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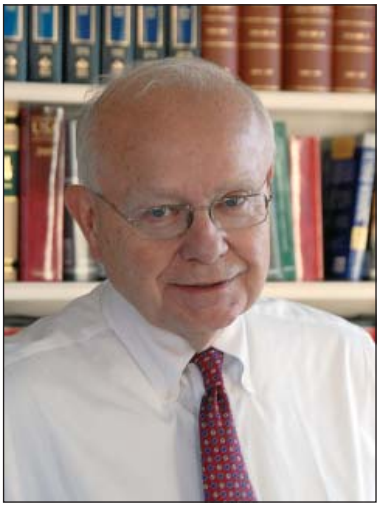
Message from the Chair



Daniel Kolb

It is always a pleasure to look through *New York Dispute Resolution Lawyer*. It continues to be a great credit to the Section, for which we are all very grateful to Edna Sussman, Laura Kaster and Sherman Kahn who have tirelessly edited it for so many years. I am especially pleased to emphasize their work this year because we are looking forward to a further step which will be to collect many of the best articles from the publication, which, like the Section, is in its tenth year, and to publish them in a single volume. Efforts are under way to review the great writing that has been provided over the years and to compile a timely collection.

In addition to reflecting on how outstanding the papers in this publication have been over the last 10 years, I think this is an appropriate time to recognize what an extraordinary job has been done by those who brought our Section into existence 10 years ago and have so ably developed its offerings to members. Starting with the Section's first Chair, Simeon Baum, those who have served as Chair before me and those who have chaired the many committees and activities of the Section have made it exceptionally successful. Due to their work the Section's benefits include its continually successful Fall and Annual Programs; very interesting committee meetings, including guest speakers and important initiatives such as our numerous diversity programs, diversity scholarships and rule and legislative recommendations; outstanding training programs in both Arbitration and Mediation; the very successful annual Fall Arbitration Moot Competition among the State's major law schools; a national writing competition inaugurated in 2017; and the recent addition of the Resolution Roundtable blog permitting significant exchanges on important dispute resolution issues and this great publication. One need only go to a committee meeting or program to appreciate the vitality of the Section.

This year we have added still more to the list of Section activities and initiatives. In the spring of 2017 we joined with the Commercial and Federal Litigation (ComFed) Section for a very successful program. We are now moving not only to make such a joint program with ComFed a regular Spring feature but also to develop closer ties with ComFed so as to expand the exchange of ideas and benefits between the Sections. We are trying to bring advocates and neutrals together more often so that they can benefit from common exchanges and a better understanding of their respective roles. As a potentially very important part of that effort, an outstanding working group composed of advocates, in-house counsel and neutrals, coordinated by our Chair-Elect, Debbie Masucci, is working on a new training program for advocates in mediation. Both ComFed and the Corporate Counsel Section are joining us in that effort. We hope to roll out that new program in 2018.

Another important initiative is to increase the benefits of the Section to those living upstate. There have been very significant advances in ADR upstate in recent years that reflect its importance there, but members upstate have not had as many opportunities as they should to benefit from Section offerings. To address that shortfall, we have begun a program of webinars that will benefit members throughout the state, with two in the Fall and two in the Spring. We expect to provide a webcast of our Spring Program with ComFed so that it will be available throughout the state. We are increasing cooperation with the CLE office of the State Bar to develop multiple live programs upstate, and we are taking steps to draw from upstate members recommendations of additional ways in which we can improve the Section's offerings for them.

Consistent with the better use of webinars and webcasts, we are also in the process of significantly enhancing use of social media, including both Twitter and Linked-In, to improve communication and outreach.

My hat is off to those who have brought the Dispute Resolution Section to where it is and I very much look forward to the work of the Chairs who follow me who will, I am sure, be superb stewards for a Section of which we should all be proud.

Dan Kolb

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Award-Winning Student Papers

Message from the Co-Editors-in-Chief


Edna Sussman


Sherman Kahn


Laura A. Kaster

This expanded issue reflects some new efforts by our Section. It includes two award-winning student papers that are longer than our typical articles. Lela Love, Director of the Kukin Program for Conflict Resolution at Benjamin N. Cardozo Law School, describes the competition that led to these papers and the awards as follows:

> On the evening of October 26, 2017, at New York Law School, after the annual conference of the New York State Bar Association (NYSBA) Dispute Resolution Section, the winners of the 2017 National Championship ADR Law Student Writing Competition were honored. Sara Benzidi, the winner of the grand prize ($10,000), flew in from Belgium for the ceremony. Sara completed her LL.M at Harvard Law School this past academic year, and winning the competition was the crown on her year. Her championship paper was titled "How to Mitigate the Risk of Setting Aside or Refusal of Recognition and Enforcement of a Med-Arb Award." Carl Mudd of Brooklyn Law School won the $1,000 New York Competition with his paper, "The Past, Present and Future of the Doctrine of 'Manifest Disregard.'"
>
> John Wilkinson, who led the NYSBA Dispute Resolution Section's participation in the competition, described the organization of the competition, a collaboration between the NYSBA DR Section and the American College of Civil Trial Mediators (ACCTM); the careful and difficult judging process by 16 judges; and the 55 entries. He said that the quality of all the papers was remarkable.

These articles are published in this issue.

In addition to our traditional Ethics column by Elayne Greenberg and the usual arbitration, mediation, international, case notes, and book review topics, this issue includes a special section on Artificial Intelligence and New Arbitration Data Sources. Artificial Intelligence is upending many areas, including valuation for the purpose of settlement and mediation. With respect to New Arbitration Data Sources, in arbitration, the argument can be made that the greater the available information on arbitrators, the more likely that parties and counsel will select arbitrators who are not just "the usual suspects." We always attempt to bring you information from the field that suggests new trends and ideas.

From its inception, our Section has been engaged in addressing the diversity issues that face our profession and has supported and encouraged equality in our dispute resolution field. The Section is committed to providing opportunities and developing skills of women, minorities, law students, and young lawyers and to increasing their representation in our Section.

Some of the Section's efforts include:

1. **Diversity Scholarship:** For the second year, the Section is offering five mediation and five arbitration scholarships to encourage greater opportunities for women and minorities;
2. **Diversity Mentorship Program:** This new program will provide training, support, and connections to assist women and minorities to become active participants in ADR;
3. **Call for diverse speakers, panelists and writers:** We seek to expand opportunities for women and minorities to demonstrate their skills and expertise by providing them with greater exposure;
4. **Symposium on Diversity in Dispute Resolution:** Each year the Diversity Committee offers a program focused on how to break through. This year, the Committee held a Symposium on February 26 focusing on solutions to this pernicious problem by learning about the successes of experts in a wide range of industries;
5. **Dispute Resolution Clinic:** This new clinic develops the skills of law students and new lawyers to represent parties who would otherwise be unrepresented in mediation and arbitration proceedings. The clinic starts with a training seminar and includes experienced advocates as mentors;
7. **Arbitration Moot:** 2018 will be the fourth year that the Section, the American Arbitration Association, the New York International Arbitration Center, and the Chartered Institute of Arbitrators will sponsor a moot in which law students at New York region law schools compete as advocates for parties in a mock arbitration; and
8. **Writing Competition:** As discussed above, our writing competition resulted in the two stellar articles published here.

In the upcoming year, the Section will expand activities by establishing a Task Force to examine what else can be done to break barriers for women and minorities in the field. We hope you will join us in making all of this happen.

Our Section and this publication continue to be in the forefront of our profession and we hope you will become an active participant in our efforts.

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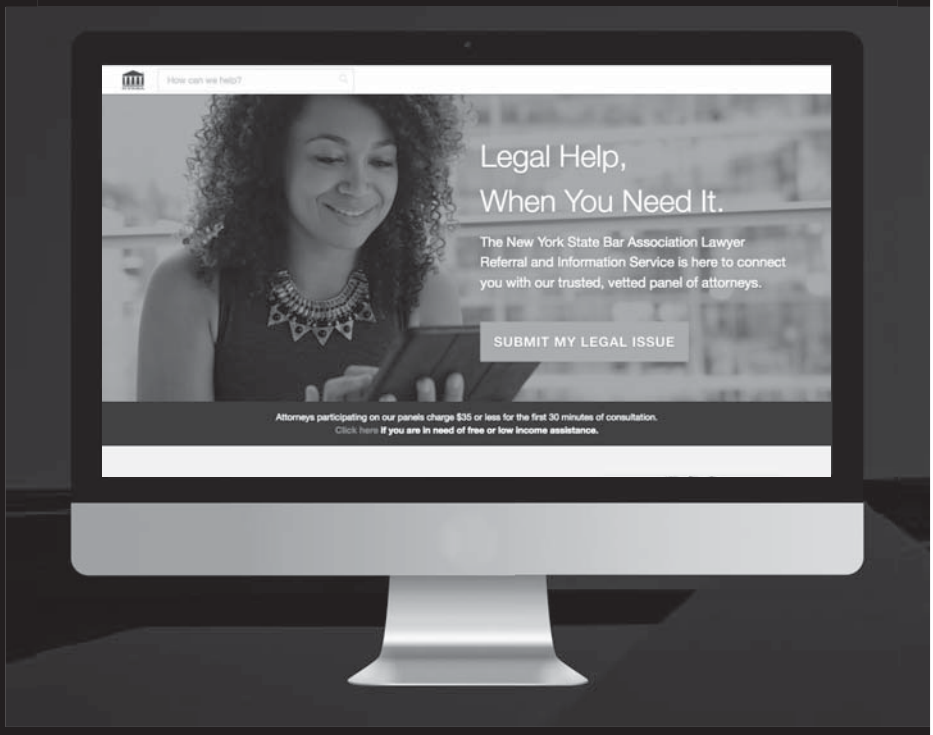

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Acts Like a Lawyer, Talks Like a Lawyer…Non-Lawyer Advocates Representing Parties in Dispute Resolution

By Professor Elayne E. Greenberg

The Ethical Issue:

What are the ethical implications for lawyer mediators, arbitrators and dispute resolution providers when the lines between the roles of lawyers and the non-lawyers who are representing clients in dispute resolution become blurry? Traditionally, non-lawyer advocates (hereinafter NARs) have represented clients in the negotiations, mediation and arbitration of legal matters without cause for concern. Yes, labor union representatives, sports agents, and special education advocates are three familiar examples of non-lawyers who represent clients in negotiations, mediations and arbitrations, informing clients of their legal rights. Routinely, the lawyers and neutrals presiding over the dispute resolution procedure have warmly welcomed these non-lawyers, viewing these non-lawyers as valued participants who provide their clients beneficial subject matter expertise to help resolve the legal dispute at hand. However, that welcome has now turned tepid and tentative as FINRA and its neutrals question the ethics of some of those non-lawyers who are representing clients in FINRA arbitration.

The Immediate Problem That Re-ignited the Controversy

The FINRA Codes of Arbitration and Mediation Procedures provides in relevant part that parties in securities arbitrations and mediations may be represented by NAR so long as such representation does not conflict with state law proscribing such representation.[1] Thus, pursuant to the FINRA code, aggrieved investors have opted to be represented in their settlement talks and dispute resolution procedures not only by lawyers but also by family, friends, law school clinics and NAR firms. NAR firms have proliferated, ostensibly to offer public investors an alternative representation to lawyers in FINRA securities mediations and arbitration.

However, FINRA had been receiving complaints from lawyers and neutrals who question the ethics of a small number of these NAR firms and have requested that FINRA take steps to address these concerns.[2] Included among the complaints of unethical behavior were allegations that some NAR firms required the aggrieved investor to sign a retainer agreement to pay the firm a $25,000 non-refundable fee for representation; some NAR firms advocated frivolous or stale claims as leverage to elicit settlements; some NAR firms have misused FINRA dispute resolution procedures by "employing inappropriate business practices," and some NAR firms posted photos of settlement checks in violation of confidentiality agreement to help market the firm's value.[3]

Professor Elayne E. Greenberg is Assistant Dean for Dispute Resolution, Professor of Legal Practice and Director of the Hugh L. Carey Center for Dispute Resolution at St. John's School of Law. Please send your comments to her about this topic at greenbee@stjohns.edu.

In response to these complaints, on October 18, 2017 FINRA issued regulatory notice 17–34 inviting FINRA forum users to comment on their experiences with NAR firms.[4] In this notice, FINRA acknowledged that although some NAR firms offer a valuable service to some aggrieved investors, NAR firms are unregulated.[5] FINRA also recognized the impact of any restrictions on NAR firms will ultimately have a cost and benefit to investors.[6] For example, although the implementation of practice restriction on NAR firms might serve to protect aggrieved investors from the cost of NAR firms' misconduct, these restrictions might also serve to incentivize aggrieved investors to instead retain lawyers at an additional expense.[7]

The Broader Ethical Issue

The FINRA-NAR issue is actually a reflection of a broader problem: How do we ensure access to justice for all? For many, the escalating costs of retaining lawyers presents a barrier in their quest to access justice. In lieu of lawyers, some are seeking a more affordable alternative and are turning to NARs. As one familiar example, the New York Unified Court System provides funding to Community Mediation Centers who use NARs to provide those unrepresented with legal advice.[8] Some embrace the use of NARs in this context while others argue that NARs are just providing basement justice for the have-nots.

Adding to the challenge of this problem, there is no consensus on whether lawyer representation as opposed to representation by NARs will actually provide individuals with a better outcome. It may be a fantasy that any lawyer will provide the client with a better outcome than a NAR. Our respected colleague Jean Sternlight states that whether legal representation is actually a benefit compared to NAR representation is not easily proven by the research.[9] Sternlight notes, and this author agrees, that all legal counsel is not alike. While we have great pride in observing skilled lawyers advance their clients' interests, we have also cringed when observing lawyers who do not know the law and misguide their clients to unfortunate outcomes.

Another respected colleague, Sarah Cole, looks at the access to justice issue from a different vantage point and provokes us to consider whether there are some types of cases where NAR representation is actually the unauthorized practice of law and should not be allowed.[10] Cole explains that during the past three decades arbitration practice has evolved and is now used to resolve an increasing number of statutory claims.[11] While arbitration was initially created to resolve routine contractual business disputes by applying business customs and norms, now arbitration is also used to resolve statutory claims by applying the law.[12] Cole asserts that whether or not we classify the representation clients by non-lawyers in statutory arbitrations as the unauthorized practice of law, clients need lawyers to represent them in the arbitration of these statutory claims to protect these clients from harm.[13]

The Ethical Codes Maintain the Blurry Lines

How should lawyer arbitrators and mediators ethically respond to non-lawyer advocates who represent parties in mediation or arbitration? Lawyer mediators and arbitrators may turn to both the New York Rules of Professional Conduct and the relevant neutral ethical codes for guidance and still remain unsure of how to proceed ethically. These ethical codes don't explicitly clarify what constitutes the unethical practice of law, or advise neutrals about what to do when a neutral believes that a NAR has crossed the blurry line into the unauthorized practice of law. For example, the ethical codes for mediators[14] and arbitrators[15] explicitly advise that neutrals should uphold the integrity of their respective dispute resolution procedures. Are arbitrators and mediators upholding the integrity of the process if they encourage or discourage the participation of NAR? Should NAR participation be permitted in some disputes and not others?

We could also look at New York Rule 5.5 that addresses unauthorized practice of law. Rule 5.5 explicitly provides that:

> (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction. (b) A lawyer shall not aid a non-lawyer in the unauthorized practice of law.[16]

However Rule 5.5 does not help the lawyer mediator and arbitrator differentiate between permitted subject matter support and the unauthorized practice of law.

For this writer, New York Rule 2.4, Lawyer Serving as Third-Party Neutral reinforces a practice boundary that may be tested when there is a NAR supporting a party in mediation or arbitration. Explicitly Rule 2.4 provides that:

> (a) A lawyer serves as a "third-party neutral" when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter. (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

This rule recognizes the mistaken belief held by many unrepresented participants that their arbitrator or mediator who is also a lawyer, despite statements to the contrary, will protect the unrepresented participant from legal harm or mistakes. Two for the price of one.

This rule also reminds lawyers serving as a neutral of their ethical obligation to remain anchored in their neutral role, and not be pulled to take a more legal representational role by providing legal advice to an unrepresented party. However, practicing lawyer mediators and arbitrators often confess how challenging it is not to correct an unrepresented parties' faulty legal reasoning. Moreover, lawyer arbitrators and mediators find themselves in an ethical quagmire when lawyers representing parties just got the relevant law wrong. Might this challenge for lawyer mediators and arbitrators be exacerbated when parties are represented by NARs? Depending on the lawyer mediator and arbitrator, the neutral might feel even more pulled to provide legal advice if the neutral doesn't consider NAR as a representative or if the NAR gets the law wrong.

Some readers may be more dizzied after reading these rules and remain unsure about how to proceed if a NAR is engaging in the unauthorized practice of law in a dispute resolution procedure in which you are a neutral. You are not alone. However, we can always take solace in the knowledge that neutrals always retain the right

to withdraw from a dispute resolution procedure if the neutral does not believe they can carry on their neutral role. For some, the right to withdraw is a welcome escape hatch. For others, the right to withdraw is a punt that fails to address the more nuanced issue: how should neutrals ethically proceed when a party is represented by a NAR?

Conclusion

As I write this column, I am coming to the sobering reality that this problem raises questions with no simple answers. This topic calls into question whether we truly believe in the clients' right to self-determination in which they are free to choose their own representative when participating in a dispute resolution procedure or whether we adopt a more maternalistic stance, believing clients need to be protected when selecting a representative. We are also forced to confront the limitations of access to justice for all and the remedies we are willing to support to right this egregious wrong. Yes, this problem is also entrenched in the politics of maintaining the exclusivity of the legal profession. Ultimately, however, this issue forces us to personally consider as lawyer mediators and arbitrators what it means to us to maintain a dispute resolution procedure of integrity.

Endnotes

1. *See* http://www.finra.org/sites/default/files/Regulatory-Notice-17-34.pdf.
2. *Id.*
3. *Id.*
4. *Id.* The deadline for the comment period was December 18, 2017.
5. *Id.*
6. *Id.*
7. *Id.*
8. https://www.nycourts.gov/ip/adr/cdrc.shtml.
9. Jean R. Sternlight, *Lawyerless Dispute Resolution: Rethinking a Paradigm*, 37 Fordham Urban L. J. at 391 (2009).
10. Sarah Rudolph Cole, *Blurred Lines: Are Non-Attorneys Who Represent Parties in Arbitrations Involving Statutory Claims Practicing Law?*, 48 U. of Calif. Davis 921 (2015).
11. *Id.* at 925.
12. *Id.*
13. *Id.* at 960.
14. https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf.
15. https://www.americanbar.org/content/dam/aba/migrated/dispute/commercial_disputes.authcheckdam.pdf.
16. NY Rules of Professional Conduct Rule 5.5 (2017) at http://www.nycourts.gov/rules/jointappellate/ny-rules-prof-conduct-1200.pdf.

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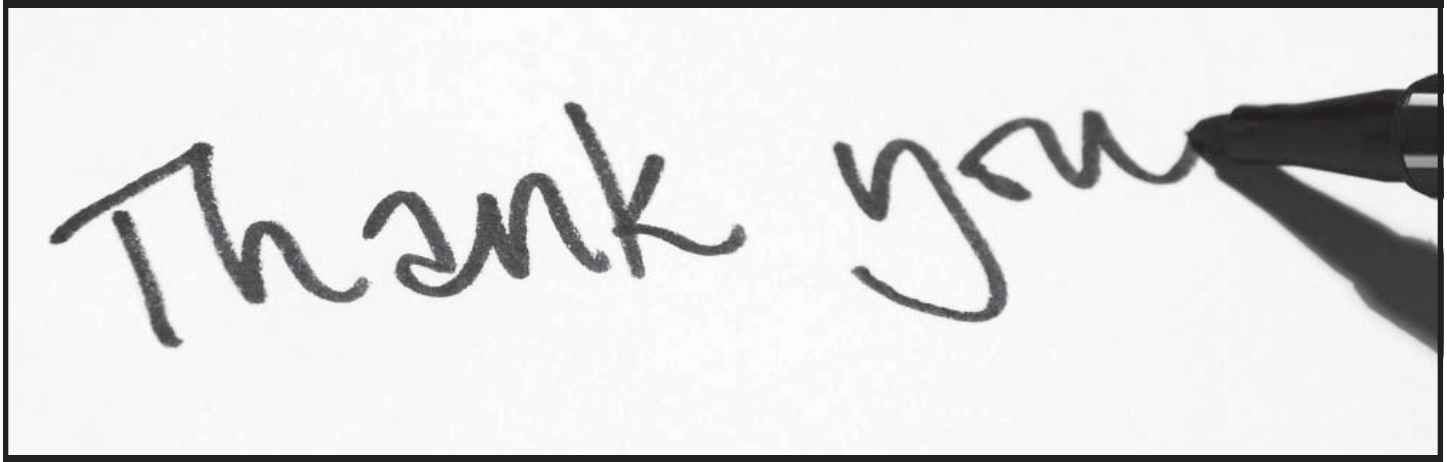

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Sharon Stern Gerstman
President

Pamela McDevitt
Executive Director

NYSBA

Summary of Report of the New York City Bar on Awards of Interest in International Commercial Arbitration

By Thomas Childs

Time is money, and resolving a dispute through international commercial arbitration can take years. Sections 5001, 5002 and 5004 of the New York Civil Practice Law and Rules (CPLR) mandate that the New York courts award prejudgment interest, at an annual rate of 9 percent and on a simple-interest basis, upon any sum awarded for breach of contract. One question that often arises in international commercial arbitrations governed by New York substantive law and seated in New York is whether arbitrators must or should apply the CPLR's prejudgment interest provisions to the determination of pre-award or post-award interest.

The absence of any commentary on this important and recurring question prompted the International Commercial Disputes Committee (ICDC) of the New York City Bar Association to address it in a detailed report published in June 2017 (the "City Bar Report" or "Report").[1] This article is intended to provide a brief overview of the City Bar Report.[2]

Bottom Line

The City Bar Report concludes that, in the absence of express party agreement on the award of interest, international arbitrators have discretion to apply or not to apply the CPLR's prejudgment interest provisions to the determination of pre-award and post-award interest in an international commercial arbitration governed by New York substantive law and seated in New York. Arbitrators may choose to determine interest in accordance with the CPLR provisions if (by way of example) evidence exists that the parties intended the statutory prejudgment interest rate to apply, or no case is made in favor of applying a different rate, or the choice of interest rate would not have a significant economic impact one way or the other. Moreover, if both parties argue that the CPLR provisions govern their respective claims for interest, a tribunal could reasonably infer agreement between the parties that the statutory rate applies in their arbitration.

On the other hand, arbitrators may choose to determine pre-award and post-award interest based on commercial considerations and without regard for the CPLR's prejudgment interest provisions, for several reasons. First, the CPLR provisions contain numerous terms indicating that they are intended to apply to court proceedings, not arbitration. Second, the legislative history of the provisions indicates that the New York State Legislature adopted a fixed nine percent prejudgment interest rate in part for reasons not directly related to the compensatory purpose of an interest award and not necessarily relevant to the award of interest in international arbitration. Third, New York State's Appellate Departments have held that the CPLR provisions do not necessarily apply to domestic arbitration and that an arbitral tribunal's decision on this question is not subject to review by the courts.[3] Fourth, the award of nine percent simple interest in accordance with the CPLR provisions may materially overcompensate or undercompensate the prevailing party for the loss of use of its funds.

Party Choice: Contractual Stipulations and Arbitration Rules

The question whether international arbitrators must or should apply the CPLR's prejudgment interest provisions may not even arise if the parties' contract or the arbitration rules chosen by the parties contain provisions regarding the award of interest.

Often, the parties' contract will contain a "late payment" clause or other similar type of clause stipulating how interest is to be assessed on amounts past due under the contract. If the losing party's breach consisted of a failure to make or a delay in making a required payment under the contract, it would generally be appropriate for arbitrators to apply a late payment clause to the assessment of pre-award and post-award interest. On the other hand, arbitrators should exercise caution in deciding whether to grant interest in accordance with a late payment clause if the losing party's breach did not involve non-payment or late payment.

If the parties' contract does not contain a stipulation governing the assessment of interest on any damages awarded, the arbitrators should look to the arbitration rules chosen by the parties for any provisions regarding the award of interest. The rules of several leading arbitral institutions, including the American Arbitration Association's International Centre for Dispute Resolution (ICDR), the London Court of International Arbitration, and the Singapore International Arbitration Centre, grant arbitrators discretion to award such interest as they consider appropriate.[4] By contrast, the UNCITRAL Arbitration Rules and the rules of several other leading institutions, including the International Chamber of Commerce and the Hong Kong International Arbitration Centre, are silent with respect to the award of interest.

In view of the frequent use of the ICDR International Arbitration Rules in international commercial arbitrations governed by New York substantive law and seated in New York, the City Bar Report addresses the require-

ment under ICDR Article 31(4) that the tribunal "tak[e] into consideration the contract and the applicable law(s)" in exercising its discretion to award interest under this article. The Report concludes that ICDR Article 31(4) allows an arbitral tribunal, in the exercise of its discretion, to determine pre-award and post-award interest wholly or partially in accordance with statutory prejudgment interest provisions (such as the CPLR provisions) applicable to court judgments under the law governing the parties' contract. On the other hand, a tribunal would also have discretion to award interest under ICDR Article 31(4) based exclusively on commercial considerations and without any regard for the CPLR provisions.

New York Substantive Law

The City Bar Report takes the view that, in the absence of any contractual stipulation or arbitration rule governing the assessment of interest, international arbitrators should generally determine interest in accordance with the substantive law governing the parties' contract, because interest is an element of complete compensation for a claim.

State and federal courts have found the CPLR's prejudgment interest provisions to be substantive for choice-of-law and *Erie* purposes.[5] Whether the CPLR provisions apply in arbitration does not turn, however, on whether they are characterized as substantive or procedural for purposes of determining their applicability in state or federal court. Rather, the key question is whether the CPLR provisions are directed to the determination of interest not only by a court, but also by arbitrators.

As explained above, the City Bar Report concludes that the CPLR's prejudgment interest provisions are not binding on international arbitrators, who have discretion to determine interest based wholly or partially on commercial considerations.[6] This conclusion follows from the text of the CPLR provisions, their legislative history, and the decisions of New York state courts reviewing arbitrators' awards of interest in domestic arbitrations governed by New York substantive law.

Guidelines for the Exercise of Discretion in Awarding Interest

How should international arbitrators exercise the discretion they possess with respect to the determination of pre-award and post-award interest in international commercial arbitrations governed by New York substantive law and seated in New York? Guidelines developed by the federal courts of appeals for the awarding of prejudgment interest by the district courts in federal question and admiralty cases may provide useful guidance for international arbitrators.

The Seventh Circuit Court of Appeals set forth perhaps the clearest and most comprehensive guidelines in *In re Oil Spill by the Amoco Cadiz*.[7] In a *per curiam* opinion, Chief Judge Bauer and Judges Easterbrook and Fairchild held that:

- A district court should award prejudgment interest at the market rate, because interest at this rate "puts both parties in the position they would have occupied had compensation been paid promptly."
- The market rate is "the minimum appropriate rate for prejudgment interest, because the involuntary creditor [*i.e.*, the prevailing party] might have charged more to make a loan."
- The most relevant market rate is the rate "the [losing party] must pay for money" because (1) by not immediately compensating the prevailing party for its harm, the losing party in effect forced the prevailing party to make a loan equal in value to its harm and (2) the losing party's borrowing rate reflects (among other things) the risk of its nonpayment of this loan.
- A district court need not try to determine the actual rate that the losing party must pay to borrow money. If the court chooses not to engage in such "refined rate-setting," it should award prejudgment interest at the U.S. prime rate.[8]

Similarly, the Second Circuit Court of Appeals has held that the district courts may award prejudgment interest at a rate that "reflects the borrowing cost of money, if measured for example by the average prime rate or adjusted prime rate."[9] Alternatively, the district courts may award interest at a short-term, risk-free rate.[10]

Economists differ as to how interest should be calculated in order to compensate the prevailing party for the loss of use of money it was entitled to receive from the date its claim arose until the date of the award.[11] It will generally be up to the parties in the arbitration to argue to the arbitral tribunal what rate is appropriate in the particular circumstances of their dispute.

Post-Judgment Interest

"Post-award" interest ordered by an arbitral tribunal only accrues until the date of a U.S. federal or state court judgment enforcing the award, because the debt created by the award is deemed to merge into the judgment under the merger doctrine prevailing in the United States.[12] Interest on the judgment, or "post-judgment interest," is separately determined in accordance with the law of the enforcement forum. The only way that parties can override the general merger rule is to use "clear, unambiguous, and unequivocal" language in their contract indicating that interest will accrue at the specified rate after the entry of judgment.[13] Where the parties have agreed to a broad arbitration clause, the question whether they have sufficiently contracted for their own post-judgment rate is a determination reserved for the arbitral tribunal.[14]

Survey of Arbitral and Court Decisions

The City Bar Report includes appendices summarizing (a) pre-award and post-award interest determinations

of arbitral tribunals in approximately 45 international commercial arbitrations governed by New York substantive law, and (b) New York federal and state court decisions reviewing arbitral awards of interest in international and domestic arbitrations governed by New York substantive law. These summaries indicate that arbitrators grant pre-award interest to the prevailing party as a matter of course and sometimes also grant post-award, prejudgment interest, but that uncertainty exists with respect to the criteria that they should apply in determining interest. The City Bar Report may serve to enhance consistency and predictability in the analysis underpinning arbitral awards of interest in cases governed by New York substantive law.

Endnotes

1. *See* Awards of Interest in International Commercial Arbitration: New York Law and Practice, Report of the Committee on International Commercial Disputes of the New York City Bar Association, June 21, 2017, available at http://bit.ly/2tMcyPB (accessed on December 6, 2017).
2. The author of this article served as chair of the drafting subcommittee. The drafting team included ICDC Chair Richard L. Mattiaccio and subcommittee members James H. Carter, Louis Epstein, Grant A. Hanessian, Louis B. Kimmelman, Joseph E. Neuhaus, Peter J. Pettibone, John V.H. Pierce, Linda J. Silberman, Robert H. Smit, and Jami M. Vibbert. The City Bar Report includes appendices that summarize the relevant New York case law and arbitral awards located in the course of extensive research supported by associates and summer associates at the law firms of several ICDC members. The research covered New York state and federal case law reviewing arbitral awards of interest in both international and domestic arbitrations governed by New York substantive law.
3. *See, e.g.*, *Penco Fabrics, Inc. v. Bogopulsky, Inc.*, 146 N.Y.S.2d 514, 515 (1st Dep't 1955); *Dermigny v. Harper*, 6 N.Y.S.3d 561, 562 (2d Dep't 2015); *Rothermel v. Fidelity & Guarantee Ins. Underwriters, Inc.*, 721 N.Y.S.2d 565, 566 (3d Dep't 2001).
4. ICDR International Arbitration Rules, Art. 31(4); LCIA Arbitration Rules, Art. 26.4; SIAC Arbitration Rules, Art. 32.9.
5. *See, e.g.*, *Davenport v. Webb*, 11 N.Y.2d 392, 394-95 (1962); *Schwimmer v. Allstate Ins. Co.*, 176 F.3d 648, 650 (2d Cir. 1999).
6. The City Bar Report is expressly limited to international arbitration out of consideration for the scope of the ICDC's mandate. However, in surveying New York case law and all arbitral awards that could be located, no cases or awards were found to support a principled distinction between international and domestic arbitration on the questions addressed in the Report.
7. *See In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1331-35 (7th Cir. 1992).
8. *See id.*
9. *Mentor Insurance Company (U.K.) Ltd. v. Norges Brannkasse*, 996 F.2d 506, 520 (2d Cir. 1993).
10. *Id.*
11. *See* Aaron Dolgoff & Tiago Duarte-Silva, *Prejudgment Interest: An Economic Review of Alternative Approaches*, 33(1) J. Int'l Arb. 99 (2016).
12. *See, e.g.*, *Marine Mgmt, Inc. v. Seco Mgmt., Inc.*, 574 N.Y.S.2d 207, 208 (2d Dep't 1991), *aff'd*, 80 N.Y.2d 886 (1992); *Westinghouse Credit Corp. v. D'Urso*, 371 F.3d 96, 102 (2d Cir. 2004).
13. *See, e.g.*, *Marine Mgmt*, 574 N.Y.S.2d at 208; *Westinghouse*, 371 F.3d at 102.
14. *Tricon Energy Ltd. v. Vinmar Int'l, Ltd.*, 718 F.3d 448, 457 (5th Cir. 2013).

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Business Essentials for Neutrals: Starting, Growing, and Sustaining Your Practice

By Reginald A. Holmes and Merriann M. Panarella

Introduction:

Congratulations! You are or have decided to consider a career as a neutral. And whether you are or intending to ply your trade in the commercial world or in the community, pro bono or non-profit space, the felicitation stands. Few professions provide such a consistently rich platform for pursuing a life of Tikkun Olam.[1] However, unless you master the business essentials necessary for a financially successful neutral practice, you will likely stumble over obstacles that will derail all your lofty 'better the world' goals.

Fortunately, a knowledge of the business essentials that will permit you to pursue your desire to do all of the good you wish to do as a neutral and still do well enough to support yourself and your family are not deep dark, mysterious, or indecipherable secrets. Indeed, the approaches, strategies, and tactics best calculated to establish a financially successful neutral practice are well known to savvy legal services marketers, DR service providers, and successful neutrals. The authors, independent and successful neutrals in their own right, have distilled these approaches, strategies, and tactics, updated them for the current industry landscape, and combined all of that with their decades of professional observations, experiences and knowledge. The results of those efforts are summarized and shared in this article. The objective of this article is to better equip you with the perspectives, education, and skills you will need to successfully start, grow, and sustain your neutral practice and of course to aid you in doing all of the good you are called to do. Our earnest desire is to help you do well while doing good.

Let's start our journey through this material with the definition of a few terms. First, let's describe the "DR industry." The DR industry is a multi-billion dollar industry consisting of any private entity or person that provides services focused on the resolution of disputes outside of the public courts. The field is broad enough to encompass not just arbitrators, mediators and the like but also service providers, professional and trade associations, educators, settlement counsel, and law firms and suppliers.

This article will utilize the term "neutral" to refer to any person who works or engages a process to resolve disputes, conflicts, or disagreements between parties without representing either of the parties and while acting impartially. Neutrals who offer their services for money and adhere to a professional code of conduct are the focus of this article. While the reader should ideally have some basic knowledge and work experience in the DR field, anyone looking to enter the profession will also benefit greatly from the insights presented here.

Our arc through this material will begin with a discussion of the business realities that should be considered by any prospective neutral before entering the profession. We will then discuss the business essentials and the practical considerations that should be a part of any practitioner's plan for business success.

After that, we provide insight, strategies, and best practices for starting, marketing, and growing your neutral practice. We will also touch upon servicing your caseload and sustaining your earned success. Additionally, we will explore the unique considerations, concerns, obstacles, and opportunities that often confront diverse neutrals. Penultimately, we will discuss the quality of life factors for neutral. Finally, we offer our observations about the future of the DR industry. Will it be bright and growing or dark and declining?

The Business Realities of Being a Neutral

Anyone exposed to the lengthy, expensive, and inflexible court system often thinks that there has to be a better way to resolve disputes. After some experience with DR processes, many are hooked and start seriously considering whether being a neutral is something they could either do full time or when they retire. If you are one of these people, before jumping in it's good to have a sense of the business realities neutrals face including the basics of supply and demand, what work is out there and how many are hoping to obtain it?

Both anecdotally and statistically, mediation work is growing. Mediation work increases as litigation grows. According to U. S. District Court statistics, total cases filed from 2015-2016 rose 4.6 percent.[2] In 2016, parties filed 291,851 complaints in U.S. District Courts. According to this barometer, disputes for potential mediations exist and are growing in many areas.

Moreover, corporations have embraced mediation as a way of controlling costs and resolving matters expeditiously. A 2011 study stated:, "today corporate experience with mediation is virtually universal. Ninety-eight percent of respondents indicated that their company had used mediation at least once in the prior three years, a ten percent jump from the 1997 figure."[3] Although recent

accredited studies are difficult to locate, anecdotal reports and observations by the AAA, CPR and IMI suggest that the use of mediation has continued to grow at a similar pace though 2017. Gone are the days when a suggestion to try mediation in stalled negotiations is deemed a sign of a weak case by opposing counsel.

Given these statistics, the number of potential mediations should be growing. Courts also encourage the parties to mediate, which is admirable, However, many jurisdictions offer mediation to the parties for free, thus decreasing the cases available for professional mediators. For example, the Ninth Circuit provides free mediation to litigants because the process helps resolve disputes quickly and efficiently; the Circuit has eight paid full-time mediators on its staff for this purpose.[4] In the U. S. District Court in Boston, the Magistrate Judges have taken over the mediation program so there is no cost to the parties. Many other courts also offer court-connected mediation of one type or another, so knowing what programs are available at the local, state, and federal level will provide more information on the demand side.

On the supply side, as mediation has caught on, many lawyers find it an appealing process for dispute resolution. From semi-retired lawyers and judges who merely desire to keep their toe in the legal waters, to those who aspire to build a practice, more people seek to mediate disputes than there are disputes. Again, case availability may well depend on whether there are court-connected matters in the local jurisdiction that funnel cases to a volunteer court-connected panel or to a panel of pre-qualified mediators.

Domestic commercial arbitration has not fared quite as well. According to the 2011 study referenced above, while companies recounted using mediation for nearly all kinds of disputes, fewer are using arbitration in key categories; "[s]ubstantial drops were reported in the number of companies reporting arbitration usage in commercial/contract disputes (from 85% in 1997 to 62.3% in 2011)…."[5] As was the case with mediation, more recent validated studies on the growth of the use of arbitration are difficult to locate. However, anecdotal reports and observations from the AAA, the world's largest provider of arbitration services, and others suggest that the use and demand for domestic commercial arbitration services has remained relatively flat through 2017. Arbitration, which historically has been an efficient, cost-effective, and flexible adjudication process, may have suffered from an importation of litigation processes in recent years. Most service providers have revised their rules and encouraged arbitrators on their panels to manage their matters as cost-effectively as possible, with the hope that arbitration will again become a preferred adjudicatory method for the resolution of business disputes.

On the other hand, international arbitrations appear to be on the rise and are likely to continue to grow as global commerce increases. Also, parties are attracted to international arbitration because the awards are generally enforceable under the New York Convention. In the American Arbitration Association's B2B Dispute Resolution Impact Report, in 2015, 8,360 domestic *and* international business cases were filed with transportation, commercial insurance, entertainment/media, and pharma/biotech cases significantly up over 2014.[6]

As with mediation, it appears that there are more arbitrators than disputes. Arbitrators have tended to be homogeneous and primarily white, male and older individuals. Efforts are under way by most service providers to encourage parties to choose diverse and women neutrals. Research the panels you are able to join in your jurisdiction, the number of arbitrators on those panels and the number of cases available so you can plan accordingly.

Preliminary Preparation

To become a competent neutral, your preparatory steps should include taking a self-inventory, engaging in necessary training and then advanced and specialty training, affiliating with relevant organizations, and exploring apprenticeship and mentoring opportunities.

Why conduct a self-inventory? Earning a living as a neutral is nuanced and starting a full-time practice will be challenging. Before investing the necessary time and energy to develop a practice, it is useful to consider your professional objectives, background and experience, temperament, and perspective.

Regarding professional goals, is this a full-time endeavor, a part-time exploration, or an avocation? Be clear on both the time and energy you are willing to devote to your practice and what you expect to achieve professionally. A consideration of relevant background and experience up front will help direct both your training and later marketing efforts. You don't need to be a lawyer to be a mediator or arbitrator in many fields, but you do need to be known and respected in your industry. While neutrals vary in their substantive areas of expertise, to practice at the highest level a neutral should have the right temperament for the task at hand. For most neutral activities, this means the ability to actively listen, be patient, withhold quick judgments, and have a high emotional IQ. Former litigators need to leave advocacy behind, and retired judges need to recognize that mediation and arbitration are flexible processes determined by the parties' needs, not theirs. Finally, a neutral, by definition, must, in fact, be neutral and impartial to their very core.

Prospective neutrals should ask two fundamental questions: 1) Am I right for the neutral profession? and 2) Is the neutral profession right for me? If you answer one question in the negative, save yourself a lot of time, money, and heartache and consider another line of professional work. However, if you answer yes to both, apply the principles and suggestions in this article and move forward with the establishment of your practice.

Generally, there are no state or federal requirements for mediation training although you should check the law of the state where you want to practice. In Massachusetts, for example, while there's no '"formal" training requirement, in order to enjoy the statutory protection of confidentiality accorded a mediator, you must have at least 30 hours of training in addition to other requirements.[7] Also, most panels that you seek to join do have basic training requirements. For example, the AAA requires "the completion of at least 24 total hours of training in mediation process skills…."And, in New York, mediators who wish to serve on court rosters must have taken at least 40 hours of mediation training.[8] The safest course is to take one of the many 40-hour mediation programs offered by law schools, bar associations, private practitioners, and service providers.[9] The ABA maintains on its website a list of ADR Training Providers organized by state.[10]

Regarding arbitration, there are again, generally, no state or federal licensing or training requirements. Basic training in arbitration case management is highly recommended, especially for those with little experience in arbitration. Arbitration, while adjudicatory, is not litigation. Attending courses will also increase your chances of getting on prestigious panels as you will be asked on panel applications to list your DR training. Again, arbitration courses are widely offered by law schools, bar associations, private practitioners, and service providers.

Advanced and specialty training helps sharpen your skills, enhance your credentials, and demonstrates your expertise in substantive areas. The World Intellectual Property Organization (WIPO) offers a Workshop for Mediators in Intellectual Property Disputes as well as arbitration training, and the American Health Lawyers Association offers both mediation and arbitration training tailored to health law disputes. Depending on your area of concentration, you will be able to find advanced courses. Also, after you have received "basic" training, attending an "advanced institute" not only satisfies CLE requirements but introduces you to new ways to resolve issues.

Affiliation with professional organizations and bar associations provides opportunities to further enhance your expertise as well as network with colleagues. Regarding bar associations, many have robust dispute resolution sections with active committees in different types of dispute resolution as well as specialty areas. For example, the ABA has a Dispute Resolution Section that hosts an annual conference and has committees that focus on mediation, arbitration, conciliation and ombuds, as well as employment, health, international and intellectual property, among others. Similar the NYSBA has an active Dispute Resolution Section with excellent programs, webinars, and conferences. The list of potential professional associations is limited only by your desired subject matter focus and imagination. A few that you might consider joining include the American Intellectual Property Law Association, the American Health Lawyers Association, the National Employment Lawyers Association and, if applicable, the Association of Corporate Counsel. In the international sphere, you might consider the Chartered Institute of Arbitrators, which provides both training and credentialing, and the International Bar Association.

Finally, an apprenticeship or mentor can provide enormous assistance when starting out. Several organizations have apprenticeship opportunities such as the AAA's Higginbotham Program, and the ICC's Young Arbitrator's Forum for those under 40 years old. Many court-connected mediation programs offer training, observation, and apprenticeship opportunities as well. If you are able, we strongly encourage you to find an experienced DR practitioner who is willing to mentor you and allow you to observe mediations or arbitrations. Such experience would be invaluable.

Starting Your Practice

Once you have affirmatively answered all the gateway questions and completed the preliminary work to become a neutral, you have set the stage to start your practice. What do you do next? First, determine whether you intend to pursue your neutral career as an avocation, a business, or a calling. Your answer will have important implications as to how you start your practice.

If for example, you want to pursue "neutraling" as an avocation, you can achieve that objective by creating a relationship with a service provider that will give you occasional cases. If you choose this route your capital, time commitment, and marketing effort requirement should be minimal. The business essential here for you is to focus on finding, defining, and forging a satisfactory relationship with a source of cases. Thereafter, to sustain that relationship you must service those cases promptly, cost-effectively, and fairly with due regard for the financial interest of your service provider. This option is appropriate for and popular with (and sometimes uniquely available to) retired judges.

If, on the other hand, you are pursuing your neutral practice as a business that will be used to support you and/or your family, you must ask and answer a few more preliminary questions. Among them are these:

1) Are you financially prepared for the likely initial (and sometimes permanent) drop in income that often occasions the start-up of a neutral practice?

2) Do you possess the passion, drive, and willingness to commit the copious amounts of energy required to power up a new neutral practice in today's climate?

3) Will your physical and mental health permit you to do what you must do to have a successful practice?

4) Do you possess or can you develop the necessary reputation for being successful in your area of focus? A solid reputation is a crucial characteristic of financially successful neutrals.

If and only if the above questions are answered in the affirmative should you proceed to start your practice with the possibility that you will be able to earn a full-time income from it.

If you are pursuing your neutral practice in response to a calling (as is the case with the authors) you will have even more in-depth questions to ask. Is this really what you want to do or is it just a potential escape from the demands of your current professional focus? In what ways do you feel that being a neutral will provide the satisfying work you are called to do? Proceed to start your practice when you have a realistic sense of your attraction to the profession. Can you add this to your other legal work rather than jump in to an exclusive practice?

Whether you approach starting your practice as an avocation, business, or calling, you will be well served to conceive, structure, and write out a business plan as to how you intend to achieve your goals. Creating a written business plan for your prospective neutral practice is a critical factor that should not be ignored. See it as the roadmap to take you from where you are to the successful neutral practice that you are seeking to establish. Your journey may be long, complicated, and difficult. Don't leave home without your map.

What should be in your business plan? Consider addressing areas including finances, basic business start-up necessities, and panel affiliations. Among the financial matters you will want to reflect on are hourly/daily rates, billing practices, anticipated expenses, and cash flow. When you start to think about what you want to charge, you should research the going rates in your region for those with experience commensurate to yours. Often, neutrals beginning a practice believe that if they price their services lower relative to others, they will attract more business. Paradoxically, this strategy may backfire as DR users may view the lower rate as indicative of a lower level of quality. Once you establish your pricing structure, determine what billing practices you plan on using. Some neutrals use tools such as Clio.com while others just create timesheet and invoice templates which they use to bill clients on a monthly basis. Whatever you decide to do, record the time you spend on your matters on a daily basis to ensure accuracy and completeness.

There are potentially endless expenses when starting a DR practice, so your business plan should reflect your view of what you need to do and your priorities. Budget for necessary training, conferences, subscription agreements, panel and bar association fees, office or virtual office expenses, website creation and maintenance, and public relations, marketing, or other consultants. In the beginning, your expenses will likely exceed your income, so consider your cash flow needs over a comfortable period of time for you.

Your business plan should also include basic start-up necessities such as creating a new resume, and bio, obtaining business cards, using social media, and developing a contact list. As you begin, take a look at what past experience you can leverage to create a DR resume. Spend time and thought on this exercise as it will inform both your website, your LinkedIn account should you choose to have one, and the short bios you use for speaking and writing. Also, obtain business cards early on. Many vendors offer inexpensive options such as Vistaprint and Staples. Moo claims to offer "Uniquely premium Business Cards for everyone." So have fun with the look of what you will present to the people that you meet.

A website is no longer a luxury for practitioners, it is a necessity. To get started, research the websites of neutrals you know and neutrals whose practices you seek to emulate. Ask other neutrals or sole practitioners what web designers they used. Consider whether you want or need a search engine optimization consultant to maximize your exposure. Find a professional photographer for your headshot and aim for a picture that reflects confidence, as well as your personality. Consider whether you want a blog associated with your website for posting your own newsletters or a discussion of recent cases. And, strive to keep your website updated. As you speak, write, teach, and gain experience, it should all be reflected on your website.

While a website is essential, there is a divergence of opinion on the use of other forms of social media. The use of Facebook, for example, raises the question of whether your "friends" might create conflicts if they are related to the parties or counsel in an arbitration before you.

Many neutrals do maintain a LinkedIn page which allows them to post links to articles they have written as well as provide notice of presentations they are planning. However, they neither solicit nor accept endorsements to avoid creating a future conflict.

In leveraging your prior experience in your new DR endeavor, use your former contact list to keep in touch with colleagues and acquaintances. And, as you engage in the DR community, keep your contact list up to date.

Your business plan should also include your research on the service provider panels with which you seek to associate yourself. These panels, especially in the case of arbitration, can be an important source of cases. On the mediation front, look for local panels including court-connected rosters. While the latter may require volunteer services for all or part of mediations, they are often an excellent opportunity to gain experience. If you can find the opportunity, mediate with others. As an arbitrator, look into the panels available for your level of experience. FINRA, the Financial Industry Regulatory Authority,

has an arbitration panel with relatively low barriers to entry and provides free online training, an online exam, and distributes arbitrators names to potential parties by random computer allocation. Other panels such as the AAA and CPR require substantially more experience and credentials. If you aspire to be on a panel, understand their requirements and plan accordingly.

Writing out a business plan, whether detailed or simple, will help you organize your thoughts, drill down on your finances, and prioritize your approach to starting your practice.

Marketing Your Practice

Now that you have the start of a business plan, the next component of your plan will be a written marketing strategy. Depending on your style, a written marketing plan may include publicizing your new focus, pitching your business, choosing a marketing approach, increasing and maintaining your DR visibility, joining organizations relevant to your marketing approach, volunteering, marketing with others, and ethical considerations. Diverse and women neutrals may have unique issues that also should be addressed.

After all the work you've done, now is NOT the time to be shy and retiring. Announce your new DR focus enthusiastically to you contact list. Consider writing a short article to include with your announcement. Decide how you want to pitch your business—what makes you uniquely situated to be the parties' best choice for their dispute?

Most experienced neutrals are process management experts. Many believe that expertise in the subject matter of the mediation or arbitration before them is not as important as their process management skills. However, it's better to go narrow and deep rather than shallow and wide. While you may be able to handle a variety of disputes, and may over time, start with a niche that results organically from your experience and background. You can choose a specialty practice such as employment, health, intellectual property, environmental or family law. One well-respected mediator focuses on disputes involving animals. Also decide on what services within the DR field you will be offering: mediation, arbitration, conciliation, special discovery master, eDiscovery master, etc. Finally, think about where you will focus your practice geographically. While sticking to the deep/narrow initial focus, look at where your work is likely to come from and plan accordingly.

Visibility is critical to any successful marketing effort. Many bar associations publish newsletters and welcome articles so submit a paper in your chosen area of expertise. DR presentations also offer opportunities for people to hear you talk authoritatively. Consider organizing and moderating a panel on a subject and inviting others with more experience to speak. Indicate your willingness to make presentations, whether in person or by webinar, and seek opportunities to do so. Use social media including, as mentioned earlier, a website which you keep updated, and a LinkedIn account on which you post your speaking engagements and links to your articles. Once you have decided upon the organization affiliations that make sense given your focus, get out and attend meetings and network with others in your chosen field. The idea is for people to think of you when an appropriate case comes their way. Let your light shine brightly. Finally, try to leverage what you do. Can you turn a paper you researched into a presentation? How can you repurpose your efforts to maximize your results?

At the outset, you may want to consider volunteering to gain experience. Many regional courts have court-connected mediation programs that provide mediators to parties at no cost. Volunteering can help hone your skills, introduce you to other local mediators or arbitrators, and provide references for you down the road.

Marketing with others is not only useful but fun and provides each of you with an opportunity to tout the other's accomplishments. Find a presentation partner or someone with whom you can co-author an article, with the result that you both have the marketing visibility but half of the work otherwise involved. Everyone appreciates being recognized, so look for opportunities to reward colleagues, to recommend other neutrals when appropriate, and to work to increase the number of cases available to all.

Marketing a neutral practice presents a bit of a conundrum and a few ethical considerations. As a neutral, you have disclosure responsibilities to the parties to ensure your impartiality. As an arbitrator, it is particularly important that your "conflict awareness radar" is up and running at all times. The viability of your award depends on avoidance of partiality or even the appearance of it. If you market your neutral services to a law firm and shortly after that are chosen by that firm as an arbitrator, you will need to disclose the contacts that you had. Avoid situations, to the extent that you can, that will create conflicts or disclosable events.

While everyone wants to promote themselves in the best possible light, be careful to honestly describe your experience and background. Parties and counsel are more closely scrutinizing the experience and background claims of neutrals and there are indications that they are increasingly willing to take action or even sue when misrepresentations are discovered or suspected.[11] Such claims of misrepresentation could be devastating, if not fatal, to any effort to develop a neutral practice. Honesty and integrity are not only essential components of a personal marketing plan but are also critical to maintaining the public's trust in the neutral profession.

Here are a few considerations for diverse and women neutral in marketing their practices. Diverse/women

neutrals may undervalue their skill set and services, believe that they need far more experience than is required, and set their rates at too low a level. Underestimating one's services or skill set may lead to overdoing pro bono work. Diverse/women neutrals may also experience being viewed as either overly aggressive or too timid. Awareness and humor can dispel any awkward encounters. Finally, rather than divisive competition, diverse/women neutrals will gain much by working together to expand the use of ADR and shared opportunities in the field. A rising diverse tide lifts all diverse boats.

With active patience, persistence and the artful use of technology, marketing your neutral practice can be both energizing, satisfying, and rewarding.

Servicing and Supporting Your Caseload

Once you are up and running, how can you best service and maintain your caseload? To begin with, continue to work closely with service providers. Service providers and case managers can be instrumental for a smoothly functioning arbitration. A mutually respectful relationship with a case manager will inure to your benefit. Case managers often have an early read on counsel; they are service provider insiders and experts, and can, while not affecting your ultimate responsibility as the arbitrator, help you look good. In addition, sometimes case managers help decide who will be on lists provided to parties. Be aware that the way that you treat them has a direct bearing on your success.

Next, use technology to maximize your efficiency. You will need a robust conflicts program that includes not only the parties but also the lawyers and experts. Create a file management system that will allow you to organize and find documents relevant to your arbitration or mediation matter quickly. For example, you may want to create a folder for each arbitration and include within that folder subfolders for pleadings, orders, exhibits, time sheets, and invoices. You may also have a folder with arbitration templates containing a preliminary hearing checklist, a pre-hearing order, confidentiality agreements, subpoenas, time sheets or other documents you find yourself using regularly. If you choose to maintain your files electronically, which most do, be sure to back up your system with cloud storage such as Backblaze, Carbonite, or iDrive.

Many arbitrators use iPads or tablets to maintain files, take notes, and otherwise manage arbitrations. Tools such as Documents by Riddle allow you to keep all your documents in one place by accessing Drop Box, Google Drive files, Box, or other cloud storage. PDF Expert allows you to edit PDFs as text documents. One Note by Microsoft offers note taking capabilities as does GoodNotes 4, which provides searchable notes. Depending on your style and priorities, there are many more tools to help you service and maintain your caseload.

For arbitrators, service providers can act as a buffer between the arbitrator and counsel as well as provide financial case management services, handle administrative matters, and resolve arbitrator challenges. If parties contact you directly with an ad hoc matter, consider informing them that it is your preference to work with the AAA or CPR. In the event the parties opt not to have an administered arbitration, the AAA, for example, offers À La Carte Services, which allows the parties and arbitrators to choose the services needed, including Case Financial Administrative Services and Arbitrator Challenge Review Procedures, among others.

Growing and Sustaining Your Practice

While starting and growing a neutral practice may be difficult**,** sustaining your success may be even harder. If starting and building your practice is comparable to an airplane taking off and reaching cruising altitude, then maintaining your practice can be compared to maintaining a stable altitude. The key to achieving a sustained practice is finding a pace that provides the level of income and satisfaction that you seek while demanding no more energy and expenses then you wish to expend.

Here are the keys to sustaining a successful practice:

1) Stabilize your organizational structure—Lock in the personnel structure that helped you achieve your prior success. Maintain your service provider relationships as well as other relationships that provide your pipeline of cases and assist you in the servicing your cases. Never take any relationship for granted, always express gratitude for the values that both of you bring to your joint enterprise.

2) Service all of your cases to the best of your abilities. Exceed the standard expectations of all stakeholders (parties, attorneys, case managers, witnesses, etc). Make working with you an exceptional professional experience. Measure your success by whether and how often those with cases return to you.

3) Maintain your visibility to the people, organizations, and professional associations that are sources of your work. Be disciplined (and kind) about weeding out of your professional life those associations that drain your time, energy, morale, resources and provide you little in return. Writing, speaking, and service engagements with organizations can be useful (and sometimes fun ways) of maintaining your visibility.

4) Continue to engage and use social and virtual media. They provide excellent platforms for generating visibility that work even when you are sleeping. But caution is in order. Injudicious use of social media can create conflicts, or the appearance of conflicts, by demonstrating or suggesting relation-

ships that will bar you from or complicate your ability to take cases.

5) Continue to engage in professional and personal activity that gives you joy. Action that lifts your spirits or gives you energy and a sense of satisfaction and fulfillment will provide the necessary fuel to power you forward in achieving all of your life's mission (including your professional ones). After all, sustaining yourself is the *sine qua non* of supporting your practice.

The Future of the DR Industry

Dispute resolution's future likely includes both growth in the number of cases and an evolution of processes to catch disputes before they arise and to resolve those matters that do happen at the earliest possible time. DR practitioners are likely to continue to grow in numbers as well with increased emphasis on encouraging the parties to use diverse and women neutrals. It remains to be seen whether the growth in the number of neutrals and the size and importance of cases being committed to DR will lead to any licensing and/or certification requirements.

The industry is expected to continue to evolve both incorporating older practices with "twists" like med-arb[12] or arb-med[13] and settlement negotiations or variations on these themes and creating new approaches to satisfy the parties' needs.

Regarding newer approaches, neutrals and parties are working to use DR processes that work in one industry, such as alliance managers in the pharmaceutical industry who work to spot problems before they lead to project failure, to other industries. The AAA offers Judicial Settlement Conferences mirroring those offered by federal and state courts. Neutrals offer deal facilitation services for negotiations that have hit a wall. And, a promising new development is the Arbitration Settlement Conference[14] in which the arbitrators, with deep knowledge of the dispute before them and consent of the parties, conduct settlement conferences.

Conclusion

Achieving business success as a neutral involves taking a dispassionate look at a passionate vocation. Once you have decided that this is the profession for you, dive on in. Do your research regarding necessary training, and associate yourself with organizations that will both support your practice, allow you to meet other neutrals, and provide cutting edge programs. Work on creating the best business plan that you can, with an eye toward not only the business essentials but also how you work and what you need to thrive. Take every opportunity to market your practice and increase your visibility while having your conflict radar awareness engaged. Use all the resources at your disposal to service your caseload as efficiently as possible and ultimately to grow and sustain your practice. And don't forget to enjoy your practice and your life; in other words, have fun!

Endnotes

1. Tikkun Olam is an ancient Hebrew term which in contemporary use refers to the duty of each human to work for universal justice, peace and the betterment of the world. The authors use the term here for its secular richness and not in its strict religious meaning.
2. *See* Table C-2A U.S. District Courts-Civil Cases Commenced by Nature of Suit; http://www.uscourts.gov/sites/default/files/data_tables/jb_c2a_0930.2016.pdf.
3. *See* Thomas J Stipanawich and J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations*, 19 Harvard Neg. Law Rev. 1, 41.
4. *See* https://www.ca9.uscourts.gov/mediation/.
5. Stipanawich and Lamare, *supra* note 3, at 46.
6. *See* American Arbitration Association," B2B Dispute Resolution Impact Report, Key Statistics," p. 3.
7. See M.G.L. c. 233 Sec. 23c.
8. *See* Part 146 of the Rules of the Chief Administrative Judge, NyCourts.gov.
9. For example, the Program on Negotiation at Harvard Law School offers a five-day course on mediating disputes as well as advanced mediation training. And the Straus Institute for Dispute Resolution of Pepperdine School of Law offers many mediation trainings both for those starting out and for those seeking specialized training.
10. https://www.americanbar.org/groups/dispute_resolution/resources/adr_training_providers.html.
11. *JAMS, Inc. v. Superior Court of San Diego (Kensella)*, No.D069862 — Cal.RPtr.3d —, 2016 WL4014068 (Ct. App. Jul 27, 2017).
12. A process in which a mediator serves as an arbitrator if the matter is not settled.
13. *See* Edna Sussman, *Developing an Effective Med-Arb/Arb-Med Process*, NYSBA New York Dispute Resolution Lawyer, Spring 2009, Vol. 2, No. 1.
14. A process in which an arbitrator attempts to settle a matter before her.

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Automatic Court-Annexed Mediation in New York's Federal District Courts—Sometimes Numbers Don't Lie

By Gary Shaffer

On the surface, it might seem that a court automatically sending cases to mediation is an oxymoron. Self-determination—including deciding whether to mediate—is often thought of as an essential aspect of the mediation process. However, it turns out that, at least for the mediation programs operated by New York's Federal District Courts, automatically sending cases to mediation, or in one revealing instance arbitration, is quite successful in resolving large numbers of cases with little court input or oversight. This article will provide an overview of—and more important the data relating to—the court-annexed mediation programs in those courts.

New York has four district courts, the Western, Northern, Southern, and Eastern Districts. Each of those courts maintains data relating to their court annexed mediation programs and the data shows that where a court rule requires that cases be sent directly to mediation, 50 percent or more of those cases typically get resolved through the mediation process. I will first address the Western and Northern Districts, then the Southern, and lastly the Eastern District. The reason for this is that in 2006 the Western District, largely through the efforts of then Chief Judge William Skretny, enacted a far-reaching mediation program whereby almost all civil cases went directly to mediation. The program was so successful, that in 2014 the Northern District adopted almost the identical program. The Southern District has had an automatic mediation program that has steadily, and successfully, expanded over the past several years, and while the Eastern District has yet to adopt an automatic mediation program it has some interesting data that reveals the far-reaching potential of court-annexed programs.

Western District of New York

In 2006 the Western District of New York in Buffalo became the first district court in New York to establish mediation as the default process to be followed in almost all civil cases. As Section 2.1 of the Court's ADR Plan states, "All civil cases filed on or after the Effective Date of the ADR Plan shall be referred automatically to ADR."[1] That section also sets forth some limited exceptions to the rule, such as habeas corpus and extraordinary writs, bankruptcy and Social Security appeals, cases implicating issues of public policy, exclusively or predominantly, etc.[2] The Plan has an opt-out provision, though it stresses that motions to opt-out will only be granted for good cause shown. "Inconvenience, travel costs, attorney fees, or other costs shall not constitute 'good cause' and a movant to opt out must explain why ADR 'has no reasonable chance of being productive.'"[3] The use of the word "productive" establishes an interesting criterion. The rule does not refer to the chance of settlement. And for good reason. As many attorneys and litigants who have participated in a mediation know, mediations can narrow issues, expeditiously work through discovery, and begin the foundation for settlement talks even for cases that do not actually settle at mediation. They can be very productive.

The Western District program was initially established as a pilot program and renewed each year until, due to its overwhelming success, was made permanent in 2010. In 2012, the court expanded the program's reach to include those cases in the Western District's Rochester courthouse.

How successful is the program? Of the 3,011 cases that entered the program through 2014, 2,360 were settled either before the mediation, at the mediation, or within 60 days following the mediation. In other words, 78% of the cases that went to the program were resolved with almost no court involvement.[4]

Northern District of New York

Recognizing the enormous success of the Western District's program, the Northern District of New York implemented an almost identical pilot program beginning January 1, 2014. That program, too, was so successful that it was made permanent through General Order No. 47 issued on May 23, 2016. [5] On the surface, the Northern District's success rate does not appear as high as that of the Western District's. According to the raw data, the Northern District success rate is only 36 percent.[6] However, the Northern District's "success rate" includes only those cases that actually settle at a mediation session. It does not include those cases that settle either before a mediation or within 60 days thereafter. While it is unknown what the precise success rate would be if those figures were included, data from other court annexed mediation programs—the Western District and the Central District of California—suggest there is every reason to think the Northern District success rate would be at least in the 50 percent range if such information were included in its results.[7]

One subtle but interesting aspect of the Northern District program is that it is entitled "Mandatory Mediation Program." There has been understandable caution in the ADR world to use the word "mandatory" when referring to mediation. It smacks of coercion rather than self-determination. However, the Northern District seems to have taken the bull by the horns and been direct about its approach. However, regardless of terminology, it may be useful to state the obvious: mandatory mediation does not

mean mandatory settlement. A case that does not settle in mediation continues in court, and most automatic court mediation programs require only that a party attend one mediation session of two to four hours. This makes the success rates even more remarkable.

Southern District of New York

The Southern District program is narrower than either the Western or Northern District programs. In 2011, the Southern District program began automatically sending to mediation counseled employment discrimination cases, and cases against the City of New York, or its employees, alleging the use of excessive force, false arrest, or malicious prosecution by employees of the NYPD in violation of 42 U.S.C. § 1983.[8] On October 15, 2015, Chief Judge Loretta Preska issued Administrative Order M10-468, which set forth Discovery Protocols to be followed in the employment matters.[9] On October 3, 2016, the Southern District expanded the automatic mediation program to include police-related § 1983 actions brought against police departments in Westchester, Rockland, Putnam, Orange, Dutchess, and Sullivan counties.[10] The recent expansion also set forth procedures relating to mandatory discovery, demands and offers, and standard forms for the release of medical and police records.[11]

The Southern District program has increased the number of pro se employment cases handled by the Mediation Office, and seeks to secure legal representation for pro se plaintiffs for the purpose of the mediation. More recently the Southern District expanded the automatic mediation program to include cases filed under the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq., (FLSA).

The data from the Southern District automatic program shows one critical thing. It works extremely well. In 2015, a total of 1,094 cases were referred into the SDNY Mediation Program. As of July 28, 2016 (the date of the most recent Annual Report) 1,030 of the cases were closed with the following rates of settlement:[12]

Automatic Employment: 46%

Pro Se Employment: 66%

Judge-referred (non-*pro se* employment): 63%

Local Civil Rule 83.10 (the § 1983 Plan): 64%

The SDNY data include only those cases resolved after a mediator is assigned, even if it settles before an initial in-person session. However, not included are cases settled at any time after the final mediator report is docketed.[13] Again, if the Southern District included settlements before and within 60 days after the mediation, the above figures would be even higher.

Eastern District of New York

The Eastern District of New York has both a court annexed mediation program and a court annexed arbitration program. As compared to the three other District Court programs, only the arbitration program is compulsory. Mediations take place when referred by a judge or magistrate. The EDNY Alternative Dispute Resolution Report for the period July 1, 2015—June 30, 2016 reports the following results:[14]

EDNY Mediation Program

During the period of July 1, 2015 to June 30, 2016, 221 cases were referred to the mediation program. Of those, mediation was completed in 149 cases. Of the cases where mediation was completed, 67% were settled as a result of mediation. This settlement rate does not reflect cases resolved after litigation resumed regardless how soon after the mediation. Of the remaining 72 cases where mediation did not occur, 24 cases settled prior to mediation, and 10 cases did not proceed to mediation due to a stay of proceedings or other motion. 38 cases referred to the mediation program are still pending.

If we eliminate the thirty-eight cases still pending, and the 10 that did not proceed to mediation due to a stay of proceedings or some other motion, and include the 24 cases that settled prior to mediation, the "success rate" of the cases sent to mediation is a little over 71%.

EDNY Mandatory Arbitration Program

Unique among the four federal district courts in New York, the Eastern District has a Compulsory Arbitration program pursuant to Local Civil Rule 83.7. With a few limited exceptions, the rule requires that the clerk of the court "shall designate and process for compulsory arbitration all civil cases… wherein money damages only are being sought in an amount not in excess of $150,000.00 exclusive of interest and costs."[15]

According to the EDNY's Alternative Dispute Resolution Report for the period July 1, 2015 to June 30, 2016, 129 cases were referred to the EDNY compulsory arbitration program. Of the cases where an arbitration hearing was scheduled, *65% were voluntarily dismissed prior to a hearing*. As of publication of the annual report, 33% of the cases were still pending and 2% actually proceeded to a hearing.[16] Note also that the EDNY's compulsory arbitration program does not leave a loser at the arbitration precluded from thereafter using the court process. Section 83.7(h) of the Court Rules permits any party, within 30 days after an arbitration award has been docketed, to demand in writing a trial de novo in the District Court.

What Makes an Automatic Program Successful?

The data from the automatic court-annexed ADR programs in New York's federal district courts are remarkable to say the least. They show it is realistic to expect roughly half, and often more, of all civil cases

directly sent to mediation, without the parties' consent, will be resolved with little court involvement. Anecdotal evidence also supports the idea that these programs can have an enormously positive effect on court caseloads and backlogs.[17]

Below are some features that seem to underlie successful program.

Well Trained Mediators

Providing well trained mediators is an essential aspect of a successful court annexed program. Each of the four District Court programs provide for training and program mediators are vetted before entering the program. New mediators observe mediations before they handle any and are observed once they have moved on to mediating cases on their own. Parties submit evaluation forms after the mediation, where they can comment on the quality of the mediation and the mediator. These evaluation forms are reviewed by the program administrators to ensure quality control.

The programs bring mediators together on a regular basis to discuss cases, new procedures, and new law, and to exchange ideas about mediation practice. This helps mediators sharpen their skills and stay abreast of developments.

Expansive Mediator Roles

Simply having a mediator involved in a case can create the conditions for the dispute's resolution. This is partly a function of the mediator's role during all court annexed mediations.

Discovery

Mediators in these programs are given wide latitude in handling cases and often act as de facto magistrates. Since cases are usually sent to mediation before discovery, the mediator and the parties typically figure out what discovery is needed before a productive mediation session can be held. Based on my litigation background, and my experience mediating cases in the Southern District program and elsewhere, it is clear that the amount of discovery that might normally take place during a full litigation is significantly reduced when cases are mediated. In addition, addressing discovery matters with the parties is often the start of an informal working relationship between the parties and the mediator, which can later facilitate the settlement process.

Facilitator

The most obvious role of the mediator is facilitating discussions between the parties. It is beyond the purview of this article to discuss what makes a good facilitator, but the federal district courts in New York have made vetting, training, and ongoing interaction with mediators an important part of their programs.

Follow Up: Nudge in Chief

While many cases get resolved in a single session mediation, others do not. The ability of mediators to contact parties after initial sessions to question, cajole, and discuss ideas is often what enables a case to settle. Mediators often continue caucusing with parties between sessions through follow-up phone calls that keep the parties communicating and developing new approaches to a resolution. Even federal court magistrates, who often will take on a mediation role, may not have the time, or the luxury of casual conversation with parties, to engage in ongoing settlement talks.

Data Collection

The Districts have made data collection an important aspect of their programs, though it is always a work in progress. Programs expand or are modified, or additional data is deemed worth collecting. Data collection is not overly difficult with some initial planning. Basic case data is uniformly in electronic form. Entering mediation dates and whether and when a case was successfully resolved can be, and usually is, entered into the court database. This makes basic statistical assessment of program performance relatively straightforward. Keeping good data is essential to know if a program is working well. One result of the Western District's data collection was that the program was proven to be so successful the Northern District of New York adopted almost the exact same broad-based automatic program.

Compensation

Lawyers and judges expect to be paid for their work. Both the Western and Northern District rules require that mediators be paid, though they also require pro bono work so parties who cannot afford to pay can also participate. The Eastern District program provides for limited compensation. The Southern District program has no compensation and all mediators participating in the program work for free. This should change. The experience of the Western and Northern District programs is that lawyers and litigants quickly come to appreciate the benefits of the automatic court-annexed referrals to mediation. Mediator cost, typically split between parties, is rarely a significant cost of the process. Given the amount of prep work, mediation work, and often follow-up work required for a successful mediation, the courts should ensure that mediators in their programs are properly compensated.

Conclusion

Cultural shifts typically start slowly and gain momentum. For many years ADR, and in particular media-

tion, has been the new next best thing. Change always seemed just around the corner. But its use is now quickly accelerating. The bold 2006 Western District pilot program that sent almost all incoming civil cases directly to mediation was the initiative of Chief Judge William Skretny. Clearly his finger was on the pulse. The program kept working and four years later it was made permanent. Having observed that success, the Northern District picked up the same program, started a pilot, and in only two years it became permanent. In 2011, the Southern District began sending to mediation some § 1983 and counseled employment cases (except those under the FLSA) filed in its Manhattan courthouse. Pro se employment cases were then added. In 2016 the program expanded to include the six "upstate" counties covered by the White Plains courthouse. Now the FLSA cases have been added. The Eastern District seems poised to follow.

There is little reason why automatic mediation programs could not be successfully implemented in the state courts, especially in (though certainly not limited to) the commercial parts. Since cases sent to mediation *ab initio* require less court involvement, reduce motion practice, and caseloads, they should not require much additional administrative staffing. Court annexed automatic mediation programs have been implemented and proven successful. The rules have been created, revised, and are now in place. The direction is clear. If you build it, they will come.

Endnotes

1. ADR Plan, Western District of New York, found at http://www.nywd.uscourts.gov/sites/default/fi les/ADRPlanRevisedJune242011.pdf.
2. *Id.*
3. *Id.*, Section 2.2C.
4. Information supplied by Barry Radlin, ADR Program Administrator for the Western District of New York.
5. General Order No. 47 can be found at http://www.nynd.uscourts.gov/sites/nynd/files/general-ordes/GO47_9.pdf.
6. NYND Mediation Program Statistics can be found at http://www.nynd.uscourts.gov/pilot-mandatory-mediation-program-statistics.
7. The Central District of California, for example, does keep data on cases in its court-annexed program that settle within 60 days of the last mediation session.
8. *See* Local Rule 83.10 of the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York. The Rules can be found at http://www.nysd.uscourts.gov/rules/rules.pdf.
9. The Order can be found at http://nysd.uscourts.gov/docs/mediation/2015%20-%20Second%20Amended%20Standing%20Admin%20Order%20-%20Counseled%20Employment.pdf.
10. *See*, "Plan for Certain § 1983 Cases Against Police Department in Westchester, Rockland, Putnam, Orange, Dutchess, and Sullivan Counties", located at http://www.nysd.uscourts.gov/docs/mediation/1983%20Plan%20Whitxxxxxxx`e%20Plains%20Final.pdf.
11. *Id*.
12. Data contained in the Annual Report of the Southern District of New York Mediation Program for calendar year 2015, dated July 28, 2016. The report can be found at http://www.nysd.uscourts.gov/docs/mediation/Annual_Reports/2015/Annual%20Report.2015.pdf.
13. Email from Rebecca Price, SDNY ADR Program Director, December 19, 2016.
14. All data relating to the Eastern District of New York are taken from the Alternative Dispute Resolution Report, July 1, 2015—June 30, 2016, Eastern District of New York. The Report can be found at https://img.nyed.uscourts.gov/files/local_rules/2015-2016mediationreport.pdf.
15. Local Rule 83.7(d)(1). The rule can be found at https://img.nyed.uscourts.gov/files/local_rules/localrules.pdf.
16. The Report can be found at https://img.nyed.uscourts.gov/files/local_rules/2015-2016mediationreport.pdf.
17. *See*, Petro, Michael, *Special Report: Alternative Dispute Resolution, Federal ADR Chips Away at Court Docket*, Buffalo Law Journal, Vol. 87, No. 1, June 22, 2015. The article can be found at http://www.bizjournals.com/buffalo/blog/buffalo-law-journal/2015/06/federal-adr-chips-away-at-court-docket.html.

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M&A Arbitration and Expedited Procedures: A Need for Speed?

By Alejandro López Ortiz

In an M&A transaction, two or more corporate entities or their operating units are transferred or combined, resulting in the creation of a new entity, or in one of the former entities acquiring the shares or the assets of the other. An M&A transaction may take many different forms and different sets of contracts may be used to formalize it. However, what it is common to all M&A transactions is that the process is generally disruptive for the business of the different entities involved. This is particularly the case in hostile M&A transactions, when an entity attempts to take the control of another without its consent. But even in friendly deals, the period during which the transaction is negotiated or executed comes with a great deal of uncertainty: the deal may be pulled for a number of reasons; unexpected information may be revealed, external events (including economic, political and regulatory) may occur, altering the conditions in which the parties expected the transaction to take place; scrutiny is increased, and, in any event, control of the business is expected to change hands. All of these situations may give rise to disputes between the parties not only when the deal is through, but also during the process. This is why parties to these types of transactions may have a genuine interest in resolving these disputes in an expedited manner. In these cases, resorting to fast-track arbitration (either designed ad hoc for the transaction, or relying on existing expedited procedures under the rules of an arbitral institution) may be a good option.

Typology of Disputes in M&A Transactions

Disputes in M&A transactions are more common than one might expect, and the way in which they are to be handled has become a strategic decision in the transaction. Different types of disputes generally arise at different stages of M&A transactions, and the need for a speedy resolution is not the same in all of them. Generally speaking, we can identify three different periods when disputes may arise: pre-signing, between signing and closing, and post-closing of the deal.

The pre-signing stage refers to the period during which the parties establish the first contacts and sign a letter of intent which sets forth the terms under which they will proceed to negotiate the deal. During this period, disputes generally refer to the binding effect of the letter of intent, breaches of covenants contained in it (such as confidentiality agreements) or claims for the abandonment of the negotiations (*culpa in contrahendo*).[1] Disputes at this stage generally do not have a particular need for speed. If despite the dispute, the parties continue to be interested in the deal, they will normally overcome their differences and will most likely not consider litigating; if on the other hand, parties walk away from the deal, it seems unlikely that the parties have any special urgency to determine the consequences of the breach, as they will normally concentrate in other businesses. Precisely as a consequence of this limited interest of the parties to resolve disputes occurring at this early stage, it is not often that letters of intent include arbitration agreements.[2]

In the period after the closing of the transaction, when it has been given full effect and the control of the business or of the shares has changed hands, disputes will often arise, for example, in respect of the application of price adjustment clauses and breaches of representations and warranties or indemnities. These disputes are frequently decided in arbitration and generally require a complex legal or factual analysis. For this, and also due to the fact that the transaction has already taken effect, the parties do not tend to have a particular need for speed when resolving disputes arising out of this phase, except if the dispute involves claims that the transaction should be undone, when the need for a swift resolution of the dispute becomes more acute.

It is during the period between the signing of the transaction and the closing when the need for a speedy resolution of disputes that may arise becomes more extreme and perhaps justifies the use of fast-track arbitration.

Disputes in the Post-Signing and Pre-closing Period

The period between the signing of the transaction and the closing, which may last for months, even over a year, is marked by temporariness and uncertainty: the deal is done, but not yet effective, while regulatory approvals (predominantly antitrust and merger control clearance) are obtained, necessary restructuring steps are taken (for example, the creation of a vehicle entity, the spin-off of the business to be transferred, etc.) and other conditions precedent (such us approvals and waivers from borrowers and guarantors) are met. In fact, the occurrence or not of these events may delay the execution of the transaction and even put it at risk. Further, during this period, external circumstances may change affecting the rationale

or the commercial sense of the transaction or the parties may simply change their mind. The following categories of dispute typically arise during this period:

- In the first place, the very occurrence of the conditions precedent that would trigger closing may become at the heart of a dispute between the parties.[3] In this type of dispute, the parties may have differing views on whether the condition precedent has taken place or not, and if not, whose responsibility is it and who is to suffer the consequences of this noncompliance.
- Secondly, during this period, while the combination or transfer has been agreed upon, the business often continues to be run by the selling party or original owner. However, the seller may no longer feel in charge of the business, while the purchaser is not yet in control, which may damage the value of the business. Further, the interests of the parties may not be fully aligned during that period or may even be conflicting if the seller has within its reach, for example, increasing the price to be received. In these circumstances, it is not unusual that differences in respect of the management of the business arise.[4]
- Thirdly, M&A contracts habitually include "Material Adverse Clauses" (MAC), which attempt to protect one of the parties from the occurrence of a relevant change of circumstances affecting the business. Normally, the occurrence of one of these circumstances allow the purchaser to rescind the contract or to significantly modify the price or other conditions. It is usual that parties dispute whether the material adverse event has taken place, and its consequences.[5]

These disputes are extremely time critical, as they normally prevent the closing from taking place. Further, the longer the closing takes, the more likely it is that other disputes will arise during this period, thus trumping the transaction.

"Parties may, however, resort to 'Fast-Track' arbitration to decide specific disputes within a short time frame. This may be done through a tailor-made procedure with short deadlines or by resorting to institutional rules providing for expedited procedures."

Consequently, parties are interested in a dispute resolution method that would allow them to have the controversy decided promptly, so that the period of uncertainty is reduced to a minimum.

Dispute Resolution Mechanisms and Expedited Arbitration

While arbitration is the preferred method of dispute resolution when it comes to disputes arising out of M&A transactions, as it allows a specialized resolution of complex commercial disputes in a swift manner and with moderate costs, increasing complexity in commercial arbitration makes the average time to resolution too lengthy for the needs of disputes arising out of this post-signing and pre-closing phase. In fact, it is not unusual for an international arbitration to take over 18 or 24 months to be decided, which is excessive when an M&A transaction is pending.

Parties may, however, resort to "Fast-Track" arbitration to decide specific disputes within a short time frame. This may be done through a tailor-made procedure with short deadlines or by resorting to institutional rules providing for expedited procedures,[6] such as the recently launched Expedited Arbitration Rules of the International Chamber of Commerce (ICC),[7] the Singapore International Arbitration Centre (SIAC),[8] and the American Arbitration Association's International Centre for Dispute Resolution Arbitration Rules (ICDR).[9]

Parties may also consider other mechanisms which allow obtaining a quick ruling in a dispute, such as *dispute boards* (which are increasingly used in complex construction projects) or emergency arbitration proceedings[10] (such as the Emergency Arbitration Rules of the ICC,[11] SIAC,[12] or the emergency measures of protection under the ICDR rules).[13] However, none of these mechanisms offers a final determination of the controversy, which may (in the case of dispute boards) or shall (in the case of emergency arbitration) be submitted to final decision by an arbitral tribunal, which may in fact overturn the earlier ruling.

Drafting a Fast-Track Arbitration Clause for M&A Disputes

If parties consider including a fast-track procedure to resolve M&A disputes, the first question that they should analyze is whether this procedure shall apply to all disputes arising out of the transaction or only to certain disputes. Arguably, it is not necessarily a good idea to submit all disputes to the fast-track procedure, as disputes arising after the closing may be better dealt with in a procedure allowing the parties more time to prepare the case. Therefore, it is important to carefully determine which disputes are to be submitted to fast-track arbitration and which ones will be decided following a standard procedure.

The second decision to be made is whether to use pre-set rules of expedited arbitration or to design a tailor-made procedure in the arbitration agreement. While pre-established rules, such us the expedited procedure contained at the ICC Rules,[14] the SIAC Rules,[15] or the ICDR Rules[16] have the clear advantage of offering tested

rules, which limits the risk of poor drafting or unwanted loopholes, sometimes the existing procedures do not offer the parties the speed they need for their dispute. These rules allow for a decision up to a period of six months, which may not be sufficiently fast for the parties' needs.

"During that phase, the transaction is pending, and resolving disputes in a speedy manner may be the difference between a successful deal and a failed transaction."

The third point that drafters of these fast-track clauses need to consider has to do with the design of the procedure.[17] While parties may want to expedite resolution of the dispute, they need to make sure that the resulting procedure provides equal treatment to the parties and does not prevent parties to reasonably present their case; otherwise, the enforceability of the award would be endangered. Similarly, it needs to be ensured that the tribunal (preferably a sole arbitrator) has enough time to render a reasoned decision, unless he or she is dispensed from the duty to provide reasons in jurisdictions where this is allowed and where enforcement might be sought.[18]

Finally, if this tailor-made procedure is to be administered by an arbitral institution, it is advisable to discuss in advance with the institution that the procedure designed will be compatible with the rules of the institution and that the institution will be able and willing to administer the arbitration as agreed by the parties.

Conclusion

Disputes arising during the period between the signing and the closing of an M&A transaction are particularly time-sensitive. During that phase, the transaction is pending, and resolving disputes in a speedy manner may be the difference between a successful deal and a failed transaction. Fast-track arbitration procedures may offer the parties the mechanism they need to resolve such disputes within the required deadline. Parties may rely on pre-set institutional expedited rules or design tailor-made fast-track procedures; in this second scenario, parties need to be extremely careful to balance their need for speed and due process requirements, to avoid endangering the enforceability of the award.

Endnotes

1. E. Fischer and M. Walbert, Chapter I: *The Arbitration Agreement and Arbitrability, Efficient and Expeditious Dispute Resolution in M&A Transactions*, in C. Klausegger, P. Klein, et al. (eds), Austrian Yearbook on International Arbitration 2017, Austrian Yearbook on International Arbitration, Volume 2017, 1 at 21.
2. B. Ehle, *Arbitration as a Dispute Resolution Mechanism in Mergers and Acquisitions*, in Comparative Law Yearbook of International Business (2008), at 291.
3. A. Carlevaris, *The Arbitration of Disputes Relating to Mergers and Acquisitions: A Study of ICC Cases*, ICC International Court of Arbitration Bulletin Vol.24 No. (2013), at 4.
4. B. Ehle, *supra* note 2, at 293.
5. A. Broichmann, *Disputes in the Fast Lane: Fast-Track Arbitration in Merger and Acquisition Disputes*, International Arbitration Law Review, Issue 4 (2008), at 148-149.
6. *Id.* at 146.
7. ICC Arbitration Rules 2017, Article 30 and Appendix VI.
8. SIAC Arbitration Rules 2016, Article 5.
9. ICDR Arbitration Rules 2014, International Expedited Procedures.
10. E. Fischer and M. Walbert, *supra* note 1, at 32-35.
11. ICC Arbitration Rules 2017, Article 29 and Appendix V.
12. SIAC Arbitration Rules 2016, Schedule 1.
13. ICDR Arbitration Rules 2014, Article 6.
14. ICC Arbitration Rules 2017, Article 30 and Appendix VI.
15. SIAC Arbitration Rules 2016, Article 5.
16. ICDR Arbitration Rules 2014, International Expedited Procedures.
17. K. Sachs, *Solving Tensions Between Expert Determination and Arbitration Under M&A Contracts*, In International Arbitration Under Review: Essays in Honour of John Beechey (2015), 367-368.
18. However, in a very interesting decision (*Newedge USA, LLC v. Manoel Fernando Garcia*, STJ September 1, 20014), the Brazilian Superior Court of Justice recognized for the first time an unreasoned award issues in New York, despite the fact that the Brazilian Arbitration Act requires arbitral awards to provide reasons, stating that it did not violate Brazil's public policy. See H. Burnett and M. Carreteiro, *Brazilian Court Recognizes An Unreasoned New York Arbitral Award* In Kluwer Arbitration Blog, September 29, 2014.

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Globalizing Trends in Ascertaining the Content of the Applicable Law in International Arbitration—Beyond the Civil-Common Law Divide

By Mohamed S. Abdel Wahab

Arbitration is a bespoke process that caters to the needs of the business community and the disputing parties. In international arbitration many different legal systems and traditions are at play, and sometimes uncertainty reigns with respect to the limits and boundaries of ascertaining and applying the content of the *lex causae* (i.e., the law governing the merits of the dispute). Whilst, at the first place, the parties bear the primary burden of establishing the content of the applicable law, it is unequivocal that the arbitrators have powers to determine and ascertain the content of the applicable law.

In the law and practice of international arbitration, three approaches in ascertaining the content of the applicable *lex causae* could be distinguished. According to the *first civil law-oriented approach*, an arbitral tribunal ascertains and determines the content of the applicable law pursuant to the *iura novit curia* presumption. Pursuant to the *second common law-oriented approach*, an arbitral tribunal would procedurally treat the *lex causae* as a matter of fact to be proven by the parties. Regarding the third approach, it is a *hybrid approach* where an arbitral tribunal may combine aspects of the first and second approaches.

"Arbitral tribunals need to... strike a balance between the need to properly and correctly apply the law and the need to respect and observe the legal principles of party autonomy, due process and transparency, which all entail that arbitrators may not take the parties by surprise when applying the law."

The dilemma is that national arbitration laws and institutional rules do not usually address the extent to which arbitrators may, *ex officio*, apply and ascertain, *sua sponte*, the contents of the *lex causae*. However, some exceptions do exist. For example, Section 34(2)(g) of the English Arbitration Act (1996) explicitly empowers the tribunal to consider "*whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and law.*" This clearly implies that an arbitral tribunal is bound to determine and ascertain the content of the applicable law or rules of law which it intends to apply, either as chosen by the parties or as deemed appropriate by the tribunal in the absence of the parties' choice. Nevertheless, no normative rules clarify how a tribunal can effectively, efficiently and properly ascertain and apply the *lex causae*, especially when the tribunal does not possess the required knowledge of the applicable law.

In addition to this *dilemma*, there are also *risks* and *perils* associated with the approach(es) taken by arbitral tribunals when ascertaining the content of the applicable substantive law. Arbitral tribunals need to cautiously and prudently exercise their *applicable law investigative powers* to strike a balance between the need to properly and correctly apply the law and the need to respect and observe the legal principles of *party autonomy*, *due process* and *transparency,* which all entail that arbitrators may not take the parties by surprise when applying the law.

Global Trends in Ascertaining the Content of the Applicable Law

Apart from the traditional adversarial and inquisitorial dichotomy, the means by which the content of the applicable law could be ascertained remains, absent the parties' agreement, subject to the arbitral tribunal's discretion and the applicable procedural norms. Globally, the means by which the contents of the applicable law may be ascertained fall into three broad categories:

(a) pleading and proving the content of the applicable law through counsel and documentary evidence;

(b) resorting to party appointed or tribunal appointed legal expert(s) to ascertain the contents of the applicable law, and/or

(c) relying on the tribunal's legal knowledge of the applicable law, if it possesses such knowledge and if so envisaged by the parties.

However, these means remain subject to the parties' *legitimate expectations*, which entail affording the parties an adequate opportunity to address, comment on, and analyze the legal issues that have arisen out of the tribunal's approach to the *lex causae*. Thus, arbitral tribunals conducting their own research into the applicable law are expected to furnish the parties with an adequate opportunity to address the tribunal's findings before basing the award thereon. This is addressed in more details below.

The Guiding Principles of Arbitral Discretion and *Iura Novit Arbiter* Limitations

Pursuant to the principles of party autonomy and legitimate expectations, arbitrators are generally under a legal obligation to apply the law or rules of law chosen by the parties, and, in the absence of such choice, arbitrators

should determine and apply the governing law or rules. In fulfilling such an obligation, arbitrators retain the discretion, and *may* have the right, to raise certain legal issues *sua sponte* and to ultimately ascertain the content of the applicable law.

Practice shows that arbitrators, whether from civil or common law backgrounds, tend to proactively engage with the parties and raise, *sua sponte*, procedural and substantive legal issues without being largely constrained by the traditional civil-common law divide. This overlooked, yet visible, practice bears witness to a degree of convergence in the practice of international arbitration.

In light of this legal realism, the International Law Association (ILA) Committee on International Commercial Arbitration addressed the issue of ascertaining the content of the applicable law in international commercial arbitration in 2008. The conference, held in Rio de Janeiro, Brazil between 17-21 August 2008, resulted in a set of recommendations on how an arbitral tribunal should ascertain the content of the applicable law, which defines the trajectory of *iura novit arbiter*. The pertinent ILA Recommendations (5)–(8) are of particular importance in this context.

Recommendation 5 sets out the general principle in this regard. It provides that arbitrators should *primarily* receive information about the contents of the applicable law from the parties.

Recommendation 6 states that, in general and subject to Recommendation 13, arbitrators should not introduce legal issues—propositions of law that may bear on the outcome of the dispute—that the parties have not raised.

Recommendation 7 confirms that arbitrators: (i) are not confined to the parties' submissions about the contents of applicable law, and, subject to Recommendation 8, (ii) may question the parties about legal issues the parties have raised and about their submissions and evidence on the contents of the applicable law, (iii) may review sources not invoked by the parties relating to those legal issues, and (iv) may, in a transparent manner, rely on their own *legal knowledge* as to the applicable law.

Recommendation 8 provides the needed comfort to the parties and the balancing factor by emphasizing that, before reaching their conclusions and rendering a decision or an award, arbitrators should give parties the reasonable opportunity to be heard on legal issues that may be relevant to the disposition of the case. They should not give decisions that might reasonably be expected to surprise the parties or go beyond that which was claimed or requested by them, save for exceptional and concrete international public policy considerations.

According to these ILA Recommendations, arbitrators should not, *ex officio*, introduce any legal issues—propositions of law that may bear on the outcome of the dispute, except where the legal issue concerns matters of *ordre public* (*for example, arbitrators must raise the issue of illegality of contract on their own motion*). The reason for this being, although certain jurisdictions accord the power to the arbitrators to raise legal issues *ex officio*, the arbitral tribunal could be challenged or accused of exceeding its mandate if it based its decision on a legal rule not invoked and discussed by the parties.

That said, arbitral tribunals do not have absolute discretion; their inherent, implied and/or discretionary powers aim at safeguarding the integrity and the efficient conduct of the proceedings. In discharging their mandates and navigating through the perils and challenges of ascertaining the content of the applicable law, arbitral tribunals need to consider a host of laws and rules that include: the overriding mandatory provisions of the *lex arbitri*, the governing *lex causae* and any other applicable procedural and substantive rules, including any overarching rules of due process.

Striking the Proper Balance—Optimal Equilibrium Beyond the Civil-Common Law Divide

The boundaries and limits of the principle of *iura novit arbiter* remains at the core of the debate regarding arbitrators' powers to ascertain the content of the applicable law(s). It is in this respect that the principles set forth by the ILA Recommendations offer the safe harbor guiding principles that: (i) define the limits and harness arbitral discretion, (ii) avert the abuse of arbitral powers, (iii) maintain the fine line separating justice and legality from encroachment and subjectivism, and (iv) observe the parties' legitimate expectations.

On such account, the prevailing practice in international arbitration confirms that certain global trends exist and guide arbitrators in prudently exercising their discretion. These global trends are limited by three essential constraints:

> (a) ne ultra petita (i.e. arbitrators should avoid exceeding the parties' claims and relief sought, modifying the subject matter of the dispute, and/or deciding on legal ramifications that did not form part of the case record), (b) maintaining transparency and foreseeability (i.e., not surprising the parties or defying their legitimate expectations regarding the decision making process), and (c) due process (i.e. safeguarding the parties' right to address all pertinent legal issues and maintaining the principle of adversarialism—le principe du contradictoire—where the parties should be afforded a reasonable opportunity to confront and address the opposing arguments and claims in an adversarial mode).

It is in this context that Article 22(1)(iii) of the LCIA Arbitration Rules captures the essence and limits of

arbitral discretion and the optimal balancing approach to be adopted by arbitral tribunals. Article 22(1)(iii) reads:

> (1) The Arbitral Tribunal shall have the power, upon the application of any party or [...] upon its own initiative, but in either case only after giving the parties a reasonable opportunity to state their views and upon such terms […] as the Arbitral Tribunal may decide:
>
> […]
>
> (iii) to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying relevant issues and ascertaining relevant facts and the law(s) or rules of law applicable to the Arbitration Agreement, the arbitration and the merits of the parties' dispute. [Emphasis added]

Accordingly, it is clear that the principle *iura novit arbiter* is subject to concrete limitations that vary depending on the applicable legal system and the overarching golden rules of *due process*, *adversarialism*, *party autonomy and legitimate expectations* as well as *aversion of circumvention of arbitral jurisdiction*. The principles of the ILA Recommendations offer guidance for arbitrators when ascertaining the content of the applicable law.

It is submitted that the success and stability of the international arbitration system hinges not only on respecting and observing the principle of party autonomy, but also on considering those overriding global legal principles that safeguard the legitimacy, integrity and operability of the system. Arbitrators must first turn to the parties to seek their input, since they bear the burden of ascertaining the applicable law. Failing adequate or proper submissions by the parties, arbitrators may resort to other discretionary means to ascertain the content of the applicable law, as stated above.

However, in ascertaining the content of the applicable law, arbitrators must not circumvent the fundamental principles of: (i) due process and adversarialism; (ii) jurisdiction (*ratione materiae, ratione temporis, ratione personae* and *ratione locus*); and (iii) not exceeding the parties' claims, defenses and relief.

In application of the above, it is submitted that the following practical and legal principles ought to be considered by arbitrators when ascertaining the content of the applicable law:

(a) Arbitrators have the discretion (not the obligation) to raise, *sua sponte*, legal issues not raised by the parties, insofar as such issues are pertinent to the determination of the dispute;

(b) In raising legal issues *sua sponte*, arbitrators have to be very cautious so as not to exceed their mandate and jurisdiction, raise irrelevant issues, transform the nature of the dispute and/or induce a party to raise legal arguments not timely raised at the party's own initiative;

(c) The following legal issues should be promptly communicated to the parties for their review and analysis prior to rendering an award on the basis thereof:

1. Any legal issue that impacts the parties' legal characterizations and interpretations of contract(s), act(s), and/or event(s);

2. Any legal issue of a public policy or overriding mandatory nature that can impact the validity or enforceability of the award; and

(d) Legal texts, precedents, authorities, and other sources additional to those submitted by the parties, which are exclusively utilized by the arbitrators for the sole purpose of fortifying their reasoning in an award and which do not go beyond the parties' claims, defenses and arguments, do not always require prior submission to the parties for their commentary or analysis insofar as they are simply additional sources that do not change or affect the parties' respective cases and the outcome of the award. However, this ought to be carefully considered in light of the applicable procedural rules. The author acknowledges that the practice in certain arbitral institutions may militate against the inclusion of additional fortifying legal sources that are not in the record. Nevertheless, this institutional practice is primarily driven by the desire to avert any risk, whether probable or improbable, of challenge to the award.

It should be noted, however, that the above principles are not intended to be exhaustive and, in any event, arbitrators ought to be careful in communicating with the parties to avert being seen as engaging in inappropriate predispositions and premature determination that could trigger challenges against arbitrators.

By and large, the arbitrators' duty to apply the law(s) and approach to ascertaining the content of the applicable law(s) under the limits of *iura novit arbiter* will continue to be a controversial issue that will evolve and be re-shaped by considerations of legal necessity and practical realism, yet it will continue to be subject to globalizing principles and trends that transcend the traditional civil-common law divide.

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Multilingual Arbitrations: Optimizing Parties' Agreements, Scope, Costs, Award-Making

By Guido Carducci

Introduction

The growth of international business and trade multiplies international transactions and, in part, multilingual arbitrations. While national courts operate in their language, exceptionally in two or three languages in federal systems, most institutional rules and legislations offer a significant advantage of international arbitration over court litigation by granting the parties two distinct freedoms, i.e., to choose a language other than the language of the seat of the tribunal, and more languages as to their proceedings as a whole. Such rules and legislations generally do not exclude what could be regarded as a third freedom, i.e., the parties choosing more languages, each as to distinct aspects of the arbitration, although complexity would increase and few are the aspects likely to be usefully subject to different languages.

This article addresses issues and challenges that international multilingual arbitrations raise.

I. Importance of Language(s)

Language(s) matters and affects numerous variables, including the following:

i) access to and communication with the tribunal and the other party(ies);

ii) reduction of potential arbitrators by requiring two or more languages;

iii) possibility to work and degree of performance of arbitrators, counsels, experts, witnesses;

iv) necessity, costs and time, of translation and interpretation;

v) degree of accuracy in translation or interpretation and thus in the tribunal's and counsel's analysis of written or oral evidence.

Parties are advised to consider pros and cons of language before departing from the ordinary one language to a two or more language(s) arbitration. Consideration should be in light of the relevant circumstances (volume and languages of contract(s), applicable law, documents, witnesses, etc.). Should these be known only partially at the time the arbitration agreement is drafted, consideration at a later time or at the beginning of the arbitration would provide a better informed decision. Although multilingual arbitrations may be beneficial also in some domestic disputes, this article assumes the parties opted for a bilingual international arbitration and leaves aside other and secondary roles of language in arbitration.[1]

II. Determination of Language(s) and Its Scope

Various international rules of arbitration[2] and the UNCITRAL Model Law[3] recognize the parties' freedom to choose more languages as to their proceedings.

Should the parties omit to agree about language(s), the tribunal may decide after consideration of any relevant circumstance, including the language of the contract[4] or of the documents containing the arbitration agreement.[5] As the constitution of a tribunal may take some time, an alternative distinguishes between the determination of language(s) by default, by the appointing authority and then by the tribunal after its constitution.[6] Although rules are often silent, it is advisable for the tribunal to consult the parties before reaching its decision as to language(s).

Time: Although the determination of language(s) is to be prompt as it is crucial for any communication between the parties, with the tribunal as soon as it is constituted, and for any submission of documents and evidence, only some rules require such determination by the tribunal to be prompt after its constitution.[7]

"Early consideration of…the linguistic aspects of an international arbitration are beneficial to, at least, saving costs and time, and possibly to enhancing legal predictability."

Scope: An important matter is scope, i.e. the issues the selected language(s) applies to. Although one may believe that the relevant language(s) covers necessarily the whole arbitration, the reality may be more nuanced. First, the parties may agree otherwise. Second, should the parties fail to agree the tribunal may decide otherwise. Third, not all rules define what issues are to be covered by the tribunal's determination of language(s).

The UNCITRAL Rules and the Swiss Rules clarify that such determination covers the statements of claim and of defense, any further written statements, and any oral hearings.[8] Award-making is thus excluded. Failing a parties' agreement, a tribunal may thus determine that languages A and B apply to such statements and hearings and issue the final award only in language A or B. Another tribunal, in similar circumstances and under the same UNCITRAL or Swiss Rules, may decide to issue the award in languages A and B. The parties should consider the scope of language(s) under the relevant rules and agree to amend it where appropriate. Should the parties disagree, the applicable rule and the tribunal's determination within such rule play a significant role.

The UNCITRAL Model Law takes in part a different position. First, it clearly defines its by-default scope of language (written statements, hearings, award, decision or other communication by the tribunal) and submits it to any agreement of the parties or tribunal's determination. Second, it extends differently from the UNCITRAL Rules, the scope of the language(s) to any award, decision or other communication by the tribunal.[9] Award-making is thus in the same language(s), as any written statement or any hearing, agreed by the parties or determined by the tribunal. Comparing rules, the more recent Model Law makes more sense than the Rules in linking linguistically by-default award-making to proceedings.

III. Investment Arbitration

The Rules of arbitration considered so far may apply to both commercial and investment disputes. Concerning exclusively the latter, under the ICSID Arbitration Rules of Procedure the parties may agree on the use of one or two official languages of the Centre, i.e., English, French and Spanish, and also on the use of a different language if the tribunal gives its approval.[10] Failing an agreement, each party may select one of the official languages.[11] Comparing rules, differently from arbitrations conducted under most rules an ICSID arbitration can thus be bilingual following two unilateral acts, two parties' unilateral selections of an ICSID's official procedural language. This although neither the parties agreed upon, nor the tribunal determined, these two languages.

IV. Optimizing Parties' Agreement as to Language(s)

Ideally, a multilingual international dispute would deserve a clear and detailed arbitration or subsequent agreement as to language(s). In practice, time is short and the parties often use common standard arbitration clauses which focus on the essential agreement to arbitrate and omit any determination as to language. Nevertheless, various institutions, such as ICC or ICDR,[12] invite the parties to consider adding such a determination.

Although most arbitrations are confidential and reliable empirical evidence is limited, it seems that several arbitration agreements focus not directly on language(s) and on its scope, as would be desirable, but only on one and indirect aspect, i.e., the linguistic capability of the tribunal. We refer to clauses referring the dispute to a "bilingual" (exceptionally trilingual) arbitrator(s) or tribunal in languages A and B. As we noted above (II) such clause has several implications. For instance, the more linguistic capabilities are required in the clause the fewer arbitrators are likely to meet the requirement and be appointed.

More fundamentally, is such a clause referring the dispute to a "bilingual" tribunal desirable? It is better than no clause at all as to languages. At the same time, this clause should be avoided as:

i) it means "only" that the tribunal is capable to arbitrate in both A and B languages;

ii) its focus is indirect, on the linguistic capability of the tribunal, and fails to address directly what is essential, i.e. the selected language(s) and its scope;

iii) it lacks scope and fails to express whether the choice of a bilingual tribunal "implied" bilingual arbitral proceedings and, if so, as a whole or in part. The tribunal is advised to seek a clarification from the parties.

It follows that, for the sake of clarity and predictability, a clause referring the dispute to a "bilingual" (or trilingual) tribunal should be omitted and replaced in international multilingual disputes by a clear clause on language(s) and scope. Below are some suggested clauses of this kind that the parties may wish to consider and adapt as they deem fit when drafting the arbitration or subsequent agreements, with a view to enhancing clarity and legal predictability as to the linguistic aspects of their arbitration.

i) "All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of (X) by one or more arbitrators able to conduct the arbitral proceedings in language A, and also in language B if all parties so request in writing."

The tribunal ought to be bilingual, while the proceedings will be by-default in language A. The parties may then opt for both languages depending on circumstances (volume of documents, oral testimony, etc.).

ii) "All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of (X) by one or more arbitrators conducting the arbitral proceedings in languages A and B."

Self-explanatory. While the proceedings shall be in languages A and B, the bilingual nature of the proceeding may impact and benefit the participants differently.

Between the parties and the tribunal:

In bilingual arbitral proceedings, communications, submissions and evidence may be in both languages and parties save the time and the costs of translation. Actually, they gain also as to a different risk, less frequently referred to, the risk of inaccuracy in translation and interpretation in case of a hearing (see above, II), unless the tribunal's capability in the relevant language(s) is less than the translator's or interpreter's. Beyond linguistic knowledge and capability other factors play a role from this perspective. Among others, while a translator is called to translate a document out of context and relying on his/her familiarity with context and/or the limited context the party requesting the translation may have provided, the tribunal generally reads and hears more about context which may lead to a more accurate under standing.

Between the parties:

Differently from above, the parties may, or may not, be able to work in both languages A and B. If not, party Y communicates only in language A and party X in language B. Then issues of time, costs, and accuracy of translations, and interpreta tion in case of a hearing, remain a reality between the parties. A bilingual tribunal does not help in this regard.

iii) "All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of (X) by one or more arbitrators conducting the arbitral proceedings (i.e., any written statement by a party, any hearing and any award, decision or other communication by the tribunal) in languages A and B."

This formulation adds to (ii) and is useful if the applicable rules do not specify scope of language(s) or if the parties wish to amend the by-default scope.

iv) "All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of (X) by one or more arbitrators conducting the arbitral proceedings (i.e., any written statement by a party, any hearing and any award, decision or other communication by the tribunal) in languages A and B and issuing the award(s) in (one language or) two originals, one in each language."

This formulation adds to (iii) by including expressly award-making and the option for an award in one or two languages. Some rules are clear in requiring award-making in the two languages, both versions being equally authentic, as under the ICSID Arbitration Rules[13] if the parties selected two languages. In other cases, the parties may prefer bilingual tribunal and proceedings for various reasons and yet receive a one-language award. As arbitral awards are key, parties in multilingual proceedings should consider whether they prefer the award(s) in one or more language(s).

v) "All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of (X) by one or more arbitrators con ducting the arbitral proceedings (i.e., any written statement by a party, any hearing and any award, decision or other communication by the tribunal) in languages A and B and issuing the award(s) in (one language or) two originals, one in each language. In case of linguistic divergences between the two originals the parties may seek an interpretation by the tribunal or the tribunal may correct the original(s) on its own initiative[14] within X weeks/months from the day the award is issued. Each original of the award is operative and self-sufficient in its language, not in a hierarchical relationship to the other original. The tribunal may set language A or B as prevailing with a view to solving such linguistic divergences.

Compared to iv) this formulation enhances legal predictability in multilingual awards. It allows "bilingual" tribunals to designate one of the languages as "prevailing" if they feel more comfortable in it, without questioning the operational and self-sufficient character of the award in each language. The tribunal is advised to check whether this or similar formulations could conflict, though unlikely, with a mandatory requirement (below, VIII).

V. Court Assistance, Recognition and Enforcement of Foreign Awards

State courts operate in their own language, even when they assist multilingual international arbitrations as to the constitution of the tribunal, issuing anti-suit injunctions, and more. Under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[15] the party applying for recognition and enforcement in a contracting state is to supply a certified translation of the award and the arbitration agreement if they are in a foreign language.

VI. Translation and Interpretation Costs

It is relatively common for parties to agree to a bilingual tribunal for various reasons, as well as to reduce or eliminate costs of translation and interpretation. Such reasoning may, at times, fall short.

First of all, whatever its degree of linguistic capability and knowledge, any tribunal takes more time to work in two rather than one language. While each party saves time and costs by working only in language A or B the tribunal needs more time to work and arbitrate in the two languages, especially if the award(s) is to be issued in both languages. This additional time is likely to increase the tribunal's fees under most arbitration rules.

Furthermore, as we noted above, a bilingual tribunal does not avoid translation and interpretation costs and time as to communication between the parties if they are not all able to work in both languages. If so, two questions arise.

(1) As to who is to cover such costs, most rules of arbitration do not expressly include in the costs of arbitration the translation and interpretation costs.[16] Generally, the party requesting the translation covers the related costs locally. Interpretation costs are easier to determine, and concentrated at the time and location of the hearing. The parties may agree or the tribunal may determine who covers them.

(2) As to whether the translation and interpretation costs may be allocated between the parties by the tribunal, most arbitration rules do not identify specifically such costs among the costs of arbitration. The UNCITRAL Rules differ

in part and by adding "other costs" incurred by the parties to the preexisting "legal costs"; the 2010 version opens the list of arbitration costs to other categories of costs incurred by the parties in relation to the arbitration, although only to the extent that the tribunal determines that the amount of such costs is reasonable.[17] The UNCITRAL Notes on Organizing Arbitral Proceedings (2016) also provide some guidance as to such costs, though leaving to the tribunal, or to other rules, the decision whether to include them in the costs of arbitration.

VII. Languages and Mandatory Requirements

To the extent that most legislations on international arbitration allow the parties to agree, or the tribunal to determine should the parties fail to agree, the language(s) of the arbitration it is unlikely, though not impossible, that national legislation would set a mandatory requirement limiting directly the parties' agreement, or the tribunal's determination.

However, a cautious approach must be taken in any examination of whether any jurisdiction would impose direct or indirect limitations on linguistic choices. Furthermore, the tribunal's determination of language(s) is more likely to be the target of such limitations than an agreement of the parties themselves. For instance, should the parties fail to agree and then the tribunal decides to direct along the formulation suggested above in (v) ("In case of linguistic divergences between the two originals the parties may seek an interpretation by the tribunal or the tribunal may correct the original(s) on its own initiative within X weeks/months from the day the award is issued. Each original of the award is operative and self-sufficient in its language, not in a hierarchical relationship to the other original. The tribunal may set language A or B as prevailing with a view to solving such linguistic divergences.") would such formulation be in conflict with the "equal treatment of parties" principle which requires, according to the UNCITRAL Model Law, that the parties be treated with equality and each party be given a full opportunity of presenting his case? Also, if the prevailing language is A is the party acting only in language B entitled to invoke such conflict to obtain the annulment or the non-recognition and non-enforcement of the award? Subject to a country-by-country legal analysis, it is submitted that this formulation should not be regarded as generating such conflict. In view of the fact that this formulation:

i) leaves unaffected the right of each party to present its case in one of the selected languages;

ii) allows a tribunal's interpretation or correction of each original of the award,[18] two tools that could solve the linguistic divergence and make the use of the prevailing language pointless;

iii) does not affect substance, the outcome of the dispute: whatever the meaning of the award's term in the prevailing language (A or B), such meaning may be to the benefit of any party, claimant or respondent; and

iv) does not generate situations that violate the right to be heard, such as in Swiss international arbitration law: the tribunal disregarding a party's statements, arguments and evidence important to the decision,[19] or a party's right to present facts essential to the decision, its legal arguments, evidence on pertinent facts, and the party's right to participate in the hearing.[20]

While this article focuses on B to B international disputes, B to C disputes are more likely to raise legal mandatory requirements as to language in jurisdictions that substantively protect consumers also in the arbitration context.

Conclusion

Early consideration of these matters and a clear and well-reasoned parties' agreement upon the linguistic aspects of an international arbitration are beneficial to, at least, saving costs and time, and possibly to enhancing legal predictability in cases including the risk of an inaccurate translation or interpretation of evidence or normative texts.

Endnotes

1. For instance, under the LCIA Rules the languages of the parties are taken into account in the selection of the arbitrator(s) (Art.5.9).
2. UNCITRAL Rules, Art.19 (1), ICC Rules, Art.20, LCIA Rules Art.17, ICDR International Arbitration Rules Art.18, Swiss Rules, Art.17 (1).
3. Art.22 (1).
4. ICC Rules, Art.20.
5. ICDR International Arbitration Rules, Art.18.
6. LCIA Rules Art.17.
7. For instance, the UNCITRAL Rules, Art.19 (1), and the Swiss Rules, Art.17 (1).
8. UNCITRAL Rules, Art.19 (1), Swiss Rules, Art.17 (1).
9. Art.22.
10. After consultation with the Secretary-General.
11. Art.22.
12. After the standard ICC and ICDR arbitration clause the ICC and ICDR explanatory texts note that it may be desirable for the parties to add inter alia the language(s) of the arbitration.
13. Art.22.
14. Such options apply without an agreement under rules such as the UNCITRAL Arbitration Rules (articles 37, 38);
15. Art.4.
16. UNCITRAL Rules, Art.40 (2), ICC Rules, Art.38 (1), ICDR International Arbitration Rules, Art.34, Swiss Rules, Art.38.
17. Art.40 (2, e).
18. For instance, under Art.37 of the UNCITRAL Rules.
19. Swiss Federal Tribunal, S.p.A. v. B. AG, 4A, 259/2015.
20. Swiss Federal Tribunal, A.X. Sarl v. Y and Z SA, 4A 42/2016.

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Artificial Intelligence Challenges and Opportunities for International Arbitration

By Kathleen Paisley and Edna Sussman

The world is undergoing a technological revolution that will dwarf the industrial revolution and will disrupt virtually every aspect of our business and personal lives, including the manner in which disputes arise and are resolved.

The centerpiece of the current stage of the technological revolution is artificial intelligence (AI), which will affect the manner in which:

- Business is conducted (including block chain, and other disruptive technologies);[1]
- Transactions are entered into (including smart contracts, bitcoin and other distributive mechanisms);[2]
- Disputes are raised and resolved.[3]

In these days of rising concerns about the resources and time it takes to decide disputes, artificial intelligence has the potential not only to reduce the time and cost of resolving disputes, but by increasing predictability and reducing risk, also to discourage unmeritorious claims and to create incentives to settle early. However, at the same time, concerns are raised about the impact that artificial intelligence will have on decision making and access to justice depending on who has access to its benefits, the transparency of, and control over, the arbitral data and algorithms, including publication of awards and potential risks to confidentiality and personal data protection, to name a few.

After a brief introduction to artificial intelligence, we will consider the potential impact of artificial intelligence on international arbitration, with a focus on the potential benefits to be gained from reducing uncertainty; the possibility for making the arbitral playing field more or less level depending on who has access to AI; and the prerequisites to successful implementation of AI, including the potential benefits to AI from increased access to awards.[4]

The debate over how artificial intelligence is implemented in international arbitrations raises some of the same concerns as the wider debate over the benefits versus the risks of transparency versus confidentiality generally and of award publication specifically, but the opportunities created by the widespread application of artificial intelligence to international arbitration will bring this tension to the fore in new and challenging ways.[5] The purpose of this article is to consider a few of them.

What Do We Mean by Artificial Intelligence?[6]

Artificial intelligence, or "AI," is the term coined to describe the general process whereby large amounts of data are combined with powerful iterative data processing systems and intelligent algorithms, thereby enabling the software to learn automatically from patterns or features in the data. The term AI is often used loosely, and encompasses many subjects including machine learning, deep learning, neural pathways, BOTs, cognitive computing, and natural language processing, but it is the software's ability to learn automatically from patterns or features in the data that makes it "intelligent."

It is beyond the scope of this article to discuss AI in depth, but simply put it is a technological means to employ software and data processing systems to digest and analyse large amounts of data using algorithms that allow the software to learn as it goes. The potential breakthrough for AI as it is applied to the law will be, among other things, the use of cognitive computing to allow AI not only to provide simple answers to questions and predictions about results, but also more complex reasoning, and to do so automatically without human intervention.

At its current stage of development, the efficacy of AI is highly dependent on the quality of the data processed and the algorithm applied, which dependencies are key to understanding both the potential benefits and risks from applying artificial intelligence to international arbitration.[7]

With digitalization, virtually every piece of information addressed in a typical arbitration exists in a digital form. This is true of the communications between the parties; between the parties and the institution; among the arbitrators and/or the institution; the evidence (including email communications); the names and details of expert and fact witnesses and their testimony, the transcript, the communications among the arbitrators, draft awards, etc.

We can think of this as the arbitral micro-data, that is, the data that is relevant to a specific dispute and that is addressed by one or both of the parties, the decision maker, and/or the institution in presenting, hearing, and/or deciding a specific case. This can include literally mil-

lions of data points, and the main use of artificial intelligence today is to analyse and use arbitral micro-data more efficiently and effectively.

Then there is the arbitral macro-data, that is, the information about the dispute resolution process and its outcome, which for the most part is contained in the award(s), including who acted as counsel, the arbitrators, the outcome of the dispute, the rationale for the decision, the damages theory, the damages method, the valuation, etc. For ease of reference, we will equate arbitral macro-data with awards as this is the most important piece of information about arbitral outcomes.

While the application of artificial intelligence to arbitral awards is in its infancy and will be a complex process, it is uniformly predicted that over time artificial intelligence will be applied to slice and dice data and to predict trends and outcomes that will forever change the basis on which disputes are brought and the manner in which they are decided. However, this requires access to the arbitral awards containing the necessary information to make these predictions.

How Is AI Applied Today to Arbitral Micro-Data?

The main use of artificial intelligence in arbitration today is to review increasingly vast amounts of digital arbitral micro-data held by parties and their counsel in order to determine what is relevant to the case and then to analyse that data and present it in a more effective manner. This use of AI to process arbitral micro-data has, and will increasingly, help to correct the cost and time problem created by the digital data at issue in complex disputes today—hence, as is often the case, technology may eventually help solve the problem it largely created because of digitization.[8] But the gateway to having these benefits is having access to the systems, the data, and the ability and processing power to use them.[9]

How Will Artificial Intelligence Reduce Arbitral Uncertainty?

Looking forward, one new frontier contemplates expanding the use of AI to analyse arbitral awards to undertake actual legal reasoning and to provide reasoned advice about how companies and legal arguments have fared in the past, how arbitrators have decided issues, and how damages have been approached.

This means that, for example, AI offers the potential of predicting results in advance including, for example:

- Chances of success generally, and with a particular decision maker;
- Likely range of damages generally, and with a specific decision maker;
- Timing to decision before a particular institution, and before a particular decision maker;
- Likely costs to be incurred;
- Likely range of a cost award generally, and with a particular decision maker, and
- Facts about opposing counsel, including their experience in particular matters and before particular decision makers.

When they come to fruition, the common benefit in all of these more advanced uses of AI to predict results in arbitration is that they will reduce the uncertainty inherent in any dispute resolution process. While there are obviously other non-economic factors at play in disputes, reducing the uncertainty about the outcome will both reduce the pursuit of unmeritorious claims and allow disputes to be settled more quickly when they do arise, with the consequent positive economic and social impact.

What Are the Potential Merits of AI in International Arbitration Cases?

When arbitration ensues, AI also holds out the promise of changing the way that cases are prepared, including, among other things, enabling parties to:

- Pick arbitrators based on likely results;
- Make arguments that are more likely to be successful with those arbitrators;
- Reduce the time and cost of legal research and data analytics, and
- Plan more realistic budgets, among many other things.

What Policy Implications Does This Have for the Arbitral Playing Field of the Future?

If AI is widely available at an affordable price, it has the potential of providing more arbitral actors increased access to information about their chances of success, their best strategy for success, what arbitrators to select, and other issues allowing them to participate in the process on a more equal footing at a lower cost through technology.[10] However, this promise of AI will only be realized if all actors have reasonable access to AI systems based on a reliable data set at a reasonable cost, failing which it will have the opposite effect of making the playing field even less level.

It is therefore important to ask ourselves upfront how AI will develop and will it be done in a way that fosters or restricts participation? Who will have access to the necessary systems and data required to use the predictive capacity of AI to reduce litigation/arbitration risk? What will the cost of access be? For which purposes? Will this access effectively be available only to large law firms, litigation funders, corporations, and insurers, or will means be developed to allow this data to be collected and these services to be performed at a cost that permits the benefits to be felt more broadly in both developed and developing countries and by both small and large players in cases

of varying size? Who and how will the algorithms be developed? Who will have access to them? Will access to awards and other arbitral macro-data be open or closed? What impact will this have on data protection and privacy interests?

These are difficult questions. International arbitration repeat-players have previously had unique advantages in picking arbitrators, knowing what arguments to make, and predicting outcomes. This first-hand knowledge based on personal experience will always have significant value, but data that holds various aspects of those experiences when incorporated into a more complete data set and using highly sophisticated technology, computing power, and intelligent algorithms can enable others to capture much of that specialized knowledge.

The insights AI offers already allows companies to search legal data from courts (including the US Supreme Court) and to provide customers with predictions about, among other things, how a particular judge or court is likely to rule on a particular issue, time to decision before that judge or that court, and opposing counsel's success before that judge or court.[11] The AI conclusions are reported to be remarkably accurate and often at a cost significantly lower than the countless hours a young lawyer would have to spend finding and attempting to analyse all the inputs. Thus, AI may serve to revolutionize the current disequilibrium in resources between parties who can afford the many lawyer hours such analysis may require and those who cannot.

But transformation requires not only that access to the necessary AI technology systems be offered at a reasonable cost, but also access to the data across a broad range of disputes. Thus far, the roadblock to the use of AI to undertake reasoning and more sophisticated analysis has been the requirement for manual extraction and organization of the data input by humans, but text analytics is changing that by allowing information to be extracted automatically.[12]

However, this requires the data from which this is extracted—in this case arbitral awards—to be available to be analysed.

> In a cognitive computing paradigm … the knowledge is embodied in the corpus of the texts from which the program extracts candidate solutions or solution elements and ranks them in terms of their relevance to the problem. **This assumes of course that an available corpus of texts contains information relevant to the type of problem.[13]**

This requirement that a sufficient "corpus" of readily available texts exists is not straightforward in the case of arbitral awards for a variety of reasons, including lack of access to awards and the decentralization of the data points, among others.

What Challenges Does AI Face in Using Awards to Predict Results in International Arbitration?

One of the hallmarks of international commercial arbitration is that arbitral awards in commercial cases are not published.[14] In contrast, in investor-State arbitration before the International Centre for the Settlement of Investment Disputes (ICSID), maritime arbitration by the Society of Maritime Arbitrators (SMA), and sports arbitration by the Court of Arbitration for Sport (CAS), unredacted awards are published in many instances.

It is beyond the scope of this article to provide complete information about the practices of international arbitral institutions with respect to the publication of selected awards in a redacted or summary form. The International Court of Arbitration of the ICC (ICC), International Centre for Dispute Resolution (ICDR), Singapore International Arbitration Centre (SIAC), the Stockholm Chamber of Commerce ("Stockholm Chamber"), and the Milan Chamber of Arbitration ("Milan Chamber") publish redacted versions of selected awards usually with party and possibly tribunal permission and typically excluding the names of arbitrator, parties and counsel, and the ICC publishes summaries of cases also excluding the names of parties and arbitrators and has started to separately publish the names of arbitrators sitting in their cases. The LCIA and the Stockholm Chamber, among others, publish selected decisions on arbitrator challenges with the names of the parties, counsel and arbitrators redacted, and the ICDR has recently announced that it will publish international challenge decisions as it has done in the past for domestic decisions.[15] The Hong Kong International Arbitration Centre (HKIAC) and the Swiss Chambers Arbitration Institution (SCAI) do not proactively publish any awards or decisions, but allow for publication to be requested subject to consent requirements.

The following chart provides a useful summary on the publication practices of the commercial arbitration centers:[16]

No publication, but it can be requested	**Selected Summaries**	**Selected awards with Redaction**	**Full awards**
HKIAC, SCAI	ICC	ICC, ICDR (soon to include challenges), LCIA (challenges to arbitrators only), Milan Chamber, SIAC, Stockholm Chamber (including challenges)	ICSID, CAS (appeals from institutional awards only), SMA

Arbitral institutions have also begun to publish studies of the time and cost of proceedings under their rules, and the AAA has conducted a study comparing the length of time in arbitration to U.S. federal courts and the consequent cost to the parties of the longer time to resolution in court.[17]

The growing need for the information contained in arbitral awards has also led several organizations to start developing databases that provide arbitration related information. The three best known at this time are all featured in this issue.

- Arbitrator Intelligence[18] will make available responses to detailed surveys to be completed by arbitration users who will report on their experiences with specific arbitrators. Arbitrator Intelligence has also collected almost 1,400 arbitral awards from jurisdictions around the world, which it intends to make available in some form.
- Dispute Resolution Data[19] collects arbitration-related data from critical sources including most of the major international arbitration institutions.
- Global Arbitration Review Arbitrator Research Tool (GAR ART)[20] provides information about individual arbitrators which includes individual arbitrator's own responses as to their procedural preferences and practices as well as providing names of counsel who have appeared before the arbitrator and arbitrators with whom they have sat on an arbitration panel.

While all this data is helpful in gaining a deeper understanding of the commercial arbitral process, the current lack of access to the full reasoning of the award and the names of the arbitrators, experts, and counsel makes it insufficient for various aspects of AI analysis.

On the other hand, while it is beyond the scope of this article to address how data protection will impact international arbitration, access to awards requires reconciliation with the GDPR and other data protection laws (the application of which may also further increase the importance of confidentiality during the processing of personal data during arbitrations).

This means that, while full unredacted awards would obviously be preferable for AI, data protection and other concerns may favor redaction of personal data. However, even if the names of the parties and any individuals were omitted, the predictive ability of AI would be greatly enhanced if awards were available including the full reasoning and the names of the arbitrator(s), counsel, and experts, who typically could give their permission in advance to disclosure.[21] Of course, parties would have to be able to refuse publication, and public access to awards including arbitrator names raises many other issues, including the potential for increasing the time and cost of award drafting, issue conflict creeping into commercial arbitration, procedural paranoia increasing and impacting the written product, and further risks of unintentional release of confidential information and data protection concerns.[22]

The currently available data set of unredacted awards including the additional data identification of arbitrators, parties, and counsel is generally limited to those cases where the award is enforced and becomes public or one of the parties makes it public. This means that even where unredacted awards are available, the process of obtaining or accessing them on a continuous basis across hundreds of jurisdictions and many arbitral institutions is cumbersome, time consuming, and expensive. This decentralization of available arbitration awards and the multiple platforms on which awards are lodged creates additional hurdles and may limit the ways that AI can be employed in arbitration in the near term, thus potentially decreasing its efficacy and increasing costs.

Further, to the extent that one key aspect of AI would be geared at predicting future arbitrator behaviour, developing the data is not the only impediment to a meaningful AI analysis because of the impact of the typical three-person tribunals on the predictive ability of AI. For ease of use, the AI expectation may be that the chair was the decision maker and the result attributed to him or her for purposes of predicting results in future cases, whereas in fact the other tribunal members are likely to have had an impact, often a determinative one on the outcome, especially with respect to the reasoning provided. On the other hand, attributing the result equally to all tribunal members would presume that each of them would have reached the same conclusion on his or her own or as chair, which may not the case (again, particularly with respect to the reasoning). The algorithms will no doubt find a solution for this, but it remains a challenge.

The lack of an easily accessible data set, decentralized decision making, and other characteristics of international arbitration may increase the upfront and on-going costs and time required to use AI to predict outcomes in international arbitration. This may slow the adoption rate for AI for international arbitration as service providers grapple with these issues, making it less accurate at least at the outset, and more expensive.

On the other hand, when a full arbitral award is available or can be made available, the material available to process is often more complete than court decisions because arbitrators decide the whole case (unlike US judges where juries often reach the final result) and provide a fully reasoned decision addressing all issues (unlike most lower courts, especially in civil law countries, where court decisions can be sparse).

Moreover, the prevailing use of international arbitration to resolve the vast majority of complex, high value

trans-border disputes means the incentive to make AI work well for international arbitration is very high. This would be expected to create an increased push for arbitral awards to be made more available, which, coupled with the fact that confidentiality may not be as critical to users as previously understood,[23] may further the trend towards transparency of awards.

What Does This Mean for the Future of Artificial Intelligence in International Arbitration?

Whether we like it or not, artificial intelligence is going to play a major role in international arbitration in the near future. The amounts at issue are too high and the benefits from artificial intelligence too great to avoid it.

Al has significant potential benefits for international arbitration, but as members of the international arbitration community we must ask ourselves for whom, at what cost, and how this might impact international arbitration more generally in ways that may not be obvious.

This article only scrapes the surface of the competing concerns raised by the use of AI in international arbitration and the authors expect these questions to lead to healthy debates among the international arbitration community for many years to come, but the potential benefits and risks that artificial intelligence poses for international arbitration merit the debate.

Endnotes

1. *See, e.g.,* Don and Alex Tapscott, Blockchain Revolution: How the Technology Behind Bitcoin Is Changing Money, Business, and the World (2016); Melanie Swan, Blockchain: Blueprint for a New Economy (2015).
2. *See, e.g,* Andreas M Antonopoulos and Gavin Wood, Mastering Ethereum: Building Smart Contracts and Dapps (2018); Jeff Read, Smart Contracts: The Essential Guide to Using Blockchain Smart Contracts for Cryptocurrency Exchange (2016).
3. *See, e.g.*, Kevin D. Ashley, Artificial Intelligence and Legal Analytics: New Tools for Law Practice in the Digital Age (2017) (detailed technical discussion of the application of artificial intelligence to legal practice) (hereafter "Ashley"); Richard Susskind, Tomorrow's Lawyers: An Introduction to Your Future (2d ed. 2017).
4. A number of articles have been published recently about the potential uses of AI in international arbitration, including, for example, Paul Cohen and Sophie Nappert, *The March of the Robots*, Global Arbitration Review (Feb. 15, 2017), http://globalarbitrationreview.com/article/1080951/the-march-of-the-robots; Jose Maria de la Jara, Alejandra Infantes, and Daniela Palma, Machine Arbitrator: *Are We Ready?* Kluwer Arbitration Blog (May 4, 2017), http://kluwerarbitrationblog.com/2017/05/04/machine-arbitrator-are-we-ready/ (hereinafter "Machine Arbitrator: Are We Ready?"); Jack Wright Nelson, *Machine Arbitration and Machine Arbitrators*, Youngicca Blog (July 28, 2016), http://www.youngicca-blog.com/machine-arbitration-and-machine-arbitrators/.
5. For a discussion of the pros and cons of publishing commercial arbitration awards *see*, New York City Bar Association, International Commercial Disputes Committee, *Publication of International Awards and Decisions*, February 2014, available at https://www2.nycbar.org/pdf/report/uploads/20072645-PublicationofInternationalArbitrationAwardsandDecisions.pdf ("NYCBA Publication of Awards").
6. For an understandable explanation of the technology behind AI, *see* Ashley *supra* fn. 3.
7. The authors note the serious debate about the need for transparency and ethical considerations posed by the application of artificial intelligence generally and to the law specifically, which is being spearheaded by the AI Initiative of the Future Society at the Kennedy School at Harvard, the considerations of which are beyond the scope of this article. *See* ai-initiative.org.
8. The authors note that this is not the same issue as the amount of disclosure, as parties must first apply these processes to their own data before addressing any data from the other side.
9. The coming into force of the European Union General Data Protection Regulation will impact the processing of the personal data at issue in complex disputes. It is beyond the scope of this article to address data protection, except to say that the protection of personal data will become increasingly important to international arbitration. *See* Regulation (EU) 2016/679 of the European Parliament and the Council of 27 April 2016 on the Protection of Natural Persons with regard to the Processing of Personal Data and on the Free Movement of Such Data, and repealing Directive 95/46/EC (General Data Protection Regulation) Official Journal L 119/1 (4.5.2016) (GDPR).
10. These issues are closely related to those made in favour of increased transparency generally that are discussed in the NYCBA Publication of Awards, *supra* fn. 5.
11. *See, e.g.*, M. Hutson, *Artificial Intelligence Prevails at Predicting Supreme Court decisions*, Science Magazine (May 2, 2017), http://www.sciencemag.org/news/2017/05/artificial-intelligence-prevails-predicting-supreme-court-decisions.
12. *See* Ashley *supra* fn. 3 at p. 5.
13. *Id.* (emphasis added).
14. This discussion is derived from the NYCBA Publication of Awards, *supra* fn. 5, published in 2014. The authors note that this discussion is limited solely to publication of awards, not the confidentiality of the process.
15. Caroline Simson, *The American Arbitration Association Sets Agenda For 2018,* Law 360, January 19, 2018, available at https://www.adr.org/sites/default/files/document_repository/AAA_Sets_Agenda_For_2018_Law360.pdf.
16. Source NYCBA Publication of Awards, *supra* fn. 5 (with modifications).
17. Roy Weinstein, *Arbitration Offers Efficiency and Economic Benefits Compared to Court Proceedings*; N.Y. Disp. Resol. Law. Vol. 10 No. 2 (2017); the full study is available at http://go.adr.org/impactsofdelay.
18. *See* Arbitrator Intelligence at www.ArbitratorIntelligence.org and in this issue see, Catherine Rogers, *Arbitrator Intelligence: From Intuition to Data in Arbitrator Appointments*, N.Y. Disp. Resol. Law. Vol. 11, Issue 1 (2018).
19. *See* Dispute Resolution Data at http://www.disputeresolutiondata.com/and in this issue see, Brian Canada, Debi Slate and Bill Slate, *A Data-Driven Exploration of Arbitration as a Settlement Tool: Does Reality Match Perception*? N. Y. Disp. Resol. Law. Vol. 11, Issue 1 (2018).
20. *See* Global Arbitration Review Arbitrator Research Tool at https://globalarbitrationreview.com/arbitrator-research-tool; and in this issue *see* David Samuels, *The Unusual Suspects—Easier to Find with GAR's ART,* N.Y. Disp. Resol. Law. Vol. 11, Issue 1 (2018).
21. Of note in this regard is SIAC, which currently provides in its form appointment document for arbitrators to indicate whether

their names can be included in published redacted awards and provides for the arbitrators to assign any copyright to the institution.

22. For a discussion of the pros and cons of publishing commercial arbitration awards *see*, NYCBA Publication of Awards, *supra* fn. 5, published in 2014; *see also* Kim Landsman, Book Review, *The Rise of Transparency in International Arbitration: The Case for Anonymous Publication of Arbitral Awards*, N. Y. Disp. Resol. Law., Vol. 7, Issue 1 (2014), reviewing a collection of essays compiled by the Milan Chamber of Arbitration and the Law School of the University Carlo Cattaneo-LIUS.

23. Queen Mary School of Law and White & Case, *2010 International Arbitration Survey*, p. 29, available at http://www.arbitration.qmul.ac.uk/docs/123290.pdf ("The responses indicate that confidentiality is important to users of arbitration, but it is not the essential reason for recourse to arbitration."). But the authors note that this could change as data protection compliance becomes more important.

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Arbitrator Intelligence: From Intuition to Data in Arbitrator Appointments

By Catherine A. Rogers

In virtually every sector of modern business, data is enhancing if not replacing intuition as the basis for making decisions. This trend holds even for assessments as seemingly subjective and rariefied as predicting the quality—and hence price—of an exquisite French Bordeaux.[1]

"[A]d hoc individual research largely confines assessment of potential arbitrators to feedback from a limited number of individuals."

In selecting international arbitrators, however, intuition still predominates. For example, a recent industry survey by Berwin Leighton Paisner found that the most important qualities in selecting an arbitrator are identified as "expertise" (according to 93% of respondents) and "efficiency" (according to 91%).[2] Expertise and efficiency, however, are not easy to measure or quantify.

These qualities are not data or credentials that are listed on arbitrators' CVs. Instead, expertise and efficiency are cumulative, largely intuitive assessments that are drawn from a number of sources and metrics, which may vary from case to case depending on a client's needs.

Given the confidential nature of arbitration, gathering the relevant information means personal phone calls with individuals who have appeared before a potential arbitrator or, better yet, sat as a co-arbitrator with that person. This kind of ad hoc individual research largely confines assessment of potential arbitrators to feedback from a limited number of individuals. Despite this limited scope, ad hoc research can be time-consuming (and therefore costly), but not always reliable. Without broad data against which to evaluate these inputs, however, it is impossible to determine whether the feedback is broadly representative, readily transferrable to the case at hand, or just an outlier.

Another problem with ad hoc information gathering is that it creates an information bottleneck. Newer and more diverse arbitrators cannot readily develop international reputations as long as personal references are the primary means for determining expertise and efficiency. This informational bottleneck is increasingly intolerable in light of concerns about the lack of diversity among international arbitrators and in-house counsel with corporate benchmarks to meet, and greater pressure to find, newer arbitrators about whom there is a scarcity of information.

Arbitrator Intelligence (AI) seeks to solve these problems by bringing data-driven analysis to arbitrator appointments. The means to these ends is the recently launched Arbitrator Intelligence Questionnaire, or AIQ.

The AIQ

The idea behind the AIQ is simple. The AIQ seeks to replicate, through systematically collected feedback, the same kind of information currently sought through person-to-person inquiries. Data from the AIQ will not eliminate altogether the value of individualized ad hoc inquiries, but it will allow parties and counsel to tap into the collective intelligence of the global international arbitration community.

The AIQ is designed for parties, in-house counsel, external law firms and even third-party funders to complete at the end of each arbitration.[3] The web-based questionnaire asks a number of background questions about the case, and then inquires about a number of features that are relevant for future arbitrator selection. For example (to paraphrase a few questions from the AIQ): Did the arbitrators grant document production? If so, what standard did they use? Did the arbitrators ask questions that demonstrated familiarity with the record? Did contract interpretation in the award reflect a plain meaning analysis of the words in the contract? Or did it consider the drafting history? Or did it seek to adopt a more flexible interpretation to achieve fairness and equity in the outcome of the dispute?[4]

"Achieving systematic completion of AIQs is Arbitrator Intelligence's biggest challenge. To that end, AI is entering into collaboration agreements with various arbitral institutions around the world."

As a practical matter, the AIQ is divided into two phases, and each phase can be completed in 10 minutes or less. Phase I concentrates on objective background information about the case, and can be completed by anyone who has access to the award or case file. Phase II contains questions that relate to the conduct of the arbitration and, in some instances, seek professional assessments. As a consequence, Phase II should be completed by an attorney or party who actively participated in the proceedings. Certain background information from Phase I questions automatically prefills the relevant questions in Phase II to make it even faster to complete.

In developing the questions for the AIQ, AI employed state-of-the-art survey design (in coordination with the Penn State Survey Research Center), as well as extensive public and expert input. The ultimate goals were multiple and ambitious: to ensure quality feedback; to avoid questions that even implicitly preferenced certain cultures or legal traditions; to ensure fairness to arbitrators, and to promote systematic responses.

Achieving systematic completion of AIQs is Arbitrator Intelligence's biggest challenge. To that end, AI is entering into collaboration agreements with various arbitral institutions around the world. Under these agreements, institutions agree to forward the AIQ to parties and lawyers at the end of each arbitration, and in exchange AI will give collaborating institutions free access to AI Reports (see below).

To date, AI has formally entered into such agreements with a few institutions (such as Singapore International Arbitration Centre and AM-CHAM Quito), and is in discussions with more than a dozen other institutions. So watch for emails coming to you from arbitral institutions at the end of your arbitration!

AI is also inviting parties and law firms to support it by signing *The Arbitrator Intelligence Pact*.[5] By signing the *AI Pact*, parties, law firms, individual counsel, arbitrators, arbitral institutions, and arbitration organizations commit to supporting AI's goals of transparency, accountability, and diversity by helping to promote completion of AIQs regularly at the conclusion of arbitrations.

Notably, one of the world's leading law firms has not only signed the *Pact*, but also agreed to provide retrospective AIQs on cases completed in the last few years. AI is currently in discussions with several other firms that are also considering providing retrospective AIQs. AIQ data is essential for AI to develop AI Reports, so consider joining these industry leaders by completing AIQs on recently completed arbitrations.

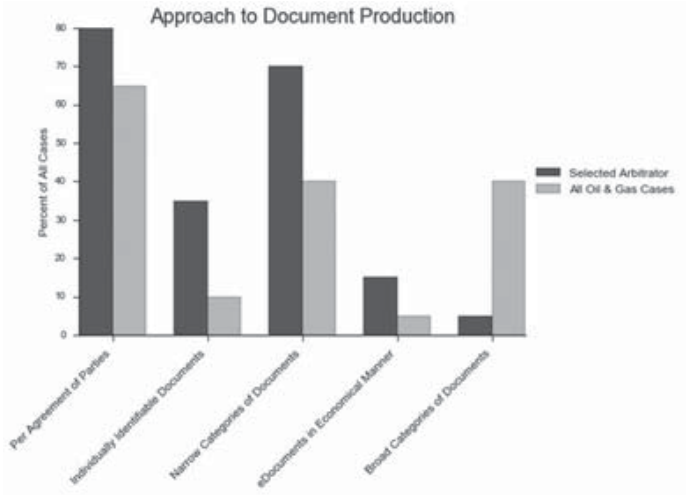
Once sufficient information has been collected through the AIQ, Arbitrator Intelligence will begin publishing AI Reports, through its partner WoltersKluwer.

Arbitrator Intelligence Reports

AI Reports are still in the development phase, and the nature and scope of AI Reports will inevitably evolve over time, particularly as AI's base of data expands. Nevertheless, it is already easy to see from some preliminary mock-ups how AI Reports will help promote more data-driven decisions about arbitrator appointments.

By way of preview, consider the following chart regarding a (hypothetical) arbitrator's approach to document production:

Figure A (based on hypothetical data—for illustrative purposes only)

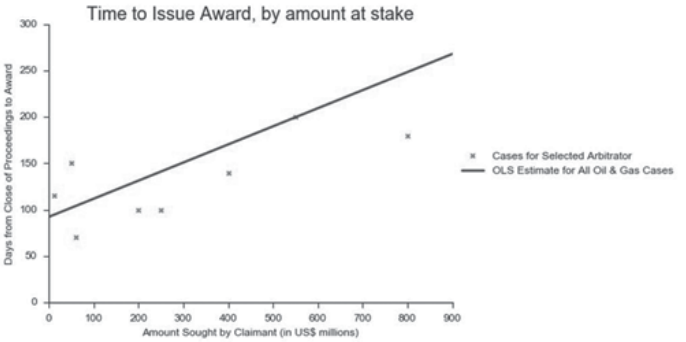


This basic chart provides a systematic comparison of the arbitrator's historical practice in granting document production (the light gray bars to the right), as compared with the document production practices of all arbitrators in the sample oil and gas cases (the dark gray bars to the left).[6]

There are several advantages to this approach over ad hoc individual inquiries, or self-reporting by arbitrators. First, when asked to comment on their own practices, most arbitrators explain that their approach will vary depending on the type of case. This chart examines disputes within a particular industry (oil and gas), but it could alternatively evaluate the data based on case size, applicable law, or some combination of these or other variables.

Even more importantly, Figure A above and Figure B below demonstrate the benefits of assessing individual cases in comparison to a baseline of data in similar cases.

Figure B (based on hypothetical data—for illustrative purposes only)



In Figure B, the *y*-axis indicates how many days an award is rendered after close of proceedings (defined in the AIQ as the last day of hearings or the day of the last post-hearing submissions). The *x*-axis indicates the size of the case as a proxy for complexity (on the assumption that more time is needed to draft awards in more complex cases). The slope shows the relationship between amount

at stake and length of hearing for all arbitrators presiding in oil and gas cases in the sample.[7] Each x is a case decided by the arbitrator of interest.

Like Figure A above on document production, the independent baseline in Figure B (the blue line) provides a valuable check against mistaken assumptions about the representativeness of performance in a particular case. For example, by luck of the draw, ad hoc research may reveal two examples of cases in which an arbitrator rendered awards more than 200 days after the close of proceedings. Based on this feedback, a client may conclude that this arbitrator is simply too slow and thus disqualified from consideration. But that assessment may be different if broader data reveals that only a few of the arbitrator's awards took longer than 200 days or that, depending on the size of the case, a 200-day time frame is well within the norm for all similar cases.

"Arbitrator Intelligence will liberate arbitrator selection from the 19th Century's telephone and introduce it to the 21st Century's data-driven analytic solutions."

These charts and graphs are prototypes for off-the-shelf AI Reports and, again, are based on hypothetical data. AI Reports will provide numerous forms of data analysis on various topics, and the range will inevitably grow and develop over time as more data is generated.

In the future, AI also anticipates being able to produce customized reports as more data is available. For example, in some cases, the ability to obtain (or avoid) document production may be the lynchpin of a party's strategy. In that case, a party may want a bar chart similar to the Figure A above, but instead one showing the three arbitrators on its shortlist.

Of course, AI Reports will identify the limitations of the data, particularly in production of early AI Reports. More generally, there are a number of challenges in analyzing data from phenomena as complex as arbitral disputes. Such challenges include accounting for different institutional rules, differences in appointment of the arbitrator (was the arbitrator party-appointed, or sitting as a chair or sole arbitrator?), and changes in data and to arbitration practice over time.

As an academically affiliated entity, however, Arbitrator Intelligence is uniquely positioned to meet these complex challenges. AI's Board of Directors will oversee development of the AI Reports and the software needed to generate them. The board is composed primarily of university professors who collectively possess the essential range of expertise in relevant fields, including empirical research in international arbitration, data analytics in the legal profession, mass data collection and strategic decision-making, econometrics, artificial intelligence, and information systems.[8]

In addition to its Board of Directors, AI also has a Board of Advisors that brings to the project diverse perspectives from among in-house and external counsel, leading arbitrators, institutional representatives, and academics specializing in international arbitration.[9]

Conclusion

When Arbitrator Intelligence was first conceived,[10] major law firms stated (unabashedly!) that they hoped this project would fail. AI would be seeking to gather and make widely available information that they sold to their clients, information that signaled their value-added expertise, information that distinguished them from lesser competitors. And they did not want the competition.

Today, given the size and complexity of the market, the reaction is quite different. Even the leading law firms with the largest networks for collecting information recognize that there is no such thing as "enough information" about arbitrators. In-house counsel are increasingly demanding more than mere intuition to justify arbitrator appointments. They want concrete data and analysis that their colleagues use in making other business decisions and that they will especially need if they have to explain an unexpected result to management. Even arbitral institutions, which also appoint arbitrators, increasingly need more information to optimize their appointments and remain competitive.

For those of us who enjoy drinking good wine, but not necessarily investing in wine futures, we may still prefer the tasting notes of well-known aficionados and recommendations from a sommelier's *tastevin*. But for parties selecting the individuals who will pass judgment on their most important disputes, precision is critical and should not be left to intuition alone. Arbitrator Intelligence will liberate arbitrator selection from the 19th Century's telephone and introduce it to the 21st Century's data-driven analytic solutions.

Endnotes

1. As Ian Ayres notes in his book Super Crunchers: Why Thinking by Numbers Is the New Way to be Smart (2007), Orley Ashenfelter's data-driven analysis of wines made more accurate predictions than renowned wine critic Robert Parker on an '86 vintage, and Ashenfelter's wild card predictions on '89 and '90 wines also turned out to be surprisingly accurate.
2. Carol Mulcahy, *Diversity on Arbitrator Tribunals: Are We Getting There?*, available at http://www.blplaw.com/expert-legal-insights/articles/diversity-on-arbitral-tribunals-are-we-getting-there (January 12, 2017), last accessed January 26, 2018.

3. Notably, arbitrators and arbitral institutions are not invited to complete AIQ because of confidentiality concerns. For more information about how AI protects confidentiality, *see* Frequently Asked Questions about the AIQ on our website: http://www.arbitratorintelligence.org/aiq-frequently-asked-questions/.
4. These exemplars paraphrase questions in the actual AIQ, a static version of which is available on the Arbitrator Intelligence website: http://www.arbitratorintelligence.org/.
5. Text of the *Pact* and the form for signing on can be found at http://www.arbitratorintelligence.org/arbitrator-intelligence-pact/.
6. The categories in this graph are based on questions in the AIQ, which are in turn based on the IBA Rules for the Taking of Evidence in International Arbitration and follow a series of questions about whether document production was granted and by which part(ies).
7. The blue line is derived from an ordinary least squares (OLS) regression with length of hearing as the dependent variable and amount at stake as the independent variable.
8. Members of the AI Board of Directors include Chris Drahozal (empirical research in international arbitration), Chris Zorn (data analytics in the legal profession), Scott Gartner (mass data collection and strategic decision-making), Lee Giles (artificial intelligence and information systems), and Johannes Fedderke (econometrics). For more information about the AI Board of Directors, visit the AI website at: http://www.arbitratorintelligence.org/board-of-directors/.
9. Details about AI's Board of Advisors can be found at http://www.arbitratorintelligence.org/about/board-of-advisors/.
10. Catherine A. Rogers, *The Vocation of International Arbitrators*, 20 Am. U. Int'l L. Rev. 957 (2005), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=691470.

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SAVE THE DATE!

New York State Bar Association and Westchester County Bar Association's Dispute Resolution Sections invite you to join them at their Social Event:

April 25, 2018 | 6:00 p.m. – 8:00 p.m.

Yonkers Brewing Co. | 92 Main Street, Yonkers, NY

Cost: $20. Includes One Complimentary Glass of Wine or Beer and Hors D'oeuvres.

A Data-Driven Exploration of Arbitration as a Settlement Tool: Does Reality Match Perception?

By Brian Canada, Debi Slate and Bill Slate

Arbitration as a Settlement Tool: Costly and Slow?

As an alternative dispute resolution (ADR) mechanism for reaching settlement, arbitration is not without its critics, particularly when it comes to time and money spent. According to the *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*,[1] respectively 68% and 36% of survey respondents indicated "cost" and "speed" as being one of the three worst characteristics of international arbitration, and conversely, respectively 2% and 10% of respondents listed "cost" and "speed" among international arbitration's three most valuable characteristics. These complaints underscore similar perceptions and concerns regarding the costs of arbitration, as explored in *Law and Practice of International Commercial Arbitration* (4th edition).[2]

If the perception of a protracted duration and high cost of arbitration truly make it a less favorable dispute resolution mechanism for parties looking to reach settlement, then an analysis of case data should reveal that most documented arbitration cases would not reach an early settlement, but rather result in a later settlement after an oral hearing or by an award. Further, if this perception holds true, then for those cases that do reach settlement, such an outcome would be reached very late in the arbitration process, with commensurate associated costs. Here, we investigate the extent to which these perceived outcomes are reflected in reality by exploring a comprehensive repository of recent arbitration case data collected and maintained by Dispute Resolution Data (DRD), an organization providing online, subscription-based access to aggregated arbitration and mediation case data.

Elucidating the True Nature of Arbitration as a Settlement Tool

At the time of this writing, the DRD database contains approximately 190,000 data points, collected across 3,800 alternative dispute resolution cases, which reflect categorical and quantitative information that includes case types, commercial and industrial sectors, geographic regions, various costs and fees, dates of key events, outcomes, award amounts, and much more. These data, collected from arbitration institutions and mediation organizations through a carefully designed and controlled user interface provided via the DRD website,[3] fill a long-standing need for greater availability, clarity, and transparency of ADR information, particularly for those parties who are considering arbitration but may not necessarily understand its true value, especially in light of its perceived cost and duration.

Of the approximately 3,800 total cases in the DRD database, about 3,500 (92%) represent international commercial arbitration cases. A high-level summary of these cases is presented in Figure 1. All data represented herein are current as of December 2017. Overall, approximately half (52%) of all arbitration cases ended in settlement, with the remaining cases divided up among outcomes including an award being rendered (33%), administrative closure (6%), withdrawal (6%), dismissal (1%), with the remaining 2% of cases having other or unspecified outcomes.

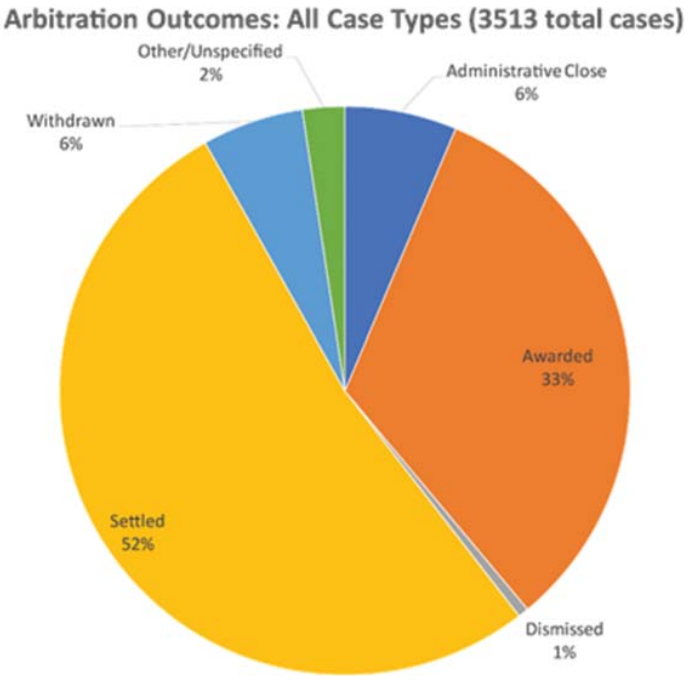
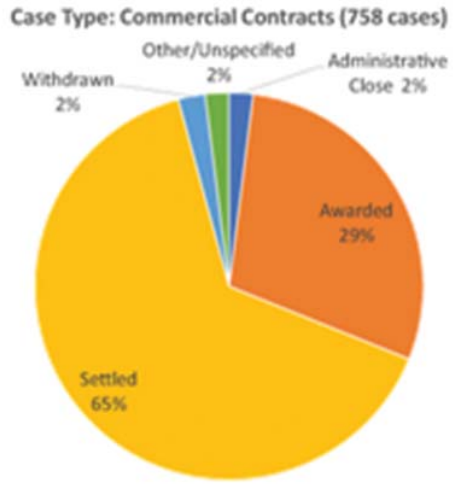
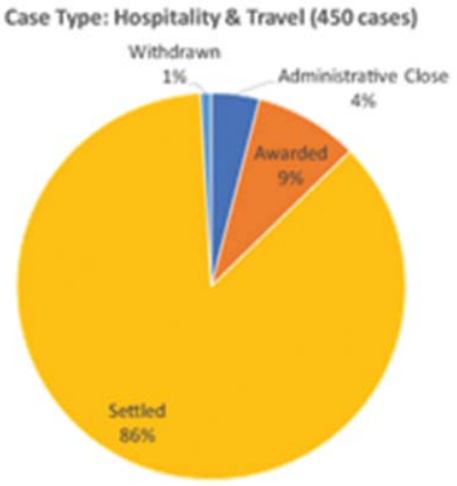


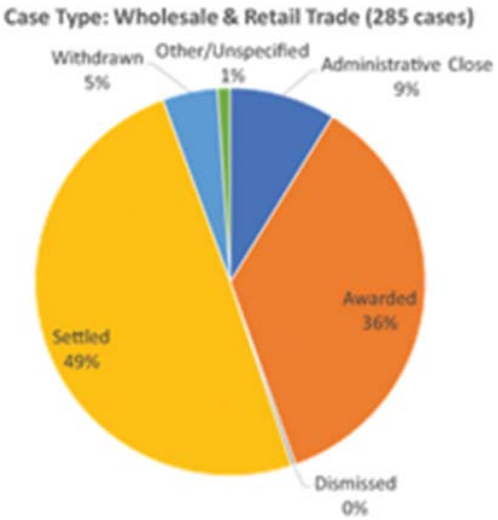
Figure 1. Outcomes of 3,513 Arbitration Cases in the Dispute Resolution Data repository. All data represented in this and the remaining figures in this article are current as of December 2017.

The DRD database reflects arbitration case types from many industrial and commercial sectors, with some sectors more widely represented than others. Presently, the top four case types, in terms of the number of records entered, include Commercial Contracts (758 arbitration cases), Hospitality and Travel (450 cases), Wholesale and Retail Trade (285 cases), and Financial Services and Banking (237 cases). From Figure 2, we can see that in all but one of these case types, settlement was the most frequent outcome.

While the representations of the arbitration cases in Figures 1 and 2 demonstrate that settlement is not only possible but also a more likely outcome than any other case conclusion type, they each nonetheless represent a single, "static" view with no regard to the point in the arbitration process at which settlement occurred.







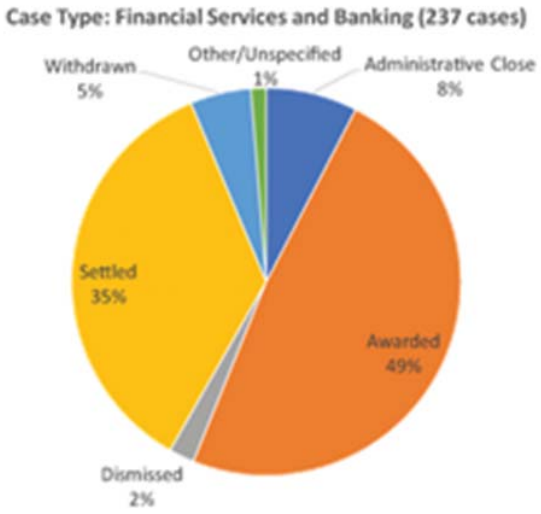


Figure 2. Outcomes of Arbitration Cases for Top Four Case Types in the DRD Repository.

When Did Settlement Occur?

For those arbitration cases that ended in settlement, it is helpful to know the point in the arbitration process at which settlement occurred, as this serves as a marker for the potential duration (and, in turn, potential cost) required to reach this outcome. For each of the arbitration cases that reached settlement, the DRD data set included dates of key points in the arbitration settlement process, including the date on which the claim was filed (hereafter referred to as the "claim date"), the date of settlement, as well as other dates as applicable (counter-claim date, preparatory hearing date, and as well as the starting and ending dates for any oral hearings). Using these dates, we determined the point at which settlement occurred by finding the event with the latest date that preceded settlement. As shown in Figures 3 and 4, the most recent arbitration event occurring prior to settlement was most frequently the claim date, regardless of case type. For these cases, we computed the number of days from the claim date to the date of settlement. Box-and-whisker plots of these data are reported in Figure 5; for each of the four most highly represented case types, we report the average length of time (in days) from claim date to settlement for each case type, with the margin of error (also in days) computed at the 95% confidence level.

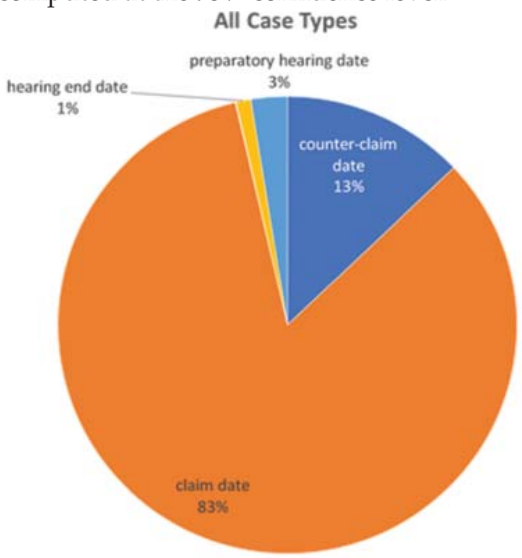


Figure 3. Most Recent Event Occurring Prior to Settlement, All Case Types

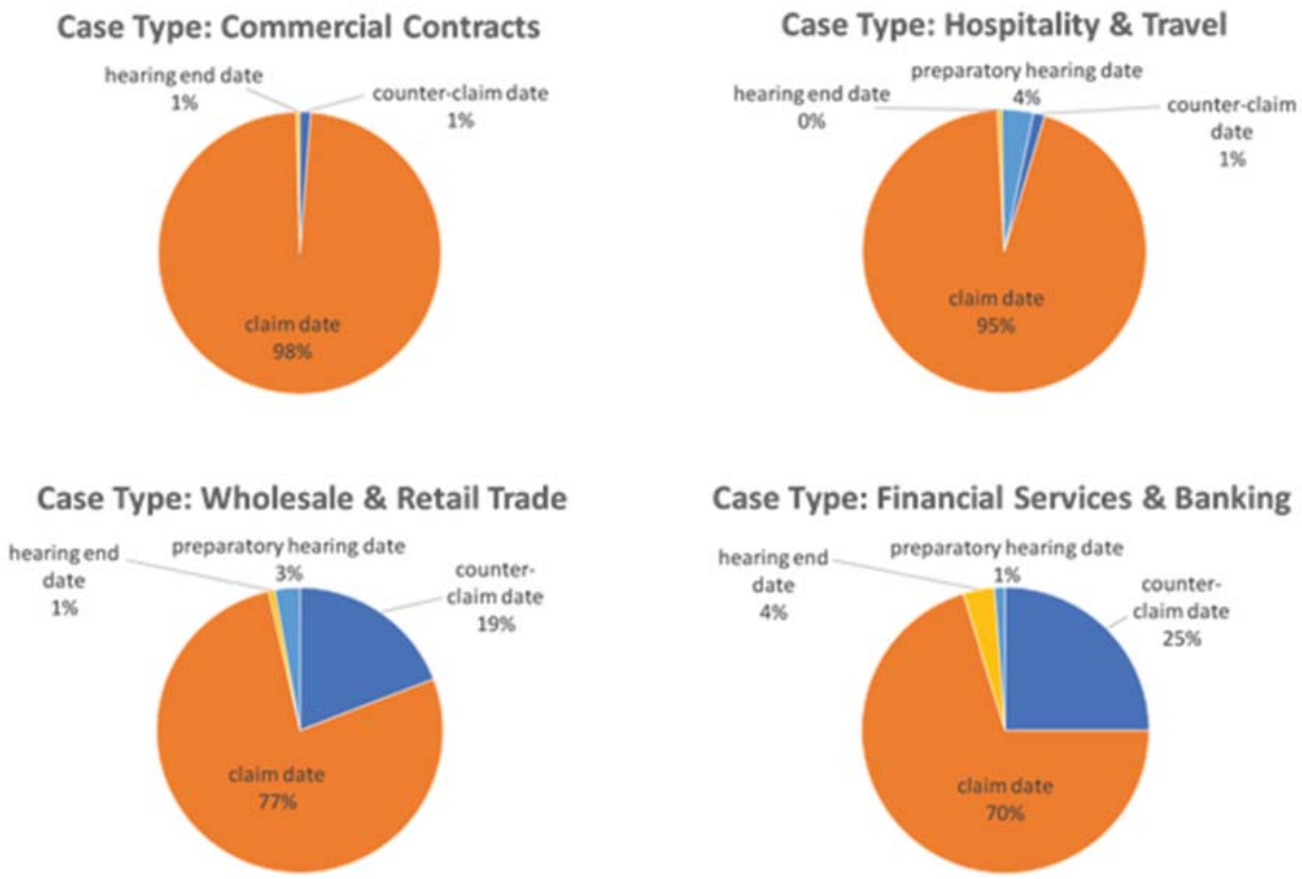


Figure 4. Most Recent Event Occurring Prior to Settlement, Grouped by Case Type

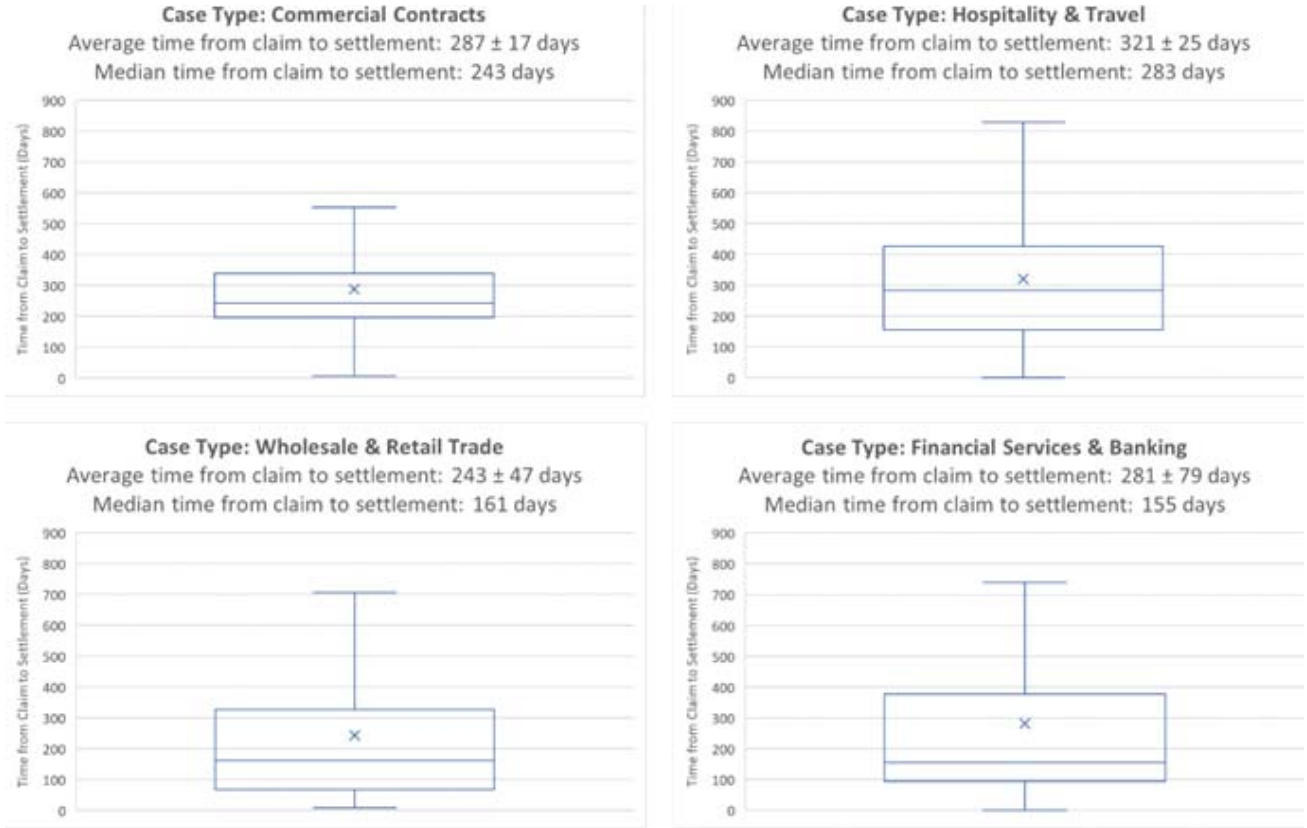


Figure 5. Distributions of the number of days to reach settlement for arbitration cases in which settlement occurred prior to any other arbitration events following the initial claim date. For each case type, the X indicates the

average time from claim to settlement. Stacked boxes represent the interquartile range (i.e., between the first and third quartiles), with the median number of days represented by the horizontal lines inscribed within each box. Individual outliers are not shown in accordance with DRD policy to safeguard the interests of our data contributors.

Concluding Remarks and Future Work

Our high-level analysis of hundreds of records' worth of actual international commercial arbitration case data suggests that arbitration has the potential to be an effective settlement tool, given that settlement is the most frequent outcome of all arbitration cases in the DRD repository, and of those cases that do reach settlement, the vast majority of cases settle after the claim date but before any other significant events in the arbitration timeline. From Figure 5, it is clear that among the four most highly represented case types (and among those cases for which the claim date is the most recent event prior to settlement itself), both the average and median number of days to reach settlement was under one year, with some variance from one case type to another.

While the current analysis provided herein does appear to provide some evidence to show that arbitration can be a mechanism to swiftly reach settlement, further study and greater transparency of actual case data is necessary for disputing parties to make the most informed decision possible. As the DRD repository continues to be populated, we are continuing to apply data analytics to the data set to identify interest trends and patterns that we believe may be useful to those who are evaluating different mechanisms for dispute resolution. In forthcoming published studies, we will show the results of deeper investigations the potential relationships between and among various dimensions in our dataset. For example, we plan to examine the effects of both case type (i.e., industrial or business sector, including more specific subtypes) and case region (where arbitration took place) on the outcome of the case, the time required to reach that outcome, and the associated costs of achieving that outcome.

Endnotes

1. White & Case LLP, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*. Available online: https://www.whitecase.com/publications/insight/2015-international-arbitration-survey-improvements-and-innovations.
2. Redfern, Redfern, A., Hunter, M., and Blackaby, N. (2004). Law & Practice of International Commercial Arbitration, 4th edition. London: Sweet & Maxwell.
3. http://www.disputeresolutiondata.com.

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The *Un*usual Suspects—Easier to Find With GAR's ART

By David Samuels

Introducing the Arbitrator Research Tool—A New Website by the Publishers of Global Arbitration Review

Have you ever wished you knew who'd seen an arbitrator "in action"—recently, so you could ask if he or she is as good as they used to be (hint: they probably aren't…)?

"…'GAR-ART'…is a site [which] launched in beta form in mid-2017. It consists of many individual arbitrator profiles that are highly searchable."

Or that you could find out so-and-so's procedural preferences, before the first procedural meeting, so you can strategize? Or are you just tired of feeling uninspired when it comes to appointments—knowing there are excellent, well-matched people out there, but you can't seem to summon any to mind?

Global Arbitration Review's 'Arbitrator Research Tool'—*GAR ART*—is here and can help on all three.

The ART—you say "A-R-T" or "GAR-ART" (vocalised as a hyphenated 'word')—is a site, from *GAR,* launched in beta form in mid-2017. It consists of many individual arbitrator profiles that are highly searchable, and serves up unique data: 'relational' information about who's worked with whom that's not available elsewhere.

In a nutshell, each profile gives you:

- A full CV and breakdown of experience,
- A 23-question interview on how the arbitrator approaches cases, and (the secret ingredient in the shampoo)
- The names of counsel and arbitrators who've seen this person in action recently and who might be contacted for an eyewitness account: the people they've sat with, or had as advocates, on cases.

At the time of writing, ART is at 200 arbitrators and growing. It will hit 350 before long, and 600 in time. It is intended to, and does, include the well-known and the less well known. I suggest you visit the ART A-Z page (find it via the home page), which lists everybody who is featured in the tool. You will find names you know and names you don't.

At this point, I'd *like* to show you the ART in action. (And there is a video on the ART home page that will do just that (https://globalarbitrationreview.com/arbitrator-research-tool). Alas, this is print. So instead here's a description of how it works.

How It Works

The ART has two modes of use.

The first: to find an arbitrator who fits the objective aspects of a case. Let's say, for instance, you want a female with experience applying UAE law. You set those parameters in the search and, voilà, you get four names.

You can now explore their individual profiles further.

Or, perhaps you needs someone experienced as a chair (10+appointments), who also knows Germany as a seat. You change the criteria to select those. Now you get six names.

Used this way, the ART can suggest good people you may not independently think of. And, if you don't know them, it will also help you form an impression of what they might be like, and how they might approach a case—buttressed by people you could contact for an eyewitness's account.

This is the second way to use it: to get a feel for an arbitrator new to you.

Here you go to an arbitrator's main page. (Type in the person of interest—and if they're included, the search field will autocomplete.)

So, say we are researching a particular individual. Go to his or her main page. You are now looking at a large page with the arbitrator's photo on it. It has four segments: contact details (beside the photo); a yellow button that says "Worked with recently"; a section called "Q&A"—blank but with a clickable '+' sign; and then below that "Data."

Under Data, you see headings such as gender, nationality, languages, number of arbitral appointments in the past three years, number of those as chair, seats, applicable laws, and number of appointments in investment cases, with the arbitrators's data for each. All those headings are searchable.

The Procedural Questionnaire

What about the arbitrator's procedural preferences?

Here you need to click on '+' sign beside "Q&A." A question and answer section pops open. In this you have answers to 23 questions on everything from secretaries

to whether the arbitrator favours skeleton arguments, to how they approach mid-case settlement, and costs.

Here is an example of the questions and answers.

> **As co-arbitrator—are you in favour of the parties interviewing candidates for chair that you have identified pre-any final appointment?**
>
> Answer: Yes, if parties so wish. They should both have the opportunity.
>
> **What is your preference on the presentation of evidence?**
>
> Answer: Witness statements and expert reports, followed by an examination of the witnesses/experts at a hearing.
>
> **What is your approach to counsel misconduct? Do you prefer to deal with it then and there or to wait until the end of the case?**
>
> Answer: It depends very much on the nature of the misconduct. To deal with it in the course of the proceedings requires a very high degree of diplomacy.
>
> **What is your usual approach to costs?**
>
> Answer: (That is a rather broad question.) Usually, for the allocation of costs I follow the general principle that the outcome of the dispute governs the allocation, unless the applicable rules or very special circumstances provide for a different rule.
>
> **What is a 'normal' turnaround time for you to deliver an award (assuming no exceptional circumstances)?**
>
> Answer: 1-2 months.
>
> **Would you describe your procedural style as closer to common or civil law?**
>
> Answer: A pragmatic mixture of both depending of the culture of the parties. It is important to find out what the expectancies of the parties are."

All of the ART profiles have this Q&A.

How arbitrators answer vary. Nobody wants to paint themselves into a corner. So the style of answers vary a lot. Some are very terse. Others, such as the arbitrator above, are medium length. Others go into more depth. Here's an example of someone who goes into depth.

> **How much does your approach vary, case to case?**
>
> Answer: I consider it very important to engage with the parties at the outset regarding matters of procedure and expectations for timetable. Of course, like all arbitrators over the years I have developed various procedural suggestions for the parties, depending on the nature of the dispute, but I do not regard these as one-size-fits-all. I do not have a standard "Procedural Order No. 1" that I attempt to impose across all cases.
>
> **What is your approach to proposing settlement mid-case?**
>
> Answer: I do not consider it appropriate to inquire into the status of settlement discussions or to suggest such discussions. If the parties mutually wish to suspend arbitration proceedings to pursue settlement or mediation with other interlocutories, that is fine, but I do not consider it appropriate that I personally be engaged in that exercise.
>
> **What is your approach to identifying potentially dispositive issues early?**
>
> Answer: In my proposed agenda for the first procedural session I include an inquiry to the parties as to (a) whether they believe there are any issues of law (including jurisdiction or arbitrability) that are potentially dispositive or might significantly narrow the issues in dispute or the scope of factual inquiry, and (b) if so, a discussion as to whether such issues are suitable for resolution as a preliminary matter or, based on their factual matrix or otherwise, are more appropriately reserved for resolution as part of the final award—in each case, taking into account the expectation that proceedings should be conducted with a view to expediting the resolution of the dispute. I find that including these questions expressly in the first procedural agenda tends to focus everyone's attention at the outset on the optimal structuring of proceedings, in light of the particular parameters of the dispute.

Before launch, we didn't give all that much thought to the Q&A section. We figured it would be useful, but slightly decorative at the same time. Not the case, apparently.

Many of our early users have praised the insight on offer from the questionnaires.

I recall a younger U.S. partner who tested ART before launch in particular, who raved about how useful it was. He had a particular female arbitrator as chair coming up in a case, someone he didn't know (except by name). As he explained, thanks to the ART Q&A, he could tell "she's much more of a 'civil' lawyer than I would've thought." As a result he and his team changed their whole approach to the case: "We would've got there eventually, but it probably saves us six months of making a less than ideal impression."

The "Worked With" Data

You've absorbed the Q&A and know the experience. Now you'd like to hear from someone you know what this arbitrator is like. This brings us to the final piece of the ART jigsaw puzzle: the relational data.

To bring it up, click "Worked with recently." A second page opens, with the names of arbitrators he or she has chaired or had acted with as co-arbitrator, and counsel the arbitrator has seen on cases in the past three years. They're arranged in alphabetical order, in columns.

Other people will have a column called "chaired by"—listing the arbitrators who've been president of their tribunals. If you want to email any of those people, they're hot-linked to a professional email address. So an email pops open when you click.

Whether you know any of them depends on your own personal network. But the chances are in this field you do, or you know someone who will. So you're a step closer to being able to get that all important first-hand impression.

Incidentally, this relational data comes with the following disclaimer:

> *The information on this page is sourced and checked by* GAR*, not the arbitrator. It is presented as a route to additional insight on the individual. It is not a complete picture of their work. Please use it with respect as set out in our terms and conditions*.

In other words, these names are collected by *GAR* rather than the arbitrator in question. Nevertheless, as you can see it can be pretty comprehensive.

And that's it.

The tour of ART is over. We hope it's come across as simple, elegant, and easy to use, and similar to what for a lot of people already happens in real life. You can probably already think of lots of things you'd add into it if you could.

Reactions

ART went live in a beta form in April 2017. It was an anxious moment. There are so many things you know you won't spot until people start using it (hence the beta approach).

People, however, have been very kind in their judgment.

One of the comments an independent arbitrator who works from Texas tweeted, soon after we gave her access: "So impressed with the GAR Arbitrator Research Tool. This is what the industry has been missing."

Another beta tester was also supportive. She told us ART could "democratise the access to arbitrators and facilitate the introduction to lesser known arbitrators," and would also be great for projects that require "positive discrimination."

Meanwhile, a very senior arbitrator said it could have value to arbitrators too, where they have to decide who they want on a tribunal, e.g., as chairman. "I could see this being used to close the gap" between past reputation and current performance/service levels," he said, "because it's really remarkable the degree to which someone's performance and their reputation can be out of sync."

The "new" always attracts attention, so it was inevitable that the ART would be met with some questions.

I got to hear some of the concerns first hand.

Around the time we launched, in April 2016, I took part in a panel on arbitrator selection at the Corporate Counsel International Arbitration Group—the CCIAG—annual meeting, held in London.

"Anyone who wants to be included in the ART can. The only criteria requirement is that you had some arbitrator appointments in the past three years. It's also free."

Discussion of the ART rather took over that part of the meeting. There were lots of views. On the negative side of the ledger, two thoughts predominated. One*, won't this inspire challenges*? And two *wait a minute … won't this be bad for me and my business? Privileged insight into the arbitrator pool is part of what I'm selling. You're taking my edge away!*

I've heard the same points a few times since.

These days, when the topic of challenges comes up, I tend to give the same answer as the moderator of my CCIAG panel gave that day. He said that he has always

regarded the arbitrator challenge as part of the hygiene of the system: if a challenge needs to be made, it needs to be made, and there's little ultimately to be gained by putting barriers in its way.

It's hard to put it better than that.

But if I had to add anything it would be: I'm not a practising lawyer, but simply from first principles, it would be hard to bring a challenge using solely the information in the ART. Though it's useful, it doesn't give you that much relational data to use. It doesn't show you, e.g., who appointed whom, or how often a counsel has appeared in front of an arbitrator in the past three years—the sort of thing you'd need to establish a pattern. Turning the ART data into a challenge would be a challenge. (It would also be against our terms of use and lead to your being banned from further use. And there may be additional deterrents we could devise.)

As for the fear it will take business away from established counsel, well, that's harder to rebuff. Nobody likes to help their competition, nor should they. But as I suggested at the CCIAG meeting, I think aficionados of arbitration can be a bit more self-confident. If something is useful to the layman, it's going to be even more useful to them. I expect ART to make the really good people even better.

At the CCIAG I was asked what the reaction from "the frequent flyers" had been. I was candid. Some have refused to let us include their names. Although we reserve the right to "go hostile," since we have our information double sourced, we haven't. Right now, including them isn't that important, except to encourage others (and we have enough senior people to accomplish that). As one naysaying frequent flyer put it—"nobody needs to get information about me." He also said he thought it was a "good project—for the others."

Why do those frequent flyers not want in? Where we've had a reason, it's been: challenges. I have my own view about the authenticity of this reason but now is not the place to get into details. I'd like to underline, too, that not all of the frequent flyers are outside ART. Several are in, and more are in transit so to speak—they're completing their Q&As so we can set them live.

Overall, at the CCIAG meeting, the crowd was warm to the ART, with several floor speakers noting the benefits.

A number of speakers from the floor immediately got the benefits—that it would be a useful aide memoire; that it would help to bring good people to fore more easily; that it would allow you to find someone who was a good fit for a case who was not one of the usual suspects to be found, "that it might help you to appoint someone you didn't really know but who was a good fit otherwise for the case" (one of the "unusual suspects" a member of the audience put it). Several were in-house counsel who would like to play more of a role in arbitrator selection. The ART may help them.

At the end of my session I asked the CCIAG audience for a quick vote on our prospects:

"Who thinks the ART is a net positive?" I started.

A majority of the audience, which was about 60 strong, raised its hands.

"And who thinks ART may cause more problems than it solves?"

No hands, although a few people abstained.[1]

Where Next?

Anyone who wants to be included in the ART can. The only criteria requirement is that you had some arbitrator appointments in the past three years. It's also free—your only investment will be the time it takes to do the questionnaire.

Feel free to contact me at david.samuels@lbresearch.com for more information. Ditto if you'd like to join the 70+ firms who now have access to the system, and who use it every day, among them some of them the largest players in the industry. You have to have a GAR subscription, but after that the money required is very favourable. Sadly, we cannot offer a per project rate at this point in time.

It's becoming clear that ART is a project that will never truly end. We're already working on the ART version 2.0, which will have all sorts of extra useful functionality. To that end, I'm about to put together a user group/advisory board to guide us. ART version 2.0 will be able to do even more things, such as suggesting arbitrators you may want to look at, based on previous searches. And there are some other great ideas percolating I'd rather not say too much just yet. Let's just say, there may be a way to do feedback on performance that doesn't turn you into 'Tripadvisor for Arbitrators' but is still extremely useful (without being burdensome). Watch this space!

Endnote

1. For a report on the CCIAG session, see Douglas Thomson, GAR Arbitrator Research Tool Gets London Grilling, 24 March 2017, available at https://globalarbitrationreview.com/article/1138585/gar-arbitrator-research-tool-gets-london-grilling.

David Samuels is editor in chief and publisher of *Global Arbitration Review*, as well as a number of its sister publications.

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The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration—Taking a Test Drive Down the Highways and By-Ways of Best Practices (4th Edition)

Edited by Jim Gaitis, A. Holt Gwyn, John J. McCauley and Laura Kaster
Reviewed by Simeon H. Baum

One Law for the Lion & Ox Is Oppression.
William Blake (*Marriage of Heaven & Hell*)

The College of Commercial Arbitrators is an august group of experienced arbitrators who, over the years, have done more than gather for self-congratulatory sessions over whiskey and cigars in smoke filled pubs. Among their varied contributions to the Dispute Resolution field is a *Guide to Best Practices in Commercial Arbitration*, which the College first issued in 2006. It has now been reissued in a fourth edition, under the editorial leadership of Jim Gaitis, with a trio of fellow editors—A. Holt Gwyn, John J. McCauley, and our own Laura Kaster—co-editor of NYSBA's *Dispute Resolution Lawyer*.

Having become aware of this new *Guide to Best Practices*, I decided to take it for a test drive. If I were to develop a list of tricky arbitration questions that come up for many of us during our work as arbitrators, would this *Guide* be a handy tool? Would it provide a workable roadmap that would lead the reader to illuminating discussion on one's vexing issue?

I invite you to accompany me on the test drive, and encourage you to determine whether the *Guide* drives like a Maserati. If it does, you might be inclined to take it for a ride yourself.

Before our tour, one might marvel at the resources that went into the development of this work. The current volume has 104 contributors,[1] all of whom, by dint of membership in the college, draw on many years of experience as arbitrators practicing at the highest level of our profession. A review of these names reveals a Who's Who of commercial arbitrators on the domestic and international scene. Surely the efforts of this group can generate some guiding light.

Of particular pride is the number of members of NYSBA's Dispute Resolution Section[2] who are in their ranks—approximately 25 percent by my count. While I would choose not to offend by identifying some and not mentioning well-deserving others, I must highlight two contributors whose inclusion is particularly affecting. These are the late David Brainin and Carroll Neesemann. Over 20 years ago, I came to rely on David, in ADR Bar gatherings, to be a consistent voice of balance and intelligence on any issue that was being addressed by the group. Carroll Neesemann, who for years ran Morrison & Foerster's litigation group in New York, was the authority on the law of arbitration in any bar group in which I participated. I miss them both. Years ago, Carroll told me that, in his view, the best arbitrator in New York was his dear colleague John Wilkinson, who is also on this list. NYSBA can be proud to note that both John Wilkinson and fellow contributor Edna Sussmann are past chairs of this Section.

"The result is an effort to gather best practices while recognizing variety and complexity. The Guide *embraces this diversity by setting out core concepts and procedural issues and sharing contrasting views in a manner that enables the user to strike a balance and have a clearer sense of the range of considerations that should inform decision making on the given issue."*

Let us now shift focus from the people to their task—defining best practices in arbitration. Arbitration, even if narrowed to the commercial zone, is a tremendously varied field. There are matters of all shapes and sizes, in a wide array of substantive areas. Parties themselves have widely varying wishes for the dispute resolution process when they opt to go for arbitration. Some seek speed, efficiency, low cost and informality, while others might wish to preserve due process protections, discovery opportunities, and even application of governing law or opportunities for review that result in processes antithetical to those

envisioned by this first broadly described group. Counsel drafting arbitration clauses or representing parties in arbitration, arbitral forums developing procedural rules and administrative protocols, and arbitrators applying their craft may have widely divergent, yet thoughtfully legitimate, views on what should take place in the arbitral arena.

Some will favor reasoned awards, others a one liner, at best. Some would go straight to hearing, while others would craft elaborate discovery. Some permit motions; others eschew them. Some seek nearly judicial processes; others might wish for a non-attorney expert in their field to decide wisely and pragmatically in a manner reflecting custom of the industry or usage of the trade, even if, *e.g.*, it means overlooking a statute of limitations or the ancient documents doctrine when considering a 20-year history of bordereaux in a reinsurance matter.

With the complexity and variety existing in the arbitration field, one wonders whether—even as the product of leaders in the arbitration field—a best practices guide is an act of hubris. While some might rest with marveling at this complexity, seeing a world in each grain of sand and heaven in each wild flower, arbitrators are a brave and decisive bunch. The College of Commercial Arbitrators, following efforts commenced in 2001 by the American College of Construction Lawyers, then joined by the CCA in 2003, girded up their loins and gave it a try.

The result is an effort to gather best practices while recognizing variety and complexity. The *Guide* embraces this diversity by setting out core concepts and procedural issues and sharing contrasting views in a manner that enables the user to strike a balance and have a clearer sense of the range of considerations that should inform decision making on the given issue. It might be impossible accurately to trace the path of a spinning gyroscope as it maintains balance while in motion. Nevertheless, the balancing act of the CCA has produced a map that we are about to put to the test.

As we ready for the race in our would-be Maserati, it is helpful to view the basic lineaments of this map. The *Guide* is structured in a manner that facilitates an intuitive search for answers. Its 20 chapters and two appendices run in roughly chronological order according to the stage one might be in during an arbitral proceeding.

The first five chapters address matters preliminary to arbitration. After the introduction (Chapter 1) come: appointment, disclosures, disqualification of neutral arbitrators (Chapter 2); non-neutral arbitrators (Chapter 3); fees and expenses—a theme dear to every neutral's heart (Chapter 4); and determining jurisdiction and arbitrability—a law rich review (Chapter 5).

The next five chapters address the work of arbitrators just before conduct of the hearing itself. This covers prehearing conferences and prehearing management (Chapter 6); motions (Chapter 7); discovery (Chapter 8); a newly minted chapter on summoning nonparty witnesses (Chapter 9); and eDiscovery (Chapter 10).

Smack in the middle is conduct of the arbitration hearing itself (Chapter 11). This section is made manageable by moving from consideration of design of the process through management of its elements—including exhibits, testimony, time, logistics, and even site visits—into an extraordinary and fascinating treatment of conduct of the arbitrators themselves during hearings, and finishing with briefing and closing arguments.

The next couple of chapters wrap things up chronologically, addressing awards and substantive interlocutory decisions (Chapter 12), and finally post award matters (Chapter 13). The treatise next presents another freshly crafted chapter on the unique and increasingly timely role of emergency arbitrators (Chapter 14). This is followed by one of the most fascinating, reflective and useful pieces in the *Guide*—a consideration of intratribunal relations (Chapter 15). This chapter alone is a rare gift to the arbitration bar.

The balance of the treatise covers special situations. Following an excellent treatment of class actions—embracing arbitrability, clause interpretation, class certification, and approval of class settlements, among a variety of essential subjects—(Chapter 16), the *Guide* introduces the last of the three new chapters introduced in this 4th edition: unique issues in construction arbitration (Chapter 17). Two comprehensive chapters on international arbitration, one on preliminary matters (Chapter 18) and the next on the conduct of proceedings (Chapter 19), are followed by a thought provoking piece on hybrid processes (Chapter 20). This last piece covers arb/med, med/arb, and arb/med/arb. It does a good job of laying out the ethical thicket that one must navigate when shifting between processes. It spells out areas for disclosure and waivers; highlights challenges to impartiality and the appearance of impartiality; and wisely cautions neutrals to be sure that the operative agreement addresses what information arbitrators will consider should the process morph back into an arbitration after the conduct of *ex parte* discussions in the form of mediation caucuses.

Our overview of the *Guide* remains as incomplete as would be a description of Fisher & Ury's classic, *Getting to Yes*, if one failed to mention the BATNA. Just as the BATNA is first mentioned in the second edition's tail to that classic, here too, the 4th edition features two timely and useful appendices that were created for this new version of the *Guide*. Appendix I presents a guidance note on arbitration and social media. How many of us have wondered what to do with that pesky LinkedIn site, revealing over 500 of one's nearest and dearest friends? Appendix II offers a guidance note on maintaining security of an arbitrator's electronic information. It is a cautionary tale for the tech-unsavvy, to say the least.

Well, we have spent enough time racing the motors as we prepare for our test drive. It is time to take this baby for a run. Let us take a look at how it handles with a few quirky or essential questions.

- Can someone please give me a checklist of issues to address in a pre-hearing call?

Sure. Take a look at the 37-item checklist at Chapter 6.III.C.

- How do I handle differences with fellow arbitral panelists?

Take a look at Chapter 15 and get back to us.

- I am not sure how to bill compared to my other panelists.

Really, you ought to read Chapter 15.

- Is it ok for me to handle a class action arbitration?

Head over to Chapter 16.

- Folks are asking me to move from my role as arbitrator to engage in an arb/med/arb process. Is this permissible, and, if so, how do I structure a good process while preserving my neutrality and the trust of the parties and counsel?

Turn left at Chapter 20.

- What the heck is a Bayesian search? Counsel keep mentioning this in their squabble over e-Discovery.

Consult the glossary in Chapter 10. (Ok, I will admit that I invented this question only after reading Chapter 10. I am glad to know what a Bayesian search is now.)

- I could use some tips in handling technology during our hearing.

Go straight to Chapter 11, then take a left at subsection VII.

- Isn't there a better way to deal with expert testimony than having the first expert opine during claimant's case and waiting two days until the second expert opines during respondent's presentation? I have a hard time remembering what the first one said, and really have some follow up thoughts for the first expert after hearing the second.

You will find some creative ideas on putting experts together in Chapter 10.

- Can I award punitive damages?

You will achieve good mastery (this is a pun) of this issue after consulting Chapter 12.V.B.

- What is the optimal way to organize the timing of Exhibits?

Speed over to Chapter 11.IV.

- During my last visit to Equinox gym, my trainer kept complaining that he needed a more "muscular" arbitrator. What can I do?

Put on the brakes and consider what Chapter 8 has to say on proportionality in discovery, and then move forward to Chapter 10's application of this notion in the e-Discovery context.

- Is it ok for me to do my own legal research? I am not sure counsel have given me all that I need to make the right decision.

There is a traffic jam over at Chapter 6.V.S. Something tells me a good number of arbitrators are considering this question over there.

I suspect the reader has gotten the message. The *Guide* passed this road test with flying colors. Yet no review is fully credible without a little spice. So here are some additions, enhancements or modifications one might look for in a 5th Edition.

Even though John Wilkinson and Carroll Neesemann were among the chief authors of the excellent protocols on the handling of discovery in domestic commercial and international arbitration, which were created by NYSBA's Dispute Resolution Section and received with approval by our House of Delegates,[3] search as I might, I saw no mention of them in the *Guide*. I hope they are offered for reference in the 5th edition. Similarly, one hopes that the authors of Chapter 20 add "ACR" to the acronym used for what is typically referred to as the AAA/ABA/ACR Model Standards of Conduct for Mediators. It is vital to show due regard for all contributors to those essential standards, including the non-attorney neutrals who are part of that organization.

A major component of a wish list for volume five would be guidance on deliberation and decision making itself. This could include tips on how to use a *Daubert*-like analysis when considering what weight to give to an expert's testimony. It could include advice on how to assess, conceptualize, and calculate damages. It might even include thoughts on how to judge credibility of witnesses. It might include a piece on cognitive biases and cross-cultural differences applied to the arbitrators' assessment of testimony, decision making, and impression of and relations with one's fellow arbitrators.

The 37-part checklist for pre-hearing conferences could add two more items: need for translators and interpreters, and whether a record of the hearing is needed. More might be developed on theories addressing whether to create a detailed or terse award.

Once during the fourth battle of Kawanakajima, the famous 16th century *daimyo*, Takeda Shingen, was resting in his tent when his foe, Uesugi Kenshin, rushed in on horseback. With aplomb, Takeda Shingen reputedly lifted his iron fan and effectively deflected a blow from Uesu-

gi's sword, at the same time exclaiming "a snowflake on a blazing fire." The above wish list for volume five is no more than a few snowflakes extinguished by the illumination offered by the *Guide to Best Practices in Commercial Arbitration*. I unequivocally recommend it to the reader.

Endnotes

1. The 104 contributors are: Gerald Aksen; Henri C. Alvarez; Markham Ball; John M. Barkett; John A. Barrett; William L. D. Barrett; William G. Bassler; Albert Bates, Jr.; Axel Baum; Bruce W. Belding; Gary L. Benton; Trey Bergman; R. Doak Bishop; John T. Blankenship; John P. Bowman; John K. Boyce, III; David N. Brainin (deceased); Thomas J. Brewer; John E. Bulman; Joseph F. Canterbury, Jr.; James H. Carter; Richard Chernick; Winslow Christian (deceased); Louis Coffey; Deborah A. Coleman; Peter D. Collisson; Louis A. Craco; Philip E. Cutler; Robert B. Davidson; Louise E. Dembeck; M. Scott Donahey; Paul J. Dubow; James W. Durham; Neal M. Eiseman; Jay W. Elston; Eugene I. Farber; William B. Fitzgerald; James M. Gaitis; Patricia D. Galloway; Walter G. Gans; Barry H. Garfinkel; Eugene S. Ginsberg; Ruth V. Glick; George Gluck; Marc J. Goldstein; Herbert H. (Hal) Gray, III; James P. Groton; A. Holt Gwyn; Sally Harpole; David M. Heilbron; John W. Hinchey; John R. Holsinger; L. Tyrone Holt; Robert A. Holtzman; Carl F. Ingwalson, Jr.; John Kagel; Alan M. Kanter; Laura A. Kaster; Richard H. Kreindler; A. J. Krouse; Urs M. Laeuchli; Louise A. LaMothe; June R. Lehrman; Larry R. Leiby; Nancy F. Lesser; Richard A. Levie; William H. Levit, Jr.; James R. Madison; Richard R. Mainland; John Burritt McArthur; John J. McCauley; Bruce E. Meyerson; Lawrence R. Mills; Carroll E. Neesemann (deceased); Lawrence W. Newman; Susan H. Nycum; Michael S. Oberman; Philip D. O'Neill; Allen Overcash; Gerald F. Phillips (deceased); Elliot E. Polebaum; Lucy F. Reed; Thomas D. Reese; Barbara A. Reeves; Kathleen A. Roberts; Deborah Rothman; John M. Seitman; Vivien B. Shelanski; John A. Sherrill; Stanley P. Sklar; Allison J. Snyder; Francis O. Spalding; Stephen S. Strick; Edna R. Sussman; R. Wayne Thorpe; Christi L. Underwood; Curtis E. von Kann; Robert W. Wachsmuth; David E. Wagoner (deceased); Irene C. Warshauer; Robert P. Wax; Dana Welsh; Michael S. Wilk; John H. Wilkinson.
2. With apologies to any I miss or mischaracterize, I believe the following list, consisting of roughly 25% of the total contributors to this CCA *Guide*, have also belonged to NYSBA's Dispute Resolution Section: Gerald Aksen; William L. D. Barrett; Axel Baum; David N. Brainin (deceased); James H. Carter; Louis A. Craco; Robert B. Davidson; Louise E. Dembeck; Neal M. Eiseman; Eugene I. Farber; Walter G. Gans; Barry H. Garfinkel; Eugene S. Ginsberg; Ruth V. Glick; George Gluck; Marc J. Goldstein; Laura A. Kaster; Carroll E. Neesemann (deceased); Lawrence W. Newman; Michael S. Oberman; Lucy F. Reed; Kathleen A. Roberts; Vivien B. Shelanski; Edna R. Sussman; Irene C. Warshauer; John H. Wilkinson. To the extent I have included any who are not members of this Dispute Resolution Section, we expect applications shortly.
3. One can find these protocols online at: https://www.nysba.org/Sections/Dispute_Resolution/Dispute_Resolution_PDFs/Guidelines_for_the_Efficient_Conduct_of_the_Pre-hearing_Phase_of_Domestic_Commercial_Arbitrations_and_International_Arbitrations.html.

Simeon H. Baum, President of Resolve Mediation Services, Inc. (www.mediators.com), has successfully mediated or arbitrated more than 1,000 disputes. He is the founding Chair of NYSBA's Dispute Resolution Section. He advises New York Court system on ADR and has trained their Commercial Division mediators for the last 20 years. In 2011, 2014, and 2018, Best Lawyers selected Mr. Baum as New York's ADR "Lawyer of the Year." He teaches on the ADR faculty at Benjamin N. Cardozo School of Law. SimeonHB@DisputeResolve.com.

ADR Advocacy, Strategies, and Practices for Intellectual Property and Technology Cases (Second Edition)

Edited by Harrie Samaras
Reviewed by Joseph P. Zammit

There can be little doubt that there has been an ever increasing trend over the past two decades toward the use of ADR to resolve business disputes, both domestically and cross-border. More and more, faced with the delay, expense, and public relations risks of traditional court litigation, not to mention the unpredictable nature of jury verdicts, clients themselves have demanded that their counsel consider the advantages of ADR. After a somewhat slow start, this has become just as true in disputes involving intellectual property and technology as in other types of commercial matters.

Yet, despite a growing number of ADR specialists, the American bar in general has failed to keep pace with the sophistication and variety of modern ADR. Old attitudes die hard, and unfortunately many practitioners still seem to approach ADR as simply litigation in a conference room rather than a courtroom. Lawyers (and business people for that matter) could greatly benefit from a comprehensive but concise guide to the gamut of ADR choices, the rules that govern their operation, and the strategies and techniques for successfully employing them. Stepping admirably into the breach, the ABA Section of Intellectual Property Law has given us *ADR Advocacy, Strategies, and Practices for Intellectual Property and Technology Cases* (Second Edition), edited by Harrie Samaras. Ms. Samaras, who is not only the work's editor but also a co-author of five of the book's 13 chapters, is impeccably credentialed for the job. She is a full-time neutral focusing on arbitrating and mediating IP and technology cases, a Distinguished Fellow of the College of Commercial Arbitrators and the Chartered Institute of Arbitrators, as well as a Distinguished Fellow of the International Academy of Mediators, and also consults, teaches, and trains in the area of ADR.

ADR Advocacy is especially directed to the use of ADR in IP and technology cases, and it splendidly fulfills that objective. Chapter 1 (by James F. Davis) provides an overview of the various ADR tools and their applicability to resolving IP/technology disputes, illustrating his points with numerous helpful "cases in point" drawn from IP and technology matters. Throughout the balance of the book specific issues presented by IP/technology cases are addressed, such as the selection of appropriate mediators and arbitrators, the effective use of experts, the advisability of tutorials, the resolution of FRAND disputes, and the implications of 35 U.S.C. § 294(d) (mandating that any arbitration award in a patent case become part of the public patent prosecution file of the patent at issue). Indeed, entire chapters are devoted to forms of ADR unique to IP matters: the Federal Circuit's appellate mediation program for IP cases (Chapter 8 by J. William Frank and Harrie Samaras), the Section 337 mediation program at the U.S. International Trade Commission (Chapter 9 by Hon. Theodore R. Essex, Lisa R. Barton, and James R. Holbein), UDRP proceedings (Chapter 11 by Dina Leytes and Harrie Samaras), and the use of Special Masters in IP cases under Rule 53 of the Federal Rules of Civil Procedure (Chapter 12 by Don W. Martens and Gale R. ("Pete") Peterson) (although this last is not strictly speaking unique to IP cases, and it might be argued is not a form of ADR at all, as it is a mechanism employed in a federal district court litigation).

But the value of *ADR Advocacy* is hardly limited to IP practitioners. On the contrary, it delivers a wealth of information, insights, strategic advice, and tactical considerations useful to ADR advocates in any sort of business dispute. Before discussing a few examples of these, however, it should be said that, despite its multiplicity of chapter authors, the book definitely conveys the feel of an integrated whole, a tribute to Ms. Samaras's skill as an editor. After Chapter 1 introduces the various forms of ADR, the book proceeds in logical fashion with chapters on negotiating and drafting ADR clauses (Chapter 2 by Frank L. Politano); Early Case Assessment, a systematic approach to collecting and analyzing information about a dispute and its business impact, with a view to enhancing predictability and informed decision-making (Chapter 3 by Cynthia Raposo and Harrie Samaras); initial damage assessments to keep things real and determine whether early resolution is economically advisable (Chapter 4 by Carol Ludington); mediation from several viewpoints (Chapter 5 by Magistrate Judge Mary Pat Thynge, Chapter 6 by Kevin Rhodes, and Chapter 7 by Merriann Panarella and Harrie Samaras); two forms of specialized mediation, namely, appellate mediation at the Federal Circuit (Chapter 8 by J. William Frank and Harrie Samaras) and Section 337 mediation at the ITC (Chapter 9 by Hon. Theodore R. Essex, Lisa R. Barton, and James R. Holbein); arbitration (Chapter 10 by Michael H. Diamant, Stephen P. Gilbert, Laura A. Kaster, and Harrie Samaras); a specialized and expedited form of arbitration for domain name disputes (Chapter 11 by Dina Leytes and Harrie Samaras); the use of Special Masters in litigation (Chapter 12 by Don W. Martens and Gale R. ("Pete") Peterson); and finally a discussion of some tools useful to persuade, evaluate, and communicate in ADR proceedings (Chapter 13 by Kevin R. Casey). There is consistency in format, terminology, and the use of numerous examples and appendices throughout.

One is hesitant to discuss in more detail some chapters in *ADR Advocacy* for fear of slighting the rest. It must be said that they are all of the highest quality, and their authors are uniformly highly qualified and very experienced in IP/technology ADR. Nevertheless, in order to provide a better flavor of the scope and variety of *ADR Advocacy*, this reviewer has chosen to expand upon three of the chapters.

Hon. Mary Pat Thynge's chapter on mediation from an experienced magistrate judge's perspective presents a practical, common-sense, business focused discussion of the mediation process in IP cases and, by extension, business disputes in general. From personal experience, this reviewer knows Judge Thynge to be a thoughtful, patient, and congenial mediator. Her view of what mediation is—or should be—is really quite perceptive:

> Mediation is not compromise—it is negotiation….For counsel and their clients to discern…what their *final* trial presentation will be entails a major investment of time, emotion, resources, and money, with no guaranteed benefit.
>
> Mediation returns to the parties what litigation has taken away—control. It allows the parties to control the decision-making process. Unlike litigation and trial, it requires their direct, intimate involvement and judgment, and thereby provides them the means to tailor a result, whether through a settlement agreement, license, or other business arrangement, which addresses their individual needs. It gives parties resolution opportunities beyond the limited constraints of a particular case, allowing a global, rather than piecemeal, approach to finality, and it maintains privacy within the confines of the law and mandatory reporting obligations. It allows parties to choose the method for resolving prospective disputes and to avoid future litigation. [Pages 177-78.]

Judge Thynge's comments on the *timing* of mediation are also of interest, especially regarding the amount of information parties actually need to effectively engage in mediation: "In considering when to mediate—*the earlier the better*. A matter settles when the parties know enough about a dispute to intelligently agree to resolve it. Such knowledge, however, does not require discovery to the *n*th degree, a claim construction opinion, or a summary judgment decision." [Page 181.] This attitude runs contrary to the instincts of many defense counsel in patent cases, who typically insist that mediation cannot be meaningful until discovery is complete, and perhaps not even until expert reports are filed and a *Markman* ruling is handed down. Note, however, that Judge Thynge does not disagree that sufficient information is necessary for successful mediation, but rather raises the question of what quantum of information constitutes "sufficient" information.

Finally, Judge Thynge's comments on whom to bring—or not bring—to a mediation session are also worth mentioning, although some might not agree with all of those comments. Particularly provocative is her advice to leave the inventor, prosecution counsel, and in-house IP counsel at home, if possible.

Although *ADR Advocacy* devotes only a single chapter (Chapter 10) exclusively to commercial arbitration, chapter authors Michael H. Diamant, Stephen P. Gilbert, Laura Kaster, and Harrie Samaras have delivered a virtual mini-treatise on the subject. While the focus again is on issues of particular concern in technology cases, the chapter provides many insights adaptable to other kinds of business cases. Particularly helpful is the discussion of privacy and confidentiality in arbitration—and the difference between the two—as well as practical suggestions to practitioners on how to maximize confidentiality when that is deemed important. [Pages 367-78.] Also of note is the authors' sage advice regarding the preliminary conference and other pre-hearing matters such as discovery, tutorials, bifurcation, witness disclosures, motions, and pre-hearing briefs. [Pages 382-402.] An appendix provides a convenient and comprehensive checklist of topics to be addressed at the preliminary conference. [Pages 417-419.] The section on the evidentiary hearing itself covers such seemingly mundane, but necessary, tasks as marking and assembling exhibits and using summaries of voluminous exhibits, as well as more substantive issues such as opening and closing statements, the presentation of testimony (both fact and expert), and post-hearing briefs.[Pages 402-13.] In addition, the authors provide an insightful analysis of factors that may prompt a party to request a simple—rather than reasoned—award, namely, collateral estoppel effect of the award, confidentiality, cost, and concern over copycat claims.

Chapter 13 of *ADR Advocacy*, by Kevin R. Casey, is entitled "Tools Useful to Persuade, Evaluate, and Communicate in ADR Proceedings." As the title suggests, the goal of the chapter is to familiarize counsel and neutrals with tools that can be useful to achieve resolution of a dispute. Some of these tools, such as the use of charts, exhibits, and other visual aids to convey information in a more impactful manner, as well as the use of technology such as laptops, spreadsheets, and smartphones to research information, keep track of changing data, facilitate negotiation, and rapidly document a resolution, are well-known (if sometimes overlooked) by practitioners. Others, like the use of screening tools to help determine the appropriate form of ADR or select the right neutral, the use of mock arbitration panels, and Decision Tree Analysis may be less familiar. Mr. Casey does an admirable job of describing each of these tools, their application, and effectiveness. Perhaps most intriguing is his introduction to the possible use of computerized algorithms such as Adjusted Winner and Proportional Allocation in resolving intellectual property cases. [Page 553.] A helpful appendix explains these algorithms in more detail and provides an example of their use. Without pretending to fully understand this algorithmic approach, this reviewer applauds the effort to introduce more scientific rigor into the ADR process.

As hopefully suggested by the foregoing, *ADR Advocacy* is broad in scope, comprehensive in execution, and very practical. It should be on the bookshelf of every IP/technology lawyer and ADR practitioner.

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The Roles of Psychology in International Arbitration

Edited by Tony Cole
Reviewed by Jane Wessel and Ben Pilbrow

The Roles of Psychology in International Arbitration[1] is series of essays by experts from the fields of law, arbitration, psychology, philosophy and anthropology on the roles of psychology in international arbitration. It is a grand example of inter-disciplinary cross-fertilization, containing valuable and sometimes surprising insights for international arbitration experts. The overall impact is a comprehensive consideration of a broad range of psychological phenomena as they apply to international arbitration.

Part 1 deals with the decision making process of arbitration. This opens with a study by Professor Rusty Park considering the interconnections between an arbitrator's application of the law, the psychological impact of the risk of being annulled, and the influence of procedural "soft laws" in international arbitration. He highlights the benefits of the communal decision-making in a three-member tribunal in counteracting possible biases (both conscious and subconscious). Professor Park also raises a fascinating question of whether the source of an arbitrator's authority, coming as it does from the individuals involved in the proceedings, may lead to arbitrators favoring individualistic concerns, by contrast with state-appointed judges who may tend to prioritise community values.

In Chapter 2, Peter Ayton and Genevieve Helleringer, professors respectively of psychology and law, consider bias, vested interests and self-deception in decision making in the context of the degree to which one party may rely on the impartiality of an arbitrator appointed by its counter-party. Professors Ayton and Helleringer suggest that "*people confabulate a plausible explanation*" for why they reached a certain conclusion and "*in so doing, 'seem' to be 'unaware of their unawareness"'* and so cannot have an accurate insight into their own decision-making process. Professors Ayton and Helleringer question the ability of arbitrators to self-certify their impartiality, and even suggest, worryingly, that disclosure of a possible source of bias may undermine an arbitrator's ability to counteract its influence in making a decision.

Chapter 3 considers biases in arbitrator decision-making, exploring similar themes to Chapter 2, but this time from the more conventional perspective of an experienced arbitrator. Edna Sussman asks whether international arbitrators should consider the impact of the procedural flexibility of the arbitration process, which tends toward allowing documents into evidence that might be excluded in court, but which the arbitrators cannot then disregard. She considers various forms of bias, including hindsight bias, anchoring bias, framing bias, coherence bias, and confirmation bias, each of which may have a considerable effect in the decision making process, although the extent of that influence depends upon the background and experiences of the arbitrator. Ms Sussman helpfully recommends a number of conscious steps that an arbitrator can take to combat the impact of biases.

In Chapter 4, Jos Hornikx, an expert in communication and information studies, focuses on cultural differences in assessing the merits of arguments. Professor Hornikx discusses some fascinating research on the influence of culture on the assessment of argument quality. Based on the well-known research led by Professor Geert Hofstede into cultural differences, Professor Hornikx postulates that arbitrators from different cultural backgrounds may perceive the quality of arguments differently because of the different importance that they may ascribe to different values. Although Professor Hornikx recognizes the limitations of the available research outside Western cultures, his insights may provide useful insights into the decision-making process of arbitrators from different cultural backgrounds.

Part 2 focuses on arbitration as a means for the resolution of disputes. In Chapter 5, Professor Ran Kuttner suggests that international arbitration is like a ship, where the parties own and can travel on the ship, with the arbitrator as the ship's captain. He proposes that, as a result, the question of "*who controls the ship*" is more open to interpretation in international arbitration than in litigation (where, to continue the analogy, the ship is a public ferry and the parties merely passengers). Professor Kuttner argues that a new breed of arbitrator is coming into being: a manager of the dispute resolution process, with a key role as a facilitator.

In Chapter 6, Pietro Ortolani and Donna Shestowsky focus on the psychology of the disputants in arbitration, a sadly neglected area of study. Dr. Ortolani and Professor Shestowsky undertake a comparison between various aspects of domestic and international arbitration. The authors suggest that the disparity between domestic and international arbitration is a logical result of the differing motivations of parties choosing arbitration in these contexts. In the international sphere, parties are keen to ensure that their counterparty does not enjoy home advantage in the choice of substantive rules, an issue that usually does not arise in the context of domestic arbitration. Additionally, the predictability of the default option differs in an international context (where conflict of laws rules may be highly unpredictable).

Richard Earle outlines the development of investor-state arbitration in Chapter 7 and emphasizes the importance of neutrality in the context of supra-national

arbitration. Using *Occidental v. Ecuador* as a foundation for exploring these themes, he explains the purpose, context and legal footing for investor-state arbitrations and considers how unconscious bias and cultural intelligence may have played a part in the decision by Ecuador and other Latin American states to break away from ICSID in favor of UNASUR.

Part 3 focuses on the arbitral procedure. Mark Cymrot and Paul Levine explore in Chapter 8 the psychological benefits of going first in arbitration proceedings, considering how anchoring and framing can influence arbitrators. They offer a fascinating study comparing the primacy and recency effects to see whether a party gains more advantage by going first in proceedings or by having the last opportunity to persuade the tribunal. The authors conclude that anchoring is likely to have the more powerful influence. They provide a list of strategies to deal with these psychological effects, which should be in every advocate's arsenal.

"For international arbitration practitioners, it contains many helpful insights and practical tips..."

Ula Cartwright-Finch considers in Chapter 9 the effect of human memory on witness evidence in international arbitration. Many studies have shown that memory is a constructive process, such that later experiences, including the act of recollection itself, influence a witness's memory. Ms Cartwright-Finch's careful review of the psychological phenomena involved in memory recollection calls into question the weight that is given to such evidence. It would be interesting to expand on this research by considering how different methods of witness preparation influence a witness' memory of events on which he is giving evidence.

In Chapter 10, Cornel Marian and Sean Wright suggest that there is a difference between how claimants and their counsel react to separate awards on costs because of the different psychological biases influencing them. The chapter is clear and compelling, and has the considerable advantage of presenting significant practical advice to international arbitration practitioners. It concludes by presenting and discussing a number of techniques aimed at combating these biases.

Part 4 deals with the role of the arbitrator. It commences with a study by Professor Dieter Flader and Charles Anderson in Chapter 11 of their research into the role of social interaction in international arbitration, approaching the question from a wholly qualitative point of view, in contrast to the quantitative method typically used in the social sciences. The aim of their research is to give a more accurate and developed description of the strategies of arbitration. The result, for readers used to the quantitative approach of modern science or legal analysis, is unusual and rather challenging. The authors are philosophers whose primary interests are in psychology and linguistics. Their insights into the meanings provided to certain words by the international arbitration community are interesting, but one is left questioning whether the size of their sample suggests that their findings may not be representative of the international arbitration community as a whole.

Chapter 12 returns to the views of an experienced arbitrator, but one who is an engineer rather than a lawyer. Geoffrey Beresford Hartwell makes the interesting assertion that arbitration is not legal in nature, but a method of making practical decisions. He relies upon himself, an arbitrator without legal training, as evidence justifying his assertion, and emphasizes that arbitration is based upon trust between parties and arbitrator, in contrast to litigation, which is based upon state authority. From this foundation, he considers the circumstances when an arbitrator may be removed for lack of neutrality, and the role of experts in arbitration. Beresford Hartwell's insights are impressive, although this chapter has little to say about psychology and the role it plays in international arbitration.

Chapter 13 considers the influence of dissents in arbitration. Audley Shepherd QC and Daphna Kapeliuk describe the incidence of dissents in common law courts, civil law courts, international courts and international arbitration (both commercial and investor-state). Dissents are the epitome of a strong, confident judicial process, beneficial in testing (and, counter-intuitively, bolstering) the views of the majority, and they can sometimes be a catalyst for the evolution of the law (although this is unlikely in the context of arbitration). On the other hand, they directly undermine the authority of the majority decision they oppose. The authors consider the possibility that an arbitrator may be motivated, subconsciously or not, to dissent from the majority decision in order to support the party that appointed him or her, and the impact of a dissent on the collegial nature of panel deliberations. Lastly, they consider the impact that a dissent may have on the unsuccessful party, particularly if the dissent focuses on issues of procedural irregularity.

Finally, Part 5 focuses on the context of international arbitration. In Chapter 14, Stavros Brekoulakis questions whether the current approach to dealing with arbitrator bias is insufficient, in that it focuses solely on the question of individual bias and tends to overlook cultural and systemic biases, to which international arbitration institutions may be vulnerable due to the homogenous nature of their membership. From this point, he develops his theme by suggesting that the existing empirical studies of arbitral judicial behavior fail to provide a comprehensive explanation of arbitral decision making, because they do not take account of this institutional context. Professor Brekoulakis points out the lack of significant academic scrutiny of these issues.

Chapter 15 is a fascinating exploration of international arbitration from the point of view of anthropology and its research techniques, focusing on cultural (rather than individual) approaches to dispute resolution. Professor Bantekas identifies two difficulties that the international arbitration community may have in judging the suitability of general arbitration practice to specific communities: (i) the unperceived bias that is brought to the issue, whether cultural or relating to pre-established practices, and (ii) language barriers, which often run deeper than the meaning of individual words so that they cannot be overcome with a dictionary alone. He considers the influence on dispute resolution of West African culture, which prioritises the reconstruction of social relationships over the vindication of rights, albeit while also emphasizing the priority of legal certainty. This cultural difference has important repercussions for marketing the "product" of arbitration in West Africa.

Finally, in Chapter 16, Adriana Aravena-Jokelainen and Sean Wright consider factors that historically arbitration users have considered important in choosing to use arbitration. With this foundation, they argue that arbitration institutions can "balance the triangle" by strengthening the three key factors for arbitration users: (i) perceived neutrality, (ii) perceived trust and (iii) treatment with respect and dignity.

Conclusion

The Roles of Psychology in International Arbitration is an admirable book. It gathers input from an array of experts in a diverse range of fields. For international arbitration practitioners, it contains many helpful insights and practical tips that should test their preconceptions and enable them to improve their understanding and practice of international arbitration.

Endnote

1. Edited by Tony Cole, First Edition published 2017 by Kluwer Law International B.V.

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Med-Arb: How to Mitigate the Risk of Setting Aside or Refusal of Recognition and Enforcement of a Med-Arb Award

By Sarah Benzidi

Introduction

Albert Einstein reportedly said: "The true sign of intelligence is not knowledge but imagination."[1] One field in which we can observe the human imagination is the field of dispute resolution mechanisms. Parties can choose among litigation, arbitration, mediation, negotiation, parenting cooperation, early neutral evaluation, mini-trial, settlement conference, and referral to the expert, and this enumeration is not even exhaustive.

One of the numerous options available to parties to solve their disputes is a process called med-arb. Although advantageous in many respects, this fairly recent alternative dispute resolution mechanism is not without its problems. Can those problems be overcome? This is what this article seeks to examine.

The article will be divided in three main parts. In the first part (I), we will issue a brief reminder about what med-arb is (A and B) and look at the reasons why med-arb has been developed in recent decades (C).

The second part of this article (II) will be dedicated to an analysis of the issues raised by the hybrid nature of med-arb. Emphasis will be placed on four specific issues that might have a direct impact on the viability of an arbitral award rendered in the context of a med-arb. Those issues are the rule of confidentiality (A), the right to know of and to confront the other side's arguments (B), impartiality (C), and independence (D).

Finally, we will assess med-arb and its potential benefits in light of the four analyzed issues. Has our imagination gone too far? Or is this innovative form of ADR worth keeping, and if so, under what conditions? Is it possible to mitigate the risk of setting aside or refusal of recognition and enforcement of a med-arb award? This will be the subject of the last part of this article (IV).

I. Med-Arb: A Hybrid Form of ADR

A. Definition of Med-Arb

As the word indicates, med-arb is an alternative dispute resolution mechanism that combines mediation and arbitration in sequence in a single case. Mediation is a "voluntary, confidential process in which a third-party neutral intervenes to assist the disputants to negotiate a mutually acceptable resolution."[2] Arbitration is "the most formal alternative to court adjudication wherein disputing parties present their case to one or more impartial third person who are empowered to render a binding decision." Med-arb, then, refers to "the hybrid process in which mediation is combined with arbitration."[3]

Med-arb is a two-stage dispute resolution mechanism. In the first stage, parties try to come to an agreement with the help of a third-party neutral called a med-arbiter, who first assumes the role of a mediator. If the parties do not solve their dispute during this first stage, they enter the second stage of the process, the arbitration phase, in which the med-arbiter switches roles from mediator to arbitrator. In that second stage, the parties relinquish control over decision making to the arbitrator, who conducts an adjudicative hearing to decide either the entirety of the dispute or the outstanding issues, if the parties reached a partial agreement in the mediation phase.[4]

The parties may also choose two different neutrals to serve as the mediator and the arbitrator in their dispute. However, this article will focus on the situation, sometimes referred to as "same-neutral med-arb," where the parties appoint the same neutral to serve both functions.[5]

Finally, it should be stressed that med-arb is a voluntary process. There can be no med-arb without an agreement of the parties to use this type of dispute resolution mechanism.[6]

B. How Does It Work in Practice?

Both the mediation phase and the arbitration phase of a med-arb are closed to the public. It is therefore difficult to know what exactly goes on behind the closed doors of a med-arb.[7] Beyond the fact that all med-arb proceedings combine mediation and arbitration, the process may differ considerably from one med-arb to another. The overall structure and conduct of a med-arb proceeding will ultimately depend on the parties (including the specifications they have made in their dispute resolution clause or contract) and on the med-arbiter (her education, her experience, and her preferred approaches, which may vary based on the specific circumstances of each case). For instance, the usual definitions of "med-arb" imply that the mediation phase and the arbitration phase are separated, but with the agreement of the parties, the med-arbiter

could also move back and forth between mediation and arbitration.[8]

Med-arb should be distinguished from other alternative dispute resolution mechanisms like early neutral evaluation[9] or, in the context of family law, parenting coordination.[10] It also ought not to be confused with arb-med, in which the arbitral hearing occurs before the mediation session. In an arb-med, the arbitrator will usually issue an award and put it in a sealed envelope before the parties start mediating. If the parties reach an agreement, the neutral tears up the envelope and the decision will never be revealed. If they do not, the arbitrator reveals the award.[11] Arb-med does not raise the same issues as those created by med-arb. However, it can be more time-consuming and more expensive.

C. Why Was Med-Arb Developed?

1. General Context

In recent years, the ADR community has seen increasing experimentation with med-arb, noting that med-arb proceedings are a "frequent feature in many mass-tort settlement ADR programs that have been reviewed and approved by the courts in recent years."[12] As early as 1997, a survey indicated that med-arb was the preferred ADR procedure for 23 percent of the survey's respondents in the service industry, and 13 percent in the transportation, communications, and utilities group.

Table 8
Preferred ADR Procedure by Industry (in percent)

Procedure	Mining/ construction	Durable mfg.	Non-durable mfg.	Trans./com./ utilities	Trade	Finance	Insurance	Service
Mediation	60	70	65	63	56	68	59	50
Arbitration	30	16	23	18	18	17	19	17
Med-arb	0	6	3	13	8	2	5	23
In-house grievance	0	5	4	4	13	2	11	10
Mini-trials	0	1	0	0	0	0	0	0
Fact-finding	0	1	3	0	3	6	0	0
Peer review	0	0	1	0	0	0	3	0
Ombudsperson	10	1	0	4	2	4	3	0

Source: See endnote 13

More recently, Robert N. Dobbins noted that hybrid processes, particularly med-arb, were "growing in popularity."[14] And a 2008 survey among practitioners indicated that process concerns about med-arb were decreasing.[15]

How can we explain the growing interest in med-arb? The process first arose in the public sector[16] before gaining popularity in the private sector. According to Brian A. Pappas, interest in med-arb is rising among professionals who provide both mediation and arbitration services because of the increasing legalization of ADRs: "Mediation is becoming more evaluative and adversarial, arbitration and litigation are increasingly similar, and arbitration is viewed as too costly, too inefficient, and effectively, the 'new litigation.'" [17] Med-arb seems to offer a process combining the best of mediation and arbitration: it guarantees a final resolution of the conflict ("finality") but leaves some room for settlement ("flexibility"), which promotes "efficiency and cost-savings over the use of arbitration."[18] In short, med-arb proponents consider that it resolves the problems of mediation and arbitration: "The Med-Arb 'solution' is to combine arbitration's finality with mediation's flexibility in order to gain efficiency and the best of both processes."[19]

2. Med-Arb's Appealing Features

Features contributing to the appeal of med-arb are many and, as mentioned, include finality, efficiency and flexibility.

A med-arb process offers the parties greater flexibility when compared to pure arbitration, because the parties can try to resolve their dispute by themselves in a first step, which is especially valuable if the parties want to preserve their relationship. Therefore, they have more control over the overall dispute resolution process.

Parties are also sure to find a solution to their dispute, either by their amicable agreement or by the arbitral award. Med-arb's finality guarantees the parties that a decision will be made if they cannot settle by themselves. This guarantee does not exist in a pure mediation, where the parties who do not reach an agreement will have to incur the expenses of a new process (e.g., arbitration, litigation).

Relatedly, med-arb is also generally regarded as an efficient dispute resolution mechanism. Once the parties recognize that no agreement can be reached, the arbitration phase can go relatively fast. The med-arbiter will already know the issue, the facts, and the positions of the parties upon entering the second phase of the med-arb. Contrary to a "pure arbitrator," the med-arbiter will be able to carry out her mission without having to study the case from scratch. The med-arbiter may thus not need as much time to decide the case as a judge or an arbitrator would.[20]

Since the parties are supposed to try to find a solution by themselves in the presence of the potential arbitrator of their case, the parties to a med-arb may be incentivized to be more reasonable.[21] For instance, "research in commercial uses of med-arb suggests that clients tend to be more conciliatory and less hostile in med-arb as compared to pure mediation (…) Clients know that they mediate in the shadow of arbitration; accordingly, they may be more likely to reach a decision."[22] Hence, med-arb may be useful in a particularly high-conflict situation where the parties (or at least one of them) tend to be unreasonable. This latter aspect may have the effect of encouraging the parties to resolve their dispute more rapidly, which can have a positive impact on the overall cost of the process.

As just mentioned, cost might be an appealing factor too. A med-arb proceeding will likely be less expensive than litigating the dispute in court. By opting for a "same-

neutral med-arb," the parties will contract with one person to deliver two services and will thus most likely pay less than if they had to appoint two different persons to fill the roles of mediator and arbitrator.[23]

Another advantage of combining mediation and arbitration is that it may allow the parties to substantially narrow their dispute during the mediation phase, leaving only the outstanding issues for the arbitration stage. In some cases, it may be useful to the parties for the arbitration of the outstanding issues to take place "as soon as possible following the narrowing of the dispute accomplished during the mediation phase. (…) If the mediator has earned their confidence, the parties may prefer to have the mediator decide the remaining issues over any other neutral."[24] Parties could also ask the med-arbiter to decide between the parties' last best offers, or within the range bounded by those offers.[25]

These factors may make med-arb particularly attractive for parties involved in small cases that do not warrant big dispute-resolution costs. Parties also might be willing to use med-arb in bigger disputes that they would like to solve in a fast, efficient and cost-effective manner over which they would like to retain relative control.[26]

II. Four Potentially Problematic Issues Regarding Med-Arb

Despite all the advantages to parties in allowing the same neutral to play the role of mediator and arbitrator in the same case, med-arb raises important practical, ethical, and legal issues.

The choice of a med-arbiter might present a practical difficulty. Although one might think that the parties can save time in the appointment process, since they only need to find one person instead of two to intervene as a mediator and arbitrator—which may be true in some cases—the parties might actually have trouble finding and agreeing on the choice of a neutral who has the (very unique) skills required to assume both functions. If the med-arb is not properly conducted, it might also be difficult for the parties to know exactly when the mediation phase has ended and when the arbitration phase has begun. Who should decide that the mediation has failed and that it is time for the parties to enter arbitration? When should such a decision intervene? Also, efficiency—in theory one of med-arb's advantages—might not be achieved if the set of facts relevant to mediation differs from the facts pertinent to the arbitration.[27]

The hybrid nature of med-arb may also alter the behavior that parties would have in a "pure" mediation. Because they know that their mediator can potentially become their arbitrator, parties may be reluctant to fully participate in the mediation process and may avoid talking openly from fear that what they would say during the mediation could be used against them in the arbitration phase.[28] The parties may also seek to ingratiate themselves with the neutral during the mediation phase: "Perhaps this could manifest itself in the parties acting as if they are on their 'best behavior,' but it could also involve deception or trying to paint the opposing party in a negative light."[29]

Last but not least, med-arb raises the risk, analyzed in detail below, of the neutral using confidential information disclosed in the mediation (particularly in caucus) in fashioning the arbitration award. Furthermore, the right to be heard and the med-arbiter's independence and impartiality may also be at risk, as explained in the next sections of this article.

Those reasons explain why acceptance of the "same-neutral med-arb" system is not universal. For instance, the American Arbitration Association recommends that the same person not serve as both mediator and arbitrator in the same case: "Except in unusual circumstances, a procedure whereby the same individual who has been serving as a mediator becomes an arbitrator when the mediation fails is not recommended, because it could inhibit the candor which should characterize the mediation process and/or it could convey evidence, legal points or settlement positions ex parte, improperly influencing the arbitrator."[30] The AAA nevertheless offers a sample med-arb clause to those parties who would like to use med-arb to resolve their disputes: "If all parties to the dispute agree, a mediator involved in the parties' mediation may be asked to serve as the arbitrator."[31]

This section will focus on four major issues that may hinder the process of the execution and recognition of the arbitral award rendered at the end of a med-arb. They include: (A) the rule of confidentiality in mediation, (B) the right to know of and to confront the other side's argument, (C) the rule of impartiality, and (D) the rule of independence. In the last section (IV), we will discuss whether these issues can be addressed in such a way that the risk of challenging med-arb awards may be reduced.

A. Med-Arb and Confidentiality

1. Presentation of the Issue

The Uniform Mediation Act (UMA), which has been adopted in twelve jurisdictions and introduced in another two,[32] provides parties to a mediation with a general privilege[33] protecting the mediation communications from involuntary disclosure in later proceedings,[34] explicitly including the arbitral proceedings.[35] The privilege may be waived, but if fewer than all parties waive the privilege, the non-waiving party will be able to prevent the use of mediation communications in the subsequent procedure.[36] Moreover, even the states that have not adopted the UMA may also prohibit the use of mediation communications in other proceedings. And further complicating the situation, some states may regulate the mediation communications within a specific subject area (such as labor law in Massachusetts).[37]

The confidentiality of mediation communications functions on two levels. First, this rule applies to the joint sessions held during a mediation and thus binds all the mediation participants (the parties and the mediator). This is what I call the first level of confidentiality. But this rule also operates at a second level, by protecting the information communicated by one party to the mediator during what are called "caucuses." A caucus is a "private meeting between mediator and one party to explore new options, to clarify proposals, to allow the parties to cool down, to gather facts for the mediator's use or to give the parties a break from negotiations."[38] This private session, requested by either the mediator or one of the parties, also allows the other party to meet with his/her own party members, make the necessary phone calls, and rest.[39] Caucuses can be very useful to the mediator to facilitate agreement when the conversations in the joint sessions are not constructive anymore: each party has the opportunity to talk in private to the mediator with the assurance that all the information she does not want to share with the other party will remain confidential. This is what I call the second level of confidentiality.

In mediation, it is thus perfectly conceivable that the process ends with some information disclosed to the mediator but still withheld from the other parties. This asymmetry is not problematic because the mediator does not have any decision-making power—her role is to help the parties to find a solution to their dispute, not to arbitrate the conflict.

By contrast, this unilateral exchange of information from one party to the neutral, to the exclusion of the other parties, is far more problematic when the neutral is invested with a decision-making mandate, as in the case of the arbitrator. Most ethical rules governing arbitrations expressly forbid *ex parte* contacts with the arbitrator, i.e. in the absence of the other parties to the arbitrated dispute. For instance, the American Arbitration Association's Commercial Arbitration Rules provide that "No party and no one acting on behalf of any party shall communicate ex parte with an arbitrator or a candidate for arbitrator concerning the arbitration," except for the purpose of selecting a candidate arbitrator.[40]

If information in a mediation can be communicated exclusively to the mediator during caucuses, and if such unilateral communication of information is strictly forbidden in an arbitration, what is the correct rule in med-arb, which is supposed to combine the characteristics of mediation and arbitration?

2. Confidentiality Issue In Caucuses

There are different ways to address the question of the communication of confidential information during caucuses.

Option 1: Confidential Information Can Be Communicated During Caucus but Cannot Be Used in the Arbitration Phase

A first way to address that question would be to allow the med-arbiter to hold caucuses during which confidential information can be communicated to her by one party, but to prohibit the med-arbiter from using that confidential information in her arbitral deliberations. This option would both preserve the confidentiality of caucuses and respect the rule preventing the arbitrator from deciding based on *ex parte* communication. Hence, this option seeks to maintain the specific features of, respectively, mediation and arbitration, making med-arb a simple juxtaposition of a "pure" mediation and a "pure" arbitration.

Martin C. Weisman has adopted this position, arguing that the med-arbiter must be able to disregard mediation communications during the arbitration phase and that nothing disclosed in caucus can be considered in the arbitration phase unless introduced by either party independently during the arbitration.[41] The med-arbiter should thus "forget" about all the confidential information she was told in private sessions.[42]

Is that solution realistic? Studies show that "judges frequently cannot 'close the valves of (their) attention.' The presumption that people can ignore what they know, or use it for some purposes but not for other purposes, may sometimes be true, but often is little more than a convenient fiction."[43] This is why the authors of those studies, Wistrich, Guthrie and Rachlinski, recommend, for instance, that a judge who supervises settlement discussions not serve as the fact finder in the same case.[44] Further, research has shown that judges are less able to ignore inadmissible information when making determinations that they consider less amenable to judicial review.[45] Those findings have led Brian A. Pappas to write, in response to Martin C. Weisman: "If judges are unable to reliably disregard information, how can we expect arbitrators (who face little risk of review) to not consider mediation communications during the arbitration phase? (…) Being human means that we are not completely in control of our thought processes."[46] Accordingly, even the most ethical med-arbiter may be challenged by a solution of "deliberate amnesia."

Option 2: Confidential Information May Be Communicated During Caucus but Has to Be Disclosed to the Other Parties Later on in the Mediation

In a second option, a med-arbiter would be permitted to hold caucuses during the mediation stage, but everything said during those private sessions would have to be disclosed to the other parties at some point during the mediation.[47] In this second option, the parties would know that anything they tell to the med-arbiter during caucuses would have to be communicated to the other party later on in the mediation phase. In such a

framework, the purpose of caucusing would be limited to facilitating the dialogue between the parties. Because it might be difficult to reveal some things in front of all of the participants of the mediation, caucuses as described here would enable a party to reveal some information to the mediator first, and then, as a second step, disclose that information to the other parties, with the help of the mediator, if necessary.

However, this option is not satisfactory either, because it does not guarantee the appearance of impartiality. A party could be legitimately concerned that not all of the information that has been communicated to the med-arbiter during caucuses will be disclosed later in the mediation. Moreover, this option could end up working against the parties, because mediation is supposed to be a safe place for discussion and open dialogue between the parties and also between the parties and the mediator. Consider the situation in which one party feels comfortable enough to start telling the med-arbiter confidential things that she does not want to be known by the other parties. That party would have no other choice than to disclose that confidential information to the other parties. However, it would be contrary to the spirit of mediation in my view to "punish" the party for being "too ready" to talk openly to the mediator.

Option 3: No Caucus Can Be Held in a Med-Arb

The third option would consist of preventing the med-arbiter from holding caucuses. In this scenario, all the information disclosed by one party would be communicated to the mediator, as well as the other parties, at the same time, during the joint sessions.

This third option is the only one that, from a strictly legal perspective, does not raise any issue. It is true that option 3 is tantamount to depriving the med-arbiter of a powerful tool in the mediation phase. Many praise the efficiency of caucusing in mediation.[48] However, one should not forget about the specificities of med-arb. It is quite common that a mediator decides to caucus when she feels that the tension between the parties is too important to generate constructive discussions. But we have already seen that parties may be incentivized to be more reasonable in a med-arb than in a "pure" mediation because they know that the med-arbiter is empowered to decide the final outcome of their case if they cannot find an agreement (*see* p. 65). We can thus assume that the situations where caucuses would be necessary or useful would be less likely to occur in a med-arb than in a pure mediation. Of course, caucuses are not limited to situations where the parties are being unreasonable. There are other reasons why a mediator might want to caucus, for instance, when a party seems a bit lost or feels pressured in the process. In those cases, unfortunately, the inability of the med-arbiter to ask for a private session with a party might be a real disadvantage. Nevertheless, this disadvantage compared to a pure mediation is, in my opinion, acceptable, because med-arb offers a guarantee that a pure mediation does not: the parties are certain that their dispute will be solved at the end of the process (through the mediation phase or if not, through the arbitration phase). Of course, this third option reinforces the counsels' and the med-arbiter's duty to provide accurate information to the parties before the med-arb starts. In such a scenario, the parties' counsel and the med-arbiter should ensure that the parties have a clear understanding of what a caucus is, and what its advantages are, and that they would be deprived of private sessions with the neutral if they opted for a med-arb rather than for a pure mediation.

3. Confidentiality Issue in Joint Sessions

We have addressed the issue of confidentiality in the context of caucus (what I called the second level of confidentiality in mediation, which binds one party and the mediator). What about the confidentiality issues raised by the general mediation process (what I called the first level of confidentiality in mediation, which binds all the participants in a mediation—the parties and the mediator), beyond the confidentiality issues specific to private sessions?

According to some authors, the confidentiality protecting mediation implies that the med-arbiter in the arbitration phase can only use the pieces of information that a "pure arbitrator" would have at her disposal: namely the elements contained in the file of the case or the elements that would be exposed by the parties during the arbitral hearings.[49] This position results from a strict interpretation of the different acts (such as the Uniform Mediation Act), statutes or guidelines providing that the mediation communications cannot be used in other proceedings, including arbitral proceedings, with no exception for med-arb.

When taking over the role of the arbitrator, the med-arbiter obviously already knows the facts of the case and, depending on how far the mediation process has gone, potentially knows more than what a "pure arbiter" could find in the file of the case, including the feelings of the parties, their personal past, the history of their personal relationship, their underlying conflicts, and more. Should the med-arbiter forget about everything she heard while acting as a mediator that has not been formally discussed in the arbitration phase? Does the first level of confidentiality in mediation prevent the med-arbiter from making use of that additional information in her arbitral deliberations?

I do not think so. We have already seen that "deliberate amnesia" is not a reliable solution, since human beings struggle to ignore information of which they are aware. More importantly, "deliberate amnesia" would not be consistent with the decision of the parties to opt for med-arb. Med-arb is a voluntary process: the parties to a med-arb have chosen, among a broad variety of dispute resolution mechanisms, a kind of ADR precisely charac-

terized by the fact that the mediator is supposed to turn into an arbitrator should the parties reach an impasse in the mediation phase.[50] As explained above (see *supra* p. 65), one of the reasons why parties might choose med-arb over pure arbitration is that they wish to avoid having to re-explain the case from scratch to a new arbitrator, in the interest of economy and/or efficiency. Moreover, the parties have chosen the specific track of mediation to start their dispute resolution process. They have thus chosen a form of ADR centered on discussions that are generally more focused on the parties' interests than on their positions, which is a kind of discussion normally not held during arbitration proceedings. Is the choice of med-arb not an indication that the parties actually wish the med-arbiter to rely on the in-depth knowledge of the case she acquired during the mediation phase? If not, what would be the point of appointing the same neutral to perform as mediator and arbitrator in the same dispute?

The different regulations prohibiting the use of mediation communications in subsequent arbitration proceedings do not account for the situation where the parties have deliberately chosen the same person to be the mediator and the arbitrator of their dispute. I think that those rules should be adapted to take into account the specific situation of a "same-neutral med-arb."

Currently, the med-arbiter is only allowed to take into account mediation communications in fashioning her award if the parties have expressly consented to it in writing. The case law demonstrates that without such an express consent, a losing party who can prove the use of mediation information by the med-arbiter during the arbitration phase can successfully challenge the med-arb award.

In *Bowden v. Weickert*, for instance, the Ohio Court of Appeals vacated a med-arb award because the med-arbiter clearly used mediation communications to fashion it. The court reasoned: "the arbitrator had a duty to remain impartial (…) and to protect the confidentiality of all mediation communications."[51] Hence, the med-arbiter could only rely upon evidence presented at the arbitral hearing when crafting his arbitration award. Because he failed to do so, the Court concluded that he had exceeded his authority. The Court nevertheless recognized the parties' right to engage in med-arb, but some rules had to be respected "at the outset:"

> At a minimum, the record must include clear evidence that the parties have agreed to engage in a med-arb process, by allowing a court-appointed arbitrator to function as the mediator of their dispute. The record must also contain: (1) evidence that the parties are aware that the mediator will function as an arbitrator if the mediation attempt fails; (2) a written stipulation as to the agreed method of submitting their disputed factual issues to an arbitrator if the mediation fails; and (3) evidence of whether the parties agree to waive the confidentiality requirements imposed on the mediation process by (the Ohio law) in the event that their disputes are later arbitrated.[52]

The same year, the Texas First District Court of Appeals concluded that: "Just as it would be improper for a mediator to disclose any confidential information to another arbitrator of the parties' dispute, it is also improper for the mediator to act as the arbitrator in the same or a related dispute without the express consent of the parties."[53] Three years later, a Massachusetts Superior Court ruled that any waiver of the mediation privilege had to be clear and explicit by the parties holding the privilege, even in the med-arb context.[54]

In summary, according to current doctrine, med-arb awards rendered based on mediation communications, as opposed to arbitration evidence, may be subject to being vacated under the Federal Arbitration Act or a similar state statute without a proper waiver by the parties allowing the med-arbiter to use mediation communications in the arbitration phase.[55]

Given the very nature of the "same-neutral med-arb," I think that the various statutes, acts and guidelines governing arbitration in the United States should be adapted to take into account the specificities of med-arb. It would be much more consistent with both the characteristics of med-arb and with the choice made by the parties to opt for med-arb rather than for "pure" mediation followed by "pure" arbitration, that the default rule allow the med-arbiter to use mediation information in the arbitration phase, including in fashioning her award. I thus think that in the specific circumstances where the parties have agreed to appoint, in the same dispute, the same person as a mediator and arbitrator, the confidentiality imposed on the mediator should be attached only to the *person* of the mediator and not to the *function* of the mediator. In other words, if the mediator is the same *person* as the arbitrator in the same case, she should not be prevented upon assuming the different *function* of arbitrator from making use of the additional knowledge she acquired during the mediation phase, even if that information would not be provided to a "pure arbitrator" in a typical case.[56]

Two clarifications must be made. First, here I am only considering the mediation information communicated during the joint sessions, as opposed to caucus, which I think should be avoided in med-arb for the different reasons explained in this article.[57] Second, of course, the parties should remain able to prevent the med-arbiter from using mediation information in the arbitration phase (despite the risks that this artificial solution presents)[58] but, in order to do so, their written agreement should be required. My suggestion is thus to reverse the current default rule: under the rule proposed here, a waiver by the parties would no longer be required to *authorize* the

use of mediation communications in crafting the award. Instead, a written agreement of the parties would be necessary to *prevent* such use.

B. The Right to Know of and Confront the Other Side's Arguments

The second issue raised by the hybrid nature of med-arb concerns the right to know of and confront the other side's arguments.

"It is a firmly established rule of common law that a judge or anyone exercising a judicial function must hear both sides of every case: not only the plaintiff or prosecutor, but also the defendant must be heard."[59] In the United States, this principle is part of the broader concept of "due process."

Due process also applies to arbitration. Indeed, despite the private nature of arbitration:

> Making certain the award is enforceable is one of the most central duties of the arbitral tribunal. If the arbitral tribunal wants to issue an enforceable award, the process has to meet certain quality standards. These minimum quality standards are, of course, procedural. They can be called due process requirements just like the minimum standards in ordinary court procedure. In the same way, they establish the minimum procedural safeguards necessary for someone to be deprived of his property or other rights. As such, they can be considered aspects of such elements as procedural fairness, *opportunity to be heard, and equal treatment* as well as access to justice.[60]

Due process in arbitration thus encompasses the right of the parties to equal treatment[61] and the right to be heard (on a claim or on a fact alleged or on some evidence presented by the other party). The right to be heard in arbitration,[62] or at least the right to "have a meaningful opportunity to be heard"[63] in arbitration proceedings, has been upheld by the American courts on several occasions. Failure to respect those minimum procedural standards would constitute a ground for successfully challenging the award.

Those principles imply that, similar to a judge, an arbitrator can normally make a decision only on the basis of elements that are known by all the parties and on which all parties have been given the opportunity to comment. This is partly why an arbitrator, once appointed, cannot have a private meeting with one party in the absence of the other parties.[64]

Again we see the clash between the core procedural requirements applicable to arbitration and the common practice of caucusing in mediation. The right to be heard and the right to equal treatment in arbitration constitute additional reasons as to why caucuses should be avoided during the mediation phase. By authorizing the use of caucuses in the first part of a med-arb process, the risk is created that the med-arbiter will take into account some information provided by one party without giving the other parties a fair chance to confront that information during the arbitration phase, which constitutes a blatant violation of due process requirements.

What if the parties want to be able to caucus with the med-arbiter during the mediation phase? Given the rights at stake, a simple agreement of the parties to maintain the use of caucus in med-arb is not satisfactory. The parties should at least *expressly* agree, *in writing and in advance*, that the med-arbiter can hold caucuses *and* that the med-arbiter can use the information received during those caucuses in fashioning the award. However, even this precaution might not be sufficient to remove any risk of annulment of the award by court. I am not aware of cases that have addressed that question under US law, but the risk does exist that a court will refuse to enforce an agreement by which the parties actually agree to waive in advance (without any exact knowledge regarding what they are renouncing) their right to confront the arguments made by the other parties during caucuses. The courts could indeed consider that there is more at stake than the sole *private* dispute of the parties and that such agreement might undermine the confidence of the public in the arbitrators' integrity, for instance. The same is true in an international context. Some jurisdictions are likely to consider for public policy reasons that a party cannot waive in advance his or her rights to due process, or some aspects of due process such as the right to confront the other parties' arguments.[65]

Therefore, and in addition to the previous developments regarding the confidentiality issue (see *supra*, pp. 67-68), it is safer not to hold caucus in a med-arb, in order to obtain the execution and recognition of med-arb awards.

C. Med-Arb and Impartiality

We have already seen that the confidentiality rule in mediation and the right to know of and to confront the other parties' arguments are an obstacle to the use of caucus in med-arb. So is the principle of impartiality, defined as the absence of any inclination or disinclination towards the parties. Indeed, case law indicates that the execution and the recognition of awards rendered in "pure arbitration" are declined for breach of impartiality when it is proven that the arbitrator has had unilateral contacts with one party while the dispute was ongoing.[66] Therefore, the holding of caucus meetings during the mediation phase of a med-arb is likely to lead to the same outcome.

A judge is presumed to be "impartial until proven otherwise. However, subjective impartiality requires a very delicate effort in judging; judges should endeavor

not to have any bias, prejudice, or precondition, and should avoid the *appearance* of favoring or hindering any party to a case."[67] No matter how righteous the med-arbiter is, the simple fact that a party meets the arbitrator of their case in the absence of the other parties is enough to make those parties fear that the med-arbiter is no longer impartial.[68]

The style adopted by the med-arbiter in the mediation phase may also cause the parties to question the fairness of the med-arb in its arbitration phase. Mediators can use a variety of different styles and approaches. Generally, styles range from purely facilitative to purely evaluative. In a purely facilitative approach, a mediator will assist the parties in "identifying and exploring interests, concerns, motivations, goals, common ground and possible resolutions. However, the mediator will avoid drawing conclusions for the parties or offering opinions as to value, legal positions, rights, merits of the case or potential litigation outcome."[69] In sum, such a mediator does not evaluate the case. By contrast, in using an evaluative style, "a mediator is likely to offer opinions on strengths and weaknesses of a case, to predict the outcome at trial and to initiate proposals for settlement."[70] Evaluative mediations focus more on the merits of the parties' legal positions, which is why not everyone in the mediation community is in favor of evaluative mediation. Some even view it as an oxymoron.[71] In any case, even the proponents of this style of mediation stress the importance for the mediator to be cautious because "once an evaluation is made, the mediator's appearance of impartiality may be impaired."[72] This risk is even greater in med-arb. Could a party sincerely believe that she will benefit from a fair, comprehensive, and equal examination of her file if she is told by the med-arbiter during the mediation phase that her claim is excessive and that she is unlikely to get what she demands in court?

In short, the evaluative approach, whose use is already criticized by some in a "pure mediation," increases the risk that a party who received a negative evaluation of her position during the mediation phase will ultimately challenge the award rendered at the end of the med-arb process. To avoid any suspicion of partiality, the med-arbiter should thus refrain from providing the parties with an evaluation of their case.

Finally, and more generally, a med-arbiter might have to pay more attention to deciding the case impartially compared to a judge or an arbitrator. Indeed, unlike a judge or an arbitrator, the med-arbiter will have spent hours with the parties (listening to their stories, witnessing their feelings, and trying to discover their interests) before starting the arbitration phase. However, mediators, like arbitrators, are already subject to the duty of being impartial. Med-arbiters should thus be properly acquainted with dealing with that imperative.

D. Med-Arb and Independence

It is another fundamental principle in arbitration that an arbitrator must be and remain independent throughout the whole arbitration process. By independence, I refer to the absence of personal, professional or financial interests and ties with one party, whether direct or indirect.[73] Such ties could influence the arbitrator in her decision-making process. A lack of independence may be a ground to challenge an award. Hence, it must be guarded against from the outset.

Again, this core principle of arbitration may be at risk in the context of med-arb. The mediator will probably learn the potential settlement range of the parties during the mediation phase. "Once in arbitration, however, the neutral is charged with impartially rendering the award according to the evidence, and decisions falling outside the settlement range will naturally be met with displeasure by the disadvantaged party."[74] The fact that an arbitrator may arrive at a decision through objective and legal assessment that does not fall into the settlement range reached by the parties at the end of the mediation phase may create a fear of appearing impartial, and thus potentially impede the med-arbiter's independence. "In sum, the Med-Arb hybrid provides additional pressure for the arbitrator to issue a compromised award that 'splits the baby,' a common critique of arbitration."[75]

Is this challenge insurmountable? I do not think so, but the responsibility of the med-arbiter in this respect is even greater than in a "pure" arbitration.

First of all, the med-arbiter should pay special attention to the necessity of rendering an award by reference to legal principles. Of course, we have seen that the parties could limit the med-arbiter's discretion (to the settlement range reached by the parties during the mediation phase for instance), and the med-arbiter should respect the parties' intent. But in doing so, the med-arbiter should still abide by the law[76] unless otherwise agreed by the parties.[77]

Second, the parties should be explicitly informed that if they do not find an amicable settlement to their dispute, the med-arbiter will have to decide the case *by reference to legal principles* (again, unless otherwise agreed by the parties). The med-arbiter should specifically insist on the fact that the application of the legal principles to the facts of the case could lead her to render an award that may or may not correspond to the position of a party, or that might potentially not be within the range of settlement the parties reached in the mediation phase.

Finally, to decrease the risk of a party challenging the award, the med-arbiter should draft the award with great care and precision.

III. Conclusion

It is time now to make a final assessment of the "single-neutral med-arb." Among other drawbacks, I have focused on four issues. Those issues pertain to the core principles of mediation (the confidentiality rule) or of the judicial function (the right of the parties to know of and confront the other side's arguments, and impartiality and independence of the med-arbiter). Does that mean that there should be no place for med-arb among the dispute resolution mechanisms? It all depends on how we envisage med-arb.

If we see med-arb as a simple sequence of a classic mediation and a classic arbitration, then we must conclude that med-arb fails to respect the basic procedural rights of the parties and, therefore, should not be granted the same value as other dispute resolution mechanisms.

In contrast, if we accept that med-arb is a dispute resolution mechanism *as such*, that it is a real hybrid figure, a real product that combines mediation and arbitration in a unique synthesis, rather than the result of a simple addition of mediation and arbitration—if we recognize, in other words, that med-arb is called "med-arb" and not "mediation-arbitration," then there is no reason to deprive ourselves of this original type of ADR, which can be both effective and cost-efficient.

In my view, med-arb deserves to be regulated as a full-fledged dispute resolution mechanism. The current regimes respectively applicable to mediation and arbitration do not fit the med-arb model. They have proven unable to meet med-arb's features, which, I think, explains why some are reluctant to use it.

The current acts, statutes, rules or guidelines regulating mediation and/or arbitration in the United States and also internationally, such as the ICC rules, should incorporate a section dedicated to med-arb that includes the following points:

- They should define med-arb as an alternative dispute resolution mechanism characterized by the existence of two distinct phases—the mediation phase and the arbitration phase should the parties fail to reach an amicable agreement by themselves in the mediation phase—in which the mediator and the arbitrator appointed by the parties would be the same person. The word "med-arb" would thus be limited to the "same-neutral med-arb." By contrast, "mediation-arbitration" would refer to a mediation followed by an arbitration proceeding with two different neutrals assuming the roles of mediator and arbitrator. Indeed, the word "med-arb" indicates that it is a dispute resolution mechanism governed by its own regime (such as the one proposed below). Some adjustments to the rules governing mediation and arbitration are necessary precisely because the mediator and the arbitrator are the same person. By contrast, no adjustments are required if the mediator and the arbitrator are two different persons, which is why the words "mediation-arbitration" are adequate.
- The regulations should make clear that they apply only to med-arb as defined in the previous point (same-neutral med-arb) and not to mediation-arbitration.
- They should also state that the rules normally applicable to mediation and arbitration, respectively, apply to med-arb, subject to the following adjustments:
  - Contrary to "pure" mediation, the default rule should be that the med-arbiter would be allowed to use the information received during the joint sessions of the mediation in the arbitration phase. Parties could agree to derogate from this default rule, by explicitly and in writing, preventing the med-arbiter from using mediation information in the arbitration phase, after having been warned by the med-arbiter that studies demonstrate that people can hardly ignore what they know (which of course is not a reason for the med-arbiter not to make the best efforts to disregard mediation communications).
  - Unless otherwise agreed by the parties, the med-arbiter should be prevented from caucusing during the mediation phase, because of the legal and ethical issues those private sessions raise. The parties that would nonetheless agree to maintain caucus should sign a written agreement explicitly allowing the med-arbiter to caucus with the parties separately and to make use of the information communicated by them to the med-arbiter during those caucuses. However, the med-arbiter should draw the attention of the parties to the risk that such an agreement might not be enforced by the courts, whether in the United States or abroad, for public policy reasons and that consequently the courts might refuse to execute or recognize a med-arb award if one party can prove that the med-arbiter actually used information received during caucuses in fashioning the award.
  - The med-arbiter should adopt a facilitative approach and avoid an evaluative one, unless expressly and clearly required by the parties in writing. In practice, it might be hard to draw a line between the respective spectrums of the evaluative and the facilitative approaches, but in essence, the med-arbiter should refrain from giving one party the impression that she has already made up her mind on the dispute and that there is no point in presenting his or her case in the arbitration phase. An evaluative approach should also be avoided in mediation because there is no certainty that the med-arbiter will reach the same

conclusion based on the evidence that is presented later on during the arbitration phase.

- The parties should be required to expressly agree, in clear and unambiguous terms, to opt for med-arb as defined above, with a same neutral designated as the mediator and the arbitrator of their dispute. This agreement would count as recognition that they are subject to all of the above rules.
- Finally, parties should be allowed to appoint only neutrals who can demonstrate that they are accomplished and experienced in both mediation and arbitration.

There is much more to say about med-arb. For instance, the question of evidence in med-arb and the question of the necessity of specific training to perform as med-arbiter[78] could each be the subject of an entire article. However, the rules that I propose in this article have the merit of clarifying the framework of med-arb and securing to the maximum extent possible the viability of med-arb awards.

Some might think that the idea of regulating med-arb runs counter to the flexibility supposed to characterize alternative dispute resolution mechanisms and that the use of med-arb should not be constrained by rules. I disagree. The rules that I propose are only a default regime. Parties would remain able to deviate from those rules (true, with certain formalities to be respected but parties would still be free to choose the kind of med-arb that they think is best suited for them). Moreover, flexibility must not be granted at the expense of elementary procedural rights. There is no point in refusing to regulate med-arb in order to preserve flexibility if the courts can refuse to recognize or execute the med-arb award because minimum safeguards have not been respected in the med-arb proceeding.

To conclude, the rules that I propose require from med-arbiters as well as the parties' counsel an enhanced duty to provide information to the parties. Parties cannot opt for a med-arb process if they do not know what mediation is, what arbitration is, what a caucus is, what the (truly powerful) advantages of caucusing are, and what the difference between an evaluative and a facilitative approach is, etc. This enhanced duty to inform the parties may seem like a heavy burden, but this obligation provides an opportunity to educate the parties about the countless ways to resolve a dispute, and that will only benefit the realm of ADR.

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Uniform Mediation Act, available online at http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf (last visited April 20, 2017)

The Bluebook: A Uniform System of Citation (20th ed. 2015)

Endnotes

1. Actually, this quote would not be entirely correct and would be constructed from this sentence: "Imagination is more important than knowledge" (interview of Albert Einstein by George Sylvester Viereck in the October 26, 1929 issue of the *Saturday Evening Post*).
2. Alternative Dispute Resolution in State and Local Governments: Analysis and Case Studies at 8 (Otto J. Hetzel & Steven Gonzales eds., ABA Book Publishing, 2015).
3. Gu Weixia, *The Delicate Art of Med-Arb and Its Future Institutionalisation in China*, 31(2) Pac. Basin L. J. 97, 97 (2014).
4. Allan Barsky, "*Med-Arb": Behind the Closed Doors of a Hybrid Process*, 51 Fam. Ct. Rev. 637, 637-638 (2013). This author notes that the parties are free to "agree in advance whether the arbitrated decisions will be binding or nonbinding (sometimes called "recommendatory"). Most arbitrators and theorists favor binding arbitration so the process necessarily results in a definite outcome."
5. Kristen M. Blankley, *Keeping a Secret from Yourself? Confidentiality When the Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case*, 63 Baylor L. Rev. 317, 320 (2011).
6. *Id*. at 323.
7. Allan Barsky, *supra* note 4, at 638.
8. Allan Barsky, *supra* note 4, at 638. Please note that this article focuses on med-arb as defined as a process composed of a mediation phase chronologically followed by an arbitration phase.
9. Like the med-arbiter, the early neutral evaluator may use techniques related to mediation and arbitration. However, her role is primarily to provide the parties with an evaluation of the case, based on the evidence and the arguments presented to her by each party. She might help the parties to reach an agreement but only after rendering an evaluation report, which is never binding (contrary to the arbitral decision rendered by the med-arbiter) (Allan Barsky, *supra* note 4, at 639). See also, on this topic, Alternative Dispute Resolution in State and Local Governments: Analysis and Case Studies at 28 (Otto J. Hetzel & Steven Gonzales eds., ABA Book Publishing, 2015).
10. A parenting coordinator will use methods similar to mediation and arbitration but also akin to evaluation, parenting education, co-parent counseling, monitoring or enforcement. The scope of the techniques used by a parenting coordinator is thus broader than that of a med-arbiter. Moreover, the parenting coordination usually is less formal than med-arb, especially in its second stage

(for instance, the parenting coordinator may decide on certain issues without "conducting a court-like hearing for each issue to be decided"). Also, parenting coordination will usually occur after a judicial decision has been rendered and is supposed to help the parents to implement the order, whereas med-arb is usually used by the parties with the hope of avoiding going to court (Allan Barsky, *supra* note 4, at 638-639).

11. Kristen M. Blankley, *supra* note 5 at 335 (footnote 63).

12. Thomas J. Brewer & Lawrence R. Mills, *Combining mediation & arbitration*, 54(4) Disp. Res. J. 32, 34 (1999).

13. David B. Lipsky & Ronald L. Seeber, The Appropriate Resolution of Corporate Disputes—A Report on the Growing Use of ADR by U.S. Corporations at 12 (Cornell/PERC Inst. on Conflict Res., 1998). More than 600 companies responded to the survey.

14. Robert N. Dobbins, *Practice Guide: The Layered Dispute Resolution Clause: From Boilerplate to Business Opportunity*, 1 Hastings Bus. L.J. 161, 162 (2005). *See also* Martin C. Weisman, *Med-Arb: The Best of Both Worlds,* 19 Disp. Resol. Mag. 40, 40 (2013).

15. Questionnaires were sent to about 100 commercial arbitrators and mediators in the country. Sixty-eight percent of those answering agreed that an arbitrator "may serve" as both mediator and arbitrator. "The percentage, noted Phillips, may have been even higher, because in retrospect, the question may have been misleading—some who answered 'should not serve' likely answered based on their own risk-benefit analysis, rather than based on the facts that persuade parties to want an opportunity to have a conflict mediated and then, if necessary, arbitrated by the same neutral." (Gerald F. Phillips, *Back to Med-Arb: Survey Indicates Process Concerns Are Decreasing*, 26 Alternatives to High Cost Litig. 73, 78 (2008)).

16. "In order to reach a collective bargaining agreement, particularly in important industries in which striking is not a viable option for the public good" (Kristen M. Blankley, *supra* note 5, at 323-324). For more details about the historical development of the med-arb process, see Barry C. Bartel, *Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis, and Potential*, 27 Willamette L. Rev. 661, 665 (1991).

17. Brian A. Pappas, *Med-Arb and the Legalization of Alternative Dispute Resolution*, 20 Harv. Negot. L. Rev. 157, 159 (2015).

18. *Id.* at 159.

19. *Id*. at 166-167.

20. Patrick Van Leynseele, *Med-Arb et tierce décision obligatoire: les enjeux, les écueils, les solutions et les précautions à prendre*, 1 Jurim Pratique, 104-105 (2014); Jacqueline M. Nolan-Haley, Alternative Dispute Resolution in a Nutshell at 229-230 (West group, 2nd edition 2001).

21. *Id.* at 106. See also Brian A. Pappas, s*upra* note 17, at 159 (the "*finality of arbitration is utilized as the stick to promote good behavior in mediation*"); Jacqueline M. Nolan-Haley, *supra* note 20 at 229; Bette J. Roth, Med-arb, Arb-med, Binding Mediation, Mediator's Proposal, and Other Hybrid Processes, 2 (American Arbitration Association Advanced Mediator Training, November 6, 2009, available online at http://www.rothadr.com/pages/publications/aaa%20medarb.pdf (later visited April 20, 2017).

22. Allan Barsky, *supra* note 4, at 640. *See also* John T. Blankenship, *Developing your ADR attitude: Med-Arb, a template for adaptive ADR*, 42 Tenn. B.J. 28 (2006). Some studies also demonstrate that parties were substantially more motivated to settle during the mediation phase to avoid the loss of control that would come in the arbitration phase (Martin C. Weisman, *Med-Arb: The Best of Both Worlds,* 19 Disp. Resol. Mag. 40 (2013)).

23. For different tips about how to reduce the cost of a med-arb process, see Kristen M. Blankley, *supra* note 5 at 326-327.

24. Thomas J. Brewer & Lawrence R. Mills, *supra* note 12 at 35.

25. *Id*. at 35.

26. *Id*. at 34-35; Patrick Van Leynseele, *supra* note 20 at 104.

27. Kristen M. Blankley, *supra* note 5 at 336-337.

28. *Id.* at 325; Patrick Van Leynseele, *supra* note 20 at 106; Handbook on Mediation at 175 (Thomas E. Carbonneau & Jeanette A. Jaeggi eds., American Arbitration Association, 2006).

29. *Id*. at 336.

30. American Arbitration Association, *Drafting Dispute Resolution Clauses—A practical Guide*, 33 (2013), available online at https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002540 (last visited April 18, 2017).

31. *Id*. at 34.

32. See the enactment status map on the Uniform Law Commission's website http://www.uniformlaws.org/Act.aspx?title=mediation%20Act (last visited April 12, 2017).

33. The UMA distinguishes between the privilege (Sections 4-6) and the confidentiality (Section 8). "The evidentiary privilege granted in Sections 4-6 assures party expectations regarding the confidentiality of mediation communications against disclosures in subsequent legal proceedings. However, it is also possible for mediation communications to be disclosed outside of proceedings, for example to family members, friends, business associates and the general public. Section 8 focuses on such disclosures." (UMA, Comment on Section 8). It would thus be more accurate to use the word "privilege" rather than "confidentiality" in the present article. However, I use the term "confidentiality" since this is the word systematically used in the doctrine.

> 34.(a) Except as otherwise provided in Section 6, a mediation communication is privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by Section 5.
>
> (b) In a proceeding, the following privileges apply:
> (1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.
> (2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.
>
> (3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.
> (c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation (UMA, Section 4).

35. "Proceeding means: (A) a judicial, administrative, arbitral, or other adjudicative process, including related pre-hearing and post-hearing motions, conferences, and discovery; or (B) a legislative hearing or similar process" (UMA, Section 2(7)).

36. "(a) A privilege under Section 4 may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation and:
(1) in the case of the privilege of a mediator, it is expressly waived by the mediator; and
(2) in the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant." (UMA, Section 5).

37. See Mass. Ann. Laws ch. 150, § 10A (1999).

38. Abraham P. Ordover with G. Michael Flores and Andrea Doneff, Alternatives to Litigation: Mediation, Arbitration, and the Art of Dispute Resolution at 54 (Notre Dame, Ind.: NITA, 2nd ed. 1993).

39. *Id.* at 54.

40. American Commercial Association Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes), Rules Amended and

Effective October 1, 2013 Fee Schedule Amended and Effective July 1, 2016, R.19. Available online at https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004130 (last visited April 18, 2017).

41. Martin C. Weisman, *Med-Arb: The Best of Both Worlds,* 19 Disp. Resol. Mag. 40, 40 (2013).

42. This solution is also the one proposed by PatrickVan Leynseele: "the mediator cannot incorporate in his/her final decision elements that he or she is aware of thanks to the caucus if these elements have not been debated before him during the arbitration phase. He must, in some way, *repress them ('forget them')* so that they do not influence his sentence either explicitly or implicitly" (Patrick Van Leynseele, *supra* note 20 at 127) (free translation from French; emphasis added).

43. Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, Cornell Law Faculty Publications, Paper 20, at 1330-1331 (2005). Available online at http://scholarship.law.cornell.edu/lsrp_papers/20 (last visited April 12, 2017).

44. *Id.* at 1259.

45. *Id.*

46. Brian A. Pappas, *Med-Arb: the best of both worlds may be too good to be true: a response to Weisman*, 19.3 Disp. Res. Mag. 42, 42 (2013).

47. And in any case, before the beginning of the arbitration phase (for the same reasons why a judge or a "pure" arbitrator should not start the proceedings knowing some information that a party would have communicated to her outside the presence of the other parties).

48. See for instance Patrick Van Leynseele, *supra* note 20 at 105. However, several authors underline the dangers of caucusing (see for instance Jacqueline M. Nolan-Haley, *supra* note 20 at 124-126).

49. Patrick Van Leynseele, *supra* note 20 at 127-128.

50. We assume that the parties were well aware of the fact that one same neutral could successively be the mediator and the arbitrator. In any case, the med-arbiter should ensure that the parties have clearly understood that before starting the med-arb.

51. Bowden v. Weickert, 2003-Ohio-3223, ¶ 36 (Ct. App.).

52. *Id*, at ¶ 35.

53. *In re* Cartwright, 104 S.W.3d 706, 714 (Tex. App. 2003).

54. Town of Clinton v. Geological Servs. Corp., 21 Mass. L. Rep. 609 (2006), summarized by Kristen M. Blankley, *supra* note 5 at 353. See also Twp. of Aberdeen v. Patrolmen's Benev. Ass'n, Local 163, 286 N.J. Super. 372, 669 A.2d 291 (Super. Ct. App. Div. 1996) where the Superior Court of New Jersey held that mediation communications cannot form the basis for an arbitration award. In this case, though, the court did not answer the question as to whether a waiver by the parties would make the use of mediation communications by the med-arbiter in the arbitration phase valid.

55. Kristen M. Blankley, *supra* note 5 at 322.

56. And provided that this additional information is shared by all the parties involved in the med-arb (see the following developments).

57. See *supra* pp. 15-18 and the sections B, C and D *infra*.

58. See *supra* p. 17.

59. John M. Kelly, *Audi Alteram Partem; Note*, Natural Law Forum. Paper 84, 103 (1964).

60. Matti S. Kurkela & Santtu Turunen, Due Process in International Commercial Arbitration at 1-2 (Oxford Univ. Press, 2nd ed. 2010) (emphasize added).

61. Tibor Várady, John J. Barceló III, Stefan Kröll & Arthur T. von Mehren, International Commercial Arbitration—A Transnational Perspective at 649 (St. Paul, MN: West Academic Publishing, 6th ed. 2015).

62. See for instance *Township of Montclair v. Montclair PBA Local No. 53*, Superior Court of New Jersey—Appellate Division (May 22, 2012), Case No. A-0657-1154, 2012 N.J. Super. Unpub. LEXIS 1122 (Sup. Ct. N.J. 2012) (unpublished opinion quoted by Christian P. Alberti & David M. Bigge, *Ascertaining the content of the applicable law and iura novit tribunus: approaches in commercial and investment arbitration*, 70(2) Disp. Res. J. 1-20 (2015)).

63. Ewing v. Act Catastrophe-Tex. L.C., 375 S.W.3d 545, 551-52 (Tex. App. 2012); Univ. of Tex. Med. Sch. v. Than, 901 S.W.2d 926, 928 (Tex. 1995).

64. This rule can also be explained by the necessary independence and impartiality of the arbitrator (which is why even the contacts between the arbitrator and one of the parties that took place prior to the arbitrator's appointment must be disclosed).

65. This might be the case in Europe for instance. According to the jurisprudence of the European Court of Human Rights, a waiver "must be supported by minimum procedural guarantees commensurate to the importance of the rights waived" (*Nordstrom-Janzon and Nordstrom-Lehtinen v. Netherlands*, Application No. 28101/95, 22 November 1996). "Therefore, for a waiver to be valid, it must be clear and unambiguous, as well as express and informed, and must not run counter to an important public interest. This latter requirement suggests that not all rights can be completely waived (e.g., such as the rule against partiality), but this is a question on which there is no authority and which, ultimately, is not clear" (Julia Hörnle, Cross-border Internet Dispute Resolution at 107 (Cambridge University Press, 2009)).

66. See for instance Nolan v. Colorado Cent. Consol. Min. Co., 63 F. 930, 1894 U.S. App. LEXIS 2460 (8th Cir. Colo. 1894).

67. Kemal Sahin, *Impartiality of the Judiciary*, 1 Ankara bar rev. 17, 17 (2008). Also available online at http://www.ankarabarosu.org.tr/siteler/AnkaraBarReview/tekmakale/2008-1/3.pdf (last visited April 11, 2017) (emphasis added).

68. See *supra*, p. 18.

69. Bennett G. Picker, Mediation Practice Guide, A Handbook for Resolving Business Disputes at 38 (Bethesda, Md.: Pike & Fischer, Inc., 1998).

70. *Id*. at 39.

71. *Id.* at 38.

72. *Id.* at 40.

73. Tibor Várady, John J. Barceló III, Stefan Kröll & Arthur T. von Mehren, *supra* note 61 at 383.

74. Brian A. Pappas, *Med-Arb: the best of both worlds may be too good to be true: a response to Weisman*, 19.3 Disp. Res. Mag. 42, 42 (2013).

75. *Id*. at 42.

76. So in the two examples, the med-arbiter should choose, between the options allowed by the parties, the one that is the closest to what the law dictates.

77. For instance, in a commercial dispute, parties could agree to ask the arbitrator to decide their dispute by reference to commercial practices or customs (via "honorable engagement clause," also referred to as "equity clause").

78. As underlined by Martin C. Weisman, "There are mediation and arbitration protocols governing the ethical standards in each process, but none of the standards encompasses their combination" (Martin C. Weisman, *Med-Arb: The Best of Both Worlds,* 19 Disp. Resol. Mag. 40 (2013)).

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The Past, Present, and Future of the Doctrine of 'Manifest Disregard'

By Carl Mudd

I. Introduction

Since the Supreme Court's decision in *Hall Street Assocs. L.L.C. v. Mattel, Inc.*[1] courts, commentators, and practitioners have questioned the continuing viability, and even the existence, of the doctrine of manifest disregard of the law ("manifest disregard," "doctrine," or "standard"). Some argue that *Hall Street* effectively abrogated manifest disregard.[2] Others claim that the doctrine survived *Hall Street* as either a judicial gloss or a shorthand for the grounds enumerated in Section 10 of the Federal Arbitration Act.[3] Still others, though a minority, assert that *Hall Street* did not eliminate the traditional, pre-*Hall Street* understanding of manifest disregard as a common-law, non-statutory, ground for vacating arbitral awards.[4] In light of these differing and diverging interpretations, it seems appropriate for the United States Supreme Court to step in and resolve the controversy; however, the Court has yet to explicitly hold what the correct interpretation is, though the opportunity to do so has been presented.[5] The lack of direction regarding the viability of manifest disregard, coupled with confusion surrounding the doctrine's "correct" interpretation and application (if still viable), has caused many to question the fate of manifest disregard as a ground for vacating arbitral awards.

This article examines this puzzling predicament, and attempts to provide guidance regarding the future of the manifest disregard standard. Part II briefly reviews the generally understood meaning of "manifest disregard of the law." Part III investigates the origins and development of the doctrine by examining (a) the Supreme Court's decision in *Wilko v. Swan,* (b) approaches to applying manifest disregard following *Wilko,* and (c) the Court's 2008 decision in *Hall Street.* Part IV examines how the Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits have interpreted *Hall Street,* and how these interpretations have influenced each circuit's position regarding how the manifest disregard standard should be understood. Part V examines the future of manifest disregard, and takes the position that the doctrine remains viable, if not as common-law, as a judicial gloss/shorthand for the grounds set forth in FAA § 10. Part VI suggests that the most effective way to resolve the circuit split would be for the Supreme Court to issue an opinion explicitly setting forth the "correct" interpretation and application of *Hall Street* and the doctrine of manifest disregard. Part VII contains concluding remarks and recapitulates this article's findings.

II. What Is 'Manifest Disregard of The Law'?

Section 10 of the Federal Arbitration Act[6] (FAA) provides the statutory bases for vacating an arbitral award, including "where the award was procured by 'corruption,' 'fraud,' or 'undue means,' and where the arbitrators were 'guilty of misconduct,' or 'exceeded their powers.'"[7] In addition to the statutory grounds contained in FAA § 10, there are also various non-statutory, judicially created, grounds for vacatur.[8] Manifest disregard of the law is generally understood to be one of these judicially created grounds for vacating an award,[9] though it "has not consistently or exclusively been viewed as a common-law expansion of the FAA" (discussed in greater detail below).[10] Although debate exists regarding the origins of the manifest disregard standard and its status as a common-law means for vacating an arbitral award, according to Stephen Huber, the standard approach to manifest disregard requires "a showing that the arbitrator knowingly failed to apply clearly applicable law."[11] An arbitrators mere ignorance of the law is not enough;[12] rather, the moving party must affirmatively show that the arbitrator, "[1] knew about the existence of relevant law; [2] knew that the law was controlling; and [3] intentionally refused to apply the law."

III. Origins and Development of 'Manifest Disregard'

The exact origin of "manifest disregard of the law" is a topic of debate, with no clearly discernable answer. This section examines the origins and development of the doctrine of manifest disregard, starting with the generally accepted view that the doctrine originated from dicta in the United States Supreme Court's decision in *Wilko v. Swan.* After discussing *Wilko,* this article examines various approaches to applying the doctrine of manifest disregard following *Wilko* (but before *Hall Street).* With these approaches in mind, this article then discusses the Supreme Court's decision in *Hall Street,* and the implications that decision has had on the continuing viability of the doctrine of manifest disregard.

a. *Wilko v. Swan*: The Debate Begins

The origin of the doctrine of manifest disregard is a contested issue; however, most commentators agree that the manifest disregard standard originated from dicta in the United States Supreme Court's 1953 decision in *Wilko v. Swan,*[14] where the Court stated that "the interpretation of the law by…arbitrators in

contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation."[15] Although *Wilko* was subsequently overruled on other grounds, this statement has been understood to indicate, as Ashley Sundquist and Michael LeRoy suggest, that manifest disregard of the law may be a permissible ground for vacating an arbitral award, but an arbitrator mistaken interpretation of the law, or a judge's disagreement regarding how the law was interpreted, does not provide "a justifiable reason for vacature."[16] However, the extent of the *Wilko* Court's discussion on the topic of manifest disregard is limited; no attempt is made to elaborate on the meaning of manifest disregard,[17] making it difficult for courts to determine the meaning of, and the amount of weight that should be afforded to, *Wilko's* ambiguous statement.[18]

Further complicating the issue is the fact that *Wilko* did not directly concern the scope of judicial review with regards to arbitral awards.[19] Rather, the issue confronted by the Court "was whether anti-fraud claims brought under § 12(2) of the Securities Act of 1933 could be arbitrated, or whether public policy required that such claims be litigated in state or federal court."[20] The Court's statement regarding "manifest disregard" was merely a byproduct of this analysis.[21] As Kenneth Davis notes, after addressing the main issue, the Supreme Court "lapsed into muddled dicta, which has cast the issue of the scope of judicial review of arbitration awards into uncertainty for over half a century."[22] This uncertainty resulted in confusion amongst courts, as acknowledged by the Fifth Circuit in *Citigroup Global Mkts. Inc. v. Bacon*, where the court stated that it was unsurprising that "lower courts initially grappled with the uncertain implications" of the *Wilko* Court's ambiguous statement.[23]

Despite the confusion and lack of direction regarding the meaning and application of the manifest disregard standard following the decision in *Wilko*, all circuit courts[24] eventually adopted/recognized the doctrine (though some courts have since repudiated their acceptance.)[25, 26] This was partially due, at least for certain circuits, to the Supreme Court's opinion in *First Options of Chicago, Inc. v. Kaplan*, where the Court cited *Wilko* with approval and stated that a party can still "ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances."[27] Other than *First Options*, however, the Supreme Court seldom addressed the doctrine of manifest disregard,[28] and as Thomas Burch references in relation to *Hall Street*, "only recently did the Court give it any substantive analysis."[29] As a result, lower courts were left to apply the doctrine without clear direction or constraint, resulting in differing articulation and application of the standard.[30]

b. Approaches to Applying the Doctrine of Manifest Disregard Following *Wilko* (but before *Hall Street*)

Following *Wilko*, various approaches to and applications of the doctrine of manifest disregard surfaced, "some very broad, some extremely narrow, but all attempting to balance arbitration's competing goals of efficiency and accuracy."[31] Thomas Burch, referencing Stephan Hayford,[32] divides these varying applications into three possible approaches: (1) the "futility acknowledge"[33] approach; (2) the "big error"[34] approach; and (3) "presumption-based"[35] approach.[36]

The "futility-acknowledge" approach is the narrowest approach and is "based on the level of difficulty involved in determining whether an arbitrator has consciously decided to ignore known, applicable law, especially if the arbitrator did not issue a reasoned award."[37] Courts following this approach only apply the doctrine of manifest disregard when "direct evidence exists that the arbitrator consciously disregarded the law."[38] This approach can be seen in *Advest, Inc. v. McCarthy.* There, the First Circuit stated that, in order for an arbitration award to be vacated for manifest disregard of the law, "'there must be some showing in the record, other than the result obtained, that the arbitrators knew the law and expressly disregarded it."'[39] The court went on to state that "disregard" in this context "implies that the arbitrators appreciated the existence of a governing legal rule but [willfully] decided not to apply it."[40] As the *Advest* court's articulation implies,[41] this approach is severely limited. This is because a court utilizing this approach most likely will not overturn an award absent a reasoned award,[42] "or a transcript of the proceedings showing that the arbitrator explicitly refused to follow the law...."[43] This, Burch asserts, essentially renders the doctrine a nullity.[44] Nonetheless, it appears that "[m]ost courts that recognize manifest disregard as a ground for overturning awards...use this approach."[45]

The broadest approach, the "big error" approach, focuses on "whether the arbitrator made an egregious mistake[,]"[46] and unlike the "futility-acknowledge" approach, does not require direct evidence indicating that the arbitrator consciously disregarded the law.[47] Instead, courts are allowed to "overturn an arbitration award by *assuming* that the arbitrator consciously disregarded known, applicable law based simply on the law's clarity and the arbitrator's failure to apply it."[48] This approach is illustrated by the Second Circuit's language in *Willemijn Houdstermaatschappij, BV v. Std. Microsystems Corp*.[49] There, the court agreed that manifest disregard of the law can be found where an arbitrator '"understood and correctly stated the law but proceeded to ignore it."'[50] However, the court determined that "a court may infer that [an arbitrator] manifestly disregarded the law if it finds that the error made…is so obvious that it would be instantly perceived

by the average person qualified to serve as an arbitrator."[51] As this statement indicates, a court applying this approach may infer from the facts of the case that an arbitrator knew applicable law, and assume he/she ignored it based on the law's clarity. This, Burch asserts, is in contrast to the *Wilko* court's statement "that awards should not be reviewed for 'error in interpretation,"'[52] which may indicate why this approach is the one least employed.[53]

The third approach, the "presumption-based" approach, falls between the first two approaches, and can be understood as somewhat of a middle ground. Under this approach, courts review "the record of the arbitration proceedings and will overturn the award if something in that record creates a presumption that the arbitrator ignored known, applicable law."[54] For example, in *Montes v. Shearson Lehman Bros., Inc.*,[55] the Eleventh Circuit overturned an arbitral award on the ground that the arbitrator manifestly disregarded the law.[56] In making this determination, the court examined the arbitral award (there was no written opinion), and noted that the panel was "flagrantly and blatantly urged" by the prevailing party to ignore known applicable law.[57] According to Hayford, during arbitration the prevailing party asserted "that the controlling law was 'not right,"' and repeatedly exhorted "to the arbitration panel that they should do what was right, even if it produced an outcome inconsistent with the pertinent law."[58] The court found that this, coupled with the fact that "nothing in the award or elsewhere in the record" suggested that the arbitrator "did not heed" the prevailing party's plea,[59] indicated that the arbitrator knew the law but consciously ignored it. As the Eleventh Circuit's decision illustrates, the "presumption-based" approach does require a degree of proof that the arbitrator knew the law and ignored it, but "direct proof that the arbitrator made a conscious decision to ignore the law" is not a necessary prerequisite for vacatur.[60]

As the above illustrates, the precise standard utilized by Circuit Courts following *Wilko* varied from circuit to circuit.[61] According to Weathers Bolt, however, most circuits generally agreed (with the exception of the Seventh Circuit[62]) that successful use of manifest disregard as a ground for judicial review and vacatur after *Wilko* (but before *Hall Street*) required that[63] "[l] the arbitrator or arbitrators knew the law and [2] deliberately failed to apply the applicable law."[64] Bolt also notes, and Jill Gross confirms,[65] that many circuits "also required that the law be clearly applicable to the situation at bar."[66]

c. *Hall Street*

More than 50 years after the Court's decision in *Wilko*, the Supreme Court decided the case of *Hall Street Assocs. L.L.C. v. Mattel, Inc.*,[67] which has raised many questions and concerns regarding the continuing viability of the doctrine of manifest disregard.[68] In *Hall Street,* the Supreme Court addressed (in dicta) the ambiguities associated with *Wilko* 's comments regarding the scope of judicial review of arbitral awards. The issue before the Court was "whether the parties to an arbitration agreement could validly agree to expand the grounds prescribed in § 10 and § 11 of the FAA for vacating or correcting an arbitration award."[69] The Court answered this question in the negative, holding that the grounds for vacating and modifying an award under the FAA are exclusive.[70]

In arguing that the grounds set forth in FAA § 10 and § 11 were not exclusive (i.e., the parties had a right to contractually expand the scope of review of an arbitration award), Hall Street "pointed out that courts have been permitted to expand review beyond section 10 and 11 of the FAA since *Wilko* created manifest disregard."[71] Hall Street asserted that the Court's statement in *Wilko* "meant that manifest disregard was a further ground for vacatur in addition to the grounds listed in section 10," and therefore Supreme Court precedent "allowed for nonstatutory vacatur."[72] In response, the Court acknowledged that a number of Circuit Courts had recognized manifest disregard as an additional ground for vacating an award beyond § 10 of the FAA,[73] but the Court disagreed with Hall Street's argument, in part, because *Wilko* expressly rejected what Hall Street was asking for: "general review for an arbitrator's" legal errors.[74] The Court, however, did not stop there. Instead, the Court attempted to explain the meaning of its earlier statement in *Wilko*, writing:

> Maybe the term 'manifest disregard' was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them.... Or, as some courts have thought, 'manifest disregard' may have been shorthand for § 10(a)(3) or § 10(a)(4), the paragraphs authorizing vacatur when the arbitrators were 'guilty of misconduct' or 'exceeded their powers.' We, when speaking as a Court, have merely taken the *Wilko* language as we found it, without embellishment, see *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938,942,115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995), and now that its meaning is implicated, we see no reason to accord it the significance that Hall Street urges.[75]

This statement has caused many courts and scholars to question the viability, and possibly the existence, of the doctrine of manifest disregard (at least in federal courts).[76] Although the Court "did not expressly reject 'manifest disregard' as a valid ground for review," according to Jill Gross, "it did not embrace it either."[77] This uncertainty has lead a number of Circuit Courts to construct differing interpretations of the Court's decision in *Hall Street*, prompting divergence among courts and disagreement regarding the future of the doctrine.

IV. Manifest Disregard After *Hall Street*

Since the Supreme Court's decision in *Hall Street*, Federal Circuit Courts have grappled with the issue of

whether manifest disregard remains a valid ground for vacating arbitral awards. This has resulted in varying views and responses regarding the current viability and application of the doctrine of manifest disregard. Each Circuit's view, Jonas Cullemark suggests, relates to the meaning attributed to the word "exclusive" in *Hall Street*,[78] and each Circuit's response tends to depend, according to Davis, "on whether the circuit viewed the manifest disregard standard as statutory or non-statutory."[79] As discussed below, the Circuits that have definitively addressed the issue have taken three positions regarding the doctrine of manifest disregard.[80] The first position, which I have labeled the abandonment group, holds that manifest disregard is no longer a viable basis for vacatur. The second position, the "non-statutory" group, believes that manifest disregard as a non-statutory basis for vacatur survived *Hall Street*. The third position, labeled the "shorthand or judicial gloss" group, holds that manifest disregard remains viable as a judicial gloss on the grounds listed in FAA § 10, or as a shorthand for FAA §§ 10(a)(3) and 10(a)(4). In addition to these three positions, some courts have acknowledged the continuing viability of manifest disregard, but have not definitively set forth whether the doctrine remains valid as a non-statutory, common-law ground or as a judicial gloss/shorthand for the grounds enumerated in FAA § 10.

a. Abandonment

The Fifth, Eighth, and Eleventh Circuits have interpreted *Hall Street* as effectively eradicating the doctrine of manifest disregard—*i.e.*, the doctrine no longer remains a viable basis for vacating arbitral awards post-*Hall Street*.[81] This section briefly examines decisions in each circuit denying the continuing validity of the doctrine of manifest disregard.

i. Fifth Circuit

The Fifth Circuit, in *Citigroup Global Markets, Inc. v. Bacon,* addressed the issue of "whether manifest disregard of the law remains a valid ground for vacatur of an arbitration award in light of the Supreme Court's recent decision in *Hall Street*…."[82] Relying on the history of the law of vacatur and the development of FAA,[83] the court rejected manifest disregard as an independent, non-statutory ground for vacating arbitral awards.[84] In so holding, the court determined that the Supreme Court's language in *Hall Street* made clear that the grounds for vacatur set forth in Section 10 of the FAA were exclusive.[85] As a result, the court concluded that "manifest disregard of the law as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected."[86]

ii. Eighth Circuit

In *Med. Shoppe Int'l, Inc. v. Turner Invs., Inc.*, the Eighth Circuit confirmed its view that the bases for vacating an arbitral award are limited to the express grounds set forth in the FAA.[87] According to Stanley Leasure, the court further confirmed "its understanding that *Hall Street's* practical effect was to establish the grounds specifically enumerated in the FAA as the exclusive grounds for vacatur."[88] Accordingly, the court concluded that appellant's claim that the arbitrator manifestly disregarded the law was "not cognizable" since such ground was "not included among those specifically enumerated in §10...."[89] The court reaffirmed its position in *Air Line Pilots v. Trans State*, where the court described manifest disregard as a "defunct vacatur standard."[90] The court's reasoning, John and Ari Diaconis suggest, was "that manifest disregard is a non-statutory ground for vacatur and thus impermissible under *Hall Street*'s pronouncement that FAA Section 10 is to be read exclusively."[91]

iii. Eleventh Circuit

In *Frazier v. CitiFinancial Corp.*, the Eleventh Circuit adopted the Fifth Circuit's position regarding the viability of manifest disregard.[92] The court held that manifest disregard, as a "judicially created" basis for vacatur, was "no longer valid in light of" the Supreme Court's decision in *Hall Street*.[93] In so holding, the court agreed with the Fifth Circuit "that the categorical language of [*Hall Street*] compels such a conclusion."[94] The Eleventh Circuit reconfirmed this position in *Campbell's Foliage, Inc. v. Federal Corp Insurance Corp.*, where that court determined that "the only viable ground for vacatur in [the Eleventh Circuit] were those enumerated in the FAA."[95]

b. Non-Statutory

The Sixth Circuit is the only circuit to maintain its pre-*Hall Street* position that the doctrine of manifest disregard exists as a non-statutory, common-law, ground for vacating arbitral awards. This section examines Sixth Circuit decisions illustrating the Circuit's view that manifest disregard remains a viable non-statutory means for vacatur.

i. Sixth Circuit

In *Grain v. Trinity Health*, the Sixth Circuit determined "that manifest disregard of the law is no longer a ground for modifying an award";[96] however, the court did not determine whether the doctrine remains a viable means for vacatur. According to John and Ari Diaconis, "[d]istrict courts within the Sixth Circuit seem to agree that manifest disregard has survived *Hall Street*."[97] In support of this conclusion, the district courts cite the Sixth Circuit's unpublished opinion in *Coffee Beanery v. WW*.[98] There, the court held that application of *Hall Street* is limited to circumstances involving contractual expansion of the grounds for review.[99] In so holding, the court acknowledged that *Hall Street* "significantly reduced the ability of federal courts to vacate arbitration awards for reasons other than those specified in 9 U.S.C. § 10"; however, the court found that "it did not foreclose federal courts' review for an arbitrator's manifest disregard of the law."[100] Consistent with this statement, the court found that, although its "ability to vacate an arbitration award is almost exclusively limited to these grounds...it may also vacate

an award found to be in manifest disregard of the law."[101] The court then endorsed the pre-*Hall Street* view that the doctrine of manifest disregard applies if "(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle."[102] This indicates, as John and Ari Diaconis suggest, that the Sixth Circuit "recognizes manifest disregard as an independent ground for vacatur, separate and apart from FAA Section 10."[103]

c. Statutory: Judicial Gloss/Shorthand

Though many circuits no longer advocate for the non-statutory, common-law, understanding of manifest disregard, a number of Circuit Courts still believe the doctrine survived *Hall Street* as a shorthand for, or a judicial gloss on, the grounds enumerated in FAA § 10. As Jack Rephan notes, "[a] number of Federal Circuits...have interpreted [*Hall Street*] as not rejecting, *in toto*, manifest disregard as basis for seeking to vacate an award, but that it has survived as being merely shorthand for the statutory grounds under § 10(a)(3) and § 10(a)(4) or as a judicial gloss on the statutory grounds."[104] The courts that have definitively maintained this position following *Hall Street* include the Second Circuit and the Ninth Circuit.[105]

i. Second Circuit

In *Stolt-Nielsen SA v. AnimalFeeds International Corp.* (overruled on other grounds), the Second Circuit confirmed its view that *Hall Street* did not "abrogate the 'manifest disregard' doctrine."[106] The court conceded, Jack Jarrret notes, that the Second Circuit "had previously indicated that the judicially named grounds were different from the grounds specified in the FAA."[107] However, in *Stolt-Nielsen* the court stated that it "reconceptualized" their understanding of the doctrine of manifest disregard "as a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA...."[108] The Second Circuit recently reconfirmed this position in *Sutherland Global Services v. Adam Technologies*. There, the court first noted that "the specific grounds for vacatur provided in the FAA are generally exclusive,"[109] but then stated that manifest disregard "'remains a valid ground for vacating arbitration awards"' as "'judicial gloss on the specific grounds for vacatur..."' set forth in FAA § 10.[110] Thus, it appears that the Second Circuit has adopted the view that manifest disregard remains viable as a judicial gloss.

ii. Ninth Circuit

In *Comedy Club, Inc. v. Improv W. Assocs.*, the Ninth Circuit read the Supreme Court's decision in *Hall Street* as merely identifying several possible interpretations of the doctrine of manifest disregard.[111] These "possible readings of the doctrine"[112] included the understanding that manifest disregard was a shorthand for the statuary grounds enumerated under Section 10 of the FAA,[113] which the court acknowledged was the accepted view in the Ninth Circuit.[114] Thus, the court concluded "*Hall Street Associates* did not undermine the manifest disregard of law ground for vacatur, as understood in the [Ninth Circuit]...."[115] The Ninth Circuits reaffirmed its position in *Wetzel's Pretzels, LLC v. Johnson*, where the court stated that "[i]n order for us to vacate the award on the ground that the arbitrator exceeded his powers under § 10(a)(4)," the moving party must "show that the award was 'completely irrational, or exhibit[ed] a manifest disregard of law...."'[116] In order to vacate an arbitration award for manifest disregard of the law, the court noted, "'it must be clear from the record that the arbitrators recognized the applicable law and then ignored it."'[117] Thus, it is clear that that the Ninth Circuit has adopted the view that manifest disregard remains a viable means for vacatur as a shorthand for the statutory grounds set forth in FAA § 10.

d. Surviving but Unsure

The doctrine of manifest disregard has survived in both the Fourth and Tenth Circuits. However, neither circuit has taken a definitive position on whether the doctrine survives as a judicial gloss/shorthand or an independent, non-statutory, ground for vacatur.

i. Fourth and Tenth Circuits

In *Wachovia Securities v. Brand*, the Fourth Circuit determined that its pre-*Hall Street* understanding of manifest disregard[118] remained controlling.[119] However, the court did not affirmatively determine the status of the doctrine; rather, the court found that "manifest disregard continues to exist as either an independent ground for review or as a judicial gloss, we need not decide which of the two...."[120] This position was confirmed in a footnote in *Dewan v. Walia*, where the court noted that the Fourth Circuit has "recognized that 'manifest disregard continues to exist' as a basis for vacating an arbitration award, either as 'an independent ground for review or as a judicial gloss' on the enumerated grounds for vacatur set forth in the FAA."[121]

In *Adviser Dealer Servs. v. Icon Advisers, Inc.*, the Tenth Circuit acknowledged that manifest disregard remains a viable means for vacating an arbitral award:

> A district court may vacate an arbitration award only "for the reasons enumerated in the Federal Arbitration Act, 9 U.S.C. § 10, or for 'a handful of judicially created reasons."' These judicially created reasons 'include violations of public policy, manifest disregard of the law, and denial of a fundamentally fair hearing.[122]

However, the court does not elaborate on whether the doctrine is seen as a judicial gloss or an independent ground for vacatur. Guidance as to the Tenth Circuit's position in this regard may be found in the unpublished opinion *Abbott v. Law Office of Patrick K. Milligan*.[123] There, the court "expressed the opinion that a willful decision of an arbitrator not to apply controlling law might fall

within § 10 even though the claimed ground for vacatur is expressed in terms of manifest disregard of the law."[124] Thus, it appears that the Tenth Circuit may be leaning towards the view that manifest disregard remains viable as a shorthand for FAA § 10.

V. Future of Manifest Disregard

The future of manifest disregard is far from certain. Some speculate that the Supreme Court's decision in *Hall Street* effectively abrogated the doctrine (at least as a common-law ground for vacatur), while others maintain that the doctrine has survived post-*Hall Street* as common law or as a judicial gloss/shorthand for the grounds listed in FAA § 10. In this author's opinion, the doctrine survived *Hall Street* and remains a viable and valid means for vacating arbitral awards, possibly as independent common law, but more likely as a judicial gloss/shorthand for FAA § 10. Below this section takes the position that the doctrine remains viable for two primary reasons: (1) the Supreme Court's decision in *Hall Street* did not abandon the doctrine; rather, the Court's opinion indicates that manifest disregard remains valid, possibly as common law, but most likely as a judicial gloss or shorthand for the grounds enumerated in FAA § 10, and (2) the majority of Circuit Courts continue to recognize the viability of manifest disregard, in one form or another, despite *Hall Street*.

First of all, it must be noted that the language in *Hall Street* used to support the position that the doctrine of manifest disregard is dead post-*Hall Street* (at least as a non-statutory ground for vacatur) is conclusory dicta[125] with only persuasive value (though some argue that dictum can become binding[126]).[127] In addition, the language in *Hall Street* used to support this position states that it is possible that the Court's reference to manifest disregard in *Wilko* indicated that "the term... was meant to name a new ground for review...."[128] This suggests that it is possible, though unlikely, that the doctrine can survive *Hall Street* as a common-law, non-statutory, ground for vacatur.

Even if the language in *Hall Street* effectively eradicated manifest disregard as a common law means for vacatur, it did not preclude or abandon its use in entirety. As Gross asserts, "the strict constructionist majority [in *Hall Street*] merely interpreted the FAA to preclude parties seeking vacatur from asserting grounds other than those identified in FAA section 10, and suggested that lower courts could construe the bases provided by section 10 as including 'manifest disregard.'"[129] As Gross' statement suggests, the Court did not abandon the doctrine; rather, the Court delegated to the courts the task of determining how "manifest disregard" fits into one of the four categories set forth in FAA § 10.[130] In accordance with this understanding, parties are not prohibited from asserting manifest disregard; however, in order to successfully challenge an award, the parties will have to expressly articulate (in some circuits, but not all) their manifest disregard claim in a manner so as to incorporate the language and/or grounds set forth in FAA § 10. Gross agrees with this position and asserts that "parties can continue to challenge arbitration awards on the FAA ground that arbitrator committed misconduct under [FAA § 10(a)(3)] by manifestly disregarding the law or exceeded the scope of its power under [FAA§ 10(a)(4)] by manifestly disregarding the law."[131]

Furthermore, as the preceding section indicates, manifest disregard has survived post-*Hall Street* in many circuits. However, the doctrine no longer maintains the status, or original understandings, set forth by the Circuit Courts following *Wilko*. That is, most circuits that recognize the doctrine despite the Court's language in *Hall Street* no longer see it as a common-law, non-statutory ground for vacatur (though some circuits have not affirmatively decided this).[132] This indicates that the doctrine's foundation has been weakened following *Hall Street*.[133] However, it is this author's contention that the doctrine is not dead. On the contrary, the doctrine remains a viable means for vacating arbitral awards, as evidence by the various circuits recognizing its continuing viability and applicability.[134] This is not to say that practitioners attempting to use the doctrine, even in the circuits that recognize it, will be successful. Establishing the elements of manifest disregard remains a difficult task, regardless of whether the doctrine is seen as non-statutory or a judicial gloss/shorthand. Still, the Circuit Courts' retention and acceptance of the doctrine, though modified, signals that most circuits view manifest disregard as a valid and viable means for challenging an arbitral award, and should the "right" case present itself, these Circuits will vacate the award.

As the preceding illustrates, the doctrine of manifest disregard is not dead. *Hall Street* may have caused a reformulation regarding the authority from which the doctrine derives support, i.e., whether the doctrine should be conceptualized as a separate non-statutory ground for vacatur, or as a judicial gloss/shorthand for FAA § 10; however, *Hall Street* did not completely abrogate the doctrine, for the reasons discussed above. Therefore, it is this author's contention that the doctrine survived *Hall Street*, and remains a viable means for vacating arbitral awards in many circuits.

VI. Suggestion: Supreme Court Review

In order to set forth and/or clarify the "correct" interpretation of *Hall Street* and resolve the split among the Circuit Courts, the Supreme Court ought to lay down an explicit holding accepting or rejecting the doctrine and the prevailing Circuit Court interpretations. Absent such an explicit ruling, lower courts are left to divine their own meanings. The likelihood this will occur, however, is debatable. This is because the Supreme Court has been provided multiple opportunities to decide how "manifest

disregard" ought to be interpreted and applied, but has declined to specifically address the issue.[135] Thus, the possibility that the Court will lay down an explicit holding that resolves the split among Circuit Courts is uncertain, and probably unlikely given the Court's inclination to avoid the issue. Nevertheless, it does appear that the doctrine of manifest disregard did survive *Hall Street*, though modified, and it is this author's contention that the doctrine will remain viable in the circuits that have accepted it, unless and until the Supreme Court rules otherwise.

VII. Conclusion

This article has examined the origin of the doctrine of manifest disregard, the standard's development following the Supreme Court's decisions in *Wilko* and *Hall Street*, and its future viability as a means for vacating arbitration awards. It was found that most, if not all Circuits Courts, following *Wilko*, accepted manifest disregard as a common-law, non-statutory, means for vacating arbitral awards, though some circuits maintained differing positions regarding the correct articulation and application of the doctrine. After the Court's decision in *Hall Street*, almost all of the Circuit Courts altered their understanding of manifest disregard. However, only three circuits (of the eight surveyed) have taken the position that *Hall Street* completely abrogated the doctrine of manifest disregard. Therefore, the doctrine is not dead, but rather still exists, possibly as common law, but most likely as a judicial gloss/shorthand for the grounds enumerated in FAA § 10. Although the most efficient means for resolving the circuit split would be for the Supreme Court to issue an explicit holding that would guide lower courts regarding the correct interpretation and application of manifest disregard, the Court is unlikely to take up this issue. As a result, the fate of the doctrine of manifest disregard remains uncertain, and will remain uncertain.

Endnotes

1. *Hall St. Assocs., L.L.C. v Mattel, Inc.*, 552 U.S. 576 (2008).
2. Carolina Rizzo, *Why 'Manifest Disregard' Survives as an Independent Standard for Vacatur of Arbitral Awards Even After Hall Street,* 3 Arb. Brief 1, 12-13 (2013). *See infra* Part IV(a)(i)-(iii).
3. Carolina Rizzo, *Why 'Manifest Disregard' Survives as an Independent Standard for Vacatur of Arbitral Awards Even After Hall Street,* 3 Arb. Brief 1, 12-13 (2013). *See infra* Part IV(c)(i)-(ii). *See also, infra* Part IV(d).
4. *See infra* Part IV(b). *See also, infra* Part IV(d).
5. *See e.g., Stolt-Nielsen S. A. v AnimalFeeds Int'l Corp.,* 559 U.S. 662, 672, n.3 (2010) ("We do not decide whether 'manifest disregard' survives our decision in *Hall Street Associates, L.l.C. v. Mattel, Inc.*, 552 U.S. 576,585, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008), as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10."); *Campbell's Foliage, Inc. v. Fed. Crop Ins. Corp.,* 562 F. App'x 828 (11th Cir. 2014), *cert. denied,_* U.S._, 135 S. Ct. 145 (2014); *Coffee Beanery, Ltd. v. WW, L.L.C.,* 300 F. App'x 415 (6th Cir. 2008), *cert. denied,* 558 U.S. 819 (2009).
6. Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.* (1925) [hereinafter "FAA"].
7. *Hall St. Assocs., L.L.C. v Mattel, Inc.*, 552 U.S. 576,578 (2008); FAA § 10.
8. Annie Chen, *The Doctrine of Manifest Disregard of the Law After Hall Street: Implications for Judicial Review of International Arbitrations in U.S. Courts,* 32 Fordham Int'l L.J. 1872, 1879 (2008-2009); Hiro N. Aragaki, *The Mess of Manifest Disregard,* The Yale Law Journal, at 1 (Sep. 29, 2009), *available at:* http://www.yalelawjournal.org/pdf/8l 7_hert8o16.pdf ("Manifest disregard is a common-law exception to the limited grounds for vacatur of arbitral award enumerated in the Federal Arbitration Act (FAA)."); *see* Carbonneau, *infra* note 9; Huber, *infra* note 11.
9. Thomas E. Carbonneau, *The Rise in Judicial Hostility to Arbitration: Revisiting Hall Street Associates,* 14 Cardozo Conflict Resol. 593, 604-606 (2013); Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street,* 113 Penn St. L. Rev. 1103, 1110 (2008-2009); Lisa J. Banks & Matthew S. Stiff, *The Federal Arbitration Act, ALI-CLE: Advanced Employment Law and Litigations 2013,* Katz, Marshall & Banks, LLP, at 15 (last visited May 6, 2017), http://www.kmblegal.com/wp-content/uploads/ALI-CLE-Arbitration-Feb-2013.pdf; Chen, *supra* note 8, at 1879.
10. Jill I. Gross, *Hall Street Blues: The Uncertain Future of Manifest Disregard,* 37 Sec. Reg. L.J. 232,270 (2009).
11. Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts,* 10 Cardozo J. Conflict Resol. 509, 557 (2008-2009).
12. Huber, *supra* note 11, at 557.
13. *Id*.
14. Reuben, *supra* note 9, at 1110 ("The manifest disregard standard is a non-statutory ground that emanates from dicta in the *Wilko v. Swan* case....); Chen, *supra* note 8, at 1879 ("The doctrine of manifest disregard of law traces its origins to 1953…*Wilko v. Swan....* The entire doctrine of manifest disregard of the law has developed out of... dictum from *Wilko,* a case that has been since overruled on its principle ruling."); Matthew Wolper, *"Manifest Disregard" Not Yet Entirely Disregarded,* 86 Fla. B.J. 27, 37 (2012) ("The origin of manifest disregard of the law is found in the Supreme Court's opinion in *Wilko v. Swan....);* Banks & Stiff, *supra* note 9, at 15 (Manifest disregard for the law "originated in the dictum of [*Wilko v. Swan] ...."); Michael A. Scodro, *Deterrence and Implied Limits on Arbitral Power,* 55 Duck L.J. 547, 566-67 (2005) ("The 'manifest disregard' locution originated in the Supreme Court's decision in *Wilko.. ..*"). Gross, *supra* note 10, at 236 ("The 'manifest disregard' standard originated from a statement by the Supreme Court in *Wllko v. Swan...");* Stephan J. Ware & Marisa V. Maleck, *Authorities Split After the Supreme Court's Hall Street Decision: What Is Left of the Manifest Disregard Doctrine?,* The Federalist Society, at 119 (Mar. 31, 2010), *available at:* http://www.fed-soc.org/publications/detail/authorities-split-after-the supreme-courts-hall-street-decision-what-is-left-of-the-manifest-disregard-doctrine ("The manifest disregard doctrine is traced to the Supreme Court's decision in *Wilko v. Swan...").* *See also* Adam Miliam, *A House Built on Sand: Vacating Arbitration Awards for Manifest Disregard of the Law,* 29 Cumb. L. Rev. 705, 708 (1998-1999) ("circuits derive the manifest disregard of the law standard either from the dicta in *[Wilko v. Swan]* or as an implied defense arising under section 10(a)(4) of the FAA ... "). *But see,* Michael H. LeRoy, *Are Arbitrators Above the Law? The "Manifest Disregard of the Law" Standard,* 52 B.C. L. Rev. 137, 157 (2011) ("Dictum in *Wilko* is mistakenly cited as a source of the manifest disregard standard. The Court in *Wilko* did not adopt this standard but simply discussed it as a hypothetical.").
15. *Wilko v. Swan,* 346 U.S. 427, 436-37 (1953) *(overruled on other grounds in Rodriguez de Quijas v. Shearson/American Express,* 490 U.S. 477 (1989)).
16. Ashley K. Sundquist, *Do Judicially Created Grounds for Vacating Arbitral Awards Still Exist? Why Manifest Disregard of the Law and Public Policy Exceptions Should Be Considered under Vacatur,* 2015 J. Disp. Resol. 407, 411 (2015); LeRoy, *supra* note 14, at 158 ("In this advisory statement" the Court "said that a judge may review [an arbitral award] if it manifestly disregards the law, but not if the judge disagrees with its legal interpretation.").

17. Thomas V. Burch, *Manifest Disregard and the Imperfect Procedural Justice of Arbitration,* 59 U. Kan. L. Rev. 47, 61 (2010-2011). *See* LeRoy, *supra* note 14, at 158 (the Court did not give any "further details on what manifest disregard of the law meant, and it gave no indication that it ever intended manifest disregard to constitute a new ground for vacating arbitration awards under the FAA.").

18. *See* Milam, *supra* note 14, at 708 ("[N]o secure basis exist upon which courts can apply the standard, thus leading to arbitrary and inconsistent interpretations and application among the circuits."). *See also* Scodro, *supra* note 14, at 569 ("Without statutory or other grounding aside from conclusionary dicta in *Wilko,* however, defining 'manifest disregard' has been a slippery task.").

19. Kenneth R. Davis, *The End of an Error: Replacing "Manifest Disregard" with a New Framework for Reviewing Arbitration Awards,* 60 Clev. St. L. Rev. 87, 92 (2012-2013).

20. Davis, *supra* note 19, at 92.

21. *See* Carbonneau, *supra* note 9, at 604 ("The *[Wilko]* opinion make only an incidental reference to [manifest disregard], possible by pure happenstance.")

22. Davis, *supra* note 19, at 94. *See* Carbonneau, *supra* note 9, at 604 (Manifest disregard ... actually has little to do with Wilko.").

23. *Citigroup Global Mkts. Inc. v. Bacon,* 562 F.3d 349, 354 (5th Cir. 2009). *See San Marine Compania De Navegacion v. Saguenay Terminals Ltd.,* 293 F.2d 796 (9th Cir. 1961) ("Frankly, the Supreme Court's use of the words 'manifest disregard' has caused us trouble here. Conceivably the words may have been used to indicate that whether an award may be set aside for errors of law would be a question of degree. Thus, if the award was based upon a mistaken view of the law, but in their assumption of what the law was, the arbitrators had not gone too far afield, then the award would stand; but if the error is an egregious one, such as no sensible layman would be guilty of, then the award could be set aside. Such a 'degree of error' test would, we think, be most difficult to apply. Results would likely vary from judge to judge. We believe this is not what the court had in mind when it spoke of 'manifest disregard.'"). *See also,* Davis, *supra* note 19, at 94.

24. *See, e.g., Advest, Inc. v. McCarthy,* 914 F.2d 6 (1st Cir. 1990); *Trafalgar Shipping Co. v. Intl. Milling Co.,* 401 F.2d 568 (2d Cir. 1968); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker,* 808 F.2d 930 (2d Cir. 1986); *Ludwig Honold Mfg. Co. v. Fletcher,* 405 F.2d 1123 (3d Cir. 1969); *Upshur Coals Corp. v. United Mine Workers, Dist. 31,* 933 F.2d 225 (4th Cir. 1991); *Williams v. Cigna Fin. Advisors,* 197 F.3d 752 (5th Cir. 1999); *Anaconda Co. v. Intl. Assa. of Machinists & Aerospace Workers,* 693 F.2d 35 (6th Cir. 1982); *Health Servs. Management Corp. v. Hughes*, 975 F.2d 1253 (7th Cir. 1992); *Stroh Container Co. v. Delphi Indus., Inc.,* 783 F.2d 743 (8th Cir. 1986); *French v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 784 F.2d 902 (9th Cir. 1986); *Jenkins v. Prudential-Bache Sec., Inc.,* 847 F.2d 631 (10th Cir. 1988); *Montes v. Shearson Lehman Bros.,* 128 F.3d 1456 (11th Cir. 1997); *Kanuth v. Prescott,* 292 U.S.AppD.C. 319, 942 F.2d 1175 (1991); John Diaconis & Ari Diaconis, *Six Years After Hall Street: The Continued Viability of Manifest Disregard, Jurisdiction by Jurisdiction,* Bleakley Platt, at 10 (last visited May 6, 2017), http://www. bpslaw. com/files/20 I 50729043546-ARIAS%20Quarterly%2020I 5%20 First%20Quarter%20-%20Six%20Y ears%20After%20Hall%20St. pdf (citing *McCarthy v. Citigroup Global Mkts., Inc.,* 463 F.3d 87, 91 (1st Cir. 2006); *Hoeft v. MVL Grp., Inc.,* 343 F.3d 57, 64 (2d Cir. 2003); *Duluhos v. Stasberg,* 321 F.3d 365, 370 (3d Cir. 2003); *Three* S *Delaware, Inc., v. DataQuick Info Sys., Inc.,* 492 F.3d 520, 527 (4th Cir. 2007); *Prestige For v. Ford Dealer Computer Servs., Inc.,* 324 F.3d 391, 395-96 (5th Cir. 2003); *Merrill Lynch, Pierce, Fenner & Smith, Inc., v. Jaros,* 70 F.3d 418, 420-21 (6th Cir. 1995); *Halim v. Great Gatsby's Auction Gallery, Inc.,* 5I 6 F.3d 557, 563 (7th Cir. 2008); *Manion v. Nagin,* 392 F.3d 294, 298 (8th Cir. 2004); *Collins v. D.R. Horton, Inc.,* 505 F.3d 874, 879 (9th Cir. 2007); *Dominion Video Satellite, Inc. v. Echostar Satellite LLC,* 430 F.3d 1269, 1275 (10th Cir. 2005); *Scott v. Prudential Sec., Inc.,* 141 F.3d I007, 1017 (11th Cir. 1998); *Lessin v. Merrill lynch, Pierce, Fenner & Smith, Inc.,* 481 F.3d 813,821 (D.C. Cir. 2007)).

25. *See infra* Part IV(a)(i)-(iii).

26. Davis, *supra* note 19, at 94 ("Despite the vagueness of the *Wilko* dicta, the circuit courts, one by one, recognized the manifest disregard standard."); Chen, *supra* note 8, at 1879 ("Prior to *Hall Street,* manifest disregard as an independent ground for vacatur was well accepted by all circuit courts except for the Seventh Circuit."); Burch *supra* note 17, at 61 ("every federal circuit court of appeals has adopted [the doctrine of manifest disregard] (although the Fifth and Eleventh Circuit have since renounced it), many state courts have adopted it..."); Scodro, *supra* note 14, at 567 ("Despite its humble origins and lack of explication from the Supreme Court, the 'manifest disregard' doctrine has taken hold in every federal circuit and in many state courts."); LeRoy, *supra* note 14, at 158-59.

27. *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938,942 (1995) (citing 9 U.S.C. § 10 (award procured by corruption, fraud, or undue means; arbitrator exceeded his powers); *Wilko* v. *Swan,* 346 U.S. 427, 436-437, 98 L. Ed. 168, 74 S. Ct. 182 (1953) (parties bound by arbitrator's decision not in "manifest disregard" of the law), overruled on other grounds, *Rodriguez de Quijas* v. *Shearson/ American Express, Inc.,* 490 U.S. 477, 104 L. Ed. 2d 526, 109 S. Ct. 1917 (1989)).

28. Burch, *supra* note 17, at 62 (citing *First Options of Chicago, Inc. v Kaplan,* 514 U.S. 938, 942 (1995) (citing *Wilko* and mentioning manifest disregard in a parenthetical following the cite); *Shearson/ Am. Express, Inc. v. McMahon,* 482 U.S. 220, 231 (1987) (citing *Wilko* and quoting its sentence on manifest disregard); *McMahon,* 482 U.S. at 258- 59, 268 (Blackmun, J., concurring in part and dissenting in part) (acknowledging manifest disregard and citing *Wilko); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614,656 (1985) (Stevens, J., dissenting) (stating that arbitration awards may be overturned if they are in manifest disregard of the law)); *Stolt-Nielsen* S. *A. v. AnimalFeeds Int' Corp.,* 559 U.S. 662(2010). *See also,* Scodro, *supra* note 14, at 567 ("A majority of the Supreme Court has only even hinted approval of the doctrine on one occasion since *Wilko* was decided in 1953.").

29. Burch, *supra* note 17, at 62.

30. For more information regarding the various circuits' recognition, interpretation, and application of manifest disregard following the Court's statement in *Wilko, see* LeRoy, *supra* note 14, at 160-69; Davis, *supra* note 19, at 94-96; Burch, *supra* note 17, at 62-65; Chen, *supra* note 8, at 1881-1883; Huber, *supra* note 11, at 560-63.

31. Burch, *supra* note 17, at 62.

32. Stephan Hayford, *Reining in the "Manifest Disregard" of the Law Standard: The Key to Restoring Order to the Law of Vacatur,* 1998 J. Disp. Resol. 117.

33. *Id.* at 125-24 (citing *Prudential-Bache Secs., Inc., v. Tanner,* 72 F.3d 234,240 (1st Cir. 1995); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros,* 70 F.3d 418,421 (6th Cir. 1995); *Advest, Inc. v. McCarthy,* 914 F.2d 6, 10 (1st Cir. 1990)); Burch, *supra* note 17, at 62 (citation omitted).

34. Burch, *supra* note 17, at 63.

35. *Id.* at 64 (citing Hayford, *supra* note 32, at 128-32 (internal citation omitted)).

36. *Id.* at 62-64. *See also,* Hayford, *supra* note 32, at 125-132.

37. Burch, *supra* note 17, at 62 (citation omitted).

38. *Id.*

39. *Advest, Inc. v. McCarthy,* 914 F.2d 6, 10 (1st Cir. 1990) (quoting *O.R. Securities, Inc. v. Professional Planning Assoc., Inc.,* 857 F.2d 742,747 (11th Cir. 1988)).

40. *Id.* (citing *Merrill lynch, Pierce, Fenner & Smith, Inc. v Bobker,* 808 F.2d 930, 933 (2d Cir. 1986)).

41. Note, however, that the court in *Advest* did find that, "[i]n certain circumstances, the governing law may have such widespread familiarity, pristine clarity, and irrefutable applicability that a court could assume the arbitrators knew the rule and, notwithstanding, swept it under the rug." *Id.* However, the court found that "[t]he case at bar... is not cut to so rare a patter. ..." *Id.*

42. *See O.R. Sec., Inc. v Prof'l Planning Assocs.,* 857 F.2d 742, 747 (11th Cir. 1988) ("In fact, when the arbitrators do not give their reasons,

it is nearly impossible for the court to determine whether they acted in disregard of the law.").

43. Burch, *supra* note 17, at 63 (citing Norman S. Posner, *Judicial Review of Arbitration Awards: Manifest Disregard of the Law,* 64 Brook. L. Rev. 471, 505-506 (1998)("given the fact that arbitrators seldom write opinions explaining their decisions, there is little likelihood that a losing partly in an arbitration will be able to persuade a reviewing court that the arbitrators manifestly disregarded the law.").

44. *Id.*

45. *Id*.

46. *Id.*

47. *Id.;* Hayford, *supra* note 32, at 127-128 ("This second model for the 'manifest disregard' of the law analysis is the most troublesome of the three.... It raises the prospect of vacatur when a party believes that (i) the controlling law is beyond dispute, and (ii) the award is clearly inconsistent with that law.... Reduced to its essence, this second approach to the 'manifest disregard' of the law analysis consists of nothing more than a determination of whether the arbitrator made an error of law that a reviewing court is unwilling to tolerate.").

48. Burch, *supra* note 17, at 63 (citation omitted).

49. *Willemijn Houdstermaatschappij, BV v. Std. Microsystems Corp.,* 103 F.3d 9, 12-13 (2d Cir. 1997).

50. *Id.* (citing *Siegel v Titan Indus. Corp.,* 779 F.2d 891, 893 (2d Cir. 1985) (quoting *Bell Aerospace Co. Div. of Textron* v. *Local 516,* 356 F. Supp. 354, 356 (W.D.N.Y. I 973), *rev'd on other grounds,* 500 F.2d 921 (2d Cir. 1974))).

51. *Id.* (citing *Merrill Lynch,* 808 F.2d at 933). *See also supra* note 40.

52. Burch, *supra* note 17, at 63-64 (citing *Wilko,* 346 U.S. at 436-37).

53. *Id.* at 63.

54. *Id.* at 64; Hayford, *supra* note 32, at 130 ("The framework for analysis under this third model works backwards from an arbitral outcome the reviewing court believes to be flawed as a matter of law, confirmed by an exhaustive evaluation of the factual record made in arbitration. This judicial rethinking of the factual questions and the questions of application of law to facts integral to the resolution of the matter in arbitration is coupled with a search for evidence in the record upon which the court can base a presumption of arbitral knowledge of the correct law. Once that evidence is identified the court is free to 'bootstrap' its way to the inference that the arbitrator must have ignored the relevant law in fashioning an award the court believes is contrary to the law.").

55. *Montes v. Shearson Lehman Bros., Inc.,* 128 F.3d 1456 (11th Cir. 1997). *See also, Milligan v. Piper Jaffray, Inc.,* 148 F.3d 197 (2d Cir. 1998).

56. The court agreed that a claim of manifest disregard only applies where the arbitrator is "conscious of the law and deliberately ignore[s] it," *Montes v. Shearson Lehman Bros.,* 128 F.3d at 1461, and that incorrect interpretation of the law will not satisfy this standard. *Id.*

57. *Montes,* 128 F.3d at 1461. *See* Hayford, *supra* note 32, at 19; Burch, *supra* note 17, at 64.

58. Hayford, *supra* note 32, at 129. *See also,* Burch, *supra* note 17, at 64.

59. *Montes,* 128 F.3d at 1461.

60. Burch, *supra* note 17, at 64; *see* Hayford, *supra* note 32, at 125-32 (comparing all three approaches).

61. *See* Gross, *supra* note 10, at 236.

62. *See* Weathers P. Bolt, *Much Ado About Nothing: The Effect of Manifest Disregard on Arbitration Agreement Decisions,* 63 Ala. L. Rev. 161, 164 (2011-2012).

63. Note, however, that according to John and Ari Diaconis, despite the Circuit Courts' diverging interpretations and application of manifest disregard, a common theme emerged among the circuits: "courts rarely and only in the most egregious of circumstances vacated [arbitral awards] based on manifest disregard." John and Ari Diaconis, *supra* note 23, at 10-11.

64. Bolt, *supra* note 62, at 164.

65. According to Jill Gross, "[w]hile the precise test varied from circuit to circuit, most courts agreed that, to persuade a court to vacate an award on manifest disregard ground, the losing party must show: (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether; and (2) the law that the arbitrator ignored was well defined, explicitly, and clearly applicable to the case." Gross, *supra* note 10, at 236.

66. Bolt, *supra* note 62, at 164 (citing *Duferco Int'l Steel Tracing v. T Klaveness Shipping A/S,* 333 F.3d 87, 91 (1st Cir. 2006)("[W]e mean by manifest disregard of the law a situation where it is clear from the record that the arbitrator recognized the applicable law-and ignored it.")).

67. *Hall St. Assocs., L.L.C. v Mattel, Inc.,* 552 U.S. 576 (2008).

68. Huber, *supra* note 11, at 558.

69. Davis, *supra* note 19, at 99. *See* Kevin Patrick Murphy, *Alive But Not Well: Manifest Disregard After Hall Street,* 44 Ga. L. Rev. 285, 300 (2009-2010).

70. *Hall Street,* 552 U.S. at 578. *See also,* Chen, *supra* note 8, at 1889; Ann C. Gronlund, *The Future of Manifest Disregard As a Valid Ground for Vacating Arbitration Awards in Light of the Supreme Court's Ruling in Hall Street Associates, L.L.C. v. Mattel, Inc.,* 96 Iowa L. Rev. 1351, 1362 (2010-2011); Murphy, *supra* note 69, at 300; John Diaconis & Ari Diaconis, *supra* note 23, at 13; Huber, *supra* note 11, at 588-60.

71. Murphy, *supra* note 69, at 300.

72. Gronlund, *supra* note 70, at 1362.

73. Murphy, *supra* note 69, at 301.

74. *Hall Street,* 552 U.S. at 585. *See* Huber, *supra* note 11, at 558 ("This argument was easily turned away by the Court: judicial interpretation that expands the scope of review does not provide a basis for private parties to alter review by private agreement. Besides, Wilko 'expressly reject just what Hall Street asks for here, general review for an arbitrators' legal error.'").

75. *Hall Street,* 552 U.S. at 585.

76. Huber, *supra* note 11, at 559; Murphy, *supra* note 69, at 300 ("The Court's response to [Hall Street's assertion that courts have been permitted to expanded review since *Wilko* created manifest disregard] has prompted a debate over whether the fifty-five-year-old doctrine is no longer good law, if indeed it ever was.").

77. Gross, *supra* note 10, at 236.

78. Jonas Cullemark, *Wachovia Securities, LLC v. Brand (2012): The Fourth Circuit's Dubious Position in the Ongoing Federal Circuit Split in the Application of "Manifest Disregard of the Law" as a Basis for Vacatur of Arbitration Awards Following the U.S. Supreme Court's Hall Street Decision (2008),* 22 U. Miami Bus. L. Rev. 1, 13 (2013-2014).

79. Davis, *supra* note 19, at 102-103.

80. *See* Davis, *supra* note 19, at 103-107; Stanley A. Leasure, *Arbitration Law in Tension After Hall Street: Accuracy or Finality?,* 39 Ualr L. Rev. 74, 84-101 (2016); Cullemark, *supra* note 78, at 13-17; Mylinda K. Sims & Richard A. Bales, *Much Ado About Nothing: The Future of Manifest Disregard After Hall Street,* 62 S. C. L. Rev. 407, 424- 430 (2010-2011). *See also,* Huber, *supra* note 11, at 560-577.

81. Leasure, *supra* note 80, at 84.

82. *Citigroup Global Markets, Inc. v. Bacon,* 562 F.3d 349, 350 (5th Cir. 2009).

83. *See id.;* Leasure, *supra* note 80, at 85; Leigh F. Gill, *Manifest Disregard After Hall Street: Back from the Dead: The Surprising Resilience of a Non-Statutory Ground for Vacatur,* 15 Lewis & Clark L. Rev. 265,272 (2011).

84. *Citigroup Global Markets,* 562 F.3d at 358 ("In the light of the Supreme Court's clear language that, under the FAA, the statutory provisions are the exclusive grounds for vacatur, manifest disregard of the law as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected.").

85. *See id.;* Cullemark, *supra* note 78, at 15; Gill, *supra* note 83, at 272; Sims & Bales, *supra* note 80, at 425.

86. *Citigroup Global Mkts.,* 562 F.3d at 358. Although manifest disregard as a non-statutory, common-law, ground for vacatur may not have survived *Hall Street,* according to John and Ari

Diaconis, manifest disregard "did survive *Hall Street* insofar as an arbitrator will 'exceed its power' under FAA Section 10(a)(4) when it 'is fully aware of[a] controlling principle of law and yet does not apply it."' John and Ari Diaconis, *supra* note 23, at 19 (quoting *Citigroup Global Mkts. Inc. v Bacon*, 562 F.3d 349, 357-58 (5th Cir 2009)). However, John and Ari Diaconis note that the Fifth Circuit tends to perceive the phrase "manifest disregard" negatively; as a result, "litigants should refer to only FAA Section 10(a)(4) when arguing on what would otherwise be manifest disregard grounds." *Id. See also*, *McKool Smith, P.C. v. Curtis Int'l, Ltd.*, 650 F. App'x 208, 213 (5th Cir. 2016) ("Assuming-without deciding-that manifest disregard of the law can be a *statutory* basis for vacatur, Curtis fails to show that the arbitration award was in manifest disregard of Texas law.").

87. *Med. Shoppe Int'l, Inc. v. Turner lnvs., Inc.*, 614 F.3d 485,489 (8th Cir. 2010) ("We have previously recognized the holding in *Hall Street* and similarly hold now that an arbitral award may be vacated only for the reasons enumerated in the FAA. *See Crawford Group, Inc. v. Holekamp*, 543 F.3d 971,976 (8th Cir. 2008) (citing *Hall Street*, 552 U.S. at 584).").

88. Leasure, *supra* note 80, at 87.

89. *Med. Shoppe Int'/*, 614 F.3d at 489 (citing *Hall Street*, 552 U.S. at 586).

90. *Air Line Pilots Ass'n Int'l v. Trans States Airlines, LLC*, 638 F.3d 572, 579 (8th Cir. 2011).

91. John & Ari Diaconis, *supra* note 23, at 20-21.

92. *Frazier v. Citifinancial Corp., LLC*, 604 F.3d 1313 (11th Cir. 2010).

93. *Id.* at 1324.

94. *Id.* (citing *Hall Street*, 552 U.S. at 586 ("the text compels a reading of the §§ 10 and 11 categories as exclusive"); *id.* at 589 ("the statutory text gives us no business to expand the statutory grounds"); *id.* at 590 ("§§ 10 and 11 provide exclusive regimes for the review provided by the statute")).

95. Leasure, *supra* note 80, at 89; *Campbell's Foliage, Inc. v. Fed. Crop Ins. Corp.*, 562 F. App'x 828 (11th Cir. 2014), *cert. denied*,_ U.S._, 135 S. Ct. 145 (2014).

96. Jack Rephan, *Is Manifest Disregard of the Law a Ground for Vacating Arbitration Awards?*, Pender & Coward (March 2, 2016), *available at:* https://www.pendercoward.com/resources/blog-opinions-and-observations/is-manifest-d isregard-of-the-1aw-still-a-ground-for-vacating-arbitration-awards-march-2016/.

97. John & Ari Diaconis, *supra* note 23, at 19.

98. *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App'x 415 (6th Cir. 2008), *cert. denied*, 558 U.S. 819 (2009).

99. Rephan, *supra* note 96.

100. C*offee Beanery*, 300 F. App'x at 418.

101. *Id.* at 418 (citing *Wilko v. Swan*, 346 U.S. 427, 436 (1953) (overruled on other grounds by *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989)).

102. *Coffee Beanery*, 300 F. App'x at 418.

103. John and Ari Diaconis, *supra* note 23, at 19. According to John and Ari Diaconis, the court supported this position by arguing that the Supreme Court's opinion in *Hall Street* is open to multiple interpretations, and therefore provided insufficient means for overruling "a doctrine which prior to 2009 was 'universally' recognized by the Court of Appeals." *Id.*

104. Rephan, *supra* note 96.

105. Some commentators assert that the Fourth Circuit falls within this group; however, as discussed *infra* Part IV(d)(i), the Fourth Circuit does not appear to have definitively adopted the position that the doctrine of manifest disregard survived *Hall Street* as a judicial gloss/shorthand or as independent, non-statutory, ground for vacatur.

106. *Stolt-Nielsen S.A. v AnimalFeeds Int'l Corp.*, 548 F.3d 85, 95 (2d Cir. 2008).

107. Jack Jarrett, *What's in a Name? Why Judically Named Grounds for Vacating Arbitral Awards Should Remain Available in light of Hall Street*, 20 Geo. Mason L. Rev. 909, 922 (2012-2013) (citing *Duferco Int'l Steel Trading v. Kalveness Shipping AIS*, 333 F.3d 383, 289 (2d Cir. 2003)).

108. *Stolt-Nielsen*, 548 F.3d at 94.

109. *Sutherland Global Servs. v Adam Techs. Int'l SA de* C. *V.*, 639 F App'x 697, 699 (2d Cir. 2016) (citing *Hall Street*, 552 U.S. at 584).

110. *Sutherland Global*, 639 F App'x at 699 (citing *Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444, 451-52 (2d Cir. 2011) (quoting *TCo Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329,340 (2d Cir. 2010))).

111. Leasure, *supra* note 80, at 96; *Comedy Club, Inc. v Improv W. Assocs.*, 553 F.3d 1277 (9th Cir 2009).

112. *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir 2009).

113. Rephan, *supra* note 96.

114. *Comedy Club*, 553 F.3d at 1290, 1283.

115. *Id.* at 1283.

116. *Wetzel's Pretzels, LLC v. Johnson*, 567 F App'x 493, 494 (9th Cir. 2014) (citing *Biller v. Toyota Motor Corp.*, 668 F.3d 655, 665 (9th Cir. 2012) (internal quotation marks and citations omitted)).

117. *Id.*

118. *See Wachovia Sec., LLC v. Brand*, 671 F.3d 472,483 (4th Cir. 2012) ("[W]e adopted a two-part test that a party must meet in order for a reviewing court to vacate for manifest disregard: '(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrator[ ] refused to heed that legal principle.' We do not read *Hall Street* or *Stolt-Nielsen* as loosening the carefully circumscribed standard that we had previously articulated for manifest disregard." (Citation omitted)).

119. John & Ari Diaconis, *supra* note 23, at **18.**

120. *Wachovia*, 671 F.3d at 483.

121. *Dewan v Walia*, 544 F. App'x 240, 246, n. 5 (4th Cir. 2013) (citing *Wachovia*, 671 F.3d at 483).

122. *Adviser Dealer Servs. v. Icon Advisers, Inc.*, 557 F. App'x 714, 717 (10th Cir. 2014) (internal citation omitted).

123. *Abbott v. Law Off. of Patrick J. Mulligan*, 440 F. App'x 612 (10th Cir. 2011).

124. Rephan, *supra* note 96.

125. Scodro, *supra* note 14, at 569.

126. *See* Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 Brook. L. Rev. (2010).

127. DICTUM, Black's Law Dictionary (10th ed. 2014) ("judicial dictum (1829). An opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision and therefore not binding even if it may later be accorded some weight.").

128. *Hall Street*, 552 U.S. at 585.

129. Gross, *supra* note 10, at 239.

130. *Id.*

131. *Id.*

132. *See supra* Part IV(d).

133. For more information regarding the weakening foundation of the doctrine of manifest disregard following the Supreme Court's decision in *Wilko, see* Murphy, *supra* note 69, at 306.

134. *See supra* Part IV(b)-(d).

135. *See, e.g., Stolt-Nielsen* S. *A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 672, n.3 (2010) ("We do not decide whether 'manifest disregard' survives our decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576,585, 128 S. Ct. 1396, 170 L. ed. 2d 254 (2008), as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10."); *Campbell's Foliage, Inc. v. Fed. Crop Ins. Corp.*, 562 F. App'x 828 (11th Cir. 2014), *cert. denied*,_ U.S._, 135 S. Ct. 145 (2014); *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App'x 415 (6th Cir. 2008), *cert. denied*, 558 U.S. 819 (2009).

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Battle of Munfordville, Kentucky, Sunday, Sept. 14th, 1862, c1863, by Harper's History of the Great Rebellion, Harper's Weekly

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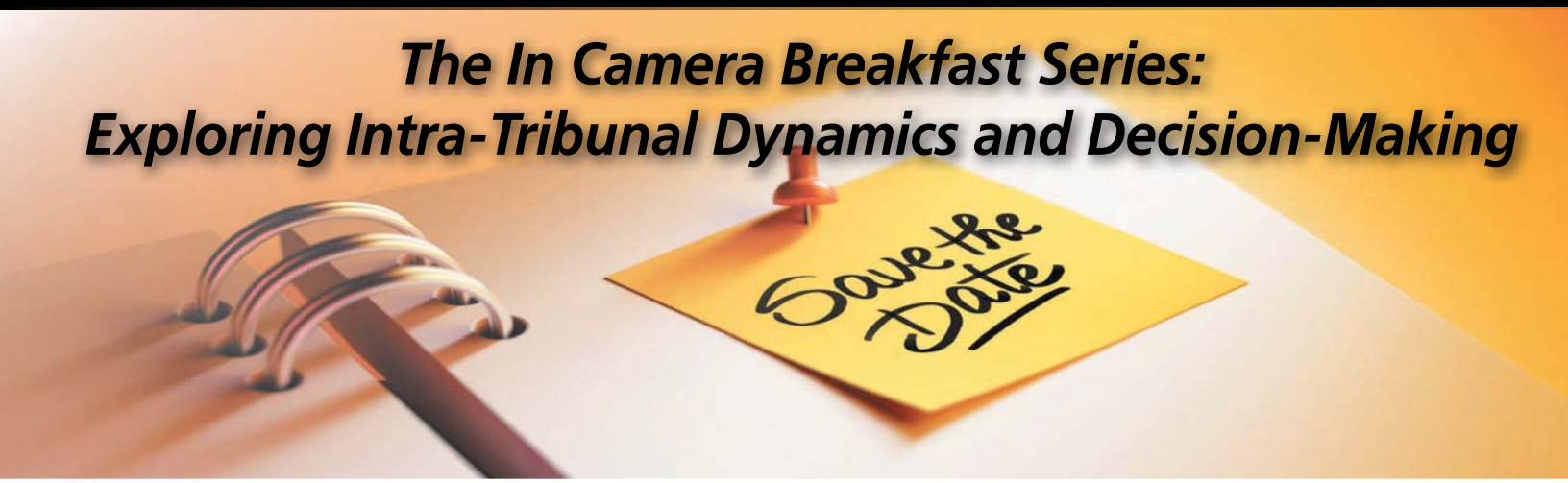
The In Camera Breakfast Series: Exploring Intra-Tribunal Dynamics and Decision-Making



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Part I: The Tribunal's Crystal Ball: Models, Experts, and Estimates in High-Stakes Cases

April 26, 2018, 8:30-10:00 a.m.

Baker & McKenzie LLP, 452 5th Ave., New York City *(Remote dial-in also available)*

Catherine Amirfar, Debevoise & Plimpton LLP * **Mark Kantor**, Independent Arbitrator * **Kathleen Paisley**, Ambos, NBGO * **David Zaslowsky**, Baker & McKenzie LLP (moderator)

Part I will explore how tribunals analyze and resolve tricky damages questions. Is it wise, for example, to ask party experts to provide arbitrators with calculations in excel spreadsheets so the arbitrators can manipulate them? Should damages questions be a topic at the preliminary conference?

Part II: The Law According to Whom? How Arbitrators 'Get it Right'

May 23, 2018, 8:30-10:00 a.m.

Hogan Lovells LLP, 875 3rd Ave., New York City

Samaa Haridi, Hogan Lovells LLP * **Judge Faith Hochberg**, Judge Hochberg ADR * **Robert Smit**, Independent Arbitrator * **Marc J. Goldstein**, Independent Arbitrator (moderator)

Part II will consider how arbitrators find and determine applicable law. Is "the law" in arbitration confined to what the parties submit? Are there different norms and expectations in domestic vs. international arbitrations as to how far an arbitrator can or should go in researching the law or the extent to which such research must be shared with the parties?

Organized by International Dispute Resolution Committee Co-Chairs
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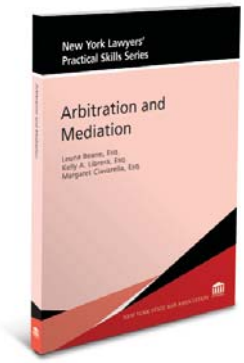

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This practice guide examines the two most common forms of alternative dispute resolution–Arbitration and Mediation. *Arbitration and Mediation* resolves the misconception that these two procedures are interchangeable by discussing their differences and providing examples of when each procedure should be used.

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