NYSBA SPRING 2015 | Vol. 8 | NO. 1

New York Dispute Resolution Lawyer

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

Message from the Chair


Sherman Kahn

In my last message I focused on the exciting developments in New York as a venue for international arbitration, including the founding of the New York International Arbitration Center. This message on international arbitration is further reinforced by the topics covered in this issue of the *New York Dispute Resolution Lawyer,* which also has a strong focus on international developments, this time with respect to mediation. The UNCITRAL Working Group II (Arbitration and Conciliation) is considering proposals to provide enforcement and recognition to settlement agreements reached in conciliation or mediation of international disputes similar to that currently enjoyed by international arbitration agreements pursuant to the New York Convention. This meeting, which was held in New York, presents an exciting view of the future of international ADR.

But ADR is not just international. The New York State Bar Association Dispute Resolution Section is a diverse cross-section of the ADR community in New York. Our members range from international arbitration practitioners with the largest law firms in New York to sole practitioners with an entirely local practice and everything in between. We have among our members full time mediators, full time arbitrators and practitioners who are users of mediation, arbitration and other dispute resolution techniques. Many of our members are full time or adjunct professors. And we have members throughout the state, across the United States and around the world.

I thought it might be interesting to our members to get some information about the demographics of our Section. We are an experienced Section. Approximately 80% of our members have been admitted for ten years or more. One reason for this is that many of our members are neutrals (arbitrators or mediators) and neutrals are generally an experienced group.

We are working hard, though, to reach out to younger lawyers and to law students. We have a very active young lawyers committee which is committed to holding events that will attract younger lawyers to the Section. Our student membership is growing and now constitutes about 8% of the Section's membership. In fact, according to the New York State Bar Association's statistical information, we have the second highest percentage of student members of any Section, behind only the Entertainment, Arts and Sports Law Section and ahead even of the Young Lawyers Section.

The Dispute Resolution Section is interdisciplinary, and cuts across subject matter areas. Not surprisingly,

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Message from the Co-Editors-in-Chief


Edna Sussman


Sherman Kahn


Laura A. Kaster

The Dispute Resolution Section under Chair and our Co-Editor-in-Chief, Sherman Kahn, had a very successful Annual Meeting at the end of January 2015. The programs run in conjunction with the Corporate Counsel Section were stimulating and the crowd large and receptive. The title of the day was "How to Succeed in ADR (by Really Trying)—A Blueprint for the Effective Use of Arbitration and Mediation." The Section's written meeting materials, gathered in a printed book, were excellent and we were very proud that many of the reprinted articles came from this journal. We have tried to anticipate many of the trending issues in ADR and to provide roadmaps for resources and additional exploration. We have had considerable success in predicting concerns and developments.

In this issue, we make another attempt to alert you to a possible future. This time it is a development on the mediation front. And it is potentially revolutionary. In the international arbitration arena, the New York Convention that permits international recognition and enforcement of arbitral awards is the engine driving arbitration growth around the world, including competition of providers and seats and a true economic boom in some areas, New York under the auspices of NYIAC included. Now the United States, with the strong support of multinational corporations and several NGOs, has proposed extending expedited enforcement and recognition to settlement agreements reached in conciliation or mediation of international disputes. United Nations Working Group II (Arbitration and Conciliation) held its sixty-second session in New York on February 2 and 3 on this topic. If a convention is eventually successful—and that may be too soon to predict—it could do for mediation what the New York Convention has done for arbitration. A world-wide expansion of the use of mediation could ensue and influence many mediation-related issues both in international disputes and in domestic mediation, including training, credentialing, and the scope of confidentiality, among other issues. We will give you our first impressions of the background and the issues here but we will continue to follow this important development on your behalf and we invite any comments you would wish to share.

Although we have several articles on this topic, we do not abandon our usual wide-ranging effort to deal with arbitration developments, ethics, cases, books and our own Section's work. We hope you enjoy the issue.

The Co-Editors-in-Chief

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cross membership between the Dispute Resolution Section and other Sections is very wide-ranging with significant numbers of our members in every other State Bar section. The Sections with the highest cross-membership with the Dispute Resolution Section are the Business Law Section, the Commercial and Federal Litigation Section, the International Section, the Labor and Employment Law Section and the Trial Lawyers Section. Our membership encompasses specialty subject matter areas as well with, for example, significant cross-membership with the Family Law Section, the Intellectual Property Law Section and the Trusts and Estates Law Section.

Although our members are spread across the state, about 60% reside in New York City or one of the surrounding suburbs. The remaining 40% are evenly split between upstate New York and out-of-state or international practitioners. While some of the concentration of our members in New York City results from the general concentration of lawyers in New York City, we have been working to increase our representation upstate. We welcome any thoughts you have about how to bring more upstate lawyers into the Section.

With adjustment for non-reporting, approximately 20% of Section members come from offices of over 100 people, while approximately 28% are solo practitioners. Approximately 70% of our members report being in private practice. The State Bar's statistics do not separate out neutrals from advocates, so there is insufficient data to identify what percentage of our members are full time neutrals, full time advocates or, like myself, have practices that include both neutral and advocacy work. However, anecdotal evidence suggests that we have a significant number of neutrals among our ranks. Moreover, our mediation and arbitration training programs help to increase the numbers of lawyers who are prepared to serve as mediators and arbitrators.

In addition to showing us the positive facts about the diversity of the Section, the numbers also show us where we need to improve. Although the numbers are not entirely reliable due to non-reporting, it appears that the Section is about 65% male and about 85% White/Caucasian. These numbers are not significantly different than the State Bar as a whole. What this means is that the Section, along with the rest of the State Bar, has some work to do in increasing racial, ethnic and gender diversity. This is something on which both the State Bar and the Dispute Resolution Section have devoted considerable effort. At the Section level, our Diversity Committee led by Alfreida Kenny and Carolyn Hansen has worked tirelessly to promote the Section to diverse audiences and to help us increase the attractiveness of our offerings to those audiences.

Even with our varied offerings, given the diverse mix of practices, experience and geography that make up the Dispute Resolution Section, it can be difficult to meet the needs of all our members in any single program. We hope though, that over time we are providing something for everyone. For example, with our Annual Meeting this January, we were pleased to be able to co-present with the Corporate Counsel Section, which added a new perspective—that of the users of ADR—to the meeting. This perspective, I hope, was valuable to the neutrals and other ADR practitioners that make up a significant portion of our Section.

The Dispute Resolution Section Executive Committee is eager to hear from Section members about their ideas for initiatives and programs designed to make the Section more valuable to the members' practices. All Section members should feel free to reach out to me or to the chairs of relevant Section committees to share ideas regarding how we can help you in your practice.

Sherman Kahn

Dispute Resolution and Corporate Counsel Sections Annual Meeting Program

Thursday, January 29, 2015
New York Hilton Midtown

How to Succeed in ADR (by Really Trying)—A Blueprint for the Effective Use of Arbitration and Mediation

Panel I: ADR Choices Have Consequences—A debate on the pros and cons of arbitration

By Donia Alwan (LLM Candidate, NYU)

Hon. Judith S. Kaye made some introductory comments emphasizing the importance of alternative dispute resolution, introducing the panelists, and noting that they had all been assigned pro and con roles for the purpose of the panel.

The first panelist, Robert R. Elliott, III, is the managing partner of the New York office of BNP Paribas as well as the co-head of its global litigation practice. In his opinion, clients ought to be counseled in advance regarding their dispute resolution options and clients should not automatically elect to include a mandatory arbitration clause. In his practice, arbitration clauses are usually negotiated when appropriate on a case-by-case basis. He does not favor arbitration unless he can negotiate the appropriate terms, which include a strict confidentiality clause or an agreement on a non-written decision so that there is no record that could affect the parties' respective reputations. He believes there is a growing realization that one can use international treaties to ensure that international arbitration awards are properly enforced. However he stated that the advantages of arbitration were often exaggerated and that in reality there is no "short and sweet" process. In fact, arbitration often means a costly discovery process, since the arbitrator and counsel are paid by the hour. Moreover, the fact that arbitrators' decisions are not reviewable on the merits is often an issue.

The second panelist, Jonathan R. Goldblatt, is in-house at Bank of New York Mellon in New York City and is the head of litigation for Americas. In his opinion, the fact that litigation involves a public record represents a problem because various allegations can easily and quickly end up in the newspapers. Such allegations can have a material impact on the market and thus banks and financial institutions usually prefer to steer clear of such pubic processes. If arbitration is properly designed, then the parties obtain a confidential dispute resolution process which is often the solution to this risk. He also considered the advantages of arbitration when dealing with parties that are in locations where the legal systems may be unreliable, as this avoids the uncertainty of adjudicating in local courts and being at the mercy of a local judge and jury. Moreover, the cost issue can be reduced greatly by building into the arbitration clause limitations on the discovery process and hearing time.

The third panelist, Brook F. Gardiner, is at NFL Management Council in New York City. He suggested that in arbitration one does not always get what he or she asked for. It is an important factor that arbitration is a confidential process. However, the concept that an arbitration remains confidential forever is not entirely accurate; in some situations, the decision is subsequently leaked. This is partially due to the fact that once the arbitrator has rendered his decision he relinquishes his jurisdiction and thus enforcement of the confidentiality provision becomes more difficult because there is no supervisory authority. He argues that arbitration is sometimes a costly process which can't be limited by law (referring to labor law and various employment contracts). Moreover, negotiating a clause limiting the process requires a business partner willing to do that. He does not consider the fact that a business partner is unwilling to submit disputes to mandatory arbitration to be a deal-breaker because he believes the client relationship is more important. He further stated that in the context of labor relations, arbitration clauses are very beneficial because of the continuing relationship.

The fourth panelist, Theodore K. Cheng, is a partner at Fox Horan & Camerini LLP in New York City. His view is that what drives a decision on whether or not to choose arbitration varies from one case to another. He suggested that in long-term business relationships some "bumps" may arise and that it is preferable to deal with these issues as quickly and expeditiously as possible. He believes that arbitration is advantageous because the parties can choose their own arbitrator who has the specific expertise they need, whereas in the adjudication process the parties don't have this option since they are assigned a judge who may not have the necessary expertise. He noted that entertainment disputes tend to attract a great deal of unwanted publicity, thus electing to refer such a dispute to arbitration ensures that the parties benefit from a confidential process. He also noted that the parties may also seek interim relief from the Tribunal, to avoid having to go to court.

The fifth panelist, Harold A. Kurland, is a partner at Ward Greenberg Heller & Reidy LLP in Rochester. He described arbitration as being a quick dispute resolution mechanism that includes a high degree of risk. He also stated that arbitration should not include huge amounts of discovery, but should be an expeditious proceeding.

The ultimate point on which most panelists agreed was that arbitration was a mechanism which should be tailored based on the type of client and dispute. It was also argued that in some respects arbitration has certain advantages but that in other cases electing to arbitrate could be a regrettable decision.

During the question and answer session various attendees raised questions on the qualification of arbitrators, the criteria for selecting a particular arbitrator and the diversity of arbitrators.

Panel II: Nothing But the Truth?—Ethical duties of candor in ADR

By Cam Tu Vo Thoi Lai (LL.M Candidate, Fordham)

The second panel of the NYSBA Dispute Resolution and Corporate Counsel Sections' Annual Meeting program, entitled, "Nothing But the Truth?," addressed the ethical duties of candor that practitioners are subject to in ADR processes. Professor Jill I. Gross, of Pace Law School, served as moderator and directed her questions to a panel consisting of a neutral, Jack P. Levin of Levin ADR; an in-house counsel, Ellen Slipp of Citi Private Bank; and an advocate, Erik S. Groothuis of Schlam Stone & Dolan LLP.

Professor Gross, who teaches ethics and ADR at Pace Law School, presented three scenarios to the panelists and asked what were the parties' respective duties in each case, whether they have encountered such circumstances in their practice, and, if so, how did they resolve the ethics dilemma.

The first scenario involved the counsel's duty of candor to adverse counsel during mediation

The setting was the following: an attorney represented a client in a settlement negotiation during mediation where the opposing counsel withdrew the offer he previously made and replaced it with a far lower one, providing a reason which the counsel found suspicious. The client then accepted the lower offer. Professor Gross therefore asked the panel whether opposing counsel had violated his ethical duties?

Mr. Groothuis addressed this issue by referring to Model Rule 4.1 of the Rules of Professional Conduct, which provides that *In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person*. According to Mr. Groothuis, this case involves a factual statement. However, he stressed the ambiguity that may exist during a settlement negotiation when the intention of a client is requested or indicated by opposing counsel. Such circumstances are expressly covered by Comment 2 of Model Rule 4.1, which provides that "*estimates or parties' intentions are not necessarily to be disclosed.*" In the given scenario, Mr. Groothuis opined that the statement of fact was irrelevant but suggested that the attorney speak with the mediator and set forth the basis on which he believes the misrepresentation affected his client. Other advice he provided is to explain to the client that he should not rely on the opposing counsel's assertion.

Professor Gross then turned to Mr. Levin, who served as a litigator prior to becoming a full time neutral, with the same question. Mr. Levin explained that when acting as counsel he had encountered such a misrepresentation and had asked for the misrepresentation to be corrected. As a mediator, if he had knowledge that a party is lying, he would ask the party to either set the record straight or pull out of the mediation. He has done so and based such an action on the trustworthiness that a mediator should require of the parties' attorneys.

Ms. Slipp noted that model Rule 4.1 is simple and unambiguous. She further noted that comments have been added to this rule because of an acknowledgment that, in the context of mediation or casual settlement conversation, attorneys do not wish to disclose every aspect of their case. To illustrate her point, Ms. Slipp quoted Comment 2: *Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category*. Ms. Slipp then highlighted that in negotiation, a comment such as *my client will not take less than $ xxx* by a counsel, with knowledge that his client will absolutely take less than the said amount, constitutes a material misstatement. Instead, the counsel can say *I would not recommend that my client take less than $ xxx* or *You, Mr. Adversary or Mr. Mediator, know that the claim is not worth less than $ xxx*, which do not constitute material misstatements.

Mr. Levin pointed out that any lowering of an offer may raise suspicion from the opposing party and the mediator. In such case, he would ask questions, not because of the potential misstatements of fact but because of the obvious impact on the negotiations going forward. He added that should he suspect something that is not ethical, he would be very tough with the counsel.

Professor Gross concluded this first scenario by mentioning a relevant article written by Professors Art Hinshaw and Jess K. Alberts[1] dealing with a study regarding lawyers' knowledge and understanding of Model Rule 4.1. The result showed that the lawyers who are practicing have little understanding of the consequences of violating this rule.

The second scenario put forth to the panel was about a potential lack of candor by counsel in statements to the arbitrators during the hearings

The setting was the following: three arbitrators composed a panel in a commercial dispute regarding the valuation of assets of an acquired company. Earlier in the

proceedings, counsel to one party, the buyer of the company, presented to the panel that the acquired company had misrepresented a cash holding of ($2,000,000) at the time of the transaction. The issue of cash misrepresentation was not part of any claim but the implication was that the alleged misrepresentation concerning the cash reflected on the underlying asset value. The arbitrators learned later in the arbitration that the parties had entered into a side agreement with the buyer acknowledging the possible cash shortfall and with the seller agreeing to pay back the money. Both parties of the arbitration knew about this side letter but failed to inform the panel. Ultimately, the case was settled but the arbitrators were quite concerned that they were deliberately lied to by the parties for purposes of manipulating the records or limiting the basis of the panel's award.

Professor Gross directed her first question to Mr. Levin by asking what he would do in this specific situation.

Mr. Levin recalled that arbitration is the result of the parties' agreement; it is the parties who construct the parameters of their controversy. He has witnessed a number of situations where the arbitrators are not told the whole story of the case, such as when an obvious key witness is not called by one side. He then stated that the larger question was whether arbitration is about discovering the truth or resolving the controversy as presented by the parties to the panel? In situations where Mr. Levin felt that something was kept from him by the parties, he directly asked the parties the reason for not having raised a particular allegation. In his experience, the parties generally say that they did not need to address a particular issue in this arbitration. His personal point of view is that it is the prerogative of the parties to shape the boundaries of the dispute.

Professor Gross then asked the panel whether they thought that arbitrators have the right to ask for an explanation for the missing information.

Mr. Levin thought that it was appropriate to ask as arbitrators want to achieve a fair result.

Ms. Slipp put forward that the attorneys have the same duty of candor before an arbitral tribunal as the duty of candor they have before judges in court. This is expressly provided for in Model Rule 3.3 which include an arbitral tribunal in the definition of tribunal. The arbitrators are the ultimate finder of facts; therefore, an obligation to stay truthful and not misstate facts or law is required. In case of a material misstatement, Ms. Slipp insisted that attorneys have a duty to correct the record. She then ask the other members of the panel about their point of view on whether there is a duty to correct a statement of fact that has been made but which was subsequently determined to be incorrect.

Mr. Groothuis contended that if the attorney was not aware of the wrongfulness of his statement of fact at the time the statement was made,, she should make sure that the record is corrected. Mr. Groothuis also highlighted the need for the Rules to be amended in order to take such circumstances into consideration.

Ms. Slipp pointed out that the other reason for this Rule is that it would be unfair for the other side to suffer a disadvantage based on the presentation of misleading evidence. She also stressed that when an attorney does not correct a misstatement of facts, his reputation may be jeopardized.

The third scenario involved the arbitrators' duty of disclosure

The scenario was as follows: an arbitrator is serving on a panel in a case involving a large broker-dealer and has not disclosed that he is currently suing a different broker-dealer for wrongful termination and at the same time, his home has been foreclosed upon by an institution related to broker dealer. The broker dealer involved in the arbitration lost the case.

Professor Gross asked Ms. Slipp what can an attorney do if he learns of that lack of disclosure after the case has been decided against his client.

Ms. Slipp noted that the scenario corresponds to a case that she actually handled, where 12 days of hearings were split into periods of 4 days. In the beginning of each 4-day period, the chairman asked the co-arbitrators for any additional disclosures, to which a particular arbitrator repeatedly answered no, even though he was actually concurrently serving on Ms. Slipp's panel and litigating 2 large matters: one involving a wrongful discrimination claim and the other to maintain a roof over his family's head.

Ms. Slipp pointed out that this is a case where evident partiality and bias can be made. She suggested that the solution was to file a motion to vacate on the basis of evident of partiality. When her client lost the case, the lawyer representing the broker-dealer informed her that the arbitrator who served on her panel is suing his client for wrongful termination. Without such a call, she would have never known about this conflict. A motion to vacate the award has been filed as this issue was not discovered until after the award was rendered. Ms. Slipp then noted that they ultimately had the award vacated and prevailed on appeals in the 11th Circuit with a 2-1 decision.

Mr. Groothuis further referred to the Canons of Ethics for arbitrators where the arbitrator's own opinion on whether she can be impartial is not the only element taken into consideration but also whether there is an appearance of partiality. Mr. Groothuis believes that this was the issue in this case.

Professor Gross then asked Mr. Levin whether, as an arbitrator, he would have disclosed this information. In its opinion, the 11th Circuit said that disclosure was required.

Mr. Levin thought that this was a black or white question. If he sees a familiar name and believes that this is the right thing to do, he would refuse to serve. According to him, not doing so can destroy confidence in the process. He also recalled the obligation of the parties to raise certain issues during or before the proceeding. As a result, he provides an opportunity to the parties to elicit what they think might be relevant for disclosure.

Ms. Slipp opined that the arbitrators bear the duty to disclose, and that the parties have no obligation to hire an investigator.

Professor Gross concluded this topic by pointing out relevance of social media in the context of the neutrals' disclosure. Ms. Slipp noted that the disciplinary committee has decided that in this context one may not send a "friend request" to a person on Facebook for the sole purpose of collecting information about that person.

Endnote

1. Doing the right thing : an empirical study of attorney negotiation ethics, Professor Art Hinshaw and Professor Jess K. Alberts, Harvard Negotiation Law Review, Spring 2011.

Panel III: The Verdict—How do arbitrators actually deliberate?

By James Ng (J.D. Candidate, NYU)

Elizabeth J. Shampnoi of Stout Risius Ross, Inc. served as the panel's moderator. The panelists were experienced arbitrators including Hon. Barry A. Cozier of LeClair Ryan; Erica B. Garay of Meyer, Suozzi, English & Klein PC; Charles J. Moxley, Jr. of MoxleyADR LLC; and Stephen P. Younger of Patterson Belknap Webb & Tyler LLP.

Judge Crozier discussed the broad differences between arbitration and traditional state court litigation. He noted that arbitration is less "constrained by rules" and seeks to "issue an award that is clear, legal, and applicable." He noted that parties and counsel are free to define the claims and issues during arbitral proceedings. He noted, however, that courts provide no guarantee that they will honor a confidentiality agreement between the parties when reviewing an arbitral award. Further, arbitral awards are generally not open to error correction on the merits. On the topic of selecting arbitrators, Judge Crozier advised parties to consider nominating an arbitrator that is knowledgeable in "process and procedure." In his experience, Judge Crozier finds that the strongest person on the arbitral panel decides how the proceedings will be run.

"One *pro se* [party] once referred to me as 'Your Highness,'" Ms. Garay recounted to the audience. She appreciates the difficulties of arbitrating disputes with *pro se* parties that are frequently inexperienced, and sometimes extremely disadvantaged in the arbitral process. In disputes involving *pro se* litigants, arbitrators should instruct the parties to address certain crucial issues, particularly the choice-of-law. If a *pro se* litigant fails to consider a critical matter, the arbitrator should then directly advise that unrepresented party to seek legal counsel.

Mr. Moxley also addressed the challenges of arbitrating disputes with *pro se* parties. He advocates a more active approach to handling unsophisticated parties. If a *pro se* litigant fails to raise issues involving "esoteric arbitration laws" or "fundamental fairness," the arbitrator should be free to perform independent research and rule on the issue—provided that the other party has the opportunity to respond. In describing the thought process of an arbitrator, Mr. Moxley encouraged advocates to listen closely to an arbitrator's questions. "Our job is to narrow it down," Mr. Moxley said. "We will share our views of what we are interested in." He noted that often the real issues in controversy are far less than it initially appears.

In Mr. Younger's experience, many people hold the overly simplistic view that "arbitrators just split the baby." He noted that arbitrators look very carefully at the relevant evidence and do their best to do justice. Ultimately, arbitrators have the twin duties of following the law as well as the contract. Like his counterparts on the panel, Mr. Younger acknowledged that difficulties do arise when arbitral proceedings involve *pro se* litigants. In those situations, arbitrators are advised to roadmap the issues to be briefed and ask more questions to develop the necessary legal arguments. In explaining the nuances of the arbitral process, Mr. Younger noted that although arbitrators bring a whole different level of technical expertise and analysis to a case, they still want to read the documents and hear the testimony before making a decision.

Program IV: Show Me the Money!—How damages are determined in arbitration

By Maria Alejandra Arboleda (J.D. Candidate, Columbia)

Hui Liu of Mauriel Kapouytian Woods LLP acted as chair and the panelists were Lea M. Haber Kuck from Skadden, Arps, Slate, Meagher & Flom LLP; Richard L. Mattiaccio from Squire Patton Boggs; Neil Steinkamp of Stout Risius Ross, Inc., and Amianna Stovall from Constantine Cannon, LLP.

Ms. Kuck outlined the significant differences between expert evidence for damages in litigation and arbitration. In litigation, the federal and state courts have detailed

rules for experts' reports, depositions and qualifications, and there is a whole body of case law which gives guidance as to the scope of the experts' testimony. In arbitration, the agreement of the parties is the first source governing what types of damages can be awarded, and then one must turn to the governing law to fill in gaps where the agreement is silent. Regarding the procedural aspect of damages evidence it is unlikely that the parties would have touched on this in their arbitration agreement, so the institutional rules governing the arbitration would apply. Generally the arbitrators decide on the procedural aspects of expert testimony and other evidence of damages in the preliminary hearing/conference with the parties. Ms. Kuck then referenced the main differences between the common law and civil law system, mainly that in the former, experts are retained by the parties and they act as witnesses, being cross-examined, whereas in the latter, experts are more likely to be retained by the court and there is high degree of skepticism toward experts retained by the parties. She noted that there is considerable flexibility in international arbitration that allows for various techniques in the presentation of damages evidence. Ms. Kuck noted that in arbitration she does not subscribe to sticking to the specific standard of "reasonable certainty" used by the U.S. courts, but rather in providing an expert report that is compelling to win over the arbitrators, and she noted that counsel should make use of the flexibility of the arbitral proceedings to use a variety of different resources for their expert report and other damages evidence.

Mr. Mattiaccio stated that this issue, as almost any other in arbitration, often depends on the arbitrators. The key in choosing appropriate arbitrators is for them to be open to the appropriate methodologies for determination of damages in the specific case before them. The expert reports should start from the beginning and explain the methodology used and why it is the most appropriate for that specific case. This approach is most helpful when there is a plural and multicultural arbitral tribunal. Mr. Mattiaccio emphasized the importance of exchanging expert reports that are very detailed, as these reports end up serving as the basis for direct testimony in witness statements. Regarding the methodology used by experts, Mr. Mattiaccio agreed that generally reasonable certainty is not the standard followed by arbitrators. And as a result, this puts real pressure on the skills of the attorney to communicate to the arbitrator and convince her that his or her expert's methodology is the correct one.

As an expert, Mr. Steinkamp raised many interesting points. Key factors to success are how experts present their conclusions on damages to the arbitral tribunal and their capability to synthesize and explain the sources for and methodology of their calculations. He stressed the importance of narrowing down the differences in damages assessment between the opposing parties' experts and the various ways this could be achieved. He also noted the usefulness of document and information exchange between the parties regarding their experts, and argued that having a deposition of the opposing expert is crucial, because it allows a party's expert the opportunity to review the technical details in which the opposing party's expert opinion is based. The most interesting technique he's experienced in arbitration for narrowing down the issues is when arbitrators encourage the experts to decide between themselves where they agree and what constitutes their true differences for damages assessment on the case. Arbitrators should consider the sometimes-used practice of having both experts testify simultaneously where each is being questioned about her own report and also allowing them to question each other. In his experience this has resulted in honest and spontaneous answers from both experts in areas where they agree; that helps to simplify the ultimate damages determination. On the use of methodology, Mr. Steinkamp opined that "reasonable certainty" is a difficult but key standard that arbitrators should aim to achieve, but that in arbitration (unlike in the U.S. courts) there is no requirement to do so. Demonstrating methodology is critical to determining the probative value of an expert report, and Mr. Steinkamp believes that while the U.S. court system is designed to clarify that issue through the use of reasonable certainty, in arbitration that standard is not part of the process. In practice, most of the opinions that are excluded from arbitral proceedings are those where the methodology used by the expert is not one that is reasonable (*i.e.*, it hasn't been used by others, has not been tested, or is not used by the industry or other practitioners), so it is crucial for an expert to prove his methodology to be appropriate.

Ms. Stovall also emphasized the importance of *telling the story* to the tribunal from the beginning of the arbitration. From an attorney's point of view, it is important to work from the beginning with your own expert to make sure you are not only proving your damages but also convincing the tribunal that the methodology used by your expert is the appropriate one.

Finally, the panelists commented on "hot tubing" (having both experts questioned simultaneously by the arbitrators), arising from a question from the audience, and most of them agreed that when acting as counsel they were not comfortable with that practice as they felt that it causes them to lose control over the process, unless they are sure that their expert is much more knowledgeable than the other party's. But it was also noted that from the arbitrator's point of view it is often the opposite, as they believe such discussions amongst the experts could only be useful for clarifying issues regarding damages.

Ethical Compass
When "Yes" May Actually Mean "No": Rethinking Informed Consent to ADR Processes

By Professor Elayne E. Greenberg

Introduction

It is time for us to rethink how to achieve meaningful party consent to ADR processes such as mediation and arbitration. I, along with my colleagues Professors Jeff Sovern, Paul F. Kirgis and Yuxiang Liu, recently contributed to the growing body of research finding that a party's consent to use an ADR process rather than utilizing a court to resolve the dispute is too often neither informed nor consensual.[1] In our empirical study "'Whimsy Little Contracts' With Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements," we found a paucity of consumer awareness and understanding of arbitration clauses in pre-dispute consumer contracts.[2] Although our research was about the degree of a party's informed consent to arbitration agreements in consumer contracts, I believe the findings have broader applicability to our understanding of a party's informed consent beyond consumer contracts and to ADR processes in general. This research challenges the long-held assumptions and ongoing practices of many ADR professionals, including myself, who believe that a party's decision to participate in dispute resolution should be a voluntary and informed decision. In this column, I will extrapolate the lessons learned from this research and question how we might make informed consent a more meaningful concept when using and conducting such ADR processes.

In Part One, I begin our discussion by introducing the different meanings and interpretations of informed consent in the ADR processes of arbitration and mediation. Then in Part Two, I illustrate the lack of meaningful party informed consent in ADR processes, by highlighting our research findings that show how consumers have little awareness of or understanding about their arbitration agreements in their consumer contracts. In Part Three, I offer the multiple causes for this lack of awareness and understanding. I conclude in Part Four with some suggestions about how we might address this nuanced and contextual problem.

Part One: What Does Informed Consent Mean in the ADR Context?

Lawyers and neutrals agree that a client's *informed consent* is a pre-requisite for a client to opt-in to ADR processes.[3] Regardless of whether parties choose to participate in arbitration, mediation or a hybrid process, parties should have quality, comprehensive and comprehensible information to fully understand their dispute resolution options and meaningfully decide which dispute resolution option, if any, to use in lieu of traditional court processes. Moreover, to ensure that parties truly give their informed consent, many lawyers and neutrals, as part of their ethical obligation, regularly provide parties with both a written and verbal explanation of the process prior to the beginning of an arbitration or mediation. Advancing their ethical mandate even further, many lawyers and neutrals also provide parties with a written and verbal explanation of the ADR process multiple times and in many forms, including promotional material, engagement letters, consent forms, media presentations and confidentiality agreements, all to ensure that parties to an ADR process are giving their informed consent to use an ADR process and forgo their right to resolve their dispute in court.

Although there is general agreement among legal and ADR professionals that informed consent should be a predicate to participation in ADR, there is little consensus about how to make the determination of informed consent and whose responsibility it is to do so.

By way of illustration, the Supreme Court's current predilection towards arbitration and the enforcement of pre-dispute arbitration agreements indicates that the concept of "informed consent" is being interpreted broadly.[4] As interpreted by the Court, the mere existence of a contract to arbitrate is sufficient evidence of party consent. Absent from the Court's inquiry is the extent to which the contracting parties were adequately informed to give meaningful consent. Similarly, the arbitrator's ethics codes do not explicitly address an arbitrator's ethical obligation to ensure party informed consent. For example, the Jams' Arbitrators Ethical Guidelines Introduction B provides:

> Arbitration—either entered into voluntarily after a dispute has occurred, or as agreed to in a pre-dispute clause—is generally binding. By entering into the Arbitration process, the Parties have agreed to accept an Arbitrator's decision as final.…[5] Thus, again the contract to arbitrate is deemed to be adequate informed consent.

Again, the ethics code deems the contract to be evidence of a party's informed consent to arbitrate.

Shifting to the mediation context, we see that informed consent is interpreted to be a central part of a mediator's broader ethical obligation to honor a party's right to self-determination.[6] Specifically, Standard IA Self-Determination provides in relevant part that:

> A mediator shall conduct a mediation on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to *process* (emphasis added) and outcome.[7]

However, the mediator's ethical obligation to ensure a party's informed consent is limited.

> A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.[8]

Thus, we see that depending on the context, informed consent appears to have different meanings. Moreover, it remains unclear who should be the insurer of party informed consent: the party himself, his lawyer or the ADR neutral.

Part Two: What "'Whimsy Little Contracts' With Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements" Tells Us About Consumers' Informed Consent to Arbitration in Consumer Contracts

Our online survey of 668 consumers showed that most consumers are unaware of and do not understand the import of the arbitration clauses in their consumer contracts.[9] Let me provide you with a thumbnail sketch of our survey and the research results. As part of the study, we showed survey participants a representative consumer contract that had an arbitration clause. The survey participants were representative of the general American population with respect to age, income, education and ethnicity. We intentionally selected a sample contract in our survey that was more readable than typical credit card contracts with an arbitration clause. Moreover, the arbitration clause in our contract was printed in bold and referenced in three of the seven pages of the sample contract. Finally, the provisions in the arbitration clause that informed consumers that they were waiving their rights to sue in court, participate in a class action, have a jury trial and appeal the arbitrator's decision were in italics and ALL CAPS.

The magnitude of the survey participants' misinformation and lack of awareness about the arbitration clause shatters any remaining illusions that parties are giving meaningful informed consent to ADR processes. For example, ninety-one per cent did not realize that the contract both had an arbitration clause and that it would prevent them from going to court. Of the 303 respondents who claimed to never have entered into an arbitration contract, eight-seven per cent did in fact enter into at least one consumer contract that included an arbitration clause.

We also tested the salience of the arbitration clause by asking the survey respondents to recall five of the words or phrases they had read in the sample contract. Tellingly, only 23 of the survey respondents explicitly mentioned arbitration or a phrase relating to arbitration. Respondents' failure to recall the arbitration clause in the contract suggests that arbitration specifically, or dispute resolution generally, was not a primary consideration for survey participants when reviewing consumer contracts.

These survey results have compelled me to question what is preventing ADR consumers from being aware of the presence of the arbitration clause and understanding what they are agreeing to. From our study, providing written explanation and having key phrases in bold and ALL CAPS are not enough to provide informed consent.

Part Three: What Is Preventing Consumers of ADR Services from Giving Meaningful Informed Consent?

We can posit many reasons, none absolute, but each shedding some light that explains why, in part, parties might not be fully informed about their dispute resolution choice despite our best efforts.

Some may insist that all consumers of dispute resolution service are not alike, and that there is a difference between sophisticated and unsophisticated consumers of dispute resolution services. Thus, the less sophisticated, such as the typical consumer entering into a consumer contract or the employee entering into an employee contract, require different types of information in a different context before they can truly give meaningful informed consent than the more sophisticated consumer of dispute resolution services such as business people. Others may counter that it doesn't matter if an individual is a sophisticated or unsophisticated consumer of dispute resolution services. Informed consent should never be taken for granted.

Offering a different perspective, in her thought-provoking book "Boilerplate," Mary Jane Radin suggests multiple reasons to explain why a party may not read and understand Agreements to Participate in dispute resolution, if these agreements are viewed as one more piece of "boilerplate" that is not worth reading.[10] First, some may feel it would be a waste of time to even read the terms because they are unlikely to understand them.[11] Second, a party may need the services now, and believe there are no viable alternatives.[12] Third, a party may be unaware that there may be any implications of participating in a dispute

resolution process and feel no need to read the Agreement to Participate.[13] Fourth, a party may trust the provider would not harm him, and believe there is no need to read the terms.[14] Fifth, a party may think that if the agreement does actually contain onerous terms, then that agreement wouldn't be enforceable. Sixth, a party may regard the person providing the contract as having greater power, so the party really has no choice but to agree.[15] Seventh, many parties don't believe that a dispute will actually occur in the future and that a time will come when they will have to exercise their legal rights.[16]

Our survey participants' illustrative comments ratify the many reasons Radin offers about why people may ignore such "boilerplate" as arbitration clauses in consumer contracts.

"I don't see how they could preclude us from filing a class action suit through a whimsy little contract."[17]

"No way they can tell me that they can screw up and then I have no recourse."[18]

"Based on my memory of what I think I've read has happened. And an old cliché, 'You can't sign away your rights.'"[19]

Still, another viable explanation of why consumers of ADR services may ignore or choose not to focus on information that will help them give their informed consent is their unwavering belief that court will always remain their default option. After all, our media replays and reinforces ongoing images of people securing justice in court. Conspicuously absent from the media are images of people also securing justice in arbitration, mediation or hybrid processes.

Part Four: How Then Might We Provide Meaningful Informed Consent?

As we re-visit this threshold issue of meaningful informed consent for consumers of dispute resolution, we realize that there is no quick fix. Rather, the problem has many causes. This more nuanced understanding of the problem suggests that different types of interventions are needed depending on the circumstances, including the sophistication of the parties, the context of the dispute and the type of ADR process employed.

For example, there are those ADR activists who are trying to create a more perfect world and influence the media to present a fuller media portrayal of the multiple ways beyond court that people in conflict may resolve their disputes. Possibly, if mediation and arbitration become more mainstream concepts in the public's eye, that will be an important step to ensuring more meaningful informed consent.

Another suggestion is that there be different standards of informed consent for different ADR processes and different types of ADR consumers. Possibly the standard for appropriate informed consent should differ if the parties are just deferring their access to court as in mediation, or if they are permanently relinquishing their access to court as in arbitration. After all, if you are going to relinquish your Constitutional rights to court access, jury trial and class actions, you must have enough information to understand the ramifications of that choice. Similarly, unrepresented or less sophisticated consumers of ADR services should be provided with a different decision-making process to ensure they are making meaningful informed decisions about ADR.

A third idea is to continue thinking about what we as committed ADR professionals might do differently in our practice and our teachings. Helping parties achieve meaningful informed consent is a practical challenge that doesn't have one immediate solution. I believe our collective thoughts, reflections and sharing will help advance our assumptions and practices.

Endnotes

1. Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis, & Yuxiang Liu, *'Whimsy Little Contracts' with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements, Social Science Research Network* (October 29, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2516432.
2. *Id.*
3. *See, e.g.*, NY Rules of Prof'l Conduct R. 1.0 cmt. 6-7 (2009 as amended through January 1, 2014); Model Standards of Conduct for Mediators Standard I (2005).
4. *See, e.g.*, Prima Paint Co. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967); Southland Co. v. Keating, 465 U.S. 1 (1984); Mitsubishi Motors Co. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985); AT&T Mobility, LLC v. Concepcion, 131 S. Ct. 1740 (2011); American Express Co. v. Italian Colors, 133 S. Ct. 2304 (2013).
5. Arbitrators Ethics Guidelines Intro. (2010).
6. Model Standards of Conduct for Mediators Standard I (2005).
7. *Id.*
8. *Id.* at Standard I(A)(2).
9. *See supra* note 1.
10. Mary Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton University Press 2013).
11. *Id.* at 12.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *See supra* note 1 at 57.
18. *Id.*
19. *Id.*

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A special thank you to Sade Forte (St. John's Law School '15) for assistance in formatting this column.

Using Forum Selection Clauses to Avoid Default Arbitration Rules

By Emily K. McWilliams and Howard S. Suskin

Occasionally, a conflict may arise between parties' obligations to arbitrate by virtue of membership in an organization and their contractual agreement with one another to litigate in a designated forum. One such conflict recently was addressed by the Second Circuit, which sided with the party seeking to enforce the contractual agreement between the parties. In *Goldman Sachs & Co. v. Golden Empire School Financing Authority*,[1] the Second Circuit held that an agreement between parties trumped a Financial Industry Regulatory Authority (FINRA) rule requiring disputes to be settled in arbitration. FINRA is a self-regulatory organization, authorized by Congress and subject to the SEC, that regulates securities firms that do business with the public in the United States

The Second Circuit's ruling concurred with the approach taken by the Ninth Circuit, and disagreed with a decision issued by the Fourth Circuit. The Second Circuit's ruling highlights an emerging circuit split over whether, despite the liberal federal policy favoring arbitration, forum selection clauses in parties' contracts supersede a pre-existing arbitration clause contained in a party's membership rules. This article addresses the emerging split among the Circuits on this issue, and also questions whether FINRA will use its enforcement authority to sanction members who attempt to supersede its customer arbitration policies.

Background to the Second Circuit's Decision: In 2004, Golden Empire School Financing Authority undertook a series of school improvement projects. To finance these projects, Golden issued municipal bonds and retained Goldman Sachs as an underwriter and broker-dealer. Goldman advised Golden to issue the debt in the form of auction rate securities ("ARS"). ARS are long-term, variable-rate instruments that reset at periodic auctions. At each auction, ARS investors submit a bid setting forth the number of ARS that they wish to purchase, hold, or sell, and the lowest interest rate that they will accept.[2]

With Goldman's assistance, Golden issued a total of approximately $125 million in ARS in 2004, 2006, and 2007. For each issuance, Goldman and Golden entered into two written agreements: (1) an Underwriter Agreement that set forth Goldman's obligation to purchase and offer the Bonds and (2) a separate but simultaneously executed Broker-Dealer agreement that defined Goldman's duty to manage the auctions for the Bonds.

The Broker-Dealer agreements contained two significant clauses regarding dispute resolution. First, the agreements contained a Forum Selection Clause providing that:

> All actions and proceedings arising out of this Broker-Dealer Agreement or any of the transactions contemplated hereby shall be brought in the United States District Court in the County of New York and that, in connection with any such action or proceeding, submit to the jurisdiction of, and venue in, such court.

Second, the Broker-Dealer Agreements contained a Merger Clause stating that it contained the entire agreement between the parties relating to the subject matter.[3]

In 2008, the ARS market collapsed, and Goldman's ARS auctions began to fail. As a result, Golden was forced to refinance the Bonds, and incurred significant losses. Golden alleged that Goldman was to blame for these costs and had fraudulently induced it to issue ARS. Specifically, Golden alleged that Goldman failed to disclose that when Goldman served as an underwriter it generally placed support bids in ARS auctions to ensure that these auctions did not fail; that Goldman's decision to stop placing support bids in 2008 caused Golden's ARS auctions to fail; and that, if Goldman had disclosed its practice of placing "cover bids," Golden would not have issued ARS to finance its school projects.[4]

Golden filed a Statement of Claim against Goldman before FINRA pursuant to FINRA Rule § 12200, which states that a FINRA member "must arbitrate a dispute" if arbitration is "[r]equested by the customer" and "[t]he dispute arises in connection with the business activities of the member."[5] As a self-regulatory organization, FINRA has the authority to exercise oversight over all securities firms that do business with the public. As a FINRA member, Goldman Sachs agreed to comply with all FINRA regulations.

Nonetheless, in response to Golden's Statement of Claim, Goldman filed an action in the United States District Court for the Southern District of New York, seeking a preliminary injunction against the arbitration proceedings. Goldman contended that Golden had disclaimed any right to arbitrate by agreeing to the Forum Selection Clauses in the Broker-Dealer Agreements.[6] Against this contention, Golden offered three main arguments that the Broker-Dealer Agreement and the FINRA Rule can be harmonized to permit arbitration of Golden's claims: (1) the Forum Selection Clause is insufficiently explicit to supersede the prior arbitration agreement in FINRA Rule § 12200, (2) the Federal Arbitration Act's presumption in favor of arbitration requires that the Clause and

the FINRA agreement be read to complement each other, and (3) that, per the New York Civil Practice Laws and Rules (C.P.L.R.), the phrase "actions and proceedings" refers only to judicial disputes and does not encompass arbitrations.[7]

The District Court granted Goldman's motion for preliminary injunction to block the arbitration. The District Court held that the Forum Selection Clause in the Broker-Dealer Agreements supplanted Golden's right to arbitration under FINRA Rule § 12200, and thus that Goldman was likely to succeed on the merits. Relying on the Second Circuit's decision in *Applied Energetics, Inc. v. NewOak Capital Mkts., LLC*,[8] rejecting the need for explicit waiver of arbitration, the District Court found that the Forum Selection Clause's breadth ("all actions and proceedings"), mandatory nature ("shall"), and reference to judicial action ("the United States District Court in the County of New York") "substantially excluded" the arbitration agreement even though it did not expressly mention arbitration.[9] The District Court also rejected Golden's argument that the court should use the Federal Arbitration Act's presumption in favor of arbitration to settle the claim as "the presumption applies only to the scope of arbitration agreements and not disputes concerning whether an agreement to arbitrate has been made."[10] The Court further elaborated that the presumption in favor of arbitration cannot "force a complementary reading that conflicts with the plain meaning of a forum selection clause."[11] The District Court rejected Golden's argument that the phrase "action or proceedings" refers only to judicial disputes as "little more than a linguistic trick" that "strains reason."[12] The District Court also noted that the "Forum Selection Clause negotiated between Golden and Goldman makes no mention of the C.P.L.R. and suggests no such limitation" and that Golden's argument "ignores that the Supreme Court, Second Circuit, and New York State courts regularly refer to arbitrations as actions or proceedings."[13]

The Second Circuit's Ruling: On appeal, the Second Circuit affirmed the District Court's judgment that Golden's and Goldman's Forum Selection Clause requiring "all actions and proceedings" to be brought in federal court superseded Goldman's pre-existing obligation, in FINRA Rule §12200, to arbitrate.[14]

In reaching its decision, the Second Circuit reconciled its prior conflicting decisions in *Bank Julius Baer & Co. v. Waxfield Ltd.*[15] (holding the forum selection clause did not supersede earlier agreement to arbitrate) and *Applied Energetics, Inc. v. NewOak Capital Mkts. LLC*[16] (holding the forum selection clause overrode FINRA Rule § 12200). The Second Circuit distinguished *Bank Julius* because the forum selection clause in that case contained non-compulsory language stating that a customer "submits to the jurisdiction of any New York State or Federal Court" and that "any Action *may* be heard" in such court.[17] In contrast, the forum selection clause in *Applied Energetics* contained all-inclusive and mandatory language providing that "*any* dispute arising out of this Agreement *shall* be adjudicated in" New York. Additionally, the forum selection clause in *Bank Julius*, unlike the agreement in *Applied Energetics*, lacked language providing that it constituted the entire understanding and agreement, such that the forum selection clause could be read as "complimentary to the agreement to arbitrate."[18]

"Goldman v. Golden reflects an emerging circuit split over whether financial services companies can force customers to litigate, despite default obligations to arbitrate, by virtue of FINRA membership."

The Second Circuit affirmed the lower court's ruling that the question of "whether an arbitration agreement remains in force in light of a later executed agreement" is not a matter of scope, but rather is a dispute over whether an agreement to arbitrate has been made. As such, the federal presumption of arbitrability does not apply.[19] The Second Circuit also agreed that there is no requirement that the parties include an express waiver of arbitration in their subsequent agreements. Rather, because the presumption in favor of arbitrability does not apply here, "[T]he forum selection clauses need only be sufficiently specific to impute to the contracting parties the reasonable expectation that they would litigate any disputes in federal court."[20] In Goldman's and Golden's case, the Forum Selection Clause specifically precluded arbitration because it is "inclusive and mandatory," and because the later-executed agreements also have a merger clause stating that they "contain the entire agreement between the parties relating to the subject matter hereof."[21] Finally, the Court agreed with the lower court's determination "the general understanding of actions and proceedings encompasses arbitrations," and is not limited to judicial disputes.[22]

The Split Among the Circuits: *Goldman v. Golden* reflects an emerging circuit split over whether financial services companies can force customers to litigate, despite default obligations to arbitrate, by virtue of FINRA membership. The Second Circuit's opinion is consistent with the Ninth Circuit's holding in *Goldman, Sachs & Co. v. City of Reno*[23] that a broad, mandatory forum selection clause superseded FINRA Rule § 12200. However, those rulings conflict with the Fourth Circuit's opinion in *UBS Financial Services, Inc. v. Carilion Clinic*,[24] which concluded that a nearly identical forum selection clause did not supersede Rule § 12200.

In *Carilion Clinic*, the Fourth Circuit held that the phrase "all actions and proceedings" referred to litigation, not arbitration, thereby permitting the customer to proceed to FINRA arbitration. The Fourth Circuit also required an express waiver of the customer's right to arbi-

tration for a forum selection clause to trump FINRA Rule § 12200. Although the Fourth Circuit, like the Second and Ninth Circuits, found that an all-inclusive and mandatory agreement may supersede the arbitration provisions of Rule § 12200, the UBS agreement did not because the forum selection clause did not explicitly mention arbitration.[25] *See also UBS Sec. LLC v. Allina Health Sys.*[26] (following *Carilion Clinic*).

Practice Tips: The split among the Second, Fourth, and Ninth Circuits teaches that parties who leave any room for ambiguity in their forum selection clauses do so at their peril. One practice takeaway is that members seeking to override an organization's default arbitration rules must ensure that forum selection clauses clearly waive the customer's right to arbitrate. As such, parties should draft mandatory forum selection clauses that specifically preclude arbitration to avoid running the risk that a court will find the clause to be merely optional. To further ensure that the forum selection clause cannot be harmonized with a prior arbitration agreement, parties might also include a merger clause stating that the subsequent agreement is exclusive of any arbitration rights or remedies under any other agreement.

It remains to be seen whether FINRA will take disciplinary action against broker-dealers who use forum selection clauses to circumvent Rule § 12200. FINRA Rule IM-12000 provides that "[i]t may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2010 for a member or a person associated with a member to…fail to submit a dispute for arbitration under the Code as required by the Code…[or] to require associated persons to waive the arbitration of disputes contrary to the provisions of the Code of Arbitration Procedure."[27] The FINRA rule portends that firms who attempt to use forum selection clauses to circumvent FINRA's arbitration rules are, perhaps, engaging in risky business. Whether firms will be able to continue using forum selection clauses to bypass default membership rules depends on how vigorously organizations defend their own policies as well as how precisely members draft their subsequent agreements.

Endnotes

1. 764 F.3d 210, 215 (2d Cir. 2014).
2. *Ashland Inc. v. Morgan Stanley & Co.*, 652 F.3d 333, 335 (2d Cir. 2011).
3. *Goldman Sachs & Co. v. Golden Empire School Financing* Authority, 922 F. Supp. 2d 435, 438 (S.D.N.Y. 2013).
4. *Id.*
5. Available at http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=4106.
6. 922 F. Supp. 2d at 439.
7. *Id.*
8. 645 F.3d 522, 526 (2d Cir. 2011).
9. 922 F. Supp. 2d at 441, 443.
10. *Id.* (quoting *Applied Energetics,* 645 F.3d at 526).
11. *Id.* at 441.
12. *Id*. at 442.
13. *Id*.
14. 764 F.3d at 215.
15. 424 F.3d 278, 284 (2d Cir. 2005).
16. 645 F.3d at 526.
17. 424 F.3d at 282 (emphasis added).
18. 764 F.3d at 215 (quoting *Bank Julius*, 424 F.3d at 285) (emphasis added).
19. *Id*. at 215.
20. *Id*. at 216.
21. *Id*.
22. *Id*.
23. 747 F.3d 733, 746 (9th Cir. 2014).
24. 706 F.3d 319, 329 (4th Cir. 2013).
25. *Id*. at 329-30.
26. No. 12–2090, 2013 WL 500373 (D. Minn. Feb. 11, 2013).
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"And, the Law Applicable to the Arbitration Agreement Is…"

By Erika Sondahl Levin

Introduction

Parties employ international arbitration for a number of reasons, including efficiency, neutrality, enhanced control over the process, the expertise of the arbitrators, and the enforceability of the award. However, these advantages may be severely compromised if an arbitration clause is poorly drafted and the parties subsequently become embroiled in a lengthy and costly legal battle over an issue that relates to the existence, validity, effect, construction, or discharge of the agreement to arbitrate.[1] Importantly, "whether the arbitration agreement is valid or not, under the law applicable to it, will have a bearing on whether the dispute can be referred to arbitration, whether court proceedings can be halted, and whether the resulting award is enforceable."[2]

"In a system that prides itself on promoting efficiency and predictability for its users, the lack of consensus over how to resolve the question of which law governs an arbitration agreement contained within a highly complex international contract undoubtedly warrants consideration."

As a creature of contract, the arbitration agreement forms the necessary entryway into arbitration by providing the requisite consent of the parties to final adjudication by an arbitral tribunal.[3] Although parties generally designate a choice of law clause (the substantive law governing the main contract) and a seat of arbitration (the procedural law of the arbitration), they typically do not specify the law that will govern the arbitration agreement.[4] While it was often thought that this level of specificity was not necessary,[5] recent developments indicate otherwise. Indeed, it has become quite clear that there is simply no international consensus on how to resolve questions relating to which law should govern the arbitration agreement in the absence of a clear designation by the parties. In light of the increasing complexity of matters governed by international arbitration, these concerns are especially pronounced when multiple jurisdictions are involved, (*e.g.*, Country X is chosen as the seat of arbitration and the law of Country Y is chosen as the governing law of the main contract). In such situations, parties should consider whether a conflict may arise with respect to the laws of Country X and Country Y in relation to the interpretation of their arbitration agreement and attempt to resolve any ambiguity at the drafting phase by specifically designating the law that they intend to govern their arbitration clause.

The risk of failing to clearly designate the law applicable to the arbitration agreement in an international transaction is especially apparent when dealing with actions to compel arbitrations and actions to enforce awards. Parties to contracts with multiple laws at play may find themselves engaged in a proverbial tug of war between various laws. For instance, in defending against an action to compel arbitration, a party might rely on Article II(3) of the New York Convention and argue that the agreement to arbitrate is "null and void, inoperative, or incapable of being performed."[6] Similarly, in defending against an action to enforce an arbitral award, a party might rely on Article V(1)(a) of the New York Convention and assert that the agreement in question is "not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made."[7] Without a specific designation, it is unclear which law the court will rely on to resolve such questions. More likely than not, one party will advocate for the application of the substantive law of the main contract, while the other party will object to that reasoning on the basis of the separability presumption and/or the New York Convention and contend that the arbitration clause should be governed by the law of the seat of the arbitration.

These are just a few examples of the many ways in which this issue might arise in practice, and parties and their attorneys need to be mindful of these risks when drafting their arbitration clauses. Parties may attempt to address questions regarding the interpretation of their arbitration agreement and attempt to resolve any ambiguity at the drafting phase by specifically designating the law that they intend to govern their arbitration clause. Admittedly, the drafting of an arbitration clause is neither done in a vacuum nor with the aid of a crystal ball. Thus, parties and their counsel will have to strike an appropriate balance in order to preserve the deal as well as their efficient recourse to arbitration in the event that a dispute does arise.

Striving for Consensus

In a system that prides itself on promoting efficiency and predictability for its users, the lack of consensus over how to resolve the question of which law governs an arbitration agreement contained within a highly complex international contract undoubtedly warrants consider-

ation. Commentators have posited that as many as nine different approaches exist to resolve the choice of law analysis relating to the arbitration agreement.[8] Without a clear designation by the parties, uncertainty abounds as no single approach has been adopted by courts, arbitrators, or commentators.

An "[a]nalysis of the choice of the law governing an international arbitration agreement begins with the separability [or severability] presumption."[9] Essentially, this doctrine distinguishes the arbitration agreement from the main underlying contract and provides that the arbitration agreement "can stand on its own validity even if the underlying contract falls away."[10] In other words, this doctrine contemplates two separate and distinct agreements contained within a single contract. As a result, when multiple laws are involved, the separability presumption may be relied upon to support the application of one law to the main contract and another law to the arbitration agreement.[11]

Consistent with this approach, Articles II and V of the New York Convention have been interpreted to "rest on the premise that the international arbitration agreement is a separable contract, subject to a specialized and *sui generis* international legal regime, not applicable to other contracts."[12] Although Article II of the [New York] Convention does not expressly prescribe a choice-of-law rule, "[it] set[s] forth substantive international rules of presumptive substantive validity, directly applicable to (and only to) international arbitration agreements…[and] prescribe[s] specialized international rules of formal validity, also applicable only to international arbitration agreements."[13] Article V(1)(a) of the New York Convention provides that "[r]ecognition and enforcement of the award may be refused…[if] the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made."[14]

According to Gary Born, "Article V(1)(a) of the New York Convention contemplates that the parties may select a particular law to govern only their arbitration agreement ('the law to which the parties have subjected it') and establishes a specialized choice-of-law rule providing that, where the parties have not explicitly or implicitly selected a law to govern their arbitration clause, that provision will be governed by 'the law of the country where the award was made [presumably the law of the seat].'"[15] Moreover, the presumptive validity of an arbitration agreement, enshrined within Article II(3) of the New York Convention, may also be relied upon in order to prevent the application of parochial rules that might somehow circumvent or invalidate the parties' arbitration agreement.[16]

Support has also emerged for the application of a validation principle that embraces the pro-arbitration objectives of the New York Convention.[17] "[T]his principle gives effect to the parties' overriding intention that their international arbitration agreement will be valid and effective, regardless of the jurisdictional and choice-of-law complexities that attend other international contracts."[18]

Recent Decisions

Over the last few years, courts in various jurisdictions have grappled with this issue. Of the recent decisions, the most well-known is that of *Sulamérica v. Enesa*, which involved an insurance dispute between Sulamérica, the insurer, and Enesa Engenharia, the insured, over claims related to the construction of the Jirau Greenfield Hydro Project, a hydroelectric generating plant in Brazil.[19] When the insured made claims under the policies, the insurer responded by filing an arbitration proceeding in London and sought a declaration of non-liability.[20] The insured, on the other hand, filed an action in Brazilian court.[21] The insurer subsequently sought an injunction from the English Commercial Court in order to restrain the insured from proceeding with its action in Brazilian court. The English Commercial Court granted the injunction to the insurer, and the insured appealed. The insurance policies at issue provided for arbitration in London under ARIAS Arbitration Rules, contained a choice of Brazilian law as the substantive law, and a clause which subjected "[a]ny disputes arising under, out of or in connection with this Policy … to the exclusive jurisdiction of the courts of Brazil."[22]

The English High Court was tasked with determining which law should govern the arbitration clause. It started its analysis with the rebuttable presumption that the parties' express choice of the substantive law of the main contract was also intended to govern the arbitration agreement:

> It has long been recognised that in principle the proper law of an arbitration agreement which itself forms part of a substantive contract may differ from that of the contract as a whole, but it is probably fair to start from the assumption that, in the absence of any indication to the contrary, the parties intended the whole of their relationship to be governed by the same system of law. It is common for parties to make an express choice of law to govern their contract, but unusual for them to make an express choice of the law to govern any arbitration agreement contained within it; and where they have not done so, the natural inference is that they intended the proper law chosen to govern the substantive contract also to govern the agreement to arbitrate.[23]

However, noting that English courts have also held that the designation of an arbitral seat can be an important indicator that the parties intended a different law to govern

their arbitration agreement,[24] the *Sulamérica* court applied a three-part test seeking to evaluate whether: (1) an express designation as to the law governing the arbitration agreement had been made; (2) an implied choice existed; or (3) in the absence of any choice, which law would have the closest and most real connection to the arbitration agreement.[25] Having found that neither an express nor an implied choice had been made by the parties,[26] the court ultimately held that the law possessing the closest and most real connection with the arbitration agreement was the law of the seat since this is where the "supporting and supervisory jurisdiction necessary to ensure that the procedure is effective" would take place.[27]

What is curious about *Sulamérica* is that it involved Brazilian parties, a dispute that arose in Brazil, a substantive choice of Brazilian law as the governing law of the main contract, and conflicting clauses, one of which provided for arbitration in London under ARIAS Arbitration Rules,[28] and another which provided for the exclusive jurisdiction of the courts of Brazil.[29] Nonetheless, the Court through the application of its three-part test found that English Law was the law with closest and most real connection to the dispute and should thus govern the issues pertaining to the arbitration agreement.

While this may seem odd at first, a closer analysis reveals that the Court may have been "motivated by a desire to uphold the validity of the arbitration agreement and to 'save' the arbitration agreement from the law governing the underlying contract which threatened its existence."[30] "[B]y applying the law of the seat, [the *Sulamérica* Court] saved the arbitration agreement from the purported rule under Brazilian law that the arbitration agreement could only be invoked with the insurer's consent."[31] Interestingly, "in all the prior cases in which the English courts held that the law of the seat was applicable to the arbitration agreement rather than the law of the underlying contract, the courts avoided the purported invalidity that would have affected the arbitration agreement at the behest of the law governing the underlying contract."[32] The justification for such a pro-arbitration or validation approach is that it preserves the parties' intentions and objectives to arbitrate.

Although a thorough analysis of *Sulamérica* and its progeny including *Arsanovia*,[33] *Habas*,[34] and *FirstLink*[35] is beyond the scope of this article, it is useful to note that these cases have demonstrated that the *Sulamérica* test may not be as straightforward or as predictable as one would have initially hoped. This is especially true if one assesses consistency from the perspective of whether the law of the seat or the substantive law of the main contract is applied. *Firstlink* is particularly noteworthy in this regard because, although the High Court of Singapore adopted the three-part test as set forth in *Sulamérica*, it expressly rejected the English Court's rebuttable presumption that a choice of substantive law was also intended to govern the arbitration agreement.[36]

However, what if the *Sulamérica* test was not intended to be measured that way, but rather was meant to operate as a vehicle to enable adjudicators to embrace a pro-validation or pro-arbitration approach?[37] When viewed from this backdrop, the *Sulamérica* test not only provides guidance, but it affords adjudicators with the flexibility necessary to promote the consistent enforcement of arbitration agreements. Such an approach would comport with the pro-arbitration goals of the New York Convention and would promote consistency amongst all jurisdictions.[38]

Institutional Perspective

From the standpoint of the world's leading arbitral institutions, varying approaches exist to determine the law applicable to the arbitration agreement, ranging from pointing to the law of the seat as controlling,[39] to deferring to the arbitrators to either apply the law with the closest connection,[40] or to applying the law which the arbitrator finds most appropriate.[41]

It bears noting that the Hong Kong International Arbitration Centre ("HKIAC") has not only addressed this issue in its 2013 amendments to its Administered Arbitration Rules, but has also revised its model arbitration clause to now include a provision, which states that "[t]he law of this arbitration clause shall be…(Hong Kong law)."[42] Parties are advised by the HKIAC that the inclusion of this provision is optional, but "should be included particularly where the law of the substantive contract and the law of the seat are different."[43] To date, the HKIAC is the only institution to have provided for such a provision in its model arbitration clause.

Conclusion

Even though some decisions over the last few years have highlighted the problems that arise when parties omit an express designation of the law applicable to the arbitration agreement, the situation is not utterly hopeless. Parties can enjoy some modicum of comfort from the fact that adjudicators seized with this issue will often do their best to effectuate the parties' intent to arbitrate as memorialized in their arbitration agreement. Relying upon the New York Convention's pro-arbitration objectives, the focus seems to have shifted away from the tug of war over whether to apply the law of the seat or the governing law of the main contract. Instead, the courts seem to increasingly embrace a validation or pro-arbitration approach, in which the emphasis is on preserving and enforcing the parties' arbitration agreement. Even so, the court's involvement will certainly come at a significant cost. While the designation of a law applicable to the arbitration agreement may not be appropriate in every situation, at a minimum, a preliminary analysis should be undertaken at the drafting stage in an effort to understand the potential interplay between the various laws involved and to proactively manage any anticipated risks.

Endnotes

1. Peter Ashford, *The Law of the Arbitration Agreement: English Courts Decide?*, 24 Am. Rev. Int'l Arb. 496 (2013).
2. Sabrina Pearson, *Sulamérica v. Enesa: The Hidden Pro-Validation Approach Adopted by the English Courts with Respect to the Proper Law of the Arbitration Agreement*, 29 Arb. Int'l 115 (2013).
3. *See* N. Blackaby, C. Partasides, A. Redfern, & M. Hunter, Redfern and Hunter on International Arbitration (5th ed., Oxford University Press, 2009), 18-19, 84-85; Jeff Waincymer, Procedure and Evidence in International Arbitration (Kluwer Law International, 2012), 129; Paul D. Friedland, Arbitration Clauses For International Contracts (2d. ed., Juris Net, LLC, 2007) (citing *United States Steelworkers of Am. Mfg. Co.*, 363 U.S. 564, 569 (1960) ("arbitration is a creature of contract")), 58-59.
4. J. Lew, L. Mistelis, & S. Kroll, Comparative International Commercial Arbitration (Kluwer Law International, 2003), 120.
5. This is especially the case in situations when the law of the seat is the same as that designated by the choice-of-law clause since that same law will also govern the arbitration agreement. *See Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 291 (5th Cir. 2004) ("[A]n agreement providing that one country will be the site of the arbitration but the proceedings will be held under the arbitration law of another country [is] 'exceptional'; 'almost unknown'; 'a purely academic invention'; 'almost never used in practice'; a possibility 'more theoretical than real'; and a 'once-in-a-blue-moon set of circumstances.'"). *Cf.*, Pierro Bernardini, *Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause*, Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention, ICCA Congress Series, 1998 Paris Volume 9 (Kluwer, 1999), 197 (discouraging the inclusion of a law directly applicable to the arbitration agreement).
6. Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("The New York Convention"), December 29, 1970, 21 U.S.T. 2517, 330 U.N.T.S. 3.
7. *Id*.
8. *See* Gary B. Born, International Commercial Arbitration (2d. ed., Kluwer Law International, 2014), 471-72 (describing the "multiplicity of choice-of-law rules…[as] ranging from the law chosen by the parties to govern their underlying contract, to the law of the arbitral seat, to the law of the judicial enforcement forum, to the law of the state with the 'closest connection' or 'most significant relationship.'"); Marc Blessing, *The Law Applicable to the Arbitration Clause and to Arbitrability*, Improving The Efficiency of Arbitration Agreements and Awards: 40 Years Of Application Of The New York Convention, ICCA Congress Series, 1998 Paris Volume 9 (Kluwer, 1999), 168-69 (identifying nine theories for determining the law applicable to the arbitration agreement; adding among others, the law of the place where the agreement was concluded, law of the parties, and an a-national approach).
9. Born, *supra* n. 8 at 472.
10. D. Lindsey & Y. Lahlou, *The Law Applicable to International Arbitration in New York,* J. Carter & J. Fellas, International Commercial Arbitration in New York (Oxford University Press, 2013), 15 ("The agreement to arbitrate is treated as an agreement that is separate from, although clearly related to, the underlying contract.").
11. Born, *supra* n. 8 at 472. A healthy dose of scholarly debate exists over how extensively the separability doctrine should be employed to resolve such questions, and whether separability was really only intended to operate as a savings mechanism to protect the parties' agreement to arbitrate should a problem arise with the underlying contract. Pierre Mayer, The Limits of Severability of the Arbitration Clause, Improving The Efficiency Of Arbitration Agreements And Awards: 40 Years of Application of The New York Convention, ICCA Congress Series, 1998 Paris Volume 9 (Kluwer, 1999), 263 ("[s]everability should thus be limited to those situations in which refusal to give effect to the clause, through a sort of solidarity with the rest of the agreement, would prevent arbitration of the issues that the parties intended to be resolved by the arbitration."). *But cf.*, Ashford, *supra* n. 1 at 471 (suggesting that such a limited interpretation is "so counter to modern orthodoxy on separability that it has little future").
12. Born, *supra* n. 8 at 477.
13. *Id.*
14. The New York Convention, *supra* n. 6. Although subtle distinctions exist, the law of the seat of the arbitration is usually treated synonymously with the law where the award was made/rendered. *See* A.J. van den Berg, The New York Arbitration Convention of 1958 (1981), 295. In the absence of a choice of law by the parties, Article V(1)(a) has been interpreted to support a default choice of law in favor of the law where the award was made. *See* Pierre Mayer, *supra* n. 11 at 266, n. 13 (stating that the situation is "somewhat less clear when the agreement contains a choice of law clause" yet noting that commentators like A.J. van den Berg have found "[i]n favour of applying the law of the place where the award was rendered even when the contract contains a choice of law clause" (internal citation omitted). *See also* Julian D. M. Lew, *The Law Applicable to the Form and Substance of the Arbitration Clause*, ICCA Congress Series No. 9, Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention (Kluwer, 1999) (advocating that Article V(1)(a) may be the key to determining the law applicable to the arbitration agreement), 144.
15. Born, *supra* n. 8 at 476.
16. *Id.*
17. *Id.* at 1318.
18. *Id.* at 493.
19. *Sulamerica v. Enesa Engenharia*, [2012] EWCA Civ 638.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id*.
24. *Id*. (citing *Black Clawson International Ltd. v Papierwerke Waldhof-Aschaffenburg AG* [1982] 2 Lloyd's Rep. 446 and *Sonatrach Petroleum Corp. v Ferrell International Ltd.* [2002] 1 All E.R. (Comm) 627).
25. *Id.*
26. *Id*. Both parties conceded that no express choice of law relevant to the arbitration agreement existed. The court held that no implied choice of law existed, although there were powerful indicators that could support such a conclusion, because (1) "the choice of another country as the seat of the arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings," and (2) "The possible existence of a rule of Brazilian law which would undermine that position tends to suggest that the parties did not intend the arbitration agreement to be governed by that system of law."
27. *Id.*
28. The reinsurers were not Brazilian.
29. *Id.*
30. A concern existed that if Brazilian law had been applied to the arbitration agreement, it would have invalidated the arbitration agreement. Pearson, *supra* n. 2 at 123-24. "Before the Court of Appeal, Enesa argued that it was not bound to arbitrate because the arbitration agreement was governed by the law of Brazil, pursuant to which the arbitration agreement could only be invoked with its consent." *Id.* at 115. Sulamérica relied on the

separability presumption and argued that the choice of London as the seat of the arbitration justified the decision that English law should govern the arbitration agreement. *Id.* at 121. "One of the key issues was therefore the determination of the law applicable to the arbitration agreement." *Id.* at 115. "[R]efus[ing] to endorse a bright line rule of law according to which the proper law of the arbitration agreement would always be the law of the place of the seat… "the Court provided guidance on determining the proper law applicable to the arbitration agreement" through its three-part test. *Id.* at 121.

31. *Id.* at 123.

32. *Id.*

33. *Arsanovia Ltd. and others v. Cruz City 1 Mauritius Holdings*, [2012] EWHC 3702 (Comm.) (holding that the expressly designated substantive law of the contract is a strong pointer to the parties' intentions regarding the law applicable to the arbitration agreement and may be an implied choice of law applicable to the arbitration agreement, and second that the selection of London as a seat is not itself an implied choice of English law for the arbitration agreement under the *Sulamerica* test, and concluding that had it been necessary to ascertain the law with the closest and most real connection to the arbitration agreement, this would have been the law of the seat).

34. *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v. VSC Steel Company, Ltd.* [2013] EWHC 4071 (Comm.) (holding that the choice of seat in conjunction with the terms of an arbitration agreement are a strong indication of the law applicable to the arbitration agreement and may constitute an implied choice of law under the *Sulamerica* three-prong test).

35. *FirstLink Investments Corp Ltd. v. GT Payment Pte Ltd.* and others, [2014] SGHCR 12 (applying Sulamerica's three-prong test and holding that it is "more commercially sensible" to presume that the parties implicitly chose the law of the seat as the law applicable to the arbitration agreement by virtue of designating it as the seat, and this is not undone by a choice of substantive law for the underlying contract).

36. *Id.* "[T]his court takes the view that it cannot always be assumed that commercial parties want the same system of law to govern their relationship of performing the substantive obligations under the contract, and the quite separate (and often unhappy) relationship of resolving disputes when problems arise. In fact, the more commercially sensible viewpoint would be that the latter relationship often only comes into play when the former relationship has already broken down irretrievably. There can therefore be no natural inference that commercial parties would want the same system of law to govern these two distinct relationships. The natural inference would instead be to the contrary."

37. Pearson, *supra*, n. 2 at 115-126; Born, *supra* n. 8 at 1395-98 (advocating the application of a "pro-arbitration interpretative rule regardless of the national law applicable to the parties' agreement to arbitrate").

38. *See* Born, *supra* n. 8 at 1398.

39. London Court of International Arbitration, Arbitration Rules (2014), Art. 16.4.

40. Swiss Rules of International Arbitration (2012), Art. 33.1; Hong Kong International Arbitration Centre Administered Arbitration Rules (2008—prior version), Art. 31.1.

41. Hong Kong International Arbitration Centre Administered Arbitration Rules (2013—most recent version), Art. 35.1; International Chamber of Commerce Rules, Art. 21.1; International Centre for Dispute Resolution International Arbitration Rules, Art. 31.1; International Institute for Conflict Prevention & Resolution ("CPR") Administered Arbitration Rules (2013), Rule 10.1; Vienna International Arbitral Centre Arbitration (2013), Art. 27.2; Kuala Lumpur Regional Centre for Arbitration Rules (2013), Art. 35.

42. Hong Kong International Arbitration Center Model Clause for Administered Arbitration under HKIAC Rules, available at: http://www.hkiac.org/en/arbitration/model-clauses#1.

43. *Id*.

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Striving for the "Bullet-Proof" Mediation Settlement Agreement

By Edna Sussman and Conna A. Weiner

"Mediation will not always be successful but it should not spawn more litigation." ***Willingboro Mall Ltd. v. 240/242 Franklin Ave., LLC*** **, 215 N.J. 242, 71 A.3d 888 (2013).**

In their seminal 2006 article, James Coben and Peter Thompson expressed surprise at the volume of litigation about mediation; their study showed an increase of ninety-five percent from 1999-2003. While this increase is undoubtedly attributable to the increasingly widespread use of mediation rather than to any fundamental flaw in the process, the case law involving mediations offers important lessons for mediators, counsel and parties. While the courts rarely fail to enforce a mediated settlement agreement, this certainly has not stopped unhappy parties from engaging in expensive and time-consuming litigation that prolongs the dispute and strains relationships, precisely what the settlement achieved in the mediation was intended to avoid.

This article addresses measures that should be considered to increase the chances not only that the mediated settlement agreement will be "bullet proof" if litigation follows but also to provide a process that eliminates or at least reduces the likelihood that any party will walk away from or seek to set aside a settlement. In striving for such a process and agreement, it is critical to pay close attention to all three phases of the mediation: (a) the contents of the agreement to mediate; (b) the conduct of the mediation, and finally (c) to the preparation of the documentation of the settlement agreement.

I. The Legal Framework

In the United States, enforcement of a mediated settlement agreement, as is the case in many jurisdictions around the world, requires a court's imprimatur. With fifty state jurisdictions and federal jurisdiction, there is no single body of law governing mediation or the enforcement of settlement agreements achieved through a mediation process.

Applicable state laws or court procedures can be determinative of the result achieved in enforcement actions on settlements. Significantly, as of this time, only twelve states have adopted the Uniform Mediation Act; thus meaningful differences persist. And as many commentators have noted, there is no uniform federal mediation law.

For example, the scope and nature of the confidentiality protections afforded to mediation vary across jurisdictions leading to different approaches by the courts in reviewing what transpired at the mediation. Jurisdictions also vary dramatically in connection with the formalities required for enforcement—requirement for a written agreement, a "cooling off" period during which consent can be withdrawn and language expressly stating that the parties intended to be bound are some examples.

A discussion of these often critical variations as they affect enforcement is beyond the scope of this article, but overriding principles emerge from the case law that should be considered in all jurisdictions.

The courts generally view mediation settlement agreements as contracts and apply traditional contract law principles to disputes arising out of efforts to enforce them. The general rule that the law favors the settlement of disputes by agreement of the parties is often quoted; indeed, settlement agreements may be viewed as "super contracts." While the courts repeatedly state that they heavily favor the enforcement of agreements that settle disputes, where contract law claims and defenses are convincingly raised, the courts (or a jury) may hear evidence. We review the basic contract defenses to set the framework for a review of best practices. It must be remembered, however, that in states with a more rigorous regime for the protection of the confidentiality of the mediation, review of such defenses as coercion, fraud or lack of capacity may be found to be limited or foreclosed, converting mediated settlement agreements into what may be viewed as "super super contracts."

Binding Contract—The question of whether the facts support mutual consent to all material terms necessary to form an enforceable contract is the area of potential attack that has been most successful in defeating efforts to enforce mediation settlement agreements. It is also the claim most likely to arise in complex business disputes since the parties are generally sophisticated, represented by counsel and accordingly less likely to find applicable other commonly raised defenses such as coercion, lack of competence, and lack of authority. Consistent with basic contract law, where the courts find that material terms in an agreement are not sufficiently definite to constitute a basis for finding mutual consent they have refused to enforce a settlement agreement. The fact that a few ancillary issues remain to be resolved will not generally defeat enforcement. It is not always clear at the outset, however, whether or not a court reviewing the matter will see the unresolved "ancillary" issues as material or essential to the very existence of an enforceable agreement; assessing the answer to these types of questions (such as in connection with releases) is the subject of much litigation in the area.

Abbreviated settlement agreements or memoranda of understanding, often prepared at the mediation session as a

shorthand recording of the terms agreed to, are frequently argued to be only agreements to make an agreement, which are not binding. The courts recognize the difficulty of generating a final settlement document in complex cases at the mediation conference. Here again, the key question is whether or not all material or essential terms have been agreed upon. The mere fact that a post-mediation, more complete document is contemplated will not defeat enforcement if a court finds such agreement. The language the parties choose, however, can be critical in this determination. Where the parties made the settlement "subject to" a formal agreement, as contrasted with "to be followed" by a formal agreement implementing the terms agreed to, enforcement has been denied.

Oral Agreement—Consistent with the standard contract law principle which recognizes the validity of oral contracts (with the exception of contracts governed by the statute of frauds), absent a contrary governing law or rule, courts in the United States enforce a mediation settlement agreement in the absence of an executed written agreement if persuaded that there was a meeting of the minds as to all material terms and the parties intended to be so bound. However, the Uniform Mediation Act and state governing law or applicable court rules in an increasing number of states effectively require a writing or its equivalent.

Duress and Coercion—The courts adopt the basic contract tenet that a contract obtained through duress or coercion will not be enforced. While some courts have noted that a certain amount of coercion is "practically part of the definition" of a mediation, and indeed many would conclude that is what the parties are looking for, a considerable number of cases have been brought asserting claims that a mediated settlement agreement resulted from duress and thus should not be enforced. Notwithstanding the fact that some of the facts alleged in the cases are quite egregious, only in rare cases have the courts believed the claims to be persuasive in establishing such duress or coercion as to defeat enforcement of a mediated settlement agreement. But the courts will require an evidentiary hearing if persuaded that sufficient facts are presented to raise a question of fact as to inappropriate duress or coercion. It should be noted that some cases are directed at contentions that the mediator himself or herself was the cause of duress and coercion.

Fraud—Even in the mediation context, with its unique negotiating framework and relationships, the courts have applied the contract rules quite strictly and required a knowing and material misrepresentation with the intention of causing reliance on which a party justifiably relied. Absent a duty to disclose, mere failure to disclose a fact that might be material to the opposing party is not a basis for defeating a settlement agreement. However, an evidentiary hearing may be required to determine whether an affirmative misrepresentation had been made and was the basis for the settlement.

Mistake—Mistake is frequently raised as a defense to enforcement of a settlement agreement, but it too is a ground that is rarely accepted by the court. The courts have often rejected claims of mutual mistake and the more difficult claim of unilateral mistake.

Incompetence or Incapacity—The law presumes adult persons to be mentally competent and places the burden of proving incompetence on the person claiming it. In the face of this burden, claims of incompetence, even based on facts that sound quite striking, have not met with much success in court where they have been raised to defeat enforcement of a settlement agreement.

Lack of Authority—Claims by a party that it had not signed the settlement agreement and that the signature by its attorney was not authorized have also not been viewed with favor. A party's counsel is often viewed as having authority when counsel is present at a mediation session intended to settle a lawsuit, a presumption that has to be overcome by affirmative proof that the attorney had no right to consent. A settlement agreement signed by counsel can also be upheld on the basis that apparent authority existed where the opposing counsel had no reason to doubt that authority. But where a question as to the grant of authority by the client to the attorney, which must be clear and unequivocal, is persuasively raised, the courts have required an evidentiary hearing.

II. Preparation for and Conduct of the Mediation

Bearing in mind the common areas for attacks on mediation settlement agreements can serve to inform a careful analysis and calibration of how the mediation process is conducted from start to finish. Of course, the level of sophistication of the parties, the substance of the dispute and the nature of the parties' relationship will affect what is practical, necessary and appropriate in the context of any particular dispute. Practitioners also will want to assess what methods may endanger the admittedly delicate mediation process and the ability of the parties to reach any agreement in the first place.

It is worth noting at the outset that many of the potential issues can be ameliorated significantly through pre-mediation preparation by the parties with the mediator and a robust agreement to mediate among the parties. As discussed further below, the issues to be considered should include: the nature of the process and the mediator's role; confidentiality; focused pre-mediation information exchange; documents that will need to be executed to effectuate any agreement; approval authority; legal or practical conditions precedent to any agreed commitments; insurance limits, etc. Indeed, preparation should, if the circumstances warrant it, take as much or more time and effort as the mediation itself.

Confidentiality—The confidentiality of the parties' communications with the mediator in the caucus model has been found by many practitioners to be essential to

their success in assisting the parties in achieving a settlement. As noted, state and federal law varies. Confidentiality issues have caused courts in some jurisdictions to refuse to explore such defenses as fraud or coercion because it would require breaching that confidentiality. Consideration should be given in the agreement to mediate to provide not only that applicable state and federal rules apply, but also expressly provide that, as a matter of contract, the mediation process and communications are confidential except for the enforcement of any written settlement agreement signed by the parties that may result and disclosures required by law. The mediation agreement can also provide that the mediator will not be called upon or subpoenaed to testify. Contracting for confidentiality among the parties should serve to protect the confidentiality of the mediation even in states or federal jurisdictions which offer a lesser standard of confidentiality.

Agreement on Terms—The most enduringly successful challenges to mediation settlement agreements stem from allegations that no binding agreement exists due to a failure to agree on material terms. Preparation with the mediator can help develop an "issues list" of what is in dispute and needs to be resolved. Pre-mediation information exchange can be critical to this effort. It is also very helpful in many cases to prepare an agreed draft of the settlement agreement, leaving out just the deal terms, and to prepare drafts of any important ancillary documents, such as releases, confidentiality agreements, non-disparagement agreements, or drafts of apologies, so that final terms can more easily be agreed during the course of the mediation. As noted, a court may find that the provisions of such an "ancillary" document constitute a material term of the agreement, and that, therefore, lack of agreement about the document is fatal to the enforceability of the entire agreement achieved during mediation.

Duress and Coercion—A discussion about the process, setting expectations as to how the mediation will be conducted including the mediator's modus operandi, exploring the individual participants' physical condition and their ability to continue with the mediation where that appears appropriate should assist in forestalling claims of duress and coercion. The agreement to mediate can address many of these issues and may be reiterated by the mediator at the beginning of the mediation.

Factors illustrative of excessive pressure have been stated by the courts to include (1) discussion of the transaction at an unusual or inappropriate time, (2) consummation of the transaction in an unusual place, (3) insistent demand that the business be finished at once, (4) extreme emphasis on the untoward consequences of delay, (5) use of multiple persuaders by the dominant side against a servient party, (6) absence of third-party advisors to the servient party, and (7) statements that there is no time to consult financial advisers or attorneys. Mediation practitioners will undoubtedly recognize the presence of several, if not many, of these factors in mediations in which they have been involved but they are not necessarily an indication of coercion. Indeed, it is in part the mediator's art in influencing the parties to stay at the table and achieve settlement that causes parties to seek mediation as opposed to just engaging in direct negotiation. Inherent in the mediator's role is the exercise of some pressure and persuasion in working with the parties in managing the process, managing the communication, controlling the setting, timing decisions, managing the information exchange, engineering who is involved and when. While such process management is generally helpful to the parties, care should be taken to be sensitive and responsive to the particular individuals participating in the mediation to ensure the ability of all parties to fully exercise their right of self-determination, particularly when working with a vulnerable party.

Fraud—In negotiation puffing and omitting information by counsel and parties is permissible conduct; misrepresentations are not. Where a problem appears to be lurking, parties can be guided by informing them that misrepresentations may cause a settlement to crater in court and that it might be useful to specifically recite any representations upon which a party relies in the settlement agreement. Such advice should serve to discourage any fraudulent conduct that might otherwise have been pursued.

Mistake—While it is difficult to set aside any contract based upon a claim that a party or parties was or were unilaterally or mutually mistaken about a material term, preparation can obviate the problems that can arise. Inadequate preparation regarding legal requirements, insurance limits, tax implications applicable building or other codes, and other issues have created significant difficulties and in some cases litigation as parties attempt to reform or rescind the agreement to reflect reality. Courts analyze whether or not a party assumed the risk of a mistake and generally are not impressed when a party has failed to do obvious pre-mediation homework. Counsel and parties should be sure to inform themselves as to such issues and mediators should consider to what extent they can flush them out and encourage proper preparation without jeopardizing their impartiality.

Incompetence or Incapacity—Those attending the mediation should be alert to signs of illness, incapacity or incompetence, especially when a party is of an age or condition which makes it more likely that there could be an issue. While the urge to get the matter settled may be great, a pause to assure that all parties are present with all of their faculties intact is essential if any party's behavior or appearance suggests there is a problem. If not satisfied that all are competent and not incapacitated, suspension of the mediation is necessary. The agreement to mediate can encourage parties to bring such issues to the attention of the mediator before and during the mediation.

Authority—It goes without saying that having people at the mediation with authority to settle is always a criti-

cal matter in the preparation for the mediation. Ensuring that they are present or will be available to approve and execute (even by fax or PDF) the agreement is essential. Whether organizations, trusts, governmental entities or the like require approval from a board or other supervisory entity should be determined in advance so that the necessary steps can be appreciated and addressed by all before the session. And with respect to individuals, inquiry should be made if there are others whose opinion on a settlement decision is crucial so that arrangements can be made to ensure that approval is obtained during the session and so avoid the possibility of a settler's remorse scenario.

Mediator Conduct—Cases relating to mediator misconduct have been brought both to set aside a mediation settlement agreement and to impose personal liability on the mediator. These cases, like those discussed above, generally fail and in some cases, mediators may be protected by statutory or common law immunities varying in reach and scope. But again, avoiding even the commencement of such litigation is the goal, and it goes without saying that a mediator must comply with all of a mediator's duties including making appropriate conflict disclosures, maintaining the confidential nature of the mediation, and assuring a setting in which the parties can exercise their right of self-determination. While there are few situations in which it is the mediator's role to assess the fairness of the resolution to the parties, there are some situations in which the fairness of the outcome may be material to the court's review, such as in class action settlements or some family matters. In such cases the mediator should consider what role he or she should appropriately play to fulfill all obligations as a mediator and foster an enforceable resolution.

III. Recording the Agreement

Record the Agreement—This may seem an obvious step, but many mediations end with only an oral agreement and a promise by one of the parties to prepare the necessary papers. It is increasingly difficult to ensure that an oral mediation agreement will be upheld; it may not be possible, in fact, in many jurisdictions as a result of mediation—or settlement-specific requirements and/or confidentiality provisions. Accordingly, taking the time to record the agreement, even if it is late at night when the mediation is finally concluded, is a step that should be taken if at all possible. (Again, bringing agreement drafts to the mediation, skeletal though they may be, is very helpful in this regard.)

Any specific requirements for enforcement under the governing state law must be identified and followed. The nature of the writing required in states that require a writing must be confirmed. In addition to a document physically executed by all parties, some states will enforce, for example, a recital of the settlement agreement in open court, an exchange of e-mails or a stenographic, audio or video recording. These formal requirements are strictly enforced by the courts and should not be overlooked.

The memorandum of understanding prepared at the close of the mediation need not be the final settlement agreement, but it should:

a. cover all of the material terms,

b. use language definite enough to be understood and to dictate performance,

c. set forth, if at all possible, methods for calculating numbers based upon information that is unknown or unavailable at the time of the mediation,

d. state, if it is the case, that the parties intend the agreement to be binding and enforceable in court,

e. take care in the use of language as to follow-up documents; reference can be made to "documents to follow" but do not make the agreement "subject to" follow up documents or "effective only upon" the execution of further documents, unless that is the result you want,

f. state that the parties have read or heard the terms of the agreement and understand them and agree to the terms,

g. state that the parties had the opportunity to consult counsel and were represented by and relied on the advice of counsel, if that is the case,

h. provide that the agreement shall be admissible in evidence in any proceeding to enforce its terms,

i. keeping in mind the discussion above as to the potential impact of mediation confidentiality on court review, consider whether or not to include a provision that mediation confidentiality is waived if any issue arises as to enforcement of the agreement,

j. be signed by the parties or authorized representatives,

k. state that they have authority to legally bind the party that they represent.

List Material Representations—If there are material representations on which a party has relied in making a decision on settlement, consider including them in the settlement agreement itself and including a statement that the listed representations constitute all the material representations on which the parties relied.

Prepare Ancillary Documents at the Mediation—If there are ancillary documents, don't assume that these are details that will be worked out after the major items are resolved. The drafts of such agreements, hopefully brought to the session, should be completed at the mediation session or, as stated above, the settlement agreement should say that it will be "followed by" such documents not be

"subject to" their completion, if that is the intention. Attention to all documentation can serve to prevent what is in fact a change of heart from becoming a legally acceptable basis for overturning the agreement in a later dispute in court.

Confirmation by Parties of Competence, Independence of Judgment, etc.—In appropriate cases consideration should be given to asking the parties to confirm the following in writing, perhaps in a separate document to be signed by the parties in which they confirm that:

a. there were no material representations made to them in the course of the mediation that were not included in the text of the mediation agreement,

b. they understood that the mediator and the opposing party and counsel were not under any affirmative obligation to provide them with information,

c. they were suffering from no physical impairment that interfered with their ability to exercise their judgment in deciding to approve the settlement,

d. that they are acting voluntarily and exercising their independent judgment in making the decision to settle the dispute.

Incorporate Into a Judgment—If the matter is in litigation, consider having the terms of the settlement incorporated into the judge's final order in the case or providing for the court to retain jurisdiction over the matter for the purposes of enforcement of the settlement agreement.

Conversion Into an Arbitration Award—If the matter is international and may require enforcement abroad, consider asking the mediator to serve as an arbitrator after the settlement is fully resolved to render an arbitration award based on the settlement agreement. Some jurisdictions around the world and some states in the United States expressly provide for such a procedure or deem the resulting agreement to have the same force and effect as an arbitral award while others seem to bar such a role for the mediator after settlement is achieved. While this measure may be useful to consider it should be noted that whether or not such an award would be recognized under the New York Convention is not clear.

Conclusion

Familiarity with the bases on which mediated settlement agreements can be attacked in court should inform practitioners as to measures that should be considered at the various stages of the mediation, to discourage challenges to the agreement achieved and reduce the risk of a court overturning the settlement. At the same time, and of equal if not greater importance, the implementation of such measures will also result in greater user satisfaction with the process.

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A Labor Mediator's Perspective on Mediation

By Ira B. Lobel

Why Labor Mediation Works

The growth of mediation in recent years has been exponential and is used in many different settings. While it is difficult to accurately determine the success of any of these mediation programs,[1] it is clear that there are institutional and procedural differences between labor mediation, court induced mediation, and mediation in other arenas. Keeping these differences in mind may be helpful to mediators in other venues when attempting to help parties settle a dispute. Successful introduction of any of these elements may sometimes help sow the seeds for settlement.

The presence of these elements makes the dynamics involving labor mediation different from mediation in other arenas. The elements include the following:

1. Only parties make the decision
2. Power relationship
3. Deadline
4. Continuing relationship
5. Cost

It is important to analyze these factors to understand why labor mediation works in many situations and why the mediation process in other venues faces different challenges. Recognition of some of these elements makes me a more effective mediator in other venues. All of these elements are intertwined and overlapping, as will be apparent from the discussion below.

Only Parties Make the Decision

In a collective bargaining situation, labor and management negotiate over wages, hours and working conditions. In the event of a disagreement, the parties can (1) agree to new terms; (2) continue to bargain and maintain the terms of the expired agreement; or (3) engage in concerted activity (strike or lockout).[2] If there is a disagreement, no third party can substitute his judgment for that of the parties. This means the parties *must* make their own decisions about the terms and conditions of employment. Even if one side can dictate the terms and conditions of employment (because of superior bargaining power), no third party has the legal power to determine the terms and conditions of employment.

In most civil matters, if the parties cannot agree on a resolution, ultimately a judge will make a decision for the parties. The parties can look to the law, equity, and cost of continued litigation as factors in determining whether or not to negotiate and settle; however, both sides know that, ultimately, someone else can dictate the settlement terms for them.

At various times in my career, I have mediated in situations where the parties can move to arbitration if no agreement is reached in mediation. In these situations, the dynamics change, because an outside decision maker can determine the outcome. The mediator, instead of using what the other side will do or not do to raise doubt, can try to suggest what the third party decision maker must do. This can dramatically change the dynamics of the negotiations.

The mediator may be able to use the uncertainty of a judge's ruling, delay in the final decision, the cost of the legal process, etc., as factors that may encourage a party to make difficult decisions prior to a trial. These elements take on a different tenor than raising questions in a labor situation of the practical implications of a strike, lockout, continued negotiations, final offers and the like. The mediator can use the uncertainty of the outside decision maker as a pressure for the parties to evaluate and reevaluate positions.

Power Relationship

The second element one must consider is the question of power. In a labor dispute, a party has the legal right to be unreasonable; the consequences may be a work stoppage or unhappy employees or poor productivity, but it is up to the parties, singularly or jointly, to decide certain courses of action. In the event one side wishes to try to force its will on the other, there is no check, through a court or other third party, on the ability of the party to do this.[3]

Contrast this to a legal proceeding where one party cannot use its power in contravention of the law. Because the judge or third party must look at the law and justice, the parties may defer to the third party's judgment, rather than risk a negotiated settlement that does not achieve the goals they are hoping for.

In some civil disputes, power can play an important role. For example, the side with deeper pockets may be able to prolong the litigation, engage in endless discovery, delay trial and have countless appeals and motions. This may prompt the weaker side into a settlement; however, if it holds out, the case will be decided on law and justice, not on power.

The mediator may constantly remind the parties that the use of power, or delaying tactics, may have some short and long-term consequences. The good mediator will constantly remind people of the "cost" of using power and leave it up to the parties whether it is worth using.

Continuing Relationship

In a labor matter, the parties know that once the dispute is settled, they must still find a way to work together. Unless one side can absolutely destroy the other side, a collective bargaining relationship is like a marriage without the possibility of divorce. The parties know that they must deal with each other in the future. Accordingly, both sides often have an interest in allowing the other side to survive. Mediators can use this "continuing relationship" as a tool to convince the parties not to be too harsh with each other.

In a civil mediation in which the parties will have to maintain a continuing relationship, such as a matrimonial matter involving children, an on-going business partnership, or an employment matter where the employee continues employment, the mediator can use the need for a continuing relationship as a means for preventing the parties from trying to "punish" the other side. In a single transaction dispute, such as a medical malpractice or a simple contract dispute, this dynamic is not present. The parties simply want to get the best deal possible and are really not concerned about the feelings or perceptions of the other party.

The mediator should be aware of whether there will be a continuing relationship. The mediator may wish to adjust questions and methodology, depending on the answer to this question. A dispute where there is a continuing relationship takes on an added dimension of possibilities that a mediator can use in "raising doubt" and trying to get the parties to reconsider their positions.

Deadline/Timing

Deadlines force parties to make decisions; lack of deadlines encourages parties to delay and defer decision. Regardless of the subject of the mediation, the reality is that the introduction of a mediator into a dispute often is a sign to the parties that they should begin to get serious. Many years ago, the entry of a mediator into a labor dispute was often tied to a strike threat or a specified stage in the process. The entry of the mediator into a labor dispute became a signal for the parties to get down to business.[4] Mediators often talk to both sides about the proper timing of the mediation. They look to see whether there is any deadline that can be used that will provide pressure for a settlement

In a civil matter, the entry of a mediator will also give the attorneys for both sides a reason to look at the file, to start preparing and to consider alternatives and possible settlements. In effect, because the mediation is taking place, it becomes a time for both sides to look at their cases more seriously. Nevertheless, parties sometimes go into mediation when they are not prepared to negotiate, possibly because it is court ordered or the proper amount of discovery has not taken place. Mediators could be very helpful to the process if, when scheduling a session, they discuss with the parties the proper time for scheduling a session, particularly as it relates to discovery. Scheduling mediation too early in the process may prevent either side from settling, since neither would have a clear idea what a case was worth. Too late in the process may have both sides firmly entrenched in their position. The timing of a motion for summary judgment or some other legal or practical event may help the parties set a deadline. A discussion with both sides may help assess the appropriate time to mediate.

Cost

In the labor arena, mediation is often provided free of charge by government. It is considered a legitimate government expense to promote sound labor relations and, in effect, keep both the economy and government working. Accordingly, the cost of mediation, and often who the mediator is, rarely becomes an issue. Even if the parties choose to hire a mediator, the cost is absorbed by the parties and not considered significant. Simply, the parties usually do not consider the cost of mediation as an issue to resolve before agreeing to mediate.

In the non-labor arenas, there are many different approaches. Some parties choose to hire and pay a mediator on an ad hoc basis. Some courts require that the parties mediate, either pro bono from a list maintained by the courts or by hiring a mediator on their own. Many courts and community dispute resolution programs have numerous pro bono mediators that are available.

All of these approaches have certain advantages and disadvantages. Paying for mediation can be problematic in many situations due to cost and lack of understanding of the process. Many have some concerns that, without any payment for the process, the parties may not take it as seriously as they should. The cost of mediation is one of the elements that must be considered. If a case can be settled expeditiously with the help of a mediator, the cost may be worth it. It is, however, sometimes very difficult to get two hard-nosed negotiators to settle on mediation when they are at each other's throats on substantive matters. This is one reason why it may be helpful to have court-ordered mediation, paid for by the parties, with the mediators selected from a list of individuals who state their fees and experience up front.

Conclusions

Mediators in one venue can learn from the dynamics and peculiarities present in another venue. Labor mediators can learn from mediators in other venues and vice versa. Mediators should be aware of the similarities and differences and try to use them to help the parties resolve disputes. This article highlighted labor mediation dynamics as they will serve to inform mediation in other contexts.

Endnotes

1. Experts differ on how to properly evaluate the effectiveness of a mediation program. For example, settlement rates, while helpful, may not be an indicator of success, unless there is a control that studies settlement rates of similar cases without mediation.
2. In the public sector, the parties can proceed to fact finding or arbitration (police and fire). Both of these quasi judicial proceedings will change some of the dynamics explored in this section.
3. One check may be a company going out of business or reducing its operations. This was often a possibility in the manufacturing sector. This possibility diminished greatly if there was a very large plant with a large capital investment (making moving or closing impractical) or an employer that could not move (for example: hospital, service industry, public sector).
4. This dynamic has changed considerably in recent years with the decline of the labor movement and lack of interest for immediacy in reaching contracts. This could be due to declining power of the labor movement, the increase in economic uncertainty, and/or decline in the effectiveness of the strike. For whatever reasons, contract expirations today do not have the same immediacy for settlement that they had 30-40 years ago.

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Commissions Import Export v. Republic of the Congo: Finding No FAA Preemption and Endorsing Parallel Mechanism for Enforcing Foreign Judgments

By Theodore K. Cheng

In *Commissions Import Export S.A. v. Republic of the Congo*,[1] the U.S. Court of Appeals for the District of Columbia held that the limitations period in the Federal Arbitration Act ("FAA")[2] for confirming foreign arbitral awards does not preempt state laws governing the limitations period for enforcing foreign court judgments, even when that judgment confirms an arbitration award. Although the preemption analysis appeared straightforward, the decision only touched upon the complexities of the "parallel enforcement mechanism" over foreign arbitral awards that the court essentially endorsed. This article will not only provide a summary of the court's decision, but also explore some of the facets of that mechanism that the court did not address.

Background

In 1998, Commissions Import Export S.A. ("CIE") filed a request for arbitration with the International Court of Arbitration of the International Chamber of Commerce against the Republic of the Congo and Caisse Congolaise d'Amortissement (together, the "Congo").[3] The dispute involved the failure of the Congo to pay certain promised amounts due on promissory notes and commitment letters executed in connection with agreements made by CIE in the 1980s to perform various public works and supply materials.[4] In 2000, the Paris arbitral tribunal issued a final award in favor of CIE, which was confirmed and upheld on May 23, 2002 in an order rejecting the Congo's appeal and effort to rescind the award.[5] Thereafter, CIE filed eleven judicial proceedings to enforce the award in France, as well as 82 non-judicial bailiff actions.[6] CIE also obtained judicial recognition of the award pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") in Belgium and Sweden, but was ultimately unable to recover any amounts owed.[7]

In 2009, CIE initiated proceedings in London under the New York Convention and obtained an order ruling that the award was enforceable in the same manner as a judgment under section 101 of the 1996 Arbitration Act of England.[8] The English court recalculated the amount due to include additional interest and other costs, issuing a judgment, which, under English law, became final, conclusive, and enforceable on March 2, 2010, and remains enforceable for six years from that date.[9]

On September 2, 2011, CIE filed a complaint in the Southern District of New York to recognize and enforce the English judgment under the New York Uniform Foreign Country Money Judgments Recognition Act.[10] That court transferred the case to the U.S. District Court for the District of Columbia under the FAA venue provisions,[11] and CIE thereafter amended and supplemented its complaint to recognize and enforce the English judgment under the D.C. Recognition Act.[12] The District Court denied CIE's motion for summary judgment and dismissed the complaint, holding that the three-year period for confirmation of foreign arbitral awards under 9 U.S.C. § 207 preempted the D.C. statute's longer enforcement period for foreign money judgments.[13] Because the arbitration award had been issued in 2000, the three-year period for confirmation had long expired and the dismissal was entered with prejudice.[14]

The Appellate Court Decision

On appeal, the D.C. Circuit reversed. In analyzing the preemption issue, the court agreed with the parties that the case was governed by *Hines v. Davidowitz*,[15] which had held that "federal law will preempt state law where 'under the circumstances of [a] particular case, [the challenged state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[16] According to the court, "*Hines* preemption analysis entails two steps: first, identifying the purposes of the federal statute; and second, determining what, if any, obstacles are posed by the challenged state law."[17] The court then examined Chapter 2 of the FAA, which implemented the New York Convention, noting that "'[t]he goal of the Convention, and the principal purpose underlying [the United States'] adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.'"[18] As a textual matter, the court concluded that the three-year limitations period for seeking a summary confirmation of "an arbitral award falling under the Convention"[19] was limited to foreign arbitral awards, as "[n]either section 207 nor any other provision of Chapter 2 mentions foreign court judgments."[20] Nor did the legislative history indicate that Congress intended Chapter 2 to govern the recognition of foreign judgments in addition to foreign arbitral awards.[21]

Thus, the D.C. Circuit agreed with CIE that "section 207's 'relatively demanding statute of limitations is tied to

its relatively generous summary confirmation process,… evincing an interest in finality in the specific context of foreign award enforcement under the streamlined procedures of FAA Chapter 2.'"[22] Moreover, the court recognized that the New York Convention itself does not limit the period for enforcement of arbitral awards and includes no restrictions regarding foreign judgments.[23] Accordingly, the court determined that "[p]ermitting [CIE] to have recourse to the D.C. Recognition Act to enforce the English judgment, then, would appear to be consistent with FAA Chapter 2's objectives and to pose no obstacle to the accomplishment of its purpose."[24]

"[T]he court recognized that the New York Convention itself does not limit the period for enforcement of arbitral awards and includes no restrictions regarding foreign judgments."

Ultimately adopting the positions set forth by both the Second Circuit[25] and the United States as *amicus curiae*, the D.C. Circuit concluded that Chapter 2 governs only the enforcement of foreign arbitral awards, and not foreign judgments.[26] Moreover, the court again noted that the inclusion of Chapter 2 "reflects a congressional judgment that the 'emphatic federal policy in favor of arbitral dispute resolution…applies with special force in the field of international commerce,'" and that "[t]hat policy is not undermined—and frequently will be advanced—through recourse to parallel enforcement mechanisms that exist independently of the FAA."[27]

Therefore, the court held that Chapter 2 does not preempt the D.C. Recognition Act for enforcing a foreign court judgment, and, specifically, that the three-year limitations period in the FAA does not displace the longer limitations period in the D.C. statute.[28] The court thus reversed the dismissal of the complaint and remanded the case to determine whether the English judgment is enforceable under the D.C. statute.[29]

Implications of *Commissions Import Export* on Enforcement of Foreign Judgments

The case for complete federal preemption here (known as "congressional occupation of the field") was unlikely to prevail because of the ostensible difference in subject matter being compared—confirmation of a foreign arbitral award vs. enforcement of a foreign court judgment—under the statutory framework established by the FAA. The permissive nature of the language in 9 U.S.C. § 207—"Within three years after an arbitral award…any party to the arbitration may apply to any court…for an order confirming the award…"—also counseled against a finding of any true conflict.[30] Indeed, the D.C. Circuit itself ended its opinion explicitly noting that it was leaving open the question of "whether 9 U.S.C. § 207 preempts longer State statutes of limitations related to State enforcement of *foreign arbitration awards*."[31] Naturally, that would have squarely presented a conflict necessitating a preemption analysis.

In any event, the ostensible holding of *Commissions Import Export* is plain: While the FAA's three-year limitations period governs the confirmation of foreign arbitral awards, state law limitations periods, even if more generous than three years, govern the enforcement of foreign court judgments that confirm those awards. More broadly, the D.C. Circuit's opinion made clear that the confirmation of foreign arbitral awards and the enforcement of foreign court judgments are two distinct areas of jurisprudence.

Therefore, for those seeking to enforce foreign arbitration awards here in the U.S., there are two possible options. One option is to seek direct confirmation of the foreign arbitral award here in this country. Doing so means adhering to the FAA's three-year limitations period. Another option is to first obtain confirmation of the award in a foreign country (in the process reducing the award to a foreign court judgment), and then seek to enforce that judgment here in the U.S., while taking advantage of the potentially more generous state law limitations periods that may exist for enforcing foreign court judgments—even those that confirm foreign arbitral awards. This latter option is essentially what the D.C. Circuit referred to as a "parallel enforcement mechanism." But the availability of such a dual-track mechanism outside of the Second and D.C. Circuits, and even within the Second Circuit itself, remains unclear.

One reason that the New York Convention has been so important in promoting international arbitration is that the United States is not a signatory to any convention or treaty that requires recognition or enforcement of foreign court judgments. Moreover, there is no federal law governing the recognition or enforcement of foreign court judgments; nor will foreign court judgments be recognized through the use of a letter rogatory or letter of request.[32] Instead, recognition of foreign judgments is provided by the laws of the individual states or by common law. Specifically, to address the concern that U.S. and foreign courts were not regularly recognizing each other's judgments, in 1962, the Uniform Law Commissioners promulgated the Uniform Foreign Money-Judgments Recognition Act (the "1962 Model Act"). The 1962 Model Act generally codified the principles of comity (and, specifically, the recognition and enforcement of foreign judgments) previously set forth in *Hilton v. Guyot*[33] and has been adopted by 31 states, the District of Columbia, and the U.S. Virgin Islands, including Connecticut and New York, but not Vermont.[34]

The Uniform Law Commissioners updated the 1962 Model Act in 2005 by promulgating the Uniform Foreign-

Country Money Judgments Recognition Act (the "2005 Model Act"), which has been adopted by 19 states and the District of Columbia, but not Connecticut, New York, or Vermont.[35] One salient difference between the two statutes is the introduction in the 2005 Model Act of a limitations period on the enforcement of a foreign judgment. Specifically, the 2005 Model Act provides that "[a]n action to recognize a foreign-country judgment must be commenced within the earlier of the time during which the foreign-country judgment is effective in the foreign country or 15 years from the date that the foreign-country judgment became effective in the foreign country."[36] This, of course, is the applicable limitations period under the D.C. Recognition Act.

"Commissions Import Export is a welcome decision that reaffirms the twin U.S. policies of favoring arbitration and encouraging the recognition and enforcement of commercial arbitration agreements in international contracts by making available the parallel enforcement mechanism of state court proceedings."

For jurisdictions that have not adopted the 2005 Model Act, the applicable statute of limitations will vary according to state law. For example, in Connecticut and New York, both of which have only enacted the 1962 Model Act, the recognition of a foreign judgment is permissible so long as the judgment is final, conclusive, and still enforceable in the foreign country of origin.[37] Thus, depending on the circumstances, the state limitations period may very well be shorter than the three years provided under the FAA. And in Vermont, which has not enacted either model act, the statutory code only provides that the Clerk of Court may receive a copy of a judgment issued by a foreign country, certified by the clerk or the court rendering it to be a true copy thereof, as *prima facie* evidence of such judgment.[38] Whether Vermont would recognize and enforce a foreign judgment is left entirely to developments in the common law.

Commissions Import Export is a welcome decision that reaffirms the twin U.S. policies of favoring arbitration and encouraging the recognition and enforcement of commercial arbitration agreements in international contracts by making available the parallel enforcement mechanism of state court proceedings. However, to minimize any unforeseen circumstances, practitioners are well advised to look into the practical nature and scope of such enforcement mechanisms, both in drafting dispute resolution clauses and in devising their clients' enforcement efforts, rather than merely assuming that such mechanisms are always readily available.

Endnotes

1. 757 F.3d 321 (D.C. Cir. 2014).
2. 9 U.S.C. §§ 1 *et seq.*
3. 757 F.3d at 324.
4. *Id.*
5. *Id.* at 325.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id. See also* N.Y. C.P.L.R. §§ 5301-5309.
11. 9 U.S.C. § 204.
12. 757 F.3d at 325. That statute provides that "[a]n action to recognize a foreign-country judgment must be commenced" before the judgment expires in the rendering country or within 15 years of the judgment becoming effective in the foreign country, whichever is earlier. D.C. Code § 15-369.
13. 757 F.3d at 325. *See also Commissions Import Export S.A. v. Republic of the Congo*, 916 F. Supp. 2d 48, 55 (D.D.C. 2013).
14. 916 F. Supp. 2d at 49-50, 57-58.
15. 312 U.S. 52 (1941).
16. 757 F.3d at 326 (quoting 312 U.S. at 67).
17. *Id.*
18. *Id.* at 326-27 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974)).
19. 9 U.S.C. § 207.
20. 757 F.3d at 327.
21. *Id.* at 327-28.
22. *Id.* at 327 (quoting CIE's appellate briefs).
23. *Id.* at 328 ("Under Article III of the Convention, signatory countries may apply their own statutory periods for the enforcement of arbitral awards, so long as such periods are not unduly short, or may choose, as many countries have, not to impose any time limit on enforcement.").
24. *Id.* at 329.
25. The Second, Circuit—the only other circuit court to address this issue—held that both the New York Convention and Chapter 2 of the FAA govern only the enforcement of foreign arbitral awards, and not the enforcement of foreign judgments confirming foreign arbitral awards. *See Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala*, 29 F.3d 79 (2d Cir. 1994); *Island Territory of Curacao v. Solitron Devices, Inc.*, 489 F.2d 1313 (2d Cir. 1973); *see also Clientron Corp. v. Devon IT, Inc.*, Civ. A. No. 13-05634, 2014 U.S. Dist. LEXIS 110364, at *27-37 (E.D. Pa. Aug. 8, 2014) (holding that a Taiwanese court judgment could be recognized and enforced under Pennsylvania's Uniform Foreign Money Judgment Recognition Act, 42 Pa. Cons. Stat. §§ 22001-09).
26. *See* 757 F.3d at 328-33. In particular, the court quoted at length the following passage from the United States' brief:

    > It is essential to recognize that a foreign court judgment confirming an arbitral award is not governed by the New York Convention or the Foreign Arbitral Awards Convention Act. As a matter of U.S. law, the mechanism for obtaining recognition and enforcement of a foreign money judgment arising out of an arbitral award has been understood to be distinct from an action seeking recognition and enforcement of an arbitral award.

Id. at 330; *see also Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala*, 989 F.2d 572, 582 (2d Cir. 1993) ("[U]nlike the recognition of arbitral awards, which is governed by federal law, the recognition of foreign judgments is governed by state law.") (citing Restatement (Third) of Foreign Relations Law of the United States § 481 cmt. a (1987)).

27. 757 F.3d at 330 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985)). In so finding, the court rejected the Congo's argument that the purpose of Chapter 2 would be frustrated if the judgment were to be enforced under the D.C. statute. *See id.* at 329.
28. *Id.* at 333.
29. *Id.*
30. *See id.* at 327 (emphasis added).
31. *Id.* at 333 (emphasis added).
32. Each of these devices is a formal request from one court to a court in a foreign country requesting judicial assistance. For example, U.S. litigators often use them to effectuate service of process or the taking of evidence in other countries.
33. 159 U.S. 113 (1895).
34. The Second Circuit, of course, covers the geographic region encompassed by these three states. *See* Uniform Law Commission Legislative Fact Sheet—Foreign Money Judgments Recognition Act (available at http://www.uniformlaws.org/LegislativeFactSheet.aspx?title= Foreign%20Money%20Judgments%20Recognition%20Act). Interestingly, the U.S. Supreme Court has never addressed the question of whether federal or state law governs the recognition of foreign nation judgments.
35. *See* Uniform Law Commission Legislative Fact Sheet—Foreign-Country Money Judgments Recognition Act (available at http://www.uniformlaws.org/LegislativeFactSheet.aspx?title= Foreign-Country%20Money%20Judgments%20Recognition%20Act).
36. Uniform Foreign-Country Money Judgments Recognition Act, § 9 (available at http://www.uniformlaws.org/Act.aspx?title=Foreign-Country%20Money%20Judgments%20Recognition%20Act).
37. *See* Conn. Gen. Stat. § 50a-32 ("Sections 50a-30 to 50a-38, inclusive, apply to any foreign judgment that is final and conclusive and enforceable where rendered."); N.Y. C.P.L.R. § 5302 ("This article applies to any foreign country judgment which is final, conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal.").
38. *See* Vt. Stat. Ann. tit. 12, § 1698 ("A copy of the record of a judgment of a court of another state or foreign country shall be received by the courts of this state as prima facie evidence of such judgment, if such copy is certified under oath by the clerk of the court rendering such judgment to be a true copy thereof, that he is the legal custodian thereof, that the laws of such state or foreign country require such judgment to be recorded, and with a certificate under the seal of such court that he is such clerk or if without a seal, to be so certified.").

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Dealing with "Pathological" Arbitration Clauses: The Italian Approach

By Fabrizio M. Prandi

Introduction

Over the last twenty years, the Italian legislature has demonstrated its intent to favor arbitration as an efficient alternative to in-court litigation, making Italy quite a convenient seat for international dispute resolution.[1] The Italian Code of Civil Procedure provides for a very "pro arbitration" solution to the recurrent problem of a particular type of "pathological" arbitration clause that refers to an institution that (i) no longer exists, or (ii) never existed, or (iii) exists but has no power or authority to administer arbitration. Both judges and arbitrators are sometimes confronted with such problems, particularly in international provisions and matters, where language barriers may foster adoption of misleading, or confusing, wording when identifying the institution that is to administer the process. When this happens, claimants and defendants battle over what the parties intended by the inaccurate contractual language. Whether that clause is valid has a dramatic impact on the final outcome of the case.

Before the extensive reformation of the rules on arbitration (enacted through Legislative Decree no. 40 of February 2, 2006), Italian case law was unsettled on this topic. On the one hand, some courts found that an arbitration clause, entrusting the management of the procedure to a non-existing arbitral body was altogether void, and that the full jurisdiction of the State courts should therefore be restored.[2] On the other hand, and more recently, the Italian Court of Cassation distanced itself from such an interpretation. When called upon to make a ruling on the alleged invalidity of a clause, which apparently lacked an applicable method for appointing the arbitrators, the Court came to the conclusion that ambiguous clauses ought to be interpreted to render them valid.[3] This new approach attempts to honor the parties' intent to submit future disputes to arbitrators. If the problem is primarily to identify a competent institution, that should not impair the validity of the clause and the parties' resolution to waive their right to go to State courts should be honored.

A New Provision of the Italian Code of Civil Procedure Addresses Clauses That Cannot Be Administered by the Expressed Provider

A new provision of the Italian Code of Civil Procedure addresses this particular pathology. Under Section 832, sixth paragraph, of the Italian Code of Civil Procedure (hereinafter referred to as "§ 832 c.p.c."), as most recently amended, when the arbitral institution refuses to administer the proceeding, the arbitration agreement remains valid and effective, but the dispute has to be submitted to ad hoc arbitration. The argument of scholars in the face of conflicting case law has been that the arbitration should go forward even when the arbitral institution does not, or cannot, administer the proceeding.[4] Section 832 c.p.c. should apply not only when the arbitral institution ceases to exist or refuses to act but also whenever an arbitral institute is temporarily unable to appoint the arbitrator(s) and/or provide a secretariat for the arbitral tribunal. Otherwise there could be "intermittent" invalidity: the clause would pass from valid to null and void (and vice versa) depending on the temporary availability or unavailability of the body administering the arbitration. This would lead to aberrant consequences, inconsistent with the most basic principles of contract law.

"Under Section 832, sixth paragraph, of the Italian Code of Civil Procedure… when the arbitral institution refuses to administer the proceeding, the arbitration agreement remains valid and effective, but the dispute has to be submitted to ad hoc arbitration."

Referral to an Institution That Has Ceased to Exist

According to some scholars, the rule of § 832 c.p.c. also applies if the chosen arbitral institution did exist at the time the arbitration clause was agreed upon by the parties, but has been closed down at some point thereafter.[5] Whilst this may not seem to be very frequent in practice, quite a few cases have confronted this issue.[6] In cases like this, the parties made no mistake with the drafting of the clause, and should suffer no detriment from a third party's decision to shut down the arbitral body. As a matter of fact, there is no significant difference between an express refusal, delivered by an existing entity, and one stemming from the lack of any response from a non-existing body. Consequently, these two situations deserve to be treated equally, and plain analogy should suffice to make § 832 c.p.c. applicable to the case of an institution that medio tempore ceased to exist.

Referral to an Institution That Never Existed

A slightly more sophisticated argument should lead to the same conclusion even when the organization referred to in the arbitration clause never existed. Under such circumstances, a fault of the parties is indeed to be found, in

that, at the very least, they proved to be inattentive when drafting their contract. Such fault of the parties could make the interpreter more comfortable at penalizing them, jeopardizing their choice for an alternative form of dispute resolution.

Given that the parties have contracted for an arbitration,[7] an interpretation that preserves the validity of as much of that agreement as possible ought to be preferred.[8] Therefore, judges and arbitrators should always divide the "arbitration contract" into its several components, each of them being a clause on its own, and analyze them separately.[9] By doing so, whenever the parties' intention to arbitrate emerges clearly enough from the wording of the contract,[10] the "choice for arbitration" clause can survive the invalidity of the "referral to a nonexisting institution" part of the contract. Of course, if the parties' intention to arbitrate is upheld when their preference as to the rules governing the arbitration cannot be enforced, the ordinary provisions on ad hoc arbitration will apply, just as prescribed by § 832 c.p.c.

Referral to an Institution That Has No Connection with ADR Procedures

In a case resolved by the Milan Tribunal,[11] the judge was called on to decide the validity of an arbitration clause that specified a nonexistent body (the "arbitration commission of the European Economic Community"), or, alternatively, to the Court of Justice, which certainly does not consider the handling of arbitration proceedings among its duties. While a referral to the Court of Justice is probably not so frequent in practice, referrals to Chambers of Commerce are somewhat more numerous, and although most of them administer arbitration, not all of them do.

When an entity that does not administer arbitrations is named, the question is whether it qualifies as an "arbitral institute," under § 832 c.p.c. While the definition should not include an institution that does not administer arbitrations, the parties' desire to have an arbitration should be honored. The denomination of a "non-arbitral" institute should have the same effect as naming a nonexistent organization—the parties would have to submit to ad hoc arbitration. Section 832 addresses and remedies a number of important impediments to the will of the parties.

Endnotes

1. For instance, the Italian Government has very recently enacted Law no. 162 of November 10, 2014, whereby the parties to an already pending judicial proceeding (either before a court of first instance, or before a court of appeals) are given an opportunity to transfer the case to an arbitration panel, which is required to issue the final award within 120 to 240 days, depending on the status of the trial.
2. *See* Cass. Civ., Sez. I, October 7, 2004, no. 19994; Cass. Civ., Sez. I, November 29, 1999, no. 13306.
3. *See* Cass. Civ., Sez. I, February 4, 2011, no. 2750.
4. AA.VV., *Arbitrato*, a cura di Carpi, second edition, Zanichelli, 2007, 874.
5. AA.VV., *La prassi dell'arbitrato rituale*, a cura di Bossi, Giappichelli, 2012, 343; Rampazzi G., comment to § 832 c.p.c., *Commentario breve al codice di procedura civile*, a cura di Carpi– Taruffo, sixth edition, Cedam, 2009, 2579.
6. *See, e.g.*, Gaillard E. Savage J., *Fouchard Gaillard Goldman on International Commercial Arbitration*, Kluwer Law International, 1999, 264.
7. It is undisputed among scholars that the arbitration agreement is a contract. See, e.g., Punzi C., *Disegno sistematico dell'arbitrato*, I, second edition, Cedam, 2011, 320; AA.VV., *Arbitrato*, a cura di Carpi, Zanichelli, 2001, 4; Cavallini C., *Profili dell'arbitrato rituale*, Giuffré, 2005, 2; Stesuri A., *Profili di attualità dell'Arbitrato*, Simone, 2003, 66.
8. § 1367 of the Italian Civil Code reads as follows: "In case of doubt, the contract or the single clauses thereof shall be interpreted in the sense in which they can have some effect, rather than in that according to which they would have none."
9. *See* Trib. Modena, February 5, 2010, *Giur. It.*, 2010, 11, 2392, according to which the agreement to arbitrate and the rules governing arbitration are two separate and autonomous parts of the arbitration clause.
10. Indeed, the mere use of the word "arbitration" is able to identify, on its own, the intention of the parties to waive their right to sue before State courts. See, e.g., Cass. Civ., Sez. Un., November 21, 1983, no. 6925.
11. Trib. Milano, November 10, 2003, *Guida al diritto*, 2004, 10, 88.

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Large-Scale Empirical Study of International Commercial Mediation and Conciliation Provides Support to UNCITRAL Process

By S.I. Strong

In July 2014, the Government of the United States presented a proposal to the United Nations Commission on International Trade Law (UNCITRAL), suggesting that UNCITRAL consider a possible new convention relating to international commercial mediation. The Commission was sufficiently in favor of the idea to ask Working Group II (Arbitration and Conciliation) to discuss the U.S. proposal at the Working Group's meeting in February 2015 and report back to the Commission in July 2015.

During the debate, several delegates indicated that they would find it useful to consider empirical data on a number of issues relating to the proposed convention. However, there was one slight problem with that request: in July 2014, there were no large-scale empirical studies dedicated solely to international commercial mediation and conciliation.

I was present at the Commission meeting in July, acting as a non-governmental observer, and decided to answer the call to action and undertake a large-scale international study of the use and perception of international commercial mediation and conciliation. With the assistance of the Center for the Study of Dispute Resolution at the University of Missouri School of Law, I generated and released a survey instrument in October 2014 to the international legal and business communities. Although the survey was quite long, with 34 different questions on a variety of subjects, support for the survey was impressive, with 221 respondents from around the world participating in the survey. Although that number may not be as high as some recent surveys involving international commercial arbitration, the world of international commercial mediation and conciliation is much smaller than the world of international commercial arbitration, and the data set is more than adequate for the purposes to which the survey will be put.

One of the best things about this survey is the breadth of the participants. Rather than being limited to a single sector (such as in-house counsel) or country, respondents came from all over the world and included private practitioners, neutrals, in-house counsel, government lawyers, academics and judges with expertise in both domestic and international proceedings. This diversity allows for very interesting data analysis so as to see whether different parts of the international community are more or less in favor of consensual means of international commercial dispute resolution.

While some people may wonder why domestic experts were allowed to participate in a survey on international practices, domestic experiences with consensual dispute resolution provide a useful starting point for discussions about mediation and conciliation in the international commercial context. Furthermore, domestic laws regarding mediation and conciliation will both influence and be influenced by any international convention that may be adopted in this field. As a result, it was considered appropriate to permit specialists in domestic forms of dispute resolution to participate in this study, even though there are some significant differences between domestic and international commercial disputes.

The project was constructed with two goals in mind. First, the study attempted to discover and describe current behaviors and attitudes relating to international commercial mediation and conciliation so as to set a benchmark for further analysis in this field. This sort of foundational research was critical, since there have been no previous in-depth empirical studies dedicated solely to consensual means of resolving international commercial disputes.

Although the information sought in this part of the survey was somewhat basic, it nevertheless provided important insights to parties and policymakers regarding current practices and procedures in this area of law. Thus, this part of the study obtained data relating to how often mediation and conciliation are currently used in the international commercial context; how mediation and conciliation are initiated in the international commercial context; why parties do or do not use mediation or conciliation in international commercial disputes; how parties might be encouraged to use mediation and conciliation in the international commercial context; and which types of international commercial disputes are best suited to mediation and conciliation.

The results to these questions were intriguing and will doubtless be very useful as the international legal and business communities consider the use of consensual forms of dispute resolution in the coming years. However, the data also identified one area where the survey could have done more. According to the respondents, parties hesitate to use mediation and conciliation in international commercial disputes because they know very little about the procedures and even less about the purported benefits of the process, most particularly the extent to which parties can expect to save time and money as a result of

mediation and conciliation. Unfortunately, this study did not ask any questions about economic and related issues. Hopefully additional studies on this issue will be conducted quickly so that parties and policymakers have sufficient information on which to base their decisions.

The study's second goal was to support UNCITRAL's work relating to a proposed new international convention. Thus, the survey asked a variety of questions relating to issues of interest to the UNCITRAL debate in order to provide participants in the UNCITRAL process with information that would be useful to their deliberations.

The results from this series of questions were particularly surprising, both because these types of questions had never been asked before and because of the content of the answers. Although the intensity of responses varied according to the question, one of the clearest aspects of the study was the level of interest in a new international convention relating to international commercial mediation and conciliation. Not only were participants very strongly in favor of a new instrument in this area of law, but respondents were very clear that any convention that is drafted in the area of international commercial mediation and conciliation should address both the front end of the process (i.e., agreements to mediate or conciliate a dispute) and the back end of the process (i.e., settlement agreements arising out of an international commercial mediation or conciliation).

A preliminary report summarizing the research findings was made available to participants in the UNCITRAL process in November 2014. This report was subsequently cited in a Note drafted by the UNCITRAL Secretariat in advance of the Working Group II February meeting and in comments submitted by various governments regarding the U.S. proposal.

Because the data had to be analyzed on an expedited basis if it was to be considered by participants in the UNCITRAL process, the findings in the preliminary report were somewhat tentative in nature. However, a full analysis of the underlying data will be published in a forthcoming article that will not only present an expanded discussion of the underlying data but that will also include several normative proposals regarding the shape of any future international action in this area of law.

Although this study constitutes the broadest and most in-depth research into international commercial mediation and arbitration to date, the UNCITRAL process has triggered interest in this subject from other quarters. For example, the International Mediation Institute (IMI) conducted a very short (four-question) survey in advance of the UNCITRAL Working Group II meeting. While the IMI survey addressed somewhat different issues than the study discussed herein and was much more limited in content, hopefully these two projects prove that it is not only possible to conduct empirical research into international commercial mediation and conciliation but that it is important to do so.

Those interested in seeing the preliminary report arising out of the empirical study can download it for free on the Social Sciences Research Network (SSRN). *See* S.I. Strong, *Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report of Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation, available on* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526302.

Those interested in seeing the results of the International Mediation Institute survey can download it for free on the IMI web site, available at https://imimediation.org/un-convention-on-mediation.

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The Time Has Come: An International Regime for the Enforcement of Mediated Settlement Agreements

By Edna Sussman

In 2002 the United Nations recognized that the use of conciliation and mediation[1] "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 States."[2] The use of conciliation and mediation has increased over the ensuing years with the growing use of step clauses in contracts, the issuance of the EU Mediation Directive, increasing court mandated mediation and the influences of Far Eastern cultures with their emphasis on harmony and amicable resolution. However, notwithstanding the widespread recognition of the benefits of conciliation, it is generally viewed to be dramatically underutilized. Many reasons are offered to explain this reality but it has repeatedly been stated that one of the significant impediments to the expanded use of conciliation in international disputes is that settlement agreements reached through conciliation are more difficult to enforce across borders than arbitral awards.

To further the goal of promoting international conciliation of international commercial disputes, the United States proposed that UNCITRAL Working Group II[3] develop a multilateral convention for enforcement.

"[N]otwithstanding the widespread recognition of the benefits of conciliation, it is generally viewed to be dramatically underutilized.… [O]ne of the significant impediments to the expanded use of conciliation in international disputes is that settlement agreements reached through conciliation are more difficult to enforce across borders than arbitral awards."

The U.S. recommendation proposed a convention that would be applicable to commercial (not consumer) international settlement agreements reached through conciliation, that conformed to specified requirements, and was subject to limited exceptions. States would continue to provide their own legal systems for the enforcement of mediated settlement agreements without the need for harmonization just as under the New York Convention they have their own procedures governing arbitration.[4] The U.S. requested that this initiative be given high priority. The U.S. explained that "solving this problem by way of a convention would provide a clear, uniform framework for facilitating enforcement in different jurisdictions. Additionally, the process of developing a convention would itself help to encourage the use of conciliation by reinforcing its status as a method of dispute resolution coequal to arbitration and litigation."[5] Thus the convention would serve dual purposes. It would both enable users of mediation to reap the benefits of their agreed solutions and would drive the increased use of mediation just as the New York Convention drove the increased use of arbitration.

Prior Efforts

The basis on which mediated settlement agreements should be enforced has been the subject of much debate but no single mechanism for the enforcement of mediated settlement agreements has emerged. There was a strong effort by those working on the UNCITRAL Model Law on International Commercial Conciliation[6] to develop a uniform enforcement mechanism. However, notwithstanding the effort made, that goal was not achieved. Article 14 provides: "If the parties conclude an agreement settling a dispute, the settlement agreement is binding and enforceable, [the enacting state may insert a description of the method of enforcing the settlement agreement or refer to provisions governing such enforcement]." The comments to Article 14 recognized that "many practitioners put forth the view that the attractiveness of conciliation would be increased if a settlement reached during a conciliation would enjoy a regime of expedited enforcement or would for the purposes of enforcement be treated as or similarly to an arbitral award."[7] The Commission supported "the general policy that easy and fast enforcement of settlement agreements should be promoted."[8] Notwithstanding, because of the differences among domestic procedural laws, it was concluded that harmonization by way of uniform legislation was not feasible. Thus, the UNCITRAL provision leaves the enforcement mechanism in the hands of the local jurisdiction. The UNCITRAL failure to arrive at a definitive single enforcement mechanism has been criticized by some scholars as the major failing of this model law.

The EU Mediation Directive[9] recognizes the importance of enforcement and states in paragraph 19 that "mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the good will of the parties." However, while the EU

Mediation Directive calls in Article 6 for Member States to ensure that it is possible for parties to make a written agreement resulting from mediation enforceable, it leaves the mechanism to be employed to the Member State as it may be "made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the member state."

The same result was reached by the drafters of the U.S. Uniform Mediation Act.[10] A concerted effort was made to develop a uniform enforcement mechanism. The final draft had included a provision allowing the parties to move jointly for a court to enter a judgment in accordance with the mediated settlement agreement but the reviewing committees ultimately recommended against that provision. It was concluded that by the time the provision was circumscribed sufficiently to protect rights, the section would not add significantly to the law related to mediation and no enforcement mechanism was ultimately included in the UMA.

Recent Calls for Action

The desirability of an enforcement mechanism has been echoed repeatedly. As the years have passed since the UNICTRAL work on conciliation in 2002, mediation has increasingly come to be considered an important dispute resolution mechanism that should be developed and supported. It is now 2015. The inability of the UNCITRAL delegates to arrive at a vehicle for cross-border enforcement is now years in the past and the need for the development of an international enforcement mechanism has become more compelling.

The European Parliament's study assessing the progress made in the five years following the promulgation of the EU Mediation Directive found that many concerns were expressed regarding the enforcement of settlement agreements, especially in cross-border disputes. The study "suggested that if enforcement were uniform, mediation would become more attractive, in particular, in the international business sector."[11]

Recent surveys and comments by users uniformly reinforce the wisdom of the proposal made by the United States that the development of a mechanism for the international enforcement of mediated settlement agreements is a project whose time has come and would be a significant factor in encouraging and increasing the use of mediation.

Enforcement Mechanisms

The process pursuant to which mediated settlement agreements may be enforced varies widely across jurisdictions. The UNCITRAL Secretariat has circulated a questionnaire to all Member States on the legislative framework and enforcement of international settlement agreements resulting from mediation to inquire as to (i) whether expedited procedures were already in place, (ii) whether a settlement agreement could be treated as an award on agreed terms, (iii) the grounds for refusing enforcement of the settlement agreement, and (iv) the criteria to be met for a settlement agreement to be deemed valid. While the final results have not yet been published, the Secretariat has reported that many replies were submitted and there was a great deal of interest in the subject. The wide variety of responses led the Secretariat to conclude that "the diversity of approaches toward the objective of enforcing settlement agreement might militate in favor of considering whether harmonization of the field would be timely."[12]

In many jurisdictions, including the United States, the principal method for enforcing a mediated settlement agreement is as a contract, an unsatisfactory result since that enforcement mechanism leaves the party precisely where it started in most cases, with a contract which it is trying to enforce. In the United States, while there is a very strong policy favoring the settlement of disputes by agreement by the parties, and the courts, in fact, almost invariably uphold the mediated settlement agreements, nonetheless the mediated settlement agreements remains a contract, and contract defenses are available to the parties.[13]

Mediated settlement agreements can be entered as a judgment in some jurisdictions. If a lawsuit has been filed before the mediation has commenced, it is possible in many jurisdictions to have the court enter the settlement agreement as a consent decree and incorporate it into the dismissal order. The court may, if asked, also retain jurisdiction over the court decree. Even if there is no court proceeding, in some jurisdictions the courts are available to enter a judgment on the mediated settlement agreement. In yet other jurisdictions acts by a notary are required to make a mediated settlement agreement enforceable.[14]

However, even if a court judgment on the mediated settlement agreement is available, the issue presented by cross-border enforcement is not resolved. Court judgments and decrees have not been accorded the deference shown to arbitral awards which are recognized and enforced in the over 145 countries that are signatories to the New York Convention.[15] Thus, even if a judgment or court decree can be obtained, the difficulties of enforcing a foreign judgment in an international matter often presents significant obstacles to enforcement and renders the judgment of diminished utility. This leads to an anomalous result. As the U.S. stated, "[G]iven that the parties to a conciliated settlement consent to the substantive terms on which the dispute is resolved, a conciliated settlement should not be less easily enforceable than an award arising from arbitration (in which the parties consented to the process of resolving the dispute, but the result itself is usually imposed on them)."[16]

Entry of an Arbitration Award Based on Mediation Settlement Agreements

This difficulty could be obviated if the mediated settlement agreements could be entered as an arbitral award and be recognized under the established enforcement mechanisms of the New York Convention. The arbitration rules of several institutions expressly provide that an agreement reached in conciliation can be entered as an arbitral award.[17] Some jurisdictions expressly provide for the entry of an arbitration award to record an agreement reached in mediation. For example, the California Code of Civil Procedure provides with respect to international conciliations:

> If the conciliation succeeds in settling the dispute, and the result of the conciliation is reduced to writing and signed by the conciliator or conciliators and the parties or their representatives, the written agreement shall be treated as an arbitral award rendered by an arbitral tribunal duly constituted in and pursuant to the laws of this state, and shall have the same force and effect as a final award in arbitration.[18]

While the enactment of such provisions would seem to be a useful avenue for mediated settlement agreements enforcement,[19] such an appointment after the dispute is settled may not be possible to effect in many jurisdictions because under local law there must be a dispute at the time the arbitrator is appointed. For example, the English Arbitration Act of 1996 provides in its definition of an arbitration agreement in Section 6(1) that an "arbitration agreement" means "an agreement to submit to arbitration present or future disputes." Similarly, New York state law provides that an "agreement to submit any controversy thereafter arising or any existing controversy to arbitration" is enforceable.[20] As there is no "present or future dispute" or "controversy thereafter arising or…existing" once the dispute is settled in mediation, such provisions may be construed to mean that it is not possible to have an arbitrator appointed to record the settlement in an award. Thus, it could be argued that any arbitral award issued by an arbitrator appointed after the settlement would be a nullity and incapable of enforcement under the laws of those jurisdictions. It could, of course, also be argued that the specific grant by statute, as in California, of the right to have the mediator/conciliator enter an arbitration award based on a mediated settlement agreement in international disputes overrides any objection based on the general definition of the arbitration agreement.[21] California, like New York, also defines an arbitration agreement as one governing "an existing controversy or a controversy thereafter arising."[22] No case has been found on this issue, leaving the question open.

Even if this impediment could be overcome by providing that the mediated settlement agreement be governed by the law of a country where such an arbitrator appointment is valid, the question of whether such an award would be enforceable under the New York Convention remains. Consent awards are generally regarded as enforceable and institutional rules provide for entry of an award on agreed terms if the matter is settled during the pendency of the arbitration. But can an award be enforced under the New York Convention if the arbitrator is appointed after the dispute is resolved in mediation? Without this enforcement mechanism, such an arbitration award in an international dispute would not suffice to meet the parties' needs.

Commentators that have analyzed this question have come to differing conclusions. Some have concluded that it is not enforceable.[23] Others have concluded that it is,[24] while yet others conclude that the result is not clear.[25]

The relevant New York Convention provides in Article 1 (1) that the Convention applies to the recognition and enforcement of awards "arising out of differences between persons." The language of the New York Convention does not have the precise temporal element of such local arbitration rules as set forth in the definition of an arbitration agreement found in the English or New York law that requires a "present or future" dispute or a "controversy thereafter arising or…existing." The reference to a "difference" in Article 1 (1) of the New York Convention does not specify when that "difference" had to exist in time in relation to the time of the appointment of the arbitrator. Thus the Convention language does not seem to expressly bar recognition of an award rendered by an arbitrator appointed after resolution of the dispute. Nor would enforcement seem to otherwise be barred by other provisions of the Convention. It would seem that even if the law of the country where enforcement is sought would not permit the entry of an award by an arbitrator appointed after resolution of the dispute, such a legal difference ought not to rise to the level of being contrary to such a fundamental public policy of any country as would preclude enforcement of such an award under the public policy exception of Article 5 (2) of the Convention.

The differences of opinion as to the applicability of the Convention to mediated settlement agreements suggest that the Convention is at least ambiguous.[26] It has been suggested that an interpretation of the New York Convention might suffice to resolve this issue.[27] However, an interpretation would require the same thorough review in Working Group II as the proposed new convention and many would say that developing a regime tailored to the specific concerns raised in the mediation context would better serve users.

Issues for Consideration

There will be many issues for Working Group II delegates to grapple with. But keeping the great importance of the goal in mind should enable the identification of solutions to all obstacles. Issues to consider may include:

- Is the New York Convention the appropriate model on which to base a new convention, and set forth a broad obligation to recognize and enforce and provide a limited set of exceptions to that obligation thus permitting the development of a relatively short and simple document?
- Should the convention cover the agreement to mediate or only the settlement agreement? The U.S. proposal only applies to the mediated settlement agreement but surveys have shown a strong interest in having the convention cover both just as the New York Convention also applies to the agreement to arbitrate.
- How should terms be defined? Mediation? Conciliation? International? Commercial? Settlement Agreement?
- What formalities need to be observed in the documentation of the settlement? In writing? What constitutes a writing? Is an e-mail exchange sufficient? A dictated transcript? Signed by the parties? Signed by the mediator? Other form requirements?
- How will one distinguish between settlement agreements achieved by the parties, and those achieved with the assistance of a third-party intermediary?
- Should there be an opt-in or opt-out feature allowing parties to choose if the convention would apply?
- What limited exceptions would be applicable to enforceability?
- Should certain claims be excluded from the application of the convention?
- Should the convention address settlement terms other than purely monetary payments just as the New York Convention requires enforcement of non-monetary terms? Should this be a decision for the states that can be dealt with by a reservation?
- How should enforcement of settlement agreements that are conditional on future events or conditions being met be addressed?
- Should there be an allowance for rectification if unforeseen circumstances arise in the course of performance?
- Should the convention apply if the mediator utilizes caucus sessions? If so, how are due process concerns to be addressed? Does an opt-in or opt-out option resolve this issue?
- Should all requirements as to the mediation itself, including the qualifications of the mediator and how the mediation is conducted, be left to the states just as the New York Convention leaves arbitration procedures to the law of the seat?
- When enforcement is sought, what law or process should the enforcing court look to, keeping in mind, as was the case with the New York Convention, of the desire to avoid a requirement for a double exequatur?
- Should the convention's application be limited to conciliated settlements signed after the convention's entry into force?
- Should the convention apply to agreements made by states?

These and other questions will require thoughtful analysis.

"Development of the convention would foster the utilization of mediation and allow mediation to live up to its promise of preserving commercial relationships, enable creative business-oriented solutions, facilitate international transactions and produce savings in the administration of justice."

Conclusion

Given the many variations across the globe for the enforcement of mediated settlement agreements, some have expressed skepticism as to whether it will be possible to develop a convention that meets all concerns. They note that prior efforts to resolve the issues have failed. Development of the convention would foster the utilization of mediation and allow mediation to live up to its promise of preserving commercial relationships, enable creative business-oriented solutions, facilitate international transactions and produce savings in the administration of justice. These goals warrant a consistent and determined effort to find the path forward to the solutions. Sometimes finding solutions to difficult problems is not easy and considerable effort is required. As Victor Hugo said, "perseverance is the secret to all triumphs."

Endnotes

1. Conciliation and mediation are used interchangeably to refer to a process where a third person or persons assists the parties in achieving an amicable resolution.
2. UNCITRAL Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law, A/Res/57/18 (2004).
3. United Nations Commission on International Trade Law (UNCITRAL) is the core legal body of the United Nations system in the field of international trade law. UNCITRAL's business is the modernization and harmonization of rules on international business. Working Group II is assigned Arbitration and Conciliation.
4. UNCITRAL A/CN.9/822, Proposal by the Government of the United States of America: June 2, 2014.
5. UNCITRAL A/CN.9/WG.II/WP.188, Settlement of commercial disputes: enforceability of settlement agreements resulting from international commercial conciliation/mediation—Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings-Comments received from States, at p. 8, Dec. 23, 2014 ("UNCITRAL Comments by States").
6. UNCITRAL Model Law on International Commercial Conciliation, *supra* n.2.
7. Guide to Enactment of the Model Law on International Commercial Conciliation ("Guide to Enactment"), para. 87.
8. *Id.* para. 88.
9. DIRECTIVE 2008/52/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 May 2008 on certain aspects of mediation in civil and commercial matters**.**
10. Uniform Mediation Act, adopted by the National Conference of Commissioners on Uniform State Laws in 2001. A 2003 amendment to the UMA incorporated the UNCITRAL Model Law on International Commercial Conciliation into the UMA and provides that unless there is an agreement otherwise, the Model Law applies to any mediation that is "international commercial mediation."
11. European Parliament, Directorate General for Internal Affairs, 'REBOOTING' THE MEDIATION DIRECTIVE: ASSESSING THE LIMITED IMPACT OF ITS IMPLEMENTATION AND PROPOSING MEASURES TO INCREASE THE NUMBER OF MEDIATIONS IN THE EU, at p.160 (2014) ("Rebooting the Mediation Directive).
12. UNCITRAL A/CN.9/WG.II/WP.187 Note by the Secretariat, Settlement of commercial disputes: enforceability of settlement agreements resulting from international commercial conciliation/mediation November 27, 2014.
13. Edna Sussman, Survey of U.S. Case Law on Enforcing Mediation Settlement Agreements, International Bar Association, Mediation Law Committee Newsletter, April 2006.
14. For a report of a survey on enforcement in the states of the EU see Rebooting the Mediation Directive, *supra* n. 11 (reporting a wide variety of enforcement processes).
15. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 38.
16. UNCITRAL Comments by States, *supra* n. 5 at p. 7.
17. *See, e.g.,* Article 18(3) of the Arbitration Rules of the Korean Commercial Arbitration Board; Article 12 of the Rules of the Mediation Institute of the Stockholm Chamber of Commerce.
18. California Code of Civil Proc. Title 9.3. Arbitration and Conciliation of International Commercial Disputes, § 1297.401.
19. *See* David Weiss and Brian Hodgkinson, *Adaptive Arbitration: An Alternative Approach to Enforcing Cross-Border Mediation Settlement Agreements*, American Review of International Arbitration, Vol. 25 No. 2 (2014) (urging the enactment of such legislation).
20. New York Civil Practice Law and Rules § 7501.
21. *See Bulova Watch Company v. United States,* 365 U.S. 753, 758 (1961) ("a specific statute governs over a general one").
22. California Code of Civil Proc. Title 9.3. § 1281.
23. Christopher Newmark and Richard Hill, *Can a Mediated Settlement Agreement Become an Enforceable Arbitration Award?* Vol.16 Arbitration International, No 1 at 81 (2000); James T. Peter, *Med-Arb in International Arbitration*, 8 Am. Rev. Int'l Arb. 83, 88 (1997).
24. Harold I. Abramson, *Mining Mediation Rules for Representation Opportunities and Obstacles*, 15 Am. Rev. Int'l Arb. 103 (2004).
25. *See* Ellen E. Deason, *Procedural Rules for Complementary Systems of Litigation and Mediation—Worldwide,* 80 Notre Dame L. Rev. 553, fn. 173 (2005). For a comprehensive discussion of enforcement of a mediated settlement agreement under the New York Convention, see Brette L. Steele, *Enforcing International Commercial Mediation Agreements Arbitral Awards Under the New York Convention*, 54 UCLA L. Rev. 1385 (2007).
26. Singapore has taken steps to obviate this issue with the development of the SIAC-SIMC Arb-Med-Arb Protocol pursuant to which parties that wishes to avail themselves of the Protocol can file an arbitration with the Singapore International Arbitration Center, have an arbitral tribunal appointed, have the case referred to mediation with the Singapore International Mediation Centre and have the settlement recorded as an arbitral award by the tribunal when the matter is settled. The Protocol is available at http://simc.com.sg/siac-simc-arb-med-arb-protocol/. This should be a very useful process if the parties are amenable to arbitration as opposed to a court proceeding since arbitration rules generally authorize the arbitrators to enter a consent award and such awards are generally viewed as enforceable awards.
27. Edna Sussman, The New York Convention Through a Mediation Prism, Dispute Resolution Magazine, Vol. 15 No. 4 (2009).

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A version of this article was previously published as "A Path Forward: A Convention for the Enforcement of Mediated Settlement Agreements" in *Transnational Dispute Management*, March 2015.

The Future of International Mediation—Is a Revolution at Hand?

By Laura A. Kaster

On a bitter day in early February 2015, a walk from the magnificent Grand Central Station down 42nd Street toward the river becomes increasingly hazardous under foot; snow and ice and wind-chill slow any progress. Credentials are gathered and then a border is crossed into an extraterritorial world of seventeen or more acres in Turtle Bay. The hearing room is an amphitheater with a well of desks identified by country names facing a dais of Secretariat members and two large screens. Booths containing translators surround the room and there is a balcony for invited NGOs, each of whom has a microphone and an earphone for the translations. The UNCITRAL (United Nations Commission on International Trade Law) working Group II (Arbitration and Conciliation) is holding its sixty-second working session, in part to consider how to move forward on a proposal for a convention on the enforceability of settlement agreements resulting from international commercial conciliation/mediation.

In the world of international arbitration, there has been a seminal force for the development of arbitral institutions, centers of international dispute resolution, and indeed economic activity on a very significant scale. That is the New York Convention codified in the United States in the Federal Arbitration Act, 9 U.S.C. § 201 et seq. That convention, first adopted in June 1958, has now been signed by over 145 countries, http://www.newyorkconvention.org/contracting-states. It permits enforcement of arbitration awards as judgments subject only to limited challenge all across the world. International arbitral awards are more readily enforceable than the judgment of foreign courts. For that reason, multinational corporations and businesses increasingly engaged in international commerce routinely include arbitration in their business-to-business agreements as the method of choice for resolving business disputes.

The system is far better than any alternative, but as disputes submitted to arbitration have gotten larger and more complex, it has become more expensive. Multinationals are looking for resolution earlier in the dispute to control costs and to try to salvage relationships. Mediation and conciliation are underutilized because it is not clear that the product of these processes can result in an enforceable instrument. Professor S. I. Strong has conducted a survey in which 74% of the respondents believed that a convention on enforcement of conciliated settlement agreements would encourage the use of conciliation (with another 18% believing that it could possibly do so).[1] Similarly, a survey of in-house counsel, senior corporate managers, and others by the International Mediation Institute found that over 93% of respondents would be more likely (either "much more likely" or "probably") to mediate a dispute with a party from another country if that country had ratified a convention on the enforcement of mediated settlement agreements.[2] Over 87% of respondents thought a widely ratified convention could "definitely" or "possibly" make it easier for commercial parties to come to mediation in the first place, and over 90% thought that the absence of an international enforcement mechanism presents an impediment to the growth of mediation for resolving cross-border disputes. Additionally, the U.S. Council for International Business—i.e., the U.S. branch of the International Chamber of Commerce (ICC)—expressed the view that a convention would be useful.

"If a convention for mediated and conciliated settlements could succeed, the change in the mediation landscape would be enormous."

For these reasons and others, the United States has proposed that the working group consider the feasibility and possible terms of a convention that would look to the New York Convention for a model.

If a convention for mediated and conciliated settlements could succeed, the change in the mediation landscape would be enormous. Mediation would gain traction and significance beyond the domestic sphere and there would be a review of credentialing.

In advance of the meeting, there were only two written submissions in addition to the U.S. proposal, one by Germany and one by Canada. The Canadian comment sought to limit any convention enforcement to monetary terms. Because the core of mediation is its ability to go beyond mere monetary resolutions (attempting to expand the pie, rather than just split it), this would be a blow to the very concept of mediation itself. Canada itself seemed to rethink its position at the meeting recognizing that many nonmonetary provisions can be enforced even when arbitral awards are concerned. However, the concern and concept of limiting enforcement to monetary terms had not entirely evaporated from the discussion.

The German comments were even more fundamental, worrying about the need for any such convention and the view that the difference between a mediated or conciliated agreement and a purely negotiated agreement was

not sufficient to justify a particular enforcement mechanism different from one for ordinary contracts (which is an utter lack of uniformity and no expedition). Germany expressed due process concerns that seemed to be based on the fact that there is no neutral decision-maker in mediation as opposed to arbitration, no one to determine that the agreement is "fair." These concerns were echoed at the meeting and there was some discussion about whether a convention rather than guidelines is the proper outcome for the working group. But it was determined that the working group would continue its efforts to determine whether a convention would be possible and whether the concerns expressed could be met.

We should all keep these developments on our radar because they may presage a great explosion of mediation in the world.

Endnotes

1. S.I. Strong, Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation, at 44, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526302.
2. https://imimediation.org/un-convention-on-mediation.

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Book Review

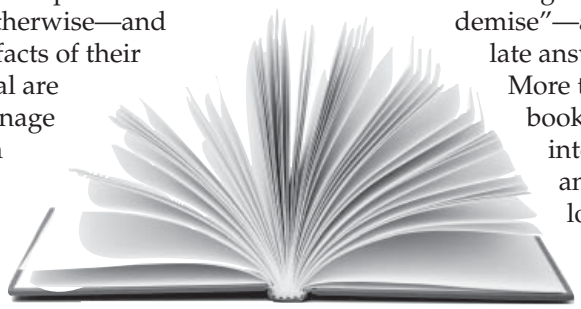
New York Contract Law: A Guide for Non-New York Attorneys

By Glen Banks

(New York State Bar Association, 2014)

Reviewed by Stefan B. Kalina

There is no such thing as a simple agreement. Any dispute unearths the complexities of the parties' relationship—whether commercial or otherwise—and casts a harsh light on the particular facts of their disagreement. Readers of this Journal are particularly interested in how to manage these issues to resolve them through mediation, arbitration or some other alternative method. Aside from craft and method, however, practitioners must also consider the substantive contractual law that governs the dispute and the enforceability of any dispute resolution mechanism the parties may have selected in the contracting process.



"Although styled as a guide for 'non-New York' attorneys, this book serves as a useful guide to gaining this critical understanding and applying it to the specifics of the arbitrations and mediations venued here in New York, regardless where one may practice."

Here and abroad, contracting parties and their lawyers often select New York law to govern their agreement. Understanding New York's *contractual* law is, therefore, essential to all stages of dispute resolution, from initial clause drafting through resolution. Although styled as a guide for "non-New York" attorneys, this book serves as a useful guide to gaining this critical understanding and applying it to the specifics of the arbitrations and mediations venued here in New York, regardless where one may practice.

Indeed, New York practitioners in particular stand to benefit from the "non-New York" approach of this book, which grew out of the recognition that foreign practitioners "had no resource to quickly and easily get a basic understanding of New York Contract Law." As the author, Mr. Banks, points out, judges in New York "have refined New York Contract Law while applying it to sophisticated commercial agreements." Mr. Banks surveys this judicial refinement, as aptly described by Chief Judge Kaye in her foreword, in an accessible question and answer format that posits issues as they arise—from formation through the "consequences of the contract's demise"—and provides thoughtful and articulate answers to questions of New York law. More than providing the answers, this book enables readers "to plunge right into" the question and learn the precise answer "without plodding through a lot of preliminary turf." Such accuracy and alacrity is helpful to New York attorneys, and especially to those seeking to benefit from the speed and efficiency of alternative dispute resolution from any vantage point in the process.

In the main, this book addresses issues of substantive law and "focuses upon the law and principles that would be applied by a court sitting in New York and applying New York law to decide the issues concerning a contract." Such pointed guidance helps drafters anticipate the effects of applying New York law to the particulars of a contract. With equal weight, the book helps litigators identify viable points of contention and how contractual issues would be likely resolved.

In so doing, the book also tackles those contractual issues that affect alternative dispute resolution, both directly and indirectly. As but one example, Mr. Banks discusses how forum selection clauses generally impact such arbitration issues as compelling arbitration in the first instance, obtaining injunctive relief in aid of arbitration and confirmation of arbitral awards. In a later section, Mr. Banks deals directly with the agreement to arbitrate "as a specialized type of forum selection clause" and how New York's state law of contracts applies to construing this particular agreement. Readers can therefore access precise standards by which the arbitrability of all or certain issues in a dispute will be resolved, and apply it to the particular facts of their cases.

In addition, the book answers whether a non-signatory can be bound to the forum selection clause to contract. By extension, Mr. Banks outlines the principles pertinent to whether a non-signatory can be bound by an arbitration clause. Consequently, readers can benefit from learning how New York contractual law would apply to this thorny, arbitration-specific issue.

In reviewing these issues, and many more in the book, readers will appreciate and likely agree with Chief Judge Kaye that New York's contractual rules and principles "have been carefully developed over the past two centuries, and why they are an excellent choice for dispute resolution today." In its own clarity of prose and certainty in explanation, this book reflects the same attributes of New York's developed contract law that has driven, and continues to drive, the oft-repeated selection of New York as the chosen law and forum to resolve commercial disputes.

The utility of the book is further enhanced with its ample citation to authoritative cases, many of which reflect a recent articulation of the contractual principle by New York's Court of Appeals, its highest court. The text is not, however, bogged down by extensive string cites, thereby allowing the reader to gain an uninterrupted, cohesive understanding of the principle at issue. An index of cases is provided, as well as suggestions for further resources, at the end of the book for ease of further reference. Mr. Banks also provides an appendix of contractual clauses that comport with New York law for additional perspective. This creates a neatly crafted book that can meet the time-sensitive demands of daily practice.

Mr. Banks has thus succeeded in preparing a book that justifiably should become an "often used tool in the practice of a lawyer who represents sophisticated clients in commercial transactions in the global economy" that belongs "near the desk where the reader works so that the reader can refer to it from time to time as questions concerning New York Contract Law arise." The dispute resolution practitioner achieves the same benefits by extension and is commended to this book as a valued resource.

"In its own clarity of prose and certainty in explanation, this book reflects the same attributes of New York's developed contract law that has driven, and continues to drive, the oft-repeated selection of New York as the chosen law and forum to resolve commercial disputes."

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To order *New York Contract Law*, see ad on p. 55 in this issue.

Paula Andrews v. County of Rockland, 992 N.Y.S.2d 131 (2d Dep't 2014)—Vacating an award under CPLR 711 on the ground that it was not final and definite because the arbitrator failed to determine the negligence of each party, which was the issue submitted to him

By Severine Losembe Botumbe

Facts

In the underlying dispute in *Andrews v. County of Rockland*, Paula Andrews commenced an arbitration against the County after she sustained personal injuries while a passenger on a bus for the disabled, owned and operated by the County. The arbitration agreement provided that the arbitrator had to rule on liability and damages. The parties also agreed to a "high-low" limit on the amount of damages, but they did not share the details of this agreement with the arbitrator. According to the parties' agreement, the arbitrator had to determine the negligence of each party in connection with the accident and an amount of damages.

The arbitrator issued an award holding that Ms. Andrews could not recover from the County—regardless of the County's negligence—because she was not wearing a seatbelt. The arbitrator also awarded "the low" sum of damages, without specifying an amount.

Pursuant to CPLR 711, Ms. Andrews moved to vacate the award on several grounds: the arbitrator exceeded his powers, the award was not final and definite, and the arbitrator acted in manifest disregard of the law. The trial court vacated the award on the ground that it was not final and definite.

Analysis

The Second Department affirmed the Supreme Court's decision to vacate the award because the award was not final and definite. The appellate court assessed that "the arbitrator's award was neither definite nor final, as it failed to resolve the controversy submitted."

First, the *Andrews* court analyzed that the arbitrator failed to dispose of the issue of negligence because it ruled on a fact that was not in dispute: the fact that Ms. Andrews was not wearing her seatbelt. This failure to dispose of the issue of negligence, which was the one presented by the parties, led to vacatur. In reaching this decision, the *Andrews* court relied on New York Supreme Court appellate division case law holding that when an arbitrator fails to "dispose of a particular issue raised by the parties," the award will be vacated.[1]

Second, the court addressed the arbitrator's award of "the low" sum of damages. The court held that the arbitrator failed to decide on an amount for damages, despite the parties requiring him to do so.

Because it failed to address both issues that the parties submitted to arbitration, the award was vacated as indefinite and nonfinal.

It is useful to keep in mind that the arbitrator must resolve the issues presented and not those raised only by the arbitrator and not the parties.

Endnote

1. *Hamilton Partners Limited v. Singer*, 736 N.Y.S.2d 219 (App. Div. 2002) (holding that an award that does not "dispose of a particular issue raised by the parties" will be vacated for being indefinite or nonfinal under CPLR 7511). *See also Papapietro v. Pollack & Kotler*, 781 N.Y.S.2d 42 (App. Div. 2004) (holding that an award will be vacated when the arbitrator making the award "so imperfectly executed it that a final and definite award upon the subject matter was not made."); *Matter of Westchester County Corr. Officers Benevolent Assn., Inc. v. Cheverko*, 978 N.Y.S.2d 58 (App. Div. 2013) (holding that if the award "leaves the parties unable to determine their rights and obligations, if it does not resolve the controversy submitted or if it creates a new controversy," it will be vacated.)

Severine Losembe Botumbe is a 3L at Fordham Law School.

* * *

Scope of Arbitration Clauses in Jurisdictional Disputes—*FarmedHere, LLC v. Just Greens, LLC*—Illinois Court Cannot Hear Preliminary Matters Where New York Arbitration Is Provided

By Gabrielle Lyons

In *FarmedHere, LLC v. Just Greens, LLC*,[1] Judge Holderman found that the United States District Court for the Northern District of Illinois Eastern Division lacked jurisdiction to determine the arbitrability of claims related to a Distribution Agreement that provided for arbitration in New York. Only a New York court could deal with preliminary considerations relating to the enforcement of the arbitration agreement. The court granted the Defendant's motion to dismiss, finding that the Plaintiff, although not

specifically named in the Distribution Agreement, was bound by the Agreement for the purposes of determining jurisdiction. Because the Distribution Agreement required arbitration in New York, only a New York court had jurisdiction to decide the arbitrability of the Plaintiff's claims.

The case is also noteworthy[2] because, in order to determine the jurisdictional issue, the Court was required to consider the preliminary issue of whether the Defendant was a party to the Distribution Agreement, and thereby bound by the arbitration clause in the first place.[3]

Background

Just Greens, LLC, d/b/a Aero Farm Systems, LLC ("AeroFarms") developed a method of aeroponic farming to allow produce to be grown in urban environments.[4] AeroFarms sought to enter a Distribution Agreement with CityPonic, LLC ("CityPonic").[5]

Pursuant to the Distribution Agreement, CityPonic undertook obligations to market and sell AeroFarms' aeroponic system, and additional obligations regarding AeroFarms' intellectual property and confidential information.[6] AeroFarms agreed to provide CityPonic with equipment, technology, training and trade secrets in relation to the aeroponic system.[7]

The Distribution Agreement contained an arbitration clause that provided,

> [a]ny controversy or claim arising out of or relating to this contract or the breach hereof shall be settled by arbitration to be held in the State of New York in accordance with the law in this jurisdiction, and judgment upon the award rendered by the arbitrators may be entered in any Court having jurisdiction thereof.[8]

Mr. Hardej, on behalf of CityPonic, signed the Distribution Agreement on February 1, 2011. However, at that time Mr. Hardej had not formally incorporated CityPonic. Although the opinion does not address the issue, it appears that CityPonic was never created. Instead Mr. Hardej formed FarmedHere on August 6, 2011[9] and represented that he was its Chief Executive Officer.[10] AeroFarms contended that FarmedHere stepped into CityPonic's shoes and took its place under the Distribution Agreement.

A dispute subsequently arose between the parties. AeroFarms filed a demand for arbitration with JAMS in New York on December 23, 2013 (alleging breach of contract, unjust enrichment, fraud, misappropriation of trade secrets, unfair competition, and patent infringement). On January 21, 2014, FarmedHere filed a petition for Stay of Arbitration in the Supreme Court for the State of New York. The same day FarmedHere filed its District Court Complaint in Illinois (where CityPonic's and FarmedHere's mutual corporate address was located), alleging violations of the Lanham Act and the Illinois Uniform Deceptive Trade Practices Act, and seeking declarations in relation to a patent owned by AeroFarms.

Jurisdiction of the Court to Determine Arbitrability

AeroFarms filed a motion to dismiss FarmedHere's Complaint (or alternatively, to stay the action) on the grounds that the Illinois District Court lacked jurisdiction to determine whether FarmedHere's claims were arbitrable, and was therefore an improper venue. Judge Holderman agreed and granted the motion without prejudice.

The court found it necessary to determine the threshold issue of whether FarmedHere should be bound by the Distribution Agreement for the limited purposes of deciding whether the Illinois District Court had jurisdiction. It held that FarmedHere had assumed CityPonic's obligations under the Distribution Agreement and was therefore bound by the arbitration clause.

The court identified the evidence that led it to conclude that FarmedHere intended to bind itself to the Distribution Agreement. The evidence chiefly involved the conduct of Mr. Hardej, who represented both CityPonic and FarmedHere. The key factors were as follows:

- At least once, Mr. Hardej expressly requested that AeroFarms substitute FarmedHere for CityPonic.[11]
- Mr. Hardej signed the Distribution Agreement on behalf of CityPonic, which did not exist, and advised that CityPonic would soon be created.[12]
- Several months later, Mr. Hardej notified AeroFarms that "[w]e started a new entity, which is the farm development/operating company called FarmedHere."[13] The court found that this declaration was "not an empty gesture," rather it implied that FarmedHere would be standing in CityPonic's shoes, confirmed by Mr. Hardej going on to request that AeroFarms substitute FarmedHere's name on billing invoices previously addressed to City Ponic.[14]
- Mr. Hardej drafted a letter of intent dated September 9, 2011 regarding FarmedHere's future use of AeroFarms' equipment. The court viewed this as "an attempt to formalize FarmedHere's ability to exploit technologies AeroFarms provided Mr. Hardej under the Distribution Agreement."[15] This led the court to reject FarmedHere's attempt to portray AeroFarms' technology as irrelevant to FarmedHere.[16]

- Although it was not determinative by itself, in the context of all the other factors, it was probative that CityPonic and FarmedHere shared the same corporate address.[17]

Judge Holderman stated that FarmedHere failed to provide contradictory evidence,[18] focusing instead on portraying Mr. Hardej as "a passive consultant, who coincidently entered into a prior agreement with AeroFarms to exploit its technology."[19] The court also rejected this characterization of Mr Hardej's role, finding that Mr. Hardej played a key role both at AeroFarms and FarmedHere.[20] The circumstances suggested that FarmedHere was a party to the arbitration agreement. The arbitration agreement required a New York arbitration.

The court applied Seventh Circuit precedent of *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lauer*,[21] interpreting the Federal Arbitration Act, 9 U.S.C § 4 (2012), holding that if an arbitration agreement contains a forum selection clause, "that only a court within the district in which an arbitration is to be held, here New York, may determine whether a claims are arbitrable."[22]

The court rejected FarmedHere's arguments that its claims in the Illinois District Court proceeding were not part of the New York action.[23] Indeed, the court criticized FarmedHere's "inexcusable"[24] conduct in creating "procedural complexity"[25] by commencing its own proceeding in Illinois rather than awaiting a determination as to the arbitrability of its claims in New York.[26] The court did state that if the New York proceeding did not result in FarmedHere's claims being heard in arbitration, FarmedHere may file a motion seeking to refile its claims.[27] Accordingly, the motion to dismiss was granted without prejudice.

Judge Holderman acknowledged the potential critique of his decision, that it might create an incentive for future defendants to argue lack of jurisdiction in circumstances where there are merely tenuous connections to arbitration agreements in other jurisdictions. However, he noted that where there was no real connection, an arbitration agreement would not be a basis for dismissing the case.

The opinion illustrates the power of forum selection clauses in arbitration agreements. The parties' chosen arbitration jurisdiction may also be the sole jurisdiction in which the arbitrability of claims can be determined. For the purposes of assessing jurisdiction, these clauses may bind not only parties who are expressly named, but also parties whose conduct indicates that they intend to be bound by such clauses.

Endnotes

1. No. 14 C 370, 2014 WL 2726707 (N.D. Ill. June 16, 2014).
2. *Id.* at *3.
3. *Id.*
4. *Id.* at *1.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at *2.
9. *Id.*
10. *Id.* at *4.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. 49 F.3d 323 (7th Cir. 1995).
22. *FarmedHere,* at *5.
23. *Id.* at *6.
24. *Id.,* n.4.
25. *Id.*
26. *Id.*
27. *Id.* at *7.

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* * *

Contracted Arbitration May Not Be Waived Due to Initial Litigation—*LG Electronics, Inc. v. Wi-LAN USA, Inc.*

By Megan Martucci

In *LG Electronics, Inc. v. Wi-LAN USA, Inc.*,[1] the Southern District of New York considered who should decide if litigation waives the right to enforce an arbitration clause, whether the actions taken by the defendant in that particular case waived its right to arbitration, and whether the arbitration clause applies if the judicial forum provision is invoked through initial litigation. Judge Ronnie Abrams held that the court would decide the issue of whether Wi-LAN waived its right to arbitration by initiating litigation and held that Wi-LAN had not

waived its right to arbitrate through its previous conduct indicating that arbitration could proceed. The court also decided that an arbitrator must resolve whether electing to file suit invoking the availability of injunctive relief in a judicial forum, permitted under the arbitration clause rendered the dispute non-arbitrable.

Background

Wi-LAN and LG entered into a patent license agreement (the "PLA"). The PLA governed wireless products and included an arbitration clause which provided that "in the event no amicable settlement can be reached [any breach of the PLA] shall be finally settled by arbitration in the city of New York, U.S.A.… Notwithstanding anything contained in the Agreement to the contrary, any Party may seek injunctive or other equitable relief whenever the facts or circumstances would permit such Party to seek such equitable relief in a court of competent jurisdiction whether in lieu of, in addition to, or prior to the initiation of any arbitration as set forth."[2] In 2012, Wi-LAN claimed that LG's manufacture, sale, and importation of certain digital flat-panel televisions violated its patents for video display technology.

On December 3, 2012, Wi-LAN filed a complaint in the Southern District of Florida asserting patent-infringement claims against LG but did not cite the PLA. On January 25, 2013 LG filed a motion to dismiss and a motion for summary judgment asserting that the televisions in question were covered by the PLA and that the company was therefore entitled to manufacture, sell and import them. LG also filed for a transfer of venue to the District of New Jersey and to stay discovery.

Within two weeks of LG's assertion that the TVs were covered products, Wi-LAN invoked the Arbitration Clause, filing an arbitration demand with JAMS. Wi-LAN followed the arbitration submission by filing a motion in the Southern District of Florida to compel arbitration on February 11, 2013.

LG filed an action in the Southern District of New York seeking declaratory and injunctive relief to prevent the arbitration from going forward. Both parties eventually agreed that the matter should proceed in New York given Third Circuit precedent precluding the district courts in that circuit from ordering arbitration outside of their districts. Accordingly, the district court in New Jersey stayed the action pending the district court of New York's ruling on the issue of arbitration.

Discussion

The first issue was whether Wi-LAN had waived its right to arbitration by initiating litigation and the court found that it had not. The district court of New York considered who should determine whether litigation waives the right to arbitration and determined "[t]raditionally, courts, not arbitrators, have decided claims of waiver of the right to arbitrate based on participation in protracted litigation."[3] In support of this decision, the court cited *Apple & Eve, LLC v. Yantai N. Andre Juice Co. Ltd.*, which stated that "questions of litigation-conduct are best resolved by a court that has inherent power to control its docket and prevent abuse in its proceedings."[4]

The court then considered whether Wi-LAN waived its right to enforce the Arbitration Clause by initiating and actively pursuing litigation. In general, parties waive their right to arbitration when they engage in "protracted litigation that prejudices the opposing party."[5] In determining whether Wi-LAN had waived its right to arbitration, the court applied a three-prong test established by the Second Circuit which considers: "(1) time elapsed from the commencement of litigation to request for arbitration, (2) the amount of litigation (including substantive litigation), and (3) proof of prejudice."[6]

The court found that LG failed to show prejudice in part because no discovery had taken place and much of the activity in the courts was generated by LG's motions. In addition, the court noted that until LG took the position that the televisions at issue were covered products under the PLA, Wi-LAN had assumed they were not. Once LG took that position Wi-LAN acted within two weeks to file the arbitration.

A second and seemingly closely related argument was raised by LG that the Arbitration Clause did not apply because Wi-LAN invoked the injunctive/equitable relief in a judicial forum as permitted by the PLA by filing litigation in Florida. The court characterized this as an issue of arbitrability rather than waiver and ruled that the issue must be decided by an arbitrator because in specifying the JAMS rules, which require the arbitrator to determine arbitrability, the parties' agreement clearly intended that issues of contract arbitrability be decided by an arbitrator.[7] Therefore an arbitrator would decide whether the Arbitration Clause is inapplicable because Wi-LAN sought injunctive relief.

Lastly, LG asserted that the claim-splitting doctrine prevents the court from enforcing arbitration and requires the court to enjoin Wi-LAN from proceeding with arbitration. The court found that the claim-splitting doctrine did not apply. The claim-splitting doctrine allows "district courts to manage their docket and dispense with duplicative litigation by dismissing the later of the two actions when a plaintiff had previously filed related claims that were pending in the same federal court against the same defendants."[8] The court found that the only previously filed claims were those stayed in the District of

New Jersey and those claims would be submitted to the arbitrator following the Order to determine which claims are arbitrable or not arbitrable. Claim-splitting has been rejected as a defense to arbitration in the past. The Supreme Court has stated that the FAA "requires piecemeal resolution when necessary to give effect to an arbitration agreement."[9]

This is an interesting case in which the characterization of the issues as either one of waiver or invocation of an election under the arbitration clause had a significant impact on the question of who determines the result. The case indicated that with matters concerning whether litigation has waived a party's right to arbitration, it is the court that decides, while matters concerning the application of an arbitration clause remain with the arbitrator to decide.

Endnotes

1. 2014 WL 361 0796 (S.D.N.Y. July 21, 2014).
2. *Id.* at 2 (quoting Dallow Decl. Ex. A. ¶ 8.3).
3. *Id.* at 5.
4. *Id.* at 6 (Apple & Eve, LLC v. Yantai N. Andre Juice Co. Ltd., citing 610 F. Supp.2d 266, 230 (E.D.N.Y. 2009)).
5. *Id.* at 7 (citing PPG Indus., Inc. v. Webster Auto Parts, Inc., 128 F.3d 10, 107 (2d Cir. 1997)).
6. *Id.* (citing PPG Indus., Inc. v. Webster Auto Parts, Inc., 128 F.3d 103, 107 (2d Cir. 1997)).
7. *Id.* at 11-12.
8. *Id.* at 13 (quotation omitted).
9. *Id.* at 14 (citing Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985)).

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

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