of the delays to justice in court as compared to arbitration proceedings.

Speedier Resolution

The study compared the length of time required for dispute resolution across the U.S., as well as in the eight overlapping jurisdictions that had the highest caseload in both court proceedings and arbitration.³ New York, a

state with high district court and arbitration caseloads, exemplifies the significant additional time required for court resolution. The median time required from filing to the beginning of the trial in New York district court was 30.9 months in 2015; meanwhile, the median time required from filing to award for arbitration cases administered by the AAA was only 12.5 months in 2015. In other words, it took more than 18.4 months longer for civil cases to get to trial in New York than was required for final adjudication of arbitration cases.⁴

When one considers time required through appeal, the median time required in New York (part of the Second Circuit) in 2015 was 41.1 months.⁵ This is more than two years longer than time required for arbitration. The results are similar in states with the highest AAA and U.S. district court caseloads. For example, in California federal courts, the median time to trial was never less than 25 months between 2011 and 2015, in and of itself considerably longer than the median amount of time required for dispute resolution by arbitration in California.⁶

For the eight overlapping states that had the highest caseload in both court proceedings and arbitration, the following chart illustrates the time to trial, the time through appeal, the time to award and the differential between arbitration and getting to trial and arbitration and getting through an appeal.

Year	U.S. District Courts (Filing to Trial)	U.S. District and Appellate Courts (Filing through Appeal)	AAA Arbitration (Filing to Award)	Additional Time Required	
				To Trial	Through Appeal
	(1)	(2)	(3)	(1) - (3) (4)	(2) - (3) (5)
	(Months)				
1. 2011	23.6	34.6	10.8	12.8	23.8
2. 2012	23.7	33.5	11.8	11.9	21.7
3. 2013	24.1	33.1	11.5	12.6	21.6
4. 2014	25.3	33.8	12.4	12.9	21.4
5. 2015	24.5	33.0	11.6	12.9	21.4

Comparisons across jurisdictions throughout the United States lead to a similar conclusion: U.S. district court cases took more than 12 months longer to get to trial than cases fully adjudicated by arbitration, and dis-

trict and circuit court cases took at least 21 months longer than arbitration to resolve when time through appeal is included.⁷ The following chart summarizes the analysis with all U.S. federal court jurisdictions included.

State	Circuit	<u>Additional Time Required</u>				
		U.S. District Courts (Filing to Trial)	U.S. District and Appellate Courts (Filing through Appeal)	AAA Arbitration (Filing to Award)	To Trial	Through Appeal
		(1)	(2)	(3)	(1) - (3) (4)	(2) - (3) (5)
(Months)						
1. California	9th	27.0	41.5	12.6	14.4	28.9
2. New York	2nd	34.6	45.7	12.2	22.4	33.5
3. Texas	5th	22.0	31.4	12.2	9.8	19.2
4. Florida	11th	18.4	26.0	11.2	7.2	14.8
5. Pennsylvania	3rd	24.6	32.3	10.2	14.4	22.1
6. Georgia	11th	25.9	33.5	10.6	15.3	22.9
7. New Jersey	3rd	35.8	43.5	11.7	24.1	31.8
8. Illinois	7th	30.4	38.4	13.7	16.7	24.7

The situation in state courts (as opposed to federal courts) is undoubtedly even worse. Almost 40 state courts have suspended filling clerk vacancies; 36 state courts have reported layoffs or furloughs; 23 state courts have reduced operating hours; and ten state courts even have reported furloughing judges. These layoffs and hiring freezes have increased backlogs and significantly lengthened the amount of time required to fully adjudicate disputes. Thus, while the statistical data made available by the federal courts is not available for the state courts, the budget cutbacks in recent years suggest that the time differential between court and arbitration is even longer, and perhaps in many jurisdictions significantly longer, than the time differential between arbitration and court proceedings in the federal courts.

The Economic Impacts of Delays in Resolution of Disputes

The importance and connection between efficient operation of dispute resolution and economic well-being of the community in the context of the judiciary has been widely recognized:

- “The importance of legal institutions and governance for economic growth is now relatively well-accepted in the economics profession. The associa-

tion has been well-demonstrated both theoretically and empirically.”⁸

- “The role of the judiciary is to set up a framework in which the bargaining for property rights follow predetermined rules...and provides a clear and quick decision in cases of doubt....The anticipated future enforcement of rights is extremely important for current decisions, contracts and future activities of all participants.”⁹
- “Judicial slowness may reduce incentives to start businesses by deteriorating the security of property rights. It may also limit possibilities of obtaining loans. Finding ways to speed up judiciaries is thus fundamental to economic growth.”¹⁰
- “The insecurity created by a weak judiciary changes economic behavior in two ways. First, the overall cost structure of the economy increases....Increased collateral to make up for the risk associated with the poor performance of property rights increases the consumer price....Second, not all risk can be covered by higher premiums. If the risk is considered too high, certain transactions simply do not take place.”¹¹

Notwithstanding that these and many other commentators have long recognized the importance of efficient resolution of disputes, insufficient attention has been devoted to measuring the actual economic impacts associated with delay.¹² These delays impose significant and measurable costs on our economy.

“Estimated total losses associated with additional time through appeal required for district and circuit court cases compared with arbitration are approximately \$51.9 billion to \$59.2 billion over the same period (i.e., more than \$860 million per month).”

During the period required to resolve disputes, resources at issue can be thought of as removed from circulation: the plaintiff cannot count on prevailing and obtaining judgment with respect to a pending claim until the case is concluded; likewise, the defendant may need to reserve funds in the event of an adverse outcome. Both parties are thus constrained and experience a loss until disputes are resolved. Had those resources been available, the parties could have used them to pay down their cost of borrowing or invested them to earn the going rate of return. Instead, the funds are in limbo, not fully available to either side.

Other things being equal, the greater the amount at issue, the greater the loss associated with delay. Thus, it is possible to rely on conservative estimates of minimum amounts at issue in district court cases and on corresponding minimum amounts at issue with arbitration cases to calculate the direct economic cost of delays. These figures represent resources that neither party can rely upon during pendency of the dispute.

These amounts, which can be considered opportunity costs, are significant. These lost resources were estimated in the study by calculating the forgone return (i.e., unrealized investment income) from the \$75,000 minimum amount at issue in district court per year based on (a) the *additional time* required to trial and (b) the average annual return on investments in the S&P 500, which was approximately 13 percent between 2011 and 2015. Direct losses associated with additional time to trial required for district court cases compared with AAA arbitration are approximately \$10.9 billion to \$13.6 billion between 2011 and 2015. This equates to more than \$180 million per month. When one includes additional time through appeal required for district and circuit court cases compared with arbitration, the amounts are approximately \$20 billion to \$22.9 billion, or more than \$330 million per month.¹³

While such measures as the returns available on the S&P 500 vary over time, and thus the direct loss figure

will vary, it is incontrovertible that the delays to resolution of disputes have severe economic consequences. Nor is the interest awarded in court sufficient in most instances to compensate for these direct losses. Regardless of the state, interest allowed on money judgments obtained typically is well under amounts associated with returns on common indices of invested capital performance such as the S&P 500, and the defendant is rarely compensated for the inability to use capital at risk in litigation when it prevails. Finally, where the courts have discretion in the determination of interest, they often adopt lower interest rates, sometimes based on “risk-free” federal government instrument rates. Indeed, post-judgment interest in federal court is dictated by a statute at a low risk treasury rate which in recent years has been below 1 percent.¹⁴

Direct losses represent resources denied the parties during pendency of disputes, and constitute only the beginning. Economists and others long have recognized that changes in economic activity, in this case the losses described above, produce additional changes that resonate throughout the economy.¹⁵ These changes often are referred to as multiplier effects and reflect the fact that the acquisition (or loss) of resources by one entity produces secondary impacts on others. For example, road construction as part of a government stimulus program puts resources in the pockets of contractors and their employees, who in turn find themselves with additional funds to spend on food, transportation, housing, entertainment, etc.

“Factors other than time required for adjudication clearly enter into decisions as to whether arbitration or litigation provides the best forum to resolve disputes.”

Recipients of these funds are indirect beneficiaries of the initial stimulus program. These types of benefits have been measured carefully by econometric models that calculate incremental spending by various types of recipients.¹⁶ Employing IMPLAN, an acronym for “impact analysis and planning,” an established tool for providing information on total economic impact to include both direct and subsequent expenditures,¹⁷ the study found that costs associated with additional time to trial for district court cases compared with arbitration equal to \$28.3 billion to \$35.3 billion between 2011 and 2015 (i.e., more than \$470 million per month). Estimated total losses associated with additional time through appeal required for district and circuit court cases compared with arbitration are approximately \$51.9 billion to \$59.2 billion over the same period (i.e., more than \$860 million per month).¹⁸

Conclusion

Factors other than time required for adjudication clearly enter into decisions as to whether arbitration or litigation provides the best forum to resolve disputes. That said, delays in civil justice carry very real economic consequences both for litigants and for our economy and should be one of the considerations in choosing a dispute resolution method.

Endnotes

1. Micronomics publication, *Efficiency and Economic Benefits of Dispute Resolution Through Arbitration Compared with U.S. District Court Proceedings*, March 2017 ("Micronomics"), available at <http://go.adr.org/impactsofdelay>.
2. This article and the study do not address the other well-established benefits of arbitration: party control, privacy, flexibility, ability to select the decision-maker, finality and cross-border enforceability.
3. Micronomics at pp. 8-9.
4. *Id.* at 10-11.
5. *Id.* at 12-13.
6. *Id.* at 13.
7. *Id.* at 14-15.
8. Cross, F.B., *Law and Economic Growth*, Texas Law Review, 80 (2002), pp. 1737-75.
9. Kohling, W.K.C., *The Economic Consequences of a Weak Judiciary*, Center for Development Research, University of Bonn (November 2000).
10. Chemin, Matthieu, *The Impact of the Judiciary on Entrepreneurship: Evaluation of Pakistan's 'Access to Justice Programme'*, Journal of Public Economics, 93 (2009), pp. 114-125.
11. Kohling, W.K.C., *The Economic Consequences of a Weak Judiciary*, Center for Development Research, University of Bonn (November 2000).
12. An example of one such effort was conducted for the California Judiciary: Economic Impact on the County of Los Angeles and the State of California of Funding Cutbacks Affecting the Los Angeles Superior Court, Micronomics publication, 2009.
13. Micronomics at pp. 4 and 18.
14. 28 U.S.C. 1961—Post Judgment Interest Rates, U.S. Courts website (<http://www.uscourts.gov/services-forms/fees/post-judgment-interest-rate/28-usc-1961-post-judgment-interest-rates>).
15. *Id.* at pp. 4 and 22.
16. *Id.*
17. See www.IMPLAN.com. Numerous articles have been written about the application of the IMPLAN model by government, academic and private industry entities.
18. Micronomics at pp. 4 and 22.

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August 29, 2017

FOR IMMEDIATE RELEASE

BUFFALO, NEW YORK – The U.S. District Court for the Western District of New York will be hosting “Settlement Week” in an effort to explore the potential for settlement with some of the older cases on the Court’s docket. The program will run from October 30 through November 8, at the Jackson Courthouse in Buffalo, and then from November 13 through 22, at the U.S. Courthouse in Rochester. Mediators from the Court’s ADR Program will be assigned to mediate the cases selected for Settlement Week, with the costs of the mediator fees to be paid by the Court.

Chief U.S. District Judge Frank P. Geraci, Jr., launched Settlement Week as part of his efforts to identify means by which to move cases through the system efficiently and deal with the Court’s heavy caseload. “Mediation has proven to be an effective tool for resolving cases, and this initiative will hopefully assist us in our constant struggle to keep up with the increasing caseload,” explained Chief Judge Geraci.

The committee planning the program is chaired by U.S. District Judge Elizabeth A. Wolford, and consists of Senior U.S. District Judge William M. Skretny, ADR Program Administrator Barry L. Radlin, Chief Deputy Clerk Patrick Healy, and ADR Program Law Clerk Amanda G. Brennan. Judge Skretny was instrumental in starting the Court’s ADR Program which is considered one of the most innovative and successful programs in the country. Settlement Week is intended to complement the existing ADR Program and target cases that either went through the Court’s automatic mediation prior to January 1, 2015, or have never participated in the ADR Program.

For additional information, contact: Barry Radlin, ADR Program Administrator, at 716-551-1511 or by email at barry_radlin@nywd.uscourts.gov.

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How Mediation Changed Me as a Lawyer

By Adam J. Halper with Caroline P. Oppenheim

My path to being a mediator began in the back of a courtroom. The case was a child guardianship matter between the children's maternal grandmother and their father. The mother had passed away. I represented the grandmother. I was sitting next to my opposing counsel in the last row of the courtroom and we were waiting to appear before the bench. Our clients were sitting outside, shooting daggers at each other with their eyes.

The case began shortly after the mother's death. The children had been living with their grandmother when she died. The father, who had been marginally involved in their lives to that point, stepped back into the picture and fought the grandmother for custody of the children. The grandmother filed for guardianship.

The matter had dragged on for two years. There had been motions, document exchange and innumerable crises and frantic weekend phone calls connected to the visitation arrangement. The father alleged that the grandmother was obstructing his relationship with his children. The grandmother alleged he didn't really have one. Neither was entirely wrong. Neither was entirely right.

"What I learned is that to go from the mindset of a litigator to a mediator isn't something that can be learned in one class or three."

The trial phase of the case had been going on for four months. We had completed testimony on three witnesses. There were about five left to examine. My opposing counsel and I spent hundreds of hours on the case. As I was looking over the papers for that day, I was struck by how little had been accomplished that benefited anyone. I turned to my opposing counsel and I asked, "What are we doing here?" There was a pause. He responded, "I don't know."

The next week, I started talking with a few people about mediation.

I'm the legal director at a non-profit called The Family Center. We work with clients who are very sick. Most of our clients are referred to us by hospital oncology and palliative care units. If you have a serious illness such as cancer and you're of modest means, you're bound to have legal troubles. They come in many forms. Many are remarkably bitter. The litigation often continues after someone has passed away. Regardless of one's resources,

in the midst of catastrophic illness, no matter how much they may try to avoid it, people often leave behind unresolved issues. My team has clients with insurance disputes (public and private), housing problems, family law issues, public benefits disputes and more.

You'd think that when people are sick or if someone dies, those affected and those left behind living with terrible grief would be more clear-headed about major decisions. Or, you might imagine that having been through the trauma of the illness of a loved one, they would lack the motivation for litigation. Not so. Most people, seemingly to sublimate sadness, are all too happy to fight over housing, money or children. It's remarkable I didn't look at ADR sooner.

Before I started mediation training, my approach to conflict was that of many other advocates. I focused on defense and attack. By way of example, many years ago, I met with a client who was known throughout the agency as trouble. Edward had been through innumerable court battles with other attorneys and his complaints were legion. At the time, he was locked in a vicious custody battle. He was also engaged in a divorce that was going nowhere. He had fired two attorneys. He was in arrears on the rent for his apartment—which needed significant repairs. He was well over six feet tall and he had a tendency to raise his voice when he didn't get the answer he wanted. His temper was explosive. Edward had a lot to be frustrated about but he often didn't help himself. He had a habit of making enemies of everyone, including those trying to help him.

One day, after he complained about one of the staff attorneys, I met with him to discuss his grievances. I did a lot of talking and, in the end, I shut him down. I felt like his complaints about his representation were baseless. I was sharp and defensive. I explained, at length, why we had taken particular actions in his case. He left our office grumbling. In response to one of the worst moments in his life, I dismissed him. I felt that I had to. It hadn't occurred to me that there was really any other way to deal with Edward.

When I first began studying mediation, I found myself impatient to begin practicing. Some time ago, during a commercial mediation observation, I asked the mediator how long it had taken him to become good at it. Five years, he responded. I scoffed. Five years seemed like a long time to be "training."

At the time, I thought becoming a mediator worked like this: You take the training and then you mediate cases. I learned quickly that it was not that simple, but for a surprising reason. It wasn't the substance or the skills sets that were foreign. It was the internal adjustment. What I learned is that to go from the mindset of a litigator to a mediator isn't something that can be learned in one class or three. It turns out that the mediator in that commercial case wasn't wrong. Starting may be simple -- becoming good and making that adjustment takes time.

"I think it has taken me about five years of mediation training, observations and actual mediation to listen differently."

Since I began my mediation training, I've observed, mediated and co-mediated many cases. I've taken several classes and an advanced mediation practicum. I've trained in how to resolve community disputes, employment disputes, family disputes, matrimonial disputes, commercial disputes, wage and hour cases, unlawful arrest cases and more. Every trainer has their own bent. Some focus on facilitative mediation—having people understand each other. Others focus on caucusing and how to do evaluative mediation—helping people understand the weakness of their case and the cost of moving forward. There's a lot to learn.

Of course, there are many common elements to these approaches. The most obvious one is that all of them require intense listening. Listening in mediation is not like listening to your friend unburden themselves at dinner.

In mediation training, you learn to listen in a particular way. It goes like this. A party speaks. The mediator listens. At a point at which something important needs to be confirmed, the mediator synthesizes what has been said and repeats it back to the speaker. The mediator asks for confirmation that they heard the speaker correctly. The speaker confirms or corrects and the process continues. This is called looping. In mediation listening and confirming understanding of the story is a crucial form of communication. However this transaction is accomplished, the message is always the same. "I hear you." In the hours of a mediation session, this quiet call and response may be transacted many times between the mediator, parties and counsel.

Looking back, I think it has taken me about five years of mediation training, observations and actual mediation to listen differently. You can understand and do looping in about 15 minutes. Still, it takes some time to internalize this skill and other skills that drive resolution. It goes against just about everything taught in law school. Instead of offering answers, in mediation one of the most important elements of the mediator's job is to have parties know you understand them. This is the beginning of

probing for a party's deeper interests. It is the place from which problem solving begins.

Mediation training has had noticeable effects on my thinking. (1) My clients are often from a very different background from me and sometimes it didn't feel productive to discuss their feelings unless there was something I could do about them as their lawyer. Now, I find that acknowledging frustrations, anger and fears is often a big step towards helping clients find satisfaction and sometimes resolution. (2) On a personal level, when listening to a story, especially of friends or relatives discussing an issue they're wrestling with, I'm now also listening for the deeper issue. I'm not psychoanalyzing, I'm just trying to get in tune with the context. (3) Finally, I understand, more than ever, the power of a well-done apology in the context of a litigation matter.

Over time, and with more mediations under my belt, I came to realize that I was listening to people differently both inside and outside of the mediation sessions. In both casual and formal conversation, instead of responding or waiting to respond, I was waiting to make sure I really understood the person speaking. I was also taking pains to make sure they knew I had understood them. Mediation is a lot more than listening, of course. During my training (which never really ends), I was relearning other pieces of lessons I thought I had sat through long ago. Problem solving, evaluation, applying the facts to the law—all took on a new color.

The result of acquiring a very different set of skills is that clients are better served. On most days, I feel better about my work and I love my work. Don't get me wrong. I didn't start looping my friends at dinner. It's just that something in the conversation changed. I became aware that it was happening with friends, family and at social and professional functions.

It also started happening at work.

Not long ago, Edward paid our office a visit. I was hardly looking forward to it. Although it had been several years since I last saw him, he hadn't changed much. He had survived a number of significant health issues as well as legal issues. Because not all of those legal issues had been resolved, he was seeking our counsel again.

When we sat down, I could see that he was tense. I remembered that when he spoke he had a habit of wringing his hands as if exercising. It's like he was training to throw a shot put. Had he been holding walnuts, he would have cracked them open.

He began by speaking about his then current problem, which focused on the mother of his children. He had custody, but she had brought him to court again, seeking custody. Although I can't say more here (and I have changed all of the relevant points of this case), I can say that the mother used the court system as way to harass him. Edward and even the court fought back, but she

had a way of making allegations against Edward that the court, in good conscience, had to explore. As Edward discussed the case, his voice and temper rose. Without being conscious of it, I started looping with him.

“Edward, you’re saying a lot here. Just so that I understand you, you feel that because you’re a black man and because you’re in a courtroom, you’re held to a different standard?” “Yes.”

“You cannot make mistakes, ever?” “Yes.”

“She (ex-wife) can, though? After all, the court knows that she’s troubled.” “Yes.”

“That seems really unfair.” “Yes.”

The conversation lasted about 45 minutes. By the time we were done, Edward was calmer. I couldn’t give him any grand answers or tell him what would happen in his case, of course. I did let him know that he had been heard. I think he may have felt that he had been heard. The difference between this encounter and our first, many years ago, was vast. It was more than just the passage of time for him or me. He had certainly changed and saw his current problems in a larger context. It made them no less infuriating. I offered no answers, but rather confirmed his understanding of the events thus far. He was visibly affected and relieved. I don’t think he had been able to have that kind of conversation with anyone else and no one had offered.

When he left my office—we were going to speak in a week’s time—he hugged me. Given my work, I don’t get a lot of hugs (sadly). I gave him a few things to think about for our next conversation.

“I hear you,” he said.

Adam J. Halper is an attorney, mediator and the Director of the Legal Wellness Institute at The Family Center, where he leads a department of lawyers, paralegals and volunteers representing thousands of clients every year. Prior to becoming Director at The Family Center, Adam was a Staff Attorney at Legal Services – NYC, the nation’s largest public interest law firm. Adam is a Mediator and is on the roster of approved neutrals in the S.D.N.Y.

Caroline P. Oppenheim is Principal Court Attorney to the Honorable Diane Kiesel who presided over the Bronx Integrated Domestic Violence Court. The mission of IDV is to adjudicate the family, criminal and matrimonial cases of families plagued by domestic violence. Prior to her present position, she was Assistant Director at the Safe Horizon Domestic Violence Project, which represents victims of domestic violence in Family and Supreme Court. Joining Safe Horizon was a career change for Caroline.

State Bar and Foundation Seek Donations to Help Hurricane Harvey Victims Obtain Legal Aid

The State Bar Association and The New York Bar Foundation are seeking donations to a relief fund for victims of Hurricane Harvey who need legal assistance.

As the flood waters recede, residents of Texas will face numerous legal issues including dealing with lost documents, insurance questions, consumer protection issues and applying for federal disaster relief funds.

Nonprofit legal services providers in Texas will be inundated with calls for help.

Tax-deductible donations may be sent to **The New York Bar Foundation, 1 Elk Street, Albany, NY, 12207**. Checks should be made with the notation, “Disaster Relief Fund.” Donors also can contribute by visiting www.tnybf.org/donation/ click on restricted fund, then Disaster Relief Fund.



Mediating a Products Liability Case

By Bruce J. Hector

All mediations are similar in one sense—one party wants something, and the other party doesn't want to give it to them. But some issues are also unique to particular fields. In a products liability case, a mediator may face special issues. At least the following should be anticipated.

There may be additional real parties in interest or people and entities who have influence on the plaintiff. All mediators consider who must be at the table. In a products liability case, the prospect of a financial recovery has its own gravitational field. These cases usually involve a serious personal injury or death, and the focus should be on addressing the needs of the victims (if still alive) and their immediate family. To be sure, a spouse usually needs to be on board with any settlement. But sometimes the prospect of money attracts more distant relatives or even friends as well, who are viewing the dispute as an answer to their financial woes (there is a heartbreaking example of this in the movie *Million Dollar Baby*). It is important for the mediator to know all the sources of potential influence on the plaintiff who is considering a settlement proposal.

There may be a potential lien against any recovery. If the injury happened at work or the injured person received workers' compensation, this adds another party of interest to the mix. There is the possibility that the comp carrier will assert a lien against any potential recovery by a plaintiff that must be paid first, even before expenses and attorney's fees. This means that the plaintiff will net even less from what appears to be a reasonable or even generous settlement offer. For example, assume the defendant has offered \$100,000. The comp lien is \$30,000, and the expenses on the case are \$10,000. That leaves a balance of \$60,000. After further deducting a 30 percent contingency fee for the attorney, that leaves the plaintiff with \$30,000. If that is what the plaintiff knows will be the recovery, it will influence the negotiation and, in any case, in order to ameliorate that effect, the plaintiff's lawyer may need to have a separate negotiation with the comp carrier. If the defendant has insurance coverage for products liability, that carrier is yet another party that needs to be involved.

Is this a single claim or the harbinger of a wave of lawsuits? Something can go wrong with a product either because of a manufacturing defect, or a design defect. A failure to meet specifications or follow established procedures in making a particular product can result in a manufacturing defect. A manufacturer may not have a problem settling such a case, because it doesn't represent an across-the-board threat to the product if the particular issue can be resolved. A design defect, on the other hand,

means that the product itself is inherently risky because of the way it was designed. A manufacturer may be comfortable settling a manufacturing defect case if it is a one-off, but view settling a design defect case as a threat to the product itself that could promote further lawsuits and even create a "going rate" for such cases. Likewise, the plaintiff's attorney may view the case differently depending on whether it is a one-time recovery, or has the potential for future business. Confidentiality is usually a concern for settling defendants, and while there is usually no problem keeping the terms of an individual settlement confidential, requiring the attorney not to bring further suits may be prohibited, and requests to seal the record must be approved by the courts, which are increasingly reluctant to do so. In fact, this cuts in favor of early mediation and a strict confidentiality agreement.

The role of experts in products liability cases is often critical. In addition to the usual medical and damages experts, there may be additional experts who may be required in fields such as toxicology, engineering or ergonomics. The experts can be extraordinarily expensive as can the preparation of animations and courtroom presentations. These high costs may also provide an incentive to settle by impacting the ultimate real recovery. The costs of testing somewhat unpredictable jury reactions to the experts can also be significant and emphasizes the risk of moving forward.

"Mediation is a particularly fruitful dispute resolution resource for products liability cases."

Allowing an individual plaintiff who is not a routine court participant to be heard is particularly important in products liability cases. That person has experienced a very significant life event that may have altered his or her work and family life. There is a special need for a joint session and the opportunity to tell their story. This can be cathartic for someone who has suffered an injury, or lost a loved one. It may also present the mediator with an opportunity to see if there are any non-monetary factors that can lead to a settlement. Claimants are not always motivated only by money. The plaintiff may want a commitment to remedy the product defect as part of a settlement. Given the bar against using subsequent remedial measures as proof of liability, this is a demand a defendant can safely consider. In addition, a contribution to a charity with which the plaintiff was involved can be a part of the settlement.

There may be a real opportunity in a personal injury case for an apology. Apologies are perilous things. If an apology comes across as insincere or half-hearted, it can do more damage than good. (“I’m sorry if what I said offended you” is a classic example). Defendants are often afraid to apologize for fear it will be taken as an admission of guilt, even though the mediation process is confidential. But a sincere acknowledgment of regret for what the claimant has suffered can sometimes remove an emotional obstacle to settlement. Such an apology can even pave the way for the settlement of a tragic cases involving the death of an infant.

CANDOR (“Communication and Optimal Resolution”) program spearheaded by the University of Michigan, and since adopted by other health systems, was created to address medical errors. Under the program, potential errors are promptly investigated and the results shared with the family. If there was indeed an error in

treatment, the institution will apologize and try to come to an agreement about compensation. After implementing the CANDOR program, the University of Michigan saw the number of lawsuits for medical errors drop by 50 percent, and litigation expenses decrease by \$2 million.

Mediation is a particularly fruitful dispute resolution resource for products liability cases. Any day that mediators can spare parties the prospect of continuing litigation is a good day, and, keeping these factors in mind, there is reason to think that products liability cases are particularly well suited to mediation.

Prior to becoming a mediator, Bruce was Associate General Counsel and Chief Litigation Counsel at Becton, Dickinson and Company (“BD”), a Fortune 500 manufacturer of medical products. You can reach him at bhector1@optonline.net.



IN MEMORIAM

Robert Coulson, Riverside, Connecticut

We recognize the life and work and contribution to ADR of Robert Coulson, an international leader in the field of arbitration and dispute resolution, who died on September 9, 2017 in Stamford Hospital, Connecticut, following a stroke. He was 93. He was president and CEO of the American Arbitration Association for two decades and a tireless advocate for more efficient and equitable alternatives to litigation.

“Almost any human activity is more profitable than worrying a dreary lawsuit through the courts,” he wrote in *How to Stay Out of Court* in 1968. “More often than not, some better method for resolution can be found than forcing an opponent to try his case in court.”

He was born in New Rochelle, New York, to Abby Stewart Coulson and Robert Earl Coulson. He grew up in New York City and spent summers in Marblehead, Massachusetts. He has lived in Riverside, Connecticut, for 40 years. He graduated from Phillips Academy, Andover, in 1943, Yale University 1950, and Harvard Law School 1953. He served in the U.S. Army during World War Two in the Harbor Craft Company in England.

After law school he practiced law in Boston, and then in New York City with his father’s firm Whitman, Ransom, & Coulson. In 1963, he became executive vice president of the American Arbitration Association and served as president and CEO from 1973 to 1994. He gave speeches across the U.S. and around the world and wrote numerous articles and eight books on the topic of alternative dispute resolution His books include *How to Stay Out of Court*, *The Termination Handbook* and *Fighting Fair*. At the AAA, he helped to dramatically expand the use of ADR in America and promoted arbitration through the International Council on Commercial Arbitration.

After retirement he served as an arbitrator on commercial and labor disputes. He was a lifelong sailor and wrote several novels based on offshore races he’d been on and a memoir titled *A Cheerful Skeptic, Sailing Through Life*. He is survived by his wife of 57 years Cynthia Coulson, their sons Crocker, Cromwell, and Christopher Coulson, his daughter from his first marriage, Deirdre Macnab, and his brother Richard Coulson, along with ten grandchildren, Saskia, Calder, Casimir, Capability, Callum, Maud, Calypso, and Neve Coulson, and Ian and Graham Macnab. He was predeceased by his son, Cotton Coulson.

A celebration of his life will take place in October at the Riverside Yacht Club.

The International Criminal Court

By H.E. Judge Joyce Aluoch

I. Introduction

The International Criminal Court (ICC) is the first permanent international court established to help fight impunity for perpetrators of the most serious crimes of concern to the international community, i.e., genocide, crimes against humanity, war crimes and crimes of aggression. The path leading to the creation of a permanent international criminal jurisdiction has been long. On 17 July 1998, more than 50 years after the Nuremberg trial, 120 States convened in Rome and adopted the founding treaty of the ICC, the Rome Statute, which entered into force on 1 July 2002, after its ratification by 60 countries. As of today, 124 States are parties to the Rome Statute. The ICC distinguishes itself from the other international criminal tribunals also established in the 1990s, the international criminal tribunals for the former Yugoslavia and Rwanda, by its permanent character, its treaty-based nature and its jurisdictional scope leaning towards universality.

“The Court’s main goal is to bring to justice perpetrators of the most serious crimes of concern to the international community. To this end, the Court currently has jurisdiction over three core crimes: genocide, crimes against humanity and war crimes.”

Today, the ICC faces an unprecedented level of activity in all areas. There are currently 10 situations under investigation, 10 preliminary examinations being conducted and three cases at trial. In addition there are appeals and reparations being adjudicated in the cases where convictions have been entered.

II. 2016 was a year of milestones for the Court

In March 2016, the Court issued its first ever trial judgment on allegations of sexual and gender-based violence for events that took place in the Central African Republic. The accused, Jean-Pierre Bemba, who was the leader of a political party and Commander-in-Chief of its military branch, was found guilty for his failure to punish or prevent crimes committed by his subordinates, including crimes of sexual violence. He was sentenced to 18 years of imprisonment. Both the conviction and the sentence are now before the Appeals Chamber.

Again for the first time in 2016, the Court dealt with war crimes against protected cultural and religious heritage in Mali. Ahmad Al-Mahdi, a former prominent figure of a group associated to Al-Qaeda, pleaded guilty to charges of destruction of religious and cultural buildings of Timbuktu in Mali. He was sentenced to a term of nine years of imprisonment.

The Court also delivered its first judgment on charges of offenses against the administration of justice in 2016. Mr. Bemba, referred to above, and members of his defense team were found guilty of having corruptly influenced defense witnesses in the main case. Penalties were imposed earlier this year. Both the conviction judgment and the sentencing judgment are currently on appeal.

This Court being the first one of its kind, it is crucial to comprehend its jurisdiction, its formal structure and the role the State Parties play, in order to better understand its functioning as well as how it is able to achieve its goals.

A. Court Designed to Complement and Strengthen, Not to Replace, National Criminal Justice Systems

The Court’s main goal is to bring to justice perpetrators of the most serious crimes of concern to the international community. To this end, the Court currently has jurisdiction over three core crimes: genocide, crimes against humanity and war crimes. The ICC will also be able to exercise jurisdiction over cases of crimes of aggression once the conditions set out during the Kampala Review Conference of 2010 are met.

The ICC was not meant to dig into the past. It only has jurisdiction over crimes that occurred *after* the entry into force of the Rome Statute on 1 July 2002 and only over such international crimes committed on the territory of a State Party or by one of its nationals. There exists, however, an exceptional mechanism which provides for the jurisdiction of the Court where those conditions do not apply, namely if a situation is referred to the Prosecutor by the United Nations Security Council (Darfur, Sudan, or Libya), or if a State makes a declaration accepting the ICC’s jurisdiction (Côte d’Ivoire, Palestine and Ukraine).

In addition to the possibility of the above-mentioned Security Council referral, a State Party to the Rome statute may itself refer a situation directly to the ICC Prosecutor (Democratic Republic of the Congo, Uganda, Central African Republic, Mali, Registered Vessels of Comoros,

Greece and Cambodia, Gabon). The Office of the Prosecutor also has the power to initiate investigations on its own initiative, *proprio motu*, subject to leave being granted by a pre-trial chamber of the Court (Kenya, Côte d'Ivoire and Georgia). It is noteworthy that the majority of the situations currently under consideration at the Court have been referred by the States themselves.

"The Presidency is comprised of one President and two Vice-Presidents, coming from Argentina, Kenya and Japan, respectively. Its main task is to coordinate and ensure proper administration of the Court."

It is essential to stress that the Court is intended not to replace, but to complement national criminal justice systems. This fundamental principle, the principle of complementarity, governs the prosecution of all accused persons by the ICC. It implies that the Court can only prosecute cases if national justice systems do not carry out proceedings themselves or when they claim to do so but are in reality unwilling to do so genuinely. This is not a matter of politics. The determination of whether the Court can try an individual is a matter of judicial evaluation.

Under the Rome Statute, victims of crimes have the right to participate in the proceedings before the ICC and request reparations in the event of a conviction. A Trust Fund for Victims has been established by the State Parties for the purpose of ensuring reparations in cases where the convicted person may not have sufficient assets.

B. The International Criminal Court: Four Core Organs Working Together to Achieve Justice Through a Fair and Just Trial

The ICC is an independent international judicial institution and does not form part of the United Nations system. Having its seat in The Hague in the Netherlands, the Court is composed of four different organs.

The Presidency is comprised of one President and two Vice-Presidents, coming from Argentina, Kenya and Japan, respectively. Its main task is to coordinate and ensure proper administration of the Court. The responsibilities of the Presidency also include external relations, the enforcement of sentences and the conclusion of cooperation agreements with State Parties.

The Prosecutor of the ICC heads the Office of the Prosecutor, which receives and analyzes referrals and communications in order to determine whether there is a reasonable basis to investigate. The office is also responsible for the prosecution of persons allegedly responsible for crimes defined by the Rome Statute.

Eighteen judges make up the three judicial Divisions of the Court; Pre-Trial, Trial and Appeals. Judges are elected by State Parties to the Rome Statute for a term of nine years, with elections being held every three years to elect six new judges. In electing judges, State Parties must take into account the need for the representation of the principal legal systems of the world; equitable geographical representation; as well as a fair representation of female and male judges. Candidates must have either practical experience in criminal law or experience in relevant areas of international law, such as international humanitarian law and the law of human rights. The judges ensure that trials are conducted fairly and that justice is properly administered. They are recognized for their high moral character and integrity and demonstrate a competence in criminal law and procedure or relevant areas of international law.

The Registry provides administrative and operational support to the judiciary and operates as a neutral organ within the ICC. It is headed by the Registrar and is also responsible for general court management, public information, translation and interpretation, among other functions. With the aim of protecting the rights of the accused, the ICC also provides for logistical and, if necessary, financial aid to defence teams.

C. Cooperation and Support from State Parties: The Founding Pillar of the Functioning of the Court

Lacking its own enforcement mechanisms, the ICC has to rely on the cooperation of State Parties for a wide range of important matters. Cooperation of States with the Court is not only crucial but indeed indispensable. State Parties are legally obliged to cooperate with the Court in circumstances such as the arrest and transfer of suspects or requests for judicial assistance. But the Court also needs to be able to rely on broader voluntary cooperation by State Parties, non-State Parties and different organisations, notably when it comes to the protection and relocation of witnesses or the enforcement of sentences. In return, the Court is always ready to support States in the implementation of the Rome Statute provisions in their national law.

"The Court has already obtained significant achievements in addressing crimes of concern to humanity as a whole, such as the use of child soldiers, attacks on civilian populations, sexual violence in conflict, destruction of cultural property."

The Assembly of State Parties and its working groups act as the ICC's management oversight and legislative body. As the world and challenges for international criminal justice change, the Court too, has to evolve. The

Assembly of State Parties therefore regularly takes decisions on various issues such as the adoption and amendment of legal texts and budget, the election of judges and of the Prosecutor.

Because of the nature of its work, the ICC finds itself in a challenging situation at times. Over the last few months, some of its Member States indicated their intention to withdraw from the Rome Statute, expressing a number of concerns, including a perception of selective justice. This perception derives from a lack of universal ratification of the Rome Statute. Until universality is achieved, there will always be gaps where impunity and criticism of selectivity can flourish. Hence, the need to call on more States to join the International Criminal Court to enable the Court to effectively and properly fulfil its mandate of bringing perpetrators of international crimes to justice.

Conclusion: The Way Forward

About 15 years after its establishment, the Court has consolidated itself as a mature institution with growing relevance in the international scene. The Court has already obtained significant achievements in addressing crimes of concern to humanity as a whole, such as the use of child soldiers, attacks on civilian populations, sexual violence in conflict, destruction of cultural property. It is important that the gains we have made in the last decades be protected.

More than ever before, the Court needs the support of all those committed to international criminal justice, in and outside our courtrooms. We need an army of advocates around the world to help extend the Rome Statute system across the globe. The members of the New York State Bar Association can certainly help in this endeavour.

H.E. Judge Joyce Aluoch is a First Vice-President of the International Criminal Court, having served previously for many years as a judge in her native Kenya. Prior to her service on the International Criminal Court she spearheaded numerous initiatives to support the rights of children and women, including serving as vice chair of the United Nations Commission on the Rights of the Child. As Judge Aluoch's nine-year term on the court ends in the spring of 2018 she looks forward to joining the arbitration community.

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Eight Common Mistakes Mediators Make When Trying to Generate Business

By Anna Rappaport

Everyone in the mediation field knows that it is extraordinarily competitive. Where else does one compete with retired judges, Am Law 100 partners with 35 years' experience, retired general counsel, not to mention innumerable smart and capable individuals who work for free for courts or otherwise? Many lawyers find mediation to be enjoyable, and aligned with their values. Unfortunately, this has led the supply of mediation services to far outstrip demand, leading to the result that the market for mediators and arbitrators is comparable to that for entertainers and professional athletes.¹ In other words, a very tiny percentage of neutrals are swamped with work, and are able to charge large sums of money, while the vast majority are struggling to support themselves (or must treat mediation as a side gig). This is quite distinct from the income distribution for lawyers, doctors or other professionals, which is more like a bell curve, with the majority making a good living and only those at the very top making extraordinary sums or at the bottom struggling. In this environment, it may seem remarkable that any lawyers, whether younger or starting later without any obvious advantages, manage to create successful mediation practices, and yet, some do. However, in order to do so, it is important to avoid common pitfalls. The following are the eight biggest mistakes mediators make when trying to create a business.

"Selling oneself is challenging for almost everyone, but being unclear on one's unique selling points compounds the difficulty."

I. Lacking a Clear Niche

Any marketing expert will say that having a clear niche is good for the bottom line; yet, many mediators continue to promote themselves as generalists. While basic mediation skills apply to any type of case, it is also true that there are numerous benefits to pursuing a well-delineated niche. A niche can be defined by a specialized practice area, type of client, geography, or some combination. The key point is that the niche should be sufficiently narrow that the mediator is able to "win" in that area, meaning that the mediator can, with time and effort, create such a strong reputation that he or she becomes an obvious choice for anyone within that niche looking for a mediator. While clearly a desirable outcome, the reality of

presenting oneself to the world as a specialist, for many, may seem risky, difficult, or even disingenuous. Although it may be challenging to develop the requisite expertise, chose among competing interests, or brave the possibility of not being hired because a potential client falls outside one's designated niche, the benefits are well worth the effort.

Narrowly targeting a specific niche makes the mediator come across as more of an expert, and clients want experts. When a person has a brain tumor, she doesn't want a generalist to operate; she wants the best brain surgeon she can find. The same principle applies for serious business problems. If the issue is important enough, the client will want someone who has handled many similar situations in the past, who can instantaneously grasp subtleties and ramifications. Conveniently, clients are also willing to pay more for those who are perceived to have greater knowledge and experience. Meanwhile, such expertise and focus are not only compelling to clients, they also increase the frequency of referrals both from one's social network as well as from work colleagues. Friends and family often lack clarity about what mediation is and whom it can help. The more clearly a mediator articulates his or her niche, the easier it is for family and friends to send referrals. Likewise, from the perspective of professional colleagues, knowing that a mediator has relevant subject matter expertise increases the lawyer's confidence that the mediator will perform admirably and reflect well upon the referrer.

"[B]usiness development is not like painting with numbers; rather, it is a form of self-expression and requires thoughtfulness and creativity."

II. Failing to Accurately Identify Unique Selling Points

One of the biggest problems for most neutrals in business development is the belief that they are interchangeable with their competitors. Yet, in contrast, few people view their doctors, mechanics or their hairdressers as fungible. Why would mediation services be any different? Each mediator has some special qualities that make him or her a great fit for certain clients and less desirable

for other clients. Parsing out what these qualities are can take time, and can be particularly challenging because most people are not good at evaluating themselves.

Numerous studies indicate that people are quite poor at self-assessment, particularly in the workplace.² For example, a 2014 study of 22 meta-analyses assessed the degree to which self-evaluations of ability correlated with objective performance measures, and found an average correlation of .29 (where 1.0 would indicate perfect accuracy).³ This inability to accurately assess one's performance affects people's ability to recognize both their own strengths and their own weaknesses. Thus, an individual who has a true gift for connecting and creating trusted relationships may not appreciate how special that quality is and neglect to leverage it for business development. Likewise, someone with an abrasive demeanor may not recognize that he or she is unwittingly creating obstacles both to settlement and to getting hired in the first place.

Selling oneself is challenging for almost everyone, but being unclear on one's unique selling points compounds the difficulty.

III. Imitating Others

It is important that one's words, demeanor and marketing initiatives reflect personal style. People sometimes think that to be successful at business development, they need to have a salesman-like personality: be extraverted and work the room. Others believe the recipe is to write and speak. No one disputes the value of learning from others' examples and experience. However, it is also important to remember that business development is not like painting with numbers; rather, it is a form of self-expression and requires thoughtfulness and creativity. Behavior that is authentic and engaging from one person comes across as artificial or peculiar when copied by someone else. While it would be wonderful to have a magic formula, each person must look at his or her own special skills, background, connections, and personality to choose a path forward that is authentic. On the most basic level, marketing is about having people know, like, and trust you, and that is hard to accomplish when one is imitating others.

IV. Failing to Seek Mentors

As in any new endeavor, information is one of the keys to success as a mediator. Yet, many new mediators neglect to seek out mentors. Mentors can help new mediators understand organizational dynamics, state-specific issues, identify speaking or writing opportunities, as well as provide tips and advice regarding mediation techniques, business development, and other topics. Mentors can also be a great source of referrals. Busy mediators may be unable to take a case due to scheduling or other conflicts, in which case a well-regarded mentee may be able to take on some overflow business. While it is valuable to take advantage of formal mentoring programs where they exist, newer mediators can also benefit from

organically creating relationships with more experienced practitioners. Reaching out to those whom you admire, and nurturing those relationships over time, can be a key component of a successful mediation career.

V. Ignoring Preexisting Networks

New mediators often avoid using their existing networks to get business. However, for those who are trying to create a viable practice, there is no faster or more effective approach than reaching out to the lawyers and judges whom you have known for years, meeting them for lunch or coffee, discussing your approach to mediation and asking in a polite and appropriate way to be considered next time they need a mediator or are asked for a recommendation. Many lawyers who have been active in their communities for years don't realize the depth and breadth of their positive reputations. Excellent legal work, leadership activities, and simple pro-social behaviors such as being friendly, helpful, and polite leads to a goldmine of goodwill, respect and trust. Many mediators fail to leverage these existing relationships because they feel awkward reaching out or because of concerns about neutrality. However, those who try it generally find this approach to be highly effective. The mediator discloses any preexisting relationships and it usually does not manifest as a significant impediment.

VI. Failing to Develop a Strategy

Even when mediators choose a niche, they don't necessarily have a strategy. The niche determines who you are going after, and the strategy is about how you are going to attract them as clients. For example, writing and speaking do not automatically lead to clients. To optimize business development potential, it is important to think carefully about location, audience, topic, etc. Similarly, attending conferences, gaining new credentials, and taking leadership positions can be a waste of time and money unless chosen deliberately and implemented strategically. Reading any well-regarded book on strategy⁴ can help mediators start to think through choices in a more deliberate, systematic and strategic manner.

VII. Staying in a Comfort Zone

To succeed in any significant new endeavor generally requires the acquisition of additional skills, as well as personal growth. Creating a successful mediation practice is no exception. Many mediators are willing to do the mental and emotional work necessary to overcome biases, to learn to listen at a deeper level and to manage their reactions in order to become more effective in mediation. However, when it comes to business development, people often remain in their comfort zone. Everyone has some of the qualities that are useful for business development, but almost no one is blessed with the full range. Some people are naturally comfortable meeting new people. Some may be exquisitely well-organized. A few are born for public speaking. Others may be good at making requests (like

asking for referrals or business). Developing the missing skills is often uncomfortable at first, but it opens doors and can make all the difference in the success of one's practice.

VIII. Not Writing Out a Plan

Every lawyer knows that the discipline of researching and writing a brief leads to a completely different level of clarity and understanding than is achieved by simply thinking through the issues in one's mind. Yet, many mediators think that having a business plan in their heads is just as good as writing it out. While a business plan rarely has the level of complex argumentation found in a brief, there are still a lot of variables to consider, research to undertake, and choices to make in order to optimize the likelihood of achieving success. Without the discipline imposed by writing, those factors usually are not sufficiently addressed. Some argue that it doesn't matter, since the trajectory of one's business never goes according to plan. Nevertheless, the process of writing out a plan and thinking through various choices, options and variables helps one prepare for whatever eventualities occur, and enables people to make better decisions and achieve their goals faster than they would otherwise.

Avoiding these common pitfalls can help mediators avoid costly errors and unnecessary frustration as they identify an authentic and fitting road to success.

Endnotes

1. Urska Velikonja, *Making Peace and Making Money*, *Dispute Resolution* 17, no. 2 (Winter 2011): 20-29.
2. See Joyce Ehrlinger et al., *Why the Unskilled Are Unaware: Further Explorations of (Absent) Self Insight Among the Incompetent*, *Organ Behav Hum Decis Process*. 2008 Jan 1 105(1): 98-121; Erich C. Dierdorff and Robert S. Rubin, *Research: We're Not Very Self-Aware, Especially at Work*, *Harvard Business Review*, March 12, 2015.
3. Ethan Zell and Zlatan Krizan, *Do People Have Insight Into Their Abilities? A Metasynthesis*, *Perspectives on Psychological Science*, March 2014 vol. 9 no. 2 111-25.
4. For example, A.G. Lafley and Roger Martin, *Playing to Win: How Strategy Really Works*, Harvard Business Review Press, 2013; Richard Rumelt, *Good Strategy, Bad Strategy: The Difference and Why It Matters*. New York: Crown Business, 2011; Chan W. Kim and Renée Mauborgne, *Blue Ocean Strategy: How to Create Uncontested Market Space and Make the Competition Irrelevant*, Boston, Mass.: Harvard Business School Press, 2005.

Anna Rappaport, PCC is the principal and founder of Excelleration Coaching. She has been coaching for 17 years and helps lawyers and neutrals create business development strategies and overcome internal and external obstacles to implementation. She speaks around the country on business development topics and is a leader in the ABA Women in Dispute Resolution Group. She can be reached at anna@excellerationcoaching.com.



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New Rights for Freelance Workers in New York City

By David C. Singer

New York City has adopted the Freelance Isn't Free Act (Local Law No. 2016/140) (FIFA). The law became effective May 15, 2017 and establishes and enhances protections for freelance workers, including the right to a written contract, the right to be paid timely and in full, and the right to be free of retaliation. New York City has become the first city in the nation to protect freelance workers through legislation to prevent client non-payment, which is alleged to have become widespread. Some sources have estimated that 4 million workers in New York City are freelance and as many as 55 million workers are freelance nationwide.

A freelance worker is defined as a person or organization composed of no more than one person, hired or retained as an independent contractor by a hiring party to provide services in exchange for compensation. It appears that an arbitrator or mediator who maintains a solo practice qualifies as a freelance worker under FIFA.

"Arbitrators and mediators should take note of their rights under FIFA [Freelance Isn't Free Act]."

The law applies to law firms or other hiring party that hires a freelance worker located in New York City; the hiring party need not be based or doing business in New York City. Law firms that engage freelance workers, including neutrals, paralegals, expert witnesses and support personnel should be aware of FIFA; attorneys, as well as sales representatives and medical professionals, are excluded from the law.

More specifically, FIFA requires the following:

- Whenever a hiring party retains the services of a freelance worker and the contract between them has a value of \$800 or more (either by itself or when aggregated with all contracts for services during the preceding 120 days), the contract shall be reduced to writing.
- The contracted compensation shall be paid to the freelance worker either (a) on or before the date such compensation is due under the terms of the contract; or (b) if the contract does not specify when the hiring party must pay the contracted compensation or the mechanism by which such date will be determined, no later than 30 days after the completion of the freelance worker's services under the contract.
- Once a freelance worker has commenced performance of services under the contract, the hiring party shall not require, as a condition of timely payment, that the freelance worker accept less compensation than the amount of the contracted compensation.

- No hiring party shall threaten, intimidate, discipline, harass, deny a work opportunity to or discriminate against a freelance worker, or take any other action that penalizes a freelance worker for exercising any right guaranteed under FIFA, or from obtaining future work opportunity because the freelance worker has done so.

A freelance worker may bring an action alleging violations of FIFA. The law creates penalties for violation of such rights, including damages, statutory damages of \$250, double damages, injunctive relief and reasonable attorney's fees. The protections are similar to the protections that many states, including New York, provide to outside sales representatives who earn commissions. (Sales representatives, attorneys and medical professionals are excluded from FIFA.)

Moreover, the Corporation Counsel may commence a civil action on behalf of the City where reasonable cause exists to believe that a hiring party is engaged in a pattern or practice of violations of FIFA. In such civil action, the trier of fact may impose a civil penalty of up to \$25,000, which shall be paid into the general fund of the City.

FIFA also creates a new procedure for filing complaints with the director of the Office of Labor Standards. The director is to establish a "navigation program" that provides information and personal assistance by telephone and email, as well as online information that includes model contracts, general court information, templates and forms and attorney referrals. The director also shall send the freelance worker a survey requesting voluntary information about the resolution of the freelance worker's claims. Such survey shall ask whether the freelance worker pursued any claims in court or through an alternative dispute resolution process, whether the hiring party ultimately paid the compensation that the freelance worker alleged was due or if the matter was resolved in a different manner.

Arbitrators and mediators should take note of their rights under FIFA.

In anticipation of FIFA, law firms and other hiring parties need to review their vendor contracts to determine whether the vendor is located in New York City and a freelance worker under FIFA. They also should review their relationships with freelance workers located in New York City that are not memorialized in written agreements. Law firms need to ensure that they are complying with FIFA regardless of whether they do business in New York City. Also, the law may be a precursor to similar laws adopted in other jurisdictions.

David C. Singer is an active arbitrator and mediator of a wide range of commercial, employment and international matters. He is a partner at the law firm of Dorsey & Whitney LLP, and former Chair of the Dispute Resolution Section of NYSBA.

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The CPR Corporate Counsel Manual for Cross-Border Dispute Resolution

Edited by Ank Santens and Jennifer Glasser
Reviewed by Bart Schwartz

The explosive growth of international commercial arbitration has been widely remarked.¹ Well over 5,000 commercial international arbitrations are filed each year.² Today, up to 90 percent of international commercial contracts include an arbitration clause.³

With these trends, a wealth of material on international commercial arbitration—including countless articles, books and training manuals—has appeared. Most of these works are aimed at the interests of academics, neutrals and advocates for parties to cross-border disputes, with much less focusing on the needs of corporate practitioners. Now, into that void, comes an outstanding new resource: *The CPR Corporate Counsel Manual for Cross-Border Dispute Resolution (2017)*, edited by Ank Santens, Chair, and Jennifer Glasser, Secretary, of the CPR Arbitration Committee. Ms. Santens—a distinguished neutral and counsel focusing on international arbitration—is a partner at White & Case, where Ms. Glasser, who also focuses on international arbitration, is an associate.

The quality of this work is uniformly high. Not only is it eminently readable; unlike many multi-author books in the legal field, *The CPR Corporate Counsel Manual* is consistent in style, format and issues covered from chapter to chapter.

Following the introduction, a stage-setting chapter on “Planning for a Cross-Border Dispute” covers the peculiarities that make it especially important to plan for disputes in negotiating and drafting cross-border contracts. It then steps through the dispute-resolution mechanisms available—negotiation, mediation, expert determination and expert boards and arbitration—assessing the utility of each in the resolution of cross-border disputes. In a section typical of the practical, orderly analysis that characterizes the entire work, the chapter moves into a discussion of six issues for the practitioner to consider in deciding which approach would be most advantageous to clients in various situations, given the characteristics of the commercial contract in question. The chapter closes with a brief discussion of investor-state arbitration, which will be the subject of further discussion in the final chapter of the book.

The next two chapters cover drafting cross-border multi-step dispute resolution clauses and drafting expert-determination and dispute-board clauses. Each of these, as well as the following chapter on drafting arbitration



clauses, includes a section, with a useful summary table, on the necessary elements of the clause under discussion. Each then discusses potential optional elements, pointing out the circumstances under which each is most useful. As with the arbitration-clause chapter that follows, these chapters are replete with sample contract language.

The longest chapter deals with drafting international arbitration clauses, with sections on necessary elements, optional elements, multi-party and multi-contract clauses, the “battle of the forms” and agreements to submit existing disputes to arbitration, among other things. While the sections are written by various authors, here, too, the work’s editorial discipline has ensured consistency of format and of issues covered.

“[T]he section highlights points that inexperienced drafters and drafters relying on form arbitration clauses often overlook.”

The first section, on necessary elements of cross-border arbitration clauses, by Ms. Santens, is a useful resource for any drafter and an essential one for those who are new to drafting cross-border arbitration clauses. In discussing the choice between institutional and *ad hoc* arbitration, Ms. Santens comments on seven “major arbitral institutions with proven track records for [administering] international commercial arbitration.” A “Useful Resources” annex to the work gives the website addresses for each of these institutions, where the practitioner can find a description of the institution’s resources and procedures and the full text of its rules. She then reviews three recommended alternatives for practitioners who opt for *ad hoc* arbitration rules, again giving website addresses for the full text of the rules. The succeeding subsections discuss the need to specify an appointing authority for *ad hoc* arbitration and the use of model clauses.

Following the thread of crisp, practical analysis that runs through the work, Ms. Santens continues with sub-

sections on each of the necessary elements of arbitration clauses, including provisions on the scope of the dispute subject to arbitration, the seat of the arbitration (with useful discussions of the importance of the seat, recommended seats and the *lex arbitri*—essentially, the procedural law of the arbitration), the language of the arbitration, the selection of arbitrators (including the number of arbitrators and the method of selection), and the choice of substantive law governing the contract. Ms. Santens approaches each of these topics with analytical rigor and practical advice, once again providing helpful sample language on the various points.

“Rounding out the work’s treatment of aspects of cross-border dispute resolution of particular interest to corporate lawyers is an excellent chapter on managing cross-border ADR.”

The next section covers optional elements. Its author, Viren Mascarenhas, is a prominent international arbitration lawyer and an adjunct professor at Columbia Law School. The section reviews 14 different elements that drafters should consider, giving sample language for each, and evaluating the circumstances under which each of these elements may be advantageous to the drafter’s client.

In addition to subjects that are commonly covered in arbitration clauses in cross-border contracts (such as allocation of fees, arbitrator qualifications, confidentiality and interim relief), the section highlights points that inexperienced drafters and drafters relying on form arbitration clauses often overlook. Mr. Mascarenhas deals, for example, with the importance of considering whether the drafter should attempt to negotiate an affiliate or parent-company guarantee and the circumstances under which it may be advantageous to negotiate for rights of judicial review beyond the limited review available under New York Convention. Among other things, he discusses the CPR Arbitration Appeal Procedure, a particularly well-thought-out option that drafters who wish to incorporate expanded rights of review should consider.⁴

A third major section of the chapter on drafting arbitration clauses deals with multi-party and multi-contract arbitration clauses. It treats the unique considerations applicable to such clauses, and it provides sample language in helpful tables breaking down the elements of a multi-party clause and of a multi-contract clause.

Moving beyond clause drafting, the work includes a chapter on structuring foreign investments to attract investment treaty protection against expropriation and other potential adverse actions of foreign governments. The authors—Barry Garfinkel, a well-known and deeply

experienced senior member of Skadden’s international litigation and arbitration group, and Gunjan Sharma, an associate in the group—provide succinct, sophisticated advice that all but the most seasoned practitioners dealing with international investment contracts would be well-advised to read in its entirety.

Rounding out the work’s treatment of aspects of cross-border dispute resolution of particular interest to corporate lawyers is an excellent chapter on managing cross-border ADR, including cross-border arbitration. The chapter offers thoughtful, practical advice on early case assessment; client counseling; preparing for the proceeding; selecting negotiators, neutrals and experts; document preservation and collection; managing the proceedings (including fast-track proceedings); approaches to settlement; and post-arbitration set-aside and enforcement proceedings. It also includes a separate section on investor-state arbitration.

All told, *The CPR Corporate Counsel Manual for Cross-Border Dispute Resolution* is a welcome addition to the cross-border ADR literature. With its consistent quality and format, its practical and yet rigorous approach and its clear-eyed focus on the needs of the corporate practitioner, it will be an indispensable resource for in-house lawyers new to the field and a handy reference for old hands drafting cross-border ADR provisions and managing cross-border proceedings.

Endnotes

1. See, e.g., Gary Born, *A New Generation of International Adjudication*, 61 Duke L.J. 775, at 830 n.211 (2012) (“The number of international commercial arbitrations filed annually has substantially increased each year over the past several decades.”), citing 1 Gary Born, *International Commercial Arbitration* at 69 (2009) (charting annual numbers of international commercial arbitrations filed with various arbitral institutions over a 14-year period).
2. S.I. Strong, *Realizing Rationality: An Empirical Assessment of International Commercial Mediation*, 73 Wash. & Lee L. Rev. 1973 (Fall 2016).
3. *Id.*
4. The CPR Arbitration Appeal Procedure can be found at <https://www.cpradr.org/resource-center/rules/arbitration/appellate-arbitration-procedure>.

Bart Schwartz is Executive Vice President, Chief Legal Officer and Secretary of Assurant, Inc. (NYSE:AIZ), an S&P 500 diversified insurance and financial services company operating in North American, Latin America, Europe and Asia. He is a member of the CPR General Counsel ADR Panel and a Fellow of the Chartered Institute of Arbitrators. He is the original coeditor and principal author of the two volume treatise *Corporate Governance: Law and Practice* (Matthew Bender & Co. 2004, two volumes, with annual updates).

How Arbitration Made a Difference: Arbitrating for Peace

Edited by Ulf Franke, Annette Magnusson and Joel Dahlquist

By Edna Sussman

Upon the 100th anniversary of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the SCC commemorated the occasion by celebrating the important role that arbitration has played for trade, economic development and peaceful resolution of disputes. Under the leadership of the SCC's Secretary-General Annette Magnusson, the SCC produced a book titled *How Arbitration Made a Difference: Arbitrating for Peace* and a movie titled *The Quiet Triumph—How Arbitration Changed the World*. Both are stirring and evocative works that readers should make every effort to enjoy. The movie is available at no cost on the SCC website. The book brings history to life with discussions by distinguished authors of the signal successes arbitration has achieved in resolving disputes that could have led to war.

The introduction to the book by Stephen Schwebel provides a succinct history of the development of arbitration involving states. Each of the 14 chapters that follow offers an analysis of a single dispute resolved by arbitration involving a state entity. Each chapter provides an introduction, describes the background of the conflict, the issues presented, the process followed, the resolution and, in many cases, the contribution made to the development of new norms and procedures for conflict resolution. To pique your interest we offer a preview of some of the conflicts discussed. Every student of arbitration would be well served to learn about these significant and intriguing historic conflicts and their resolution.

The book leads with a discussion by Jan Paulsson of the Alabama Claims Arbitration of 1872, which has been described by leading historians and commentators through the years as the greatest arbitration ever. The sums awarded were stupendous and the conflict presented a threat to world peace. The ship, the *CSS Alabama*, over the course of two years traveling the ocean, sank 64 U.S. vessels during the Civil War, and, along with 13 other similar vessels performing the same search and destroy of U.S. merchantmen and ships, virtually paralyzed carriage by sea to and from the northern states. The U.S. government blamed Britain for the commercial losses caused by these cruisers, which were built in England and manned by English sailors, and insisted that Britain had failed to respect neutrality. American leaders were clamoring for reparations that in today's dollars would be the equivalent of U.S. \$30 trillion, and would have bankrupted the British treasury. Britain acknowledged its legal duty to respect neutrality but denied any failure on its part to comply with the law. The ships were constructed in England, but were adapted for war outside of England leaving an open issue as to whether Britain had in fact violated its neutrality obligations. Feelings ran

high and war was a distinct possibility. Following extensive negotiations, the Washington Treaty of 1871 was successfully negotiated, pursuant to which Britain expressed regret for the *CSS Alabama* and other vessels that left from British ports and the two states agreed to a tribunal of five arbitrators. The chapter provides a fascinating description of those party-appointed arbitrators and their role, the conduct of that arbitration, the development of the importance of the principle of competence-competence, and the role of diplomacy in arriving at the ultimate resolution.

As an example of a territorial dispute resolved in arbitration, David Rivkin addresses the *Egypt v. Israel* (Taba) Award issued on September 29, 1988. Taba is a 250-acre triangular territory located about a dozen miles south of Eilat on the shores of the Gulf of Aqaba. It is a picturesque location and the home of a five-star beachfront hotel which had become important to Israel's tourism industry. It had no significant strategic or political importance in and of itself, but it took on considerable political significance following the peace treaty entered into between Egypt and Israel in 1979. The dispute presented a real risk of abandonment of that treaty, which called for Israel to withdraw from the Sinai. Tensions over this border dispute and other issues that arose following the peace treaty threatened the breakdown of that hard-won treaty. The situation was rescued by the arbitration, which marked the first time a dispute between an Arab state and Israel was settled by arbitration. In the award, the tribunal complimented the parties for the "spirit of cooperation and courtesy which permeated the proceeding in general and which thereby rendered the hearing a constructive experience."

And, of course, the book includes a review by Karl-Heinz Bockstiegel of the well-known Iran-U.S. Claims Tribunal which was created in 1981 as one of the measures taken to resolve the crisis in relations between the Islamic Republic of Iran and the United States arising out of the November 1979 hostage crisis at the U. S. Embassy in Tehran and the subsequent freezing of Iranian assets by the United States. While the tribunal held its first meeting in the Peace Palace in The Hague in July 1981, at the time of this writing there are still a few cases remaining between states pending for decision. But over 3,700 claims lodged by nationals have been adjudicated. The Iran-U.S. Claim Tribunal's work has had an immense impact on the development of arbitration and served as the schooling ground for a host of the generation's arbitration practitioners, both arbitrators and counsel. The chapter highlights some of the issues that were reviewed and addressed by the Tribunal, including what would be acceptable in the

taking of evidence, the scope of applicable substantive law, the interpretation of treaties and *force majeure*.

Additional chapters include discussions of the dispute that arose out of the French sinking of the *Rainbow Warrior* Greenpeace flagship vessel for its campaign against French nuclear tests carried out in the Pacific; the conflict over Brcko which was uniquely positioned along the Croatian border providing the Bosnia-Herzegovina Federation with one of its only points of access to the rest of Europe; the dispute in Sri Lanka involving issues concerning whether property destruction was caused by the government forces or by the Tamil Tigers; the dispute concerning the construction and location of the U.S. Embassy in Moscow; the border dispute between Pakistan and India in the Rann of Kutch; the dispute concerning cross-border pollution from Canadian smelters into the United States. To learn more about these and other fine examples of resolution through arbitration, read the book.

Conclusion

The book should be of interest not only to those fascinated by historical events, but also those interested in arbitration and the important role it has played over the

decades in promoting peace. As former United Nations Secretary General Kofi A. Annan states in his foreword: “[p]eaceful resolution of disputes rarely makes the headlines. The use of the rule of law and pursuit of peace often takes place quietly, far away from the limelight.” This book serves the important purpose of bringing arbitration forward into the limelight as a significant contributor to world peace. It can only be hoped that world leaders will seize upon opportunities to engage in arbitration and other amicable dispute resolution processes, as have those in the conflicts featured in the book, to resolve even seemingly intractable conflicts.

Edna Sussman, www.sussmanadr.com, is an independent arbitrator focusing on domestic and international complex commercial disputes and serves on institutional arbitration and mediation panels around the world. Edna is a former chair of the New York State Bar Association Dispute Resolution Section, and serves on the board of the AAA, Vice-Chair of the New York International Arbitration Center, chair of the AAA-ICDR Foundation, and as the Distinguished Practitioner in Residence at Fordham University School of Law.

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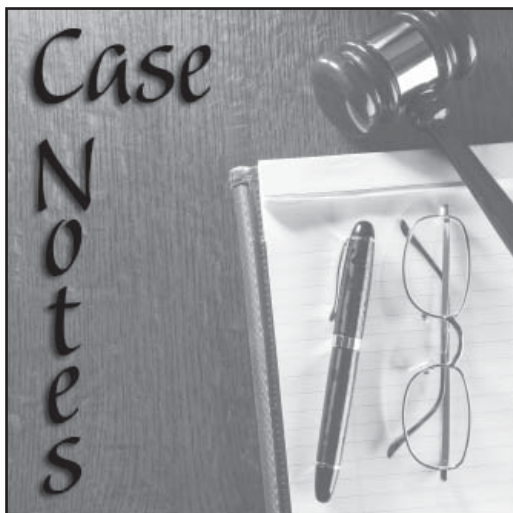
Albtelecom Sh.A v. Unifi Communications, Inc., 2017 WL 2364365 (S.D.N.Y. May 30, 2017)—Enforcing Consent Awards Under the New York Convention

By Laura A. Kaster

Over the last several years, this journal has followed the effort made by multinational corporations to have the United Nations develop a new convention or model law that confers on the mediated settlements of international disputes the same expedited enforcement enjoyed by arbitral awards under the New York Convention. The United Nations Commission on International Trade Law (UNCITRAL) Working Group II has had multiple hearings and meetings and is proceeding to consider how this goal may be achieved. Meanwhile, the district court for the Southern District of New York has acknowledged another path to the same result. In the first decision to specifically address the enforceability of a consent award under the New York Convention, the court in *Albtelecom v. Unifi Communications* has ruled that a consent award embodying the settlement agreement of the parties to an international ICC arbitration is fully entitled to the same expedited enforcement as any other international arbitral award.

The Background Facts

The parties' 2006 international telecom provisioning agreement called for ICC arbitration of any disputes. In 2012, Albtelecom initiated an arbitration before the ICC. An arbitrator was appointed and hearings were held. In 2014, while the hearings were ongoing, the parties notified the arbitrator that they were in settlement discussions and asked him to postpone the hearings. Following some delays, the parties reached an agreement and asked the arbitrator to enter a consent award embodying their agreement. The arbitrator drafted an award reflecting the settlement and the parties modified it. The arbitrator and ICC then issued an Award by Consent on September 2, 2015. It awarded Albtelecom the amount of EUR 1,088,000, which Unifi was to pay by bank transfer in 39 monthly installments. The award further provided that, should Unifi fail to make payments consistent with the schedule it set and fail to cure under the terms provided by the settlement agreement, Albtelecom was entitled to claim EUR 2,100,000 from Unifi. Albtelecom petitioned to



confirm the award and enter judgment the difference between the 2.1 million and the few monthly payments that had been made. Unifi defended on the ground of post-award conduct that it asserted vitiated the obligation to make payments and specifically argued that a consent award could not be enforced under the New York Convention.

The Consent Award Analysis

The district court held that the New York Convention controlled and that under it, Chapter 2 of the Federal Arbitration Act, 9 U.S.C. §§ 201-08, confirmation was required unless the opponent of the petition met the high burden of establishing that there were one of seven specified statutory grounds under article V of the Convention to refuse enforcement. The court held that under the applicable summary judgment standard:

The face of the Award reflects full participation by both parties in the arbitration process, which had proceeded for more than three years as of the date on which the Award was entered. The Award reflects consent to the terms and the text of the Award, by both parties. It reflects due care by arbitrator Knoll. And the parties' consent to the Award—their stipulation to its terms—provides a sound basis for its entry.¹

Unifi's argument was that the settlement was "outside of arbitration" because it was not an award made by the arbitrator. The court rejected that analysis:

The parties here certainly could have dismissed the arbitration in favor of a private settlement agreement. Instead, as the record reviewed above reflects, they affirmatively asked arbitrator Knoll to adopt as part of an ICC arbitral Award, *in haec verba*, the terms of their settlement agreement in the Award. The parties then proceeded, with the arbitrator's consent,

to edit the draft Award, to assure that it reflected their agreement. Far from being resolved “outside of arbitration,” the parties’ dispute, therefore, was ultimately resolved *in* arbitration, based on the parties’ stipulation to particular terms as embodied in the Award.²

The court viewed the award entered by the arbitrator “mid-arbitration” with the parties’ consent as indistinguishable under the law from any other award. Moreover, as a matter of policy the court opined that any other rule would discourage resolution of disputes in arbitration because an enforceable award under the convention would not result. The court held that the post-award issues could be raised in a separate proceeding (an arbitration had been filed), but it enforced the award.

This is an important case in the developing law under the New York Convention. It offers a way to support settlements in international disputes. The Secretariat of the UNCITRAL Working Group II had previously noted no case law was directly on point:

Indeed, the New York Convention is silent on the question of its applicability to decisions that record the terms of a settlement between parties; the travaux

préparatoires of the New York Convention show that the issue of the application of the Convention to consent awards was raised, but not decided upon; reported case law does not address this issue. [footnotes omitted].³

New York has pointed to another route to obtaining an enforceable mediated settlement in international disputes.

Endnotes

1. Slip op. at 5.
2. *Id.*
3. <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V14/080/44/PDF/V1408044.pdf?OpenElement> page 10.

Laura A. Kaster is a co-editor in chief of this newsletter and a Fellow in the College of Commercial Arbitrators, on the CEDR International Panel and a mediator at the Global Mediation Exchange Center. She is on the Tech list of the Silicon Valley Arbitration and Mediation Center, an AAA arbitrator and master mediator, and an arbitrator and mediator for CPR Panel of Distinguished Neutrals. She is a full-time neutral working in the New York area.

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Case Summaries

By Alfred G. Felio

Supreme Court Rules FAA Preempts Application of Kentucky's Clear-Statement Rule

The Kentucky Supreme Court concluded that under that state's clear-statement rule relatives who had power of attorney and who exercised that power when signing nursing home agreements on behalf of their now-deceased relatives were not required to arbitrate their disputes with the nursing homes. That court reasoned that the underlying power of attorney agreements did not specifically grant to the signing relatives authority to enter into an arbitration agreement with the nursing home where the "sacred" constitutional right to a jury trial was implicated. The United States Supreme Court reversed, finding that the Kentucky ruling "fails to put arbitration agreements on an equal plane with other contracts." The Court emphasized that no Kentucky court "has ever before demanded that a power of attorney explicitly confer authority to enter into contracts implicating constitutional guarantees." The Court viewed the Kentucky Supreme Court decision as evidence of the kind of hostility to arbitration that resulted in passage of the Federal Arbitration Act (FAA) almost a century ago. The Court also rejected the argument that the FAA only applied to the enforcement of contracts, not to their formation. "A rule selectively finding arbitration contracts invalid because improperly formed fares no better under the Act than a rule selectively refusing to enforce those agreements once properly made" and cited its discussion of the doctrine of duress in the *Concepcion* decision in support. If this were allowed, the Court concluded, the "FAA would then mean nothing at all—its provisions rendered helpless to prevent even the most blatant discrimination against arbitration." *Kindred Nursing Centers v. Clark*, 137 S. Ct. 1421 (2017).

FAA Exemption Applies to Contract Between Trucking Company and Driver

The FAA exempts contracts of employment of transportation workers from the Act's coverage. The dispute here was between a former truck driver and the trucking company for which he drove under the terms of an "Independent Contractor Operating Agreement." The driver brought a class action alleging violations of the FLSA, and the trucking company moved to compel arbitration under the arbitration provision in the Agreement. The First Circuit framed the question before it as whether the FAA exemption "extends to transportation-worker agreements that establish or purport to establish independent-contractor relationships." Here, the trucking company conceded that the driver was a transportation worker. This concession, along with the legislative history and giving the phrase "contract of employment" its ordi-

nary meaning, led the First Circuit to conclude that "the contract in this case is excluded from the FAA's reach." The court emphasized that its holding was limited to situations in which the "arbitration is sought under the FAA, and it has no impact on other avenues (such as state law) by which a party may compel arbitration." *Oliveira v. New Prime, Inc.*, 857 F.3d 7 (1st Cir. 2017).

Non-Payment of Arbitration Fees Constitutes Material Breach, Rendering Arbitration Agreement Unenforceable

Purchasers of used vehicles invoked the arbitration clause in their purchase agreement and filed a demand against the dealership that sold them their cars. The demand for arbitration was granted by the trial court but the dealership refused to participate in the arbitration or to pay the requisite arbitration fees, and the AAA declined to administer the case. The plaintiffs then filed a class action and the dealership moved to dismiss and to compel arbitration, asserting that the AAA had not been the proper arbitral forum. The lower courts held that the arbitration should be reinstated. The New Jersey Supreme Court reversed, ruling that the AAA was the proper forum for arbitration and that the dealership's knowing refusal to cooperate with the arbitration process by refusing to pay the requisite arbitration fees constituted a material breach of the agreement that precluded arbitration. The court made it clear that "the benefit expected under an arbitration agreement is the ability to arbitrate claims." The failure to advance the requisite fees that results in the dismissal of arbitration, the court reasoned, goes to the essence of the agreement and deprives a party of the benefit of that agreement. The court cited cases by the Ninth and Tenth Circuits supporting the view that failure to pay administrative fees to the arbitral institution constitutes a material breach. Here, the dealership both failed to participate in the arbitration in any way and to pay its fees. The court concluded that the dealership, in addition to breaching the agreement, breached its duty of good faith and fair dealing, rendering the arbitration agreement unenforceable. The court noted, however, that it was not establishing a "bright-line rule." Rather, the court explained that the refusal or failure to participate in the arbitration, while a material breach of the agreement, will not necessarily preclude enforcement by the breaching party; rather, the court explained that that determination "must be made on a case-by-case basis after considering the agreement's terms and the conduct of the parties." *Roach v. BM Motoring*, 228 N.J. 163, 155 A.3d 985 (2017). Accord: *Nadeau v. Equity Residential Properties Mgmt. Corp.*, No. 16 CV 7986 (VB), 2017 WL 1842686 (S.D.N.Y. May 5, 2017) (failure of employer to pay AAA arbitration

fees constitutes material breach of agreement precluding arbitration).

Arbitration Clause Buried in Warranty Guide Unenforceable

Page 97 of the “Health and Safety and Warranty Guide” provided to purchasers of Samsung’s Smart-watch gave notice that disputes would be subject to individual arbitration and that class arbitration was barred. Five pages later consumers were informed that they may opt out of the arbitration procedure. Samsung moved to compel arbitration of a consumer class action. The Third Circuit concluded that Samsung had failed to provide reasonable notice of its arbitration program and affirmed denial of the motion to compel. The court acknowledged that while “it may sometimes be presumed that consumers agree to contractual provisions of which they are on notice, that presumption is warranted only where there is a reasonable basis to conclude that consumers will have understood the document contained in a bilateral agreement.” Here, no notice was provided that a waiver of legal rights was contained on page 97 of a Health and Safety and Warranty Guide. Under these circumstances, the court concluded that “we will not presume that consumers read or had notice of that purportedly binding agreement.” *Noble v. Samsung Elecs. Am., Inc*, No. 16-1903, 2017 WL 838269 (3d Cir. Mar. 3, 2017). Accord: *Norcia v. Samsung Telecommunications America*, 845 F.3d 1279 (9th Cir. 2017) (101-page product safety and warranty information brochure failed to provide inquiry notice of applicable arbitration provision).

Prospective Waiver Doctrine Precludes Enforcement of Arbitration Agreement

A borrower of an online payday loan electronically signed a loan agreement that required the arbitration

of any dispute relating to the agreement and that Otoe-Missouria tribal law be applied to the exclusion of any other state or federal law or regulation. The interest rate on the loan was 440.18 percent. The borrower brought a putative class action alleging, among other claims, violation of the RICO Act. Defendants sought to compel arbitration and the district court denied the motion. The Fourth Circuit affirmed, ruling that under the prospective waiver doctrine “courts will not enforce an arbitration agreement if doing so would prevent a litigant from vindicating federal substantive statutory rights.” The court found no ambiguity in the agreement in finding that “the arbitration agreement functions as a prospective waiver of federal statutory rights and, therefore, is unenforceable as a matter of law.” The court declined the invitation to sever the offensive provisions which it viewed as requiring it to rewrite the agreement. The court concluded that “when a party uses its superior bargaining power to extract a promise that offends public policy, courts generally opt not to redraft an agreement to enforce another promise in that contract.” *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330 (4th Cir. 2017). See also *Eisen v. Venulum Ltd.*, No. 1:16-CV-00461 EAW, 2017 WL 1136136 (W.D.N.Y. Mar. 27, 2017) (arbitration clauses found to be substantively unconscionable where, by requiring application of British Virgin Islands law, protections and remedies available under U.S. Securities laws were precluded).

Mr. Feliu, of Feliu Neutral Services, is an arbitrator, mediator, and independent investigator based in New Rochelle, New York. These case summaries were originally prepared for the Employment and Commercial Arbitration Panels of the American Arbitration Association.

If you haven't yet checked it out, we are pleased to introduce you to an Internet-based private online professional Community for the Dispute Resolution Section. We invite you to participate! Members of our Section run the gamut from law students and newly admitted attorneys who are just finding their way to well-seasoned and experienced attorneys. We want all of you to share your experiences and your knowledge while also being free to ask questions of others in the Section and participating in the intellectual discussion we hope to generate. You can find our Community at www.nysba.org/DRScommunity.

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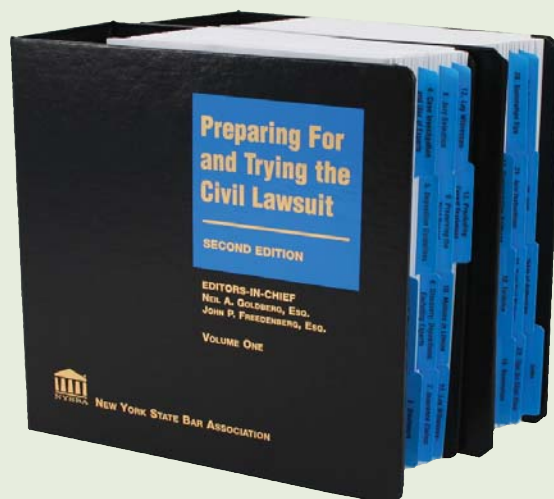
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