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New York Dispute Resolution Lawyer

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of the New York State Bar Association

Inside

Message from the Chair

It is my privilege to serve as the Chair of the NYSBA Dispute Resolution (DR) Section this year, especially in this time of change and growth. This is also a year of celebration since the Section celebrates its 10th anniversary this year. Look for our new logo on the website and other places.

A few years ago the American Bar Association did a survey to determine what areas of law would grow in the future. Alternative dispute resolution was identified as one of the fastest growing areas. The growth is coming after a time of examination and evolution. This issue contains articles highlighting these observations and changes.

The Global Pound Conference series, held worldwide, concluded in 2017, but the information gathered from the events is still bearing fruit. Herbert Smith Freehills, the International Mediation Institute and PriceWaterhouse issued a Report this summer focused on major trends and regional differences. This issue contains highlights of that report focused on the user who is looking for efficiency when selecting a dispute resolution process and wants advocates to work more collaboratively with adversaries.

Another outgrowth of the Global Pound Conference was the interest in and use of mixed modes to manage dispute resolution. This issue has several articles on arb-med and innovative processes that move the discussion of these tools forward.


Deborah Masucci

In June, UNCITRAL's Working Group II completed its work with the adoption of a Convention and Model Law to enforce mediation settlements in cross-border cases. Many expect that this work will become known as the full employment act for mediators, but more seriously, it recognizes the growth of international commerce and the need for a better way to resolve cross-border disputes. The Convention will be known as the Singapore Convention, recognizing the stature of Singapore as a center for dispute resolution in Asia.

In June, we also celebrated the 60th anniversary of the New York Convention. This popular Convention has bolstered international arbitration, making the process a favored dispute management process.

What can we expect from the Dispute Resolution Section this coming year? The Executive Committee is energized and we have many projects and programs on tap. The focus of the year will be on young lawyers/ law students, broadening opportunities, and innovations. Some important and exciting programming highlights are:

- The ADR in the Courts Committee is collecting feedback and will be our conduit to the Court Advisory Committee established by Judge Marks. The state Courts are primed to integrate ADR into the court system to address backlogs and improve efficiency of the courts. More will come as the year progresses.
- In October the Dispute Resolution, Commercial and Federal Litigation, and Corporate Counsel Sections with New York Law School, will be co-sponsoring a mediation advocacy training. This is an effort to educate new and experienced inside and outside counsel on the most effective advocacy choices available to get the most out of mediation. Attendees will walk away with hands-on tools that they will integrate into their practices.

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Book Reviews

- The Mediation Committee is offering law schools a Mediation Moot in March 2019. This effort is the styled after the Arbitration Moot and builds on its success. The Moot will be open to New York State law schools
- The Arbitration Committee will participate in a new Rand Study on the corporate use of ADR.
- The Ethics Committee will develop and issue a report on "Is there an Ethical Imperative to Consider ADR?"
- The Membership Committee is launching a new member survey so we can meet the needs of our current and future members
- The Legislation Committee will be visiting with New York State legislators to solidify the Section as a resource for information and advice about ADR. This is particularly important because there is a sense that the next legislative session might be more actively looking at ADR legislation
- The Section is establishing a Task Force to identify recommendations to increase opportunities for women and minorities as advocates and neutrals in ADR proceedings. The goal is to highlight many steps already taken by the Section but also to establish us as proactive resources for those who are underrepresented.
- Our new Public Relations Committee will continue to push using social media to promote everything we are doing but will also be an education arm. In October, it will pilot a program on optimizing LinkedIn.

This is just the tip of the iceberg. There is more to tell you about but I will save it for the next issue where I hope to tell you about our successes and results.

Please join me in making all of these initiatives happen.

Deborah Masucci

Message from the Co-Editors-in-Chief

Edna Sussman

Sherman Kahn

Laura A. Kaster

As a new year begins for the Section, we should pause to think about the generosity of those who dedicate time and effort to support the academic and practical development of Alternative Dispute Resolution. This work often serves no direct benefit to those who labor for the collective good and who have changed the legal culture over the last 20 or so years. ADR is now a part of law school training, a complementary process in many if not most court systems, and it has generated new economic developments in many countries around the world and in New York with NYIAC, supported by our Section. Our Section leaders have all taken part in this development. Not only in New York, but beyond.

Our new Section Chair is a prime example of dedication to expanding the use and scope of ADR. Deborah Masucci has a long history of innovation in ADR. In the last few years alone, not only has she chaired the ADR section of the American Bar Association, but she has been chair and co-chair of the Board of the International Mediation Institute (IMI) during its important sponsorship of the Global Pound Conference and IMI Mixed Mode Task Force. There are key articles in this issue that reflect that world wide effort over two years to ascertain the needs of disputants, advocates and neutrals that will guide the future of international ADR. Similarly, representing IMI, she was actively involved in UNCITRAL's Working Group II efforts that have resulted in a proposed Singapore Convention and Model Law that are also discussed in this issue. We welcome our new Chair and thank all of our current and prior officers for their continued dedication to the field.

Although there has been a change in legal culture, it has not gone as far in the New York court system as it has elsewhere. John Feerick's and Linda Gerstel's article on ways to increase the use of mediation in New York courts is an important feature of this issue. It is aligned with the consistent lament that litigation and sometime arbitration can be so costly as to deny access to justice and limit recourse for small business and private citizens in particular. Mediation needs to be utilized more by the courts, and perhaps within other dispute resolution processes as well. Disputants want a result and they will accept a mix of processes—appropriate to their needs—that gets a cost-effective, prompt and fair resolution. There are multiple articles in this issue on the work of various providers and institutions around the world to reflect these needs and cut down costs while insuring enforcement of results.

We continue to feature Elayne Greenberg's important column on ethical issues in ADR and to review new books that may be of interest to you. We also address negotiation as well as mediation and arbitration and new ideas for clauses that can foster early resolution. Importantly, Al Feliu has provided case summaries.

We are quite proud of this journal and welcome any comments or suggests you may have.

The Co-Editors-in-Chief,
Laura A. Kaster, Sherman Kahn and Edna Sussman

Save-the-Dates!

Alternative Dispute Resolution in Personal Injury & Civil Litigation CLE Program
Wednesday, October 3rd | Melville Marriott | Long Island
Thursday, October 4th | AMA Executive Conference Center | NYC
7.0 MCLE Credits: 6.0 Skills; 1.0 Ethics

Agenda Topics:
Mediation in Personal Injury Matters | The Mediator's Perspective | Practical Applications of Alternative Dispute Resolutions | Mediation from The Insurance Company/Claim Adjuster's Perspective | Summary Jury Trials | Arbitration and Arbitration Agreements in Civil Litigation | Ethical Issues related to Alternative Dispute Resolution

Ethics Meets the "O" in DR

By Professor Elayne E. Greenberg and Noam Ebner, Guest Collaborator[1]

Introduction

Lawyers, the menu of justice options available to resolve your clients' legal disputes has now expanded to include online dispute resolution processes. Online dispute resolution (ODR) is an umbrella term that may be used to describe the use of technology to help expedite legal case management, replicate existing dispute resolution processes online, such as by utilizing video conferencing for arbitration and mediation ("replication ODR"); or to help streamline or even resolve legal claims through the use of algorithms ("algorithm ODR" or "algorithm-based ODR").[2] Even though ODR is fast becoming a regular part of legal practice, generally, and dispute resolution, specifically, many lawyers are ambivalent about this trend. Lawyers are beginning to recognize that a growing number of arbitrators and mediators are offering to conduct their processes online, and that this might offer convenience and expertise to their clients. However, lawyers are less sure about the merits of digital justice—the term used for those court initiatives that integrate algorithms into case management and decision systems, such as the one being considered in the New York courts. New York, following the lead of other court systems in the U.S. and around the world who are offering online dispute resolution processes to help resolve defined legal disputes,[3] is planning to pilot an ODR program to settle small claims disputes.[4]

Some naysayers fear that the increased use of ODR will transform the practice of law, arbitration and mediation; others are concerned that court systems venturing into digital justice might eventually go beyond that, rendering lawyers, mediators, and arbitrators obsolete and then extinct. Such prognostication might be entertaining to some, terrifying for others, and intriguing to others.[5] Yet, one thing is clear: your ethical obligation as a lawyer has now expanded to helping your client decide, choose, and, if selected, prepare for ODR. What should you consider when helping clients decide whether ODR is right for them? If clients opt for an online dispute resolution procedure to resolve their legal dispute, how might you advise your clients to act so as to increase the likelihood that they will best achieve their interests? Beyond posing lawyers a new set of practical tasks, the expanded role also poses an expanded set of ethical considerations.

This column will provide an overview of ethical considerations related to ODR advocacy in two types of ODR processes: replication ODR and algorithm-based ODR processes, both of which are becoming part of court-connected processes. While most of the writing related to ethics in ODR has focused on the ODR system provider's ethics, or those of individual practitioners, this column focuses on your ethics as an attorney who is considering recommending ODR for your client. I am honored to have my esteemed colleague and critical thinker about ODR, Noam Ebner, collaborate with me in facilitating this evolving discussion.

Professor Elayne E. Greenberg is the Assistant Dean of Dispute Resolution, Director of the Hugh L. Carey Center and Professor of Legal Practice at St. John's Law School. Professor Noam Ebner is the Professor of Negotiation and Conflict Resolution in the Department of Interdisciplinary Studies at Creighton University Graduate School. Thank you Tina M. Kassangana ('19) for your research assistance.

This conversation will continue in four additional parts. Part One will provide an overview of court-connected ODR, a less familiar ODR process to most. For those doubters about ODR, Part Two will explain its benefits. In Part Three, we will highlight the ethical considerations for lawyers about ODR use when you are advising, counseling and advocating for your clients. We will conclude by offering lawyers suggested guidelines to help them ethically respond to this rapidly evolving trend.

Part One: How Does Court-Connected ODR work?

As court-connected ODR programs emerge in different jurisdictions in the U.S. and around the world, the first challenge facing lawyers is that such programs are far from cookie-cutter. The programs differ in the type of legal cases they are designed to resolve, the number of stages included in the program design, the use of algorithms to provide appropriate tailored options to participants and the use of algorithms to render online decisions. To date, court-connected ODR programs have been designed to resolve a range of cases from divorce to small claims disputes. Some have multiple stages such as an online evaluation, online negotiation, online facilitation and online decisions. Some programs are synchronous, others are asynchronous. Some focus on providing parties with information, others on providing them with solutions.

Of particular concern to lawyers, court-connected ODR involves algorithmic intervention in the dispute. By

algorithmic intervention, we mean that the parties input information about the dispute into a computer system, and then the system makes process and/or outcome decisions for them. Such algorithmic intervention may take the form of automated, algorithm-based case intake, case management, information exchange, and initial resolution efforts. The movement from one phase to the next is determined by the system, with little or no human intervention or specific human monitoring of each case. Current ODR systems tend to be hybrid, in the sense that algorithmic intervention is complemented by human facilitation. If initial algorithmic interventions are not successful, the system shifts parties to an online replication process, in which a human mediates, or adjudicates, their dispute.

The ODR systems of today use algorithms to determine the *advice* parties are given and the *process* they go through. As ODR develops, however, direct algorithmic intervention in the *outcome*—through more aggressive case management, shunting some cases towards automated decision or through supplanting human involvement at later decision-making stages—is nearly inevitable. Looking ahead at the rise of the algorithms, lawyers need to ask: How are these algorithms formulated? Will the algorithm advantage or disadvantage your client? Do "repeat players" enjoy any advantage?

Part Two: What Might ODR Processes Offer Your Client?

Generally speaking, ODR is touted to offer clients an efficient, less emotional and more arm's-length resolution to your client's dispute. As an illustration, replication ODR offers parties all of the advantages that traditional mediation and arbitration offer over litigation, and, in addition, enjoys benefits of time saving and flexibility. Algorithmic ODR also extols efficient resolutions and offers additional benefits. One is the potential for achieving *optimal* results by maximizing party outcomes to a degree that even traditional ADR, for all its aspiration to win-win outcomes, rarely achieves. From a justice perspective, another benefit of algorithmic ODR is that it provides users with standardized results. Thus, algorithmic ODR can enhance justice by eliminating human factors that cause two similar cases to be treated differently.

When counseling a client about whether one of these processes is an appropriate option for them, lawyers must first work with the client to assess and prioritize their justice interests. If the efficient resolution of the presenting dispute is a priority for your client, algorithmic ODR might be an appropriate means of resolution. However, if your client's priority is having her "day in court" or seeking a remedy beyond the standardized outcome list of an algorithmic ODR system, such a process would not suit them. On the other hand, issues of both voice and creative outcomes might be satisfied through replication ODR—even though such a process might take longer. For other clients, the lack of a physical experience of a day in court might render such a process unsuitable. The suitability of any particular ODR process to your client's needs requires understanding all of your clients' interests, including their justice interests. This requires a set of considerations different from typical litigation management, and one that goes beyond the now-familiar considerations involved in assessing the suitability of a traditional ADR process.

Part Three: What Does Ethics Have to Do With ODR?

Your ethical obligations as detailed in the N.Y. Part 1200 Rules of Professional Conduct[6] also extend to ODR. After all, ODR is just another means for your client to resolve her legal dispute and get the justice she seeks. Thus, lawyers must be well-versed in how ODR operates if you are to provide competent,[7] client-informed[8] and ethical representation[9] of your clients. Even if you are not representing your client in the ODR process, your guidance on participation must be given within an ethical framework: You must have the requisite skill to counsel and advise clients about ODR and provide them with sufficient information about the ODR choice they are facing so that they are able to make an informed decision.

We note that New York State has not fully adopted the ABA's wording of comment 8 to Model Rule 1.1 on attorney competence, which dictates that "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology.**" Instead, New York State has limited the scope of technological competency in its version of Comment 8(ii) to "keep abreast of the benefits and risks **associated with technology the lawyer uses to provide services** to clients or to store or transmit confidential information." Therefore, we impute that a lawyer's duty to stay abreast of developments in technology that affect her clients, such as ODR, stems from more general duties requiring knowledge, skills, thoroughness and preparation. In court-connected circumstances, it also stems from the lawyer's duty detailed in Comment 8(i) to NYS Rule1.1(a) to "keep abreast of changes in substantive and **procedural** law."(emphasis added, throughout).

However, competence in providing preliminary counsel, ongoing advice, and actual representation to your client is not the only ethical concern pertaining to ODR. When it comes to honoring a lawyer's ethical obligation to protect attorney-client privilege and confidentiality of settlement discussion,[10] lawyers whose clients are considering using ODR have additional confidentiality considerations. In fact, we believe that the potential increases in breaches of data security that are possible or likely with the increased use of ODR expands a lawyer's ethical obligation to verify the ethics and standards of the ODR provider that the client is considering. In this regard, new questions abound. For example: Is the platform through which the ODR process is conducted secure?[11] What information is stored, and what is done with it? Is it accessed by the ODR provider, or by the court system, to review specific cases, or to garner insight regarding system-wide trends? Do the algorithms that are part of

the specific ODR program yield biased results in favor of repeat users? Do they tend to prompt quick rather than explained decisions, and what does this mean for your client's affairs? If you and your client are mediating via video conferencing, is the interaction being recorded? Are there other people in the room that you cannot see and don't want to be part of the process? Do you have an input in these protocols? You do not need a degree in computer science in order to provide guidance on these issues, at least to the extent of noting the challenges these issues pose and exploring your client's concerns. You do, however, need to familiarize yourself with a working knowledge of ODR platforms and practices, their advantages and the question marks they raise, dedicating particular effort to learn about specific platforms introduced in the jurisdiction of your practice.

Part Four: Takeaways for Lawyers

Because ODR is such a rapidly evolving field, we realize that it is hubris to offer precise predictions about how lawyers should ethically counsel clients regarding use of ODR, or use ODR in their client representation. Rather, we believe you will find it more useful if we offer three guidelines to help you navigate ODR's addition to the justice and dispute resolution landscape.

First, your personal attitude towards technology should not interfere with your ethical responsibilities as a lawyer. You may be natural born techie who approaches ODR with a comfort that may obscure ODR's actual limitations. On the other end of the spectrum, you may be technology adverse, believing you can avoid ODR totally. After all, you have been successful without ODR most of your career. ODR is not about your personal attitude. It's all about the client's preferences.

Second, our competence and comfort with ODR will grow as we experiment with its use and value. The devil is in the details, and technology reveals its details only to curious users. You cannot possibly appreciate all the nuances of ODR advocacy without having practical experience using it. So, begin using ODR, with an eye toward flagging ethical issues for consideration.

Third, get involved. Good ODR practice dictates that dispute system designers reach out to those potential users of the court-connected ODR program to better understand users' needs and concerns. Help these dispute system designers build a better mousetrap. It is much more constructive to share your concerns during the development stage than after the ODR process is a *fait accompli*.

We welcome your ideas and comments about this emerging justice option.

Endnotes

1. Professor Elayne E. Greenberg is the Assistant Dean of Dispute Resolution, Director of the Hugh L. Carey Center and Professor of Legal Practice at St. John's Law School. Professor Noam Ebner is the Professor of Negotiation and Conflict Resolution in the Department of Interdisciplinary Studies at Creighton University Graduate School. Thank you Tina M. Kassangana ('19) for your research assistance.
2. See *generally* Katsh & Rabinovich-Einy, Digital Justice (2017).
3. *See, e.g.,* http://www.ncsc.org/~/media/files/pdf/about percent20us/committees/jtc/odr percent20qr percent20final percent20v1 percent20- percent20nov.ashx.
4. E-mail communication dated 5/7/18 with Diana Colon, Assistant Deputy Counsel at the New York State Unified Court System (on file with author).
5. Also, very confusing to some, particularly around the question of whether the systems being discussed are human-driven or algorithm-operated. See, on this point, Zeleznikow, J. (2017); Don't Fear Robo-Justice, https://theconversation.com/dont-fear-robo-justice-algorithms-could-help-more-people-access-legal-advice-85395 .
6. http://www.nycourts.gov/rules/jointappellate/ny-rules-prof-conduct-1200.pdf.
7. N.Y. Rules of Professional Conduct 1.1(a) Competence provides A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill (emphasis added), thoroughness and preparation reasonably necessary for the representation.
8. Rule 1.0(j) explains that informed consent denotes the agreement to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.
9. *See, e.g.,* Rule 1.2 (a) Scope of Representation and Allocation of Authority Between Client and Lawyer states in relevant part … a lawyer shall abide by a client's decisions concerning the objectives of representation, and as required by Rule 1.4 shall consult with the client as to the means by which they are to be pursued…(a) (2) A lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished. *See also* Rule 1.4 Communication 1.4(a)(1) (i) A lawyer shall promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(j), is required by these rules.
10. RULE 1.6. Confidentiality of Information (a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless: (1) the client gives informed consent, as defined in Rule 1.0(j); (2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or (3) the disclosure is permitted by paragraph (b). "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates. -9- (b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime; (3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud; (4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm; (5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or (ii) to establish or collect a fee; or (6) when permitted or required under these Rules or to comply with other law or court order. (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rules 1.6, 1.9(c), or 1.18(b).
11. Of course, we appreciate that as of the writing of this column, no ODR platform is totally immunized from security breaches. However, some are more secure than others.

Cyber Attacks: Issues Raised in Arbitration

By Edna Sussman

"There is a new mantra in cybersecurity today, "It's when not if."[1]

Introduction

Cyber intrusion and hacking are in the news almost daily, with damaging invasions of law firms, corporations, governmental agencies, and political entities. "Security breaches are becoming so prevalent that there is a new mantra in cybersecurity today: 'It's when not if,' a law firm or other entity will suffer a breach."[2] Those who monitor IT systems report dozens of attempted attacks on a daily basis. Arbitration participants have not been immune.

This article seeks to flag for further analysis: (a) arbitrators' duties with respect to cybersecurity risks, (b) admissibility of illegally obtained documents, (c) authentication of documents, (d) sanctions, (e) the psychological impact on decision-making of inadmissible evidence, and (f) the arbitrator's duty to report.

The Arbitrators' Duties

At the ICCA Conference in 2018, a consultation draft of the Cybersecurity Protocol for International Arbitration was circulated for comment. The Protocol is "intended to encourage participants in international arbitration to become more aware of cybersecurity risks in arbitration and to provide guidance that will facilitate collaboration in individual matters about the cybersecurity measures that should reasonably be taken, in light of those risks and the individualized circumstances of the case to protect information exchange and the arbitral process."[3] It is hoped that adherence to the Protocols coupled with adherence to practical guidance on how to protect against cyber intrusion will diminish the number of incidents in international arbitration.

Guidance on how arbitrators should manage their practice in light of today's cyber risk have been emerging and arbitrators would be well advised to consult those sources and consider whether they should undertake some cyber security measures in their practice.[4] Users of arbitration are entitled to expect that arbitrators will take at least basic security measures and it is anticipated that user expectations in this regard will increase in the coming years. Steps taken now can avoid problems in the future. Many measures can be taken that are neither expensive nor difficult. This is a subject that no arbitrator can safely ignore.

Admissibility

Arbitrators have broad discretion in dealing with evidence under applicable laws and institutional rules. Given this wide discretion and the binding nature of arbitral awards, tribunals generally admit evidence to avoid risking vacatur for failure to provide a full and fair opportunity to present the case, and then consider its credibility, weight and value. However, on a proper showing evidence may be excluded by the arbitral tribunal.

Where it is demonstrated that evidence has been obtained illegally the arbitral tribunal is faced with a difficult choice. With the prevalence of cyber intrusions in today's world, it is inevitable that tribunals will be increasingly required to address the question of whether they should admit illegally obtained evidence. However, no clear line of authority has developed to guide tribunals as to how they should treat illegally obtained evidence. Tribunals have arrived at different conclusions on the question.[5]

Illegally obtained evidence is not new, but it is likely to be more prevalent in this age of technology and big data. The classic case dealing with illegally obtained evidence is the 2005 decision in *Methanex v. United States* (*Methanex*), long before WikiLeaks, in which the tribunal declined to admit the evidence.[6] Methanex attempted to rely on documents obtained by going through wastepaper and rubbish in support of its position. The tribunal stressed the general duty of good faith and the fundamental principles of justice and fairness and declined to admit the evidence, although it also considered the question of materiality of the evidence and concluded that it was only of "marginal evidential significance."[7]

In the well-known *Yukos* award, which granted $50 billion in damages, the tribunal relied extensively on confidential diplomatic cables from the United States Department of State that had been illegally obtained and published on WikiLeaks.[8] The tribunal provided no analysis of whether evidence illegally obtained should be admitted. Other published awards in investor state cases have specifically addressed the admissibility of evidence illegally obtained through cyber intrusion. *See, e.g., Libananco v. Turkey* (counsel communications intercepted—not admitted)*; Caratube v. Kazakhstan* (hackers uploaded government documents—11 introduced, those not privileged admitted), *Conoco Phillips v. Venezuela* (after an interim decision material documents were made public on WikiLeaks—court declined to reconsider its decision and did not consider the evidence; strong dissent).

The decisions appear to emphasize who committed the wrongful act, whether the documents are privileged, and whether the information revealed was material to the decision on the merits. Balancing the search for truth and other values is not new. It is just being presented in a new context in our digital world. As William Park said, "Nothing new resides in balancing truth-seeking against values that further public goals rather than adjudicatory precision."[9]

Authentication

Litigation positions taken by parties with the ascendance of cyber intrusion may be presented in a variety of ways. A party may contend that the documents were "stolen" by hacking into his or her IT system; thus, illegally obtained. That contention raises questions of admissibility discussed above. A party may contend that it no longer has the documents available for production because it was hacked. That contention raises questions of proof as with any assertion that documents no longer exist. Or illegally hacked emails might be posted publicly on WikiLeaks or some other platform on the web that is publicly available. Again, that raises a question of admissibility discussed above. Parties may contend that the emails were fabricated by a hacker and that they did not write them. That contention raises questions of authenticity.

Authentication is not an issue frequently encountered in international arbitration. However, it is likely that with the prevalence of cyber intrusions and the ease with which it seems to be possible to intrude, arbitrators will likely be required to review an increasing number of objections to admissibility based on lack of authenticity.

Sanctions

The question of what sanctions a tribunal has authority to impose, and when and how sanctions should be imposed, has been the subject of extensive discussion in recent years in the wake of the issuance of the 2013 International Bar Association Guidelines on Party Representation in International Arbitration (IBA Guidelines). Various proposals have been made as to who should be responsible for sanctioning counsel. Cyber intrusion brings that issue to the fore.

Tribunals are appropriately concerned about guerrilla tactics, and consideration of remedies beyond the exclusion of evidence may be appropriate in cases of cyber intrusion. As the tribunal stated in *Libananco*:[10] "The Tribunal attributes great importance to privilege and confidentiality, and if instructions have been given with the benefit of improperly obtained privileged or confidential information, severe prejudice may result. If that event arises the Tribunal may consider other remedies available apart from the exclusion of improperly obtained evidence or information."

The IBA Guidelines empower the tribunal to address "misconduct" by a party representative after giving the parties notice and a reasonable opportunity to be heard. Misconduct is broadly defined by the IBA Guidelines to include "breach of the present guidelines, or any other conduct that the arbitral tribunal determines to be contrary to the duties of a party representative." The nature of the "misconduct" intended to be covered has not been established but, certainly, cyber intrusion would fall into that category. In determining the remedy, the tribunal is to consider the nature and gravity of the misconduct, the good faith of the party representative, the extent to which the party representative knows about or participated in the misconduct, the potential impact of a ruling on the rights of the parties, the need to preserve the integrity and fairness of the arbitral proceedings, and the enforceability of the award. These considerations clearly outline the matters to be considered in deciding whether to impose a sanction on a party for cyber intrusions, if it is concluded that the tribunal has authority to do so.

The Impact on Decision-Making of Inadmissible Evidence

Study after study has established that fact finders cannot ignore inadmissible information and are influenced in their decision-making by that information, even if it has been excluded. As Doron Teichman and Eyal Zamir sum up the literature: "[n]umerous studies have documented the effects of inadmissible evidence in … legal domains, such as hearsay evidence, pretrial media reports, and illegally obtained evidence. These studies show that inadmissible evidence affects judicial decision-making in civil as well as criminal settings, irrespective of whether that evidence favors the prosecution or the defense. A recent meta-analysis concluded that 'inadmissible evidence produced a significant impact.'" [11]

As the courts have found it can be "difficult to 'unring the bell.'"[12]Arbitrators should be sensitive to this unconscious influence and carefully assess the evidence upon which they rely to ensure that it supports their conclusions without reference to excluded evidence. Advocates should be sensitive to the fact that highlighting evidence to urge its exclusion may cause it to make an even deeper impression on the fact finder.

Duty to Report

Cyber intrusion is a crime in jurisdictions around the world. Violations of privacy laws are also implicated. What, if any, is the arbitrator's duty to report a cyber crime? And to whom? Local authorities? Counsel's bar association? The administering institution? While arbitrators must first consider whether they are under any legal or ethical obligation that requires them to take action, the resolution of the question presents the tension between reporting wrongdoing and the confidentiality of the arbitration proceeding.

Elliott Geisinger and Pierre Ducret distinguish between doctored documents and witnesses lying on the stand, which they consider sufficiently dealt with by the tribunal's disregard of such evidence on the one hand and what they referred to as a "Balrog"[13] on the other hand. A Balrog is a violation of fundamental national or supranational rules close to transnational public policy. They cite as examples money laundering, corrupt practices, gross violation of competition law, fraudulent conveyances, financing of terrorism, violation of embargoes, traffic of cultural property, and gross violations of environmental regulations.[14] If a party hacks into another party's computer system, or worse yet, posts it publicly or provides it to others to post publicly, one might well conclude that the matter involves no ordinary doctored document, but rather rises to the level of a Balrog.

However, Geisinger and Ducret conclude that finding a reporting duty is in complete contradiction with the confidential nature of international commercial arbitration and suggest that most legal systems would not impose any such duty even with respect to Balrogs. They allow for possible exceptions for extremely serious violations of fundamental legal principles, such as human trafficking where the confidentiality of the arbitration becomes a "minor consideration."

The question of when an arbitrator has a duty report is likely to be a continuing discussion not only in the context of cyber intrusions but also in connection with other unlawful acts.

Conclusion

The ease with which it appears cyber intrusion can be accomplished and the almost daily reports of hacks suggest that arbitrators are likely to increasingly be presented with issues related to breaches of cyber security. The issues are not new. They are merely presented in a new guise. It is hoped that this article will lead to further analysis of the issues raised in this context.

Endnotes

1. David Reis, *ABA Tech Report 2017*, ABA, https://www.americanbar.org/groups/law_practice/publications/techreport/2017/security.html (last visited May 23, 2018).
2. *Id.*
3. *Draft Cybersecurity Protocol for International Arbitration—Consultation Draft*, ICCA-NYC Bar-CPR, http://www.arbitration-icca.org/media/10/43322709923070/draft_cybersecurity_protocol_final_10_april.pdf at p.5 (last visited May 23, 2018).
4. *See, e.g.*, Stephanie Cohen & Mark Morril, *A Call to Cyber Arms: The International Arbitrators Duty to Avoid Digital Intrusion*, 40 Fordham Int'l. L. J., 981 (2017); Jill D. Rhodes & Robert S. Litt, The ABA Cybersecurity Handbook: A Resource for Attorneys, Law Firms, and Business Professionals (2d ed. 2018); Arbitration in the Digital Age: The Brave New World of Arbitration (Maud Piers & Christian Aschauer eds., 2018); ARIAS•U.S, Practical Guide for Information Security in Arbitration (2017).
5. For a discussion of the arbitral decisions addressing the admissibility of evidence obtained through cyber intrusion, *see* Cherie Blair & Ema Vidak Gojkovic, *WikiLeaks and Beyond: Discerning an International Standard for the Admissibility of Illegally Obtained Evidence*, 22(1) ICSID Rev.—For. Inv. L. J. 1 (2018); J. H. Boykin & M. Havalic, *Fruits of the Poisonous Tree: The Admissibility of Unlawfully Obtained Evidence in International Arbitration*, 5 Transnat'l Disp. Mgmt. J. (2015); Jessica O. Ireton, *The Admissibility of Evidence in ICSID Arbitration: Considering the Validity of Wikileaks Cables as Evidence*, 30(1) ICSID Rev.—For. Inv. L. J. 231 (2015).
6. NAFTA Chapter Eleven Arbitral Tribunal: *Methanex Corporation v. United States of America*, Final Award on Jurisdiction and Merits, August 3, 2005, Text of Decision, 44 I.L.M. 1345 (2005).
7. *Id.* at ¶ 56.
8. *Hulley Enters. Ltd. (Cyprus) v. Russian Fed'n*, PCA Case No. AA 226, Final Award, 1185–86 (Jul. 18, 2014) [hereinafter *Hulley*]. The District Court of The Hague quashed the final award from *Hulley* on other grounds on April 20, 2016. As of this writing the appeal is pending.
9. William W. Park, *Truth Seeking in International Arbitration*, in The Search for "Truth" in Arbitration: Is Finding the Truth What Dispute Resolution is About? 1, 10 (Markus Wirth et al. eds., 2011). For a comprehensive decision which directly addresses the balance between the competing policy imperatives of truth and privilege in the context of WikiLeaks exposure, *See, Wee Shuo Woon v. HT S.R.L.,* [2017] S.G.C.A. 23 (Sing.).
10. *Libananco Holdings Co. Ltd. v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues at ¶ 80 (Jun. 23, 2008.
11. Doron Teichman et al., *Judicial Decision-Making: A Behavioral Perspective*, *in* Oxford Handbook of Behavioral Economics and the Law 1, 9 (Eyal Zamir et al. eds., 2014). *See also* Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. Pa. L. Rev. 1251, 1279–81 (2005).
12. *N.L.R.B. v. Jackson Hosp. Corp.*, 257 F.R.D. 302, 307 (D.D.C. 2009).
13. The Balrog reference draws upon Tolkien's Lord of the Rings tale of miner dwarves who dug too deeply and unleashed "a terrible daemon from ancient times," the Balrog.
14. Elliott Geisinger & Pierre Ducret, *The Uncomfortable Truth: Once Discovered What to Do With It*, in The Search for "Truth" in Arbitration: Is Finding the Truth What Dispute Resolution is About? 113, 114 (Markus Wirth et al. eds., 2011).

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Keeping Arbitration Safe for Texas

By John Boyce

"No man's life, liberty, or property are safe while the legislature is in session." Judge Gideon J,. Tucker, 1866

"We intend to foster relationships from session to session and to serve as a resource to legislators and committee staff counsel as bills come up affecting arbitration."

It doesn't make for a good day when learning that your livelihood and passion are in jeopardy. In 2007, we of the Alternative Dispute Section of the State Bar of Texas[1] were informed that the Texas Legislature was contemplating a bill that required disclosure of *all* arbitration awards. Panic. Sections are forbidden by law from advocating or opposing most legislation.[2] We were helpless. Whatever we did would have to be done by individuals, haplessly no doubt. New York's own Judge Gideon J. Tucker's famous observation in 1866, "No man's life, liberty, or property are safe while the legislature is in session" became more than platitude.

Apart from meager efforts, we did nothing. Fortunately (no thanks to us), the bill died in conference along with 95 percent of the some 6,000 bills filed every biennial session.[3] We dodged a bullet.

You might have thought we would have learned a lesson and attempted some organized response in 2009, but no. Again, we were blindsided by an even more serious bill of an influential legislator that would have imposed "objective" standards on arbitrators, allowed courts to vacate awards under conventional appellate standards—i.e. errors of fact or law, and allowed interlocutory appeals of motions granting applications to compel arbitration. This time, at the last minute, through hard individual lobbying of several attorneys, we prevailed upon the House Judiciary Committee not to let the bill out of committee to the floor where it might easily have passed.

This angst of being prey to legislation that would effectively end arbitration in Texas—cleverly without appearing to do so—was the genesis of the Texas Arbitration Council prior to the 2011 session. We serve as an "educational resource" only. We do *not* formally lobby. The Council comprises two groups: first, prominent arbitrators, and, second, the ADR Section itself. Together we hired and jointly funded a governmental affairs consulting firm—i.e., a "lobbyist"—for the *strict purposes only*:

1) to assist in working with elected and appointed leadership in monitoring proposed legislation identified by the client, and
2) to advise the client in offering comments and advice in an appropriate manner to state decision-makers.[4]

We neither write, nor propose, nor oppose legislation. Serving as an educational resource the ADR Section did not run afoul of the Bar's restrictions on formal lobbying.[5, 6]

We intend to foster relationships from session to session and to serve as a resource to legislators and committee staff counsel as bills come up affecting arbitration. Our experience over the years is that, while the professional community, including arbitral institutions such as the American Arbitration Association (AAA), do an excellent job of educating attorneys and parties on arbitration law and its nuances, we could do a better job of educating the very elected decision makers responsible for those laws. This reluctance may stem from lobbying restrictions imposed on integrated bars, as in Texas, and the restrictions imposed on arbitral institutions to maintain non-profit § 501(c)(3) status under the Internal Revenue Code. It may be a matter of limited resources. We sought to build a reputation so interested parties would know to come to us for advice and comment. This has largely happened.

"Our relationships paid off as staff, elected officials, and lobbyists of other groups approached us seeking our comments to various proposals, bills, and ideas."

Our lobbyists were critical in facilitating this goal. With their wealth of knowledge they tracked legislation; estimated passage; got us appointments with elected officials and committee staff counsel, and visited with officials and staff on legislation. The team organized breakfasts for staff where we made educational presentations. Our consultants provided us notice of upcoming committee hearings (some are posted with little advance warning), and advised us on the content of our testimony before those committees.[7] These services, which we could not have done on our own, were well worth their fee. They led bi-weekly conference calls to discuss the status of pending legislation. Our efforts bore fruit early on: we were relieved when a bill that would have upended decades of precedent by giving courts, at the outset, authority to determine the validity and enforceability of contracts containing arbitration clauses never got out of conference.[8] Again, we are only a resource.

The efficacy of our approach paid off in the 2013 session when an arbitration-friendly legislator floated

amending the Texas General Arbitration Act (TAA)[9] to set forth mandatory disclosures for arbitrators, like those of the AAA or other arbitral institutions.[10] Who could be against fair arbitrators, particularly when one of the well-recognized grounds of vacatur under either the TAA or FAA is "evident partiality?"

"Through many sessions we learned of the gulf of understanding of arbitration in the Legislature, the judiciary, and the public."

We were. However well-intentioned the bill, our fear was that it would be vulnerable to the so-called "Christmas Tree" effect: amendments (like ornaments) would be tacked on at the last minute which that undermine arbitration. These amendments might have nothing to do with the disclosure issues the bill purported to remedy. We didn't see new statutory disclosure as even necessary: the system was self-regulating through the same "evident partiality" vacatur standard. Ultimately, we prevailed on the legislator, who withdrew the bill. Without organization that would not have happened.

We continued our same approach in 2015. Our relationships paid off as staff, elected officials, and lobbyists of other groups approached us seeking our comments to various proposals, bills, and ideas. Ironically, because we did not formally lobby, we had more credibility. We were not pushing an agenda. No serious bills threatening arbitration were introduced that session. There are three reasons (the last two of which would equally true in New York). The first is political: the Texas Legislature has become staunchly conservative and business friendly. Many legislators hostile to arbitration had retired. Second, the TAA is a workable statute and, besides the political issue of mandatory arbitration, does not need substantive change.[11] Third, the FAA's pre-emption of state laws "net" seems to be cast wider, meaning that serious changes in state arbitration law will invite more challenges in court.[12]

"It is ever more incumbent upon practitioners to accurately explain the process to elected officials, the judiciary, and the general public."

Through many sessions we learned of the gulf of understanding of arbitration in the Legislature, the judiciary, and the public. There is much misinformation floating around. We wrote an education pamphlet titled "Benefits of Arbitration in Texas," some of which was derived from a similar ABA publication.[13] On the advice of our consultants we specifically addressed consumer and employment arbitration. Most elected officials have little concern about traditional business-to-business arbitration. Employment and consumer arbitration, however, evoke strong opinions both in favor and against. The ADR Section paid for the pamphlet. This allowed us to enlist the resources of the State Bar's publications department. We printed a thousand copies, distributed them to the Texas judiciary and the Legislature and have received encouraging comments.

2017 saw the reappearance of several issues from past sessions over minor changes in arbitration. For example, we again saw a "Sharia-law" bill designed to insure constitutional rights on arbitrations from foreign jurisdictions in family law only. We had no real concerns; it passed. Another bill granted arbitrators authority to abate actions if technical provisions in Texas construction law aren't met. We felt this weakened arbitration. It did not pass. We avoided adverse attempts to affect arbitration through engagement and aggressive issue education of legislators and staffs.

Our reputation has been confirmed when the Legislature invited us, during the 2017- 2018 interim (1) to assist in rewriting arbitration procedure in property tax disputes, (2) to review the applicability of statutes of limitations in arbitration, and (3) to review licensing standards for out-of- state attorneys conducting arbitrations in Texas. We are working on all three, but the latter two because they touch so many practice areas—are fair issues for the State Bar to take up in its 2019 legislative agenda.

With the upsurge of publicity over allegations of workplace sexual harassment, such as the #MeToo movement, we anticipate that the 2019 Legislature will see bills to limit arbitration, particularly its confidentiality in employment disputes. It could mean public disclosure of awards. This presents a challenge to the Texas Arbitration Council. It puts arbitration at the intersection of the public policy. There is a legitimate debate about confidentiality agreements enabling inappropriate behavior. Our concern is that in the emotional stampede to rectify an injustice seemingly innocuous language will slip into the bill, without scrutiny, that would bleed into commercial arbitration. We have seen it before.

Conclusion

The Texas Arbitration Council has been effective. Given the heated discussion of the place of arbitration in today's environment, it is ever more incumbent upon practitioners to accurately explain the process to elected officials, the judiciary, and the general public. Our structure is simple. Its relative inexpensive cost would lend itself as a template easily replicated in other states. At stake is arbitration's safety.

Endnotes

1. Similar to New York's Dispute Resolution Section, the Texas Bar is divided into practice sections.
2. Unlike the New York Bar, the Texas Bar is an "integrated bar"—i.e., "an association of attorneys in which membership and dues are

required as a condition of practicing law in a State." *Keller v. State Bar of California*, 496 U.S.1, 5 (1990). Thus, all attorneys in Texas are members. Analogizing an integrated bar to a labor union, the Court in *Keller* held that expenditures for political or ideological activities, not reasonably incurred for the purpose of regulating the legal profession, violated members' First Amendment rights. *Id.* at 9-17. This prohibition has been codified in Tex. Gov. Code § 81.034 "Restriction on Use of Funds." Part VIII of the Board of Director's Policy Manual addressees the extensive process for a proposal to be placed on the Bar's legislative agenda. Some Sections have legally circumvented these restrictions by creating a foundation, each voluntarily supported by a Section's members. For example, the Business Law Section created the Business Law Foundation. The New York Bar Association, as a private voluntary bar association, would not face these restrictions, but would be subject to the general New York Lobbying Act, Art.1-A of New York Legislative Law.

3. The Texas Constitution limits the Legislature's sessions to 140 days from January through May of odd-numbered years; the next session begins January 2019. Tex. Const. art. III, § 23(b).
4. Language comes from "Contract for Professional Services" with our lobbyist.
5. The contract was approved by the State Bar's counsel and included this language: "[Lobbyist] understands that the client, as a Section of the State Bar of Texas, is restricted in the use of funds for legislative actions. Such restrictions are set forth in Part VIII of the State Bar of Texas Board of Directors Policy Manual, Sec. 81.034 of the Texas Government Code and *Keller v. The State Bar of California*, 496 U.S. 1 (1990). The client shall not request any services from [Lobbyist], and [Lobbyist] shall not render any services to client, that conflict with those restrictions on the use of funds." We intend to remain a resource only. Our limited role allowed us, nonetheless, to work with the Bar's legislative team.
6. We focus on Texas only, and leave monitoring of federal legislation to, among others, the Section of Dispute Resolution of the ABA.
7. When signing in to testify before committees we were careful not to sign in as "opposing" or "in favor" but only as a "resource."
8. This bedrock precedent is the so-called Separability Doctrine which essentially "separates" the arbitration clause from the remaining agreement and allows arbitrators, in contrast to courts, to make the determination of the overall contract's invalidity. It's intent is to make arbitration an expeditious process. The bill would have innocuously gutted commercial arbitration.
9. Much of the TAA is derived from the FAA, and Texas courts have generally construed the TAA along the same lines as the FAA. *See City of Pasadena v. Smith*, 292 S.W. 3d 14, 19 (Tex. 2009). *But see*, *NAFTA Traders. v. Quinn*, 339 S.W. 3d 84, 95 (Tex. 2011) (declined to construe vacatur standards under the TAA similarly to the FAA).
10. Common disclosures related to prior relationships with parties, counsel, witnesses, etc.
11. The Uniform Law Commission considers the TAA, like the New York Arbitration Law of 1920, New York CPLR Article 75, to be "substantially similar" to the Uniform Arbitration Act (1956). Neither state has adopted the Revised Uniform Arbitration Act, U.L.A. 1-98 (2009 & Supp. 2015). Fortunately, this means the Texas Arbitration Council is in a "defensive" role. We seek no affirmative changes in the TAA.
12. *See generally* Jon O. Shimabukuro and Jennifer A. Staman, *Mandatory Arbitration and the Federal Arbitration Act*, Congressional Research Service at 11 (2017); Kristen M. Blankley, *Impact Preemption: A New Theory of Federal Arbitration Preemption*, 67 Florida Law Review 711 (2016).
13. Co-authored by your Edna Sussman, co-editor of the *New York Dispute Resolution Lawyer*.

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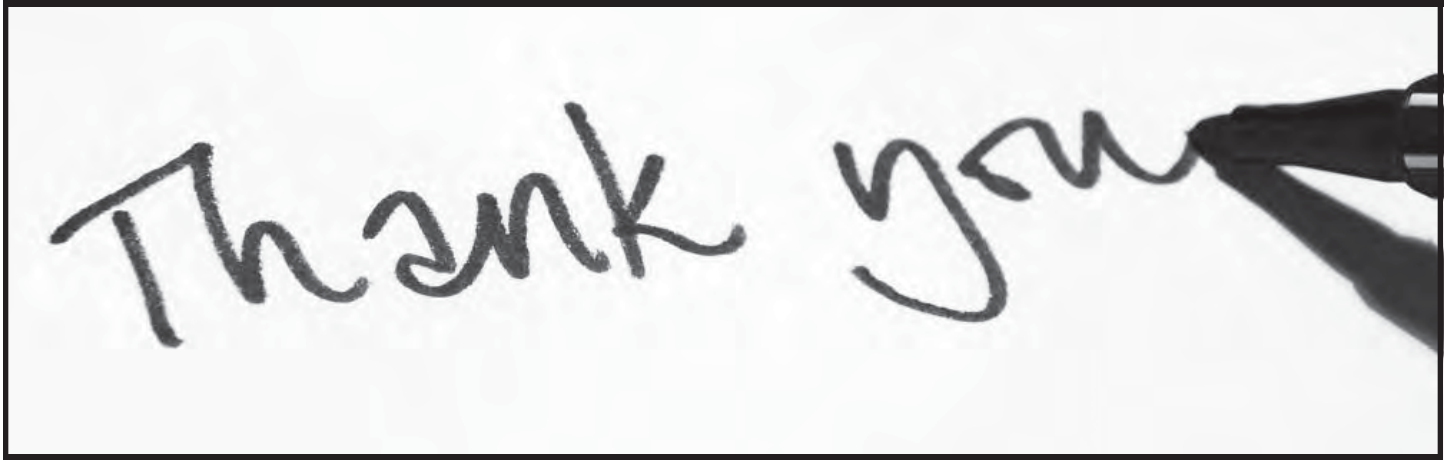

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The Arbitration of Intercreditor Disputes Among Financial Institutions

By Richard M. Gray

Lenders have historically resisted arbitrating disputes under credit agreements, instead preferring what they regard as more reliable results obtained in court. Because they view a borrower's obligation to repay loans with interest to be not only straightforward but also sacrosanct, they tend to be concerned that arbitrators might simply "split the baby." Also, in the belief that deep-pocketed financial institutions make unsympathetic defendants, they avoid subjecting themselves to claims of lender liability in a forum they fear may not apply the strict letter of the law. Whatever the merits of these concerns, they are unlikely to change soon.

Disputes Among Financial Institutions

However, it is important to recognize that these concerns relate to disputes with borrowers,[1] not with other lenders. Disputes among lenders under syndicated credit agreements used to be rare. Financing structures were simple, and syndicates of lenders consisted of relatively homogenous, same (or at least similar)-thinking, conflict-averse commercial banks that expected to do many deals together over time. Now, financing structures are more complex, often involving several classes of senior and subordinated creditors with different collateral packages. The universe of lenders includes diverse financial institutions—banks, hedge funds, CLOs and others—with differing views of how to work out a troubled loan and less interest in cooperating with other lenders solely for the sake of maintaining relationships. It is not unusual for a distressed debt investor to analyze credit documentation for ways to gain advantage over other lenders, including by acquiring a blocking or controlling position to gain leverage under the collective action provisions.[2] Tensions and the likelihood of disputes between creditors increase at times of financial distress.

There is currently increasing attention to and acceptance of arbitration as a means of settling financial disputes. The International Chamber of Commerce released a summary report on this subject in 2016[3] and is expected to release a more comprehensive analysis later this year. Other examples include the optional arbitration clauses adopted by the International Swaps and Derivatives Association (ISDA) and the Loan Syndications & Trading Association (LSTA) in some of their model documentation, and the growing prominence of the Panel of Recognized International Market Experts in Finance (PRIME Finance), which works in cooperation with the Permanent Court of Arbitration in the Hague to resolve disputes concerning complex financial transactions. Of particular interest, some U.S. bankruptcy judges recommend that parties in pending cases submit selected issues to arbitration for the sake of judicial economy.[4] This comes at a time of increasing acceptance of arbitration by bankruptcy courts, generally for "non-core" issues.[5]

Disputes Relating to Ratable Treatment

Although there are many areas of possible contention in intercreditor relationships, the most important are those that directly or indirectly affect the ranking of claims, including the ratable treatment of similarly situated creditors. Although ratable treatment is generally provided by the credit documentation at the time of signing, subsequent amendments[6] or tactical steps taken in connection with bankruptcy cases can give rise to disputes. For example, in *Prudential Ins. Co. of Am. v. WestLB AG, NY Branch,*[7] the court addressed a dispute between lenders under a common credit agreement following their successful credit bid for two ethanol plants in their borrower's bankruptcy. Title to each plant had been taken by those lenders, but preferential interests were allocated only to the subset of those lenders that agreed to provide exit loans to the bankrupt borrower. The lenders that had declined to provide the exit loans sued, complaining that the preferential interests violated the ratable treatment protections of the credit agreement, while the lenders who received the preferential interests defended those interests as separate compensation for providing the exit loans.[8]

Another case, one that attracted significant attention in the syndicated loan markets and continues to worry market participants, involved a credit facility for NYDJ Apparel, LLC. In that case, a lender used its controlling position under a syndicated loan agreement to effect an amendment that enabled it to provide new, super-priority loans and junior super-priority loans in exchange for its existing loans. The lenders holding the minority position were not offered the same opportunity, and their existing loans—which before the amendment had ranked equal with the loans of the controlling lender—fell to a third-place ranking. In November 2017, the minority lenders sued in New York Supreme Court, alleging violations of the credit agreement (including an implied covenant of good faith and fair dealing).[9]

Benefits of Arbitration for Intercreditor Disputes

The foregoing cases are just two examples of a trend of increasing friction among lenders. When the friction evolves into live disputes, the usual benefits of arbitration over litigation apply, but some benefits are worth emphasizing.

Cost and Speed: Although the circumstances of intercreditor disputes vary and the outcomes are fact-specific, many cases are more legally intensive than fact-intensive and therefore require less discovery. However, the questions of fact are frequently sufficient to survive a motion for summary judgment, which might tempt parties into more protracted and costly, but possibly unnecessary, discovery in a litigated proceeding. This could be avoided or mitigated in arbitration.

Expertise: Documentation for syndicated lending can be complex for the uninitiated, especially when the transaction includes multiple classes of creditors, collateral and one or more intercreditor agreements. The resolution of a single issue may involve many overlapping provisions and an understanding of how subtle differences in wording can reconcile apparently inconsistent clauses (or an understanding of how truly inconsistent clauses should be reconciled). One of the principal attractions of arbitration, of course, is the ability of the parties to select arbitrators with the requisite expertise.

Finality: The dollar amounts involved in loan transactions can be large, but they will rarely rise to the level of "bet the company" disputes for the lending institutions. Adverse parties will want to resolve disputes expeditiously without endless appeals, and then move on. The limited grounds for vacating arbitration awards gives them the ability to do so.

Pre-Dispute Arbitration Clause or Post-Dispute Submission Agreement

Any arbitration agreement would ideally be contained in the primary contract at initial signing, before any dispute arose. Obtaining such an agreement, however, would be difficult. That contract, usually a multi-party credit agreement, is signed by the borrower, the syndicate of lenders and their administrative agent. For the reasons stated above, lenders are unlikely to agree to arbitrate disputes with borrowers. While it may be possible in theory to craft a clause narrowly to cover disputes only among lenders, arbitration clauses with carve-outs can be tricky to draft in practice and subject to avoidance in application. Many transactions that involve multiple classes of creditors—first/second lien financings[10] are one example—have standalone intercreditor agreements that could contain arbitration clauses. But they are still integral parts of the overall financing with the borrower, and it would be difficult to know in advance whether or how a specific issue in any future intercreditor dispute might affect or be affected by the borrower's rights and obligations. Indeed, borrowers are often parties to intercreditor agreements for this reason. These considerations, as well as the relative novelty of arbitrating intercreditor disputes, help explain the absence of pre-dispute arbitration clauses in intercreditor arrangements for loan transactions.

Notwithstanding the absence of pre-dispute arbitration clauses, the author is aware through personal experience and anecdotal evidence of the arbitration of intercreditor disputes pursuant to post-dispute arbitration submission agreements. Even though—as the conventional wisdom goes—it is difficult for parties in an active dispute to agree on anything, there are good reasons to wait for a dispute to crystallize before parties agree to arbitrate. Financial institutions do have experience with arbitration in other types of cases, but there is not a long track record for this type of case. Proceeding slowly and cautiously on a case-by-case basis will give them the opportunity to become more comfortable with the arbitral process for these disputes. Also, it may be preferable to make a decision to arbitrate based on the nature of the specific issue and circumstances. Parties could make an assessment of how the resolution might affect the rights and obligations of the borrower and then decide whether to arbitrate or bring a lawsuit involving all parties. Parties could also consider the need for extensive discovery and whether it is important to establish judicial precedent on an important legal issue in order to avoid future, similar disputes in other transactions. Even if parties initially preferred litigation, they could subsequently change their minds and decide to arbitrate based, for example, upon their mutual assessment of an assigned judge's lack of expertise in the area.

Conclusion

Although there is evidence of a small, emerging trend to arbitrate intercreditor disputes between financial institutions, the novelty of arbitration for those disputes and the possibility of issue-specific concerns preclude any expectation of widespread pre-dispute arbitration clauses in the near future. When such disputes do arise, however, parties should seriously consider arbitration on a case-by-case basis.

Endnotes

1. These concerns are more acute for U.S. domestic borrowers. In the cross-border context, they may be outweighed by the easier enforcement of arbitral awards as compared to foreign judgments. The Loan Market Association (LMA) and the Asia Pacific Loan Market Association (APLMA), the leading industry organizations for loans syndicated in Europe and Asia, provide optional arbitration clauses in their model documentation for borrowers located in jurisdictions where enforcement of foreign judgments may be problematic.
2. The collective action provisions specify the minimum principal amount of loans required to be held by lenders to entitle them, among other things, to direct action by the administrative agent, to consent to amendments or waivers and to exercise remedies. A single lender that acquired a majority of the loans would have significant leverage.
3. *Financial Institutions and International Arbitration*, Report of the ICC Commission on Arbitration and ADR Task Force on Financial Institutions and International Arbitration (2016). The report describes arbitration in derivatives, sovereign finance, investments, regulatory matters, international financing, Islamic

finance, international financial institutions, development finance institutions, export credit agencies, advisory matters and asset management.

4. This practice is more modest than proposals to use international arbitration to further the goals of the Model Law on Cross-Border Insolvency, drafted by the United Nations Commission on International Trade Law (UNCITRAL). *See, for example,* Allan L. Gropper, *The Arbitration of Cross-Border Insolvencies*, 86 Am. Bankr. L.J. 201 (2012).
5. Alan N. Resnick, *The Enforceability of Arbitration Clauses in Bankruptcy,* 15 Am. Bankr. Inst. L. Rev. 183 (2007); Arbitration Agreements and Bankruptcy: Which Law Trumps When? NABTalk, Journal of the National Association of Bankruptcy Trustees (Summer 2010).
6. The validity of amendments, particularly those relating to ratable treatment, can be the subject of disputes, especially as to whether an amendment adopted by a simple majority of lenders also required the consent of other lenders. Also, some credit agreements that provide for ratable treatment of all similarly situated lenders allow that treatment to be amended by lenders holding a majority of the loans, a result that could defeat the original purpose of the ratable treatment protection.
7. 2012 N.Y. Misc. LEXIS 4822 (N.Y. Sup. Ct. 2012).
8. The plaintiffs prevailed.
9. After the court denied the defendants' motion to dismiss, the credit agreement was amended again—this time to afford the minority lenders the same opportunity to exchange their lower ranking loans for higher ranking loans. The possibility of an appellate decision was thereby lost.
10. In these financings, two groups of creditors obtain liens over the same or overlapping items of collateral and agree by contract to their relative priorities.

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It's Never Too Late to Arbitrate

The Case for Mid-Suit Arbitration Agreements

By Richard H. Silberberg and Dai Wai Chin Feman

The benefits of incorporating arbitration provisions in commercial contracts are well-established.[1] Often overlooked, however, are the advantages of agreeing to arbitrate disputes *after* the inception of a lawsuit filed in court.

"Parties can craft bespoke arbitration agreements that leverage the 'best of both worlds' from both judicial and alternative dispute resolution processes."

Even for parties that initially resisted arbitration—either by declining to include an arbitration provision in an underlying contract, or opposing the arbitrability of a dispute—certain features of the judicial process may change the equation in an ongoing lawsuit such that proceeding in court is no longer appealing, practicable, or advantageous for either party. Enter the mid-suit agreement to arbitrate.

Arbitration is a creature of contract. Parties to an existing lawsuit are, therefore, free to negotiate arbitration arrangements that are tailored to the issues at hand. Arbitration agreements in commercial contracts often consist of boilerplate provisions drafted to be as general as possible, and it is rare that such agreements anticipate important aspects of procedure that are relevant to the adjudication of a potential dispute. Mid-suit arbitration agreements, however, can be precisely customized to the realities, idiosyncrasies, and procedural postures of specific disputes that have already arisen. Indeed, parties can craft bespoke arbitration agreements that leverage the "best of both worlds" from both judicial and alternative dispute resolution processes.

Mid-suit arbitration agreements are not mutually desirable in every case. However, parties would be well-advised to consider the possibility of moving to arbitration at various junctures in the litigation lifecycle. An agreed submission of the dispute to arbitration at any stage of the litigation will obviate any challenge to arbitrability. This article discusses various stages of litigation at which arbitration may be an attractive pivot for parties, and why.

After the Denial of a Motion to Dismiss

The denial of a motion to dismiss is the first sensible point to consider mid-suit arbitration. Defendants often resist arbitration because they believe they have a strong argument that the plaintiff's case should be dismissed at an early stage of the case as a matter of law, and that an arbitrator may be less willing than a judge to grant a dispositive motion until the claimant has had a reasonable opportunity to present its case. Once a motion to dismiss is denied, however, the prospect of an early exit from the litigation has vanished.

With the initial defensive advantage of traditional litigation having been mooted by the denial of the motion to dismiss, parties can and should consider arbitrating the remainder of their dispute. The parties have wide latitude to negotiate an arbitration agreement covering all aspects of the dispute remaining to be adjudicated. They can take full advantage of arbitration's well-known benefits of party control, speed, cost, flexibility, confidentiality, and finality. Since the initial pleadings and motion practice have served their purpose of focusing the parties' attention upon the important issues in the case, the parties are in a good position at that stage to develop a refined agreement addressing the precise issues to be determined and the manner in which such issues should be presented to the factfinder, all while obviating any possibility of a dispute over arbitrability. Parties can also dispense with ancillary costs associated with a court action, such as the retention of local counsel.

The freedom to contract underlying the arbitration process can be used to bridge gaps between parties' respective preferences. The ability to modify rules in administered arbitrations should be fully leveraged to that end.[2] For example, one party may be averse to arbitration because it prefers that a judge preside over the dispute. The parties could address this concern by agreeing that the tribunal be composed of former state or federal judges. The parties could even stipulate that the former judges have particular expertise in the genre of dispute at issue, a feature that the court system may lack.

Discovery is another area in which parties may avail themselves of the opportunity to blend the most favorable aspects of litigation and arbitration. For example, the taking of depositions may prove to be a point of contention between the parties. While depositions are commonplace in litigation, they are less so in arbitration. Beyond setting parameters governing the number and length of depositions, parties may agree to conduct corporate representative depositions, which are rarely provided by arbitration clauses and cannot be ensured in the absence of an agreement between the parties to conduct them. Parties may even customize the scope of those depositions beyond the means available under federal or state procedural rules by limiting the number of enumerated topics of the corporate representative's testimony. Further,

by stipulation, they may agree to conduct depositions of specific non-parties under their control. In a similar vein, parties can take advantage of other traditional discovery devices, such as interrogatories or requests for admission, while imposing strict limits that are aligned with arbitration's goals of efficiency and expedition. Similar parameters could be applied to e-discovery through limitations imposed upon document requests, custodians, search terms, and privilege logs.

Mid-Discovery

Exposure to the burdens and complexities of discovery in court actions may also make arbitration a logical mid-discovery alternative to litigation. While there are clearly circumstances in which one party seeks to benefit from the broad scope of traditional discovery as a fishing or pressure tactic, that is not always the case. Indeed, mid-discovery litigation fatigue can be mutual as parties are faced with terabytes of data, dozens of depositions, frustrating meet-and-confer sessions, and serial motions to compel. Clients may not appreciate the full cost, extent, and intrusiveness of lawsuit discovery until they have experienced it first-hand. Furthermore, parties often find that courts rarely have the patience or capacity to thoroughly and expeditiously adjudicate discovery disputes, even those that potentially could impact the outcome of the case. By contrast, arbitrators are generally in a position to rule on discovery disputes during the course of a party-initiated telephone conference or following an exchange of correspondence, without the need for filing wasteful motions to compel. Challenges to privilege designations or redactions of confidential documents can also be quickly resolved by a special master designated for that purpose.

"The benefits of arbitration are not restricted to parties that have entered into pre-dispute arbitration agreements."

The sensitive nature of document production may also be a factor in the litigation vs. arbitration calculus during the mid-discovery stage. Discovery frequently proves embarrassing for both parties. In business disputes, the public disclosure of sensitive or personal information is often a byproduct of litigation rather than the goal. In such circumstances, both parties, upon re-evaluation in the context of ongoing discovery, may prefer the private nature of an arbitration proceeding over a court action, particularly given the penchant of judges to favor public access to court records even if both parties wish to preserve confidentiality.

Another feature of arbitration that should be examined during discovery is the likelihood that arbitrators will screen post-discovery dispositive motions before agreeing to entertain them. Discovery often reveals to both parties that issues of fact are undeniably present. In arbitration, that realization is likely to prevent the filing of post-discovery dispositive motions. But, in court, the filing of post-discovery summary judgment motions (even dueling summary judgment motions) is more commonplace, either as a Hail Mary, a cost-pressure tactic, or to preview issues for the court.

As an illustration, AAA Commercial Rule R-33 provides that an arbitrator may entertain a dispositive motion if the movant establishes that the motion is likely to result in the disposition of the case or in a narrowing of the issues. That is a reasonably high bar that litigants in court actions are not necessarily required to meet prior to filing summary judgment motions.

In addition to being costly, post-discovery motion practice can delay the trial of a court action for months, sometimes years. Thus, in situations where both parties have realistic views of their chances on summary judgment, they may mutually agree to proceed straight to an arbitral evidentiary hearing in lieu of costly, likely pointless, and time-consuming motion practice in court.

Pre-Trial

After years of costly discovery and motion practice, litigation fatigue is at its highest in the pre-trial phase. Unfortunately for parties, judicial requirements and the uncertainty of trial scheduling drive significant additional costs and expenses that can cause litigation budgets to balloon. Arbitration is therefore a logical consideration at this inflection point. For parties that have resisted arbitration to preserve the procedural accoutrements of traditional litigation, little incentive may remain to stay in court.

For example, many judges require onerous, highly detailed pre-trial submissions, including proposed *voir dire* questions, requests to charge, motions *in limine*, jury instructions, verdict forms, and, in some cases, joint pre-trial orders that can resemble a blueprint for the entire trial. The parties have limited ability to agree upon which—if any—of a judge's preferences are necessary, appropriate, or productive in the context of a given dispute.

Moreover, trial scheduling is unpredictable and fraught with delays. Congested dockets routinely result in long periods of inactivity, followed by a notice that parties should be available for trial on as little as 24 or 48 hour notice. The "hurry up and wait" aspect of trial scheduling can add unnecessary cost and inconvenience as parties' counsel repeatedly gear up for trial.

By choosing to arbitrate, parties can conveniently agree to hold the evidentiary hearing at a time when both sides' witnesses and counsel are available, rather than subject themselves to the anxiety, pressure, and uncertainty of trial-ready calendars. Parties can also avail themselves of the added benefit of choosing the location of the

hearing and gaining the advantages of physical space and technological capability for witness preparation, breakout rooms, video testimony, and translation booths that are unavailable in many, if not most, courts.

Jury trials are also likely to be lengthier than evidentiary hearings before experienced arbitrators. Delays associated with jury selection, objections to the admission of testimony, motions to strike testimony, conflicts in judicial schedules requiring breaks in the taking of testimony, the necessity of explaining legal concepts to laypersons, and other factors all contribute to prolonging the ultimate taking of the evidence (and increasing attorneys' fees).

In advance of jury trials, parties may also feel pressure to retain jury consultants and conduct mock trials. While such services may offer helpful perspective on trial strategy, they often result in six-figure expenditures that would not be necessary in an arbitration hearing before a sophisticated tribunal. These costs, combined with the inherent uncertainty of jury verdicts (hence the need for a consultant), may eclipse any perceived advantage associated with a jury trial. And, the uncertainty inherent in a jury trial can outweigh whatever goodwill a party believes it has developed with a judge over the course of the litigation.

Even without the delays and additional costs occasioned by jury trials, verdicts in bench trials may take months to issue, and may be followed by additional rounds of motion practice. The timing of issuance of arbitration awards, on the other hand, is generally limited by the rules promulgated by the administrative provider, and can be further controlled by the parties in their arbitration agreement.

Confidentiality should also be a prominent consideration at the pre-trial stage. Highly confidential or embarrassing facts are often disclosed in discovery, and trial testimony on these points may be inevitable. In circumstances where both sides have an incentive to avoid public disclosure, the confidentiality of an arbitration is a logical solution.

Finally, a note on finality. Finality is widely regarded as a benefit of arbitration. But the lack of an appellate mechanism may give pause to certain parties about leaving the court arena. A potential compromise is the incorporation in the mid-suit arbitration agreement of appellate procedures available in certain arbitration forums, including the AAA and JAMS.[3]

Conclusion

The benefits of arbitration are not restricted to parties that have entered into pre-dispute arbitration agreements. Such benefits are available after a lawsuit has been commenced, and even if a case is on the eve of trial. Yet, mid-suit arbitration agreements remain underutilized. While parties may prefer certain features of traditional litigation over arbitration, such preferences are rarely insurmountable, and most, if not all, can be accommodated by the arbitral process.

Strategic considerations will ultimately prevail in determining whether to make the mid-suit transition from traditional litigation to arbitration. Parties that perceive themselves as "winning" will be more inclined to remain in court. Other parties may be hesitant to raise the prospect of arbitration to avoid appearing weak. Nevertheless, parties to a litigated matter would be well-advised to periodically evaluate whether the potential advantages of the arbitral process warrant transitioning from court to arbitration. In doing so, they will likely find a sliding scale of incentives that tilts increasingly toward arbitration.

As cases proceed procedurally in court, parties gradually exhaust the benefits of traditional litigation that may have caused resistance to invoking arbitration at the outset. And, as the outlook for early victory in a lawsuit fades, parties may be more willing to arbitrate if the confidentiality of the proceedings and the outcome is assured.

Finally, as they now do with mediation, court administrators should consider implementing requirements that parties periodically discuss the possibility of arbitration as an alternative to litigation. Such requirements would educate parties and, possibly, provide them with a mechanism that would satisfy their paramount goals while ultimately reducing court congestion.

Endnotes

1. *See, e.g.*, Edna Sussman & John Wilkinson, Benefits of Arbitration for Commercial Disputes, Arbitration Committee of the ABA Section of Dispute Resolution, *available at* https://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/March_2012_Sussman_Wilkinson_March_5.authcheckdam.pdf.
2. *See, e.g.*, AAA Commercial Arbitration Rule R-1; JAMS Comprehensive Arbitration Rule 2.
3. *See* AAA Optional Appellate Arbitration Rules; JAMS Optional Arbitration Appeal Procedure.

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The Underutilization of Mediation in New York and What Should Be Done About It?

By John D. Feerick and Linda Gerstel

History certainly shows us that mediation, arbitration, and other forms of dispute resolution have been with us from time immemorial. Many recognize the significant benefits to mediation such as party autonomy, reduced costs, confidentiality, preservation of business and family relationships, as well as agreements that can provide speedier relief and offer some remedies that would not be available in court. At the same time, people have also recognized that there are some limitations to the process of mediation: it is not appropriate for all types of cases; it does not always result in settlement; it lacks the procedural and constitutional protections guaranteed in the federal and state courts; legal precedents cannot be set in mediation, and it often lacks a formal discovery process. However, in many cases where the advantages of mediation outweigh the disadvantages, the mediation process is either not explored at all or underutilized. With all the benefits in cases where mediation is appropriate and would provide overwhelming benefits to parties as well as to the civil justice system, why is it underutilized in New York both in court-annexed programs and among ADR provider organizations.[1] Or it may be more appropriate to ask, given the success of many(but not all) of the mediation pilot programs in New York, is it time to ensure a more comprehensive approach to ADR in New York and admit that perhaps the time may be ripe (in cases where mediation is appropriate) to move to a post-pilot era?

It is critical that we are asking this question now and it is particularly appropriate now as judges, such as Victor Marrero of the Southern District of New York, have raised alarms and concerns about the litigious, costly and time-consuming nature of modern day litigation.[2] Judge Marrero notes that, in 1938, when the Federal Rules of Civil Procedure (the Rules) became effective, a promise was made of a new federal system "to secure just, speedy and inexpensive determinations of every action and proceeding."[3] He posits that the original intent of the Rules is not being realized in modern practice, pointing to surveys in which practicing attorneys strongly object to the expansive discovery as too costly and identify abuse by lawyers as a major reason for the cost and motion practice which exacts a high economic and social price borne by everyone who relies on the justice system. Indeed, the American College of Trial Lawyers has joined the chorus seeking reforms, acknowledging the abuses of the trial system. All of this suggests that grand opportunities are available for the growing number of lawyers, young and old, including former federal and state court judges, who are entering the field of problem solving through the tools and processes of ADR, the most popular of which, and widely used throughout the country, is mediation.

It is also appropriate at this time that we address ADR in a more comprehensive fashion across the state and federal courts in New York, two years after the passing of former Chief Judge Judith S. Kaye, who was a true pioneer and leader for promoting the expansion of ADR pilot programs.[4] Judge Kaye would be pleased to know that the current Chief Judges both in the state and federal courts, those who administer the ADR court-annexed programs as well as leaders of the New York Bar Association and ADR provider organizations, seem motivated to take mediation to a new level in New York.

It is also important to recognize that much of the infrastructure to expand mediation programs already exists. In the past 10 years, courts and private companies focused on the collection of ADR data,[5] particularly those centered in New York, have carefully kept data covering many issues from type of cases, to settlement rates, to time elapsed from the filing of a complaint to a mediation, to help us determine whether these pilot programs have been successful. Keeping data is critical because if a problem cannot be measured then it cannot be managed or improved. The key data from these programs leads to the overwhelming conclusion that given the success of these programs—in unclogging dockets and in giving litigants access to justice while minimizing the cost of pursuing it—requires that we think critically about how to continue to expand mediation programs. We hope to suggest some measures that can allow New York to be a leader in innovative measures to increase the utilization of mediation

I. The Historical and Comparative Perspective for Increasing the Use of Mediation

In the 1970s, courts were increasingly jammed by backlogs and protracted litigation. Harvard Law Professor Frank Sander, a pioneer in the field of ADR, was struck by the contrast between litigation and labor arbitrations, in which disputes were resolved quickly, inexpensively and effectively outside the courts. He delivered a paper at the Pound Conference advocating for a "multi-door courthouse" where a court official would assess the nature of each new dispute during intake and decide on an optimal

dispute resolution process (such as litigation, mediation, arbitration, conciliation, etc.).[6] In a 1990 published debate, Sanders argued "[if] our mission is to help clients find the best way to handle their disputes . . . why shouldn't it be part of our explicit professional obligation to canvass those options with clients? How would we feel about a doctor who suggested surgery without exploring other choices?"[7]

The Alternative Dispute Resolution Act of 1998 authorized federal courts to compel parties to participate in certain ADR processes, including mediation. 28 U.S.C. § 652(a) (2006). Although the federal district courts started designing and testing ADR procedures as early as the 1970s, the biggest growth in ADR came in response to the Civil Justice Reform Act of 1990 (CJRA).[8] The CJRA required the federal district courts to develop cost and delay reduction plans including the adoption of six case management principles, the sixth of which was alternative dispute resolution.[9] Many of the 94 district courts developed ADR procedures in response to this statute.[10] With regard to the federal courts generally, 25 districts, or a little more than a quarter of the courts, provide only general authorization to use ADR, authorize settlement conferences only, or authorize both.[11]

It is noteworthy that the Second Circuit was the first federal appellate court to implement a mediation program, doing so in 1974, well before other circuits.[12] Moreover, the Southern District was among the first courts to pilot an ADR program in the 1980s, initially offering a small arbitration program in collaboration with the American Arbitration Association (AAA).[13] In response to the CJRA, the Southern District gathered an advisory group of judges and members of the bar and recommended a mediation pilot as the best option for compliance with the CJRA.

Other countries and states seem to have fashioned more comprehensive mediation programs by creating automatic referral programs, often structured with certain exclusions and opt-outs, resolving most cases without need for court intervention. A survey of countries where mediation is often automatic and resolves a significant number of cases found that countries such as Italy[14] and Turkey are at the forefront of using mediation as a primary method of resolving disputes.[15] A recent empirical study from researchers at the Singapore Management University has identified three crucial factors that influence the likelihood of a case being settled through mediation: timing of the referral, the stage of the litigation, and the level of contentiousness between the disputants when deciding whether to refer a case to mediation.[16] Surveys conducted in connection with the recent Global Pound Conference found that Asia Pacific voters indicated that the stakeholder with the greatest responsibility to effect change in dispute resolution policy is governments or ministries of justice.[17] Most surveys of courts in the United States point to California 2,932 cases referred in District Court for the Central District of California, success rate of 50 percent, and 3,828 cases referred in District Court for the Northern District of California, success rate of 55 percent),[18] state courts in Florida (over 100,000 cases diverted to mandatory mediation programs)[19] and state courts in Texas as being at the forefront of expanding automatic referrals programs or expanding the types of cases that are subject to mediation,[20] ranging from mortgage foreclosures to patent matters.[21] While number of cases and success rates are not the only measure of success, post mediation surveys in all of these jurisdictions reflect satisfaction rates often exceeding 85 percent.[22]

A snapshot of dispute resolution in 2018 would show mediation gaining in popularity, especially as clients get discouraged as the price of arbitration at times can look like the price of a protracted litigation, although efforts are being made to address this issue. This all points to an increasing need for our ADR provider organizations and our courts to be ready to meet the challenge with mediation programs, whether automatic or within a judges' discretion, covering a range of suitable cases. Mandatory mediation should no longer be considered an oxymoron.[23]

II. New York Federal District Courts

In 2006, the Western District of New York under the leadership of Judge William Skretny became the first federal court in New York to establish automatic mediation programs as the initial default process to be followed in almost all civil cases (with "opt-out provisions"[24] and exclusions for limited matters such as habeas corpus, extraordinary writs, bankruptcy and social security appeals-cases that predominately implicate issues of public policy). The pilot was initially limited to the caseload of Judge Skretny, who pioneered the program. As he has recounted, he did not see much of an alternative because civil cases going through a litigation process in the district took 67 months from the initial filing to completion. The mediation pilot became a permanent program in 2010 due to its success of resolving nearly 78 percent of cases without court involvement.[25] The Northern District adopted a similar mandatory program.[26] Although statistics in the Northern District were considerably lower because only cases that settled at the mediation were counted , if the measure included cases which settled within 60 days of the mediation, then the success rate would likely mimic that of the Western District.[27] The success of automatic mediation in these districts of New York necessitate that we examine expansion of mediation programs in the Southern and Eastern Districts of New York as well as in state courts.

A significant expansion of the Southern District mediation program took place in 2011.[28] The program has progressed and expanded each year in a number of ways: by creating new automatic pilots in terms of the types of cases; establishing mediation discovery protocols tailored to piloted programs; instituting the establishment

of mediator advisory panels; focusing on efforts to increase diversity,[29] and assessing the quality of mediators through surveys and required observations of mediations prior to being an active member of the court's panel.[30] The Southern District of New York's mediation program is narrower than the Western or Northern District in that the only cases that are automatically sent to mediation are counseled employment discrimination cases, certain Fair Labor Standards Act (FLSA) cases[31] which a designated group of judges are piloting, and certain 1983 police misconduct cases. The Southern District program relies on volunteer mediators (currently 315) who are assigned by the court. Taking a leadership role in ensuring a more successful and even-handed mediation, the former Chief Judge, Loretta Preska, issued specific discovery protocols outlining information to be exchanged in advance of a scheduled mediation session in employment cases in order to level the playing field and increase the likelihood of a successful mediation (Admin. Order M10-468). Following the success of the employment discovery protocol[32] and recognizing the importance in creating a systemic initial exchange of information, in 2018 a new discovery protocol was established for FLSA matters.[33]

Another protocol for Americans with Disabilities Act cases modeled on a local rule in the Northern District of California requiring a meet-and-confer at the site and an exchange of information on attorneys' fees prior to a mediation is expected to be released by Chief Judge Coleen McMahon shortly. It is likely that a new discovery protocol might also be considered for personal injury matters. It is worth considering whether the discovery protocols established for employment and now FLSA cases should have an impact beyond these types of cases either by adopting them for novel areas or simply by educating the bar on how to approach early stages of discovery in mediations. In recognizing the importance of discovery protocols to improve mediation programs, the Southern District of New York has taken an important leadership role that others are likely to consider.

Court administrators of ADR programs have been active partners with judges in seeking to expand mediation programs. The data carefully cultivated over the years and publicly available should be quite convincing that pilot programs should expand and most have become permanent programs after years of success.[34] For example, the Southern District's 2016 Annual Report demonstrates an impressive settlement rate as well as a fairly short period from the time of referral to conclusion of the mediation. The data shows rates of settlement as follows: 48 percent for pro se employment; 50 percent for other employment cases that are under the automatic referral program, whereas judge-referred employment was 78 percent; FLSA cases (whether judge-referred or part of the automatic pilot program) was 65 percent. Limited sampling for other matters still showed promise—contracts, 55 percent; personal injury and products liability, 75 percent; copyright, 78 percent, and property cases, 83 percent. On average, the time from case referral to mediation was 92 days, compared with 11 months if the case is closed by a court action or decision.

In 1991, through its Civil Justice Expense and Delay Plan, the Eastern District of New York introduced programs for court-annexed mediation and early neutral evaluation (ENE). The program is not automatic but referrals take place when a judge or magistrate decides to refer a case. In addition, all matters involving damages of $100,000 or less were referred to a pre-existing program of court-annexed arbitration. Unlike court-annexed arbitration, which was mandatory, court-annexed mediation can only be ordered on consent of the parties. The parties in cases filed in the Eastern District program pay their mediators and may choose from the panel of mediators on court roster or select a neutral outside of the roster. The settlement rate of 67 percent is similar to other federal courts in New York.

What is particularly interesting about the statistics of both the Eastern and Southern Districts, showing great promise for the future course of mediation in New York, is how the numbers of cases that were handled through the mediation programs have grown over the course of a relatively short time span. For example, the annual reports show that in the Eastern District (which is only automatic for FLSA cases) there was a 38 percent increase in discretionary referrals.[35] Nevertheless, the number of cases were still modest by comparison to jurisdictions outside of New York. The statistics for 2016, the most recent year, show a total number of referrals of 306 cases (nearly half of which were FLSA) compared to the oldest available statistics from 2000 of 180 referrals.[36] More optimism can be found in the statistics from the Southern District, which show that in 2016, a total of 1,072 cases were referred to mediation (340 of which were non-automatic) compared to the oldest statistics available on the court website from 2011 showing a total of 567 cases. Over five years, the Southern District mediation program has nearly doubled the number of cases and nearly half were cases outside of the court's automatic program.

Between 2009 and today, Superstorm Sandy became the impetus for an insurance mediation program both at the AAA and in the Eastern District of New York, which offers a "lesson plan" that might help increase the use of mediation in New York. The key to success in these programs included the fact that (1) the courts and AAA understood the need to educate mediators about insurance claims (in effect to provide subject area expertise)—this was done by requiring continuing legal education on insurance law even for those lawyers who had some expertise in insurance matters; and (2) the mediators were paid but at a below market rate, which was a compromise between mediators serving on a pro bono basis and an industry stepping up to address the crisis (it helped that Governor Cuomo paved the way for these programs). One of the noteworthy lessons of the mediation programs

that were created in the wake of Storm Sandy was the importance of partnership efforts and collaboration that took place between an ADR organization and the federal courts, which "stepped into the void" to address the multitude of insurance claims. During this same period, another crisis brought on by the Great Recession resulted in New York state and its bankruptcy courts responding with the creation of new mediation programs when a pressing need developed for a sudden increase in new categories of cases, such as the mortgage foreclosures that began to overwhelm the court dockets.[37] For example, in 2011 the Bankruptcy Court for the Southern District of New York began a "Loss Mitigation" mediation program, which achieved loan modifications in 56 percent of the matters that were mediated.[38] The Eastern District and the AAA Storm Sandy mediation programs provide a critical lesson of how mediation programs can provide justice to individuals without costly litigation. Over 6,000 claims were resolved at a 65 percent settlement rate at the AAA and over 201 claims were resolved in the Eastern District with a similar settlement rate.[39] In fact, the success of the Storm Sandy mediation in the Eastern District was the impetus for the creation of an automatic FLSA mediation program. The automatic referral programs need not be limited to mass disaster claims or to an influx of cases that suddenly overwhelm the courts such as recent FLSA cases or real estate matters resulting from the economic pain caused by the Great Recession.[40] These pilots have been fashioned as a reactive response to a need. The Eastern District demonstrated great creativity in establishing the Sandy and FLSA automatic mediation programs; however, the fact that the 2016 Report shows that 92 percent of referrals are from Magistrate Judges indicates that there should be substantial room for growth. A more proactive method might be considered in growing the mediation programs even further and learning from unsuccessful pilots.

III. New York State Courts

As the former chair of the City Bar ADR Committee, Chris Stern Hyman has recently noted, "requiring mediation in civil cases in New York state courts has been less successful than similar efforts in the federal district courts, so I think addressing impediments in New York state courts is a priority and in particular the need for data about what works."[41]

The New York State Unified Court System (NYSUCS) offers parties access to free or reduced-fee mediation in family law, general civil and commercial law disputes with services that are available in many courthouses and in the Community Dispute Resolution Centers (CDRC) located in almost all of New York State's counties. Disputes such as neighbor disagreements, custody and visitation arrangements, and landlord-tenant issues are well suited to mediation. Any New Yorker, regardless of whether he or she has a case pending in court, may use CDRC services in their local area. Over 1,000 professionally trained mediators volunteer their services for matters referred for arbitration and mediation including consumer-merchant disputes, matrimonial property division issues and automobile Lemon Law cases.[42] Reduced-fee collaborative divorce and mediation services may also be available to eligible couples through the court-sponsored Collaborative Family Law Center (CFLC).[43]

A two- year pilot that began in the summer of 2014 in the First Judicial District provided that each week, every fifth Commercial Division case in which a Request for Judicial Intervention (RJI) was filed was referred to a Mandatory Mediation Pilot Project.[44] The statistics from the 2014 Commercial Pilot have not been published publicly but that pilot did not meet expectations for a variety of reasons.[45] In 2017, a new pilot project ("the Non-Division Pilot Project") was established in which certain commercial cases not assigned to Commercial Division justices are automatically referred to mandatory mediation. The cases in the Non-Division Pilot Project are newly filed commercial cases (excluding pro se matters) assigned to a Justice outside the Division and in which the filer of the RJI designated the matter as a "contract" case and sought a preliminary conference. In adopting the 2017 mandatory mediation pilot project, the task force indicated that it was inspired by the positive track records of courts that had already required parties to mediate, noting similar programs were piloted in Florida, Texas, California and New Jersey.[46] In designing the new Non-Division Pilot, program administrators applied the lessons learned from the earlier pilot. Rather than randomly assigning every fifth case to mediation, the pilot limits the universe of eligible cases to contract disputes where the RJI sought a preliminary conference. Cases with dipositive motions already pending are excepted from inclusion in the program. The pilot created an upfront preliminary conference parts designed for cases within the program to exempt inappropriate cases. For cases within the program, discovery targets would be set with counsel. The lessons learned from the earlier pilot provided parameters for a new pilot that has already met with more success.[47] Pilots were also initiated in Surrogate's Court in New York and are in development in Westchester County. In addition, pilots are also in development in Housing Court in Kings County. Pilots are also in development in the matrimonial parts of the Supreme Court in Suffolk and Kings Counties and in New York City Family Court and Ithaca Family Court.[48]

As recently as April 20, 2018, Chief Judge Janet DiFiore and Chief Administrative Judge Lawrence Marks announced a plan to revitalize the court system's commitment to ADR by building upon the court's existing statewide programs and promoting the goals of the Chief Judge's Excellence Initiative to enhance the quality of justice[49] and by forming an Advisory Committee led by John S. Kiernan, the outgoing president of the New York City Bar Association. It is expected that this initiative will be considering the expansion of presumptive ADR programs

in the Supreme Court, lower civil courts, Family Court and Surrogate's Courts.

IV. Online Dispute Resolution in New York

A few years ago, some academics noted that online dispute resolution (ODR) "has not come into its own and would not manifest fully until videoconferencing became more ubiquitous."[50] Technology changes rapidly, yet perhaps at a slower pace in the public court systems. With regard to ODR, Europe and Canada seem to be on the cutting edge when it comes to integrating ODR in many types of cases, including housing and divorce.[51] The first players in the field of ODR were big online retailers.[52] The Ministry of British Columbia created the Civil Resolution Tribunal, which is considered the most forward-thinking court of ODR in the world (handling 14,000 cases in its first seven months of operations). In 2013 the European Commission launched a website for ADR of consumer disputes concerning goods and services purchased online, and in 2016 due to the importance of introducing the ODR mechanism the UNCITRAL adopted the Technical Notes on Online Dispute Resolution.[53] In the United States, the National Center for Technology & Dispute Resolution was founded in 1998 at the University of Massachusetts by professors Ethan Katsh and Janet Rifkin, who are considered leading promoters in the United States for ODR.[54] Michigan, Ohio and Utah have been recognized as states that have successfully piloted ODR.[55]

New York is lagging behind in ODR and is still considered to be in the exploratory stages. In practice, in the Second Circuit Court Appeals Mediation Program (CAMP) technology tools are utilized, allowing for private and virtual joint sessions mediated by telephone because parties and their counsel are often located far from Manhattan. By contrast, computer-based mediations are conducted through applications that are especially designed to analyze the data entered by each participant and to suggest compromise solutions to the parties' disputes. This latter type of ODR does not appear to be used in New York although programs have begun to explore it.

Blueprint for Increasing Utilization of Mediation In New York: Review of Past Surveys

Two reports provide a blueprint to begin to explore what has changed over the past 15 years and what can be done to increase the utilization of mediation in New York. One report is from the New York State Bar Association (NYSBA) Mediation Committee "Mediation Through the Eyes of New York Litigators" dated 2011 (NYSBA Report). The other report is from the Committee on Federal Courts Association of the Bar of the City of New York, "Court Annexed Mediation Programs in the Southern and Eastern Districts of New York: The Judges Perspectives," dated August 2004 (Judicial Perspective Report).

The NYSBA Report asked: why more cases are not mediated? Data showed that 90 percent of attorneys believed mediation is underutilized because of unfamiliarity or lack of knowledge of the process, resistance from lawyers and clients and concerns about the process, while 10 percent said mediation is not encouraged by lawyers and judges. Several lawyers expressed a concern that suggesting mediation would be seen as a sign of weakness. Fifteen percent expressed concerns about mediator quality, the belief that the outcome of mediation is not binding, and concern about an adversary's good faith or that a mediator may simply get parties to "split the difference."[56]

> "Others who were skeptical about mediation mentioned shortcomings, such as unskilled mediators, cost, the delay in litigation it sometimes causes, and expectation that money will be paid even for non-meritorious cases. In deciding whether to mediate a particular case, the principal factors the litigators consider are timing, cost, strengths and weaknesses of each case, both sides' willingness to mediate in good faith, the benefit of hearing an impartial assessment of the case and its risks and the likelihood of success."[57]

"The survey suggests that some of the familiar sources of resistance to mediation are losing force and 85 percent of the litigators interviewed reported suggesting mediation only received negative responses less than 9 percent of the time."[58]

Mandatory mediation programs eliminate this psychological fear factor of appearing weak by eliminating the requirement that one party raise the suggestion to mediate and legends in the personal injury Bar confirm that the barrier is a real one. It appears that past concerns of the threat to lawyers' income seems to have lost ground. Most litigators understand that mediation often is in their clients' best interests and "a happy client who refers other clients."[59] Some suggested that businesses be introduced to mediation and its benefits through presentations and mock mediations before groups like the Chamber of Commerce and at industry conferences, through informative websites and television programs.[60] More than 86 percent believed that mediation delivered real benefits even when it did not yield a settlement on the spot: exchanging information without formal discovery; assessing the strengths and weaknesses of each side's position; narrowing and clarifying issues; improving attorney communication; obtaining an impartial assessment of the case; encouraging adversaries to consider the others' needs and interests; and, quite often, beginning a process that leads later to settlement.

Similarly, the Judicial Perspective Report offers some interesting suggestions by judges nearly 15 years ago

covering a variety of issues such as the level of information provided to judges; the pace of the process; the quality and expertise of mediators, compensation; types of cases; the decision whether to refer matters to mediators or magistrates, the choice by some district judges to act as settlement neutrals, at whose initiative and at what time should the referral be made, whether the litigation should be stayed and whether there is value in a "failed" mediation.

With regard to type of cases most suited to mediation, some judges, paraphrasing Justice Stewart, said that they know a case likely to benefit from mediation when they see it. Sophisticated commercial cases were mentioned by many judges as good candidates for mediation while one judge, however, said that she does not like to refer "mega" commercial cases because she is "flying blind" without knowing the identity of the mediator.[21] Employment cases also headed the list of cases most likely to settle, particularly pro se employment cases as well as § 1983 cases, intellectual property, personal injury, securities, business disputes or other contract matters, particularly where there is the potential for an ongoing business relationship. Numerous judges said that they refer large, complex commercial cases to private mediators. Apart from subject areas, judges identified case characteristics such as where the money at issue is not significant compared to the potential cost of the litigation. These cases were recently singled out by Judge Marrero in the Cardozo Law Review as "disproportionate litigation,"[61] which he said should be promptly referred at the parties' choice either to a magistrate, court panel mediator or to a private mediator.

Another interesting issue related to whether mediators should be paid. While mediators get paid in the Eastern, Northern, Western Districts, the issue of payment seems to be a "loaded issue" where there was substantial disagreement and even some ambivalence reflected in the survey. In the Southern District, one quarter of judges disfavored compensation, believing the program works well and volunteer mediators derive prestige and professional satisfaction from this pro bono work. Judges felt reluctant to burden parties with additional court costs. Other judges favored the payment of mediators, noting that payment would cause the parties to take the process more seriously. Another judge said that the parties should pay the mediator if they wish to choose him or her. Some judges (including two who generally disfavor paying mediators) believed that mediators should be paid in large, complex cases because parties are likely to be wellable to afford to pay the mediator and the amount at stake usually will justify the expenditure.

Thirteen Principles to Increase the Use of Mediation in New York

1. Never Let a Serious Crisis Go to Waste

A quote often attributed to Mayor Rahm Emanuel seems appropriate here; "You never let a serious crisis go to waste; and I mean by that it's an opportunity to do things you think you could not do before." This quote has applicability both from our courts' experience with the claims arising out of Superstorm Sandy but even more so with regard to the systemic crisis that Judge Marrero has recently highlighted in the Cardozo Law Review.[62] The lessons of Sandy and similar mass disaster claims seem to suggest that we consider expanding the mediation programs. Individuals should not see the choice as a binary process between litigation or mediation, but rather an important tool in the process to resolve claims

2. Educate Transactional Lawyers of the Importance of Incorporating Mediation Clauses

The first step that might be considered is reaching out to transactional lawyers to educate them on the benefits of mediation and the importance of incorporating a multi-step approach to dispute resolution. Increasingly, agreements, particularly in the international context[63] and often domestically in joint venture agreements, are using a multi-step approach, alternatively referred to as an escalation clause, a multi-tiered dispute resolution or "waterfall" clause (negotiation, mediation, litigation), in underlying contracts, be it a simple vendor contract or a global, highly technical research and development agreement.[64] The clauses, as part of a dispute avoidance mechanism, require that disputes be referred to negotiations between senior management and lay down a number of steps that parties need to undertake sequentially, prior to instituting either an arbitration or litigation. Arbitration grew exponentially because corporations and transactional lawyers began to incorporate arbitration clauses into transactional documents.

3. Adopt the UMA in New York

Although many states have adopted the Uniform Mediation Act (UMA), New York has not yet done so and confidentiality is critical for mediation.[65] Although many federal court-annexed programs have a standard form that all parties to the mediation are required to sign, it would be helpful to adopt legislation that makes clear the importance of confidentiality in mediation proceedings.

4. Consider New Survey to Judges About Improvements to Current Mediation Programs

Consider a new survey to get updated judicial input on additional types of cases to include in new automatic mediation programs, or judges willing to act as trailblazers for a group of new case types (similar to the prototype of the current Southern District FLSA programs), or taking an even bigger step to determine which judges might be willing to spearhead pilot automatic mediation programs like the prototype of the Western and Northern Districts. A new survey might determine whether there is a consensus among judges as to whether to explore a combination of these options and whether attitudes have changed for compensation of mediators or the assignment or selection process.

5. Consider Addition of Mini-Trials, Early Neutral Evaluations as Alternatives to Mediation

Other jurisdictions, notably the Northern District of California, the District of Vermont as well as the Superior Court of Orange County, California make ENE a significant part of their ADR programs. Rule 4.1 of the Western District of New York refers to other ADR interventions providing "it is expected that cases referred to ADR will proceed to mediation. However, the following options are also available upon the stipulation of all parties: Neutral Evaluation; Mini Summary Trial: Arbitration (Binding and Non- Binding); Case Evaluation and Settlement Week, when scheduled by the court." A co-author of this article was referred a matter scheduled for a six-month trial in New Jersey and asked if he would act as a chair in a seven-day mini-trial. He was then asked to put his thoughts on the strength of case in an envelope. A few weeks later the parties reported a settlement and that the mini-trial had a substantial impact on the decision. Nassau County seems to have a successful ENE[66] program that could be a model for others.

6. Engage Counsel to Continue to Explore Mediation

A recent amendment effective January 1, 2018 adds language to Commercial Division Rule 10 requiring counsel to certify at various stages the exploration of ADR. We would suggest in cases where there is not an automatic referral, adding additional question to each litigant/counsel, "Are you open to the use of mediation? If so, call or respond by email to the court clerk." Neither side needs to know the other side's response. Analogous to a mediator's proposal if only one side responds affirmatively the clerk merely advises both that there is no agreement. If both respond affirmatively, the case gets referred to mediation. There has also been discussion of revisiting the issue of whether there should be revisions to the "Client Bill of Rights" so as to incorporate a provision concerning ADR.

7. Continue to Collect Transparent Data, Support the Quality of Mediators and Engage in Public Relations to Promote the Success of Mediation

We are indebted to court administrators and ADR organizations for their diligent efforts to collect and analyze data that forms the basis for expanding programs. Court administrators might consider uniform criteria to measure the data. Earlier surveys identified the need to better publicize to judges, lawyers and clients the benefits of mediation. The NYSBA recently created a new short video entitled "Understanding Mediation." Infrastructure systems already in place provide quality assurance that future expansion will be professionally handled by educated and neutral mediators. Quality assurance pursuant to Part 146 of the Rules of the Chief Administrative Judge has been established by guidelines for qualifications and training of neutrals and a Mediator Ethics Advisory Committee (MEAC). A comparable Mediation Advisory Committee exists in the Southern District and recently in the Eastern District.

8. Consider Issues of Diversity and Compensation as Mediation Programs Expand

As this article is going to print, ABA Resolution 105 and its accompanying report promoting diversity unanimously passed the House of Delegates.[67] As mediation programs expand, consideration of corollary issues of increasing diversity and compensation of neutrals might be reviewed. Many courts in other states and in certain federal courts in New York currently do compensate mediators, while others such as the Southern District of New York, the D.C. Circuit and the Western District of Pennsylvania do not.[68] The issue of compensation for neutrals has been raised in NYSBA reports where 18 years ago it was noted," the Committee is concerned about the court system's heavy reliance of pro bono service. In order for court ADR programs to be expanded and provide quality ADR services to the public, it will be necessary to pay neutrals … paying neutrals for court annexed mediation needs to be considered seriously if court annexed ADR is to move to the next level in New York."[69] Under the Storm Sandy Model, mediators were paid at a reduced hourly rate, in New York Supreme Court mediators provide the first three hours of mediation at no charge and then may bill at $400 per hour, at those District Courts where mediators are currently unpaid, it may be appropriate to revisit the issue of compensation especially where Fortune 500 companies are litigants.

9. Continue Expanding Pilot Programs and Build on the Successes and Failures

Much can be learned from an exchange of ideas based on existing mediation pilot programs. Many of the federal courts programs have been overwhelmingly successful. Some state pilots, on the other hand, did not meet expectations but analysis of unsuccessful pilots allows for the creation of improved models. There are programs that are automatic with exclusions and opt-outs, others which are entirely discretionary with judges, and yet others that are hybrids. One interesting model that is worthy of consideration is the Western District of Missouri's[70] Mediation and Assessment Program (MAP), which for all no-excluded cases are randomly assigned for mediation to one of three options: United States Magistrate, the MAP Director, or an outside mediator. Others, such as the CAMP, rely on court administrators to actively screen cases for mediation, and CAMP appears to be a quite successful model. Some continue to believe in expanding automatic pilots incrementally, one dose at a time. Others are believers in the concept that all programs should be automatic because trying to forecast the types of cases that may benefit from mediation is like trying to read a crystal ball. Perhaps, the Southern and Eastern Districts are moving methodically in extending automatic pilots, and it's unclear whether those districts will ever adopt an across-the-board au-

tomatic mediation program. The Southern and Eastern Districts have taken a more conservative approach than the Western and Northern Districts through a strategic process of careful assessments, comparative studies, adaptation, consensus building and implementation. There may come a time to move in a more comprehensive manner given the problems identified by Judge Marrero.

10. Expand Use of Online Mediation

Countries outside of the United States have increased the use of ODR. The ABA and the Center for Innovation[71] are involved with supporting ODR programs and every effort should be considered to explore programs where mediation is appropriate.

11. Expand Mediation Programs in Law Schools' Clinics to Partner with Courts

Clinical ADR programs should expand so that law students understand the fundamental value of problem-solving processes. Fordham Law School has been a pioneer in court mediation programs since 1985 in Small Claims Court. Other law schools have made and are continuing to make important contributions as well, including, Cardozo Law School and New York Law School, and Seton Hall Law School in New Jersey by assisting Judge Preska with an innovative program since 2011 representing pro se parties in mediation.

12. Expand Mentoring Programs to Support the Courts' Expansion Efforts

Whether it be in the effort to diversify neutrals or to support the expansion of new pilot mediation programs, there is a need to improve mentoring programs in the field of ADR. All stakeholders should consider a collaboration of mentoring programs and apprenticeships to reach more diverse candidates.

13. Facilitate an Increase in the Use of Mediation by Convening Stakeholders

Some law schools have incorporated new courses aimed at teaching lawyers how to be leaders by developing courses on Facilitation for Lawyers. A symposium such as the one organized by the NYSBA, held at Fordham University this past spring[72] can be the first step in a facilitation to bring all the stakeholders together. Some of the ideas presented here were developed after hearing suggestions from judges, ADR coordinators, and ADR provider organizations supportive of expanding mediation. For the past 18 years, New York has taken a leadership role by gathering ADR stakeholders for an annual Mediation Settlement Day to discuss moving the needle forward on increasing the quality and use of mediation[73] and by supporting and assisting the ADR Inclusion Network, an initiative to bring all ADR stakeholders together to focus on measures to increase diversity.[74] Perhaps it may be worthwhile for the Second Circuit Judicial Conference to consider ADR and the issues raised by Judge Marrero in its annual conference. Both Mediation Settlement Day and the ADR Inclusion Network are New York initiatives (not found elsewhere in the country) likely to have an impact beyond the state's borders.

Conclusion

State and federal court mediation programs across the United States have acted as petri dishes piloting a variety of programs. Successful programs share a combination of factors including: (1) freedom to choose mediators, at least as an initial step; (2) a mediation grievance system and post mediation surveys available to monitor mediators; (3) court-ordered discovery protocols; and (4) exclusions and opt-out provisions. In other words, automatic mediation programs should be tempered by other ways of increasing party autonomy. New York courts took an early leadership role in developing ADR programs. The data shows us the overwhelming success of the current programs. In order for New York to reassume its leadership role in a continuation of facilitated discussions among judges, administrators and the experience of ADR provider organizations will act as the North Star pointing the direction in which new mediation pilot programs can expand. Yet consideration must be given to whether the time has come to move beyond mediation pilots toward a more comprehensive automatic mediation program in additional subject areas that offer exclusions and opt-out provisions accompanied by a degree of party autonomy in the selection of neutrals, while still offering diverse mediators opportunities to flourish. New York dockets eclipse by far those outside of our state—so any growth in ADR will have enormous implications outside the state.

As we have experienced in our own bar work, the profession works slowly in areas that change practices and cultures, whether the legal profession of New York is willing to embrace a potentially transformative ADR comprehensive initiative is uncertain, but without the leadership of judges and the state courts it seems unlikely. Change does come because of a particular leader such as Chief Judge Judith Kaye and her community courts, jury reform and mandatory continuing education for lawyers; by Chief Judge Jonathan Lippman and his pro bono agenda for new lawyers seeking admission; and by the organized bar and its leaders such as Seymour James with regard to voting rights reform, and the late Steve Krane with regard to the ABA Model Rules of Professional Conduct. Chief Judge DiFiore's Excellence Initiative that embraces ADR and addresses other features of the justice system offers another opportunity for enhancement and advancement.

Endnotes

1. It is beyond the scope of this article to address in any detail the underutilization of mediation across the spectrum of various ADR provider organizations because published statistics on mediation are generally not available. However, from the information

available and at a recent conference held at Fordham Law School in New York on May 8, 2018, "The Litigative DNA—the Underutilization of Mediation IN New York and What Can Be Done About It? (the Litigative DNA Conference), it is clear that the number of arbitrations handled by ADR providers far eclipse mediations. NYSBA, The Litigative DNA, full course materials, *available at* www.nysba.org/LitigativeDNAMaterials. Yet, FINRA statistics for the January 2018 reflect the ratio of arbitration matters to mediations were 384 compared to 36, at page 96.

2. Marrero, Victor, *The Cost of Rules, the Rules of Cost*, 337 Cardozo L. Rev. 1599 (2016).

3. *Id.*

4. *See Court Referred ADR in New York State: Final Report of the Chief Judge's New York State Alternative Dispute Resolution Project* (May 1,1996) (Kaye Report); New York State Bar Association Committee on Dispute Resolution: *Bringing ADR into the New Millennium—Report on the Current Status and Future Direction of ADR In New York* (Februrary,1999) (ADR into the New Millennium) www.nysba.org/LitigativeDNAMaterials.

5. *See* http://www.disputeresolutiondata.com.

6. In Memoriam: Frank E.A. Sander '52, a pioneer in the field of ADR (1927-2018), https://today.law.harvard.edu/memoriam-frank-e-sander-52-pioneer-field-alternative-dispute-resolution-1927-2018/.

7. Shestowsky, Donna, *When Ignorance Is Not Bliss: An Empirical Study of Litigants' Awareness of Court-Sponsored Alternative Dispute Resolution Programs,* Harv. Negotiation Law Rev. Vol. 22:189 Spring 2017, citing Frank E. A. Sander & Michael L. Prigoff, *Professional Responsibility: Should There Be A Duty to Advise of ADR Options?* 76 A.B.A. J. 50,50 (1990).

8. ADR in the Federal District Courts: An Initial Report—2011, https://www.fjc.gov/sites/default/files/2012/ADR2011.pdf.

9. 28 USCA section 471. The six principles that must be included in the plan are (1) systemic, differential treatment of complex and simple cases (2) early and ongoing control of the pretrial process by setting early firm trial dates, controlling the extent of discovery and deadlines for motion practice (3) careful and deliberate monitoring of complex cases (4) encouragement of cost effective discovery and voluntary exchange of information; (5) conservation of judicial resources by prohibiting the consideration of discovery motions unless accompanied by certifications of good faith efforts, and (6) authorization to refer appropriate cases to available ADR programs.

10. *Id.*

11. ADR in the Federal District Courts: An Initial Report-2011, https://www.fjc.gov/sites/default/files/2012/ADR2011.pdf. *Id.* at 6.

12. *See* Niemic, Robert J, Mediation & Conference Programs in the Federal Court of Appeals (2006).

13. For a discussion of the evolution of the Southern District mediation program *see* Price, Rebecca, *An Alternative Approach to Justice: The Past, Present, and Future of the Mediation Program at the U.S. District Court for the Southern District of New York* (2014), Volume 6, Yearbook on Arbitration and Mediation, http://elibrary.law.psu.edu/arbitrationlawreview.

14. D' Urso, Leonardo, *Italy's Required Initial Mediation Session: Bridging the Gap Between Mandatory and Voluntary Mediation*, Alternatives (April 2018).

15. *See* Masucci, Deborah, 2016 International Mediation & ADR Survey, Census of Conflict Management Stakeholders and Trends, Professional Mediation Worldwide: Promoting Consensus and Access to Justice, Fordham Law Dispute Resolution Society 11th Annual Symposium International Commercial Mediation: *How Culture and Regulation are Affecting Business Practice, Mediation* (November 2017), www.Fordham.edu.

16. Anderson, Dorcas Quek; Chua; Eunice & Ngo Tra My, *How Should the Courts Know Whether a Dispute Is Ready and Suitable for Mediation? An Empirical Analysis of the Singapore Courts' Referral of Civil Disputes to Mediation*, 23 Harv. Negotiation L. Rev 268 (Spring 2018).

17. *See* Phillips, Anita, *Asia-Pacific GPC Participants Want Enforceable Decisions and Efficient Processes*, Dispute Resolution Magazine (Spring 2018).

18. *See* Schaffer, Gary, *Court Annexed Mediation by the Numbers,* (2018), www.nysba.org/LitigativeDNAMaterials.

19. *See* Quek, Dorcas, *Mandatory Mediation: An Oxymoron: Examining Feasibility of Implementing Court Mediation*, Cardozo Journal of Conflict Resolution (2010), https://cardozojcr.com; Jakabovics, Andrew & Cohn, Alon, *It's Time We Talked: Mandatory Mediation in the Foreclosure Process,* https://www.americanprogress.org, (2009).

20. *See* ADR—Federal Courts—District by District Summaries, Department of Justice, www.justice.gov/pdf, (gathering data on whether program is voluntary or automatic, payment of neutrals, attendance requirements, whether sanctions are available and confidentiality).

21. *See* Lavene, Lionel M., Snabria, Cecilia, McIntyre, Krisi & Bluda, Brandon, *Alternative Dispute Resolution of Patent Cases: Eastern District of Texas, Northern District of California,* Intellectual Property & Technology Law Journal (July 2015).

22. *See* Schaffer, Gary, Court Annexed Mediation by the Numbers, *supra* note 18.

23. *See* Quek, Dorcas, *supra* note 19.

24. Barry Radin, ADR Program Coordinator for the Western District of New York stated at a recent conference that motions for "opt-outs" are rarely granted. The Litigative DNA Conference.

25. *See* Shaffer, Gary, *Automatic Court Annexed Mediation in New York's Federal Courts: Sometimes Numbers Don't Lie* (2018), www.nysba.org/LitigativeDNAMaterials.

26. *See* General Order No. 47, http://www.nynd.uscourts.gov./sites/nynd/files/general-orders/.GO47.9.pdf; NYND Mediation Program Statistics, http://www.ndny.uscourts.gov/pilot-mandatory-mediation-program statistics.

27. *See* Shaffer, Gary, *supra*, note 18 at 3.

28. For a discussion of the evolution of the Southern District mediation program *see* Price, Rebecca, *An Alternative Approach to Justice: The Past, Present, and Future of the Mediation Program at the U.S. District Court for the Southern District of New York* (2014), Volume 6, Yearbook on Arbitration and Mediation, http://elibrary.law.psu.edu/arbitrationlawreview.

29. *See* www.newyorklawjournal (October 17,2017), Professional Excellence Awards, Rebecca Price, Administrator of the mediation program for the Southern District for her diversity efforts.

30. *See* Report of New York City Bar, *Not on Trees, but Mediators Grow: Assuring Best Practices in Court Annexed Mediation,* (August 2015) (http://ww2nycbar.org.

31. *See* Mediation Referral Order dated August 31, 2016 for cases that include claims under the Fair Labor Standards Act 29, U.S.C. §§ 201.

32. *See* Emery G. Lee III & Cantone, Jason A. *Report on Pilot Project Regarding Initial Discovery Protocol for Employment Cases Alleging Adverse Action,* (October 2015).

33. *See* Initial Discovery Protocol for Fair Labor Standard Act Cases Not Plead as Collective Actions (January 2018), www.fjc.gov./sites/default/files/materilas/12.

34. *See* Price, Rebecca, U.S. District Court S.D.N.Y. Mediation Program Annual Report, January 1, 2016—December 31, 2016 2016 Annual Report.

35. *See* Annual Report for Eastern District of New York dated July 1, 2016-June 30, 2017, http://img.nyed.uscourts.gov/files/local_rules2016mediationreport.

36. *See* Report of Cases Referred in Eastern District from 2000, http://img.nyed.uscourts.gov/files/local.

37. *See* State and Local Foreclosure Mediation Program Update and New Development (January 2010), www.nclc.org; *see also* White, Alan, CUNY School of Law, Georgia State University Law Review Vol. 33 (2016-2017) readingroom.lawgsu.edu/gslr.

38. *See* http://www.uscourts.gov.nyb.lossmitigation pdf; Gill, Daniel, Bankruptcy—Court's Mortgage Modification Program—A Success (February 24, 2017), www.bna.com.

39. Statistics from the AAA supplied by Jeffrey Zaino, Vice President of AAA; Statistics from the Eastern District available through the program's website, U.S. District Court E.D.N.Y. Mediation Program Annual Report, https://img.nyed.uscourts.gov/files/local_rules/2015-2016mediationreport.pdf.

40. *See* Leibouts, Gerald & Hidalgo, Lucero Ramirez, *ADR In Real Estate Matters: The New York Experience* (2010), www.cardozojcr.com.

41. *See* Memorandum to Panel Members from Chris Stern Hyman, February 1, 2018, addressing the Conference on Underutilization of Mediation in the Courts, www.nysba.org/LitigativeDNAMaterials.

42. During 2016, CDRCs served 67,118 people in 27,012 total cases. Family matters, including child custody, visitation and support, accounted for 24 percent of these cases.

43. http://www.nycourts.gov/ip/adr/What_Is_ADR.shtml#WhatisADR; Cases mediated through the CFLC have a 91 percent success rate, www.nysba.org/LitigativeDNAMaterials.

44. *Id.*

45. First, cases randomly selected for mandatory mediation could either be substantively or procedurally inappropriate; second, the Pilot deadlines allowed too much leeway, providing a 120-day period from the date of referral to select a mediator. As the Pilot drew to a close nearly 30 percent of the cases that were referred to the program were exempted either by stipulation or by the assigned judge (conversations with John F. Werner, Chief Clerk—Supreme Court Civil Branch, New York County).

46. *See* https: www nycourts.gov/courts/comdiv/PDFs/ChiefJudgeTaskForceOnCommercialLitigationInThe21stpdf at 25, 26.

47. For cases that moved on to mediation from the conference part as of the end of January 2018 the statistics indicate that 145 cases were referred to mediation, 99 cases completed mediation and 59 of those cases settled in mediation. (Conversation on August 16, 2018 with Lisa M. Courtney, Statewide ADR Coordinator, NYS Unified System).

48. *Id.*

49. *See* Press Release dated April 20, 2018, *New ADR Initiative Aims to Reduce Case Delays and Enhance Access to Justice*, www.nycourts.gov/press.

50. *See Online Mediation: Has Its Time Come?* 15 Ohio St. L. J. on Disp. Resol, 735 (2000).

51. *See* Einhorn, Marcy, *Online Dispute Resolution: The New Normal* (Spring 2018), http:///www.nyb.org/NY Litigator.

52. *See* Larson, David Allen, *Artificial Intelligence: Robots, Avatars and the Demise of the Human Mediator,* 25 Ohio St. J. on Dispute Resolution, 105,111 (2010).

53. *See* UNICTRAL 2016 report, http://www.unictral.org/pdf/English/texts/odr/V1700382_English _Technical Notes_on_ODR.pdf.

54. *See* http://www.odr.info.

55. *See* Joint Technology Committee Report Online Dispute Resolution in the Courts (November 2016), https:www.ncsc.org.

56. Report of the Mediation Committee of the New York State Bar Association Dispute Resolution Section 2011, https://www.nysba.org/Sections/Dispute_Resolution/Dispute_Resolution_PDFs/Through_the_Eyes_of_New York_Litigators.html at 14.

57. *Id.*

58. *Mediation in a Litigation Culture*, Disp. Resol. Mag. at 8, 9–10 (Summer 2011).

59. *Id.* at 8-10.

60. *Mediation in a Litigation Culture*, *supra* note 58.

61. *See* Marrero, *supra*. Cardozo Law Rev at 1682.

62. *See* Marrero, *supra* note 2.

63. Multi-tiered Dispute Resolution Clauses, IBA Litigation Committee (October 1, 2015), www.ibanet.org.

64. *See ADR in Business Practice and Issues Across Countries and Cultures, Ingen-Housz, Goldsmith, Jean-Claude, and Pointon, Gerald*, page 285 (Kluwer 2006); Keynote Address at the IBA Conference by Mr. Wesley Wong, S.C., Solicitor General of Hong Kong SAR on *Mediation v. Arbitration: Best Friends or Best Enemies? A View from Asia*, 1 December 2016, https://www.doj.gov.hk-pdf.

65. *See*, Weil, Richard, *Is Mediation Confidential in New York?* N.Y.L.J. (October 25, 2012).

66. In Supreme Court, Nassau County volunteer mediator-neutral evaluators are available for civil cases after a preliminary conference or when referred by a judge and the Matrimonial Center operates a Special Master Neutral Evaluator Program (approximately 35-40 cases referred a year to a roster). Statistics supplied by Lisa M. Courtney, Statewide ADR Coordinator

67. *See* American Bar Association Section of Dispute Resolution Report to the House of Delegates Resolution 105 www.americanbar.org..

68. *See* Kaster, Laura & Dickney, Janine, *Progress on the New Jersey's Mediation Front,* N.J.L.J. (March 14,2013) available at https://www.njlawjournal.com/id1202592121978/Progress-on the-NJ-Mediation Front.

69. New York State Bar Association Committee on Dispute Resolution: *Bringing ADR into the New Millennium—Report on the Current Status and Future Direction of ADR In New York* (Februrary, 1999), at pages 20, 82 (ADR into the New Millennium), www.nysba.org/LitigativeDNAMaterials.

70. http://www.mow.uscourts.gov/district/map.

71. The website www.abacenterforinn-ovation.org.

72. NYSBA, The Litigative DNA, *supra* note 1, full course materials available at www.nysba.org/LitigativeDNAMaterials.

73. *See* www.nycourts.gov.adr MSD.

74. *See* www.adrdiversity.org.

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Another Approach to Avoiding Litigation

By Alan Gettner and Gary P. Shaffer

We live in a litigious society. Our courts are flooded with cases. Yet the costs of litigation continue to mount as e-discovery has increased the number of documents that must be reviewed in commercial cases and lawyers' billing rates continue their inexorable rise. This has, as we all know, led to an increased interest in alternative dispute resolution, whether it be arbitration, with its claims of reduced costs and quicker results, or mediation, which aims to end litigation short of trial, avoid litigation altogether, or at least narrow the issues in dispute.

Sometimes arbitration or mediation is agreed to by the parties only after the dispute erupts. Increasingly, mediation is ordered by courts eager to reduce caseloads. In the commercial sphere, contracts may include dispute resolution clauses that provide for alternative dispute resolution. These provisions can require three-stage ADR (negotiation, mediation, arbitration), two-stage ADR (Med-Arb) or one-stage ADR (arbitration or mediation). They can simply call for mediation or arbitration, or be much more specific, setting forth who must attempt to negotiate a settlement (e.g., senior executives with no earlier involvement in the matter in dispute), the range of disputes to which they apply, how the neutral or neutrals are chosen, the rules under which the procedure will be held, limits on discovery, and the consequences of refusing to participate in the contractually mandated procedure, to name only the most common areas often covered by such provisions.

This article calls attention to another contractual approach to avoiding the costs and strains of litigation, one that requires a party to notify the other side of a dispute and provide information and documents in support of its position, before commencing an action. Such a provision helped resolve a complex dispute relating to a merger and acquisition transaction, but it might also be appropriate for disputes of lesser complexity.

Here, adapted from an actual contract in the merger and acquisition transaction, is the suggested provision:

> A party who wishes to make a claim for breach of this contract or indemnification hereunder shall give written notice to the party from whom damages or indemnification is claimed with reasonable promptness after its discovery of the facts and circumstances giving rise to the claim, and shall promptly provide the other party with all pertinent information and documents in its possession regarding the claim and its resulting damages. To the extent that providing such information is not practical, the claiming party will permit the other party to inspect such books and records in its possession relating to the claim as the other party may reasonably request. Within 30 days after receipt of such notice and such information and documents or completion of such inspection, the other party shall notify the claiming party whether it accepts the claim or contests it.

One of the authors encountered this type of provision in the sale by a multinational corporation of a very troubled subsidiary with worldwide operations. After the transaction closed, the purchaser alleged, in a notice pursuant to the above provision, that the company it purchased was in worse shape than represented in the sale and purchase contract. Consistent with the provision, the purchaser also delivered 55,000 pages of documentation in support of its claim. What made this procedure so productive is that it allowed seller's counsel to evaluate the strength of the claim and estimate litigation costs at a much earlier stage in the dispute than would normally have been possible. Seller's counsel was also able to advise its client on the amount of executive time required to prepare for and participate in the litigation. Not surprisingly, this led to a client decision to enter into settlement negotiations. Those negotiations extended well beyond the 30-day deadline envisaged by the above provision, but were eventually successful.

We believe the key to the provision's success is the requirement that the claimant reveal all information then in its possession on which its claim was based. This allowed an early and realistic evaluation of the strength of the claim and the potential costs of defending it. That in turn led to settlement negotiations free of the costs and emotions inherent in starting a litigation, or even in proceeding directly with an arbitration. In our experience, early settlement negotiations, whether direct between parties or assisted by a mediator, may fail due to insufficient knowledge of the full basis of a claim, or doubts about posturing as to its strength or weakness. The approach outlined above ensures that negotiations begin with the potential defendant having full knowledge of the basis for the claim.

Though evidently further facts may (and often do) emerge during litigation, we believe settlement is most likely to occur when parties have the greatest possible access to the underlying facts, which allows for a realistic evaluation of risk and costs. Presumably that is one reason why settlements so often occur on the proverbial "courthouse steps" when everyone, at last, has all the facts in hand. The suggestion set forth above brings the courthouse steps closer to home and puts the parties in a position where settlement discussions at an early stage in a controversy are more likely to be fruitful.

While the particular dispute described above involved a complex transaction, the "notice and disclosure" provision might be just as effective in less complex situations. Often the key to resolve a dispute without litigation is figuring out how to get the ball rolling, without either side appearing weak or too eager to settle. This provision does that. One could also add mediation to the provision, so that if the parties were unable to resolve the dispute on their own, they would then enter a mediation with the issues narrowed and much relevant discovery having taken place.

Even a relatively simple dispute such as one involving breach of a supply contract calling for goods to be delivered by a certain date would benefit. The claimant makes clear the basis for the claim and the other side must respond. While the potential defendant can simply notify the claimant it rejects the claim, if mediation is the required next step in the absence of a settlement, the parties know they will have be talking to each other soon enough. The cost-efficient thing to do would be to not wait.

Successful pre-litigation dispute resolution can take many forms. The suggested contract provision described here worked in a situation that, without it, could easily have led to several years of very costly litigation. Marrying that provision to one requiring mediation would extend its usefulness even further.

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Hybrid Proceedings: Resolving Disputes by Integrating Arbitration and Mediation

By Barbara A. Reeves

"Each case had its own unique reasons for the success of its unique hybrid process."

Aerodynamically, the bumble bee shouldn't be able to fly, but the bumble bee doesn't know it so it goes on flying anyway. - Mary Kay Ash

Introduction

In the United States, experienced arbitrators emphasize the importance of an arbitrator acting like an arbitrator, and warn that it is not wise for an arbitrator to change hats and become a mediator at some point in the process. Or worse yet, after mediating, revert back to being an arbitrator to finish the case. This, the accepted thinking goes, is a recipe for unenforceable settlements or arbitration awards, and thus not advisable or workable. Meanwhile, internationally the process of mixed-mode dispute resolution has been gaining traction.[1] This article discusses four case studies of hybrid/mixed mode proceedings in the United States that began in arbitration and, not understanding that veering into mediation could be a recipe for failure, the arbitrator proceeded to integrate mediation and arbitration to reach resolution. Each case had its own unique reasons for the success of its unique hybrid process.

Examples

Example 1. When There Are Issues That Determine How a Party Will Resource the Case

An Italian subsidiary (Licensor) of a U.S. corporation licensed software to a company based in California (Licensee), a provider of semiconductor products for the aerospace industry. The parties entered into a Software License Agreement ("License Agreement"). Pursuant to the License Agreement, Licensor granted Licensee a three-year perpetual and nonexclusive license to use the software at two specified manufacturing locations. After two years, (a) Licensor was acquired by a U.S. company (Claimant) in a stock purchase agreement, and (b) Claimant learned that Licensee had been using the software also at an unauthorized site in India. Claimant alleged that it was the assignee of the License Agreement and sued for breach of contract, misappropriation of trade secrets, willful misuse of intellectual property and copyright infringement. Although bringing a claim for copyright infringement, Claimant had not registered a copyright in the United States for the software at issue in the dispute.

The License Agreement included a Limitation of Liability clause that provided that neither party would be liable for indirect, special, incidental or consequential damages, including lost profits, and in no event shall either party's liability exceed the amount paid for the software giving rise to the claim. A ruling on this issue would determine how the parties would resource this case.

At the preliminary arbitration management conference, the parties informed the arbitrator that they wanted to bring three dispositive motions: (1) whether a copyright holder that has not registered its copyright in the United States is barred from bringing a claim for copyright infringement in arbitration in the U.S.; (2) whether the License Agreement had in fact been assigned to Claimant as part of the Stock Purchase Agreement; and (3) the applicability of the limitation of liability clause in the License Agreement.

The parties brought their motions, and the arbitrator ruled that there were disputed issues of material fact regarding each motion. The arbitrator and parties then decided to hold an evidentiary hearing for the limited purpose of resolving the disputed facts. Following the hearing and ruling, the parties asked the arbitrator to mediate the dispute. With the benefit of the arbitrator's rulings on the disputed issues, the mediation resolved the dispute, and the parties were able to continue their relationship.

Example 2. When a Key Party Is Missing

An investor (Claimant) invested in a biotech company which was then acquired by another biotech company and another group of investors (Respondents). Following the acquisition, the acquiring company discovered that it had bought its way into federal government False Claims Act charges. The law firm that had handled the transactions had, unbeknownst to the parties, represented all of the parties in various parts of the transactions, as well as various individuals who had undisclosed relationships with the parties.

Claimant and Respondent biotech companies were all parties to interlocking arbitration agreements. After a week of arbitration hearings, two things were painfully obvious: (1) none of the Respondent parties had the money to pay any award that might result, and (2) the law firm, which was not a party to the arbitration but whose partners became key witnesses, appeared to have committed malpractice. The only potentially available source

of funding was the non-party law firm's malpractice policies. One Respondent in the arbitration was also a plaintiff in a legal malpractice action against the law firm pending in court. That case was at least a year from trial. Neither the law firm nor the carriers were interested in a global mediation at that point.

"Unlike the bumblebee, the arbitrator knows that what he or she is about to do may not be successful, but tries anyway, believing that there might be a better result from an integrated mixed mode dispute resolution process."

One option: stay the arbitration for six to nine months and then try to involve the law firm and its carriers in mediation. That was not acceptable to the Claimant who wanted finality sooner. Solution: the arbitrator mediated with the parties to the arbitration, resolved their claims, with potential settlement funds coming from the Respondent who was a plaintiff in litigation against the law firm.

Example 3. When There Are Too Many Claims

A group of affiliated hospitals filed an arbitration, pursuant to a Hospital Services Agreement, against a health plan seeking to recover alleged underpayments accumulated over the past four years amounting to tens of millions of dollars and thousands of claims. After months of pre-arbitration discovery disputes, the arbitrator and counsel sat down and spent several days designing a dispute resolution process. The arbitrator acted as a mediator in assisting the parties in the drafting and signing of a Dispute Resolution Agreement. By virtue of casting the dispute resolution design process as a mediation, the parties' negotiation positions remained subject to the mediation privilege, allowing them to discuss various options and positions without concern that those negotiations could be used against them in the future.

The parties, with the help of the mediator, designed a process that allowed each party to designate a number of sample claims to be parceled out to six different arbitrators, sitting as single arbitrators, for resolution. Following the arbitrations of the sample claims, the parties returned to mediation, using the results of the sample claims as guidance from which to extrapolate a resolution of all of the claims, a global settlement.

Finally, the parties' Dispute Resolution Agreement provided that in the event the mediation was not successful, the mediator would become an arbitrator and the parties would convene a mini-arbitration, focusing on testimony from the experts, after which the arbitrator would issue an award. The result—and the resulting process—is confidential, but the case has concluded.

Example 4. The Unplanned Arbitration-Mediation

The arbitration hearing was proceeding in the third day of a scheduled five-day hearing. The expert for the Claimant, a start-up tech company, began his testimony about damages suffered by the Claimant project as a result of alleged the Respondent's alleged patent infringement. As the expert walked his way through his spreadsheet, counsel for the Respondent objected: "Objection. This is a summary. Where are the documents upon which the spreadsheet is based?"

The underlying documents had never been produced to the Claimant. The lawyers argued about whether they had been requested, whether they were required to be produced, whether the expert's testimony was admissible without them, whether Claimant had evidence of damages without the expert's testimony, and whether the documents could be produced now with a brief (one day? one week?) recess in the arbitration to permit Claimant to review them.

The arbitrator heard argument and announced that he would have a decision after the noon recess. He stepped into the facility's café and encountered one of his colleagues who had just finished a half-day hearing. "What are you doing this afternoon? How would you like to mediate these parties out of a mess?"

The parties, recognizing the uncertainties of their positions, spent the afternoon mediating and resolved the case.

Conclusion

In each of these examples, the arbitrator could have followed the arbitration agreement through to issuing an award, as the parties had contracted. In each case the arbitrator, with the permission of the parties veered off from the strict path of arbitration, integrating other tools of resolution into the process. Unlike the bumblebee, the arbitrator knows that what he or she is about to do may not be successful, but tries anyway, believing that there might be a better result from an integrated mixed mode dispute resolution process. Was the result "better" in these examples? Who knows, but it's worth discussing.

Endnote

1. For an excellent article exploring mixed mode ADR, *see generally* T. Stipanowich and V. Fraser, *The International Task Force on Mixed Mode Dispute Resolution: Exploring the Interplay between Mediation, Evaluation and Arbitration in Commercial Cases,* 40 Fordham Int'l L.J. 839 (2017).

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The Crucial Prologue: Telling Your Story in the Pre-Mediation Statement

By Adam J. Halper and Bart J. Eagle

This is the start, the beginning The prologue to the yarn that you're spinning. A million synonyms will never get close to describe the feeling.
- Tomas Kalnoky

Introduction

Attorneys are storytellers. They have to tell their stories in writing before tough audiences. Attorneys spend a lot of time on writing because they understand how important it is to reduce a complicated set of facts and law into a compelling narrative. Logic and reason persuade decision-makers, but the twin currents of that stream are told in the context of a story.

To enjoy writing and telling your client's story is crucial in mediation. Mediators often ask that parties submit statements prior to the mediation session. The purpose of a pre-mediation statement is two-fold. First, a statement from each side serves to ground the mediator in the nuts and bolts of the case. Written well, the statement may also provide important context for how and why a dispute developed. Second, the statement provides an opportunity for the attorneys. In writing the statement they get a chance to include in the narrative factual and legal arguments. This may be the first time attorneys really have an opportunity tell the story of the dispute and have it heard by a neutral party. It presents a significant opportunity for lawyers to do some quality writing on behalf of their clients.

The Problem

Remarkably, many attorneys view the preparation and writing of a pre-mediation statement as a chore. Instead of creating a strong narrative, they provide the mediator with some information as to the claims, defenses and, perhaps, status of previous settlement discussions. A party seeking damages can also be expected to state their damages with enough detail so that it does not appear that they were manufactured out of thin air. And, if requested to do so by the mediator, each party is often asked to present its suggestion as to how the dispute can be settled. While it is necessary to provide the mediator with this basic information, the minimum rarely helps the mediator to fully understand the dispute and it doesn't help the attorney advance their case to settlement.

The result is foreseeable. The party seeking damages proclaims their willingness to settle for *almost* all that they seek; and the party seeking to avoid liability offers to pays *almost* nothing. In both cases, the "almost" position is used so as to appear reasonable. Thus, the pre-mediation statement is often a recitation of the complaint and the answer.

"View these statements as in the service of 'setting the stage' and stating your arguments, not only as form of advocacy but also to help try and set the expectations of the other side."

Good attorneys know when not to miss an opportunity and mediators should be mindful of not letting the advocates off the hook easily, as both the attorney's client, and the mediator, will suffer. Attorneys and mediators should view the submission of a pre-mediation statement as an *opportunity* to assist in the preparation of session and the resolution. In a word, by submitting a strong and thoughtful pre-mediation statement, they start the mediation with a prologue, a story that provides context for the dispute and sets the tone for the mediation.

The Answer

As attorney and as mediator, how does this get done? Let us suggest some considerations, a thought outline, that puts the mediator in the role of facilitator, early, and also puts the attorney in the position of writer, advocate and storyteller, early. We suggest that mediators take some time during the first conference call to really discuss the importance of—or at least the opportunity provided by—the pre-mediation statement. Whether you are the mediator or the attorney in a dispute, the way to turn a chore into an opportunity is to start by asking the parties to discuss their *interests* in the case and not just their *positions*.

Background of the Dispute

Mediators should request and attorneys should start a statement by providing background information that may not be readily apparent from the pleadings. As attorney or mediator, good questions include: Is there a relationship between the parties that should be examined or that can

be preserved, or that may make the dispute particularly difficult to resolve? Or that might provide an opportunity to do so? What impact has the dispute had on each party, their business or maybe even their personal lives and how might that affect the ability of each party to resolve the dispute? Many cases may not present strong answers to these questions. Still, some will and the answers might assist the mediator in exploring avenues for settlement. Even if there are no relationships to be explored and the only injury is to the checkbook, asking and considering the questions might provoke thinking. You never know. And the inclusion of substantive background in the ultimate writing of the pre-mediation statement may be helpful to the mediator.

"Often, the work put in before the mediation session begins can help drive it to a successful conclusion."

What *Actually* Is in Dispute

Disputes contain more context than what lives in the answer and the complaint. In preparing and reviewing the pre-mediation statement, consider, "What is the dispute really about?" For example, someone made a complex but ultimately unsuccessful business decision. In a dispute that will be determined by the provisions of a written agreement, are each party's views of the skills and business acumen of the other really important? They won't be to a court; how much time—if any—does everyone want to spend in mediation arguing about it? As a mediator who might be in the position of suggesting that attorneys think about these questions and as an attorney carefully considering whether and how to answer them, remember the party's real interests. Not all of those may get into the story in the pre-mediation statement but some of them might if only because no one had asked until that moment.

Evaluations and Expectations

Similarly, a challenging and often overlooked discussion in the pre-mediation statement is whether the parties have evaluated their cases. Mediators might consider asking attorneys what elements of the case really influence each party's assessment of the strengths and weaknesses?

Also, mediators should discuss with the attorneys in a pre-mediation conference the expectations of the parties and counsel and what parties hope to get out of it. Whether $5,000 or $5 million is at issue, these are really important considerations for the attorney and for the mediator. Party evaluations and expectations are linked and if possible, should be discussed as content for the pre-mediation statement. Not all of it might go on the paper, but perhaps some of it should.

Resolution Needs and Interests

A thoughtful evaluation leads to a discussion of how to resolve the case. As an attorney writing the statement and as a mediator in the role of reviewing the statement, ask what are the barriers to resolving the matter? Again, maybe it's money and maybe it's not. This is very different from a party's *wants*, which can often be the full surrender of the other party, along with an apology. Chances are, that won't be achieved in mediation. So, what does one want to put into the pre-mediation statement to assist the process? Come back to interests.

For example, in a dispute following the termination of employment, consider each party's *real* needs and interests and how much of that might be helpful in a statement. Employment cases are often about a lot more than just dollars and contract language. Pre-mediation statements often discuss contract law, employee severance; enforceability of non-compete provisions and trade secrets. However, what is often left out may be just as important, and may not be easily discernible by the mediator—or the parties—without exploration. For example, there may be other barriers to a resolution, such as what occurred leading up to and at the time of termination, and concerns over each party's relationships with customers and contacts. Where the balances tilt on such issues is worth considering. Of course, in any case, it could be all of the above, but any hope of settling the dispute, rather than litigating it to a conclusion, will require the mediator, the attorneys *and the parties* giving a great deal of consideration to their real needs and interests, not just their *wants*, and the real needs and interests of the other party, not just the dollars. Writing this up is a valuable exercise for everyone. Yes, the mediator is new to the picture, but the parties (and, certainly, their attorneys) may be too, and this is an important inquiry for them. The answers to these questions may help tell their story.

Even where the story is one-sided, a carefully written statement is valuable. In some disputes, the parties seeking relief, plaintiff or defendant, are entitled to all that they are seeking—which includes everything and nothing. There are times when a plaintiff is entitled "to it all," and, other times, when a defendant's "no pay" position is appropriate. Often, these parties are directed to mediation by a court or prior agreement between the parties. In these situations, it might be appropriate to consider exchanging statements. If the case is so absolute in its outcome, then a party should have no real objection to saying say so, while the other party should demon-

strate—and not just state—why that is not the case. The statements can serve to help the party in the wrong to understand the futility of its position. Or it may allow the parties to address relevant factors that are different from "right or wrong," such as a party's ability to pay, the need for a payout, etc.

Show Your Bones?

Exchanging statements is not common, but it shouldn't be overlooked. Many mediators discuss the value of having sides exchange the mediation statements. Many attorneys bristle. Still, for any attorney the writing may change significantly if it's known there is to be an exchange with the other side. However, there may be a value in sharing your arguments with your adversary, whose client may never have had them presented to her in a clear and concise manner.

Sometimes, it may be appropriate to come up with a work-around that helps to inform adversaries and educate the mediator. For example, the attorneys might write one brief statement addressing some important issues and exchange them, so that each side can be prepared to address—with their client, prior to the mediation, and at the mediation itself—the issues and facts that the other side believes are dispositive. The statements are confidential in the context of the mediation. View these statements as in the service of "setting the stage" and stating your arguments, not only as form of advocacy but also to help try and set the expectations of the other side, and, hopefully, to gain insight into the other side's needs and interests. When parties and attorneys exchange statements they may see and hear arguments differently. Simultaneously, attorneys can submit a completely separate statement to the mediator with information they view as helpful to the resolution of the case but that they do not yet want the other side to know.

Everyone Wants to Talk Numbers. Do It, but Talk About All of the Numbers

Mediators should request and attorneys should try, as best they can, to discuss calculations on what the matter will ultimately cost the clients at different stages of the case if mediation fails. This may help the mediator better understand the gulf between the parties and, perhaps, misperceptions that may exist. Numbers are hard. We get it. We do not suggest, even in a confidential statement, that attorneys put their high and low on the paper. Those might change anyway. However, we do recommend that the ranges be discussed with clients prior to the mediation session. They should be advised this will be a topic in caucus and that it will be discussed, if not in the first round, then soon thereafter. Also, the attorney should prepare to discuss the numbers in a pre-mediation call. Often, the work put in before the mediation session begins can help drive it to a successful conclusion. To the extent this can be put on paper, this is a worthy topic for mediators to request content and a worthy topic of consideration for attorneys.

Keep It Simple

In most cases, there may be contested views of legal issues central to the case. Mediators should request and attorneys should address these in pre-mediation statements. Still, there's no need to turn the statement into a brief or law review article and mediators should instruct attorneys as such. After all, one of the statement's purposes is to enable the mediator to understand the issues and each party's view of them, so that she can assist each side to factor them in when weighing the strengths and weaknesses of each side's case; it is not to provide a starting point for further legal research, to enable the mediator to render a learned opinion that will finally and definitively settle the issue. When requesting and writing a statement consider endnote citations. For those of you familiar with Brian Garner and his LawProse books, you've seen this before. It is part of the plain language approach to legal writing. Plain language statements may not be appropriate to submit to court. It is very appropriate for a mediation. Statements get a lot shorter and easier to read. This is helpful, again, for the attorney and their client as well as the mediator.

Putting It Together

How does one ask for or write this up? It may be easier than one thinks. What we have suggested is to discuss background, dispute development, evaluation, needs and interests, challenges and the possibility that some if not all of this information can be written in a statement and may even be exchanged. It is a statement with a beginning, middle and an end. In such a pre-mediation statement, there is not only a story (or several), but the chance of resolution.

Mediators may be reluctant to suggest and attorneys may be wary of putting this kind of work into a pre-mediation statement. In the presence of resistance, have attorneys and clients go back to interests above and enumerate the strongest factors that are guiding their thinking about the case and the numbers. If the local rules don't ask for hard numbers in the statements, don't put them in but do write your story about the how one should evaluate the case. Also, anticipate the other side's argument and address them. And be comprehensive and straightforward when doing so, not simply dismissive. Attorneys and parties will build credibility with the me-

diator. The stronger pre-mediation statement, the one the mediator is most likely to credit at the end of the day is the one that recognizes that even with strong facts, there are still others that may result in a loss at court or a long road that likely includes settlement after costly discovery and dispositive motions.

Conclusion

Putting effort into the pre-mediation statement is helpful because it can aid the mediator in identifying communication problems, likely areas of impasse, key interests that need to be uncovered and explored, and more. A pre-mediation statement is a story of not only how a dispute came to be, but also of why it advanced to court, discovery and more. If that is not something worth writing about, we don't know what is.

Does writing up a pre-mediation statement differently or with added non-traditional elements guarantee successful resolution? Of course it doesn't. But by thoughtfully considering how the case is to be presented in advance of the mediation, mediators and attorneys ensure that they have made every possible effort to utilize the time and the opportunity of the mediation session. And the parties will always thank you for telling the story and for telling it well.

Telling that story begins with the pre-mediation statement.

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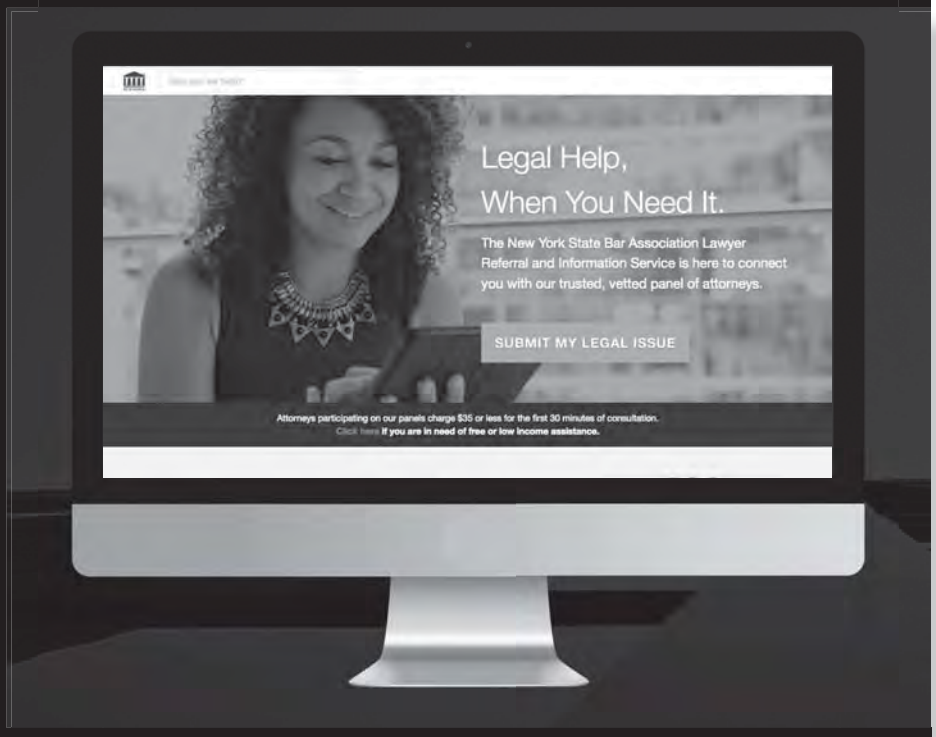

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Enforcing International Arbitration Awards Rendered Under the ICSID Convention

By Merriann Panarella

Introduction

New York has long been a welcoming jurisdiction for international arbitration and, until recently, provided an *ex parte* procedure for enforcing arbitration awards rendered under the ICSID Convention. Unlike the New York Convention, ICSID awards are not subject to judicial review by the member states. Instead, the ICSID Convention provides that any interpretation, revision or annulment of the award take place within the ICSID regime.[1] While member states play a limited role in addressing ICSID awards, the ICSID Convention provides that such states shall recognize an award as final and binding and "enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."[2] The ICSID enabling act, Section 1650a, provides that federal courts have exclusive jurisdiction over ICSID awards but does not address the process by which the courts convert an award into an enforceable judgment in the United States.[3]

Historically, the federal court in the Southern District of New York enforced ICSID awards on an *ex parte* basis. While the cases in the Southern District were uniform in engaging an *ex parte* process, the differing reasoning used to reach that result caused the Committee on International Commercial Disputes of the New York City Bar to issue a Report on the Recommended Procedures for Recognition and Enforcement of International Arbitration Awards Rendered Under the ICSID Convention in 2012[4] discussing the need for standardized procedures for transforming ICSID awards into entered judgments.[5] As a result, the Report proposed an *ex parte* process satisfying the requirements of New York CPLR Article 54.[6]

With its decision in *Mobil Cerro Negro, Ltd. v. Venezuela*, 863 F.3d 96 (2d Cir. 2017), the Second Circuit put an end to the Southern District's *ex parte* practice holding that the Foreign Sovereign Immunities Act (FSIA) provides the *sole* basis for United States courts' jurisdiction over foreign sovereigns. Consequently, the FSIA's procedural requirements including service of process and venue apply when the award debtor is a foreign sovereign. To better understand the reasoning behind the Second Circuit's reversal of the Southern District's practice, this article first sets forth the statutory framework underlying the ICSID Convention, its enabling act Section 1650a, and the FSIA. The article will then review the District Court's reasoning in approving an *ex parte* procedure, and the Second Circuit's reversal of this procedure and its analysis and reconciliation of the ICSID Convention and Section 1650a with the FSIA. Finally, the article will address the plenary process required to enforce ICSID awards in the wake of the *Mobil* decision.

The Statutory Framework

The ICSID Convention

The Convention on the Settlement of Investment Disputes (the "ICSID Convention"), entered into force in 1966, is a multi-lateral treaty ratified by 153 contracting states.[7] The ICSID Convention established the International Centre for Settlement of Investment Disputes (the "Centre") under whose authority arbitration panels are convened to adjudicate disputes between international investors and contracting states.[8]

Under the ICSID Convention, the ICSID Centre convenes arbitrations between member states and nationals of member states to resolve international disputes.[9] At the conclusion of the proceedings, the ICSID tribunals issue written awards that address "every question submitted to the Tribunal," and "state the reasons" for their award.[10] A party who is dissatisfied with an award may challenge it *only* within the ICSID Centre by requesting an interpretation regarding the meaning or scope of the award,[11] a revision,[12] or an annulment of the award.[13] Requests made for an interpretation, a revision or an annulment are all addressed to the ICSID Centre's Secretary-General.

The ICSID Convention addresses Recognition and Enforcement of the Award in Section 6, Articles 53-55. Article 53(1) provides that the award "shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention."

> The role of the member states is set forth in Article 54(1):
>
> Each Contracting State shall recognize an award rendered pursuant to this Conven-

> tion as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

Execution of awards is governed "by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought."[14]

Finally, the ICSID Convention does not affect the laws regarding sovereign immunity, "[n]othing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution."[15]

The ICSID Enabling Statute—Section 1650a

In August 1966, Congress passed the ICSID Convention implementing statute, 22 U.S.C. § 1650a, which provides:

> (a) An award of an arbitral tribunal rendered pursuant to chapter IV of the convention shall create a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States. The Federal Arbitration Act (9 U.S.C 1 et seq.) shall not apply to enforcement of awards rendered pursuant to the convention.
>
> (b) The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have exclusive jurisdiction over actions and proceedings under subsection (a) of this section, regardless of the amount in controversy.

The clear language of the statute creates a right under a treaty of the United States and the pecuniary obligations imposed by such an award shall be given "full faith and credit" as if the award were a final judgment in a court in the United States. The statute provides exclusive jurisdiction in the federal courts. The text of the enabling statute, however, does not specify the process by which the courts convert an ICSID award to a federal judgment.

The Foreign Sovereign Immunities Act

Congress passed the Foreign Sovereign Immunities Act in 1976 to free the Government from making sovereign immunity decisions on a case-by-case basis, to clarify measurable standards, and to "assur[e] litigants that… decisions are made on purely legal grounds and under procedures that insure due process." *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 488 (1983). The FSIA provides that "[s]ubject to existing international agreements to which the United States is a party," foreign sovereigns "shall be immune from the jurisdiction of the courts of the United States" except as provided for in one of the Act's exceptions to jurisdictional immunity.[16]

The exceptions to jurisdictional immunity are set forth in Section 1605 and include any case (a)(1) in which the foreign state has waived its immunity and (a)(6) in which an action is brought to enforce an arbitration agreement or to confirm an award made pursuant to an agreement to arbitrate subject to certain conditions. Accordingly, the FSIA does not shield a foreign sovereign from the exercise of jurisdiction to enforce an ICSID award pursuant to both of these exceptions.[17]

The Supreme Court has had occasion to review the scope of the FSIA in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989) stating, "[w]e think that the text and structure of the FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts." The Second Circuit has recognized the "categorical" nature of this holding, "[t]he FSIA provides the exclusive basis for obtaining subject matter jurisdiction over a foreign state." *Kirschenbaum v. 650 Fifth Ave and Related Properties,* 830 F3d. 107, 122 (2d Cir. 2016) (citations omitted).

The *Mobil* Decision

Factual Background[18]

The basic facts leading to the ICSID's panel award were not in dispute. Acting through a variety of entities, Mobil invested in two oil development ventures with a Venezuelan state-owned entity in the 1990s. In 2007, the Venezuelan government, nationalizing its oil industry, seized Mobil's interest in the projects. Seeking compensation for its losses due to the expropriation, Mobile submitted a request for arbitration to the ICSID Centre. In 2014, after both Mobil and Venezuela participated in a lengthy arbitration, an ICSID arbitral tribunal issued an award in Mobil's favor and ordered Venezuela to pay Mobil $1.6 billion plus interest. The day after the award issued, Mobil filed an *ex parte* petition in the Southern District of New York seeking recognition of the award pursuant to Section 1650a. Mobil relied on the ICSID Convention and

N.Y. CPLR 54. The District Court granted the petition and entered judgment against Venezuela that day.

The District Court Grants Mobil's *Ex Parte* Petition to Enforce the ICSID Award[19]

In resolving the appropriate process for converting an ICSID award into a judgment, the District Court considered, first, the ICSID Convention and Section 1650a, and then turned to the FSIA. With regard to Section 1650a, the District Court reviewed prior decisions in the Southern District and found that "[e]ach time, the district court recognized the ICSID award (i.e., converted it to a federal court judgement) without requiring that a plenary lawsuit be brought."[20] While the District Court found that there was an undisputed statutory gap in Section 1650a, it determined that it is appropriate to look to the forum state's law to fill the gap and provide the necessary procedure:

> [U]sing the streamlined recognition procedure in CPLR Article 54 *effectuates* the policy interests underlying the ICSID enabling statute, because, by facilitating conversion of an ICSID award to a judgment, it facilitates granting "full faith and credit" to the award and enables the creditor to move towards enforcing it.[21]

The District Court then turned its attention to the FSIA. Regarding subject matter jurisdiction, the District Court found two bases under the exceptions to immunity provisions set forth in Section 1605: (a)(1) (waiver) and (a)(6) (arbitration). The District Court also found a third statutory basis for jurisdiction in Section 1604, which states that immunity is "[s]ubject to existing international agreement to which the United States is a party at the time of enactment of this Act…." The District Court then addressed the more substantial issue of FSIA's requirements of service of process and venue. Finding the FSIA's text silent regarding the need for plenary action to enforce an ICSID award, the District Court engaged in an analysis of the FSIA and the ICSID Convention and section 1650a to determine whether there was tension between the two statutory schemes. The District Court found that construing the FSIA to permit ICSID creditors to use state recognition procedures would allow foreign sovereigns to vindicate fully the rights they do have. The ICSID Convention provides foreign sovereigns with the opportunity to challenge ICSID awards within the Centre. FSIA offers foreign sovereigns strong protection at the execution and attachment stages. The District Court, thus, upheld the use of New York's *ex parte* process to convert ICSID awards into federal court judgments.

The Second Circuit's Reversal

Venezuela appealed the District Court's decision to the Second Circuit, arguing that the District Court erred in not requiring Mobil to bring a plenary action before entering judgment on the ICSID award and that the court lacked subject matter and personal jurisdiction over Venezuela under the FSIA. Venezuela and the United States as amicus curiae argued in support of the procedure adopted by the district courts in the District of Columbia and the Eastern District of Virginia,[22] where award creditors must file a complaint seeking entry of judgment on the award, serve the complaint on the foreign sovereign, and comply with the FSIA's venue requirements.

Mobil argued in support of the Southern District's longstanding approach that federal courts may enter judgment summarily, according to the state court procedures in the forum state, here New York's CPLR Article 54. Section 5401 defines foreign judgment as "any judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in this state, except one obtained by default in appearance, or by confession of judgment." According to Section 5402, the procedure is *ex parte:*

> The judgment creditor shall file with the judgment an affidavit stating that the judgment was not obtained by default in appearance or by confession of judgment, that it is unsatisfied in whole or in part, the amount remaining unpaid, and that its enforcement has not been stayed, and setting forth the name and last known address of the judgment debtor.

The judgment creditor must give notice to the judgment debtor within 30 days of filing the judgment and affidavit.[23]

The Second Circuit determined that this matter required it to reconcile the ICSID Convention and Section 1650a with the FSIA to determine the appropriate procedures for converting an ICSID award into a federal judgment. As part of this inquiry, the Second Circuit considered "whether Section 1650a provides an independent source of jurisdiction over a foreign sovereign award-debtor or whether the later-enacted FSIA offers the sole basis for federal courts' jurisdiction over foreign sovereigns."[24] Finally, the court considered whether, even if the FSIA provided the sole source of jurisdiction over foreign sovereigns, Section 1650a empowers the courts to modify the FSIA procedural requirements and adopt state court summary procedures.

Addressing the possible basis for subject matter jurisdiction, the Second Circuit agreed with the District Court that subject matter jurisdiction existed under the implied immunity and arbitration exceptions of the FSIA, 28 U.S.C. § 1605(a)(1)(waiver) and (a)(6) (arbitration). The Second Circuit disagreed, however, that Section 1650a also provided a basis for subject matter jurisdiction over foreign sovereigns, stating that even if Section 1650a at one time provided such a basis, when Congress passed the FSIA it provided the *sole* basis for obtaining jurisdiction over a foreign sovereign. The Second Circuit then addressed FSIA Section 1604's carve-out for "existing international agreements" and, calling it a question "not free from doubt," the court rejected the argument that the carve-out includes the ICSID Convention, "[i]nternational agreements that predate the FSIA are excluded from the Act's reach only when they expressly conflict with the Act's immunity provisions."[25] Here, there are no conflicts that would trigger a carve-out as actions to enforce ICSID awards fall under specific exemptions from immunity under the FSIA Section 1605.

The Second Circuit then turned its attention to whether the FSIA also controlled the procedures to be used when actions are brought against a foreign sovereign award-debtor and concluded it did. First, the court, disagreeing with the District Court, found no ambiguity in FSIA's language regarding service of process and venue. The court again found compelling the Supreme Court's determination that FSIA's "purpose is to set forth comprehensive rules governing sovereign immunity, including procedures for commencing lawsuits against foreign states" (internal quotation marks and citation omitted).[26] Further, Congress did not expressly exempt actions against foreign sovereigns under Section 1605(a)(6) from the state's service or venue requirements and did not provide an expedited procedure to enter a judgment against a foreign sovereign in any circumstance. The court "accord[ed] conclusive weight to the affirmative and sweeping provisions in the FSIA's comprehensive statutory scene and the observation that the FSIA makes no provision for summary procedures in any instance."[27]

The Second Circuit next turned to whether a straightforward application of FSIA's service of process and venue provisions would "bring the FSIA into grave tension with the objectives of the ICSID Convention and of Congress" (quoting the District Court's opinion, citations omitted).[28] In addressing any purported conflict between the FSIA and the ICSID Convention and its enabling act, the court noted that it owed "particular deference to the interpretation favored by the United States."[29] The court agreed with the United States that FSIA's requirements and the United States' obligations under ICSID were not in significant tension. Article 54 of the Convention affords ICSID arbitral awards the status of final state court judgments. Section 1650a requires the federal courts to accord ICSID awards "full faith and credit as if the award were a final judgment of . . . one of the several states." Relying upon the legislative history of Section 1650a, the court concluded that the "full and faith and credit requirement" would preclude the federal court from inquiring into the merits of the underlying controversy. Further, the court, again relying on legislative history, gleaned Congressional intent to assure uniform enforcement of ICSID awards in the United States. Applying the procedures set forth in the FSIA will facilitate such national uniformity.

The court then grappled with the issue of whether the reference in the ICSID Convention's Article 54, which requires a member state to "*recognize* an award" and "*enforce* the pecuniary obligations imposed by that award" (italics added), created two distinct actions, as the District Court found. Relying on the fact that the ICSID Convention was not self-executing, the court first turned its attention to the ICSID enabling act, Section 1650a, to determine the scope of the court's authority. The court noted that Section 1650a(a) "refers to enforcement, but not to recognition….It makes no mention of recognition as a separate, additional judicial action and we think that its framing was intentional."[30] The court found language confirming this conclusion in Section1650a(b)'s grant to the federal courts of "exclusive jurisdiction over actions and proceedings under subsection (a)."[31] According to the court, actions and proceedings connote something more than an *ex parte* conference.

The court also deemed persuasive Section 1650a's direction that the "Federal Arbitration Act . . . shall not apply to enforcement of awards rendered pursuant to the [ICSID Convention]."[32] The FAA's provision for confirmation of arbitral awards by court order and not through an "action" was evidence that Congress knew how to provide for summary procedures in the arbitral context and simply elected not to do so in Section 1650a.

Finding that Section 1650a contemplated only enforcement and not recognition of ICSID awards, the Second Circuit turned to what it means to "enforce" a state court judgment in federal court and award it full faith and credit. The Court determined that while actions to enforce state court judgments in federal court are rare, "federal courts generally require that a civil action be filed, with notice to the judgment creditor, before enforcing a state court judgment."[33] The court also relied on legislative history to support its conclusion that Section 1650a mandates enforcement of ICSID awards in federal court through an action on the award and not an *ex parte* preceding.

Accordingly, the Second Circuit held that the FSIA provides the sole basis for subject matter jurisdiction over foreign sovereigns and Section 1650a provides no exception to that rule. As a result, the FSIA's provisions regarding service of process and venue must be satisfied when the ICSID award-debtor is a foreign sovereign.

Enforcing IDSID Awards in the Wake of *Mobil*

While federal courts must treat ICSID awards as final and binding, as a consequence of the Second Circuit's decision, an ICSID award-creditor seeking to convert an award to a judgment in New York must comply with the provisions of the FSIA. Section 1608 of the FSIA sets forth the procedure for service upon a foreign state and stipulates that the foreign state has 60 days after service to serve an answer or a responsive pleading. Completing service of process could take several months under this process. The Second Circuit did envision that once service was effected, there would be opportunities to streamline the process by moving for judgment on the pleadings or for summary judgment.

The ICSID award-creditor must also comply with the venue requirements set forth in the federal venue statute. Section1391(f) governs civil actions against foreign nationals and provides venue where a claim arises and where a substantial part of the property subject to the action is located. If venue cannot be obtained according to these requirements, the federal court for the District of Columbia is the default venue. Moreover, New York remains a viable alternative for executing on a judgment as once a judgment is entered in federal court, pursuant to 28 U.S.C. § 1963, the judgment can be registered in any other federal court.

The Second Circuit is the only circuit court of appeals that has addressed the interplay between the ICSID Convention, its enabling act, and FSIA, and its decision is in accord with decisions issuing from federal district courts in the Eastern District of Virginia and the District of Columbia. Given the high regard for the Second Circuit Court of Appeals, and its well-reasoned opinion, as well as the paucity of cases involving ICSID awards, it is unlikely another circuit court of appeals will hold otherwise.

Endnotes

1. *See* ICSID Convention Articles 50 through 53.
2. *See* ICSID Convention Article 54.
3. *See* 22 U.S.C. § 1650a.
4. *See* N.Y.C. Bar, Comm. on Int'l Commercial Disputes, *Recommended Procedures for Recognition and Enforcement of International Arbitration Awards Rendered Under the ICSID Convention.IS THERE A CITATION?*
5. *Id.* at 25.
6. *Id.* at 26.
7. *See* https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx.
8. *See* Mar. 18, 1965. T.I.A.S. No. 6090, 17 U.S.T. 1270.
9. ICSID Convention Articles 36 and 37.
10. ICSID Convention Article 48.
11. ICSID Convention Article 50.
12. ICSID Convention Article 51.
13. Article 52(1) lists five grounds upon which a party may request annulment including (a) that the tribunal was not properly constituted; (b) that the tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state reasons on which it is based.
14. ICSID Convention Article 54(3).
15. ICSID Convention Article 55.
16. 28 U.S.C § 1604.
17. *Blue Ridge Invs., L.L.C. v. Republic of Arg.*, 735 F.3d 72, 83-85 (2nd Cir. 2013).
18. *Mobil Cerro Negro v. Bolivarian Repub. Venezuela,* 863 F.3d 96, 108—109) (2nd Cir. 2017) (*Mobi*l).
19. *Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela,* 87 F.Supp 573 (S.D.N.Y., 2015).
20. *Id.* at 579-80.
21. *Id.* at 584.
22. See *Continental Casualty Company v. The Argentine Republic*, 893 F. Supp. 2d 747 (E.D. Va., 2012) and *Micula v. Government of Romania,* 104 F.Supp. 3d 42 (D. D.C., 2015).
23. N.Y. CPLR Article 5403.
24. *Mobil, supra* at note 18, 112.
25. *Id.* at 114.
26. *Id.* at 116.
27. *Id.*
28. *Id.*
29. *Id* at 117. Before the FSIA was implemented, courts long gave deference to the State Department when making decisions regarding sovereign immunity.
30. *Id.* at 119-120.
31. *Id.* at 120.
32. *Id.*
33. *Id.* at 122.

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Consent or Agreed Awards and the New York Convention—What Is the Status?

By Laura A. Kaster

In 2018, several developments coalesced to demonstrate a felt need among international disputants for an alternative to arbitrating cases to award. The final report of the Global Pound Conferences was issued reporting on the conferences held from 2016 to 2017 in 24 countries and obtaining over 4,000 responses to consistent questions about the needs and desires of the users of ADR. Among its many important conclusions was that users desire more streamlined and cost-effective dispute resolution and expect the process to be flexible enough to incorporate mediation. The Herbert Smith Freehills, PwC and IMI Report at 9 (2018), https://www.globalpound.org.

"[I]f a pending arbitration results in a settlement and that settlement is reflected in a consent award, is it enforceable under the New York Convention? The answer is pretty certainly yes."

In a parallel development, UNCITRAL's Working Group II, which had been discussing the possibility of an international instrument to improve enforcement of mediated settlements, concluded in June 2018 that it would recommend a new Singapore Convention—and a Model Law—that would permit enforcement of mediated settlements in signatory countries as an analog to the New York Convention.[1]

The ability to enforce arbitral awards worldwide under the New York Convention has been the driving force behind the enormous growth of international arbitration and international arbitral tribunals and centers.

"[C]an a mediated settlement entered as a consent award be enforced under the New York Convention…[T]he answer is that if steps are taken carefully, a resulting arbitral consent award should be enforceable under the New York Convention."

The eventual acceptance of the Singapore Convention promises significant changes in the future of ADR. But Conventions take time to be signed, adopted, and implemented. What is the status of the law now on consent awards or awards that are based on a mediated settlement?

The question may have to be broken into parts. First, if a pending arbitration results in a settlement and that settlement is reflected in a consent award, is it enforceable under the New York Convention? The answer is pretty certainly yes. Two recent U.S. decisions are quite clear on this point and there is no basis in the New York Convention itself or in the rules of various arbitral bodies that could justify a distinction between an award and a consent award.

Second, can a *mediated* settlement entered as a consent award be enforced under the New York Convention? Here the answer may be a bit more nuanced and some procedures need to be observed to assure litigation is not generated. But again, the answer is that if steps are taken carefully, a resulting arbitral consent award should be enforceable under the New York Convention.[2] This is an important option that international practitioners and disputants desire.

Consent Awards in Pending Arbitrations

Two recent United States district court cases reject the contention that a consent award entered by an arbitral tribunal and reflecting the settlement by the parties during the pendency of an arbitration is not an "award" enforceable under the New York Convention.

In *Transocean Offshore Gulf of Guinea VII Ltd. v. Erin Energy Corp.*,[3] an arbitration before the London Court of International Arbitration arose from a dispute over a contract for drilling equipment, personnel, and services in the waters off the coast of Nigeria. Before the arbitration hearing was held, the parties consented to the entry of an arbitral award by the tribunal.

In the subsequent district court proceeding in Texas, Transocean and Indigo argued that Erin Energy had not paid what it owed under the consent award and the legal costs award. They petitioned for confirmation of the awards under the New York Convention.

Erin Energy challenged the availability of summary enforcement of the consent award by asserting that the court lacked subject matter jurisdiction on the ground that consent awards are not subject to the Convention. Erin Energy's argument was founded on the contention that a consent award is fundamentally different from other arbitral awards because an arbitral award represents the tribunal's conclusions, not the parties' agreement.[4]

Interestingly, Erin Energy cited the 2016 United Nations Commission on International Trade Law Secretariat Guide on the Convention, which states: "The Convention is silent on the question of its applicability to decisions that record the terms of a settlement between parties. During the Conference, the issue of the application of the Convention to such decisions was raised, but not decided upon. Reported case law does not address this issue."

However, the *Transocean* district court rejected Erin Energy's argument that the Convention's silence meant that it was not intended to apply to consent awards. *Id.* The *Transocean* court relied heavily on the earlier decision in the Southern District of New York in *Albtelecom SH.A v. UNIFI Commc'ns, Inc*.[5] Both courts viewed any prohibition to enforcement of a settlement reached during the pendency of an arbitration to be counter to public policy. In *Albtelecom,* the court viewed the award entered by the arbitrator "mid-arbitration" with the parties' consent as indistinguishable under the law from any other award. Both courts opined that any other rule would discourage resolution of disputes by settlement in arbitration because an enforceable award under the Convention would not result. *Transocean* specifically rejected the argument that enforcement under the New York Convention depends on the arbitral tribunal actually making its own findings:

> No binding or persuasive statutory language or case law requires a court to hold that a tribunal must reach its own conclusions, separate from the parties' agreement, to make a valid, binding award subject to the Convention. As the *Albtelecom* court noted, this rule would dissuade parties from seeking arbitration in the first place or benefitting from the efficiencies it is meant to provide.[6]

These authorities are persuasive as to United States application, is it different elsewhere? For example, English law is clear on this point, providing that "An agreed award shall state that it is an award of the tribunal and shall have the same status and effect as any other award on the merits of the case."[7] And the UNCITRAL Model Law on Commercial Arbitration Article 30(2) provides that "[a]n award on agreed terms has the same status and effect as the award on the merits of the case."[8]

French law appears to be silent on the issue,[9] but that does not by itself suggest that consent awards will not be enforced.[10] However, a French case has given some pause. In *Receivers of Viva Chemical (Europe) NV [Belgium] v. Allied Petrochemical Trading & Distribution LC [Isle of Man]*,[11] the Paris Court of Appeal annulled an enforcement order of the Parisian lower court. However, the French court did not rely on the fact that it was a consent award alone. It held that the enforcement of the award would be contrary to French international public policy.

On 28 September 2006, Viva Chemical purchased 3,400 tons of base oil from a company called Petroval. Viva Chemical never paid for the oil. Nevertheless, Viva sold the oil to Allied Petrochemical. On 22 May 2007, two days before Viva filed for bankruptcy, Allied Petrochemical and Viva jointly appointed a sole arbitrator who rendered an award by consent the following day, deciding that Allied Petrochemical was the owner of part of the oil. Allied then obtained an order of enforcement of the award by consent in the Paris First Instance Court. Viva's receivers appealed the order on the ground that the award was fraudulent and would violate the principle of equality between creditors. The arbitration had been filed during the period—on the eve of bankruptcy—when transactions may be voided to protect creditors.

The Court of Appeal found not that consent awards are universally unenforceable but that in this case the award by consent had been made in the absence of a dispute between the parties and that the award was fraudulent and contrary to public policy. There is nothing extraordinary about the refusal to enforce the award in *Viva Chemical*. The UNCITRAL Model Law and most national arbitration acts permit voiding an award (whether or not by consent) on the grounds of public policy.[12] Indeed, the New York Convention itself provides:

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

Viva Chemical does not undercut the viability of consent awards obtained mid-arbitration; it does provide a nice transition for analyzing consent awards based on a mediated agreement. All awards are subject to public policy examination.

Consent Awards Based on a Mediated Agreement

There is no logical distinction between a settlement that was derived from the parties acting independently or a settlement that results from a mediation that the parties then bring to the arbitrators. The resulting consent awards are indistinguishable. The question of enforceability of mediated settlements (or any settlement for that matter) entered as a consent award arises when no arbitration is pending and the parties either ask the mediator to enter a consent award as an arbitrator (changing hats) or ask to convene an arbitration for the sole purpose of entering the mediated settlement as an award.

The problem derives from language in the New York Convention providing that "This Convention shall apply to the recognition and enforcement of arbitral awards . . . *arising out of differences between persons, whether physical or legal.*"[13] Some scholars posit that if a settlement has

already been reached or mediated, there is no longer a "difference" between the parties and the Convention does not apply. Although there are sound arguments against this approach,[14] no settling parties would want to have to litigate the issue. Particularly in light of the Singapore Convention's direct resolution on enforcement of mediated settlements in the absence of an arbitral award, there is no need to subject parties to uncertainty. The most efficient approach is to initiate the arbitration *before* or at the same time as the mediation. This is the solution under the Singapore International Mediation Centre and Singapore International Arbitration Centre (SIAC) Arbitration-Mediation-Arbitration Protocol,[15] and others, including the New Jersey statute that permits enforcement of mediated awards.[16] Under this Arb-Med-Arb approach, whether the arbitrator appointed also acts as mediator (subject always to the express written consent of the parties), the resulting consent award should be enforceable under the New York Convention.

Conclusion

International disputants want solutions that include a mediation opportunity. They can have that now with an enforceable result. The Singapore Convention is coming but the future is already available.

Endnotes

1. *See* Masucci and Ravala, the Singapore Convention: A First Look in this issue, supra at ___, citing the Singapore Convention and Model Law, forthcoming on UNCITRAL's website, as well as an official record of the United Nations upon formal adoption by the General Assembly. In the interim, see UNCITRAL, 51st Sess. UN Doc A/CN.9/942 and UN Doc A/CN.9/943.
2. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, http://www.newyorkconvention.org/english, and 9 U.S.C. § 201-08.
3. 2018 WL 1251924, at *1–2 (S.D. Tex. Mar. 12, 2018).
4. *Id.* at *2.
5. 2017 WL 2364365 (S.D.N.Y. May 30, 2017). *See also* Kaster, *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*, NY Dispute Resolution Lawyer (Vol 10 Fall 2017).
6. *Transocean Offshore Gulf of Guinea VII Ltd. v. Erin Energy Corp.*, No. CV H-17-2623, 2018 WL 1251924, at *4 (S.D. Tex. Mar. 12, 2018).
7. Arbitration Act of 1996 c.23 § 51 (Eng.).
8. http://www.uncitral.org/pdf/english/texts/ arbitration/ml-arb/06-54671_Ebook.pdf.
9. Yaraslau Kryvoi & Dmitry Davydenko, *Consent Awards in International Arbitration: From Settlement to Enforcement*, 40 Brook. J. Int'l L 852 (2015).
10. *Id.*
11. Cour d'appel [CA] [regional court of appeal], Paris 1e ch. (section C), 9 Apr. 2009, case no. 07/17769. Reported in Mealey's International Arbitration Report, Vol. 24, # 8 (August 2009).
12. UNCITRAL Model Law on Arbitration, note 8 *supra*, art. 34(2)(b)(ii). ("An arbitral award may be set aside by the court [in the seat of arbitration] only if: . . . . the court finds that . . the award is in conflict with the public policy of this State."); *see also* Gary Born, International Commercial Arbitration 256-67 (2009).
13. Article I(1) of the New York Convention, http://www.newyorkconvention.org/english.
14. See Edna Sussman, *The New York Convention Through a Mediation Prism*, 15 Disp. Resol. 10 at 12 n. 162 (2009) (arguing that the Convention does not specify a difference has to exist at the time of the appointment of the arbitrator).
15. *See* Aziah Hussin, SIAC-SIMC's Arb-Med-Arb Protocol, *supra* at ____.
16. New Jersey International Arbitration, Mediation and Conciliation Act, N.J.S.A. 2A:23E-1 et seq. (2017).

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8:30 AM – 10:00 AM	Executive Committee Meeting
8:30 AM – 10:00 AM	Resumé Revamping Table (representatives from provider organizations)
8:45 AM – 10:00 AM	Registration
10:00 AM – 10:10 AM	Welcoming Remarks by DRS Chair Deborah Masucci
10:10 AM – 11:25 AM	**Plenary 1** **A Roundtable on Mediation Impasse-Breaking Techniques** (1.5 Skills) Experienced mediators will address how they handle various impasse situations that arise in mediation sessions. Using hypothetical scenarios, the panelists will share specific impasse-breaking techniques that have worked for them (or that they have considered using) in a facilitated roundtable session that will promote peer learning.
Moderator:	**Gabrielle Y. Vázquez, Esq.** McGrail & Bensinger LLP
Panelists:	**Jennifer Lupo, Esq.** Lupo Law PLLC
	Charles M. Newman, Esq. Law and Mediation Offices of Charles M. Newman
	Ruth D. Raisfeld, Esq. Ruth D. Raisfeld, P.C.
	Stephen Sonnenberg, Esq. JAMS
11:25 AM – 11:35 AM	BREAK
11:35 AM – 12:30 PM	**Plenary 2** **Sharpening our Communication Skills in the Online World: Strategies and Tips for Mediators, Arbitrators, and Advocates** (1.0 Skills) In a world that increasingly incorporates the latest technology into our workspace, ADR practices are also evolving to include increased communications through e-mail, video conferencing, social media platforms, and other means of online communicating. In many instances, the first time the participants (including the neutral) in a mediation or arbitration actually meet and interact with each other in person is at the session or hearing, but there are many other means of communicating that can be used as part of the process. Learn how to properly and clearly communicate in this online world – a critical skill set that everyone in the ADR field needs to develop – in a training session, appropriately enough, via videoconferencing.
Moderator:	**Theodore K. Cheng, Esq.** ADR Offices of Theo Cheng LLC
Speaker:	**David A. Hoffman, Esq.** Boston Law Collaborative, LLC
12:30 PM – 1:30 PM	Networking Luncheon

1:30 PM – 2:45 PM **Plenary 3**

Access to Justice: Opening the Door to Additional Protections in Arbitration
(1.5 Areas of Professional Practice)

The recent decade has witnessed the growth of interim, provisional, and conservatory relief in arbitration. Arbitral institutions took the lead, amending their rules also to permit the appointment of emergency arbitrators. This panel investigates grounds for relief and the process of accessing such relief in both domestic and international arbitration proceedings.

Moderator:
Rekha Rangachari, Esq.
New York International Arbitration Center

Panelists:
James P. ("J.P.") Duffy IV, Esq.
Baker & McKenzie LLP

Erica B. Garay, Esq.
Garay ADR Services

Hon. Faith Hochberg (ret.)
Faith Hochberg ADR

2:45 PM – 4:00 PM **Plenary 4**

The Ethics Gameshow! (1.5 Ethics and Professionalism)

Being cognizant of, and complying with, ethics and disciplinary rules are an everyday task for ADR professionals, particularly if you are both a neutral and an attorney. Team-up with your colleagues to answer various ethics hypotheticals and then compare your answers with those provided by our resident panel of ethics experts to score points. The winning team gets a prize!

Hosts:
Theodore K. Cheng, Esq.
ADR Offices of Theo Cheng LLC

Felicia T. Farber, Esq.
Farber Resolutions LLC

Experts Panel:
Hon. Carol E. Heckman (ret.)
Lippes Mathias Wexler Friedman LLP

Nicole Hyland, Esq.
Frankfurt Kurnit Klein & Selz PC

Lewis Tesser, Esq.
Tesser, Ryan & Rochman, LLP

4:00 PM – 4:15 PM BREAK

4:15 PM – 5:15 PM **Plenary 5**

Securing the Decision: A Primer on Arbitral Award Writing (1.0 Skills)

This panel explores best practices to safeguard an arbitral award (interim, partial final, final) against future court proceedings for enforcement, set-aside and vacatur. Diversity of perspective is a focal point, with voices from arbitral institutions, counsel, and arbitrator.

Moderator:
Kabir Duggal, Esq.
Arnold & Porter Kaye Scholer LLP

Panelists:
Christian P. Alberti, Esq.
International Centre for Dispute Resolution

Stephanie Cohen, Esq.
Independent Arbitrator

Marek Krasula, Esq. (invited)
SICANA, Inc./International Court of Arbitration

Kiera S. Gans, Esq.
DLA Piper

Richard L. Mattiaccio
Allegaert Berger & Vogel LLP

5:15 PM – 6:30 PM **Networking Reception honoring the Winners of the National Championship NYSBA/ACCTM Alternative Dispute Resolution Law Student Writing Competition/Resume Writing Table**

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What Users Want and How to Address Their Needs and Expectations Using the Results of the Global Pound Conference

By Amal Bouchenaki, Jonathan Cross, Liang-Ying Tan and Silvia Marroquin

In an increasingly globalized and connected economy, complex conflicts call for sophisticated and efficient solutions. However, the increasing popularity of arbitration over recent decades does not mean that arbitration is always the appropriate solution. Recent surveys reveal that other dispute resolution processes could help resolve commercial and civil conflicts, but that they are not even being considered by practitioners. This illustrates a disconnect between practitioners' understanding of dispute resolution processes and users' expectations. How can the field respond to this disconnect and bridge the gap? How can dispute resolution processes be designed to provide appropriate solutions in terms of costs, time, outcomes and enforceability?

The GPC Series 2016-2017: A Groundbreaking Data Gathering Experiment

As an empirically driven conversation about what can be done to improve access to justice and the quality of justice around the world in commercial and civil conflicts, the Global Pound Conference (GPC) Series 2016-2017 embodies a unique and ambitious initiative to collect data and report on how civil and commercial disputes are resolved in the 21st century.[1]

The GPC was named in honor of Roscoe Pound, the Dean of Harvard Law School who, in 1906, addressed the American Bar Association and called for a reform of the administration of justice system. During the first Pound Conference,[2] held in 1976, Professor Frank Sander[3] proposed that alternative forms of dispute resolution be used to reduce reliance on conventional litigation. This proposal marked a turning point of alternative dispute resolution (ADR) in the U.S. legal system and gave birth to innovative changes that offered disputants more procedural alternatives. The GPC was organized in homage to the contributions of those who laid the groundwork for the development of ADR and it prompted lawyers, advisors and academics to develop improved systems.

Over recent decades, numerous legal systems around the world have embraced dispute resolution to increase the range of procedural choices available to disputants. The 40th anniversary of the GPC celebrates the globalization of all forms of civil justice (court litigation, arbitration, conciliation and mediation) across national borders, while it acknowledges the gaps between users' expectations and what practitioners are providing.[4]

The GPC brought together over 4,000 dispute resolution stakeholders[5]—including in-house counsel, private practice lawyers, arbitrators, arbitral institutions, academics and government officials—who engaged in 28 conferences across 24 countries held worldwide throughout 2016 and 2017. During each event, participants used an information technology platform to vote in real time on specific sets of questions.[6]

"In-house counsel were judged to be change enablers, and to bear the responsibility of encouraging their organizations and their external lawyers to consider dispute resolution options more carefully. In contrast, 70 percent of global delegates said external lawyers were the primary obstacles to change, followed by adjudicative providers (judges and arbitrators)."

Herbert Smith Freehills, global founding sponsor of the series, teamed up with PwC and the International Mediation Institute (IMI) to identify key insights that emerged from the extensive voting data collected during the events. The publicly available report offers an unprecedented global insight into dispute resolution today.[7]

The GPC's contribution to the collection and analysis of reliable, comparative and actionable data in the field of dispute resolution is not comprehensive; instead, it helps identify further areas for research and investigation.[8] First, the project is not primarily intended to be academic and does not represent a pure data collection environment—participants at each conference were self-selected and represented each stakeholder group to varying degrees. Second, the voting population covers all continents; common and civil law systems; jurisdictions known for highly developed dispute resolution systems; and jurisdictions which are developing ADR procedures to complement existing mechanisms. Nonetheless, the data analysis reflects certain trends by stakeholder group and geographical distribution that are thought-provoking,

if not determinative.[9] An example of this is while New York delegates identified the words "education," "technology," "collaboration" and "accountability" as describing the changes to focus on in the future, delegates in Lagos chose "legislation," "education," "awareness" and "technology."

With these factors in mind, we briefly address the trends that have been identified by the GPC Series on how the market is dealing with parties' wants, needs and expectations, what users really need, and how dispute resolution can change to provide it.[10]

"The GPC report indicates a general desire among stakeholders to use pre-dispute protocols, combine processes and encourage collaboration. The challenge is to effectuate this with consistent and reliable dispute resolution processes."

The GPC Results: Parties Desire Less Confrontation and More Collaboration

The needs and areas for improvement that were identified by stakeholders reflect the key global themes discussed in the report: *Efficiency*, *collaboration*, *change* and *non-adjudicative processes*.

Efficiency: While efficiency appears to be the main driver determining parties' choice of dispute resolution processes,[11] it is unclear whether it is actually achieved with most dispute resolution processes involving litigation or arbitration. In fact, two thirds of in-house counsel canvassed at the GPC events stated they require *more* efficiency in dispute resolution.

Collaboration: Parties expect greater collaboration from advisors in dispute resolution. Around two-thirds of in-house counsel said they want more collaboration from their lawyers with both clients and opponents.

Change: In-house counsel were judged to be change enablers, and to bear the responsibility of encouraging their organizations and their external lawyers to consider dispute resolution options more carefully. In contrast, 70 percent of global delegates said external lawyers were the primary obstacles to change, followed by adjudicative providers (judges and arbitrators).[12] Adjudicative providers were also considered to be the most influential players in bringing about change after governments and ministries of justice.[13]

Non-adjudicative process: Interest in the use of pre-dispute protocols and mixed-mode dispute resolution was clearly reflected in the results by all stakeholders. Stakeholders selected preventive dispute processes and the combination of processes as the most effective tools to improve the future of commercial dispute resolution.[14]

Stakeholders are mindful of the advantages of participating in non-adjudicative processes. For example, used appropriately, mediation and conciliation incur lower costs and expenses, enable the parties to retain more control over the outcome, and allow for business relationships to be improved or restored if a settlement is reached.[15]

Stakeholders identify external lawyers and in-house counsel as the actors that bear the responsibility for ensuring that disputants understand their options and the consequences of each process before deciding which one to use.[16] Keeping this in mind, stakeholders said that the main challenges parties face when seeking resolution of commercial disputes are financial and time constraints as well as insufficient knowledge of the options available to resolve disputes.[17] There is thus a need for this information gap to be bridged by practitioners, to provide users with greater advice on procedural options and design processes that reflect their budget, timetable and their wish to preserve a business relationship.

Stakeholders further identified legislation or conventions that promote recognition and enforcement of settlements, as well as protocols promoting non-adjudicative processes before adjudicative processes (opt-out), as instruments that can improve commercial dispute resolution.[18]

The GPC report indicates a general desire among stakeholders to use pre-dispute protocols, combine processes and encourage collaboration. The challenge is to effectuate this with consistent and reliable dispute resolution processes.

Dispute Resolution Lawyers Need to Learn to "Mix and Match"

Collaboration may appear to be at odds with traditionally adversarial practice, but it also presents opportunities for innovation to meet users' expectations.

***Mediation*:** While mediation has occupied a discrete second place behind arbitration for a long time, the GPC results suggest that this should no longer be the case. Mediation provides disputants with the option of a shorter proceeding that entails fewer costs and offers more flexibility to control the procedure. Specifically, adversarial and collaborative processes should no longer be perceived as exclusive modes of resolving disputes, but instead should be viewed as complementary solutions.

***Thinking "mixed-mode"*:** The field needs a new lens to look at conflict management. Mixed-mode processes can provide more suitable, efficient and collaborative procedural choices to parties due to their capacity to adapt (they can be used sequentially, in parallel or integrated with one another) to the nature of commercial disputes. As agents of change, advisors and providers need to introduce more collaboration in their adversarial mindset to tailor the right dispute resolution process for the dispute and the parties. Practitioners do not bear the sole responsibility for change. Law schools, professional training regimes and law firms need to play a fundamental role in leading this change.

***Rethinking representation*:** Cultural expectations influence the way in which the representation of a client is understood in a given legal system and play a part in how collaboration is introduced in dispute resolution. Zealous advocacy may leave less room for collaboration,[19] even in jurisdictions where the culture favors conciliation and settlement negotiations. The GPC results clearly reflect that stakeholders across the world consider collaborative thinking to be the way forward. Dispute resolution practitioners have to anticipate their clients' needs with creative dispute resolution thinking, collaboration to achieve efficient outcomes and traditional representation when necessary.

***Pre-action protocols and arbitration clauses*:** In addition to providing collaborative solutions once the conflict has arisen, lawyers can encourage collaboration *before* the dispute arises. This can be achieved through pre-action protocols before arbitration proceedings are commenced, or by way of arbitration clauses that include the option or obligation to attempt conciliation and mediation prior to initiating litigation or arbitration.

***Dispute resolution institutions*:** These are essential to create a clear framework that welcomes innovative procedures and does not compromise on effective and enforceable outcomes. Institutions should consider amending their rules to incorporate opportunities for parties to engage in a non-adversarial forum. Judicial case management or changes to domestic rules of civil procedure can also provide a way forward.

***"Arb-Med-Arb" initiatives*:** Some institutions have already made innovative procedural options available to parties. In November 2014, the Singapore International Arbitration Centre (SIAC) and the Singapore International Mediation Centre (SIMC) introduced the hybrid proceedings called "Arb-Med-Arb" (*i.e.*, Arbitration-Mediation-Arbitration) which combine arbitration and mediation. In Arb-Med-Arb, after the tribunal is constituted, the proceedings are immediately stayed in order for the parties to attempt to settle their disputes by way of mediation within eight weeks from the commencement of the mediation. If the mediation succeeds, the tribunal enters a consent arbitral award (as opposed to a settlement contract between the parties). If the mediation fails, the parties are referred back to arbitration.

So far, SIAC and SIMC are the only institutions to offer a model clause and clear rules on how Arb-Med-Arb proceedings should be conducted.[20] And, although parties conducting arbitration under other institutional rules are free to ask for a stay in the arbitration and to attempt to settle the dispute through mediation, in practice, it seems unlikely that parties would opt for this without clear procedural rules. The growing demand for collaboration may therefore prompt other institutions to offer similar hybrid proceedings in the future.

***A new legal framework for mediation*:** The GPC report coincides with the creation of a new legal framework for the enforcement of settlement agreements reached through international commercial conciliation or mediation by the United Nations Commission on International Trade Law's (UNCITRAL) Working Group II.[21] Currently, when a party to a mediated settlement agreement fails to comply with the terms of the agreement, the other party has to commence separate proceedings in court, or through arbitration, to enforce the agreement. The creation of a uniform framework for recognition of settlement agreements resulting from mediation would increase predictability and has the potential to place mediation on an equal footing with arbitration. This new development should see an increase in parties' choice of mediation.

Conclusion

The data in the GPC report is undoubtedly a "mandate for change." The GPC was a timely opportunity to question the *status quo* and acknowledge that advisors do not always know, or provide, what their clients want.

Dispute resolution faces a turning point in its development; in the same manner that Professor Sander proposed that ADR be used to reduce reliance on conventional litigation 40 years ago, today stakeholders propose that ADR reduce its reliance on formalistic adversarial resolution processes. Users want cost effective, flexible, faster and fairer dispute resolution processes. The findings of the GPC Series should inform the choices and decisions of stakeholders who are in a position to shape the dispute resolution field through local and international reforms. The GPC Series is a valuable initiative, but it is only the beginning of a call for innovation that will improve ADR processes and access to justice if stakeholders take action.

Endnotes

1. The GPC Series is limited to civil cases entailing commercial disputes, including contract and tort but excluding family, consumer, criminal, or other kinds of cases.
2. The first Pound Conference was organized in 1976 to recognize Dean Roscoe Pound's contributions to law and justice. The event was sponsored by the American Bar Association, the Conference of Chief Judges, and the Judicial Conference of the United States.
3. Frank E.A. Sander, *Varieties of Dispute Processing*, address delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, April 7–9, 1976, in 70 F.R.D. 111, 133–34 (1976).
4. The London 2014 Pilot Event was held on October 29, 2014 under the title *Shaping the Future of International Dispute Resolution* by the International Mediation Institute (IMI). The London Convention generated data suggesting that significant gaps exist between the users' expectations and what the advisors, institutions, practitioners, educators and policy makers provide.
5. *Welcome*, GPC, http://globalpoundconference.org/about-the-series/welcome-to-the-gpcseries#.WHv3sdzVnRw (last visited June 26, 2018). The five stakeholder groups were: (1) Parties: end-users of dispute resolution, generally in-house and executives; (2) Advisors: private practice lawyers and other external consultants; (3) Adjudicative Providers: judges, arbitrators and their supporting institutions; (4) Non-Adjudicative Providers: mediators, conciliators and their supporting institutions; and (5) Influencers: academics, government officers and policy makers.
6. The events were organized in four interactive sessions: Session 1: Access to Justice & Dispute Resolution Systems: What do parties want, need and expect?; Session 2: How is the market currently addressing parties' wants, needs and expectations?; Session 3: How can dispute resolution be improved? Overcoming obstacles and challenges; and Session 4: Promoting better access to justice: What action items should be considered and by whom? The questions are available on the GPC website, www.globalpoundconference.org.
7. The global voting data provides a wide range of insights into the topics raised in the core questions. The questions were answered by 2,472 voters, among which 14 percent answered as party; 26 percent as advisor; 15 percent as adjudicative provider; 31 percent as non-adjudicative provider, and 15 percent as influencer. The GPC report, the cumulative voting results and the voting results from each event can be downloaded from the GPC website, https://www.globalpound.org/gpc-series-data/the-gpc-final-report/.
8. International Mediation Institute (IMI) and the Academic Committee invite researchers and scholars to help analyze data.
9. *See* GPC report, Global Data Trends and Regional Differences, pages 19 to 27, available on the GPC website, https://www.globalpound.org/gpc-series-data/the-gpc-final-report/.
10. This article concentrates on the results of Session 2: How is the market currently addressing parties' wants, needs and expectations?; and Session 3: How can dispute resolution be improved? (Overcoming obstacles and challenges).
11. Common law regions (UK, North America and Oceania) and the civil law region of Continental Europe chose demand for increased efficiency, including through technology, as the factor that would have the most significant impact on future policy-making in commercial dispute resolution. In Asia, the leading choice was the demand for certainty and enforceability of outcomes. See results for Question 4.4—Which of the following will have the most significant impact on future policy-making in commercial dispute resolution?—in the GPC report, cumulative voting results.
12. Question 3.4—Which stakeholders are likely to be most resistant to change in commercial dispute resolution practice?
13. Question 3.5—Which stakeholders have the potential to be most influential in bringing about change in commercial dispute resolution practice?
14. Question 2.5—Currently, the most effective commercial dispute resolution processes usually involve which of the following?; and Question 3.2—To improve the future of commercial dispute resolution, which of the following processes and tools should be prioritised?
15. Question 2.3—In commercial disputes, what is achieved by participating in a non-adjudicative process (mediation or conciliation) (whether voluntary or involuntary, *e.g.*, court ordered)?
16. Question 2.4—Who is primarily responsible for ensuring parties involved in commercial disputes understand their process options and the possible consequences of each process before deciding which one to use?
17. Question 3.1—What are the main obstacles or challenges parties face when seeking to resolve commercial disputes?
18. Question 3.3—Which of the following areas would most improve commercial dispute resolution?
19. Delegates from North America (which attended events in Baltimore, Austin, Los Angeles, Miami, New York, San Francisco and Toronto) expressed their preference for lawyers to advocate on behalf of their clients during dispute resolution processes in contrast with other regions where delegates indicated they wanted lawyers to work collaboratively with parties to navigate the process. This illustrates the tradition of zealous advocacy in common law jurisdictions, and especially in United States dispute resolution. See cumulative voting results in the GPC report for Question 1.5—What role do parties involved in commercial disputes typically want lawyers (*i.e.*, in-house or external counsel) to take in the dispute resolution process?
20. For information on the SIAC-SIMC Arb-Med-Arb, *see* http://simc.com.sg/arb-med-arb/; for information on Arb-Med-Arb Model Clauses, *see* http://www.siac.org.sg/model-clauses/the-singapore-arb-med-arb-clause.
21. The Singapore Convention on Mediation was finalized on June 26, 2018 and is scheduled for adoption by the General Assembly later this year. On August 1, 2019 the convention will open for signature in Singapore, and the process of domestic implementation by states will begin. The final text will be available in the following weeks.

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The Singapore Convention: A First Look

By Deborah Masucci and M. Salman Ravala

On 25th June, 2018, at its 51st session, the United Nations Commission on International Trade Law (UNCITRAL), the U.N.'s core legal body in the field of international trade law, approved by consensus of its member States a "Convention on International Settlement Agreements Resulting from Mediation." It will be commonly referred to as the "Singapore Convention" upon adoption by the United Nations General Assembly and ratification by at least three member States. The official signing ceremony for the Singapore Convention is expected to be in late 2019.[1]

The Background: A Timely Proposal

In May 2014, UNCITRAL, through its Working Group II (WGII), received a proposal from the United States[2] government to develop a multilateral convention on the enforceability of international commercial settlement agreements.[3] The foundation of the proposal was to encourage the acceptance and credibility of mediation as a tool for resolving international cross-border disputes. A second goal of the proposal was to find a more efficient and robust enforcement mechanism when a party breached a mediated settlement agreement without resorting to costly and time-consuming processes such as initiating a new lawsuit to obtain a judgment or court decree on a settlement agreement or utilizing consent awards in arbitration. The need for the proposal was premised on the existing conviction of the global community, adopted by United Nations, that the use of mediation and conciliation "results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by [member] States."[4] The United Nations previously adopted UNCITRAL Conciliation Rules (1980) and UNCITRAL Model Law on International Commercial Conciliation (2002), as well as the widely ratified Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly referred to as the "New York Convention" (1958). Adoption of the Singapore Convention therefore moved relatively swiftly and also included the adoption of UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements resulting from International Commercial Mediation (the "UNCITRAL Model Law on ICM-ISA"). Adoption of the Model Law will ensure a more widespread global acceptance by member States in their local jurisdictions and smoother domestic implementation across the world.

The Deliberations: Mediation in Action

Since 2014, deliberations on the international instruments took place over eight UNCITRAL Working Group II sessions, by 85 member States and 35 non-governmental organizations, including the International Mediation Institute (IMI). Delegations vigorously participated in debate over the proposed Singapore Convention and related Model Law. The diversity of voices that contributed to the deliberations and eventual adoption is to be celebrated and welcomed by the global business community.

Progress on the instruments had many parallels to a multi-party co-mediation. WG II elected a Chairperson from the member states. The Chairperson (the lead mediator) effectively developed the agenda for the proceedings, secured consensus from the participating members, framed and reframed for action agreements and disagreements, and brought in experts and others to supplement the knowledge of delegates. As meetings progressed, member States substituted delegates to include internal mediation experts in their delegations. Each session convened with a joint caucus. Consultation meetings or private caucuses were used during the sessions to work out language with one or two delegates filling the role of co-mediators. The UNCITRAL Secretariat provided technical assistance to the group ensuring consistency of provisions and language with other instruments adopted by UNCITRAL. Educational programs were held between and during WGII sessions. They provided opportunities for delegates to learn more about practices globally and why there is a need for a Convention despite lack of evidence that mediated agreements are not being honored.

The Key Provisions: Integrating the ADR Landscape

The Preamble section of the Singapore Convention acknowledges that "mediation is increasingly used in international and domestic commercial practice as an alternative to litigation"[5] and further acknowledges the "significant benefits"[6] of mediation. There are only 16 Articles in the Convention.

Article 1 outlines the scope, applying the Convention to cross-border commercial disputes resolved through mediation where "at least two parties to the [written] settlement agreement have their places of business in different States"[7] or in which parties "have their places of business different from either the State in which a substantial part of the obligations under the settlement agreement is performed or the State in which the subject matter of the settlement agreement is most closely connected."[8] Article 1 specifically excludes settlement agreements

related to consumer, family, inheritance, and employment matters, as well as those enforceable as a judgment or as an arbitral award.[9]

Article 2 defines key terms used in the Convention such as "place of business," "in writing," including in electronic form, and even "mediation." Article 3 summarizes the general principles and obligates member States that ratify the Convention and also permits a party subject of the Convention to invoke a defense and to subsequently prove that a particular dispute being raised was already previously resolved by a settlement agreement.

Article 4 provides a specific but broad checklist of what a party must supply for enforcement of the international settlement agreements that result from mediation. Article 4 includes submission of a "settlement agreement signed by the parties"[10] and "evidence that the settlement agreement resulted from mediation."[11] Evidence includes items "such as" a "mediator's signature on the settlement agreement,"[12] or "a document signed by the mediator,"[13] or "an attestation by the institution" administering the mediation. In the absence of such proof, Article 4 allows a party to submit "other evidence" acceptable or required by a competent authority of the member State where relief is sought. Article 4 also addresses key issues related to electronic communication, translation of settlement agreements, and calls for the competent authority of the member States enforcing the settlement agreements to "act expeditiously."[14]

Article 5 was vigorously debated and certain overlaps within the Article are intentional to accommodate the concerns of a member State's domestic legal systems. Article 5 includes the grounds when a competent authority may refuse to grant enforcement. These circumstances include incapacity of a party, or where the settlement agreement a) is null and void, inoperative or incapable of being performed; b) not binding or not final; c) was subsequently modified; d) was performed; e) is not clear or comprehensible; or where granting relief would be contrary to terms of the settlement agreement or contrary to public policy, and subject matter is not capable of settlement by mediation under the law of that party. A competent authority may also refuse to grant relief where there is a serious breach by the mediation of standards applicable to the mediator or the failure by the mediator to disclose to the parties' circumstances as to the mediator's impartiality or independence.

Article 6 addresses issues of parallel applications or claims and draws inspiration from the New York Convention. It grants, to the competent authority of the member State where relief is being sought, wide discretion to adjourn its decision under the Convention where an application or claim relating to a settlement agreement was made in a court, an arbitral tribunal, or other competent authority.

Article 7 also draws inspiration from the New York Convention and allows member States flexibility to enact national legislation in their countries to expand the scope of settlement agreements excluded by Article 1, Paragraphs 2 and 3 of the Singapore Convention.

Article 8 allows for a tailored adoption of the Convention by each member State, allowing for two reservations when ratifying the Convention. The first reservation is one which relates to the member State or its own governmental agency. The second allows for a declaration that the Convention applies only where the parties to the settlement agreement resulting from mediation have agreed to the application of the Convention.

Article 9 clarifies that the settlement agreements encompassed by the Convention include those concluded *after* entry into force of the Convention, related reservations, or withdrawals by the member State. Article 16 similarly clarifies that the settlement agreements encompassed by the Convention include those concluded *before* denunciation of the Convention.

The Future: Mediation Benefits Our World

In 2016 and 2017, the IMI convened the Global Pound Conference series which surveyed an array of participants from around the world, including those in the business community.[15] Participants surveyed represented many fields such as law, construction, energy, architecture, international business, healthcare, food and beverage, tourism, trade, education, and finance.[16] One survey question asked respondents to rank why they believed parties do not try to solve their commercial cross-border dispute through mediation. Lack of a universal mechanism to enforce a mediated settlement was cited as the second highest ranked reason. On a similar question about the likely use of a mediation clause in contracts if there existed a uniform global mechanism to enforce mediation settlements, the survey result found over 80 percent of the respondents answering in the affirmative. One respondent event added a comment that "lack of uniform enforcement mechanism is a problem."

The enforcement regime promulgated by the Singapore Convention and related Model Law address the concerns raised by those surveyed by the IMI. Incorporating input from around the world, it promises to foster international trade, improve access to justice, and increase confidence, predictability and certainty amongst the business community. It also assists member States and their respective judiciaries to become more efficient in resolving disputes, especially those of commercial nature where parties seek stability and certainty.

Adoption of the Singapore Convention and Model Law on the global stage signals the most credible acknowledgment of mediation as a meaningful tool to resolve cross-border commercial disputes. The timing of the adoption is also significant and perhaps eye-opening,

a subliminal reminder to the world community that the Singapore Convention, akin to the New York Convention, has the power to significantly and positively shape a harmonious regime of international trade around the world.

Endnotes

1. The final text of the Singapore Convention and Model Law is forthcoming on UNCITRAL's website, as well as an official record of the United Nations upon formal adoption by the General Assembly. In the interim, *see* UNCITRAL, 51st Sess. UN Doc A/CN.9/942 and UN Doc A/CN.9/943.
2. The U.S. is one of 60 member States that consider proposals for recommendation and adoption by UNCITRAL.
3. UNCITRAL, 51st Sess. UN Doc A/CN.9/942 (25 June, 2018).
4. General Assembly resolution 57/18, *Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law,* A/RES/57/18 (19 November 2002), available from undocs.org/A/RES/57/18.
5. UN Doc A/CN.9/942, *supra* note 1, at Preamble.
6. *Id.*
7. UN Doc A/CN.9/942, *supra* note 1, at Art. 1.
8. *Id.*
9. UN Doc A/CN.9/942, *supra* note 1, at Art. 2, 3.
10. UN Doc A/CN.9/942, *supra* note 1, at Art. 4.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. Global Pound Conference Series 2016-2017, Shaping the Future of Dispute Resolution and Improving Access to Justice, Cumulated Data Results, *available a*t https://www.globalpound.org/wp-content/uploads/2017/11/2017-09-18-Final-GPC-Series-Results-Cumulated-Votes-from-the-GPC-App-Mar.-2016-Sep.-2017.pdf (last visited, June 25, 2018).
16. Weiss, David S. and Griffith, Michael R., Report on International Mediation and Enforcement Mechanisms, *available at* https://www.imimediation.org/download/.../imi-njcuidr-wgii-report2017v4-0-pdf.pdf (last visited, June 25, 2018), at p.7.

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Data Protection Meets International Arbitration: The Impact of the GDPR on Arbitration

By Kathleen Paisley

When it applies to a case, the GDPR sets rules for when, where, how, and how much personal data can be processed during an arbitration, and, unless exempted, grants data subjects rights to transparent information about the use of his or her data during the arbitration (which may include data privacy notices), to review and rectify data, to erasure and to deny processing, among other things. The application of these rules may result in less data being processed more securely during arbitrations governed by the GDPR. However, in applying them both during the arbitral process and by the regulators, it is critical that the cross-border, often confidential, consensual, decision-making function, including the protection of the parties due process rights, be taken into consideration. This Article proposes a case-by-case approach to GDPR compliance that uses data protection protocols to allow the arbitral process to work effectively within the GDPR framework.

As anyone who has an email account likely knows, the EU General Data Protection Regulation (GDPR)[1] recently came into force and has been the subject of previously unseen compliance efforts due to the risk of criminal liability, individual and collective claims by data subjects,[2] and fines of up to the higher of 4 percent of global gross revenue or €20 million.[3] In contrast to most U.S. data protection laws, the GDPR prohibits the processing of personal data by a third party (including during an arbitration) unless expressly allowed by the terms of the regulation.[4] When applicable, the GDPR also sets rules for when, where, how, and how much personal data can be processed during an arbitration. After explaining when the GDPR applies to arbitration, this article considers the regulation's practical impact on a complex international arbitration and how binding data protection measures can be used to provide predictability and enhance compliance.[5]

Application of the GDPR to Arbitration

The GDPR applies broadly to all arbitrations where "personal data" is "processed" by the parties, their counsel, arbitral institutions, members of the arbitral tribunal, experts and vendors ("arbitral participants").[6] The European conception of what is "personal data" is significantly broader than that applied in the United States. For purposes of the GDPR, personal data processing during an arbitration includes any review or other treatment of arbitral information or evidence of any kind by which an individual is identified or identifiable even when the personal data is contained in a business-related document (such as work emails, lab notebooks, agreements or construction logs) ("personal arbitral data").[7] This means that virtually any treatment of any piece of evidence, notes, filings, draft awards and the award itself during an arbitration will likely constitute the processing of personal arbitral data covered by the GDPR when it applies ("arbitral data processing"). Put simply, when the GDPR applies, every time a person is named or identifiable, anything an arbitral participant does with or to that document is covered.

Complying With the GDPR During the Arbitral Process

The GDPR applies to arbitral participants who are either established in the European Economic Area (EEA), or that target EEA data subjects, and its reach is effectively extended by the international data transfer rules.[8] Each arbitral participant should therefore consider at the outset of an arbitration whether the GDPR applies to its processing of personal data during the arbitration, and, if so, what rules apply.

The GDPR imposes obligations on data "controllers" and data "processors" with more extensive duties imposed on the controllers of data.[9] Data controllers are those who make decisions about the processing, whereas data processors must process the data at the behest of a controller.[10] Given the nature of the activities typically undertaken by arbitral participants during an arbitration, they will often be considered both data controllers and data processors during the course of the arbitral process, and hence must apply the more stringent data controller rules.

As a practical matter, this creates overlapping data protection rights and duties on the parties, their counsel, arbitral institutions, members of the arbitral tribunal, experts and vendors, each of whom may have individual liability for GDPR compliance. Furthermore, each of these participants may be subject to the jurisdiction of a different Member State supervisory authority and may take a different view of how the rules apply to the arbitration. This creates significant uncertainty and concern about how the GDPR may affect the arbitral process.[11]

From a case-specific perspective, GDPR compliance usually should be addressed at the initial procedural conference or even earlier, but an issue may arise as to whether the tribunal should raise data protection or wait for the parties to raise it and what to do if the parties do not raise it. Arbitration is a party-driven process and it usually goes beyond the scope of the tribunal's duties to raise legal issues that have not been raised by the parties. However, where the legal principles potentially at issue extend liability not only to the parties, but also to the tribunal itself (and potentially the institution), it would seem appropriate for the tribunal to raise these issues on its own initiative, at least to the extent necessary to ensure its own compliance.

When applicable, GDPR compliance may be bolstered by adopting a signed binding data protection protocol or other binding measure agreeing how the rules will be applied to a particular case and who is responsible for what. This can be done in the Terms of Reference or the First Procedural Order or in another instrument addressing:

- The legal obligations imposed by the GDPR and other applicable laws;
- What measures are required for compliance with those legal obligations;
- Who will be responsible for compliance;
- The impact of data protection on the arbitration (data transparency, cybersecurity, document disclosure, data transfer, travel etc.); and
- Provide for any indemnities.

For ease of reference, this will be referred to as a "binding data protection instrument," and the remainder of this article considers how a binding data protection instrument may address data protection in the context of a specific case.

Permissible Data Processing

The processing of personal arbitral data requires a legal basis under the GDPR.[12] The GDPR contains no express provision allowing processing for arbitration. Arbitral data processing therefore must be justified under one of the general permissible bases for processing, which for purposes of arbitration are usually limited to either informed consent and the legitimate interest of the data controller.[13]

Informed consent must be obtained from each data subject, which is difficult in an arbitration given the nature of the consent required and that it can be withdrawn at any moment by the individual data subject, which creates risks for relying on consent as a basis for arbitral data processing. For example, it is difficult to obtain consent from employees because, unlike United States law, European law may not recognize employee consent as legitimate because of the leverage the employer has over the employee to extract consent. This means that most arbitral data processing will require justification under the legitimate interest standard.[14]

The legitimate interest basis for data processing recognizes that there may be a legitimate need for a data controller or a third party to process personal data, but then considers whether the interests of data subject(s) outweigh that legitimate interest, taking into consideration the riskiness of the processing. The relevant EU data protection authority[15] has recognized that the pursuit of legal claims may fall within the legitimate interest standard, provided the data processed is limited and data subject rights are not infringed by the processing. As a practical matter, this means that GDPR compliance may narrow the amounts and types of personal data that is reviewed during an arbitration by the parties, vendors, outside counsel, and the experts, including during document disclosure, where personal data is covered by the GDPR.

Binding Data Protection Instrument: The binding data protection instrument should state the basis or bases being relied upon for the processing of the personal arbitral data during the arbitration.

International Data Transfers

The GDPR's rules are even stricter when data is transferred outside the EEA. The transfer of personal data outside the EEA is prohibited, including during an arbitration, unless expressly allowed by the GDPR.[16] Transfer is defined broadly and is likely to include downloading a document from the cloud, opening an email, or even storing it on a computer that is carried outside the EEA, including during an arbitration. These data transfer restrictions are in addition to those applicable to data protection generally.

It is beyond the scope of this article to undertake an in-depth analysis of the application of the international transfer restrictions to arbitration. Briefly, a transfer of personal data outside of the EEA, including in the context of an arbitration, must be justified on one of four bases: (1) an EU adequacy finding; (2) implementation of adequate safeguards; (3) application of a specific derogation; or (4) if nothing else is feasible, application of the general derogation allowing for transfers where the data controller has a compelling legitimate interest, but this only applies to one-time transfers and requires notification to the relevant Member State supervisory authority.[17]

When an arbitration requires transferring personal data outside of the EEA to a country without an adequacy finding,[18] the GDPR provides a specific derogation allowing occasional transfers where "necessary for the establishment, exercise or defence of legal claims," expressly including out-of-court procedures. However, the personal data transferred must be (i) "necessary" for the claim or defense, (ii) minimized, (iii) protected after transfer, and (iv) the data subject may need to be notified of the transfer.[19] The explicit consent and compelling legitimate interests standards are also possible bases for arbitral data transfer, but are unlikely to be feasible for most arbitral data transfers due to the nature of the consent required and the need for multiple international transfers.[20]

Another approach worth exploring when the legal claims derogation is too limiting is that the GDPR also expressly allows international data transfers pursuant to contractual arrangements provided they have been authorized by the relevant Member State supervisory authority in advance.[21] This would allow arbitral participants to develop a set of contractual undertakings complying with the most important provisions of the GDPR which, when agreed to by the arbitral participants, would allow the free transfer of data internationally among those who have entered into the undertakings. For example, an

arbitrator or institution could have a pre-approved set of contractual clauses that would then be agreed to by the other participants allowing transfer amongst them. Some arbitrators and counsel will be uncomfortable with this approach, and it remains to be seen whether it would hold muster with the relevant EU and Member State supervisory authorities, but, where appropriate, it could allow data transfer that would otherwise be prohibited and hence be worthy of consideration.

Binding Data Protection Instrument: When international data transfers are required during an arbitration, any binding data protection instrument should state the basis or bases being relied upon for the data transfers.

Cybersecurity

Adequate cybersecurity is mandatory whenever the GDPR applies, including the implementation of "appropriate technical and organisational measures to ensure a level of security appropriate to the risk," taking into account "the state of the art, the costs of implementation and the nature, scope, context and purposes of processing as well as the risk of varying likelihood and severity for the rights and freedoms of natural persons," which may include pseudonymization or anonymization.[22] Pseudonymization means eliminating personal data (for example redaction) in a manner whereby it can be reinstated, anonymization means permanent deletion.

While not applying the GDPR standard, the ICCA/NYC Bar/CPR Draft Cybersecurity Protocol for International Arbitration, released for consultation in 2018, and the Debevoise & Plimpton Protocol to Promote Cybersecurity in International Arbitration, launched in 2017, are helpful to consider when adopting cybersecurity measures.[23]

Binding Data Protection Instrument: Any binding data protection instrument should state the cybersecurity measures being undertaken and why they are considered adequate under the GDPR standard.

Data Minimization

The GDPR generally requires the processing of personal data to be minimized.[24] Data minimization starts with the initial internal collection of data by the parties and extends throughout the process. In the context of document production for United States litigation,[25] the principles of which would be expected to be applied to arbitration, the relevant EU data protection authority has said that before personal data is reviewed for litigation it should be culled for relevance and to exclude sensitive information, preferably by the party or an expert data analyst, and pseudonymized or anonymized where possible.[26] Application of the data minimization principle, especially when data will be transferred outside the EEA, may eventually lead to less data being reviewed and disclosed in arbitration cases governed by the GDPR.

Binding Data Protection Instrument: The binding data protection instrument should address the efforts undertaken to minimize the data being processed, including during any data disclosure process (especially when tribunal-ordered).

Data Retention and Destruction

Data retention and destruction are considered "processing" under the GDPR.[27] The GDPR requires retention periods to be set at the time of data collection with the goal of minimizing the data being processed, which are applicable to arbitration.[28]

Binding Data Protection Instrument: The binding data protection instrument should address data retention. From the tribunal's perspective, it will be important to confirm that any data provided to the arbitrators can be retained as long as required by law or any relevant bar or other ethical rules. The parties' data retention policies may also be relevant to data disclosure and other issues addressed in the binding data protection instrument.

Data Subject Rights.

The GDPR grants data subjects significant rights, including the right to transparent information about the use of his or her data (which may include data privacy notices), to review and rectify data, to erasure and to deny processing, among other things.[29] These rights could apply to literally hundreds of individuals in a complex case and exemplify the difficulties in reconciling the GDPR with arbitration.

The first step is to consider what rights apply. Arbitration is exempted from certain of data subject rights when the data processing is "necessary for the establishment, exercise or defence of legal claims,"[30] and the GDPR further allows Member States to exempt other data subject rights when required for "the protection of judicial independence and judicial proceedings" and "the enforcement of civil law claims," which have been extended to arbitration in at least one EU country.[31]

After it is decided exactly what rights apply, the question is who is responsible for compliance? Under the GDPR, all data controllers are responsible and liable for complying with data subject rights (and, as discussed, there are likely to be many data controllers in an arbitration). However, for some data subject rights, like the provision of data protection notices, it is not feasible for all arbitral data participants to comply simultaneously. The GDPR wants the data subject to get one clear notice, not numerous different notices. But each arbitral participant is legally responsible for compliance and risks liability, although there is an exception where notification would be overly onerous.

Binding Data Protection Instrument: The binding data protection instrument should describe what data subject rights apply, who will comply and how, and describe the

processes being put in place to insure compliance and any applicable indemnification provisions.

Looking Forward

The relevant EU and Member State data protection authorities have yet to provide guidance about the application of the GDPR to arbitration, which would create increased certainty and uniformity. However, it is important for any guidance provided to properly reflect the realities of complex commercial arbitration and its cross-border, often confidential, consensual, decision-making function, including the protection of the parties due process rights. In the meantime, the case-by-case approach to GDPR compliance suggested in this article is imperfect but allows the arbitral process to work effectively within the GDPR framework.

Endnotes

1. Regulation (EU) 2016/679 of the European Parliament and the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. L 119/1 [hereinafter GDPR]. The GDPR applies to the current 28 EU Member States, which are Austria, Belgium, Bulgaria, Cyprus, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, the Netherlands and the United Kingdom. The GDPR has also been implemented into the Agreement on the European Economic Area (the "EEA Agreement") and therefore also applies to the three EFTA States (Iceland, Liechtenstein and Norway).
2. The term "data subject" refers to the individual that is identified or identifiable by the data. In the arbitration context, for example, this would be the person referred to or copied on an email, contract, lab report, etc. that is submitted in evidence, or is mentioned in a witness statement, brief, draft award etc. So in a complex arbitration, this could be hundreds of people.
3. GDPR *supra* note 1 at Art. 83.
4. GDPR *supra* note 1 at Art 6 (1).
5. The author has recently published an extensive treatment of these issues in the Fordham International Law Journal, *It's All About the Data: The Impact of the EU General Data Protection Regulation on International Arbitration* Volume 41, Issue 4 (2018), some of which were also addressed in the Global Arbitration Review at the time the GDPR came into force in *Managing Arbitral Data under the GDPR* (29 May 2018) https://globalarbitrationreview.com/article/1170035/managing-arbitral-data-under-the-gdpr.
6. GDPR *supra* note 1 at Art. 5.
7. *See id*. at Art. 4 (containing the definitions of the terms used in the regulation).
8. *See id*. at Art 3.
9. *See id* at Art 5(2), 24.
10. *See id*. at Art 29.
11. For cases existing when the GDPR came into force, if data protection has not already been considered, these issues should be raised as soon as they come to light to address compliance going forward.
12. *See* GDPR, *supra* note 1, at Art 6 (1).
13. *See id.*
14. *See id.*
15. The term "relevant EU data protection authority" refers both to the previous Article 29 Working Party established under the Data Protection Directive, and the European Data Protection Board established by the GDPR to issue guidelines, recommendations, and best practices to encourage consistent application of the GDPR and specify guidelines concerning the setting of administrative fines. The opinions of the Article 29 Working Party remain valid until modified under the GDPR.
16. *See* GDPR, *supra* note 1, at Art. 44.
17. *See, e.g.,* Guidelines 2/2018 on Derogations of Article 49 under Regulation 2016/679 (25 May 2018) [hereinafter "Derogations Guidelines"].
18. When a country has an adequacy finding data can flow freely to that country. The United States does not have a general adequacy finding but data can flow freely to entities agreeing to the Privacy Shield. The other countries having an adequacy finding are Andorra, Argentina, Canada (commercial organizations only), Faroe Islands, Guernsey, Israel, Isle of Man, Jersey, New Zealand, Switzerland, and Uruguay (and Japan and South Korea are negotiating with the EU).
19. *See* Derogations Guidelines *supra* note 17, at pp.12-13.
20. *See id.*
21. *See* GDPR *supra* note 1 at Art. 46 (3). Note that the GDPR also foresees pre-approved "standard contractual clauses" but these include provisions that are unacceptable for arbitration, including audit rights.
22. *See* GDPR *supra* note 1, at Art. 32.
23. *See ICCA*/NY Bar/CPR Consultation Draft Cybersecurity Protocol for International Arbitration Art. 13 (2018), http://www.arbitration-icca.org/media/10/43322709923070/draft_cybersecurity_protocol_final_10_april.pdf; Debevoise & Plimpton Protocol to Promote Cybersecurity in International Arbitration (2017), https://www.debevoise.com/~/media/files/capabilities/cybersecurity/protocol_cybersecurity_intl_arb_july2017.pdf.
24. *See* GDPR *supra* note 1, at Art 5 (1) (c).
25. Given their judicial function, EEA Member State courts are exempted from regulation by the data protection authorities, in deference to court supervision.
26. *See* Working Document on Pre-trial Discovery for Cross Border Civil Litigation (Article 29 Data Protection Working Party), 00339/09/EN WP 158, 2009).
27. *See id.*
28. *See id*.
29. See GDPR *supra* note 1, at Arts. 12-22.
30. *See id.,* at Art. 17 (3) (e).
31. *See id*., at Art. 23 (1) (f) and (j). Ireland has relied on this language to exempt the processing of personal data from certain data subject rights during out-of-court procedures. *See* Irish Data Protection Bill 2018 Art . 61 (No. 10b of 2018).

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International Arbitration and the Development of Common Law

By Noradèle Radjai

"Recent years have seen concerns raised about the legitimacy of arbitration, including concerns directed to alleged hindrance of the development of common law."

1. Overview

Recent years have seen concerns raised about the legitimacy of arbitration, including concerns directed to its alleged hindrance of the development of common law. The criticism across the common law world is that the growth of arbitration and the subsequent ebbing of court decisions are freezing doctrinal development.[1]

In England arbitration has been accused of "dragging with it into the darkness the very cases that should be used to develop the common law."[2] Most recently, the Lord Chief Justice of England and Wales fueled the debate with a controversial speech, accusing arbitration of turning the common law into "an ossuary."[3]

In Australia, commentators are observing that arbitration is "stunting the development of the common law."[4] In Canada, the Chief Justice of Canada drew the analogy that common law is akin to a living tree, where new branches are not appearing and old branches that need pruning are neglected.[5] In the U.S., some critics have gone so far as to declare arbitration responsible for "the end of law."[6] Even arbitration practitioners acknowledge the "dearth of precedent."[7]

This article proposes to assess these criticisms by asking the following questions:

- *Does* commercial arbitration hinder the development of common law?
- If so, does this hindrance render commercial arbitration any less legitimate?
- If so, how should commercial arbitration adapt?

2. Does Commercial Arbitration Hinder the Development of Common Law?

Undoubtedly arbitration is today the most common means of resolving international commercial disputes. Data from the major international arbitration institutions shows a steady growth in the number of arbitration disputes. This has led, in turn, to a diversion of commercial disputes away from commercial courts.

Many of these disputes are governed by common law. On the latest available statistics from the ICC, it would appear that English and New York law alone are the most frequent choices of law.[8] So it seems logical to conclude that the increase of arbitrations is removing from the state courts cases that might otherwise contribute to the development of common law.

One could protest against the criticism at this juncture. One could argue, for instance, that there are still many cases before the courts that contribute to the development of common law.[9] One could also argue that arbitration in the common law world also attracts cases to the common law courts.

Ultimately, however, the weight of these arguments will always be questionable, against the diminishing caseload of commercial courts relative to arbitration. Also, it is undeniable that new case law is required for common law to be able to adapt to and respond to developments in markets, trade and commerce.[10]

Therefore, the debate cannot end at this first question. Nor should it. To curtail the debate at this juncture would be a missed opportunity for a candid dialogue with the critics and a missed opportunity at a potential solution. The issue should instead be tackled at the more crucial juncture; what does this hindrance of the common law mean for the legitimacy of commercial arbitration and should we do anything about it?

3. Does the Hindrance of Common Law Development Make Commercial Arbitration Any Less Legitimate?

The outcome of any debate about legitimacy will be influenced by how broadly or narrowly the concept is defined.

We can consider a focused notion of legitimacy, looking at the interests of the stakeholders, usually the parties themselves, or what Professor Schill referred to in his seminal paper as party or community legitimacy.[11] Or we can consider legitimacy from the perspective of a broader population—per Schill's categories, this would be national or global legitimacy.[12]

Taking first the broader notions of legitimacy, from a national interest perspective, one could view the hindrance of the development of common law in any particular jurisdiction as contrary to those interests. This is true whether we view the issue from the perspective of state courts, whose mandate is to develop the law; from the perspective of parties to commercial court cases, who

will have expectations of how common law develops, or from the perspective of the public at large, whose interest is to be governed by a law that evolves and adapts in line with its programmed path.

"A solution that seeks to override party autonomy strikes at the heart of legitimacy."

From a global perspective, some argue that the stifling of the evolution of common law is not inconsistent with the interests of the population at large, since they can refer to other legal systems to govern their relationships. However, few people would disagree that the stifling of an entire system of law is not a desirable outcome—not least a system which forms the basis of almost one-third of the world's 320 legal jurisdictions.[13]

Even the civil law world is affected by this stifling. While more poignant in common law systems that base their development on binding precedent, civil law systems also develop by reference to cases, even if these are not binding precedent.[14] And even the reliance by civil law courts on doctrine and scholarly articles is necessarily curtailed by the limited access to cases, also for the purpose of commentary.

Taking a more focused notion of legitimacy, which examines the issue from the perspective of the parties or the arbitration community, one could argue that the courts and law are there to serve the public, not the other way around.[15] If parties choose to resolve their disputes in arbitration rather than before commercial courts, and as a result the law is less developed, that is the parties' choice.

However, this is perhaps overly simplistic. When parties choose common law to govern their contracts, they do so with certain notions of what that system of law represents. At the very least those notions must include an assumption that the system of law evolves and adapts with jurisprudence over time. If commercial arbitration limits this aspect of common law, then the legitimacy question must at least arise, even from purely a user perspective.

So whichever concept of legitimacy one adopts, there are arguments to be made against commercial arbitration's legitimacy by virtue of its impact on the development of law. Therefore, it should be considered how commercial arbitration can adapt to such concerns.

4. How Could or Should Commercial Arbitration Adapt to These Concerns?

A. The Proposal to Limit the Scope of Arbitration

The critics propose to revise arbitration legislation to restrict the scope of arbitration and increase the scope of courts' jurisdiction over commercial disputes.[16] Essentially, the proposed solution is to force parties to return to litigation to ensure the continued development of law.

But a solution that seeks to override party autonomy strikes at the heart of legitimacy. Parties do not opt for arbitration only to be returned to the state courts. They use arbitration to resolve their disputes, not to add to the body of common law. This and the additional time and costs that would result by parties having their arbitration cases appealed to the courts make this solution untenable, not to mention counter-productive.[17]

The development of the common law cannot depend on, or call for, the regression of arbitration. Instead a solution must be found which builds on the place that arbitration holds today, while enabling the courts to perform a mandate that in a strict sense can be performed by them and them only.[18]

B. A Solution Based on Greater Interaction Between Courts and Tribunals

It is a fact that many parties today refer their large international disputes to arbitration. If arbitration is hindering the development of common law, or even national law generally, to the detriment of its legitimacy, then we must develop a solution which taps into the law-making potential of arbitration.

(a) Body of Decisions Produced by Arbitral Tribunals (or "Lawmaking" for the Bold)

It cannot credibly be denied that a body of law is developing through arbitral awards, even if there are "persistent objectors."[19]

In the investment arbitration world, a "de facto doctrine of precedent" is now a given.[20]

In the realm of commercial arbitration, that development[21] has been somewhat slower by virtue of the limited publication of awards.[22] But where awards *are* available, it is accepted that while they are not binding precedent, they may constitute persuasive precedent as between tribunals.[23]

In practice one can see this in the formation of a body of law in certain industries, for instance a so-called *lex petrolea* in oil and gas industry and *lex sportiva* in sports. In these areas there has been a development of a group of principles that are considered standard practices in the respective industries, and hence widely accepted by them.[24] Irrespective of how we label these decisions, whether lawmaking or not, they constitute an important source for state courts that could then in turn develop the law in the strict sense. How can we achieve this?

(b) More Systematic Publication of Arbitral Decisions

The only way to enable this valuable interaction between tribunals and courts, for the furtherance of the

law, is to engage in a more systematic publication of commercial arbitral awards. Publication would enable parties to refer to such decisions in support of their arguments before courts, which would then allocate the appropriate weight to such decisions. The awards would not have precedential value in a strict sense but can be just as persuasive as other non-precedential material that is used by common law courts, such as academic articles and court decisions from other jurisdictions.[25]

Most importantly, the law would no longer be "underground."[26] To the extent companies are increasingly choosing arbitration over courts, and arbitrators are writing awards on recurring commercial legal issues, the secrecy of those awards is a loss overall.

A more systematic publication of arbitral awards is perhaps also advisable—and has been discussed—in view of other concerns from a legitimacy perspective, such as the increased involvement of states and other matters of public interest in commercial arbitrations, as well as the coherence of commercial arbitration decisions themselves.

(c) On Issues of Confidentiality

Of course, the manner and system we adopt for this broader publication of awards would have to be carefully assessed, in a manner that also respects the confidentiality of arbitration.

In this regard, it is worth noting that, while confidentiality remains an important feature for users, there has been a slight shift away from confidentiality in arbitration in recent years. The new edition of the ICC Rules, for example, does not have a default provision on confidentiality.[27] In addition, in recent years several national courts have made findings that the country's arbitration law does not include an express or implied duty of confidentiality.[28] Indeed, there is no unanimity on the issue of confidentiality across different legal systems.[29] Even in systems that integrate notions of confidentiality, parties who arbitrate necessarily accept that the details of an award may become public due to challenges to courts or through its enforcement.

Going forward, the publication of awards can be done in a manner that preserves the confidentiality of the parties and their business secrets, through a variety of means. Indeed, certain arbitral institutions and associations already publish excerpts of awards in a redacted form, including the ICC bulletin and the ICCA Yearbook on International Arbitration.[30]

Institutional arbitration rules like the ICC, the AAA-ICDR or the VIAC expressly allow for the publication of awards, in a way that does not undermine the privacy of the parties. For instance, AAA-ICDR Rules allow for the publication of selected awards that become public in the course of enforcement.[31]

Commentators have suggested further solutions, for example, publication of the award only after a certain period has elapsed[32]; publication limited to only the tribunal's reasoning[33]; and the possibility of tribunals to exclude publication of certain parts of awards upon hearing the parties.[34] For instance, the default rule of the applicable arbitration rules could be the publication of awards in an anonymized version, from which the parties could opt out.[35]

There are therefore possible solutions that can be applied in a manner that respects the confidentiality expectations and interests of arbitrations users. And while confidentiality remains an important element, even users have expressed a growing appetite for the publication of awards.[36]

5. Conclusion

The legitimacy of commercial arbitration is undoubtedly under fire today for a variety of reasons. It is only with the more systematic publication of awards that commercial arbitration can effectively respond to the criticism regarding the development of common law. It will then be for the common law judiciaries to determine what weight, if any, to give these decisions in their own application of the law in cases before them. But these latest calls for publication from the common law world may be the cue to finally take this long-heralded next step in the journey of commercial arbitration.

Endnotes

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2. Harris BOR, *Comments on Lord Chief Justice Thomas' 2016 Bailii Lecture which Promotes a Greater Role for the Courts in International Arbitration*, Kluwer Arbitration Blog (11 April 2016), *available at* < http://arbitrationblog.kluwerarbitration.com/2016/04/11/comments-on-lord-chief-justice-thomas-2016-bailii-lecture-which-promotes-a-greater-role-for-the-courts-in-international-arbitration/> (last accessed 7 June 2018).
3. Lord Chief Justice Thomas, *supra* note 1.
4. Andrew Stephenson and Astrid Andersson, *Arbitration: Can It Assist in the Development of the Common Law—An Australian Point of View*, 33(4) International Construction Law Review (2016) 413, p. 413.
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7. Ank Santens & Romain Zamour, *Dreaded Dearth of Precedent in the Wake of International Arbitration - Could the Cause also Bring the Cure?*, 7 Y.B. Arb. & Mediation (2015) 73.
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10. A. Stephenson and A. Andersson, *supra* note 4, at Section 5.
11. Stephan W. Schill, *Developing a Framework for the Legitimacy of International Arbitration*, in Albert Jan van den Berg (ed.), Legitimacy: Myths, Realities, Challenges, ICCA Congress Series, Volume 18 (Kluwer Law International 2015) 789, p. 812-813.
12. *Id.* at p. 813-817.
13. J. William Rowley QC, *supra* note 9.
14. Guy I. Seidman, *Comparative Civil Procedure*, in C. B. Picker and G. I. Seidman (ed.s), The Dynamism of Civil Procedure—Global trends and Developments (Springer 2015), p. 15.
15. Derek Auchie, *A Response to Judicial Comments on the Arbitration-Litigation Debate*, University of Aberdeen BlogSpot (5 May 2016), available at: https://www.abdn.ac.uk/law/blog/a-response-to-judicial-comments-on-the-arbitrationlitigation-debate/ (last accessed 7 June 2018).
16. Lord Chief Justice Thomas, *supra* note 1, at p. 13.
17. As Lord Saville, who chaired the committee that formed the Arbitration Act 1996, has argued, "[p]eople use arbitration to resolve their disputes, not to add to the body of English commercial law…Why, in other words, should they be obliged to finance the development of English commercial law?" Mark Saville, *Reforms will Threaten London's Place as a World Arbitration Centre*, The Times (28 April 2016), available at: https://www.thetimes.co.uk/article/reforms-will-threaten-londons-place-as-a-world-arbitration-centre-02t50mgrd (last accessed 7 June 2018); *see also* Tan Xi'en Rachel, *Essay on Lord Chief Justice Thomas' 2016 Bailii Lecture*, Singapore Academy of Law (2017) (unpublished), p. 5.
18. Justice Beverley McLachlin PC, *Judging the "Vanishing Trial" in the Construction Industry*, 5(2) Faulkner L. Rev. (2011) 315, p. 321; Ank Santens & Romain Zamour, *Dreaded Dearth of Precedent in the Wake of International Arbitration—Could the Cause Also Bring the Cure?"*, 7 Y.B. Arb. & Mediation (2015) 73, p. 83.
19. Lucy Reed, *Law-making in International Arbitration: What Legitimacy Challenges Lie Ahead?*, Working Draft for ICCA Congress Series no. 20 (2018) (unpublished), p. 10-11. The "persistent objectors" still insist that their role as arbitrators is to decide the dispute alone without any regard to future interpretation of similar treaty provisions. An illustrative example is the finding of the Romak tribunal that "the Arbitral Tribunal has not been entrusted, by the Parties or otherwise, with a mission to ensure the coherence or development of 'arbitral jurisprudence.' The Arbitral Tribunal's mission is more mundane, but no less important: to resolve the present dispute between the Parties in a reasoned and persuasive manner, irrespective of the unintended consequences that this Arbitral Tribunal's analysis," *Romak S.A. v. Republic of Uzbekistan* (UNCITRAL, PCA Case No. AA280), Award (26 November 2009), para. 171.
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24. Santens & Zamour, *supra* note 18, at p. 90.
25. Stephenson & Andersson, *supra* note 4, at 413.
26. Sir Bernard Rix, *Confidentiality in International Arbitration: Virtue or Vice*, Jones Day Professorship in Commercial Law Lecture, Singapore Management University (12 March 2015), p. 18.
27. See ICC Rules of Arbitration, r. 22(3) (2017); Jason Fry et al., The Secretariat's Guide to ICC Arbitration, paras. 3-807 at 235 (2012) ("The Rules do not provide that the arbitration proceedings are confidential. Rather than creating a general rule requiring the proceedings to be kept confidential and then attempting to define the exceptions that will inevitably arise, the Rules take a more flexible and tailor-made approach, leaving the matter for the parties or the arbitral tribunal to address in light of the specific circumstances of the case"). In addition, in recent years, several national courts have found that the country's arbitration law does not include an express or implied duty of confidentiality.
28. See, *e.g.*, Esso Australia Res. Ltd v. Plowman, XXI Y.B. Comm. Arb. 137, 151 (Australian High Ct. 1995) (1996); Judgment of 27 October 2000, Bulgarian Foreign Trade Bank Ltd v. A.I. Trade Fin. Inc., XXVI Y.B. Comm. Arb. 291, 298 (Swedish S.Ct.) (2001).
29. Sir Bernard Rix, *supra* note 26, at p. 16; Mayank Samuel, *Confidentiality in International Commercial Arbitration*, Kluwer Arbitration Blog (2017).
30. *See, e.g.*, ICC International Court of Arbitration Bulletin Vol. 25/No.2 for ICC Oil and Gas Cases., or the ICC International Court of Arbitration Bulletin Vol. 25/No.1, for the first ICC cases dealing with emergency arbitrator procedures.
31. AAA-ICRD Arbitration Rules, Art. 30(3).
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33. M. Feldman, *International Arbitration and Transparency* (2016) Peking University School of Transnational Law Research Paper No. 16-12, p. 21.
34. B. Juratowitch, *Departing from Confidentiality in International Dispute Resolution*, BIICL Seminar on Difficult Issues in Commercial, Investor-State, and State-State Dispute Resolution: Differences and Commonalities, 8 June 2017, p. 8.
35. Sir Bernard Rix, *supra* note 26, at p. 21.
36. When asked about what institutions could do to improve international arbitration, 64 percent of the respondents to the Queen Mary University survey mentioned the publication of awards in a redacted form and/or summaries: 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, conducted by the Queen Mary University and White & Case, p. 23, available at: <https://www.whitecase.com/publications/insight/2015-international-arbitration-survey-improvements-and-innovations> (last accessed 7 June 2018), p. 23.

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AAA-ICDR 2018 Update

By Luis Martinez, Michelle Skipper and Jeffrey T. Zaino

The American Arbitration Association-International Centre for Dispute Resolution (AAA-ICDR) seeks to offer both new services and innovative ways to improve the alternative dispute resolution both domestically and internationally. This article provides an update on some recent efforts by the AAA-ICDR.

eDiscovery Special Master Select

Aware that the rise in the use of electronically stored information (ESI) is resulting in a corresponding increase in the number of eDiscovery-related disputes, the AAA established AAA eDiscovery Special Master Select, not only for parties in arbitration but for also those involved in litigation. Courts and litigants increasingly are seeking knowledgeable individuals to serve as eDiscovery Special Masters. This service provides parties access to a panel of experts in the preservation, collection and production of electronically stored data. The use of a Special Master can reduce the legal costs of resolving eDiscovery disputes in court or arbitration as well as narrow the eDiscovery disputes in contention.

Case Financial Administrative Services

Adding to its list of à la carte services, that offers parties the option of selecting certain stand-alone services for non-administered cases, the AAA introduced Case Financial Administrative Services, which allows parties to utilize the full range of financial administration services provided by the AAA without commiting to full case administration. With this service, the AAA acts as an impartial third party managing the financial aspects of the case, thereby supporting the continued neutrality of the arbitrator.

Arbitrator/Mediator Videos

AAA-ICDR offers arbitrators an opportunity to augment their traditional commercial, construction, employment and ICDR panelist resume by providing parties with videos of panelists during the arbitrator and mediator selection process. The videos provide arbitrators with the opportunity to briefly discuss their expertise, methods for streamlining arbitration, philosophy on discovery, and career over the last two to three years. Mediators have wide latitude when it comes to the topics they discuss: their mediation style, their views on joint sessions, their unique skill and experience, among other topics. This is voluntary and to date nearly 300 panelists have completed videos.

Streamlined Three-Arbitrator Panel

The Streamlined Three-Arbitrator Panel option is available for large complex cases and allows parties to utilize a single arbitrator for the preliminary and discovery stages of a case. The full panel of three arbitrators then participates in the evidentiary hearing and renders the final award. The AAA-ICDR has found that a three-arbitrator panel can actually cost five times as much as a single arbitrator. Moreover, approximately 60 percent of business cases filed with the AAA-ICDR are resolved prior to award. With this in mind, the AAA-ICDR developed the Streamlined Three-Arbitrator Panel option so that parties can take advantage of a potentially large cost saving.

Pro Se Administration

The AAA-ICDR expanded its offering of resources for pro se parties, including a new video that provides information on presenting a case in arbitration. It also cooperates with the American Bar Association to provide access to the ABA's Affordable Legal Services resources.

Diversity Initiatives

As part of the AAA-ICDR's continuing effort to expand diversity on the panel of arbitrators and mediators, the Commercial Division collaborated with the Minority Corporate Counsel Association (MCCA) through sponsorship of the MCCA's annual meeting and presentation of an ADR program for its members. In August 2018, the Division worked with the LGBT Bar Association to put together a program on developing ADR skills for the LGBT Bar Annual Meeting in New York City. The Commercial Division also assisted with the conception of a new organization, the ADR Inclusion Network, which focuses on promoting diversity in the ADR community.

The AAA-ICDR also continues to emphasize diversity in its recruitment of arbitrators and mediators. Executives across every division of the organization actively recruit women and minority candidates who meet the criteria established for the AAA-ICDR's panels. As a result, in 2017, the AAA added 78 new women and minority candidates

to its roster. As part of its recruitment efforts, the AAA continues to build coalitions and participate in events with national, minority, and local bar associations and law schools around the country in order to provide training and create opportunities for diverse practitioners. The AAA-ICDR also continues to offer the Higginbotham Fellows Program every other year. This week-long program and mentoring opportunity is for diverse candidates interesting in expanding their ADR practices and/or to become an arbitrator or mediator.

Alternative Fee Arrangement

Current and past AAA-ICDR clients indicated they would be interested in having arbitrators serve under an alternative fee arrangement (AFA). Recognizing that alternatives to hourly rates are often used by businesses and their outside counsel in today's market for legal services, AFA is now an option for certain commercial and construction cases. Because not all parties would want an alternative fee arrangement, and even those interested might not want such an arrangement for all arbitration cases, the AFA is optional.

There are two options available, fixed fee and capped fee. Under the fixed fee option, the arbitrator and the parties agree to a set overall fee for the case, usually broken into fee segments tied to the various stages of the arbitration case. Under the capped fee option, the arbitrator will bill the parties based on his or her usual hourly or hearing rate, up to a specified capped amount. Once the arbitrator's billing meets the capped amount, the arbitrator will not bill further fees to the parties.

The Alternative Fee Arrangement option is available only for two-party, commercial and construction cases following the regular or large, complex case track with a single arbitrator. One important aspect for using the AFA option is counsel's ability to cooperate in the early stages of the case.

New Employment Fee Schedule

A new Employment Fee Schedule was implemented in 2017 by the AAA-ICDR, undertaken in response to changing employment and labor laws aimed at increasing access to alternative dispute resolution modalities and to ensuring equity in the resolution of workplace-related disputes. The AAA-ICDR addressed concerns raised by parties with respect to cost by shifting the responsibility for the advancement of arbitrator compensation to the employer or company. In addition, filing fees were simplified by the crafting of a flat fee for both parties.

International

From the AAA-ICDR's international division, the ICDR continued to develop a number of global initiatives and new service offerings.

There were 1,026 cases filed with the ICDR in 2017, with total claims of $6.33 billion and counterclaims of $648 million. The largest claims by industry were (in descending order) in technology, commercial insurance, energy, aviation/aerospace/national security, pharmaceuticals, financial services and commercial construction. There was a 21 percent increase in Canadian parties in ICDR cases, and 55 hearings took place in Canada.

Emergency Arbitration

The ICDR introduced its emergency arbitration mechanism in 2006. A party may apply for emergency relief before the appointment of an arbitrator or the tribunal by requesting the appointment of an emergency arbitrator at the time of filing to render a determination regarding the emergency relief sought. Since its introduction numerous other international institutions have adopted a similar mechanism. The ICDR has administered 85 emergency arbitrations since the inception of the Emergency Rule and these cases are handled on an expeditious basis with emergency arbitrators having to render their determinations regarding the requested relief pursuant to accelerated time frames.

International Diversity Initiatives

In 2017, the ICDR's international panel consisted of 17 percent women and the ICDR further strengthened its commitment to international panel diversity with 22 percent of arbitrator appointments being female, a 6 percent increase from 2016. The ICDR's also considers diversity when inviting speakers for their educational programs and conferences around the world.

International Arbitrator Search Tool

The ICDR launched its international arbitrator online search platform in 2017, a resource that enables parties to search the ICDR's roster of International Arbitrators and assists them in selecting party-appointed arbitrators, the Tribunal Chair and other members of the Tribunal.

International Administrative Review Council, (I-ARC)

The International Administrative Review Council (I-ARC) was constituted in 2017. Composed of ICDR executives, I-ARC will make determinations on the following: arbitrator challenges, filing requirement disputes/

challenges to ICDR administration, hearing locale and the number of arbitrators to be appointed. To provide consistency in decision-making, guidelines, standards and statistics will be published on the issues that have been reviewed.

The EU-U.S. and Swiss-U.S. Privacy Shield Framework

The EU-U.S. and Swiss-U.S. Privacy Shield Framework was designed to provide a compliance mechanism for data protection requirements involving personal data transferred from the European Union and Switzerland to the United States.

Personal data may only be transferred outside of the EU and Switzerland to countries that have been formally recognized by the EU and the Swiss as ensuring "adequate" data protection and the Privacy Shield program satisfies that criteria for the U.S. companies that register for this program and abide by its principles. The Privacy Shield program also allows the participating U.S. organizations to be largely compliant with the General Data Protection Regulation, which went in to effect on May 25, 2018.

In order to ensure compliance with the Privacy Shield programs, U.S. organizations must, in addition to the self-certification where they agree to the Privacy Shield Principles, select and provide access to a readily available independent recourse mechanism (IRM), so that each individual's complaints and disputes (e.g., complaints and disputes of residents of the EU and Switzerland) can be investigated and expeditiously resolved at no cost to the individual. The ICDR has been designated as the IRM for over 400 U.S. organizations.

If the individual's complaints or disputes are not resolved at the IRM stage, EU or Swiss nationals may invoke Annex I binding arbitration to determine whether a Privacy Shield organization has violated its obligations under the Privacy Shield Principles as to that individual and whether any such violation remains fully or partially unremedied ("residual claims").

Organizations voluntarily self-certify to the Privacy Shield Principles and, upon certification, the commitments become legally enforceable under U.S. law. Organizations that self-certify to the Privacy Shield Framework are required to arbitrate claims pursuant to the Recourse, Enforcement and Liability Principle.

In 2017, the ICDR was designated by the U.S. Department of Commerce to administer the "Annex I Binding Arbitration Program." U.S. Privacy Shield organizations are required to participate in these Annex I arbitrations and approximately 3,000 companies are participating in the Privacy Shield program. The ICDR, in consultation with the U.S. Department of Commerce and its EU and Swiss counterparts, developed an expedited set of international arbitration rules and arbitrator code of conduct for the program. The arbitrators were selected by the EU and Swiss jointly with the Department of Commerce. For further information on the ICDR's Privacy Shield services, visit https://www.icdr.org/privacyshield.

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Institutional Arbitration "Made in Germany": The New Arbitration Rules of the German Arbitration Institute (DIS)

By Klaus Peter Berger

"The New DIS-Rules are characterized by their strong emphasis on procedural efficiency and pro-active case management."

Introduction

On March 1, 2018 the German Arbitration Institute (DIS) published its new set of Arbitration Rules.[1] This date marked the end of an intensive consultation and drafting process which began in late 2016 and involved 28 meetings of three revision commissions. The commissions had to review 500 pages of reform proposals from domestic and international arbitration practitioners. The members of the commissions included German and foreign arbitrators, lawyers representing clients in arbitrations, as well as corporate users. The new DIS-Rules replace the 1998 Arbitration Rules, which were published on 1 July 1998 as a reaction to Germany's adoption of the UNCITRAL Model Law on International Commercial Arbitration on January 1, 1998.[2] The new DIS-Rules, like the German arbitration law, apply to both domestic and international arbitrations. Like their predecessor, the new DIS-Rules share the spirit of the Model Law as a "worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world."[3] In fact, over the past years more than 30 percent of the annual DIS-caseload involved foreign parties.[4] In addition to this international spirit, which leaves ample room for party autonomy, the new DIS-Rules are characterized by two essential features that will boost the DIS's competitiveness in the worldwide market for institutional arbitration services:

- increased efficiency of the proceedings through the use of modern case management techniques by tribunals operating under the new DIS-Rules, and
- quality control and transparency of the administrative services to be performed by the DIS under the new Rules.

Efficiency of Arbitral Proceedings

The new DIS-Rules are characterized by their strong emphasis on procedural efficiency and pro-active case management.[5] In the early phase of the proceedings, they provide for a quicker constitution of the arbitral tribunal as compared to the 1998 Rules. Deadlines for nomination of respondent's arbitrator and for the nomination of the chairman by the two co-arbitrators were shortened to 21 days after receipt of the request for arbitration, namely, 21 days after being requested by the DIS to nominate a chairman. Moreover, in the interest of speed and cost-efficiency, the new Rules deviate from the three-member-tribunal fall-back-rule of the 1998 Rules and the German arbitration law. Instead, where the parties have not agreed on the number of arbitrators, each party may apply to the DIS to appoint a sole arbitrator. Also in deviation from the 1998 Rules, the respondent is now required to submit his answer within 45 days after receipt of the request for arbitration. That deadline can be extended upon the respondent's request to a maximum of 30 additional days. Only in exceptional circumstances may it be extended beyond 75 days.

To induce pro-active case management, the Rules require the tribunal to hold a case management conference (CMC) within 21 days of its constitution. The conference should be attended by representatives of the parties to make sure that they get a first-hand impression as to how the tribunal intends to conduct the proceedings. Getting the parties involved at this early stage is essential for the efficient conduct of the proceedings given that, at the CMC, the tribunal shall specifically discuss with the parties a number of important issues related to the proactive procedural management of the arbitration. These issues include measures for increasing procedural efficiency which are contained in Annex 3 of the Rules. This Annex lists the following case management techniques:

A. Limiting the length, or the number of submissions, of any written fact witness statements, and of any expert reports provided by the parties.

B. Conducting only one oral hearing, including any taking of evidence.

C. Dividing the proceedings into multiple phases.

D. Rendering one or more partial awards or procedural orders on specific issues.

E. Regulating whether the production of documents can be requested from a party that does not bear

the burden of proof, as well as possibly limiting document production requests generally.

F. Providing the parties with a preliminary non-binding assessment of factual or legal issues in the arbitration, provided all of the parties consent thereto.

G. Making use of information technology.

The technique under F. above has always been part of the "Germanic" procedural tradition. Over the last years, it has gained increasing popularity in international arbitration, and has been adopted in Art. 2 (3) IBA Rules on the Taking of Evidence in International Arbitration.[6]

Another issue to be discussed with the parties at the CMC is the question whether the Rules on Expedited Proceedings in Annex 4 of the new DIS-Rules should be applied. Contrary to other arbitration rules, the application of these Rules does not depend on the amount in dispute, but requires an agreement of the parties. During the revision of the Rules, many in-house counsel expressed a clear preference for a system in which the application of the rules of expedited proceedings is evaluated by the parties at the outset of the arbitration during the case management conference rather than at the stage of concluding the arbitration agreement when the details of future disputes are not yet known.[7] According to the Expedited Rules, the final award shall be made, at the latest, six months after conclusion of the CMC.

"An essential feature of the new DIS-Rules is a balance between a much more 'hands-on' administrative approach by the DIS and the avoidance of undue bureaucratic interference."

At the CMC, the tribunal shall also discuss with the parties the possibility of using mediation or any other method for the amicable resolution of the dispute as a whole or of individual issues. That provision reflects the important policy enshrined in the new DIS-Rules that arbitration is not regarded as the sole alternative dispute resolution mechanism. For the same reason, the new DIS-Rules now allow the tribunal, at the request of all parties, to record in the form of an award by consent a settlement agreement or a decision arising out of proceedings pursuant to the DIS-Rules on Mediation, Conciliation, Adjudication, Expertise or Expert Determination.[8] This new authority eliminates one of the natural weaknesses of these means of alternative dispute resolution, the fact that settlements or decisions resulting from these processes do not lend themselves to immediate enforcement.[9] Parties conducting arbitrations under the new DIS-Rules will be made aware of their option to make use of the DIS's broad portfolio of ADR Rules because the new DIS-Rules allow the parties to request the appointment of a "Dispute Manager" either prior to the filing of a request for arbitration or at any time during the course of the arbitration. It is the task of the Dispute Manager to "advise and assist the parties in selecting the dispute resolution mechanism best suited for resolving their dispute." The details of the proceedings before the Dispute Manager are regulated in the Dispute Management Rules (DMR), which are contained in Annex 6 of the new Rules. When a Dispute Manager has been duly appointed, he or she may attend the CMC with authorization of the arbitral tribunal.

A final topic for the CMC is the efficient use of expert evidence, whether appointed by the parties or the tribunal. In complex disputes, that issue may not lend itself to discussion at an early stage of the proceedings. It may, however, be the subject of a subsequent CMC, which the new Rules encourage the tribunal to conduct if necessary.

To further enhance the efficiency of DIS arbitration proceedings, the new Rules also specify that the extent to which the parties have conducted the arbitration efficiently is one aspect to be taken into account by the tribunal in its decision on costs. That approach is in line with Art. 9 (7) IBA Rules on the Taking of Evidence in International Arbitration. In fixing the arbitrators' fees in cases where the proceedings have been terminated prior to the rendering of the final award, the DIS may take into account the diligence and efficiency of the arbitrators in the conduct of the proceedings, considering the complexity of the proceedings and the economic value at stake.

One scenario in which the arbitration is terminated before a final award is rendered is the amicable settlement of the dispute. The new Rules have retained the well-known provision from the 1998 DIS Arbitration Rules that deals with this topic. Pursuant to that provision, the tribunal shall, at every stage of the arbitration, seek to encourage an amicable settlement of the dispute or of individual disputed issues. This provision reflects the long-standing proactive approach to settlement in Germanic jurisdictions. The settlement conferences which are part of that tradition must be distinguished from mediation.[10] That approach has now found its way into international arbitration practice.[11] The new DIS-Rules specify that the tribunal may not engage in proactive settlement promotion if one party objects. This approach is in line with current DIS practice. A proactive approach to settlement should not be confused with forcing parties into having to agree to a settlement or to settlement terms they do not want.[12]

A further incentive to conduct the proceedings in a time-efficient manner is the DIS' involvement in the fixing of the arbitrators' fees. If the proceedings end with a final award and the draft award is not sent to the DIS Secretariat for review within three months after the last hearing or the last authorized submission (whichever is later), the DIS Arbitration Council may, after consultation with the tribunal and taking into account the circumstances of the case, reduce the fee for one or more arbitrators based on the time taken by the tribunal to issue the award.

The new DIS-Rules also reconcile the ever-increasing complexity of contract practice in domestic and international business with the fundamental requirement of consent on which arbitration is based. They contain detailed provisions on multi-contract and multi-party arbitration, including a new provision on the constitution of three-member tribunals in multi-party arbitrations, and on joinder of additional parties.

The provisions on the confidentiality of the proceedings, which were already contained in the 1998 Rules, were tightened at the request of the corporate users during the revision process. That duty now extends to the parties and their outside counsel, the arbitrators, the DIS employees and any other persons associated with the DIS who are involved in the arbitration. It relates to any information concerning the arbitration, including in particular the existence of the arbitration, the names of the parties, the nature of the claims, the names of any witnesses or experts, any procedural orders or awards and any evidence that is not publicly available. The DIS may publish statistical data or other general information concerning arbitral proceedings, provided that no party is identified by name and that no particular arbitration is identifiable on the basis of such information. However, the DIS may not publish an arbitral award unless all of the parties agree in writing.

Transparency and Quality Control of Administrative Services

Proceedings under the 1998 Rules were characterized by minimum administrative activities by the DIS during the arbitration. In many respects, institutional arbitration under the old Rules resembled *ad hoc* proceedings, with the tribunal carrying the burden of tasks which, under other rules, are to be performed by the arbitral institution. An essential feature of the new DIS-Rules is a balance between a much more "hands-on" administrative approach by DIS and the avoidance of undue bureaucratic interference. The drafters of the new DIS-Rules have transferred numerous administrative tasks and other decisions from the tribunal to the DIS. These tasks include the administration of the parties' advances on costs, decisions on the challenge and removal of arbitrators, the fixing of the arbitrators' fees in case the arbitration is terminated before the making of the final award, the increase of fees in cases of particular complexity of the dispute, and the reconsideration of the tribunal's determination of the amount in dispute, pursuant to which the fees for the arbitrators are calculated.[13] To allow the DIS Secretariat to monitor the conduct of the arbitrations under its new Rules, arbitral tribunals are required to transmit to the DIS a copy of each procedural order and the procedural timetable as well as any amendments thereto.

The new Rules also provide for a more proactive role of the DIS Secretariat in the final stage of the arbitration. They specify that the arbitral tribunal shall send a draft of the award to the DIS Secretariat for review. The Secretariat may then make observations with regard to form (e.g., lack of formalities for final awards provided for in the Rules) and may suggest other non-mandatory modifications to the arbitral tribunal, e.g., with respect to clerical errors or an incomplete or unclear operative section. This review process is less rigid and less time-consuming than the scrutiny process conducted by the ICC Court pursuant to Art. 34 ICC Arbitration Rules. The DIS usually effects the review process within 48 to 72 hours after receipt of the draft award by the DIS.[14] This process is, in fact, not new to arbitrations conducted under the auspices of the DIS. The new DIS-Rules simply reflect the already existing quality-control practice of the DIS Case Management Team. The Rules make it clear that, irrespective of this review process, the exclusive responsibility for the content of the award remains with the arbitral tribunal.

To handle the increased administrative duties of the DIS during the arbitration, a new body was created, the DIS Arbitration Council. The Council will appoint special subcommittees with three members possessing arbitral know-how for the continuing administration of individual arbitral proceedings under the new Rules. The already existing DIS Appointing Committee will retain its competencies in the context of the appointment of arbitrators. Challenges of arbitrators, however, will henceforth be decided by the Arbitration Council. The details of the activities of the DIS Secretariat, the Arbitration Council and the Appointing Committee are regulated in a transparent manner in the Internal Rules in Annex 1 to the new DIS-Rules.

Conclusion

The German Arbitration Institute has a long-standing tradition as a dispute resolution service provider that reaches back to the 1920s. With the new 2018 Arbitration Rules, the DIS has made a major step to repositioning itself in the global landscape of arbitral institutions. The

emphasis on proactive case management and broad room for party autonomy, together with the Germanic tradition of early case determination and promotion of settlement, as well as the increased administrative services by the DIS, provide a good mix of tradition and innovation. The UNCITRAL Model Law as *lex arbitri* and the long experience and excellent reputation of the German courts in all matters that relate to the support and control of arbitrations taking place in Germany create an arbitration-friendly legal environment. The 2018 DIS-Rules are therefore an attractive option, not only for the resolution of domestic disputes but also for efficient alternative dispute resolution in international business.

Endnotes

1. English text available at www.disarb.org/en/16/rules/dis-arbitration-rules-2018-id38; *see generally* Wittinghofer/Gayer/Hertel/Kupka, *The DIS Rules of Arbitration of 2018*, http://arbitrationblog.kluwerarbitration.com/2018/02/15/new-dis-rules/.
2. Text available at www.disarb.org/en/51/materials/german-arbitration-law-98-id3; *see generally Kreindler/Kopp/Gerardy*, Arbitration Guide, IBA Arbitration Committee, Germany (Updated February 2018).
3. *See* www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html.
4. *See* Theune, in *Schuetze* (ed.) Institutionelle Schiedsgerichtsbarkeit, 3rd ed. 2018, DIS-Schiedsgerichtsordnung, Einleitung, No. 4.
5. *See* for the key concerns with respect to efficient case management in international arbitration (transparency, proactivity, interactivity, proportionality) Berger/Kwon, in: Pitkowitz *et al*., *The Vienna Predictability Propositions: Paving the Road to Predictability in International Arbitration*, Austrian Yearbook on International Arbitration 2017, 141 *et seq*.
6. Art. 2 (3) IBA Rules on the Taking of Evidence in International Arbitration of 29 May 2010 provides: "The Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues: (a) that the Arbitral Tribunal may regard as relevant to the case and material to its outcome; and/or (b) for which a preliminary determination may be appropriate."
7. Wittinghofer/Gayer/Hertel/Kupka, *supra* note 1.
8. *See* for the text of these DIS-Rules, www.disarb.org/en/16/rules/overview-id0.
9. *See* for UNCITRAL's work on the preparation of instruments on the enforcement of international settlement agreements resulting from conciliation, consisting of a draft convention and draft amendments to the UNCITRAL Model Law on International Commercial Conciliation UN Doc. A/CN.9/WG.II/WP.205.
10. *See Berger Promoting Settlements in Arbitration, Is the 'German Approach' really incompatible with the Role of the Arbitrator?*, New York Dispute Resolution Lawyer 2016, 46.
11. *See* Berger/Jensen, *The Arbitrator's Mandate to Facilitate Settlement*, Fordham International Law Journal 2017, 887 *et seq*.
12. *See* Berger, *supra* note 8, at 47.
13. *See also* Wittinghofer/Gayer/Hertel/Kupka, *supra* note 1.
14. Mazza/Menz, *Neuerungen in der 2018 DIS-Schiedsgerichtsordnung im Überblick*, in: 2018 DIS Arbitration Rules, German Arbitration Journal (SchiedsVZ) Special Edition 2018, 39, 42.

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International Arbitration in Stockholm: Modern, Efficient ADR with Century-Old Roots

By Anja Havedal Ipp

"The aim was to streamline certain arbitral procedures."

The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) is one of the world's leading forums for international commercial and investment arbitration. Established in 1917, the SCC gained recognition on the global stage in the 1970s, when the United States and the Soviet Union chose Stockholm as neutral ground for the resolution of East-West trade disputes. Since then, the SCC has emerged as one of the world's foremost institutions for international commercial arbitration. Today, around half of the SCC caseload comprises international disputes, involving parties from 30-40 countries each year. The SCC also plays a unique role in the international system developed for bilateral and multilateral investment protection worldwide: More than 100 bilateral investment treaties (BITs) refer investor-state disputes to Stockholm, and the SCC Rules are now among those most commonly used for such disputes, second only to the ICSID and UNCITRAL rules.

The SCC launched revised arbitration rules at the beginning of 2017, after a two-year process that involved an international review committee, user consultations and public hearings.[1] The aim was to streamline certain arbitral procedures, respond to user demands for more time- and cost-efficient proceedings, and accommodate global trends and developments in arbitral practice. What follows is a summary of the most significant features and innovations of the revised SCC Rules, and some reflections based on a year and a half of their implementation.

Efficiency as a Guiding Principle

Arbitration users have in recent years voiced concern regarding increasing costs; according to the 2018 Queen Mary Survey, high cost and lack of speed are seen as among arbitration's worst features.[2] Heeding these concerns, the SCC made efficiency and expeditiousness the guiding principles of the rules revision process.

A new Article 2 was added, stipulating that the SCC, the tribunal and the parties "shall act in an efficient and expeditious manner" throughout the proceedings. Similarly, Article 23 provides that arbitrators must conduct the arbitration in an efficient and expeditious manner, and Article 28 requires the tribunal and the parties to "adopt procedures enhancing the efficiency and expeditiousness of the proceedings." The standard of efficiency and expeditiousness is also found in the provisions on joinder, multiple contracts, consolidation, and summary procedure.

"A party can request the tribunal to decide on one or more issues of fact or law by way of summary procedure."

To put force behind the references to efficiency and expeditiousness, the SCC Rules also include corresponding cost provisions. This means that, in apportioning the arbitration costs between the parties, the tribunal must consider each party's contribution to the efficiency and expeditiousness of the arbitration. A winning party may not recover its costs if the party's litigation tactics have caused delays. Similarly, in determining the costs of the arbitration, the SCC now explicitly considers the extent to which the tribunal acted in an efficient and expeditious manner; for example, repeated or unreasonable requests for extensions of time to render the award may result in decreased fees for the arbitrators.

Summary Procedure

Also in the spirit of efficiency, the 2017 SCC Rules include a summary procedure provision. Under article 39, a party can request the tribunal to decide on one or more issues of fact or law by way of summary procedure, without necessarily undertaking every procedural step that might otherwise be adopted for the arbitration. The request can be made at any point during the arbitration; this differs from similar provisions in other arbitration rules, which typically allow for the *early* dismissal of claims.

SCC's summary procedure is a case-management tool intended to permit the quick dismissal of frivolous claims or untenable allegations concerning jurisdiction, admissibility or merit. It may be appropriate where an allegation of fact or law material to the dispute is manifestly unsustainable, or in situations where no award could be rendered in favor of a party under the applicable law, even if the facts alleged by that party are assumed to be true.

If the tribunal grants a party's request for summary procedure, it also determines *how* to proceed. In other words, the rule itself does not specify the procedural steps, but rather allows the tribunal to shape the procedure as it sees fit. To date, the summary procedure provision has seen only very limited use, and no tribunal has so far granted a request to proceed summarily.

Tribunal Size and Secretaries

In previous versions of the SCC Rules, there was a presumption that the dispute should be heard by three arbitrators—two appointed by the parties and the SCC-appointed chair—unless the parties otherwise agreed. In the 2017 Rules, this presumption was abandoned in favor of a more flexible approach, informed by the reasoning that a sole arbitrator will result in lower fees and quicker arbitral proceedings. Now, unless the parties' arbitration agreement stipulates the number of arbitrators, the parties must express their preference in their initial submissions. In most cases registered since the implementation of the new rules, this has led to party agreement on a three-member tribunal. In the few cases where the number of arbitrators has become a question for the SCC, the board has usually decided to appoint a sole arbitrator rather than a tribunal. Overall, including cases where the tribunal makeup is stipulated by the arbitration clause, around 70 percent of cases are heard by a three-member tribunal, and the remainder by a sole arbitrator.

"In 2017, more than one-third of the 200 new cases were registered under the Expedited Rules."

Another way to make arbitral proceedings more efficient is for a secretary to assist the tribunal with administrative tasks. The role of tribunal secretaries has been a hotly debated issue in recent years, and most institutional arbitration rules now regulate how secretaries are to be appointed and what tasks they may perform. Under Article 24 of the 2017 SCC Rules, a tribunal or sole arbitrator may propose that a certain secretary be appointed, but the SCC will appoint that secretary only if the parties approve. This gives the parties an opportunity anonymously to decline the involvement of a secretary. The secretary is also required to sign a statement of impartiality and independence, and can be challenged and removed on the same grounds as an arbitrator. The SCC Rules do not, however, address the secretary's tasks, but leaves this up to the tribunal and the parties.

Multiparty and Multi-Contract Disputes

The 2017 SCC Rules also include provisions aimed at complex disputes, in which it may be more efficient to hear in one arbitration all claims related to a particular business transaction or series of transactions. Article 14 specifies the circumstances under which a party may make claims arising out of more than one contract; Article 15 provides for the consolidation of a newly commenced arbitration with a pending one; and Article 13 allows an existing party to "bring in" a third party through joinder.

Previously, these procedural tools were largely dependent on party agreement, but in the 2017 Rules the SCC may allow multi-contract claims, consolidation of arbitrations, or joinder of additional parties even over the objection of a party. In deciding whether to do so, the SCC Board will take into account whether the arbitration agreements are compatible, whether the claims arise out of the same transaction, and whether it will serve the efficiency and expeditiousness of the proceedings. Decisions by the SCC board on joinder, consolidation and multi-contract issues are preliminary; the tribunal ultimately has to decide whether it has jurisdiction over all parties and claims. So far, most requests for consolidation have been granted, and the sole request for joinder was rejected as untimely. Multi-contract claims usually proceed in one arbitration based on party agreement, except where the arbitration clauses are obviously incompatible.

Rules for Expedited Arbitration

In addition to its Arbitration Rules, the SCC also maintains separate Rules for *Expedited* Arbitration ("Expedited Rules"). Expedited arbitrations make up a growing segment of the SCC caseload: In 2017, more than one-third of the two hundred new cases were registered under the Expedited Rules. The increasing popularity of expedited arbitration may be a reaction to the general trend toward longer, more complex and resource-intensive arbitral proceedings. In an expedited arbitration, the dispute is heard by a sole arbitrator, there is often no hearing, and page and time limitations are imposed on the parties' written submissions. At the SCC, the Expedited Rules apply only where the parties have so agreed. Most commonly, this is by stipulation in the arbitration agreement, but it also happens that the parties agree on an expedited procedure after a dispute has arisen.

The SCC launched revised Rules for Expedited Arbitration in 2017, seeking to offer its users even more streamlined, efficient and cost-effective dispute resolution. One significant change in the 2017 Expedited Rules was that the Request for Arbitration also constitutes the Statement of Claim, and that the respondent's Answer also constitutes the Statement of Defense. This "front-loading" of the case aims to save time by having the main submissions in place when the arbitrator receives the case file. Although some observers were concerned that this would create confusion among users, the new procedure has worked well in practice.

In addition to the Request for Arbitration and the Answer, each party may make only one supplementary written submission. The arbitrator may, of course, request the parties to make additional submissions if necessary. The Expedited Rules also specify that submissions should be brief and, importantly, that the time frame for submission must not exceed 15 working days, unless the arbitrator finds compelling reasons to give a party more time. In the spirit of expediency, the rules also require that a case management conference be held promptly after referral, and that a timetable be set within seven days. In the

SCC's experience, arbitrators, parties and counsel generally comply with these deadlines.

The 2017 Expedited Rules introduced a presumption that no hearing should be held in an expedited case unless a party so requests *and* the arbitrator considers that special reasons exist. In practice, hearings have been held in about one-third of the cases initiated under the revised Expedited Rules. The absence of a hearing typically contributes to a quicker resolution of the dispute: In 2017, 54 percent of awards under the Expedited Rules were rendered within three months of referral, and another 38 percent within six months.

Prior to the 2017 revision of the Expedited Rules, arbitrators voiced concerns that parties' expectations of the proceedings sometimes did not match the procedural framework envisioned by the rules. As a result, the revised rules give the arbitrator a greater mandate to limit the proceedings and reject parties' requests for further submissions or longer hearings. The 2017 Expedited Rules emphasize efficiency, and instruct the arbitrator to "consider at all times the expedited nature of the proceedings."

Looking to the Future

Having celebrated its centennial in 2017, the SCC Arbitration Institute now has its eye on the horizon. The SCC intends to maintain its strong international profile, and continue to be an active voice speaking for efficient and flexible alternative dispute resolution.

The SCC aims to build on its remarkable history, letting its unique understanding of commercial and investment disputes inform an even better arbitration experience for users. To this end, the Institute is constantly evaluating the services provided by the secretariat and the work performed by the appointed arbitrators. It seeks the parties' views on the costs of the arbitration, and engages in dialogue with companies and counsel regarding dispute resolution needs and preferences. Through this continuous process, the SCC hopes to improve all aspects of the arbitral process. In the near future, this may include the creation of a digital platform for use by tribunals and parties in case management, as well as expanded services provided by the secretariat to tribunals and users.

Endnotes

1. The revised SCC rules went into effect on 1 January 2017, in connection with the SCC's centennial anniversary. The rules are available in several different languages on the SCC website (sccinstitute.com).
2. http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF.

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LCIA Innovations and Initiatives

Dr. Jacomijn van Haersolte-van Hof and Mathew Stone

"[T]he LCIA… has a role in promoting the use of international arbitration, and providing leadership in the international arbitration world in relation to various areas of interest or concern."

I. Introduction

The London Court of International Arbitration (**LCIA**) is one of the world's leading international institutions for commercial dispute resolution. The LCIA registers around 300 new arbitration referrals each year, from a diverse range of industries and from all around the world.

In addition to its casework administration services, the LCIA also has a role in promoting the use of international arbitration and providing leadership in the international arbitration world in relation to various areas of interest or concern.

Three key innovations and initiatives through which the LCIA provides such leadership are encouraging arbitrator diversity, providing robust approaches to the appointment and regulation of tribunal secretaries, and increasing transparency around challenges to arbitrators. Each of these innovations and initiatives are explored in turn below.

II. Diversity

A. Why Do We Need Diversity?

The call for increased diversity in international arbitration has become increasingly ubiquitous, but it pays on occasion to take a step back and consider the reasons for promoting diversity.

"[F]rom 2012 to 2017 the LCIA more than doubled the proportion of female arbitrators appointed, from 10 percent to 24 percent."

The first is that encouraging diversity is the right thing to do: absent a conscious effort to avoid discrimination, minority groups will be disadvantaged for what have proven time and time again to be wholly irrelevant considerations. For those selecting arbitrators, this means that the best persons for the job are often left on the shortlist, if they even make it there at all.[1]

The second provides another useful answer to those who trumpet "merit" above all: studies repeatedly show that diverse groups simply perform tasks *better* than overly specialized groups.[2] Diverse groups bring a variety of perspectives to a task, and are better able to cover each other's blind spots. It is presumptuous and misguided to think that an arbitral tribunal, a team of counsel, or a working group should be any different.

Seen from this perspective, it becomes clear that increased diversity is a benefit to be obtained rather than a burden to be discharged.

B. Gender Diversity Is a Key Focus

The LCIA has long been a leader in relation to gender diversity in international arbitration. In 2012, the LCIA became the first leading arbitral institution to provide statistics in relation to the gender of its arbitrators. In 2016, the LCIA became an early signatory to the Equal Representation in Arbitration Pledge (the Pledge), further marking its commitment to the establishment of gender equality in international arbitration.

While information and an understanding of diversity issues are important, the LCIA is well positioned to bring about more tangible change, in particular through the appointment of more diverse tribunals. This is bearing results: from 2012 to 2017 the LCIA more than doubled the proportion of female arbitrators appointed, from 10 percent to 24 percent.[3]

This improvement is impressive and places the LCIA in the lead in terms of gender diversity.[4] However, it obscures that the LCIA itself is doing a disproportionate amount of the work in improving gender diversity.

On average, around half of arbitrators in LCIA cases are selected by the LCIA, with the other half selected by the parties (with a small number of chairs selected by nominated co-arbitrators). In the last several years, the LCIA has selected female arbitrators around 30-40 percent of the time. Parties and co-arbitrators have shown signs of improvement, but in various years have selected only single digit percentages of female arbitrators. The LCIA has reached or will soon reach the point of diminishing returns (as will other arbitral institutions for whom this pattern holds true) and will need parties and co-arbitrators to step up if further improvements are to be made.

C. Other Forms of Diversity Must Not Be Neglected

Much of the focus on diversity tends to be on gender diversity, given the considerable gender inequality and ease of determining a "fair" outcome. However, the LCIA's diversity efforts are not limited to gender: in 2017, 17 percent of appointments were of candidates not previously appointed by the LCIA Court.[5] The need to appoint new arbitrators is an underappreciated aspect of

diversity—one cannot improve arbitrator diversity while continually re-appointing the same people.

The LCIA is also conscious of appointing a diverse range of nationalities: in 2017 the LCIA appointed arbitrators from 34 different countries, including Argentina, Australia, Belgium, Brazil, Canada, France, Ghana, India, Ireland, Latvia, Malaysia, Mexico, Serbia, Singapore, Spain, Uganda, the UK, and the United States. [6]

While there remains much to be done in relation to gender diversity, the next areas of focus will be far more complex, involving forms of diversity such as race, ethnicity, sexual orientation, disability, age, nationality, and religion. The LCIA looks forward to being a part of the conversation as the international arbitration community grapples with these issues.

III. Tribunal Secretaries

A. Tribunal Secretaries Are an Important Part of the Arbitral Landscape

As international arbitration grows in scope and complexity, the use of tribunal secretaries has become a common way in which arbitrators manage their workloads and ensure that arbitrations are conducted in the most efficient and effective manner possible.

In late 2017, on the recommendation of a committee of LCIA Court members, the LCIA adopted changes to the tribunal secretaries section of its Notes for Arbitrators.[7] These changes maintain the flexibility of LCIA arbitration, clarify the tribunal secretary role, and strengthen the existing elements of the LCIA's approach to tribunal secretaries.

B. Key Features of the LCIA's New Tribunal Secretary Procedures

Under the LCIA system, tribunal secretaries are (like arbitrators) required to complete a Statement of Independence and Consent to Appointment, to ensure that the proposed tribunal secretary has no relevant conflicts. The new Notes for Arbitrators now make explicit the LCIA's practice of providing the Statement of Independence to the parties prior to appointment, giving the parties an opportunity to comment on (and if necessary, veto) the proposed individual. The new Notes for Arbitrators also make it explicit that a tribunal secretary's disclosure obligation is ongoing.

The LCIA suggests an hourly rate of between £50 and £150 per hour for tribunal secretaries if remuneration is appropriate. The new Notes for Arbitrators explicitly require tribunals to propose a fee rate to the parties, to which the parties must expressly consent.

While previously the parties' written agreement was required for a tribunal secretary to be appointed, arbitrators are now also entitled to set a reasonable time limit for providing approval, at the expiry of which parties are deemed to have provided approval. This approach retains the primacy of the parties, while ensuring that parties are not able to obstruct the efficient conduct of proceedings through silence.

One of the most contentious issues regarding tribunal secretaries is the tasks a tribunal secretary should be entitled to carry out. Previously, the LCIA dealt with this by providing a list of activities that the tribunal secretaries should limit themselves to. In light of the broad spectrum of opinions on this matter, the Notes for Arbitrators still provide a list of tribunal secretary tasks, but the list is now a list of tasks that tribunals "may wish to propose." The list is a starting point for the discussion between tribunals and parties—parties must expressly consent to the tasks proposed, ensuring that all arbitrators and parties are comfortable with the tribunal secretary's role at the outset.

The fundamental theme underlying all of these changes is communication and consent, ensuring that parties are given the opportunity to have their say. By focussing on the tasks of a tribunal secretary, it is hoped that the discussion moves beyond a binary choice of accepting or rejecting the tribunal's proposal. By requiring consent in relation to individual aspects of the tribunal secretary role, arbitrators are better able to see which elements (if any) the parties have concerns about and respond accordingly. Once parties are made fully aware of the pertinent aspects of the tribunal secretary's role, and have bought in to that role, the risk of challenges or other issues arising is greatly reduced.

Other important changes to the Notes for Arbitrators include:

a) making even more explicit the prohibition on delegating the tribunal's fundamental decision-making function, recognized in various jurisdictions' case law;

b) making explicit the fact that arbitrators remain responsible for the tasks carried out by a tribunal secretary, and that arbitrators must adequately supervise the tribunal secretary; and

c) allowing parties to seek the removal of a tribunal secretary by making a challenge—as with arbitrator challenges, decisions are made by the independent LCIA Court.

By increasing the certainty and level of communication, the LCIA hopes to alleviate concerns regarding the use of tribunal secretaries and bring to light the substantial cost and efficiency benefits they can provide to parties and arbitrators.

IV. Challenges

A. The LCIA Has Released Anonymized Challenge Decisions

As part of its ongoing commitment to transparency in international arbitration, in February 2018 the LCIA made

digests of 32 LCIA arbitration challenge decisions from between 2010 and 2017 available online.[8] That release, together with the LCIA's 2011 publication of 28 challenge decision summaries from between 1996 and 2010, provides users with an increasingly significant research tool, and one which illustrates the effectiveness of the LCIA's challenge procedure.

The new digests contain anonymized excerpts of the decisions, providing insight through the LCIA Court's own words. Written challenge decisions are an invaluable resource for users, counsel, and arbitrators, as they provide guidance in relation to standards of conduct, and a greater understanding of the reasoning applied by the Court.

B. Key Findings from the Challenge Decisions

From the 2010 to 2017 tranche of decisions, several interesting characteristics and trends emerge.

i. Rarity

Challenges are rare in LCIA arbitrations, and even more rarely succeed. During the period covered by the decisions, over 1,600 cases were registered with the LCIA. Challenges were heard by the LCIA Court in less than 2 percent of these cases, and only one-fifth of those challenges were successful. Put another way, successful challenges were made in only 0.4 percent of LCIA cases during that time period.

ii. Robustness

Following a challenge, the parties not making the challenge and the challenged arbitrator are given an opportunity to provide submissions in response. Depending on the complexity of the challenge, the LCIA will appoint either one member or three members (or former members) of the Court as decision-makers. Once appointed, these decision-makers may hold a hearing or ask for further written submissions if necessary. Taking all submissions into account, the decision-makers then provide a robust and closely-reasoned decision either upholding or rejecting the challenge.

iii. Efficiency

As set out above, the challenge procedure is robust, and decision-makers produce sound decisions. However, the challenge process remains efficient: from the day decision-maker(s) are appointed, it takes on average only 27 days to provide the reasoned decision, and over half of all decisions were provided in less than 14 days.

iv. Grounds for Challenge

Grounds for challenge are diverse, with a focus on procedural matters. In half of all challenge decisions, the challenging party presented a procedural decision contrary to their interests as evidence of bias—more common even than allegations of conflict.

C. The LCIA Will Keep the Challenge Database Updated

The LCIA's release of the challenge decision database is a further indication of the LCIA's commitment to transparency, as also evidenced by its increasingly detailed annual casework reports. As part of honoring that commitment, the challenge decision database will be updated periodically when new decisions are issued, increasing its usefulness over time.

V. Conclusion

The LCIA looks forward to continuing to lead the international arbitration community in respect of arbitrator diversity efforts, encouraging efficient processes in respect of tribunal secretaries, and providing useful transparency in respect of challenges to arbitrators.

Through these and other innovations and initiatives, the LCIA will continue to ensure that international arbitration remains a clear and obvious choice for dispute resolution around the world, and that LCIA users in particular are provided with services which reflect best practice.

Endnotes

1. Global Arbitration Review, *A Year of the Pledge*, 16 May 2017, <https://globalarbitrationreview.com/article/1141653/a-year-of-the-pledge>, accessed 28 February 2018.
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7. LCIA, Notes for Arbitrators, <http://www.lcia.org//adr-services/lcia-notes-for-arbitrators.aspx>, accessed 17 July 2018.
8. LCIA, Challenge Decision Database, <http://www.lcia.org/challenge-decision-database.aspx>, accessed 17 July 2018.

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SIAC and SIMC's Arb-Med-Arb Protocol

By Aziah Hussin, Claudia Kück and Nadja Alexander

1. Introduction to the AMA Protocol

In conjunction with its launch on 5 November 2014, the Singapore International Mediation Centre (SIMC), in collaboration with the Singapore International Arbitration Centre (SIAC), introduced the Arbitration-Mediation-Arbitration (Arb-Med-Arb) Protocol (the AMA Protocol), a process that aims at combining the benefits of these two prominent alternative dispute resolution tools.

As its name suggests, the AMA Protocol may be broadly divided into three different stages, beginning with the initiation of arbitration proceedings under the auspices of SIAC.[1] Once the arbitral tribunal has been constituted, it will then stay the arbitration and SIAC will automatically refer the case to mediation at SIMC.[2] The mediation is to be completed within eight weeks after the referral. The progression to the final stage depends on the outcome of the mediation: if the parties successfully settle their dispute at mediation, they may then request the arbitral tribunal to issue a consent award following the terms of their settlement.[3] However, if the dispute is not settled in mediation, the stay of the arbitration proceedings may then be lifted and the arbitral tribunal will resume arbitral proceedings.[4]

"Singapore…refers to a brand of dispute resolution."

Parties can choose to adopt the Protocol at any time, meaning they may even do so after the dispute arises or after other dispute resolution processes are underway.[5] Compared to the Med-Arb model, the Arb-Med-Arb model has its advantage in circumstances where mediation results in a settlement that the parties wish to record as a consent arbitral award as it removes ambiguities over whether a dispute is in existence when arbitration is commenced. Further, once parties agree to the AMA Protocol, commencement of mediation is an automatic step in the dispute whereas mediation typically requires the consent of both parties.[6]

2. Context of the Protocol

(a) What Gap Does It Fill? How Does It Make a Difference?

In Singapore, the Protocol fits snugly within a pro-mediation ecosystem with robust cross-border enforcement. From an institutional perspective, the Protocol involves two service providers, the SIAC and the SIMC, in complementing existing domestic enforcement legislation and jurisprudence, such as the Choice of Court Agreements Act 2016 (CCAA) (implementing the Hague Convention on the Choice of Court Agreements) and the International Arbitration Act (IAA) (implementing the New York Convention). The SIMC Mediation Rules enforce writing requirements, which facilitates judicial enforcement. From a judicial perspective, the Protocol is supported by the Mediation Act 2017 (MA), under which a mediated settlement agreement (MSA) may be recorded as an order of court and enforced in other jurisdictions via, for example, the CCAA or IAA. The requirements to be met of an MSA (i.e., that the MSA was administered by a designated service provider or conducted by a certified mediator) introduces a direct link between private sector mediation and the courts. From the practitioners' perspective, under the Rules of Court and the Supreme Court Practice Directions, lawyers are obliged to advise their clients on alternative dispute resolution (ADR) and adverse cost orders may be made if parties are found to have unreasonably refused to engage in ADR. International and specialist mediators and arbitrators are readily accessible in courts such as the Singapore International Commercial Court (SICC), in institutions such as SIAC and SIMC, and in law firms. Mediation infrastructure and services in Singapore, such as those provided by Maxwell Chambers, are highly regarded globally. Notably, parties are able to conduct a "Singaporean" mediation out of Singapore; for the purposes of the AMA Protocol, "Singapore" no longer refers to merely geography—it refers to a brand of dispute resolution.

3. Main advantages

(a) Enforceability

As mentioned earlier, the Protocol sits within a robust cross-border enforcement system in Singapore. An international MSA (iMSA) under the Protocol may be enforced as an order of court under the MA by courts such as the SICC, which has an international bench. Similarly, an arbitral award under the Protocol may be enforced as an order of court under the New York Convention, IAA and/or the CCAA. Moreover, there are expected to be new developments in the realm of cross-border enforcement. UNCITRAL Working Group II, chaired by Singapore, is currently working on the proposed UNCITRAL Convention on International Settlement Agreements. The Convention, which will be known as the Singapore Convention once in force, will provide contracting states the mechanism for the cross-border enforcement of iMSAs. Further, SICC and the Singapore Supreme Court are members of the Standing International Forum of Commercial Courts (SIFOCC), marked by a consensus for a multilateral memorandum of understanding to enforce judgments of commercial courts across a wide range

of jurisdictions. As of July 2018, it has 32 participating courts across 23 jurisdictions.

(b) Additional Panels and Institutional Support

In addition to SIMC's primary mediator panel, there are two other panels that have been established to support SIMC's services. The panel of technical experts maintained by SIMC and SIAC,[7] comprising independent consultants and key personnel of well-established companies from diverse sectors of industry,[8] makes for another distinct advantage of the Protocol. SIMC's and SIAC's ability to offer this type of institutional support seems especially valuable given that cross-border commercial disputes in recent decades have become increasingly complex. With an expert panel at the parties' disposal, technical questions that may arise during the course of the mediation requiring profound industry knowledge no longer have to stand in the way of parties concluding an MSA. In 2018 SIMC established a specialist mediator panel comprised of mediators with specific cultural, linguistic and other expertise.[9]

"Singapore's Arb-Med-Arb Protocol signals a new way of thinking about international dispute resolution."

Furthermore, administrative and case management support services by the SIMC and SIAC on the whole ensure efficient, reliable and user-friendly organisation of the dispute resolution process. The support extends to the two institutions assisting the parties by appointing suitable high-quality arbitrators and mediators.

(c) Smooth Transitioning

What truly sets SIAC and SIMC apart from other dispute resolution service providers is their close collaboration. It reduces administrative burden for mediating in the midst of arbitration and thereby helps to avoid redundant costs: the Protocol is set into motion simply by one party filing a notice for arbitration with the Registrar of the SIAC. Later, the parties do not have to take any additional steps to ensure that the case is transferred to SIMC; SIAC takes care of all that.[10] Also, SIAC is solely responsible for collecting all fees connected to the Protocol so that the parties do not have to make separate payments to both institutions.[11]

Finally, process integrity in the form of a seamless transition between arbitration and mediation (and vice versa) is promoted by the fact that both Centres are located in the same building, Maxwell Chambers. The Protocol offers a robust and reliable framework whilst incorporating flexibility to allow parties to tailor the process according to the specific characteristics of the dispute.

4. Opportunities and Risks

(a) Expedited Timelines

The Protocol makes no provision for expedited enforcement or interim measures. Under the Protocol, either the SIAC Arbitration Rules (SIAC Rules) or the UNCITRAL Arbitration Rules apply to the arbitration, and the SIMC Mediation Rules (SIMC Rules) apply to the mediation. While the SIAC Rules make provision for both expedited enforcement and interim measures and the UNCITRAL Rules make provision for interim measures, the SIMC Rules are silent on both these fronts. This means that once the mediation has commenced, should parties require interim measures or expedited procedures the application will have to be made in the arbitration (which is stayed for the mediation). The Protocol is silent on whether, under such circumstances, the timelines under the Protocol may be adjusted or whether parties may return to the mediation process once such measures or procedures are triggered in the arbitration.[12] In practice, this may not be an issue as most mediations under the Protocol are completed within 1 to 2 days (although eight weeks is set aside for the mediation phase),[13] so parties are unlikely to make such applications within that narrow window, although they would not be hindered from seeking such measures, if necessary, in the arbitration. Furthermore, the Protocol's silence on this issue gives parties the flexibility to adjust the Protocol (whether by agreement or application) to respond to the needs of the dispute.

(b) Arbitrator/Mediator Double-Hatting

The Protocol does not prohibit parties from appointing the arbitrator to double-hat as the mediator for the mediation stage of the process. Under the SIMC Rules, parties "may" nominate a mediator for confirmation by SIMC and "may [but need not] do so from SIMC's Panel of Mediators" (Clause 4). However, SIMC generally encourages appointing different individuals.[14] It considers it preferable to use different practitioners as mediator and arbitrator to maintain the integrity and confidentiality of both processes and comply with natural justice rules.[15] Again, the Protocol, in leaving appointment open to parties, does not impose Singapore's legal norms on other cultures, rather it encourages practices that meet international standards to ensure the integrity, recognition and enforceability of iMSAs in the form of consent arbitral awards in as many jurisdictions as possible throughout the world.

(c) Structuring a Flexible, Rules-Based Hybrid Model

In a typical ad hoc hybrid model, parties would have the flexibility to decide when it is best to commence either ADR process. Under the Protocol, parties proceed to the mediation stage once the Response to Arbitration is filed, which is either 14 or 30 days after the Notice of Arbitration is filed.[16] Thus, the dispute is

structured with set timelines and gives parties certainty that the dispute will progress apace. This is significant because, in practice, the ad hoc model may be subject to abuse in the form of delays. Given the Protocol attempts to provide structure for what is essentially a flexible and fluid process which permits the parties, should they agree, to re-attempt mediation later in the dispute resolution process when the issues may have further crystallised.

(d) Outcomes: Potential Clash Between Arbitral Awards and iMSAs?

Hybrid dispute resolution also raises questions about the conversion of the mediated settlement into an arbitral award. For example, in mediation the parties are free to agree on their settlement terms, which may include arrangements for the future and are not limited by the types of remedies a court or tribunal might be able to provide. Conversely, in an arbitration the arbitral tribunal is required to issue awards consistent with the substantive law governing the dispute and the powers of the tribunal to grant remedy under the arbitration agreement, arbitration rules and/or applicable arbitration law. Arbitral awards typically grant monetary or injunctive relief, or specific performance orders, since any other result would likely lack legal basis. On the face of it, this suggests that an arbitral tribunal may conceivably not be able to record as an arbitral consent award a settlement agreement in its entirety.[17]

In Singapore the Protocol places the focus back on party autonomy. It is ultimately up to the parties to decide which aspects of their settlement they would like the tribunal to record as a consent arbitral award and which (if any) they wish to keep in contractual form. However, one should acknowledge that the Protocol is mainly directed toward parties involved in cross-border commercial disputes,[18] the resolution of which, to date, has involved terms suitable to be recorded as a consent award. Thus, it seems that a "clash of outcomes" will rarely occur.

(e) How Has the Protocol Fared Thus Far?

SIMC was officially launched in November 2014. Since then, it has administered more than 50 cases, of which approximately one-fifth utilized the Protocol. Eighty percent of the parties who use SIMC's services are from Asia. As of 2017, SIMC has a settlement rate of 85 percent.

5. Conclusion

The establishment of SIMC represents a significant development in the practice of international mediation, particularly in Asia. Singapore's Arb-Med-Arb Protocol signals a new way of thinking about international dispute resolution and the role of mediation in it.

Endnotes

1. AMA Protocol, para. 2.
2. *Id*., para. 5.
3. *Id*, para. 9.
4. *Id*, para. 8.
5. Should parties wish to include the AMA Protocol into their contractual dispute resolution clause, SIMC provides a model dispute resolution clause, the Singapore Arb-Med-Arb Clause, on its website: http://simc.com.sg/model-clauses/the-singapore-arb-med-arb-clause.
6. Joseph Tan and Joanna Poh, Notes from the Bar: Arb-Med-Arb or Med-Arb—What is the difference?, November 2017, Kennedys Law LLP
7. http://simc.com.sg/why-a-panel-of-technical-experts/.
8. George Lim & Eunice Chua, 4-8, Research Collection SMU School of Law 2015, 1 (3).
9. http://simc.com.sg/specialist-mediators/.
10. *Id.,* para. 5.
11. *Id.,* para. 10-15.
12. *See*, for example, Paul Tan and Kevin Tan, *Kinks in the SIAC-SIMC Arb-Med-Arb Protocol* (Singapore Law Gazette, January 2018) and Cameron Ford, *Purpose over Process—Empowering the SIAC-SIMC Arb-Med-Arb Protocol* (Singapore Law Gazette, June 2018).
13. This period of eight weeks may, however, be extended by the Registrar of SIAC in consultation with the SIMC; *see* AMA Protocol, para. 6.
14. http://simc.com.sg/arb-med-arb/.
15. Nadja Alexander, *Global Trends in Mediation*, in Mediation und Konfliktmanagement, 2017.
16. The deadline is 14 days under the SIAC Rules, Rule 4.1 and 30 days under the UNCITRAL Arbitration Rules, Article 4(1).
17. *See also*—Edmund Wan & Alex Ma, Singapore Arb-Med-Arb Clause - A Viable Alternative?, King & Wood Mallesons Newsletter, November 2017.
18. Christopher Boog, *The New SIAC/SIMC AMA-Protocol: A Seamless Multi-Tiered Dispute Resolution Process Tailored to the User's Needs*, Asian Dispute Review (Apr 2015), 91 (95).

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The 2018 Revision of the Vienna Rules

By Dr. Nikolaus Pitkowitz

The Vienna International Arbitral Centre (VIAC) was established in 1975 and since then has administered over 1600 cases. Its proceedings take on average 12.5 months and its arbitrators' fees are based on a fee schedule depending on the amount in dispute. VIAC is considered to be one of Europe's leading arbitration institutions.[1] VIAC is governed by its Secretary General and her Deputy, a Board (comprised of 13 individuals who are arbitration practitioners, a supreme court justice, university professors and a representative of the Austrian Ministry of Justice).[2] VIAC is advised by an International Advisory Board (comprised of 23 international practitioners).[3] VIAC does not have a formal roster of arbitrators but maintains a "list of practitioners."[4] Since 2017 VIAC has also published names of arbitrators appointed.[5] Until 2017, VIAC only handled international cases with a strong focus on Central and Eastern Europe as well as the United States;[6] as of 2018 VIAC took over the responsibility to also administer domestic cases.

"With its 2018 Rule Revision, VIAC modernized both its Arbitration and Mediation Rules but at the same time preserved its lean and flexible character."

Austria is generally considered an arbitration friendly jurisdiction with over 250 years of codified arbitration laws and a wealth of case law and (German and English) literature. Since 2014 court proceedings related to arbitrations (such as annulment of awards and challenge of arbitrators) have been handled by the Austrian Supreme Court, the highest Austrian court, as first and last instance.

The revised Rules of Arbitration and Mediation of VIAC ("Vienna Rules") entered into force on 1 January 2018. With its 2018 Rule Revision, VIAC modernized both its Arbitration and Mediation Rules but at the same time preserved its lean and flexible character. This article summarizes the most important changes relevant for the international practice.

I. New Structure of the Vienna Rules

Before the 2018 revision, the Vienna Arbitration Rules had been revised in 2006 (following Austria's adoption of the UNCITRAL Model Law) and 2013 (overhauling and modernizing the Vienna Rules). The 2018 revision brings a number of further updates to the Vienna Arbitration Rules and increases the prominence of the new Mediation Rules (introduced in 2016), in part by including new means to combine mediation and arbitration.

The Vienna Rules 2018 are now divided into three distinct sections:

- Rules of Arbitration (Vienna Arbitration Rules)
- Rules of Mediation (Vienna Mediation Rules)
- Annexes (model clauses, schedule of fees, internal rules of the Board and rules for VIAC as appointing authority).

The new structure demonstrates the intention of VIAC to reflect the growing importance of mediation proceedings in practice and to place mediation and arbitration proceedings on equal footing.

The revised Vienna Rules further implement VIAC's aim to promote gender diversity, which was recently recognized by ranking VIAC second in this field among leading arbitration institutions.[7] Among others, the revised Vienna Rules explicitly provide that terms referring to natural persons shall apply to all genders.[8]

II. Vienna Arbitration Rules

A. Electronic Case Management System

VIAC has introduced a new Electronic Case Management System, permitting VIAC to administer its files in an electronic form only and to conduct all communications between the arbitral institution and the parties by electronic means. However, special rules still apply for (i) the Statement of Claim and (ii) the Arbitral Award, which must be issued (additionally) in paper form. As a general rule, the Arbitral Award will be issued and served in hardcopy form only; the parties are, however, free to also request an electronic form of the award.[9] The authority of VIAC to authenticate arbitral awards to facilitate enforcement under Article IV.1.(b) New York Convention remained unchanged.[10]

B. Security for Costs

An entirely new provision introduced by the 2018 revision is the possibility for the respondent to request security for costs.[11] A prerequisite for the Arbitral Tribunal to order security for costs is that the respondent shows that (i) it has a potential claim for costs against the claimant and (ii) cause that the recoverability of a potential claim for costs is, with a sufficient degree of probability, at risk. The Vienna Arbitration Rules took into account the 2016 Guidelines of the Chartered Institute of Arbitrators

on the Application for Security for Costs but deliberately refrained from stipulating further prerequisites, such as the prospects of success or aspects of fairness, as these could be difficult to assess in practice. The Rules, however, grant the Arbitral Tribunal wide discretion (expressed by the word "may") to decide on a request for security of costs, and the Arbitral Tribunal may thereby also take these and other aspects in consideration.

"The arbitrator's fees under the VIAC fee schedule are now subject to up to 40 percent increase or decrease to consider complexity and efficiency. The newly introduced upside incentive for efficient handling is unique in the world of arbitration."

The Vienna Arbitration Rules also give the Arbitral Tribunal wide discretion to allocate costs among the parties.[12] Generally, under the Vienna Rules, Arbitral Tribunals follow the "loser pays rule" awarding costs in relation to the success of the outcome. However, in a situation where the parties' agreement does not permit an adverse costs award, clearly the Arbitral Tribunal will have no room to order respondent to pay security for costs.[13]

The security for costs provision applies *mutatis mutandis* if the respondent files a counterclaim. (As in previous versions, the Vienna Rules 2018 deliberately refrained from imposing a time limit on the assertion of counter claims.)

When deciding upon the respondent's request, the Arbitral Tribunal shall give the parties the opportunity to present their views on the matter. However, as suggested by the language of the provision, the threshold for the burden of proof is reduced and thus prima facie evidence should suffice. If the Arbitral Tribunal approves the request for security for costs and the claimant does not comply with the order, the tribunal may (upon request) suspend or even terminate the proceedings.[14]

C. Costs of Arbitration and Arbitrator Fees

While arbitration has many undeniable advantages, its costs are increasingly considered a disadvantage.[15] Therefore, the Vienna Arbitration Rules now explicitly stipulate that arbitration proceeding must be conducted in an efficient and cost-effective manner.[16] This principle may also be taken into account by the Secretary General when determining the arbitrators' fees and costs.[17]

The arbitrators' fees under the VIAC fee schedule are now subject to up to 40 percent increase or decrease to consider complexity and efficiency. The newly introduced upside incentive for efficient handling is unique in the world of arbitration. Previously, an increase of fees was only expressly permitted in an amount of up to 30 percent in complex cases.[18] With the 2018 revision the maximum amount has been increased to 40 percent. Most important, the efficient conduct of the proceedings has been added as additional upside criterium. Furthermore, the possibility of a cost reduction has been newly introduced, granting the Secretary General the power to decrease the arbitrator's fees up to 40 percent in event the handling of the case is found inefficient or the case is simple.[19] Thus, contrary to other institutions, VIAC not only threatens punishment but also offers a reward, depending on the complexity of the matter and the efficient conduct of the proceedings. As the Vienna Arbitration Rules provide for comparatively moderate rates,[20] the variation of 40 percent should generally be seen as reasonable. For example, in a case with an amount of dispute of €5 million the "normal" fee payable to three arbitrators would amount to €136,250. This amount can now be adjusted in the range from €81,750 to €190,750.

VIAC has also revised its own fees: Registration fees are now scaled depending on the value of the dispute (in a range between €500 and €1,500) and administrative costs have been raised slightly, but kept moderate compared to other institutions.[21] VIAC also introduced a fee cap, limiting the administrative fees to €75,000.00. As an example, in a matter with a value in dispute of Euro 5 million, the registration fees would amount to €1,500 and the administrative costs to €21,750.

D. Secretary to Support the Tribunal

The Vienna Arbitration Rules now expressly acknowledge the possibility that the Arbitral Tribunal may appoint a secretary to assist and support the Tribunal.[22] This provision aims to clarify and regulate the common situation that arbitrators are supported by (younger) colleagues. VIAC provides to arbitrators guidelines containing more detailed provisions on secretaries. Under those guidelines, the Arbitral Tribunal has to inform VIAC about its intention to appoint a secretary and to provide VIAC with the secretary's name, contact details, CV and a declaration of impartiality and independence by the secretary. As it is the secretary's task to assist and support the Arbitral Tribunal, the Arbitral Tribunal must not delegate any of its core competences to the secretary. The Arbitral Tribunal must not charge the parties any costs for the work the secretary, but may include his or her cash expenses in the costs of the Tribunal.[23]

III. Vienna Mediation Rules

With the growing popularity of mediation, particularly in conjunction with arbitration,[24] the new Vienna Rules now give both types equal standing and enable various combinations. The Vienna Rules now also enable the parallel conduct of arbitration and mediation proceedings and joint administration by VIAC.[25] In such cases administrative fees must not be paid twice but rather fees paid for one type of proceedings will be credited for the other.[26] Furthermore, the Vienna Rules expressly permit an award to be rendered on agreed terms reflecting the content of a settlement, and thus enable the parties to establish an enforceable instrument on their settlement.[27] This provision already anticipates the UNCITRAL Convention on the Enforcement of Mediation Settlements.[28]

IV. Conclusion

While the 2018 revision of the Vienna Rules does not contain any dramatic changes, it fortifies the role of VIAC as modern arbitration institution destined to continue down the road of predictability.[29] New features include the upgrading ADR methods, more flexibility in the (comparably still reasonable) fee scale, innovative tools to increase efficiency of the proceedings, and rules aimed at clarifying issues to further increase efficiency and prevent obstruction such as security for costs or use of secretaries.

Endnotes

1. White & Case/Queen Mary University of London 2018 International Arbitration Survey: The Evolution of Arbitration, p. 13.
2. Details *see* http://www.viac.eu/en/.
3. *Id.*
4. *See* http://www.viac.eu/en/arbitration/practitioners. The list contains for each arbitrator a detailed CV.
5. *See* http://www.viac.eu/en/arbitration/viac-arbitral-tribunals.
6. Cases pending in 2017 involved international parties from the following countries: USA (7), Russia (6), Czech Republic (5), Germany (4), Netherlands (3), Ukraine (3), Belarus (2), China (2), Cyprus (2), UK (2), Macedonia (2), Lebanon (2), Slovenia (2). Others: British Virgin Islands, Denmark, Isle of Man, Hungary, Italy, Israel, Macau, Moldavia, New Zealand, Romania, Sweden, Slovakia, Serbia, Seychelles and Turkey.
7. *Markus Altenkirch/Jan Frohloffen,* Diversity in International Arbitration—Statistics, published on 3 July 2017, retrievable under https://globalarbitrationnews.com/gender-diversity-in-international-arbitration-some-statistics/, last visited on 9 July 2018.
8. *See* Article 6 Vienna Arbitration Rules and Article 2 Vienna Mediation Rules.
9. This electronic version does not contain signatures of the arbitrators. *See also* Art 36 (5) Vienna Arbitration Rules; see also *Fremuth-Wolf/Vanas-Metzler*, Die neuen VIAC-Regeln [The New VIAC-Rules], ecolex 2018, 300.
10. Article 36 (4) Vienna Arbitration Rules mandates that all original copies of the award shall be signed by the Secretary General and bear the VIAC stamp, which shall confirm that it is an award of the VIAC, rendered and signed by one or more arbitrators under the Vienna Rules.
11. Article 33 (6) Vienna Arbitration Rules.
12. *See Peters,* in Handbook Vienna Rules, commentary to Art 37.
13. *Beisteiner*, New Vienna Rules: Where Do You Stand on Security of Costs?, Kluwer Arbitration Blog, 7 April 2018.
14. *Fremuth-Wolf/Vanas-Metzler*, Die neuen VIAC-Regeln [The New VIAC-Rules], ecolex 2018, 300.
15. 67 percent of the respondents questioned by White & Case LLP and the Queen Mary University of London in the course of their research for the "2018 International Arbitration Survey: The Evolution of Arbitration" found "costs" to be the worst characteristic of arbitration proceedings. White & Case / Queen Mary University of London 2018 International Arbitration Survey: the Evolution of Arbitration, p. 8.
16. Article 28 (1) Vienna Arbitration Rules.
17. Article 16 (6) Vienna Arbitration Rules.
18. Article 44 (7) Vienna Arbitration Rules 2013.
19. Article 44 (7) Vienna Arbitration Rules 2018.
20. As to exact calculation of the rates see the online cost calculator under http://www.viac.eu/en/arbitration, which by default shows the range of 100 percent and 140 percent of the costs.
21. Annex 3 to the Vienna Rules. *See also* online cost calculator at http://www.viac.eu/en/arbitration.
22. Art. 44 (1) (1.1.) Vienna Arbitration Rules.
23. *Fremuth-Wolf/Vanas-Metzler*, Die neuen VIAC-Regeln [The New VIAC-Rules], ecolex 2018, 300.
24. According to the White & Case/Queen Mary University of London 2018 International Arbitration Survey: The Evolution of Arbitration, 97 percent of the respondents who were asked about their preferred method of dispute resolution indicated that they favor international arbitration either on a stand-alone basis (48 percent) or in conjunction with Alternative Dispute Resolution (49 percent). White & Case/Queen Mary University of London 2018 International Arbitration Survey: The Evolution of Arbitration, p. 6.
25. *See* Art. 10 Vienna Mediation Rules.
26. Art. 44 (11) Arbitration Rules.
27. Article 37 Vienna Arbitration Rules.
28. Convention on the Enforcement of Mediation Settlements as approved on 26 June 2018 at the 51st session of UNCITRAL.
29. *See Pitkowitz* and 26 contributors [Moderators of the Vienna Arbitration Days Arbitration World Café], The Vienna Predictability Propositions—*Paving the Road to Predictability In International Arbitration*; Austrian Yearbook on International Arbitration, 2017, 115.

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Women in Disputes: A History of European Women in Mediation and Arbitration

Written by Susanna Hoe and Derek Roebuck
2018 HOLO Books Oxford
Reviewed by Louise Barrington

"This brand-new work…provides fascinating insights and information about women resolving disputes throughout the ages, in history, literature and legend."

One of the major obstacles in the way of women's progress in arbitration is the lack of role models. With women now occupying over 50 percent of all the seats in law school classrooms around the world for about a decade now, more women are vying for litigation and dispute resolution roles. Nevertheless, many give up after years of frustration; others don't try as they hesitate to wade into the sea of gray suits in the arbitration theatre. Yes, there are some notable women at the very top of the precarious pyramid, but they are scarce enough to be remarkable and thus the exceptions to the norm. Role models are an important factor in persuading women that they are capable of succeeding in a field that continues to be dominated primarily by older, white men.

In this brand-new work Susanna Hoe, author of several books about the history of Hong Kong, is joined by her husband Derek Roebuck, until recently the editor of *Arbitration International*. Their collaboration provides fascinating insights and information about women resolving disputes throughout the ages, in history, literature and legend. Not all of them are role models for today's age perhaps, but a fascinating opportunity to see women literally "out of the box" and in roles we might not have imagined, weaving peace into the fabric of society.

The authors guide us from the ancient world of Greek and Roman gods, biblical heroines, through Anglo-Saxon England, and on down through 4,000 years of European history, pausing in the 18th century, after which, according to the authors, the sources became too unwieldy.

From Homer's Arete to Jane Austen's Lady Catherine de Bourgh, the authors show us that women have routinely been involved in resolving disputes, despite prohibitions such as the A.D. 534 edict of Emperor Justinian forbidding women to act as arbitrators and ordering them to remember their modesty and keep away from every judicial contest. Justinian's ban remained in force in European nations until the late 19th or early 20th century, despite occasional protests from writers such as the 16th century occultist Heinrich Agrippa, who maintained that women were not incapable and indeed had been allowed in ancient ages to manage the most arduous and difficult affairs, until the tyranny of men, unjust laws and foolish customs retrenched their liberties.

It was fascinating to read the "real" story of the "rape of the Sabine women." The myth tells that Romulus, after founding Rome, proposed to increase the population by marrying his Roman men to the daughters of his conquered enemies. With amusements and festivities he invited the women from the surrounding area, and those who attended were carried off and married to the Roman men. When their fathers attacked Rome they pleaded with them and with their husbands not to shed blood but to unite the two communities into one in which they all lived in peace.

"Women through the ages have used both traditional and ingenious strategies to reconcile disputes, whether between family members or warring states."

The 7th century abbess, Saint Hilda, was a noblewoman who managed both nuns and monks in the Benedictine monastery in Yorkshire. She became known as Hilda the Peacemaker and a prayer in her honor records her gifts of justice, prudence and strength to rule as a wise mother over her household, as a trusted and reconciling friend to leaders of the church. Not only ordinary people but also kings and princes sought her counsel in resolving their disputes.

Throughout the book, as it weaves its way from England to the continent and back, we read original documents—letters, poems and public records—attesting to the talents and reputations of scores of women. Whether mediating between their husbands and rebellious sons, or

fighting for power during the regency of the 3-year-old king of Germany, women used their peacemaking skills, although occasionally resorting to threats of violence.

A teenaged queen successfully persuaded her 15-year-old husband Richard II to pardon the surviving participants in the 1381 Peasants' Revolt, thereby earning the title "the good Queen Anne." In 1210, Countess Blanche of Navarre settled a dispute between two orders of monks about the division of two areas of Woodland: "I, as arbiter of this matter, order the sites present that the division be firmly held by both sides." According to Hoe and Roebuck, contemporary documents showed that many women of rank acted as formal or informal arbitrators and mediators between parties as well as interceding between warring factions or states, either by , or even by marrying a ruler of the opposition to ally the warring sides. Women also frequently ruled as regents during the minority of their sons or absence of their husbands. Dispute resolution was part of their role. Matilda of Flanders governed Normandy during the absences of her husband William, while he was off conquering England at the battle of Hastings. Matilda is recorded as her husband's deputy mediator and judge, as his regent, and as the mediator between him and his son Robert in a political dispute.

In contrast, Eleanor of Aquitaine was another such regent and frequently acted as judge in her husband's absence; however, her high-handed treatment of the citizens of London made her extremely unpopular. When she and her husband Henry were imprisoned in the Tower of London she attempted unsuccessfully to escape. Apprehended, she was subjected to cries of "Drown the witch!" and pelted with mud, stones, rotten eggs and sheep bones.

Speaking of witches, Joan of Arc makes her appearance in 1429, to procure the coronation of the nine-month-old Charles VII as King of France. She is given credit for ending the Hundred Years War, although shortly afterward she was burned at the stake.

Women were not themselves above getting involved in disputes. The fabulously wealthy Isabella de Forz enjoyed prestige and power during the late 13th century, but was a tyrannical neighbor and serial litigator involved in disputes with everyone from the king to her daughter Amicia. She was, nevertheless, capable of settling disputes among others, including one controversy regarding the boundaries between several local parishes.

Joan FitzAlan, widowed at 25, was left with most of the County of Essex as her property, and chose not to remarry, thus re-obtaining her independence. She and her brother, the Archbishop of Canterbury, are recorded as having arbitrated a number of disputes. Women have acted as sheriff (or sheriffess) and foresters on numerous occasions and were able to act on behalf of their husbands or their estates in court from the 11th to 17th century, despite the fact that from about 1200 both ecclesiastical and Roman law in force in England prohibited them from public office.

Among the lower classes, silk-women and brewers traded in their own right, and some became involved in legal action with their suppliers, customers and competitors. Mediation was regularly used not only for family disputes but also for commercial relationships. Disputing parties could also ask friends to act as intermediaries in valuing disputed property. In Elizabethan England, Hoe and Roebuck cite many examples of women's involvement in all kinds of disputes before the Privy Counsel and the court of Chancery, where women appeared as petitioners in disputes over their own property—a right guaranteed by the Queen herself. In 1577 a group of women, aggrieved that the owner had prevented them from praying there, occupied a local chapel. Queen Elizabeth herself intervened to ensure that their punishment was only nominal.

In the 16th century, arbitration was used frequently to resolve disputes between parents and children, between siblings, and among members of extended families.

Women through the ages have used both traditional and ingenious strategies to reconcile disputes, whether between family members or warring states. Isabella of Aragon, at the age of 52, positioned herself seated on a mule between two armies in order to obtain peace. Other queens interceded, conciliated, reconciled and if necessary knelt before their husbands to entreat them to make peace.

Whether you are reading this book as a researcher or for general pleasure, it is not a book to devour at one sitting. It is a collection of delightful, informative and well-documented histories along a common theme. Pick it up and open at random, to savour and appreciate it, story by story. From the biblical warrior-prophet Deborah, who brought peace to Israel and then continued as a judge afterward, or Lady Anne Clifford resisting a mediated settlement that would have robbed her of her land, or Jane Musgrove, who mediated in the creation of the American colony of Georgia—women have never been far from the fray. As the authors write in their preface, their hope is that *Women in Disputes* will encourage a better understanding and appreciation of the role that women have played, and of the contribution they still make today.

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International Arbitration in the United States

Edited by Laurence Shore, Tai-Heng Cheng, Jenelle E. La Chiusa, Lawrence Schaner and Mara V. J. Senn
2018 Wolters Kluwer
Reviewed by Adam J. DiClemente

The rise of international arbitration's popularity has generally outpaced the development of resources to guide attorneys through its practice. Compared with the multitude of treatises offering courtroom litigators tools to understand and hone their craft, arbitration practitioners have come to rely on a much smaller set of databases and books as go-to references. Even with the recent, notably positive, developments in online services' attention to arbitration materials, the best and most common resource for answering questions in this expanding field has been consulting with experienced arbitration practitioners themselves. This is what makes the newly published treatise *International Arbitration in the United States* such a significant resource: practitioners, across a wide-spectrum of experiences, have collaborated to create a comprehensive volume that not only discusses the key issues in the field, but also provides authority, guidance, and precedent to assist attorneys in the practical tasks necessary to best serve clients.

As its title suggests, the book's editors have curated its 34 chapters around a central theme of the "unique legal and practical features of international arbitration in the United States." The first substantial part of the volume provides a concise summary of how state and federal law interact to govern international arbitrations conducted in the United States and reviews the rules of leading arbitral institutions, which are often applied in arbitrations seated here. Thereafter, clearly designed as a desk-reference, the book proceeds with great specificity through an approximate chronology of the stages typical in an arbitral dispute—from drafting arbitration clauses, to gateway challenges to arbitration in the courts, to discovery, use of judicial systems in aid of arbitration (to initiate, forestall, and seek discovery materials), proving claims and damages, and, ultimately, through enforcement and recognition of international arbitration awards.

While each chapter provides the basic, introductory information on its subject matter necessary to orient newcomers to the topic, this book does not dwell on generalities, but moves quickly to practical details. For example, Chapter 12—"Interim Measures: Arbitral Tribunals and Courts," by Lucas Bento and Michael Peng, demonstrates the book's approach. In clearly delineated sections, this chapter provides the reader with a summary of available procedures for seeking interim relief both from a tribunal directly and from an emergency arbitrator prior to the tribunal's constitution, as well as a description of leading arbitral rules' requirements for making such applications (e.g., ICDR, UNCITRAL), and covers judicial actions regarding provision and enforcement of interim relief in arbitration with an equal level of detail. The chapter's footnotes are detailed with supporting citations and quotations of authority to such an extent that a reader could, essentially, research and write the fundamentals of a brief from the content of its pages alone. Each chapter follows this approach, providing the reader with a well-documented, detailed exposition of the topic at hand.

The practical detail provided throughout this volume is enhanced by the specificity of the subject matter the editors selected for its chapters. Not only does the book cover the absolute essentials of arbitration practice—for example, the concise roadmap for "Enforcing New York Convention Awards in the United States" laid out by Rocío Ines Diagón and Paula F. Henin in Chapter 24, and the explanation of "Enforcing Agreements to Arbitrate" given by Steven Smith, Marcus Quintanilla and Paul Hines in Chapter 9, but it also delves into particularly nuanced subjects such as the rise of electronic discovery in arbitration (Chapter 16—Delyan M. Dimitrov & Dorit Ungar Black); specific approaches to calculating and understanding damages valuation and compensation models in international arbitration (Chapter 18—Mara V.J. Senn, Dawn Yamane Hewett & Stephanie I. Fine); the evolving subject of class action arbitration under U.S. law (Chapter 28—David M. Orta, Matthew A. Lee and Brian Rowe); rules and strategy considerations for constituting tribunals and challenging appointments (Chapter 11—Timothy G. Nelson & Colm P. McInerney); and the collateral effects of arbitration awards (Quinn Smith—Chapter 27).

The most striking aspect of this treatise, at least to this reviewer's mind, is the diversity of its authorship. The editors, authors, and contributors in this volume represent diverse and extensive experience in the international arbitration field. As one would expect, many contributors are long-tenured partners in international law firms, arbitrators, and professors of law. Unlike many anthologies in the legal industry, however, these essential voices are joined by others including numerous law firm associates (often intimately familiar with the nuances and details of daily practice and able to provide key practical perspectives), current and former employees of leading arbitral institutions (who have managed proceedings and are able to offer first-hand perspective on rules and arbitration administration), and an attorney for the International Arbitration Part of the New York Commercial Division of the Supreme Court (who sees arbitration disputes from the judiciary's perspective). Moreover, while the volume concerns practice in the United States, recognizing

that the United States is a global forum for arbitration, international perspectives are also represented. *International Arbitration in the United States* is a resource for and by practitioners, and the editors' efforts to ensure that distinct experiences in the industry are represented enhances the content and utility of this resource.

It is not possible to review each of *International Arbitration in the United States*' chapters in the space allotted for this review. Frankly, there would be little benefit to doing so. Beyond showing the breadth of issues in the field, the book does not set out to prove a particular point, to make a universal argument, or to change perspectives. That's a good thing: there are already many (perhaps too many) books and articles about this field that only play that role. Rather, the evident purpose of this book—and one it certainly achieves—is to provide real-world, concrete, and applicable information to assist lawyers in understanding and effectively participating in the practice of international arbitration in this country.

This book is a resource that will spend more time on your desk than it will spend on your shelf.

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Commercial Litigation in New York State Courts (Fourth Edition)

Edited by Robert L. Haig
Reviewed by David C. Singer

This well-established treatise, *Commercial Litigation in New York State Courts,* has become an essential resource for lawyers who practice in the New York State Courts. When it was first published in 1995, the treatise had 68 chapters and 63 authors. The fourth edition, which was published in 2015 by Thomson Reuters, has expanded to 127 chapters and 182 principal authors. The Fourth Edition has 22 more chapters (and 2,419 more pages of text) than the Third Edition—which was published in 2010—that address new subjects such as social media. Behind this scholarly and organizational feat is Robert L. Haig, Partner at Kelley Drye & Warren LLP, who has served as Editor-in-Chief of the treatise since its inception.

The treatise essentially covers every aspect of a commercial case, from the initial investigation and assessment through pleadings, discovery, motion practice, trial, appeal and enforcement of a judgment. The treatise also includes 53 chapters devoted to substantive areas of the law, including contracts, insurance, sale of goods, banking, securities, antitrust, intellectual property, business torts and franchise law. Also included are hundreds of litigation forms and jury instructions.

Of particular interest to the dispute resolution community are seven new chapters on Negotiations (written by Michael J. McNamara of Seward & Kissel LLP); Mediation and Other Nonbinding ADR (written by John S. Kiernan and William H. Taft V of Debevoise & Plimpton LLP); Arbitration (written by James E. Brandt, David J. McLean and Claudia T. Salomon of Latham & Watkins LLP); International Arbitration (written by Hon. Judith S. Kaye, John L. Gardiner and Jonathan L. Frank of Skadden, Arps, Slate, Meagher & Flom LLP); Litigation Avoidance and Prevention (by Mitchell J. Auslander and Sameer Advani of Willkie Farr & Gallagher LLP); Crisis Management (written by Hon. Barry R. Ostrager and Hon. Mary Kay Vyskocil), and Techniques for Expediting and Streamlining Litigation (written by Hon. Martin E. Ritholtz). The treatise also has retained chapters on Case Evaluation (written by Alan I. Raylesberg of Norton Rose Fulbright) and Settlements (by David M. Schraver and David H. Tenant of Nixon Peabody LLP).

Each chapter is written by experienced practitioners in readable prose that is accessible to the novice. For example, in the chapter on Negotiations, the author offers common sense advice regarding process and human emotions, often citing the findings from popular bestsellers *Getting to Yes: Negotiating Agreement Without Giving In*, by Roger Fisher and William L. Ury, and *Give and Take: Why Helping Others Drives Our Success*, by Adam Grant. The treatise also contains extensive discussions of more complex material that is useful to practitioners with experience in the field, including, for example, the interplay between state and federal arbitration law.

The Treatise is an extremely valuable resource and is available on Westlaw and, therefore, one can access all sections of the treatise online. All royalties from sales of the treatise and annual pocket parts go to the New York County Lawyers' Association.

After 37 years practicing law as a civil trial attorney—including 28 years as a partner at Dorsey & Whitney LLP—David C. Singer opened his own shop on January 1, 2018 as a dedicated independent arbitrator and mediator, focusing on commercial, business transactions, employment, distributorships, real estate and international matters.

UNIDROIT Principles of International Commercial Contracts: An Article-by-Article Commentary

Written by Eckart J Brodermann
Reviewed by Brenda Horrigan

Eckart Brodermann's recent book *UNIDROIT Principles of International Commercial Contracts* (the "Principles") provides a useful overview of the Principles, as well as analysis and guidance as to how such Principles should be interpreted.

The Principles were designed to be a "balanced set of rules…for use throughout the world irrespective of the legal traditions and economic and political conditions of the countries in which they are to be applied."[1] They draw from both common and civil law traditions, and have been recommended by UNCITRAL for international trade transactions. However, they remain somewhat of an unknown to many practitioners.

Mr. Brodermann's book addresses this by providing a paragraph-by-paragraph analysis of the 11 chapters contained in the Principles, which set forth 211 rules relevant to international trade. The chapters cover formation of contracts and authority of agents; validity of contracts and grounds for avoidance; content, third party rights and conditions; performance; non-performance; set-off; assignment and transfer; limitation periods; and plurality of obligors and obligees.

The book sets forth the text of each sub-article of the Principles, and then addresses official commentary and scholarly works which help to define and explain the scope and application of the rule under discussion. In providing his analysis, Mr. Brodermann draws from both civil and common law commentators and sources.

The book also includes a copy of the full text of the Principles, as well as a bibliography of books, articles and soft-law sources to which readers can turn for additional information and analysis.

In all, the work is well designed to serve as a handy desk reference for practitioners interested in learning more about the Principles, and seeking to apply the Principles in the context of international trade transactions.

Endnote

1. Brodermann, at p. 3, citing the Official Comments in the Introduction to the 1994 edition of the Principles.

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Case Summaries

By Alfred G. Feliu

Supreme Court Rejects NLRA Challenge to Class Action Waivers

***Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018)**

In a 5-to-4 decision, the Supreme Court ruled that Section 7 of the NLRA does not preclude the enforcement of class action waivers in arbitration agreements. The majority reasoned "the NLRA secures to employees' rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the Courtroom or arbitral forum." The majority rejected the argument that the FAA's savings clause permits an application of the NLRA's Section 7 rights in this situation. The majority held that the savings clause only recognizes generally applicable contract defenses and not those targeting arbitration specifically, as was found to be the case here. The majority also rejected the argument that class and collective actions are "concerted activities" protected by Section 7. The majority emphasized that Section 7 focuses on the right to organize unions and bargain collectively and does not address class or collective action procedures. Finally, the majority rejected the argument that the Court should defer to the NLRB's interpretation of the NLRA. In doing so, the Court reasoned that the NLRB's interpretation was not of the NLRA necessarily but of the FAA, which it does not administer. Justice Ginsburg filed an opinion on behalf of the dissenters.

Reinstatement of Harasser Violates Public Policy

***New York City Transit Auth. v. Phillips*, 162 A.D.3d 93, 75 N.Y.S.3d 133 (1st Dep't), leave to appeal dismissed, 2018 WL 3152553 (N.Y.)**

Aiken, a bus operator and union delegate, was terminated by the New York City Transit Authority for having sexually harassed his supervisor. An arbitration was filed, and the arbitrator concluded that while Aiken was in fact guilty of harassment, the misconduct did not rise to the level of a dischargeable offense and instead the arbitrator converted the termination to a ten-day suspension with a requirement that Aiken complete sensitivity training. In so ruling, the arbitrator criticized the victim, a supervisor, for failing to report the offensive behavior earlier. The award was confirmed by the trial court, but the appellate court reversed, finding that the "award in this case is both irrational and against [New York's] strongly articulated public policy against sexual harassment in the workplace." The appellate court rejected the arbitrator's "blame the victim" mentality, which "inappropriately shifts the burden of addressing a hostile work environment onto the employee." The court emphasized that the employer has the obligation of protecting against workplace harassment and implementing proportionate sanctions to deter offensive behavior. The "arbitrator's decision effectively prevents petitioners from following their policies and fulfilling their legal obligations to protect against workplace sexual harassment." The court added that the arbitrator "irrationally" found violative behavior occurred yet arrived "at the unsustainable conclusion that Aiken did not violate the workplace sexual harassment policy." Having found that the award violated public policy, the court remanded the matter to a different arbitrator to determine whether termination was warranted based on Aiken's sexual harassment.

Non-Signatory Who Is Not an Alter-Ego Has No Standing to Stay Arbitration

***Royal Wine Corp. v. Cognac Ferrand SAS*, 2018 WL 1087812 (N.Y. Sup. Ct.)**

A non-signatory to an arbitration agreement had no standing to stay an arbitration against a defunct party even though it has a potential financial stake in the outcome of the arbitration. The arbitration agreement at issue was contained in an exclusivity agreement between Cognac Ferrand SAS, a French liquor producer, and Mystique Brands, LLC, an American importer. The agreement was terminated, and an arbitration ensued. The arbitrator ultimately dismissed Mystique's claims and granted Cognac's counterclaims. The issue of damages remained but before the arbitrator could rule Mystique filed for bankruptcy. When the bankruptcy proceeding was final, Cognac filed a new arbitration seeking damages. However, Royal Wine Corp., a non-party to the arbitration agreement, intervened in the action by filing a preliminary injunction in state court seeking to stay the arbitration and raising defenses on behalf of Mystique. Royal argued that it was not an alter-ego of Mystique but since a judgment against Mystique could potentially impact Royal, it had the right to raise defenses on Mystique's behalf. The court rejected Royal's arguments, finding first that as a non-signatory to the agreement, Royal had no standing. The court then found that where Royal denied a legal relationship with Mystique, it was insufficient to ground its arguments on the fact that a decision in the arbitration may financially impact it. Royal's preliminary injunction action was therefore dismissed.

Manifest Disregard Claim Rejected

***Kent Building Services v. Kessler*, 2018 WL 1322226 (S.D.N.Y.)**

The CEO here terminated the defendant President for "cause," which resulted in his loss of severance and equity in the company. The President demanded arbitration and prevailed on his implied covenant of good faith

and fair dealing claim. The court rejected the employer's motion to vacate on manifest disregard grounds, finding that the arbitrator "correctly identified the applicable test for breach of the covenant of good faith under New York law." The court acknowledged that the employment agreement gave the CEO discretion to evaluate the President's performance but he could not exercise "that discretion arbitrarily or irrationally." The court pointed out that the arbitrator found that the CEO made the cause determination based on business decisions not made by the President and admittedly without reviewing relevant communications underlying the matter. The court concluded that because "this testimony provides much more than a 'barely colorable justification for the outcome reached,' the arbitrator's determination that [the CEO] acted arbitrarily and irrationally must be upheld." On this basis, the President's motion to confirm was granted and the employer's motion to vacate was denied.

Waiver Claim Rejected

***Meyer v. Kalanick*, 291 F. Supp. 3d 526 (S.D.N.Y. 2018)**

Plaintiff brought a class action against Travis Kalanick, founder of Uber, alleging price-fixing schemes violative of the Sherman Act as well as other illegal acts. Kalanick moved to dismiss. In doing so, he reserved his right to compel arbitration if the underlying Uber agreement was invoked. The motion was denied, and Kalanick moved to join Uber into this proceeding. That motion was granted, and defendants then moved to compel arbitration. The district court denied the motion, but the Second Circuit overruled the district court and compelled arbitration. Upon remand, District Judge Rakoff let his feelings about the state of the law be known. He argued that the constitutional right of trial by jury was being cast aside. He reasoned that as a result courts are now "obliged to enforce what everyone recognizes as a totally coerced waiver of both the right to a jury and the right of access to the courts—provided only that the consumer is notified in some passing way that in purchasing the product or service she is thereby 'agreeing' to the accompanying voluminous set of 'open terms and conditions'." The court added that this "being the law, this judge must enforce it—even if it is based on nothing but factual and legal fictions." Turning to the issue before the court, Judge Rakoff rejected plaintiff's argument that Kalanick had waived his right to arbitration and that that waiver should be applied to Uber. The court noted that Kalanick's actions occurred before Uber was part of the case. The court rejected plaintiff's argument that the court should not allow for defendant's "games," adding that it was plaintiff "who started the 'game' of which he now complains by bringing his suit against Kalanick only, instead of Uber, in the first place."

Forum Selection and Governing Law Provisions Enforced

***Rizzo v. Island Medical Management*, 2018 WL 2372372 (N.J. App. Div.)**

Plaintiff's employment agreement provided that New York law governs the agreement and any arbitration relating to the employment agreement would be held in Hauppauge, New York. During his employment plaintiff worked out of his home in New Jersey. Plaintiff was injured on the job and was later terminated and sued for discrimination under New Jersey law. The employer moved to compel, and the motion was granted by the New Jersey trial court, which determined that New York law was to be applied. The New Jersey appellate court affirmed. The court found that the forum selection clause to be clear and unambiguous requiring the application of New York law to the dispute. "Consequently, plaintiff's claims are subject to binding arbitration under the rules of the American Arbitration Association, venued in Hauppauge, New York, with the Employment Agreement interpreted under New York law."

Limited Discovery Related to Notice of Arbitration Granted

***Schmell v. Morgan Stanley*, 2018 WL 2427129 (D.N.J.)**

Morgan Stanley moved to compel a former executive's discrimination claim. The executive denied that he received proper notice of the arbitration agreement, which was sent via e-mail. The court, applying the standard from Rule 56 of the Federal Rules of Civil Procedure, ruled that this factual dispute precluded the granting of the motion to compel. Alternatively, the employer sought limited discovery on the notice question. The court granted the employer's request, finding that limited discovery and possible evidentiary hearings were appropriate when factual disputes were present as to whether there was any arbitrable issues.

Second Phase of Bifurcated Hearing Not Required

***BSH Hausgerate GMBH v. Kamhi*, 291 F. Supp.3d 437 (S.D.N.Y. 2018)**

The arbitration panel agreed to bifurcate the proceeding in this matter. After issuing an award on the first phase, the panel allowed briefing on the question of whether the need for a second hearing was mooted by its award. The panel ruled that the second hearing was unnecessary, and the prevailing party moved to confirm the award. The court, in confirming the initial award, noted that the panel's bifurcation order indicated that any subsequent issue to be decided will be determined later and the panel subsequently determined that the remaining claims were moot after issuance of its award. Therefore, the court concluded that a colorable basis for the award existed and it confirmed the award. The court also found that a reasonable inference could be made that the second

phase of these proceedings were not required because liability was joint and several, and the panel could have but did not distinguish between the losing parties.

Sanctions for Making Motion to Vacate Denied

***Kent Building Services v. Kessler*, 2018 WL 1322226 (S.D.N.Y.)**

After losing in arbitration, Kent Building moved to vacate the award, arguing that the arbitrator acted in manifest disregard of the law. The prevailing party moved for sanctions under 28 U.S.C. § 1927, arguing that the motion lacked any basis in fact or law. The court found that although it "ultimately disagreed with Kent's characterization of New York's good faith standard, it cannot be said that Kent's argument had *no basis* in law." Even if the motion lacked a colorable basis in law, the court added, sanctions would not have been appropriate because "bad faith" had not been shown. "That Kent recounted facts tending to cast its actions in a better light is neither impermissible nor particularly surprising."

Arbitrability Question Delegated to Arbitrators

***Wells Fargo Advisers v. Sappington*, 884 F.3d 392 (2d Cir. 2018)**

Two separate groups of former Wells Fargo employees brought wage and hour class action arbitrations before both FINRA and the American Arbitration Association. FINRA declined to process the arbitration demands, as its rules preclude class proceedings. The district court concluded that the issue of arbitrability was for the arbitrator to decide and the Second Circuit affirmed. The Second Circuit noted that one set of claimants had signed agreements that incorporated by reference an earlier set of AAA Rules that were later amended. The Rules provided that the arbitrator would rule on his or her own jurisdiction. The court noted further that the AAA had subsequently adopted its Supplementary Rules for Class Arbitrations, which also provided that the arbitrator would rule on the issue whether the arbitration clause permitted class arbitration. Under Missouri law, which governed this proceeding, the Second Circuit concluded that a "clear and unmistakable" agreement was present that arbitrability questions were for the arbitrator. With the second set of claimants, the court noted that the applicable arbitration agreement provided that "any action instituted as a result of any controversy" arising out of the arbitration relationship would be subject to arbitration. In addition, the provision went on to say that any controversy relating to the validity or enforceability of the arbitration clause was for the arbitrator to decide. Once again, the court concluded that Missouri law would require that the arbitrator decide any issue of arbitrability.

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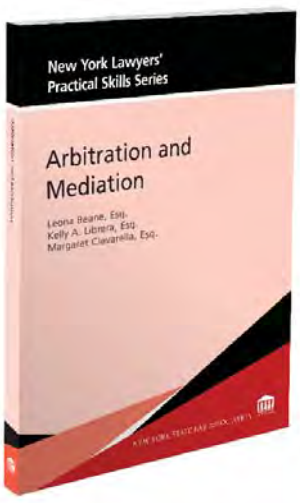

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