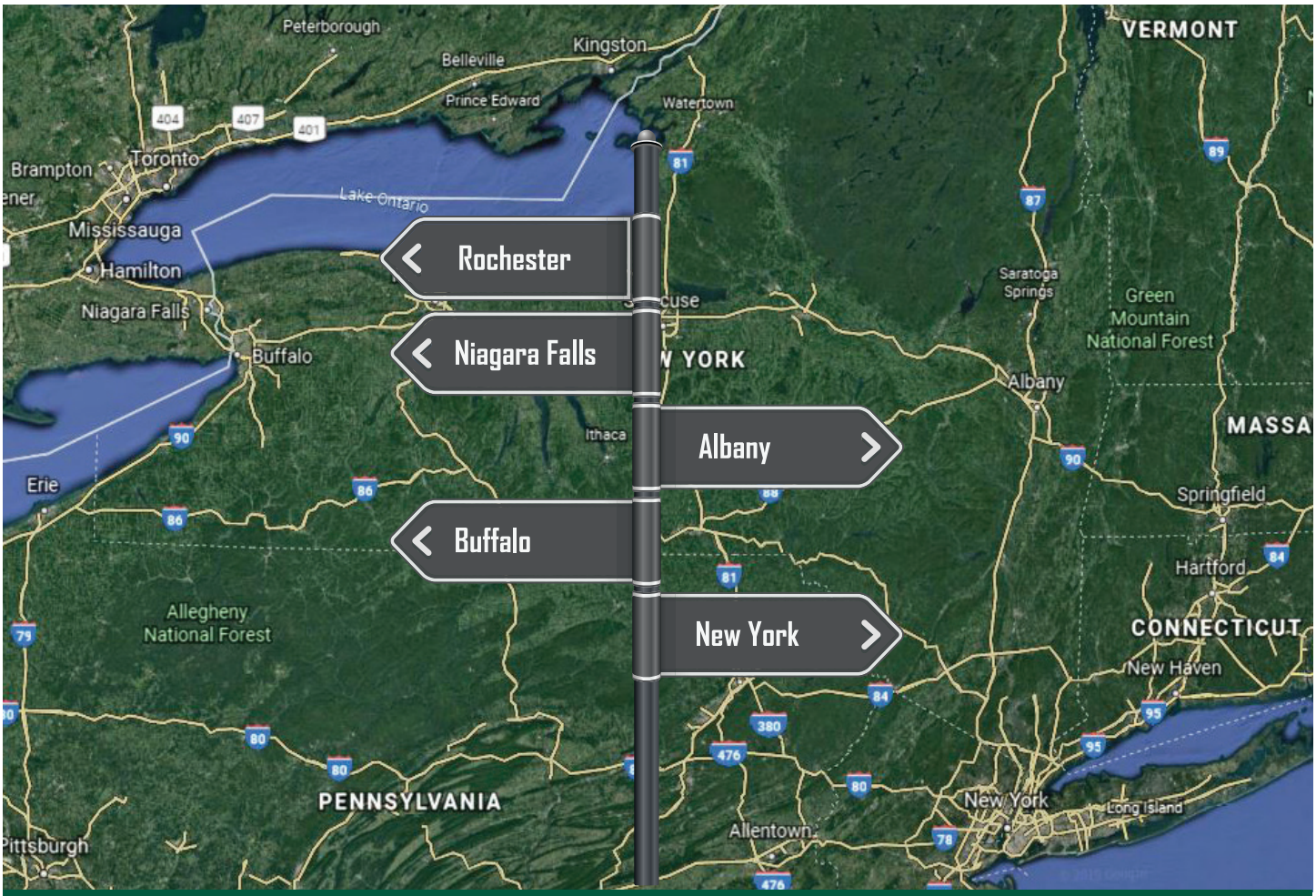
NYSBA FALL 2019 | VOL. 12 | NO. 2

New York Dispute Resolution Lawyer

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



In This Issue

ANNUAL MEETING AND EXPO

CONNECT • INSPIRE • LEARN

JANUARY 27 – 31
NEW YORK CITY

2020

NYSBA
NEW YORK STATE BAR ASSOCIATION

Table of Contents

Table of Contents

Message from the President:
Diversifying the Legal Profession: A Moral Imperative

By Hank Greenberg

No state in the nation is more diverse than New York. From our inception, we have welcomed immigrants from across the world. Hundreds of languages are spoken here, and over 30 percent of New York residents speak a second language.

Our clients reflect the gorgeous mosaic of diversity that is New York. They are women and men, straight and gay, of every race, color, ethnicity, national origin, and religion. Yet, the law is one of the least diverse professions in the nation.

Indeed, a diversity imbalance plagues law firms, the judiciary, and other spheres where lawyers work. As members of NYSBA's Dispute Resolution Section, you have surely seen this disparity over the course of your law practices.

Consider these facts:

- According to a recent survey, only 5 percent of active attorneys self-identified as black or African American and 5 percent identified as Hispanic or Latino, notwithstanding that 13.3 percent of the total U.S. population is black or African American and 17.8 percent Hispanic or Latino.
- Minority attorneys made up just 16 percent of law firms in 2017, with only 9 percent of the partners being people of color.
- Men comprise 47 percent of all law firm associates, yet only 20 percent of partners in law firms are women.
- Women make up only 25 percent of firm governance roles, 22 percent of firm-wide managing partners, 20 percent of office-level managing partners, and 22 percent of practice group leaders.
- Less than one-third of state judges in the country are women and only about 20 percent are people of color.

This state of affairs is unacceptable. It is a moral imperative that our profession better reflects the diversity of our clients and communities, and we can no longer accept empty rhetoric or half-measures to realize that goal. As Stanford Law Professor Deborah Rhode has aptly observed, "Leaders must not simply acknowledge the importance of diversity, but also hold individuals accountable for the results." It's the right thing to do, it's the smart thing to do, and clients are increasingly demanding it.

Hank Greenberg

NYSBA Leads on Diversity

On diversity, the New York State Bar Association is now leading by example.

This year, through the presidential appointment process, all 59 NYSBA standing committees will have a chair, co-chair or vice-chair who is a woman, person of color, or otherwise represents diversity. To illustrate the magnitude of this initiative, we have celebrated it on the cover of the June-July *Journal*. [www.nysba.org/diversitychairs]

Among the faces on the cover are the new co-chairs of our Leadership Development Committee: Albany City Court Judge Helena Heath and Richmond County Public Administrator Edwina Frances Martin. They are highly accomplished lawyers and distinguished NYSBA leaders, who also happen to be women of color.

Another face on the cover is Hyun Suk Choi, who co-chaired NYSBA's International Section regional meeting in Seoul, Korea last year, the first time that annual event was held in Asia. He will now serve as co-chair of our Membership Committee, signaling NYSBA's commitment to reaching out to diverse communities around the world.

This coming year as well we will develop and implement an association-wide diversity and inclusion plan.

In short, NYSBA is walking the walk on diversity. For us, it is no mere aspiration, but rather, a living working reality. Let our example be one that the entire legal profession takes pride in and seeks to emulate.

Hank Greenberg can be reached at hgreenberg@nysba.org.

Message from the Chair

Theo Cheng

It is an honor and a privilege to serve as the Chair of the NYSBA Dispute Resolution Section this year. I am thrilled to see how the Section has grown over the years and excited for what is to come.

Last year, the Section celebrated its 10th anniversary, and, under the brilliant leadership of Deborah Masucci, it had yet another successful year. Among her many accomplishments was the creation of an impactful program on Mediation Choices for Effective Representation and Advocacy, which educated both new and experienced inside and outside counsel on how to most beneficially utilize the mediation process. Debbie also spearheaded the publication of *So You Want to Be a Mediator and Arbitrator: A Guide to Starting a New ADR Practice and Giving Your Existing Practice a Boost—for New York State Lawyers*. Released just this past summer, the guide is being distributed only to members of the Section and provides practical advice on the business of being a full or part-time neutral. We thank Debbie for her leadership and service and her many contributions to the Section.

As I assume the helm, my principal focus is to broaden and expand the Section's brand—within the Section across the state and between NYSBA Sections—thereby continuing to grow our Section membership and increasing member engagement. I also hope to make the Section more relevant to its members, to our and other bar associations, and to the general public by fostering its availability as a resource and speaking out as a Section on issues of importance to the dispute resolution community. In particular, I was thrilled to hear the New York State Courts' announcement of a statewide, comprehensive implementation of presumptive mediation in civil cases, which, in part, is the result of this Section's concerted and continued efforts over the years to promote court-annexed mediation as a complementary mechanism for resolving litigated disputes. I strongly support this ambitious initiative and, at this watershed moment, hope to have the Section serve as a resource to the courts as they begin implementing their programs this fall. Our Section members have a wealth of experiences that can inform the court and court administrators of best practices, experiences in other jurisdictions, and the perspectives of expert mediators in private practice.

Additionally, as the first person of color to serve as Chair of this Section, I am keenly aware of the importance of increasing diversity and inclusion. The ADR field has fallen behind the slow progress in the legal field as a whole and fails to adequately reflect the value of diversity and inclusion to the members of the ADR community and those it serves. I am passionate about this issue, and I know it is of great significance to many other members of the Section. During my term, I will strive to ensure that the Section does its part to promote diversity and inclusion in the ADR field. I have already begun by appointing women and minorities to over 50% of the open leadership positions on the Section's Executive Committee. I have also sought both geographic and practice area diversity by appointing new liaisons to Sections that have not previously had a leadership relationship with ours, appointing an out-of-state members representative (because nearly a quarter of our members reside and/or work outside of New York State), and creating a new External Relations Coordinator position to help improve communications and coordination. With the assistance of members of our Domestic Arbitration and Mediation Committees, I have also initiated pilot programs in two upstate counties to partner with, and lend our substantive and programming expertise to, the local county bar associations in designing and implementing ADR-related continuing legal education programs that will be meaningful to the attorneys in those counties.

As always, the Section has an incredibly active calendar of events this year, which began this past June with our always well attended two-day Advanced Commercial Mediation Training Program and three-day Commercial Arbitration Program for Arbitrators and Counsel. I'd also like to highlight a pair of exciting programs we held this fall. On Friday, October 18th, we once again sponsored our program on Mediation Choices for Effective Representation and Advocacy. This program had particular prominence in view of the courts' statewide presumptive mediation initiative. The following week, on October 25th, we hosted our annual Fall Meeting, titled "The Future of ADR: Where Are We Going and How Do We Get There?" Two of the sessions focused on the rollout of the new presumptive mediation initiative, with judges and court administrators participating as speakers. In addition, there were sessions on drafting arbitration awards through

the perspectives of jurists and well-known arbitrators; updates to the signing and adoption of the Singapore Mediation Convention, which will have an enormous impact on the resolution of international, cross-border disputes; the future impact of artificial intelligence in the ADR field; and the ethical issues that are implicated when reports of potentially criminal conduct or tax evasion arise in mediations.

Later in the year, the Section focused on our Fifth Annual Judith S. Kaye Arbitration Competition. In the spring, be sure to keep your eyes open for our second edition of the Mediation and Arbitration Clinic for Advocates and New Lawyers, the return of our ever-popular Commercial Mediation Training Program, our Second Annual Mediation Tournament, our third annual joint ADR-related program with the Commercial and Federal Litigation Section, and much, much more!

With all that is happening, there is no better time than now to get more involved with the Section by coming to our meetings and events, joining one of our many active committees, volunteering for a project, suggesting a program idea, contributing to our publications and blog, becoming active on social media—there are so many ways! Please join me in broadening the reach of the Section and making Section membership meaningful and rewarding for you. I look forward to being of service and to another great year for the Section.

With warmest regards,

Theo Cheng

Dispute Resolution Section Annual Meeting Program
Thursday, January 30, 2020 | 2pm-6pm | NYC

The "Nitty Gritty": A Focus on Important Practical Aspects of Relevant ADR Topics

- Drafting Effective and Enforceable Mediation and Arbitration Clauses
- Tactics for Negotiating and Dealing with Difficult People in Mediation: Using your EQ
- Where's the Seat? How to identify the Proper Law of the Arbitration Agreement: Domestic and Abroad
- Presumptive ADR in New York State Courts: Where Things Stand and What Practitioners Should Know

Message from the Co-Editors in Chief

Edna Sussman

Sherman Kahn

Laura A. Kaster

When this issue is published, we will already have a new set of general rules for early presumptive mediation and ADR throughout the New York court system. Many of the individual courts will have proposed initial plans. This presents our Section and its members with an enormous challenge and opportunity. We, who teach, practice, and promote the value of mediation, have a responsibility to help make this important initiative a success.

The initiative was announced in a May 14 press release:

> In a transformational move to advance the delivery and quality of civil justice in New York as part of the Chief Judge's Excellence Initiative, Chief Judge Janet DiFiore and Chief Administrative Judge Lawrence K. Marks today announced a system-wide initiative in which, aside from appropriate exceptions, parties in civil cases will be referred to mediation or some other form of alternative dispute resolution (ADR) as the first step in the case proceeding in court. Dubbed "presumptive ADR," this model builds on prior successes of ADR in New York State and in other jurisdictions by referring cases routinely to mediation and other forms of ADR earlier in the life of a contested matter.

The announcement contemplated that the new initiative would apply to a wide variety of civil cases, including personal injury, matrimonial and estate matters. The initiative reflects the evidence provided by the Advisory Committee on ADR's interim report that early referral to mediation often leads to the settlement of disputes or the narrowing of issues. The driving force behind this initiative is the desire to enhance and streamline the litigation process, to promote faster and less expensive outcomes, and to enhance party involvement in and satisfaction with the resolution of disputes.

The initiative contemplates that the administrative judges will formulate plans tailored to local conditions and circumstances to be implemented beginning in the fall of 2019. In order to provide services in a vastly expanded number of cases, there will have to be a much larger cadre of qualified mediators. The initiative anticipates that each jurisdiction will develop local protocols, guidelines and best practices to facilitate the process. Additionally, the courts plan to collect comprehensive data to help evaluate the progress of the court-sponsored ADR programs and allow for changes to improve the programs going forward. In other words, this will be a work-in-progress with varied approaches in different courts and self-assessment of successes.

However good the framework rules and the individual plans may be, the challenge will be to change the legal culture—and that challenge is enormous. Those of us who have participated in state-wide programs in neighboring states or who have tracked them, know that the litigating bar and the neutrals must be a continuing part of the process and must be convinced of the program's efficacy. Even lawyers who are committed to the most cost-efficient outcomes for their clients are sometimes stymied by their habits and timelines in approaching litigation. For example, if an attorney generally does not give detailed attention to a matter until document discovery is well in process, the earliest least costly opportunity to resolve a matter may feel like an imposition that disables the attorney from proper evaluation of the case or even from projecting litigation costs. Neutrals must be proactive in focusing the parties on an exchange of only

that information needed for the early mediation. Inside counsel are well aware that early internal (and therefore one-sided) examination of documents and key witnesses can give them a good feel for the issues in the case and the costs of consuming litigation. We have to talk about this—the culture of hiding your cards needs to change. The benefits to reputation—and therefore to future business—of serving clients efficiently and satisfactorily need to be underscored to promote this program. The success of this program will also reflect on and impact private mediation.

We hope our Section will be a thought leader, evaluator and promoter of this important initiative. The reputation of mediation itself as well as the culture of the bar is at stake. Our October meeting was focused on the new rules and on the contributions we can all make to assure the training of new mediators and the success of this initiative. Join us and invest in the future of mediation in New York.

Edna Sussman
Laura Kaster
Sherman Kahn

Up Close and Personal: Whether or Not You Decide to Report a Confidentiality Exception

By Professor Elayne E. Greenberg

Professor Greenberg is the Assistant Dean for Dispute Resolution, Professor of Legal Practice and the Director of the Hugh L. Carey Center for Dispute Resolution at St. John's Law School. She can be reached at greenbee@stjohns.edu.

Thank you to Kiah Wayman, St. John's '20, for her able assistance with this column.

Introduction

In your role as lawyer or neutral, have you ever reported an otherwise confidential communication because it was one of these permissible confidentiality exceptions? Why? This column will discuss how our ethical and personal considerations shape our decisions as advocates and dispute resolution professionals about whether to report ethically permissible exceptions to confidentiality. Readers, you are invited to rethink your ethical reporting obligations and develop more self-awareness about your personal rationales for your reporting choices.

In our roles as advocates and dispute resolution professionals, we have etched into our professional cores the importance of confidentiality. In our attorney-client relationships, confidentiality is the fulcrum of a client's right for effective counsel.[1] As arbitrators, we appreciate that confidentiality, for many, is the welcome option for those who shun the public forum of litigation.[2] And as mediators, we safeguard mediation's confidentiality protections as necessary to help promote the candid discourse that many believe is vital to achieving a realistic resolution.[3]

Confidentiality, however, is not without exceptions. Our ethical codes for lawyers and dispute resolution professionals explicitly provide that under certain circumstances, lawyers and dispute resolution professional *may* be relieved from their confidentiality obligations and *may* report what is otherwise protected conduct.[4] Please note that the reporting obligation for lawyers is discretionary, not obligatory. Distinguishably, family mediators have a mandatory obligation to report violence.[5] Yet, whether the reporting obligation is discretionary or mandatory, the reporter's decision about whether to report is more often about the reporter's personal values and judgment than an ethical rule.

In Part One of this discussion, I informally surveyed mandated reporters in other professions and noted how their personal values and their relationship with the person they may be reporting have influenced the reporter's decision-making process. Part Two brings the conversation back to our profession, lawyers and neutrals, and explains the confidentiality exceptions permitted in our professional ethic codes. This conversation concludes in Part Three by re-focusing on you, a potential reporter, and heightens your awareness about the considerations that may shape your decision about whether or not to report.

Part One: Other Professionals' Decision-Making Process to Report

This discussion was sparked by a series of informal conversations that I have had with professionals from fields other than law who are mandated reporters of specified behavior. In my conversations, I asked about whether, when the appropriate situation arises, they actually report exceptions to confidentiality when they are mandated to do so.[6] I have found that mandated reporters who had no ongoing professional relationships with the person whose behavior they were reporting, such as emergency room doctors, had an easier time honoring their ethical obligation and reporting the misconduct. After all, the obligation to report is their ethical mandate, and for these professionals there is no ambiguity about honoring this obligation.

Those professionals such as psychologists, teachers or clergy who had an ongoing relationship with the person whose behavior they were obligated to report, however, were more deliberative about whether to report. These professionals shared how they would question themselves about whether, if in fact, the behavior was reportable. Another consideration that made these mandated reporters more unsure about reporting was their concern about how their reporting would disrupt their professional relationship with the person they were reporting. These professionals also expressed their fear that reporting would result in punishment, and cut off needed treatment and rehabilitation of the reported person. In one

such candid discussion, a teacher who was a mandated reporter, struggled with reporting child abuse that "may not be as bad" as the abuse the child would endure if the child was removed and placed in an abusive foster home. Furthermore, the abused child loved the abusive parent and did not want to be separated from his home.

Part Two: Lawyers' and Neutrals' Decision-Making About Whether to Report

Do we as lawyers and advocates also ruminate about whether or not to report an ethically permissible exception to confidentiality? In this section, we look at the professional ethical rules' reporting exceptions for lawyers and family mediators. In these ethical codes, please note that the ethically permissible exceptions to confidentiality in both the ABA Model Standards of Professional Conduct and the Model Standards of Practice for Family and Divorce Mediators are actually a political memorialization of a profession's biases that are balanced with broader public concerns. Thus, it is no surprise that lawyers' reporting obligation is discretionary, because the legal profession has tenaciously coveted the attorney-client privilege as sacrosanct. The family mediation community, however, has made disclosure of harm mandatory. The integrity of the family mediation profession had been threatened by domestic violence advocates who feared that abusers would seek refuge under family mediation's confidentiality cloak. To assuage these real concerns, the family mediation profession has made disclosure mandatory.

In their roles as advocates, lawyers are ethically guided about reporting permissible exceptions to confidentiality by the ABA Model Rule of Professional Conduct Rule 1.6 (b). Rule 1.6 (b) expressly provides in relevant part :

> (b) A lawyer **may** *(emphasis added)* reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm;
>
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
>
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
>
> (4) to secure legal advice about the lawyer's compliance with these Rules;
>
> (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
>
> (6) to comply with other law or a court order; or
>
> (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

Professor Roy D. Simon, Distinguished Professor Emeritus of Legal Ethics at Hofstra Law School, reminds lawyers that this discretionary reporting obligation immunizes lawyers from being disciplined for either reporting or deciding not to report.

In addition, lawyers have a **mandatory** reporting obligation to report the unethical behavior of colleagues so long as doing so doesn't compromise the confidentiality protections detailed Rule 1.6. The goal of 8.3 is to maintain the integrity of the process. Curiously, when I asked a ballroom full of lawyers who were being trained as commercial mediators if they had ever reported another lawyer for lawyer misconduct as required by this Rule, the silence was deafening. Explicitly, Rule 8.3, Maintaining the Integrity of the Profession provides:

> (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
>
> (b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

> (c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

Do we engage in a different decision-making process about whether or not to report if the person to be reported is a colleague?

Distinguishable from the ABA Model Rules of Professional Conduct for Lawyers, family mediators have an obligation to report "threats of suicide or violence." The Model Standards of Practice for Family and Divorce Mediators Standard VII states in relevant part:

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

My esteemed ethical scholar colleague, Omer Shapira, contributes to this nuanced discussion about reporting exceptions to confidentiality in his thought-provoking book *A Theory of Mediators' Ethics*. According to Shapira, mediators have a legal, moral and personal moral obligation to disclose otherwise protected mediation communications to prevent a nonparticipant from the "serious harm" of a participant's conduct or to protect "important public interests." Failure to do so could harm the public trust in the mediation process. Thus, Shapira asserts that the obligation to report is driven by not only the law, but by our society's morality and our personal values. Shapira reminds us that even when disclosure is discretionary according to the law, mediators should still consider how such disclosure might adversely impact their ethical obligation to maintain the public trust in the profession. Should Shapira's rationales be applicable to all lawyers and neutrals?

Part Three: So?

The decision about whether you as lawyers and dispute resolution professionals will exercise your reporting authority is not just an either/or decision. Rather, it is also about the person who has reporting authority. Since the decision to report is discretionary in many cases, this discretion makes it more likely that your personal biases and preferences will shape your reporting decision. Even in those situations where reporting is mandatory, you may still find that your decision about whether or not you will report is neither clear-cut nor easy.

When deciding whether to report, how do you personally prioritize the law, society's morality and your personal sense of morality in your decision making? What is your relationship with the person to be reported? Do you personally agree that the reportable incident is worthy of being reported? What are the consequences of reporting? Will reporting accomplish the goals of reporting? How do you believe your decision will impact your professional role and the integrity of your profession?

I continue to ask myself so many of these questions, because like many of you, I have not found defining answers. I welcome hearing about your thoughts and experiences. Please reach out to me at greenbee@stjohns.edu.

Endnotes

1. ABA Model Rule of Professional Conduct Rule 1.6 Confidentiality of Information, Client-Lawyer Relationship provides (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation of the disclosure is permitted by (b).
2. The Code of Ethics for Arbitrators in Commercial Disputes Canon VI. An Arbitrator Should Be Faithful to the Relationship of Trust and Confidentiality Inherent In That Office (Am. Arbitration Ass'n 2004).
3. ABA Model Standards of Conduct for Mediators Standard V. Confidentiality (Am. Bar Ass'n 2005).
4. *See, e.g.* ABA Model Rules of Professional Conduct Rule 1.6(b); ABA Model Standards of Conduct Standard V A. Confidentiality (2005); Model Standards of Family and Divorce Mediators Standard VII C. (explaining that the mediator shall disclose a participant's threat of suicide or violence against any person to the threatened person and the appropriate authorities if the mediator believes such treat is likely to be acted upon as permitted by law).
5. Model Standards of Practice for Family Mediators Standard VII, https://cdn.ymaws.com/acrnet.org/resource/resmgr/docs/Model_Standards_of_Practice_.pdf (last visited 6/29/19).
6. Disclaimer: the incidents described should not be misconstrued to be part of any empirical research. Rather, these series of conversations sparked a further discussion about how we, as lawyers and dispute resolution professionals, decide whether or not we will report an incident that is an ethical exception to confidentiality.
7. ABA Model Rules of Professional Conduct Rule 1.6 (b), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/ (last visited on May 14, 2019).
8. *Id.*
9. Roy D. Simon, *Simon's New York Rules of Professional Conduct Annotated* 218 (West, 2013 ed.).
10. Model Standards of Practice for Family and Divorce Standard VII (2005).
11. Omer Shapira, *A Theory of Mediators' Ethics* (Cambridge University Press, 2018).
12. *Id.* at. 288.
13. *Id.* at 289.
14. *Id.* at 291.

The Advent of No-Fault Insurance Arbitration

Frank Cruz

Once the stuff of late night television ads, many personal injury attorneys announce their specialties include representing motor vehicle accident victims. The essence of their messages is that injured parties may be eligible for compensation for losses or damages arising from their pain and suffering. What they generally fail to mention is that injured parties also may be entitled to insurance coverage and protection which provides compensation for related medical expenses. This article provides an overview of the introduction of no-fault insurance in New York State and the development of relevant Alternative Dispute Resolution (ADR) options.

History and Purpose of New York No-Fault Insurance

Prior to January 1, 1974, civil litigation was the only viable choice for motor vehicle accident victims seeking compensation for resultant injuries and expenses. Plaintiffs would aggregate their demands for pain and suffering and accident related medical expenses in their personal injury actions. Without available insurance protection for medical expenses, accident victims typically faced quickly mounting out-of-pocket expenses. In many instances, medical practitioners would provide related treatment if payment was secured or guaranteed by liens on plaintiffs' personal injury awards. Under this design, injured parties and providers alike would be obligated to wait for a favorable determination of negligence or fault and hoped-for award by a judge or jury before receiving any compensation.

When motor vehicle accidents became subject to the Comprehensive Automobile Insurance Reparations Act,[1] New York State legislation for the first time defined benefits available to parties injured in a motor vehicle accident. The New York State Department of Insurance, now known as the Department of Financial Services (DFS), promulgated Regulation 68 to articulate the parameters and processes for no-fault insurance benefits. The regulation was premised on the notion that injured parties might receive compensation before a determination of fault or negligence and that high volumes of plaintiffs' personal injury claims would no longer fill the courts' calendars. Since then, every motor vehicle owner in New York State is required to purchase automobile insurance that includes personal liability insurance and personal injury protection.

Pursuant to the regulation, an injured party may recover compensation for damages due to pain and suffering, also known as "non-economic losses," if the injuries breach the serious injury "threshold." A serious injury is

> a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.[2]

Not only does the regulation afford recovery for "non-economic losses," it also provides no-fault benefits or reimbursement for "economic losses" from the injured party's own insurer. Eligible injured parties may receive first party benefits or reimbursement for medical expenses up to the statutory limit of $50,000 for each person per accident.[3]

Applicants' disputes generally arise where carriers have denied or failed to deny applicants' claims for no-fault benefits in a timely manner. Injured parties may commence actions in court or pursue arbitration seeking benefits. However, the lion's share of parties elect to assign rights to reimbursement to medical providers who then may submit claims directly to insurance carriers for medically necessary services. In those instances, providers

Frank Cruz has over 12 years of legal experience including tenures as trial attorney and managing attorney and was an arbitrator with the American Arbitration Association (AAA). Since May 2016, he has served as Vice President of the AAA's New York State Insurance Program.

become the parties of interest in no-fault disputes against the carriers.

As applicants for no-fault benefits file their disputes in court, the courts have decided cases that address the utility of no-fault, its practical nature, and related public policy concerns. New York's no-fault insurance laws are designed to ensure prompt compensation for losses incurred by accident victims without regard to fault or negligence, to reduce the burden on the courts, and to provide substantial premium savings to New York motorists.[4] Under New York's Comprehensive Motor Vehicle Insurance Reparations Act [5] and the regulations promulgated pursuant thereto [6] (collectively "no-fault insurance laws"), automobile insurers are required to provide Personal Injury Protection Benefits ("no-fault benefits") for necessary expenses incurred for healthcare goods and services, including physician services, chiropractic services, physical therapy services, and acupuncture services. A healthcare service provider is not eligible to collect no-fault benefits if it is unlawfully incorporated or "fails to meet any applicable New York State or local licensing requirement necessary to perform such service in New York . . . ." [7] In a frequently cited 2005 opinion, the New York Court of Appeals offered its rationale for licensing requirements in the context of then-existing automobile insurance fraud. These eligibility requirements were promulgated "to combat rapidly growing incidences of fraud in the no-fault regime."[8] Insurers must pay or deny those claims within 30 calendar days after a claim is submitted, and failure to comply with this requirement precludes the insurer from raising most defenses, including fraud and lack of medical necessity.[9] Insurers must also provide claimants the opportunity to arbitrate disputes involving the insurer's liability to pay a claim and as a result, every automobile insurance contract contains an arbitration clause.[10]

Litigation or Arbitration?

Applicants for no-fault benefits may opt for conventional civil litigation to resolve their disputes. As a result of the statutory interest rate for awards for no-fault disputes, litigation can lead to an unexpected outcome for the parties. Earlier this year, Supreme Court Queens County considered on appeal a medical provider's declaratory judgment action arising out of an underlying claim for no-fault benefits.[11] In this instance, the plaintiff received a judgment in 2001 for $8,847.69 for no-fault benefits. However, the plaintiff did not enforce the judgment for 14 years. In accordance with an interim order holding plaintiff unreasonably allowed interest to accrue, defendant Allstate Insurance Company issued payment totaling $22,999.70, contending this would satisfy the judgment. On plaintiff's appeal, the Supreme Court held plaintiff did nothing to prevent defendant from timely paying the original judgment and ordered plaintiff was entitled to $227,060.57. While this case presents an atypical result, it does indicate a possible outcome for no-fault cases tried in civil courts.

Parties' reasons for choosing ADR for their no-fault disputes are no different from those of parties with disputes in other practice areas, e.g., avoiding the "zero-sum" results and costs of litigation. However, no-fault insurance arbitrations are unique to the extent Regulation 68 defines the relevant processes and guidelines including initiating arbitrations,[12] jurisdiction,[13] arbitration forum procedures,[14] and arbitrators' appointments.[15] As a practical matter, the regulation also serves as the underlying basis for insurers' denials of claims. For example, a carrier may deny a claim where the applicant medical provider failed to timely submit its bill in accordance with the regulation.[16]

"Parties' reasons for choosing ADR for their no-fault disputes are no different from those of parties with disputes in other practice areas, e.g., avoiding the 'zero-sum' results and costs of litigation."

Partly due to backlogs in New York's civil courts and related costs of litigation, providers increasingly have selected arbitration to resolve their no-fault disputes. When parties filing claims for reimbursement for no-fault expenses opt for arbitration, respondent insurers are compelled to appear for arbitration.[17]

For over 40 years, the American Arbitration Association (AAA) has been the designated administrator of no-fault insurance arbitrations on behalf of the DFS. In that capacity, the AAA's New York State Insurance (NYSI) program's operations are driven by the no-fault regulation provisions depicting conciliation, arbitration, awards, and appeals to a master arbitrator. This is perhaps the program's key distinction from other ADR providers in the no-fault insurance industry.

Once an applicant has successfully requested to initiate arbitration with the AAA, the applicant's claim will be referred to the AAA's Conciliation Teams which endeavor to resolve the parties' issues in dispute without the need for arbitration.[18] According to the AAA's 2018 annual report and financial statements, its New York State Insurance Division (NYSI) received 304,620 no-fault filings in

2018, which represents a 5% growth over filings in 2017. In 2018, 42% of filings were resolved during the conciliation phase.

Claims not resolved during the conciliation phase are escalated to arbitration and assigned to no-fault arbitrators for hearings. Appointed by the DFS Superintendent, the no-fault arbitrator screening committee recommends appointments of no-fault arbitrators.[19] Criteria to become an arbitrator include being an attorney licensed to practice law in New York State with no less than five years of experience deemed by the committee sufficient to consider issues inherent to no-fault insurance disputes.[20] As of December 30, 2018, the arbitrator panel consisted of 178 arbitrators with hearing sites throughout New York State.

In 2018, no-fault arbitrators held and closed 113,504 arbitration hearings. After hearing parties' no-fault disputes, arbitrators generally are required to issue their reasoned awards within 30 days from the dates hearings were held and closed.[21] Over 146,000 cases were resolved during the arbitration phase of which 94,000 were reasoned awards. No-fault arbitration parties filed 1,801 requests for master appeals, and master arbitrators issued 1,551 decisions.

Conclusion

With the prevalence of motor vehicle accidents, the importance of understanding related litigation and arbitration is not limited to injured parties, insurance carriers, attorneys, or representatives of the insurance and legal industries. No-fault insurance presents an arguably holistic alternative to its predecessor common law's fault-based approach for compensation to persons injured in motor vehicle accidents. The present structure affords injured parties the opportunity to receive reimbursement for treatment regardless of whether or when the injured party commenced a personal injury action. Consumers seeking to resolve their no-fault insurance disputes have two distinct options for filing claims. While there is no reliable data showing the number of no-fault claims filed in New York's courts, available statistics show the steady growth of claims filed for no-fault arbitration.

Endnotes

1. NY Ins. Law Article 51.
2. N.Y. Ins. Law 5102(d).
3. Insureds may elect to purchase additional personal injury protection.
4. *Allstate Ins. Co. v. Mun*, 751 F.3d 94, 99 (2d Cir. 2014).
5. N.Y. Ins. Law §§ 5101, *et seq.*
6. 11 CRR-NY 65, *et seq*.
7. 11 CRR-NY 65-3.16(a)(12).
8. *State Farm Mut. Auto. Ins. Co. v. Mallela*, 4 N.Y.3d 313, 320 n.2, 827 N.E.2d 758, 794 N.Y.S.2d 700 (2005).
9. *Presbyterian Hosp. v. Maryland Cas. Co.,* 683 N.Y.2d 274, 289, 683 N.E.2d 1, 660 N.Y.S.2d 536 (1997); N.Y. Ins. Law § 5106(a).
10. N.Y. Ins. Law § 5106(b).
11. *B.Z. Chiropractic, P.C. v. Allstate Ins. Co.*, 2019 N.Y. Slip Op. 50241(U), 62 Misc. 3d 1223(A), (Sup. Ct. Queens Cty,) Love. J.
12. 11 CRR-NY 65-4.2.
13. 11 CRR-NY 65-4.3.
14. 11 CRR-NY 65-4.5.
15. 11 CRR-NY 65-4.5(b)(2)(d)(3).
16. 11 CRR-NY 65-3.3(e).
17. 11 CRR-NY 65-4.1.
18. 11 CRR-NY 65-4.2(b)(2)(iii).
19. 11 CRR-NY 65-4.5(d)(1).
20. 11 CRR-NY 65-4.5(d)(2).
21. 11 CRR-NY 65-4.5(r).

The Second Circuit Needs To Break Precedent To Protect Reasoned Arbitration Awards

By John Burritt McArthur and Allison Snyder

Reasoned awards, which explain how the arbitrators arrived at the outcome, are the bedrock of modern arbitration. They are *de rigeure* in international arbitration. Domestically, CPR and JAMS make reasoned awards their default form. Most arbitrators operating under AAA rules in domestic commercial arbitrations of any significant size write reasoned awards, even though the AAA's commercial rules make a standard award their default.[1]

Reasoned awards are important to arbitration's legitimacy. They let parties see *why* they won or lost. Studies of satisfaction with civil litigation have found that being heard increases user satisfaction.[2] What better way to know you have been heard than to read an award that shows the arbitrators understood your position, even if they did not accept it?

Although reasoned awards dominate commercial arbitration today, neither our courts nor domestic rules have developed an effective test to evaluate whether an award is "reasoned." The Second Circuit was an early adopter of the majority "*Cat Charter*" test, which it borrowed from the Eleventh Circuit. The test is a failure. Too often, it guarantees parties will not get the reasoned award they deserve.

This article describes 2011's *Cat Charter L.LC. v. Schurtenberger*[3] award and opinion, the Fifth Circuit's 2012 acceptance of that test, and the Second Circuit's mistaken decision to join the group. It rests in part on research underlying the forthcoming book, *Reasoned Arbitration Award in the United States,* by one of the authors.[4]

I. The *Cat Charter* Test: The Eleventh Circuit Veers Off Course

Cat Charter emerged from the decision by a Massachusetts couple, the Ryans, to retire to Florida and build a catamaran, *The Magic*. Their ship builder, Walter Schurtenberger, allegedly befriended them, promised to build the boat for no more than $1.2 million, but exploited their trust and vastly overran that price. He did not finish the boat.

The dispute went to arbitration. Both parties asked for a reasoned award.[5] The Ryans claimed an elaborate fraud. The arbitrators found for them on two claims, but not on fraud. The award essentially gave them the $2 million they had spent back.

The award is two and a half pages long. It contains *no* discussion of the facts, the law, the denied fraud claim, the counterclaims, or the affirmative defenses. It just says the Ryans "have proven their [two winning] claim[s] against Respondents . . . by the greater weight of the evidence."[6] This is after a five-day hearing. A Miami federal judge vacated because the award did not "offer[] any reasons for the result." It "merely announced winners and losers."[7]

The Eleventh Circuit, which should have readily affirmed, reversed. It found the award reasoned. It did agree that *if* the arbitrators did not issue a reasoned award, they would exceed their powers.[8] It also embarked on a praiseworthy quest to develop an operational definition of "reasoned."

Unfortunately, this quest made things worse. The court first drew on other cases to announce that a reasoned award is "something short of findings and conclusions but more than a simple result."[9] Almost any award, including *Cat Charter*'s, satisfies that test. The test is vacuous because it gives no indication of what "more" is required to be reasoned. Does adding a handful of words to a standard award transform it into a reasoned one? Even the Eleventh Circuit acknowledged that its "something more" standard was not enough.[10]

John Burritt McArthur has been a trial lawyer for 36 years, an arbitrator for 25. A Fellow of the College of Commercial Arbitrators and of CIARB, he is on the arbitrator lists of, among other providers, the AAA, CPR, FedArb, FINRA, the LCIA, and other international arbitration centers. Mr. McArthur's law office is in Berkeley, California.

Allison Snyder, a partner in Houston's Porter Hedges, is a litigator, arbitrator, and mediator with over 35 years of experience representing commercial and construction clients and more than 25 years of experience as an arbitrator. She has served as chair of multiple construction law and ADR associations and is a Fellow of the CCA and the American College of Construction Lawyers. She has been a SuperLawyer in Construction/Surety law since 2004.

The court drew its second test from the dictionary:

> [A] 'reasoned' award [is] an award that is provided with or marked by the detailed listing *or mention of* expressions or statements offered as a justification of an act—the "act" here being, of course, the decision of the Panel.[11]

To illustrate this test's inadequacy, consider the panel's "reason" that the Ryans won by the weight of the evidence. This is a "justification." But so what? The winner prevails by evidentiary weight *in every single arbitration*.

The Eleventh Circuit offered a third reason for confirmation. It declared the arbitrators' greater-weight finding "to mean that, in the swearing match between the Plaintiffs and the Defendants, the Panel found the Plaintiffs' witnesses to be more credible."[12] But only a mind reader could know such a thing. The award does not discuss witnesses or evidence. It does not mention "credible," "credibility," or any similar concept.

The award's failure to address the denied claims was not harmless. Maybe the arbitrators thought they were splitting the baby. But Schurtenberger went into bankruptcy. Lacking a fraud finding, the bankruptcy court discharged the judgment debt.[13] The Ryans recovered nothing.

II. The Fifth Circuit Sails in *Cat Charter*'s Wake

The Fifth Circuit followed *Cat Charter* in *Rain CII Carbon, LLC v. ConocoPhillips*.[14] Predictably, it confirmed an unreasoned award.

The question was what price for green anode coke best fit market prices. The arbitrator found for the buyer, Rain CII Carbon. But all he said was that "[b]ased upon the testimony, exhibits, arguments, and submissions presented to me in this matter," the existing price formula "shall remain in effect."[15]

The *Rain* award was unreasoned in a not uncommon way: It listed each side's contentions and then announced who won. The trial court confirmed because the award had "three and a half pages of background and discussion" followed by a "one sentence conclusion."[16] The court surmised "*one could certainly distill some level of reasoning* between the elements of the parties' proposed formulas discussed in the Award and the arbitrator's brief ruling."[17]

Affirming, the Fifth Circuit pointed to the same contentions-and-outcome sequence. It complained that *ConocoPhillips* "ignore[d] that the [award's] previous paragraph thoroughly delineates Rain's contention that Conoco had failed to show that the initial formula failed to yield a market price, ..."[18] The arbitrator "obviously accepted" Rain's contentions.[19]

These arguments have many problems. Most basic is that the arbitrator did not say anything about *why* he found Rain's contentions persuasive. Another problem is that he did not draft the contentions. He took his award almost *verbatim* from ConocoPhillips' draft (the losing party's!).[20] Even worse, the court's idea that the award gives the arbitrator's reasons is comical because the draft the arbitrator appropriated had reasons, but the arbitrator deleted them.[21]

To see that the Rain award is not reasoned, read it while asking: "What does this award tell us the arbitrator thought about specific disputed facts and arguments?"

III. The Second Circuit Boards the *Cat Charter* Catamaran

The Second Circuit has adopted the *Cat Charter* standard uncritically. Predictably, it has confirmed unreasoned awards as reasoned. It has done so twice.

Leeward Construction. The award-form question reached the Second Circuit in *Leeward Construction Co. v. American University of Antigua – College of Medicine*.[22] Antiguan law applied. The arbitrators wrote an award that has no meaningful fact section, no "rationale," but nonetheless minutely divided the arbitration into 68 "Controvers[ies]" that it answers with 68 "Panel's Decision[s]." All this without the award's saying a thing about what the arbitrators thought about specific evidence or analyzing legal arguments. The circuit and trial courts did not question that a failure to provide reasons would require vacatur.[23] They nonetheless confirmed under the *Cat Charter* standard. Satisfying that test should be no surprise. The award is, after all, 33 pages long. Clearly 33 pages, whatever their content, offer "something more" than a standard award.[24]

The *Leeward* award has substantive problems. Lacking reasons, its authors had no opportunity to benefit from the clearer thinking that sometimes comes with writing out a rationale. One problem concerns work the college contracted to Leeward. It later canceled the contract and rebid the same work under new "Separate Contracts." Leeward won some of the re-bid work, but at lower prices.

The arbitrators repeatedly held they lacked jurisdiction over Separate Contracts.[25] Yet they nonetheless awarded Leeward damages for the re-bid work, using a "bad faith" theory Leeward never pled.[26] The trial court found this part of the award "questionable" and admitted that it "leaves much to be desired."[27] Yet it brushed past the problem of arbitrators injecting a liability theory by speculating on how the record might support bad faith.[28] Surely arbitrators cannot put their fingers on the scale by imposing their own theories, any more than reviewing courts ought to supply absent reasons.

The trial court speculated that bad faith might be based on "general principles of contract law" (perhaps New York principles?).[29] It noted "no party has ar-

gued that Antiguan contract law deviates from these principles."[30] But why should they? Leeward presumably enjoyed the arbitrators' *deus ex machina* construction of a bad-faith theory. And the college had no warning the arbitrators would gift Leeward.

The Second Circuit, like the trial court, blessed the award under *Rain* and *Cat Charter.*

Equally troubling was the award's unreasoned treatment of arguments over missed deadlines. The contract contained notice and other documentation requirements. Yet the arbitrators swept these aside. For example, they neutered a change order requirement by holding that "from the evidence considered by the panel it appears that both parties waived this requirement."[31] This conclusion is the entire detail on point. The panel rewrote the contract by treating these contract requirements as ineffective.

Tully Construction 1. Another construction case soon presented the same question about what "reasoned" means. At issue was the alleged failure of Canam Steel, successor to the project's first steel fabricator, to timely supply steel to a construction company, Tully, which held a contract to renovate the Whitestone Bridge. The arbitration took 17 days and involved 800 exhibits.[32] The agreement, a scheduling order, and AAA rules required a reasoned award.[33]

Tully pled nine claims, Canam seven. Damages ran into the millions. Yet all the arbitrator wrote was a list award. It had one line with an amount per claim, nine of them showing "$0.00." After getting the award, Canam asked the arbitrator for the reasons. He refused, claiming everybody knows a reasoned award is anything between a standard award and findings and conclusions.[34]

A Southern District court vacated because the award contained "no explanation whatsoever for the arbitrator's rulings."[35] It was not possible "to determine the reason or rationale for the arbitrator's liability and damages determinations."[36] The award did not "set forth the relevant facts, explain the nature of the claims, or offer any reason or rationale for his determinations as to liability and damages."[37] The court remanded for clarification.[38]

Tully Construction 2. The arbitrator replaced his two-page award with an eleven-page award. This was "something more" than the original standard award.[39] But the new award stubbornly did not explain the arbitrator's thinking. What did the arbitrator do? He added a brief introductory discussion, wrote a boilerplate listing of questions he claimed were relevant to each claim,[40] included for each a paragraph on each side's contentions with cites by exhibit number or transcript pages, and announced each outcome. He told the reader clearly who won. But he said nothing about why.

This is the second award's entire discussion of the Tully's first claim:

> ***Contract Overpayment***
>
> A review of the relevant, related, or both, information below, justifies the following resolution of this portion of the award sought by Claimant.
>
> Claimant asserted a "Contract Overpayment" claim against Respondent of $4,194,471.00. *See,* **C-478** (formerly **C-459**), Rows 2-11, (also **C-447**, page 16, Ex. 8f), **McPartland Tr. 107-208.**
>
> Respondent opposed the $4,194,471.00 "Contract Overpayment" claim asserting, in essence, that Claimant's calculations were based on unsupported assumptions. *See,* **R-19K** at **CAN 16606, 16627**, and **19947; C-139; C-195; Mazza Tr. 438.**

> "Cat Charter *is demonstrably not up to the task of making sure reasoned awards have true reasons."*

> ***Contract Overpayment Conclusion***
>
> Not having established by a preponderance of testimonial or of documentary evidence its entitlement to the $4,194,471.00 "Contract Overpayment" claim from Respondent, it is denied and Claimant awarded:
> $0.00[41]

Why does this arbitrator think Canam should not recover here? The award does not say.

Canam alleged the arbitrator took the record cites from Tully's proposed award, not his own work.[42] Whether he did or not, he certainly does not explain his thinking about the evidence. This time the trial court confirmed. Perhaps it was too much to ask for a second vacatur, given an award "something more" than the first award. The Second Circuit affirmed, citing *Leeward* in less than half a page of text.[43] All this is a predictable result of *Cat Charter*'s shortcomings.

Will the Second Circuit use* Smarter Tools *to toss* Cat Charter *overboard and float a more supportable doctrine? Another inadequately reasoned award has just been vacated in the Southern District.[44] Time will tell whether it is fixed on remand, settled, or appealed. If the award reaches the Second Circuit, it should seize the chance to fix the law. It is always hard to admit error. Do-

ing so within a system of precedent is even harder, but the court should abandon its current test. *Cat Charter* is demonstrably not up to the task of making sure reasoned awards have true reasons.

IV. A Short Primer on Forms of Unreasoned Awards

Parties, lawyers, judges, and arbitral providers trying to spot unreasoned awards masquerading as reasoned should be on the lookout for these characteristic unreasoned awards:

1. ***Announcement awards.*** Awards that merely announce outcomes, which is most of what the *Cat Charter* and *Tully 1* awards do.

2. ***Attestation awards.*** Awards in which the arbitrators, like *Rain's* arbitrator, attest that they have reviewed all the proper material and considered it, but then merely announce the outcome without explaining their reasons.

3. ***Burden of proof and credibility awards.*** Awards that announce that one party met or did not meet its burden, as the *Cat Charter* and *Tully 2* awards announce, or that its evidence or witnesses were more "credible," one of the Eleventh Circuit's three theories on why it should confirm the *Cat Charter* award.

4. ***Contention and issue-listing awards.*** Awards that list the parties' contentions, as in the *Rain* and *Tully 2* awards, and then announce an outcome without saying why.

5. ***Evidentiary list awards.*** Awards like the second *Tully* award that insert evidentiary cites without discussing what the evidence means.

6. ***Volumetric awards.*** Awards whose apparent virtue is that they are long, like the *Leeward* award, but that contain no reasons.

V. A Standard that Would Thwart Unreasoned Awards

A definition of "reasoned" that would effectively police awards is the following:

> A reasoned award explains who won by stating clearly its reasoning on all necessary dispositive issues: It explains the resolution of disputed gateway and threshold issues necessary to decide the arbitration, including but not limited to disputes over party and claim jurisdiction, adherence to the rule of law, choice of law, and burden of proof; explains the arbitrators' resolution of the issues and arguments of law and of fact that the parties raise on each dispositive claim, counterclaim, and defense; and explains as well the determination of each remedy, including any computations. A reasoned award also explains the disposition of each rejected claim, counterclaim, defense, and remedy that, if granted, would have altered all or part of the outcome. A reasoned award may but is not required to address cumulative alternative claims and defenses.

The test might also specifically reject *Cat Charter*-type approaches and the main forms of unreasoned awards:

> Awards that merely announce winners, that merely attest that the arbitrators reviewed the facts and arguments, that only proclaim who prevailed by the weight of the evidence or whose case was more credible, or that list the parties' contentions and then announce a winner are not reasoned. Awards also are not reasoned just because they are very long and describe a lot of facts, or because they list exhibit numbers or transcript pages or portions of pleadings without explanation.[45]

The Second Circuit can protect the efficiency of arbitration and party expectations about that often favored form of dispute resolution if it throws *Cat Charter* overboard and adopts any reasonable version of this standard.

VI. Meaningful Review for Reasons Would Not Sink New York as a Leading Arbitration Venue

If the Second Circuit begins to take reasons seriously as we suggest, would it hurt New York's position as a world center of arbitration? The answer is an unequivocal no.

Reasoned awards are the *sine qua non* of international arbitration, so making awards contain real reasons should not deter those arbitrations. Indeed, none of the awards described here—*Cat Charter*, *Rain*, *Tully 1* or 2, *Leeward*, or *Smarter Tools*—would be likely to secure confirmation under the New York Convention in any even halfway skeptical foreign court. Jettisoning *Cat Charter* therefore should strengthen New York as a leading international arbitration venue.

Domestically, perpetuation of the *Cat Charter* standard jeopardizes arbitration's legitimacy. We propose to remove that flaw in arbitration by having courts make sure that awards contain reasons when they are required. Our recommendations should ensure parties get what they ask for.

New York will benefit if it leads the way in making arbitration more responsive to its users in this way. Given the Second Circuit's prominence, if it revises its test along the lines we suggest, it may well persuade other jurisdictions to follow.

Endnotes

1. AAA Comm. Arb. Rule R-46(b). A number of specialized AAA rules make reasoned awards their default. Eg., AAA Constr. Arb Rule 47b) (providing for list award, but in Rule L-5, making reasoned awards the default for arbitrations with claims of a million dollars and up).
2. Deborah Hensler, *The Findings of Procedural Justice Research*, in AAA, *Handbook on Commercial Arbitration* 41, 43 (Thomas Carbonneau et al. eds.; 1st ed. 2006) (studies of procedural justice "consistently found that the degree of satisfaction with the legal process is a function of an individual's perception of the fairness of both the process and the outcome,").
3. 646 F.3d 836 (11th Cir. 2011).
4. Mr. McArthur's book will be available at https://arbitrationlaw.com/books/reasoned-arbitration-award-united-states-its-preparation-virtues-judicial-erosion-and.
5. *Cat Charter*, 646 F.3d at 839.
6. *Id.* at 840-41.
7. *Cat Charter L.LC. v. Schurtenberger*, 691 F.Supp.2d 1339, 1344 (S.D. Fla. 2010), *rev'd and award confirmed*, 646 F.3d 836 (11th Cir. 2011). The court added that even were it to concede [and it did not] that announcing that a party prevailed by the "greater weight of the evidence" is a "reason," the award still would not be reasoned because "the Panel's denial of all other claims was simply announced as a bare result"; it "merely announced the winners and losers." *Id.*
8. *Cat Charter*, 646 F.3d at 843 (following *W. Employers Inc. v. Jefferies & Co.*, 958 F.2d 258, 260 (9th Cir. 1992)).
9. *Id.* at 844.
10. *Id.* (calling its spectrum analysis "still insufficient to fully evaluate" award).
11. *Id.* (emphasis in original). For the source of these definitions, see *Webster's Third International Dictionary, Abridged*, 1891-92 (1993).
12. *Cat Charter*, 646 F.3d at 844-45.
13. *In re Schurtenberger*, 2014 WL 92828 (S.D. Fla. 2014).
14. 674 F.3d 469 (5th Cir. 2012).
15. *Id.* at 471.
16. *Rain*, 2011 WL 3565345, at *6 (E.D. La. 2011, *aff'd*, 674 F3d 469 5th Cir. 2012). The *Rain* arbitration was a baseball arbitration, but because the parties required a reasoned award, *id.* at ** 1, 4, just announcing which proposal won did not satisfy the reasoned requirement.
17. *Id.* (emphasis added).
18. *Id.*
19. *Id.*
20. Taken from McArthur's forthcoming book, chapter 5, section B.
21. *Id.*
22. 826 F.3d 634 (2d Cir. 2016).
23. *E.g., id.* at 638-40.
24. *Id.* (citing, among other cases, *Rain* and *Cat Charter*).
25. For the arbitrators' conclusion that the Separate Contracts lay outside their jurisdiction, see McArthur, chapter 5, section C.
26. *Id.*
27. *Leeward*, 2013 WL 1245549, at *4 n.30 (S.D.N.Y. 2013), *aff'd*, 826 F.3d 634 (2d Cir. 2016)
28. *Id.* at **4-5.
29. *Id.* at *4.
30. *Id.* at *4 n.31.
31. *See* McArthur, chapter 5, section D.
32. *Tully,* 2015 WL 906128, at *2.
33. *Id.* at *12.
34. For the arbitrator's dismissive refusal to provide reasons, see McArthur's forthcoming book, chapter 5, section D.
35. *Tully Construction Co. v. Canam Steel Corp.,* 2015 WL 906128, at *15 (S.D.N.Y. 2015), *revised award confirmed*, 2016 WL 8943164 (2016), *aff'd*, 684 Fed. Appx. 24 (2d Cir. 2017) (not for publication); *see also id.* at *17 (same).
36. *Id.* at *15.
37. *Id.*
38. *Id.* at **19-20.
39. Because the initial list award did break out damages by claim, a *Cat Charter* fan might argue that it was "something more" than a pure standard award (because it did not just award a single lump sum). That one can make this argument is another sign of *Cat Charter*'s inadequacy.
40. The arbitrator claimed these opaque questions should determine each claim: "The necessary determination is whether the Claimant's alleged damages are a result of non-concurrency, were not foreseeable, were not anticipated, are excusable, and are compensable."
41. McArthur, chapter 5, section D.
42. For Canam illustrating the arbitrator's pulling his record cites from Tully's brief, see *id*.
43. *Tully*, 684 Fed. Appx. at 28.
44. *Smarter Tools Inc. v. Chongqing Senci Import & Export Trading Co., Ltd.*, 2019 WL 1349527 (S.D.N.Y. Mar. 26, 2019).
45. These definitions are taken from chapter 2 in McArthur's forthcoming book.

Removing an Arbitrator for Incapacity

By Douglas F. Harrison

What can you do if an arbitrator in an international commercial or investor-state arbitration becomes incapacitated during the proceeding? Could you unilaterally seek to remove the arbitrator? The U.S. Federal Arbitration Act[1] does not provide for the removal of an arbitrator before an award is made, and U.S. Federal Courts have only done so in a handful of cases involving consolidation or bias.[2] However, if your proceeding is seated in an UNCITRAL Model Law jurisdiction, or perhaps in England, there is greater scope to ask the court to remove an arbitrator. As well, most administered and non-administered arbitral rules allow for this relief. Not surprisingly, given the inconvenience, financial implications and possible embarrassment involved, the ways courts and institutions have handled these situations demonstrate that the power exists, but is exercised only as a last resort.[3]

Article 14 of the UNCITRAL Model Law provides for the removal of an arbitrator for an inability to perform functions or for undue delay. It states:

> (1) If an arbitrator becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.
>
> (2) If, under this article or article 13(2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12(2).[4]

The Model Law or legislation based on it has been adopted in 80 countries in a total of 111 jurisdictions,[5] including several U.S. states.[6] To support uniform interpretation and application of the Model Law, it is important for courts and institutions to examine decisions from multiple Model Law jurisdictions.[7]

While there is no temporal component for seeking this relief in Article 14, Article 4 directs that a party must act "without undue delay" if it wishes to object to non-compliance with a provision of the Model Law that is not mandatory. Failing to do so will result in a waiver of the right to object. As Article 14 is not mandatory (i.e., parties are free to choose their own methods of dealing with a non-performing arbitrator), a party seeking to remove an arbitrator should take the necessary steps within a reasonable time of learning of the facts giving rise to the reason for seeking the removal, or it may be deemed to have waived its right to object.[8] As Article 14(1) of the Model Law makes clear, there is no appeal from the court's decision on whether or not to terminate the arbitrator's mandate in these circumstances.[9]

The English Arbitration Act of 1996[10] provides in section 24(1)(c) that on a party's application, the court may remove an arbitrator on the ground that he or she is "physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his [*sic*] capacity to do so." Section 24(1)(d)(ii) also permits the removal of an arbitrator who has "refused or failed … to use all reasonable despatch in conducting the proceeding or making an award, and that substantial injustice has been or will be caused to the applicant."

In addition to the Model Law, Article 12(3) of the 2010 UNCITRAL Arbitration Rules provides for the termination of an arbitrator's mandate in the event that the arbitrator "fails to act" or in the event of the *de jure* or *de facto* impossibility of the arbitrator performing his or her functions. Unlike Article 14 of the Model Law, the term "fails to act" is not modified with the additional words "without undue delay."[11]

Douglas F. Harrison is an independent arbitrator and mediator based in Toronto, Ontario, Canada, and was formerly a litigation partner with Stikeman Elliott LLP. He is a Fellow of the Chartered Institute of Arbitrators, as well as a member of the International Arbitration Institute and the Executive Committee of the Toronto Commercial Arbitration Society, and a Co-Chair of the University Tribunal of the University of Toronto.

The author wishes to acknowledge the assistance of Toronto lawyer Jessica Penley, who conducted some of the initial research for the topics covered in this article. A longer version of this article appears in Canadian Journal of Commercial Arbitration *1 (2019).*

The rules of the major international arbitration institutions allow the institution to remove an arbitrator in appropriate circumstances.[12] If parties have agreed to a set of rules for their proceeding, then because Article 14 is not mandatory, those rules would apply to the removal of an arbitrator:[13]

> • ICDR International Arbitration Rules: The ICDR as "Administrator" is given the ability to remove an arbitrator, on its own initiative, for "failing to perform his or her duties."[14]
>
> • Article 15(2) of the 2017 ICC Arbitration Rules: An arbitrator "shall … be replaced on the Court's own initiative when it decides that the arbitrator is prevented *de jure* or *de facto* from fulfilling the arbitrator's functions, or that the arbitrator is not fulfilling those functions in accordance with the Rules or within the prescribed time limits."[15] Article 15(3) suggests that to the extent the Court takes action to replace an arbitrator, it will generally do so after it has been made aware of an issue by a party.
>
> • 2014 Rules of the London Court of International Arbitration (LCIA): The LCIA Court may revoke an arbitrator's appointment at its own initiative, or at the request of other members of the tribunal or a party, if the arbitrator falls "seriously ill" or if the arbitrator "refuses or becomes unable or unfit to act."[16] A commentary on the LCIA Rules suggests that it would be "patently unfair" if an arbitrator's appointment was revoked due to illness if that illness did not give rise to "justifiable concerns" about the arbitrator's ability to perform his or her functions.[17]
>
> • The 2006 ICSID Convention Arbitration Rules and the 2006 ICSID Arbitration (Additional Facility) Rules: Investor-state arbitration parties can ask to have an arbitrator disqualified if he or she "becomes incapacitated or unable to perform the duties of his office."[18]

How Courts and Institutions Have Handled Requests for Removal on Account of Incapacity

The notion of an arbitrator being *de jure* unable to perform his or her functions is understood to refer to a legal inability to act under the law of the seat of the arbitration. For example, there may be a legal bar against an arbitrator who is bankrupt, has a criminal conviction, is of a nationality that is ineligible in the circumstances, or is a minor.[19] Or an arbitrator might be enjoined by a court from proceeding with an arbitration.[20]

An arbitrator who is *de facto* unable to perform his or her functions is one who is factually incapable, physically or mentally. While this would certainly include someone unable to act because of illness or injury, it could also include someone who is simply indisposed or unavailable (e.g., prevented from traveling to a hearing). In *Noble Resources Pte Limited v. China Sea Grains and Oils Industry Co. Ltd*., an arbitrator was found unable to perform his functions because he was under arrest in China at the time the hearing in Hong Kong was about to commence.[21]

It has also been suggested that arbitrators who are unfit to serve because of their behavior would be factually incapable of performing their functions as arbitrators. In September 1984, the United States challenged two Iranian judges at the Iran-United States Claims Tribunal (the rules of which were, essentially, the 1976 UNCITRAL Arbitration Rules) after the pair had physically attacked their Swedish co-arbitrator before the start of a scheduled meeting of the full tribunal. In support of the challenge, the agent of the U.S. submitted, in a letter to the appointing authority, that "[a]rbitrators who physically attack their colleagues and make violent threats against them show a fundamental, irremediable incapacity and unfitness to function as arbitrators. … Article 13(2) [of the 1976 UNCITRAL Rules] was drafted to cover all circumstances that make it impossible for an arbitrator to perform his functions. … The conduct displayed here shows such a fundamental defect in temperament and character, that it is impossible, *de facto*, for them to perform their functions as arbitrators." The Iranian judges were withdrawn by their government before a decision on the challenge was made by the appointing authority.[22]

Incapacity for health reasons has seldom been considered by courts. This is not surprising as arbitrators who find themselves in that position would usually resign or the parties would agree to terminate the mandate.

In *Succula Ltd. and Pomona Shipping Co. Ltd. v. Harland and Wolff Ltd*.,[23] Mustill J. said that an arbitrator who is "incapable of acting," the term used in §§. 7 and 10 of the English Arbitration Act, 1950,[24] would include someone who was suffering from a lifelong physical or mental incapacity, but not necessarily. In his view, the incapacity would only need to put the arbitrator "out of the action" for the arbitration proceeding in question.[25]

An application to remove an arbitrator on account of his poor health was made to the Supreme Court of Victoria (Australia) in 1989. In *Korin v. McInnes*, Brooking J. stated that this case appeared to be "the first recorded attempt to get rid of an arbitrator or his award on the ground that, physically or mentally, he was not up to it."[26] The arbitrator, who was 73, had told the parties at the beginning of the third day of the hearing that he felt unwell after having had some surgery three weeks

earlier. He said he wanted the parties to know that he might have to interrupt the hearing from time to time in order to go to the restroom. The plaintiffs' lawyer then requested, and was granted, an adjournment of the hearing in order to apply to the court for his removal. Section 44(c) of the Victoria *Commercial Arbitration Act 1984* empowered the court to remove an arbitrator if it was satisfied that the arbitrator was "incompetent or unsuitable to deal with the particular dispute."[27]

The court said that in order to demonstrate that the arbitrator is "incompetent," an applicant "must … show that the state of the arbitrator's health is now such that he is not able properly to perform the functions of an arbitrator."[28] In addition, to show that an arbitrator is "unsuitable to deal with the particular dispute" it would be appropriate to take into account "how long and difficult and rigorous" the arbitration is likely to be. In this case, however, the court dismissed the application, finding that the plaintiffs had "signally failed to prove that Mr. Eilenberg's health is now such that he is unable properly to perform the functions of an arbitrator, either generally or in relation to this dispute."[29] A "reasonable apprehension" that the arbitrator was incompetent was not enough.[30]

A German state court in 2003 dismissed an application under Article 14 of the Model Law to terminate the mandate of an arbitrator who had required mental health treatment during the course of the arbitration, following a suicide attempt.[31] After considering both parties' expert evidence concerning the arbitrator's condition, the court determined that the arbitrator had recovered from his illness and was capable of carrying on with his work; there was no evidence that he was actually unable to perform his functions as arbitrator or that he would relapse.

Reported instances of arbitral institutions removing an arbitrator for being *de facto* or *de jure* incapable of performing their functions are extremely rare, not surprisingly, given the confidentiality of such proceedings and the fact removals are usually handled quietly.[32] In 2014, 60 challenges of arbitrators were filed with the ICC Court. In only one of those cases was the challenge accepted on the basis that the arbitrator was *de jure* or *de facto* unable to perform his functions.[33] None of the LCIA Court's 60 challenge decisions from 1996 to 2017 involved a challenge on the basis of legal or factual incapacity.[34] A survey of the 84 challenges received by ICSID from 1982 to 2014 noted that there was not a single instance of an arbitrator being disqualified for incapacity or inability to perform the duties of office.[35] There have, however, been a handful resignations of arbitrators from ICSID panels for health reasons.[36] In 2006, in *Victor Pey v. Chile*, the president of the tribunal, who had had heart problems, was unsuccessfully challenged by Chile, in part, on his allegedly weak health.[37]

In 2018, the respondent in an ICC arbitration challenged a 76-year-old arbitrator on the basis that his age was "incompatible with the proper conduct of a complex arbitration."[38] The respondent argued that there was a risk that the arbitrator might "suffer from health issues (however minor)" or otherwise become incapacitated, which created "potentially serious consequences" for the parties. The ICC Court rejected the challenge. In making the appointment, the ICC had reviewed his past performance as an arbitrator, which had been efficient and timely, and noted that there was no indication that his health should be a cause for concern.

While what constitutes a *de jure* or *de facto* inability to perform the functions of an arbitrator has rarely been considered, what constitutes undue delay by an arbitrator has been the subject of a fair amount of commentary and consideration.[39] Exploring undue delay is beyond the scope of this article. However, it can be said that there have been very few successful applications to remove an arbitrator for delay. An arbitrator who becomes aware of an imminent challenge for delay is generally either going to speed up their work or resign.

Steps Following an Order Removing an Arbitrator

If an arbitrator is removed due to incapacity, that arbitrator will likely be replaced. The tribunal may have to re-hear some evidence, although the Model Law does not state whether any part of a proceeding must be repeated if a substitute arbitrator is appointed.[40] Under the English Act, these matters are left to the parties and the tribunal.[41] Article 15 of the 2010 UNCITRAL Rules states that "the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform his or her functions, unless the arbitral tribunal decides otherwise." However, Article 14.2 of the 2010 UNCITRAL Rules provides that the appointing authority may permit the remaining arbitrators to continue with the proceeding after the close of hearings and deliver an award. As well, the current rules of the ICC and the LCIA both permit truncated tribunals to continue after the hearing has closed and the arbitrators are in deliberations.[42]

According to the authors of a guide to the 2014 LCIA Rules, in respect of awards made by tribunals operating under institutional rules, "no national court has refused enforcement of an award where a truncated Tribunal has made an award."[43] Meanwhile, Gary Born notes that courts are divided on whether awards made by truncated tribunals in ad hoc arbitrations should be recognized and enforced.[44]

Conclusion

While there are provisions permitting the removal an arbitrator for incapacity, it is almost never done (at least not in the public eye). The disruption to the arbitration is potentially severe. Costs are increased for all parties. It may be embarrassing for the arbitrator. And if the request for removal is unsuccessful, then the proceeding may

become uncomfortable for at least some participants, and the party who failed to remove an arbitrator may have less confidence in the process. Courts and arbitral institutions will prefer to save the proceeding rather than ordering an arbitrator to step aside.

Endnotes

1. Title 9, U.S. Code, Section 1-14.
2. For example, *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975) (consolidation) and *Masthead Mac Drilling Corp. v. Fleck*, 549 F. Supp. 854 (S.D.N.Y. 1982) (bias).
3. In *Succula Ltd. and Pomona Shipping Co. Ltd. v. Harland and Wolff Ltd.*, [1980] 2 Lloyd's Rep. 381 (Q.B. (Comm. Ct.)), Mustill J stated, at p. 388, that removal of an arbitrator "remains a remedy of last resort, and the Court should not intervene … unless convinced this is the only right course to take."
4. Article 14 was unchanged by the 2006 amendments to the Model Law.
5. http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.
6. California, Connecticut, Florida, Georgia, Illinois, Louisiana, Oregon and Texas.
7. A principle enshrined in Article 2A, adopted in some jurisdictions as part of the 2006 amendments.
8. Peter Binder, International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions (4th ed.) (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2019), at pp. 239-40.
9. The appeal prohibition was specifically included in Article 14, "In view of the urgency of matters relating to the composition of the arbitral tribunal or its ability to function, and in order to reduce the risk and effect of any dilatory tactics": *Commentary of the United Nations Commission on International Trade Law concerning the UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006* (U.N. Sales No. E.08.V.4), at p. 30, para. 24.
10. 1996, c. 23. Available at https://www.legislation.gov.uk/ukpga/1996/23.
11. The 2010 UNICTRAL Arbitration Rules are available at https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf.
    Article 14 of the Model Law was based on Article 13 of the 1976 UNCITRAL Arbitration Rules, which contained the same language as the 2010 UNCITRAL Rules as to when the termination of an arbitrator's mandate could be sought. *See* Binder, *supra* note 8, at p. 235.
12. In addition to the rules of the ICC, LCIA and ICDR, as discussed in this article, provisions for the termination of an arbitrator's mandate for incapacity are also found in the so-called Swiss Rules and in the arbitration rules of, for example, the International Institute for Conflict Prevention and Resolution (CPR), the British Virgin Islands International Arbitration Centre, the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada, the Chartered Institute of Arbitrators, the Stockholm Chamber of Commerce, the Vienna International Arbitration Centre, the Hong Kong International Arbitration Centre, the Singapore International Arbitration Centre, the Australian Centre for International Commercial Arbitration, and the Arbitrators' and Mediators' Institute of New Zealand, as well as specialized arbitration bodies such as the Court of Arbitration for Sport, the World Intellectual Property Organization and P.R.I.M.E. Finance. For a general overview of major institutions' provisions for removing an arbitrator, see Rémy Gerbay, The Functions of Arbitral Institutions (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2016), at pp. 89-92.
13. Section 24(2) of the English Arbitration Act 1996 states: "If there is an arbitral or other institution or person vested by the parties with power to remove an arbitrator, the court shall not exercise its power of removal unless satisfied that the applicant has first exhausted any available recourse to that institution or person."
14. *See* Article 14(4) of the ICDR International Arbitration Rules, available at https://www.icdr.org/sites/default/files/document_repository/ICDR_Rules.pdf.
15. 2017 ICC Arbitration Rules available at https://iccwho.org/dispute-resolution-services/arbitration/rules-of-arbitration. For an overview of the ICC Court's handling of removing and replacing arbitrators, *see* Thomas H. Webster and Michael W. Bühler, Handbook of ICC Arbitration (London: Sweet & Maxwell, 2018), at pp. 286-291.
16. *See* Article 10 of the 2014 LCIA Rules, which are available at https://www.lcia.org/dispute_resolution_services/lcia-arbitration-rules-2014.aspx.
17. Shai Wade, Philip Clifford, James Clanchy, A Commentary on the LCIA Arbitration Rules *2014* (London, UK: Thomson Reuters, 2015), at para. 10-010.
18. ICSID Arbitration Rules: http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/partf-chap01.htm. *See* Rules 8 and 9. ICSID Additional Facility Rules: http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/facility/partd-chap03.htm. See Rules 14 and 15. The 2019 draft amendments to the ICSID Rules do not materially change these provisions.
19. Binder, *supra* note 8, at p. 236, and Doug Jones, Commercial Arbitration in Australia (Sydney: Thomson Reuters, 2013) at p. 156.
20. Jason Fry, Simon Greenberg and Francesca Mazza, The Secretariat's Guide to ICC Arbitration (Paris: International Chamber of Commerce, 2012), para. 3-614. *See also* Michael Kerr, *Concord and Conflict in International Arbitration*, 13 Arb. Intl. 12 (1997), in which the author noted a number of instances in which arbitrators, including himself, were subject to injunctions issued by courts in India and Pakistan.
21. [2006] HKCFI 334 (H.K. Ct. First Inst.). *See also* Wu Ming, *The Strange Case of Wang Shengchang*, 24 J. Int'l Arb. 63 (2007), and *Wang Shengchang free – but retains criminal record* in Global Arbitration Review (12 October 2009), *available at* https://globalarbitrationreview.com/article/1028664/wang-shengchang-free-but-retains-criminal-record.
22. David D. Caron and John R. Crook, The Iran-United States Claims Tribunal and the Process of International Claims Resolution (Ardsley, NY: Transnational Publishers, 2000) at pp. 194 and 198.
23. *Supra* note 3.
24. 14 Geo. 6, ch.27.
25. *See also* Sir Michael J. Mustill and Stewart C. Boyd, The Law and Practice of Commercial Arbitration in England (2nd ed.) (London: Butterworths, 1989), p. 533. In *Burkett Sharp & Co. v. Eastcheap Dried Fruit Company and Perera*, [1962] 1 Lloyd's Rep. (CA), the court equated incapacity with the arbitrator being "completely out of the action."
26. [1990] VR 723 (S.C.V.) at 728.
27. Victoria Act No. 10167, since repealed and replaced by the Commercial Arbitration Act 2011, Act No. 50 of 2011.
28. *Supra* note 26, at 729.
29. *Id.*
30. *Id.*
31. Judgment of 11 April 2003, 9 SchH 27/02 (Oberlandesgricht Koln). http://www.disarb.org/de/47/datenbanken/rspr/olg-koln-az-9-schh-27-02-datum-2003-04-11-id323. Article 14 of the Model Law

is incorporated into section 1038 of the Tenth Book of the German Code of Civil Procedure (Zivilprozessordnung).

32. Wade et al., *supra* note 17, at para. 10-010.

33. Loretta Malintoppi and Andrea Carlevaris, *Challenges of Arbitrators, Lessons from the ICC*, in Chiara Giorgetti (ed.), Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals (Leiden, The Netherlands: Koninklijke Brill, 2015), at p. 141. The circumstances of this challenge were not identified by the authors.

34. For the 28 challenged decisions from 1996 to 2010, see the Arbitration International Special Edition on Arbitrator Challenges, 27 Arb. Intl. 283 (2011). The LCIA Court's challenge decisions from October 2010 to present are available on the LCIA website at: https://www.lcia.org/challenge-decision-database.aspx.

35. Meg Kinnear and Frauke Nitschke, *Disqualification of Arbitrators under the ICSID Convention and Rules*, in Giorgetti, *supra* note 33, at p.51.

36. Judith Levine, *Late-in-the-Day Arbitrator Challenges and Resignations: Anecdotes and Antidotes*, in Georgetti, *supra* note 33, at pp. 283-84.

37. Karel Daele, Challenge and Disqualification of Arbitrators in International Arbitration (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2012), at p. 443. The documents in the case, including Professor Lalive's letters to ICSID in response to Chile's challenge, can be found at: https://www.italaw.com/cases/829.

38. Global Arbitration Review, *ICC Rejects Challenge Based on Arbitrator's Age.* (October 15, 2018), https://globalarbitrationreview.com/article/1175658/icc-rejects-challenge-based-on-arbitrator%E2%80%99s-age.

39. For example, in 1990 a substantial portion of the Congress of the International Council for Commercial Arbitration was devoted to "Preventing Delay and Disruption of Arbitration." *See* Albert Jan van den Berg (ed.), ICCA Congress Series No. 5: Xth International Arbitration Congress, Stockholm, 28-31 May 1990 (Deventer, The Netherlands: Kluwer, 1991).

40. Local legislation may fill this gap. For example, the international arbitration acts of some of the common law provinces and territories of Canada, all of which adopted the Model Law, include a provision stating that unless the parties otherwise agree, if an arbitrator is replaced or removed, then any hearing held prior to the replacement or removal shall be repeated.

41. S*ee* section 27 of the English Arbitration Act 1996.

42. 2017 ICC Arbitration Rules, Article 15(5) and 2014 LCIA Rules, Article 12.

43. Maxi Scherer, Lisa Richman and Rémy Gerbay, Arbitrating Under the 2014 LCIA Rules: A User's Guide (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2015), at p. 245, quoted in Sarah Grimmer, *Three Scenarios That Raise Due Process Issues*, in Andrea Menaker (ed.), International Arbitration and the Rule of Law: Contribution and Conformity (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2017), at p. 168.

44. Gary B. Born, International Commercial Arbitration (2nd ed.) (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2014), at pp. 1958-61, citing awards from truncated tribunals that were annulled in France and Switzerland and others that were recognized and enforced in the United States, the latter being *Repubic of Colombia v. Cauca Co.*, 190 U.S. 524 (1903) and *United Transportation Union v. Gateway Western Railway Co.*, 284 F.3d 710 (7th Cir. 2002).

Arbitrators in 3-D: Death, Disability and Disqualification

By Michael Lampert

Like taxes for the population as a whole, death, disability and disqualification of arbitrators after hearings have begun will inevitably happen. The purpose of this article is to discuss what the consequences are and what planning devices are available to mitigate the effects of the 3-Ds. First, we look at the problem, then look at current rule responses and finally turn to precautionary steps including insurance.

The Problem

The Global Arbitration Review (GAR), on 10 October 2018, reported on the death of the Chilean arbitrator, Fancisco Orrego Vicuña (died 2 October 2018). The article noted that his death was delaying intra-EU claims in *Fynerdale Holdings v. Czech Republic*. The dispute about his replacement as a wing surfaced in the Permanent Court of Arbitration where there were public filings about his replacement. GAR further reported that at his death he still sat on two other intra-EU claims. It also reported he had resigned from several investor state arbitrations due to what turned out to be his last illness.

There are other, less reported, cases of arbitrators dying while sitting. In one case known to the author, both the majority and the dissent had been completely finalized, cite-checked, approved by tribunal members and the institution.They were circulating for execution; two signatures already had been collected when a wing died over the weekend he was expected to sign. There was email traffic expressly stating that he had approved the relevant document and was prepared to sign it. The parties were told these facts but not which of the two documents he had been about to sign; they were asked whether they would approve the institution signing for him and appending the relevant email as proof of his intention. They declined and asked for a replacement to be appointed, brought up to speed, deliberate and participate in the award process. *Cf. Yovino v. Rizo*, 586 U.S. ____ (2019) (Ninth Circuit Judge cannot posthumously make the majority in an en banc).

More frequent than death is disability of an arbitrator requiring withdrawal, or disqualification.

If any of these happen before the preliminary conference, while there is a disruption most would agree it is minimal. But from that point on, the disruptive effect of the need to change an arbitrator due to any of the 3-Ds or any other reason, grows. The arbitration cited above, where award and dissent were nearly ready to release, meant the parties risked substantial expense in counsel and tribunal fees, as well as delay in finding hearing dates and disruption for witnesses and party representatives having to appear again in person in the rehearing process. Fortunately the substitute wing was comfortable (with some amendment) agreeing to one of the prepared documents after a review of the documentary record (including writings reflecting testimony). Expense but not disruption was the effect.

Current Rule Responses

The UNCITRAL Rules provide:

> **REPLACEMENT OF AN ARBITRATOR Article 13**
>
> 1. In the event of the death or resignation of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in articles 6 to 9 that was applicable to the appointment or choice of the arbitrator being replaced.
>
> 2. In the event that an arbitrator fails to act or in the event of the de jure or de facto impossibility of his performing his functions, the procedure in respect of the challenge and replacement of an arbitrator as provided in the preceding articles shall apply.
>
> REPETITION OF HEARINGS IN THE EVENT OF THE REPLACEMENT OF AN ARBITRATOR Article 14
>
> If under articles 11 to 13 the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated; if any other arbitrator is replaced, such prior hearings may be repeated at the discretion of the arbitral tribunal.

The rules of various arbitral organizations provide similar but not identical procedures for replacement and

Michael Lampert is a Fellow of the Chartered Institute of Arbitrators, secretary of the New York Branch; a CEDR Accredited Mediator; and was deputy general counsel of an international financial services firm. He is an experienced arbitrator, mediator, and litigator. This article is based on a talk he gave at the New York International Arbitration Club, of which he is a member.

on whether a do over is required. *See*, e.g., ICDR Article 15 (no distinction between chair and wings; remaining two decide how to proceed), AAA Commercial R-20 (similar, but if parties agree how to proceed that governs), CPR Administered International 7.9-7.12 (for successor chair or sole arbitrator that person decides need to repeat; otherwise tribunal decides) (its other rule sets are similar), JAMS International Articles 11 and 12 (JAMS decides procedure, after consultation), ICC Article 15 (ICC Court always decides replacement procedure, and after closure of proceedings how to proceed; until closure tribunal decides procedure), LCIA Article 11-12 (seems to address refusal, but not 3-Ds), SIAC Rules 17 -18 (largely UNCITRAL).

The AAA and perhaps other organizations impose on each arbitrator a duty to report to the organization when any arbitrator—including themselves—shows signs of being unfit. Medical or other problems that prevent an arbitrator from hearing evidence or deliberating need to be reported. AAA's *Standards and Responsibilities*, in its second main point provides:

> The AAA/ICDR requires arbitrators and mediators to be fit to engage in cases…. Arbitrators and mediators must advise AAA/ICDR of any personal, physical, or mental condition that may impair their ability to fully execute their responsibilities during all phases of a case. In addition, this responsibility extends to any such condition an arbitrator or mediator observes in another AAA/ICDR arbitrator or mediator or co-panelist…

Occasionally, where there has been an emergency arbitrator ruling on an application parties have agreed to have that person fill a vacancy on the panel. On the one hand that person is somewhat familiar with the matter, on the other they may have expressed a view of that merits based on the expedited procedure before them that worries one of the parties (although not inevitably; sometimes the emergency can be dealt with based on simply concluding that preservation matters, whatever the merits).

Precautionary Steps

While parties may consider age and health issues in their appointment absent strictures imposed by antidiscrimination law, there are limits on the parties' ability to implement them against an arbitrator selected by the administrating organization or other parties.GAR reports (15 October 2018) that the ICC rejected a challenge based on age (76) of a chair it appointed.

Another approach is what is sometimes called "spoiled costs insurance" or more formally "Formal Proceedings Rehearing Insurance." While the precise terms of policies such as these are subject to individual negotiation, in general they provide indemnity for the cost of a "do over" because of a covered event.

While these policies are mainly used in litigation in the High Court of England and Wales, they cover arbitrations.The standard preprinted form pays if an "insured person" can't produce a "decision" in a "proceeding" for one of three covered reasons. Section 3.2 includes an "award" in the definition of a decision. Section 3.5 includes "arbitration" in the definition of "proceeding." The three covered reasons are: (1) death, (2) disablement by accident or illness, or (3) legal disqualification.

There are 11 exclusions. While some are expected (radioactive or chemical attacks; inadequate disclosure of risks knows or that should be known by reasonable inquiry) some seem odd in light of the purpose. Pregnancy, suicide, drug abuse, alcoholism, and hazardous activities fit into this category.

As a rough estimate, if the policy is confidential (the "insured life" is not subject to a medical examination) the policy premium is about seven times more than simple ordinary life.

While not entirely clear, these policies seem not to run afoul of the usual prohibition of insuring the life of another absent an insurable interest (allowing such insurance would create in the beneficiary an economic interest in the insured's death). For a recent review and application of this principle by the Supreme Court of New Jersey, see *Sun Life Assurance Company of Canada v. Wells Fargo Bank, N.A.*, (June 4, 2019) https://njcourts.gov/attorneys/assets/opinions/supreme/a_49_17.pdf?c=hgb . Rather, Formal Proceedings Rehearing Insurance seems to be seen as a policy of indemnity- compensating an out of pocket loss caused by an insured event-not life insurance.

The websites of two English insurance brokers—Gallagher and The Judge—offer many alternatives for these and other legal risk policies.There may well be other brokers, but this is a specialized and limited market. One underwriter reported writing one or two policies in this area a year.

Such policies are largely unknown in U.S. litigation and arbitration. Perhaps because juries and alternates minimize the risk, or perhaps because some states regard it as illegal insurance on the life of another. In any event, these policies are available in international arbitration and certainly those with some English connection.

Whether they are worth it is complex. Between written witness statements, in many cases a sound recording or transcript of hearings including cross examination and some of the alternatives and the organizational rules above, perhaps the cost of a rehearing due to replacement is a risk the parties will bear. But in some complex and lengthy cases, perhaps it should be underwritten by another. In any event, the question of risk tolerance should be expressly considered.

A Five-Stop Roadmap for ICC Arbitrators: From Your Nomination to the Rendering of the Award

By Camille M. Ng

The unique features of ICC arbitration contribute to its success—from the administration and judicial supervision of ICC's International Court of Arbitration ("Court") of all cases, as assisted by the Secretariat, to its distinct fee structure to the Terms of Reference, to the scrutiny of arbitral awards. To succeed as an ICC arbitrator, therefore, a roadmap to the system may be useful. This article provides a roadmap in five stops.

1. Parties or co-arbitrators in an ICC arbitration may nominate anyone to serve as an arbitrator

The first stop is the nomination. Subject only to the parties' agreement, ICC requires no certification to be completed, no membership to be procured or maintained, no list to be joined, no test to be passed and no fees to be paid for an individual to be nominated as an arbitrator. And indeed, parties and co-arbitrators have nominated first-time arbitrators and even non-lawyers to serve as sole arbitrators and presidents of arbitral tribunals in their cases.

Nomination by parties or co-arbitrators is in fact the most common gateway to arbitrator service for ICC cases. The ICC 2018 Dispute Resolution Statistics mark this percentage at 73%. When the parties or the co-arbitrators are unable to nominate either the sole arbitrator or the president of the arbitral tribunal, or when the arbitration agreement or the parties' subsequent agreement provides for appointment by the Court, the Court will make the appointment in accordance with the ICC Rules. Parties are of course free to agree on other procedures for the constitution of the arbitral tribunal.

2. The Secretary General or the Court must confirm every arbitrator nomination

Nomination as an arbitrator makes one a prospective arbitrator. Confirmation by the Secretary General or the Court transforms the prospective arbitrator into an ICC arbitrator who may then—and should only then—start work on the matter.

The nomination by the parties or co-arbitrators triggers a two-step process: first is the circulation to the parties of the prospective arbitrator's Statement of Acceptance, Availability, Impartiality and Independence ("Statement"), as well as a *curriculum vitae* form, and the second is the confirmation decision that either the Secretary General or the Court undertakes.

Upon receiving the nomination of an arbitrator from the parties or the co-arbitrators, the Secretariat contacts the prospective arbitrator and provides him or her with documents that identify the parties to the arbitration and summarize the case—namely, (i) a case information sheet, which lists *inter alia* which of the 11 case management teams is responsible for the particular case, the parties' counsel and contact information, relevant entities for the purpose of running conflict checks, and the arbitration agreement(s) quoted in full, and also excerpts any agreements on the applicable law, the place of arbitration, and the number of arbitrators and (ii) a financial table that sets out the amount in dispute, the advances on costs already fixed by the Court, and the range of arbitrator's fees, if so applicable. If the arbitration agreement imposes qualifications or other requirements on the arbitrators, the Secretariat will highlight those as well.

The Secretariat invites the prospective arbitrator to complete the Statement on the basis of the aforementioned documents for onward circulation to the parties, along with the *curriculum vitae* form. At this stage, the parties are free to request clarification and provide comments on the information provided by the prospective arbitrator. Should the prospective arbitrator have disclosures, the Secretariat will provide the parties with a specific time limit to comment, prior to the expiration of which no confirmation decision shall be taken.

After the parties have had an opportunity to review the prospective arbitrator's forms, the Secretary General or the Court then decides on whether to confirm the prospective arbitrator. Confirmation may be defined as the authorization given by the Secretary General or the Court for the prospective arbitrator to serve as an arbitrator on a matter, without which service as an arbitrator

Camille M. Ng (camille.ng@iccwbo.org) is Deputy Counsel of the North American Case Management Team of ICC's International Court of Arbitration and is based in New York City.

may not commence. The Secretary General or the Court arrives at a confirmation decision after an examination and vetting of the prospective arbitrator's qualifications and availability (which is especially important for matters to which the Expedited Procedure Provisions may apply), as indicated in the submitted forms, as well as the nomination procedure, the requirements of the arbitration agreement, and the specifics of the case.

Once the arbitral tribunal is fully constituted—in that all of its members have been confirmed or appointed, as the case may be—the Secretariat transmits the file to arbitrator or the arbitrators for the work to begin.

3. Upon receiving the file from the Secretariat, arbitrators should prioritize the scheduling of the case management conference and the establishment of the Terms of Reference

The first order of business should be the scheduling of the case management conference and, unless the matter is governed by the Expedited Procedure Provisions, the establishment of the Terms of Reference. At this stage, the arbitral tribunal should also establish the procedural timetable for the remainder of the arbitration.

The Secretariat takes note of the date of the case management conference. It also provides comments on the Terms of Reference before their completion and will monitor their progress. Once completed, the Secretariat will transmit the Terms of Reference to the Court and will do so for the procedural timetable as well.

A distinct ICC requirement, the Terms of Reference may be defined as a snapshot of the arbitration at the time of their establishment, as they summarize the participants to the arbitration (both the arbitral tribunal and the parties), the procedure to date, and the parties' claims and relief sought. The arbitral tribunal and the parties are all expected to sign this document. These Terms of Reference are either transmitted to the Court when they are signed by all concerned, or, when a party refuses to sign the document or is not participating in the arbitration, approved by it.

Save for cases that are governed by the Expedited Procedure Provisions, the default time limit for rendering the final award is six months from the date of the last signature of the Terms of Reference. But this being said, the Court may fix a different time limit based upon the procedural timetable, which is also transmitted to the Court. The Court will generally do so based on the principle that draft awards should be submitted by arbitrators within two months after the last day of the hearing or the last substantive submission for sole arbitrators or within three months of the same for three-member arbitral tribunals.

Unjustified delays in submitting draft awards to the Court may trigger cost consequences for arbitrators. Conversely, the Court may increase the arbitrators' fees above the amount that it would have otherwise considered fixing when the arbitrators conduct the case expeditiously.

4. While the Court fixes the fees of ICC arbitrators at the end of the matter, arbitrators may request an advance on fees upon the completion of certain milestones

Before beginning work on the matter, and hopefully even before accepting a nomination as ICC arbitrator, the arbitrator would know that remuneration in ICC cases is based on an *ad valorem* fee schedule. Arbitrators in ICC cases are not compensated according to their usual hourly rate and neither are they at liberty to enter into fee arrangements with the parties. The Court instead fixes the fees of arbitrators at the close of the arbitration, as part of its fixing of the total costs of the arbitration.

While the Court sets the fees of arbitrators only at the end of the case, arbitrators may request what is termed an "advance on fees" prior to such time and should do so upon the completion of certain milestones. First among such milestones are holding a case management conference and establishing the Terms of Reference, as discussed in the previous stop, and also include holding a major hearing, and issuing either a partial award, multiple partial awards, or the final award. These milestones correspond to percentages of the fees foreseen under the scales, by which the Court may be guided when the advance on costs has been fixed on the basis of the average fees.

When the Secretariat receives a request from the arbitrators for an advance on fees, it may also request a report on the arbitrators' time spent and time estimated as well as expenses incurred and estimated. Receiving such a report enables the Secretariat to examine the financial condition of the matter and evaluate whether it would be appropriate to ask the Court to readjust the advance on costs for that case. The adequate remuneration of arbitrators is certainly one of the factors that the Court looks at in making this decision.

5. Arbitrators must submit all draft awards to the Court for scrutiny, a process by which the Court may lay down modifications to the form of the award and make suggestions as to matters of substance

Arbitrators are expected to conduct the arbitration as expeditiously as possible. The Secretariat will continue monitoring the arbitration, which is why it requires that it be copied on all correspondence exchanged in the case, and is of course available to answer any questions the parties or the arbitrators may have on the ICC Rules. At the close of the proceedings, arbitrators must submit their draft awards to the Court for scrutiny.

Along with the establishment of the Terms of Reference and the *ad valorem* fee structure, the scrutiny of

awards is a unique ICC arbitration feature and is carried out by the Court, with the assistance of the Secretariat. Article 34 of the Rules states: *"Before signing any award, the arbitral tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form."*

> *"No ICC award may be rendered without being scrutinized, and this fact is well-known (if not universally so) in the arbitration community."*

Most awards are scrutinized at a committee session of the Court, which is attended by three Court members, but some—generally those that involve a state or state entity, that have a dissenting opinion or that raise policy issues—are scrutinized at a plenary session of the Court, to which all 176 members of the Court are invited. In line with ICC's status as a truly international and diverse institution, the Court is currently comprised of arbitration practitioners from 116 countries and represents a total gender parity of 88 women and 88 men. The scrutiny process aims at improving the quality of the award and thereby enhancing its enforceability. No ICC award may be rendered without being scrutinized, and this fact is well-known (if not universally so) in the arbitration community.

And with that fifth stop, this roadmap ends. For more information about ICC arbitration, visit https://iccwbo.org/dispute-resolution-services/icc-international-court-arbitration/ or call 646-699-5704.

Critical Mediator Qualities Viewed from the Advocacy Trenches

By Norman Feit

What makes a mediator effective and special? Much has been written on the topic, and many mediators, lawyers and parties will have their own philosophies as to a mediator's role and the special qualities that make a mediator effective. Indeed, different qualities may be more essential depending on the parties, context, and dynamics. For example, a mediator effective in resolving one-on-one disputes may be ill-suited to handle complex multi-party litigation. Or, for whatever reason, a mediator's style or personality may clash with one of the participants.

Based on advocacy experience in mediations including in securities class actions and individual claims, myriad commercial disputes, employment-related actions and arbitrations, claims by bankruptcy trustees, and governmental claims where the damages sought have ranged from modest sums to billions, this article attempts to distill ten qualities that the author has found particularly prevalent in the most effective and successful mediators, regardless of the nature of the dispute, the amount at stake, or the idiosyncrasies of the parties or their lawyers.

1. *Track Record of Settlement Success*. Mediation is not typically a free excursion. It entails the expense of a mediator, the legal cost of preparation and participation, and the time of party representatives. The consequence of failing to settle is additional expensive and time-consuming litigation. Participants in mediations therefore usually approach the process motivated to reach a settlement, and want a mediator with a track record of achieving settlements. A high success rate certainly does not guarantee resolution, but it gives comfort to the parties that the mediator is effective and adds gravitas to the mediation process.

2. *Intellect and Acumen*. A dispute may involve any area of the law, the legal precepts may be complex or arcane, and the factual nuances may heavily impact the legal analysis and risks. A mediator needs to able to understand and grasp unfamiliar legal principles and how they apply to the parties' differing views of the facts. Put simply, for more sophisticated and factually intense matters, a mediator needs to be intellectually capable of getting up to speed and engaging in the analysis on the same level as lawyers and parties who have been living with the matter for a long time. A true expert in the field may speak the same language as the parties, but another mediator with additional desirable qualities may be even more effective provided that the mediator has the acumen and agility to grasp the legal and factual nuances.

3. *Ability to Listen*. A mediator is not a judge, dictating views and ordaining results. A mediator instead explores the parties' respective positions and attempts to facilitate their resolution. That means the mediator needs to be able to listen—to their issues, analyses, appetites, and anything else on their minds. Indeed, the mediation process may involve a good deal of catharsis, as parties and lawyers often unload their views with passion and frustration. To many participants, feeling like the mediator is fully engaged and absorbing everything can make a huge difference.

4. *Patience*. Mediations can be tedious and protracted. Parties and their lawyers may be entrenched in their positions with deep emotions. It may take many hours or even days to make small amounts of progress. A mediator cannot truncate or rush the process without risking its premature failure. Lengthy discussion and a degree of psychoanalysis may be needed before even testing concrete settlement proposals. If patience is a virtue, for a mediator it is essential

5. *Empathy*. Rarely are litigants unemotional and clinical as they approach mediation. Many are probably in a dispute because they believe they are right and the other side is wrong; as the saying goes, "a million for defense, not a penny for tribute." Sometimes these emotions transcend monetary damage and reach concepts of morality and ethics. An empathetic mediator will not only listen and understand, but convey sensitivity and empathy through speech and body language.

Norman Feit recently retired as global head of litigation and regulatory proceedings at Goldman Sachs after a 26-year career at the firm. He previously spent a decade practicing litigation with Sullivan & Cromwell after a Second Circuit clerkship. He now is providing consulting and advisory services, including as a neutral, at Feit Services LLC, and recently taught a seminar at Fordham University School of Law on commercial litigation drafting and mediation.

6. *Creativity*. Resolving a dispute may be more complicated than striking a simple deal based on dollars and cents. The payment's structure and nature—including timing, the extent of hard cash versus softer consideration—may be the key to achieving peace. The length and scope of competition restraints, confidentiality, or other non-monetary terms and conditions may be important. Perhaps the parties wish to continue their business dealings, albeit with added safeguards.Possibly, one side needs an expression of remorse. A mediator must be able to assess all the moving parts, and nimble enough to help the parties craft a creative solution.

7. *Boldness*. Mediators are human. They do not like rejection any more than anyone else, and they are typically reluctant to advance a settlement proposal without a high degree of confidence that it is in the ballpark and stands a good chance of acceptance. Making an unrealistic proposal invites not only pretty certain rejection, but may set back the mediation as the parties become more entrenched and disheartened. But sometimes, a mediator needs to take chances, particularly when the parties are deadlocked or the alternative is failure. Venturing into "no-man's-land" takes boldness, and the courage to do so when needed makes a mediator special.

8. *Persistence*. An effective mediator does not give up. A successful mediation may take multiple sessions, many follow-up calls, and months or even years. Yet, persistence may pay off, with occasional—not dunning—outreach and entreaties. Nothing ventured, nothing gained. And that persistence is the corollary to the track record of success discussed above.

9. *Confidentiality and Integrity*. Parties and their lawyers need to feel comfortable that when they share information or positions for the mediator's eyes and ears only, the mediator will respect that request. Trust and confidence are keys to testing the parties' positions, gaining movement, and ultimately reaching a settlement. A careful and diligent mediator will double and triple check that information may be conveyed to the other side before doing so, and protect the sanctity of information not intended for the other side's consumption.

10. *Humor*. Finally, mediations can be quite intense, even at times vitriolic. Parties may refuse even to occupy the same room. Discussions may spiral into heated argument and debate. An effective mediator needs to keep the atmosphere calm and focused, defusing tensions when they arise. Humor—albeit without belittling or deprecating—is critical to do so. Obviously, the amount of levity depends on the participants' personalities and sense of humor. But to keep them engaged and prevent emotions from taking over, a little humor is a valuable commodity.

To be sure, other qualities or attributes may make a mediator effective or special. There is no universally accepted test for mediator qualification, nor a universal rating system. But a mediator who possesses many of the qualities discussed above will likely be effective, and mediators with a reputation for possessing all of the qualities will surely be in high demand.

Arb-Med: Workable or Worrisome?

By Richard H. Silberberg and Anthony P. Badaracco

You are the sole arbitrator in a vigorously contested proceeding. You have heard four days of testimony during an evidentiary hearing anticipated to last 10 days. At the outset of the fifth day, the parties' attorneys advise you that their clients would like to try to settle. You respond by offering to contact the tribunal administrator to request a list from which the parties can choose a suitable facilitator to assist them in resolving the dispute. The parties' counsel inform you that is not what their clients had in mind. Rather, the parties have asked that you suspend the taking of testimony so that *you* can assume the role of mediator, with the understanding that if the case is not settled, you will put your arbitrator hat back on and decide the case.

You politely but firmly inform the parties' counsel of the significant risks associated with the process that their clients have proposed, and you strongly recommend that they select another neutral as their mediator. But the parties are steadfast. They do not want to spend the time or the fees that would be necessary to get another neutral "up to speed"; they tell you that your knowledge of the facts and your familiarity with the dynamics of the parties' relationship uniquely qualifies you to assist them in settling the case. And they express confidence in your ability to decide the case fairly and without bias if the mediation is unsuccessful.

What should you do? Should you (i) reject the parties' request out of hand; (ii) offer to serve as their mediator, but only after first resigning from your position as arbitrator; or (iii) honor their request and initiate mediation discussions, but only after having the parties and their counsel execute a suitable consent and waiver? The thesis of this article is that the correct answer is: "It depends." In our view, how a neutral responds to the parties' request that she serve in a dual capacity should be guided in the first instance by the neutral's overall approach to ADR processes and her determination as to whether she is comfortable undertaking the role envisioned by the parties.

Strategic decisions about models are often not as simple as choosing to mediate or arbitrate. Mixed-mode dispute resolution is becoming more common as parties endeavor to structure processes that provide optimal (and sometimes multiple) opportunities to resolve disputes. There are many different ways to structure mixed-mode dispute resolution processes.[1]

The use of the "Med-Arb" model has been prevalent for some time.[2] In this model, the parties first engage in mediation. If the mediation is successful and the dispute is resolved, that is the end of the process. If the mediation fails to produce a settlement, the parties proceed to arbitration before a different neutral who has not been privy to the mediation proceedings.[3]

Much rarer, at least in the United States,[4] is "Arb-Med" (or "Arb-Med-Arb," with the mediation stage sometimes referred to as the "mediation window"). The "Arb-Med" model generally involves the same neutral serving in both roles. The arbitration commences and proceeds to a point at which the parties wish to mediate; if the mediation discussions do not produce a settlement, the neutral resumes her role as arbitrator and decides the case.

Unlike "Med-Arb," for which the procedures are generally agreed to in advance and memorialized in the parties' dispute resolution agreement, "Arb-Med" is typically an ad hoc procedure. The parties may seek to suspend the arbitration and proceed to mediate any time before the final arbitration award is issued, provided that the arbitrator is agreeable to switching hats mid-stream. Parties that incorporate "Med-Arb" in their dispute resolution protocols have made a conscious decision to include arbitration as their "Plan B" in the event that mediation proves to be unsuccessful. By contrast, parties that resort to "Arb-Med" generally enter the process with every expectation that arbitration will lead to a final and binding resolution of the dispute, and only turn to mediation in the event that unforeseen circumstances arise during the arbitration.

There are a number of reasons why parties engaged in arbitration may wish to switch to mediation mode before the arbitration is concluded. One such reason is the prospect of reducing the parties' costs by asking a neutral already familiar with the relevant facts and evidence

Richard H. Silberberg (silberberg.richard@dorsey.com) is a partner at the New York office of Dorsey & Whitney LLP, Immediate Past President of the College of Commercial Arbitrators, and a member of the Board of Directors of the New York International Arbitration Center.

Anthony P. Badaracco (badaracco.anthony@dorsey.com.) is of counsel at the New York office of Dorsey & Whitney LLP.

to attempt to facilitate a settlement. Another is that the "Arb-Med" procedure allows each party "to evaluate its arbitration case compared to that presented by the opponents, possibly recognizing strengths or weakness that could allow common ground during mediation"—but without needing to start the process from scratch with another neutral.[5] If it turns out that the dispute cannot be settled in mediation, "the neutral is presumably already educated as to the facts and circumstances involved in the case."[6]

Risks Associated with "Arb-Med"

To be sure, there are risks associated with having an arbitrator pause the arbitral proceedings for the purpose of participating in mediation discussions. If the mediated negotiations result in a settlement, the arbitrator turned mediator is a hero. By facilitating a mutually acceptable settlement, the neutral has, at a minimum, saved the parties significant expense, which will be manifest when the parties receive a pro rata refund of the arbitrator compensation deposits that they previously advanced. But what if the mediation discussions do not produce a settlement? That can cause headaches.

The risks of having the same neutral act in the dual capacity of adjudicator and neutral facilitator arise from the concept that "[t]he principles underlying the legal system's protection for confidentiality in mediation are undermined if the neutral learns information in mediation that she carries over to affect her decision in arbitration . . . cognitive psychology teaches that even when a neutral thinks that she is setting aside this information it becomes incorporated into her thinking."[7] That is a very real concern and goes a long way toward explaining the reluctance of many, if not most, neutrals to perform both roles in an "Arb-Med" process.

In our view, regardless of the enthusiasm that the parties may have for turning from arbitration to mediation prior to the conclusion of the arbitral process, the arbitrator should carefully consider whether she is comfortable doing so. If the arbitrator concludes that she could not resume her arbitral duties if mediation were to fail without being biased or otherwise influenced by information she learned during the mediation discussions, the arbitrator should respectfully decline to participate.

Minimizing the Risks of "Arb-Med"

Given the risks associated with the same neutral serving as both arbitrator and mediator, why should an arbitrator even consider agreeing to participate? Attorneys are well known to be risk averse, and those serving as arbitrators likely would not characterize Arb-Med as a "safe" course of action.

One response is that arbitration is the *parties'* process and is a creature of contract. If the parties agree that a particular dispute resolution protocol (in this case "Arb-Med") will make it more likely than not that they will achieve a mutually-desirable result, and the parties are prepared to expressly waive any known and unknown risks associated with that process, the arbitrator should, in our view, at least explore the possibility of carrying out the parties' wishes. As stated earlier, if the arbitrator is not comfortable with performing dual roles in an "Arb-Med" protocol, that should be the end of the inquiry.

If, however, the arbitrator is confident in her ability to resume her arbitral duties following a failed mediation without being biased or otherwise influenced by information she learned during the settlement negotiations, the arbitrator should inquire of the dispute resolution provider selected by the parties whether the provider will continue to administer the case under such circumstances.[8] If the provider is willing to do so, the arbitrator should proceed to consider, with input from the parties, steps that could be taken to ameliorate the risks presented by "Arb-Med." Not surprisingly, these risk-minimizing steps involve trade-offs that could potentially impair the effectiveness of the mediation process, or jeopardize the potential for significant cost savings that may have motivated the parties' desire to pivot from arbitration to mediation.

Such steps should be carefully vetted to ensure that the parties have had the opportunity to craft an "Arb-Med" process that is fundamentally fair and that satisfies their mutual needs and expectations. Even if one accepts the threshold premise that the same neutral can serve in the dual roles of arbitrator and mediator, the details of the process matter. If the procedure appears one-sided or otherwise procedurally unfair, the parties are not likely to come away from the process feeling satisfied.[9]

Among the procedural choices to be considered by the parties, with the input of the arbitrator, are the following:

> Deferring mediation discussions until after the arbitral proceedings have been completed and the arbitration award has been written and executed. The signed award can be placed in a sealed envelope, only to be issued in the event that the ensuing mediation fails to produce a settlement. While this procedure prevents the arbitrator's decision from being influenced by information she learned during the mediation discussions, it requires that the arbitration be completed before the mediation can begin, thus sacrificing the cost savings that could be realized by engaging in an "Arb-Med" process.
>
> Conducting all mediation discussions with all participants present, eliminating private caucusing from the mediation process. While this procedure similarly

obviates the possibility that the arbitrator's decision will be influenced by information she learned in circumstances where some participants were absent, eliminating private caucuses during which the neutral can speak candidly with each side deprives the neutral of an important tool for facilitating a settlement.[10]

Conducting private caucuses, but requiring that information elicited by the neutral during a caucus with one party be shared by the neutral with the other party. While this procedure would maintain a level playing field, it would also have a chilling effect upon the parties' candor with the neutral, thereby jeopardizing the effectiveness of the mediation discussions.

Documenting the "Arb-Med" Process

Regardless of what specific steps are taken to minimize the risks of "Arb-Med," it is essential that full disclosure of those risks, and the parties' decision to proceed with full knowledge of such risks, either be (i) memorialized in a writing executed by the parties, their counsel, and the neutral, or (ii) otherwise stated on the record in the arbitration and expressly consented to by all participants.[11] Our standard protocol for documenting the parties' agreement to pursue an "Arb-Med" process involves having all participants sign a written Consent and Waiver, following a full explanation of its terms and conditions. The essential elements of that Consent and Waiver consist of the following explicit acknowledgments:

With an arbitration hearing underway, the parties have requested a pause in the arbitral proceedings to pursue mediation.

The parties have specifically requested that the arbitrator act as the mediator.

If the mediation phase does not result in a settlement, the neutral will resume the arbitration (assuming that it has not been completed) and proceed to decide the case and issue an arbitration award.

During the mediation phase, the neutral may meet privately with each party and its counsel, and may receive confidential information that the absent party believes to be false (assuming that the parties have agreed to private caucuses). The parties understand that in an arbitration hearing, it would be improper for an arbitrator to receive such information in the absence of the other party.

The parties waive their right to have the arbitrator's decision be based solely upon information received in the presence of the other party (again, assuming that the parties have agreed to private caucuses).

The parties have been informed of the disadvantages of having the same neutral serve as arbitrator and mediator, including that the parties may reveal to the neutral their respective settlement positions and their views of the strengths and weaknesses of their positions on the merits.

The parties understand that, if at any point during or following mediation the neutral no longer feels able decide the case impartially, the neutral may step down.[12]

The parties have had an opportunity to consult with independent counsel of their choice concerning the process and to appoint another neutral to serve as the mediator of the dispute.

The parties' counsel attest that they have fully informed their clients of the risks associated with the process.

Neither the dispute resolution provider nor the arbitrator shall be liable for any act or omission arising out of the arbitrator's service as the mediator of the parties' dispute. No claim against the provider or the arbitrator can be made based upon the arbitrator's dual service, and no challenge to the arbitration award can be predicated upon such dual service.

Conclusion

With full disclosure, express consent, and implementation of steps to minimize risks, "Arb-Med" can be an effective procedure for the resolution of disputes.

Endnotes

1. *See* Barbara A. Reeves, *Hybrid Proceedings: Resolving Disputes by Integrating Arbitration and Mediation*, 11 N.Y. Dispute Resolution Lawyer No. 2 (Fall 2018) at 36–37 (highlighting four examples of disputes successfully resolved in mixed-mode proceedings, each of which was structured differently from the others).

2. *See*, *e.g.*, Thomas J. Stipanowich and J. Ryan Lamare, *Living With "ADR": Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations*, 19 Harv. Negot. L. Rev. 1 (2014) (reporting that more than half of in-house counsel at large companies responded that their company had used "Med-Arb" in the previous three years); *see also* David J. McLean & Sean-Patrick Wilson, *Compelling Mediation in the Context of Med-Arb Agreements*, 63-Oct. Disp. Resol. J. 28, 30 (Aug.-Oct. 2008) (noting expanded use of "Med-Arb").

3. "Med-Arb" is often found in contractual dispute resolution provisions as part of a three-step process. The first step consists of negotiations between the parties (sometimes explicitly stated to be at the executive-to-executive level) followed, if necessary, by mediation and then arbitration.

4. "In China, arb-med is widely used in local and international arbitration cases. At least twenty to thirty percent of arbitral awards are based on disputing parties' settlement agreements," Stipanowich, Yang, Welsh, Qiming, Robinson, Jinghui, Guang, Kichaven, Madigan, Hongsong, and Jianhua, *East Meets West: An International Dialogue on Mediation and Med-Arb in the United States and China*, 9 Pepperdine Dispute Resolution L.J. 2 at 398 (2009).

5. Richard Fullerton, *The Ethics of Mediation-Arbitration*, 38 The Colorado Lawyer 31, 36 (2009).

6. Kristen M. Blankley, *Keeping a Secret From Yourself? Confidentiality When the Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case*, 63:2 Baylor L. Rev. 317, 326 (2011).

7. Ellen E. Deason, *Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review*, 5 Arb. L. Rev. 218, 220 (2013); *see also* Edna Sussman, *Developing an Effective Med-Arb/Arb-Med Process*, 2 N.Y. Dispute Resolution Lawyer 71, 72 (2009).

8. The American Arbitration Association will continue to administer a case in which an arbitrator suspends the arbitration to serve as a mediator and then re-assumes her role as arbitrator if the mediation discussions are unsuccessful provided that (i) the parties have agreed that the case should proceed in that manner, and (ii) there has been full disclosure and waiver, in a signed writing or on the record of the hearing, of the risks associated with allowing the arbitrator to mediate the dispute.

9. *See* Mark Goodrich, *Arb-Med: Ideal Solution or Dangerous Heresy?*, Alert (2012), *available at* https://www.whitecase.com/sites/whitecase/files/files/download/publications/articles-IALR-2012-Arb-med-solution-or-dangerous-heresay.pdf (tracing extensive litigation over the enforceability of an arbitral award in the case of *Gao Hai Yan & Another v. Keeneye Holdings Ltd & Others* (2011), HKEC 514 and HKEC 1626), where allegedly unfair and coercive mediation procedures were employed after an arbitration hearing had begun).

10. One tool that is not available during the mediation discussions where the same neutral serves as both arbitrator and mediator is the neutral's ability to comment on the types of arguments that an arbitrator is likely to find persuasive or not persuasive. The neutral loses that tool because she cannot reveal how she is likely to rule on the dispute if the mediation discussions fail to produce a settlement and she must decide the case. *See* comments of Jay Welsh in Stipanowich *et al.*, 9 Pepperdine Dispute Resolution L.J. 2, at 408.

11. In one case, after mediation failed and the neutral pivoted back to arbitration and entered an arbitral award, a court concluded that in issuing the award the neutral had improperly relied upon information he obtained in his role as mediator. The court invalidated the award as "arbitrary and capricious" on its face. *See* Edna Sussman, *Developing an Effective Med-Arb/Arb-Med Process*, 2 N.Y. Dispute Resolution Lawyer 71, 72 (2009). There is no indication in the opinion that the parties had executed a consent and waiver before embarking upon mediation discussions with the neutral's participation.

12. *See* Edna Sussman, *Med-Arb: an Argument for Favoring Ex Parte Communications in the Mediation Phase*, 7 W. Arb & Med. R. 421 (2013).

Switching Hats or the Complex Relation Between the Roles of Arbitrator and Mediator Seen Through the Prism of a Successful Case

By Paolo Marzolini

Introduction

The question whether arbitrators may safely switch hats and act as mediators during the arbitral proceedings has been answered with a fair degree of skepticism by commentators.[1] This skepticism is mainly rooted in the widely-accepted principle that the arbitrators' primary duty is to resolve the dispute before them through a decision (*viz., the award binding on the parties*), rather than through a *settlement reached between the parties*.

While this principle is certainly still valid today, the general approach toward the arbitrators' power to assist and support the parties' attempt to reach a settlement agreement has arguably evolved over the past few years. Institutional arbitration rules and international arbitration guidelines alike now expressly recognize the arbitrators' power to help the parties in resolving their dispute by facilitating settlement agreements.[2] Such power includes the arbitrators' power to act as mediators, provided that the parties have requested and expressly authorized them to do so in writing.[3]

The present article deals with a successful case in which the author was initially involved as sole arbitrator. Shortly after his appointment, the parties jointly agreed that the sole arbitrator should act as mediator.

Here is the account of the facts underpinning the case, the manner in which the arbitration unfolded as well as some final considerations drawn from this experience.[4]

The Background of the Case

In September 2015, Tintora S.A.C. ("*Tintora*"),[5] a Southern American company, and Productrice S.A.S. ("*Productrice*"), a French company, entered into a sale and purchase agreement (the "Agreement") under the terms of which *Productrice* was to manufacture and sell to *Tintora* two dyeing machines for an overall price of USD4.5 million. The Agreement contained a dispute resolution clause providing that any dispute arising out of or relating to the Agreement should be resolved by a sole arbitrator sitting in Geneva (Switzerland) acting pursuant to the Swiss Rules of International Arbitration, 2012 edition (the "Swiss Rules").

Shortly upon delivery, *Tintora* raised complaints against the two dyeing machines manufactured and sold by *Productrice*. In particular, *Tintora* alleged that the machines underperformed as they were not able to meet the volume and quality specifications agreed upon under the Agreement.

In July 2017, *Tintora* started arbitration proceedings against *Productrice* pursuant to Art. 3 of the Swiss Rules seeking an award ordering *Productrice* to replace the machines bought as well as to pay damages.

Productrice defended itself in the arbitration challenging *Tintora*'s allegations and submitting that the reason the two dyeing machines were underperforming was the result of certain technical aspects falling within the responsibility of *Tintora*.

The Sole Arbitrator Acting as Mediator

In November 2017, the author was appointed sole arbitrator by the court of the Swiss Chambers' Arbitration Institution (*viz*. the institutional body which administers, along with its secretariat, the arbitrations conducted pursuant to the Swiss Rules).

Shortly after appointment, the sole arbitrator convened an organizational meeting for the discussion and finalization of the procedural timetable as well as the specific procedural rules applicable to the proceedings.

A few days before the organizational meeting, *Tintora* sent a letter to *Productrice* indicating that it would be open to finding an amicable solution to the pending dispute. The sole arbitrator was copied in on this communication. *Productrice* answered *Tintora*'s proposal by putting forward the terms of a potential settlement agreement (the sole arbitrator was again copied in on this correspondence).

The exchange of communications mentioned above made apparent in the eyes of the sole arbitrator the parties' intention to make an effort aimed at settling their dispute, possibly with the sole arbitrator's direct involvement.

Paolo Marzolini (marzolini@patocchimarzolini.com) is a partner of Patocchi & Marzolini. He acts as counsel representing clients and sits as arbitrator in Switzerland and a number of other jurisdictions under various sets of arbitration rules; he is admitted in Switzerland and Italy and publishes and lectures extensively.

At the organizational meeting the sole arbitrator decided to act pursuant to Art. 15(8) of the Swiss Rules.[6] He thus inquired into whether the parties would agree that he could act as settlement facilitator within the arbitration. The parties agreed with the sole arbitrator's suggestion and expressly indicated that they would wish for him to act as mediator.

The parties' agreement (the "Mediation Agreement") was recorded in writing in the minutes of the organizational meeting which were subsequently signed by all individuals who attended that meeting (the sole arbitrator included). The terms of the Mediation Agreement may be summarized as follows:

- the sole arbitrator was vested by the parties with the power to act as mediator;
- the parties confirmed that they expressly waived their right to challenge the sole arbitrator for the activities he could perform and the information he could obtain while acting as mediator;
- the mediation would take place during a meeting of one or two day(s) to be held in Geneva;
- each party should be represented at the mediation meeting by representatives duly empowered to bind that party and sign a settlement agreement (if any);
- counsel would also be entitled to participate in the mediation meeting;
- each party would file a short mediation submission (maximum ten pages) setting out their position with respect to the pending dispute ahead of the mediation meeting (viz. the position papers);
- the role of the mediator would be confined exclusively to facilitating the parties' discussion without any evaluation of the parties' position or any power to suggest potential terms for a settlement agreement;
- the sole arbitrator would maintain his role and proceed with the arbitration eventually deciding the dispute with a final award in case of failure of the mediation;
- the arbitration would be stayed during the time necessary to complete the mediation;
- the sole arbitrator would be compensated for the activities performed as mediator by using the funds collected at the beginning of the arbitration as advance on costs.

The Mediation Meeting

The mediation meeting took place in January 2018 in Geneva as per the terms of the Mediation Agreement mentioned above. After a short introduction, the sole arbitrator/mediator left the floor to the parties' representatives in order for them to summarize each party's respective position. Upon this exchange, which was accompanied by a number of questions asked by the sole arbitrator/mediator, it became apparent that each party's position was quite entrenched. The party representatives appeared generally to be receptive to the idea of reaching an agreement; however, they did not seem to be willing to make any concession which could potentially overcome the deadlock and foster the positive outcome of the mediation attempt. The sole arbitrator/mediator realized that the parties' direct discussions would not be conducive and suggested to proceed by holding *caucuses*. For the avoidance of doubt, he explained the purpose and scope of these *ex parte* meetings and stressed that the meetings would not be an opportunity for the sole arbitrator/mediator to express any views on the merits of the case; rather, the *caucuses* would assist him better to understand the parties' interests in order to help them pursue their settlement talks in a constructive manner. The parties agreed with the sole arbitrator/mediator's proposal. Such agreement—including the parties' waiver to challenge the independence and impartiality of the sole arbitrator/mediator for the activities performed and the information disclosed to him during the *caucuses*—was again recorded in writing.

The *caucuses* turned out to be helpful; the parties "used" the sole arbitrator/mediator as a "messenger" of their requests and comments; the fact that those requests and comments were conveyed through a neutral third party rather than through direct interaction between *Tintora* and *Productrice* paved the way to a more open reception of the requests and comments coming from one party to the other. During the *caucuses* the sole arbitrator/mediator helped the parties to understand each other's proposals and shape those proposals for the benefit of enhancing the settlement talks. The parties were eventually able to reach an oral agreement on the settlement of their dispute.

The parties requested the sole arbitrator/mediator to record their settlement agreement in a formal, written document which they reviewed and approved before signing.

For the present purposes, it is worth underlining that the settlement agreement made provision for the arbitration to remain pending during the performance of the terms of the settlement and that the sole arbitrator should remain "on duty" during such performance as he could be called upon by the parties to decide (or, possibly, mediate) any further dispute which could arise along the way. Only upon the final performance of all obligations set out

in the settlement agreement would the arbitration be officially terminated.

No further intervention was required of the sole arbitrator and the arbitration was eventually terminated upon execution of the settlement reached between the parties.

Conclusion

The lesson to be learned from the account of the case set out in this article is not that arbitrators should light-heartedly switch hats. Notwithstanding this personal experience, mediation is not the ideal solution to each and every dispute before arbitrators.

The concerns that militate against arbitrators acting as mediators are indeed very serious and deserve careful consideration. In particular, the fact that arbitrators may inevitably be exposed to information which is not contained in the arbitration record during the mediation poses very compelling issues as to the actual independence and impartiality of those arbitrators who must ultimately resolve the dispute. Irrespective of the pledges one may make, arbitrators are human beings who are likely to be somehow influenced by the information to which they have been exposed during the mediation meeting. In this respect, the author shares the opinion of those[7] who suggest that arbitrators should resign if they come to the conclusion that they are no longer in a position to perform their task with the required neutrality upon the completion of the failed mediation.

"Arbitrators are no oracles delivering justice exclusively in the form of an award; rather, their role consists in providing services aimed at reaching a just resolution of the case before them . . . "

That said, arbitrators should be receptive and "read" the case before them. This implies the acceptance on the part of arbitrators that they should be ready to play a proactive role in the management of their cases. Such a role must inevitably start from the early familiarization with the file insofar as, without a deep knowledge of the case as it progresses during the arbitration, arbitrators will not be ready to seize the day and choose the right moment in which they could suggest to act as settlement facilitators.

When the parties jointly suggest that arbitrators act as mediators—such as in the case discussed in the present paper—the arbitrators should carefully consider whether they feel comfortable in that position. If the answer is in the negative, the arbitrators may offer to assist the parties to find alternative solutions, for example, by directing the parties to the mediation services of the institution administering the arbitration (if available) or another mediation institution.

Arbitrators are no oracles delivering justice exclusively in the form of an award; rather, their role consists in providing services aimed at reaching a just resolution of the case before them; these services as well as the possible resolutions of the case may take different forms.

Arbitrators must be ready to establish a dialogue with the parties on issues of procedure and substance early on in the proceedings. This dialogue, if well conducted, will, on the one hand, contribute to building trust between the parties and the arbitrators and, on the other hand, it will help the arbitrators to find the best, tailor-made solutions for the efficient conduct of the case. This includes, in certain defined instances and, of course, upon the parties' written consent, the solution even consisting in switching the hat of arbitrator with that of mediator.

Endnotes

1. David C. Elliott, *Med/Arb: Fraught with Danger or Ripe with Opportunity?*, XXXIV(1) Alberta Law Review 163, 166-168 (1995); James T. Peter, *Med-Arb in International Arbitration*, 8(1) American Review of Int'l Arb. 83, 91-98 (1997); Harold I. Abramson, *Protocols for International Arbitrators Who Dare to Settle Cases*, 10(1) American Review of Int'l Arb. 1, 3-4 (1999); Emilia Onyema, *The Use of Med-Arb in International Commercial Dispute Resolution*, 12(3-4) American Review of Int'l Arb. 411, 415 (2001); Michael Collins, *Do International Arbitral Tribunals Have any Obligations to Encourage Settlement of the Disputes Before Them?* 19(3) Arb. Int'l 333, 338-339 (2003); Haig Oghigian, *The Mediation/Arbitration Hybrid*, 20(1) Journal of Int'l Arb. 75, 75-77 (2003); Christian Bühring-Uhle et al., Arbitration and Mediation in International Business, Chapter 9—Designing Procedures for Effective Conflict Management, 249 (2006); Judith Gill, *The Arbitrator's Role in Bringing about a Settlement—An English View*, in Best Practices in International Arbitration 155, 158-161 (Markus Wirth ed., 2006); Daniele Favalli & Max K. Hasenclever, *The Role of Arbitrators In Settlement Proceedings*, 23(7) Mealey's Int'l Arb. Report 21, 22 (2008); Gabrielle Kaufmann-Kohler, *When Arbitrators Facilitate Settlement: Towards a Transnational Standard*, 25(2) Arb. Int'l 187, 197-198 (2009); Lord Woolf, *Mediation in Arbitration in the Pursuit of Justice*, 75(2) Arb. 169, 172 (2009); Bernd Ehle, *The Arbitrator as a Settlement Facilitator*, in Walking a Thin Line – What an Arbitrator Can Do, Must Do or Must Not Do, Recent Developments and Trends 79, 83 ¶ II.2 (Colloquium CEPANI 40, 29 September 2010, 2010).

   See also Peter Talbot, *Should an arbitrator or adjudicator act as a mediator in the same dispute?*, 67(3) Arb. 221 (2001) who deals with the issue from the perspective of the *Glencot v Barrett* case (*Glencot Development & Design Co Ltd v Ben Barrett & Son (Contractors) Ltd* [2001] B.L.R. 207; [2001] 2 WLUK 352 (QBD (TCC))).

   See also the empirical study on the arbitrator acting as mediator in Christian Bühring-Uhle et al., *The Arbitrator as Mediator: Some Recent Empirical Insights*, 20(1) Journal of Int'l Arb. 81. (2003); further developed by the same authors, *supra* in this endnote, at Chapter 4 – Two Surveys on Arbitration and Settlement, 105 *et seq.*

2. For institutional arbitration rules, *see*, for example, Art. 22 of the ICC Rules, 2017 edition, to be read in conjunction with the ICC Rules, Appendix IV – Case Management Techniques, paragraph (h) (ii); Art. 15(8) of the Swiss Rules; Art. 26 of the German Institution

of Arbitration Rules, 2018 edition; Art. 25(3) of the Arbitration Rules of the Milan Chamber of Arbitration, 2019 edition.

See also the Belgian Centre for Arbitration and Mediation ("CEPANI") Rules, 2013 edition, Schedule III—Rules of Good Conduct for Proceedings Organized by CEPANI, paragraph 7.

For international arbitration guidelines, *see* the General Standard 4(d) of the IBA Guidelines on Conflicts of Interest in International Arbitration, 2014 edition (the "IBA Guidelines on Conflicts of Interest"); Art. 9(2) of the Prague Rules, 2018 edition; the American Arbitration Association and the American Bar Association Code of Ethics for Arbitrators in Commercial Disputes, 2004 edition, Comment to Canon I, tempered by Canon IV(F); the UNCITRAL Notes on Organizing Arbitral Proceedings, 2016 edition, Section 12 – Amicable Settlement, paragraph 72.

See also, for special emphasis on the management of *caucuses*, Practice Guideline 7: Guidelines for Arbitrators on the Use of ADR Procedures of the Chartered Institute of Arbitrators, 2011 edition, in particular paragraph 7.

3. Klaus P. Berger, *Integration of Mediation Elements into Arbitration: 'Hybrid' Procedures and 'Intuitive' Mediation by International Arbitrators*, 19(3) Arb. Int'l 387, 392-393, 394 (2003); Bernardo M. Cremades, *Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration*, 14(2) Arb. Int'l 157, 163-164 (1998); Paolo Marzolini, *The Arbitrator as a Dispute Manager – The Exercise of the Arbitrator's Powers to Act as Settlement Facilitator*, in The Arbitrators' Initiative: When, Why and How Should It Be Used? 99, 117 (Domitille Baizeau & Frank Spoorenberg eds., 2016); Abramson, *supra* note 1, at 7-8, 15; Ehle, *supra* note 1, at 88-89 ¶ V.2; Donna Ross, *Med-Arb/Arb-Med: A More Efficient ADR Process or an Invitation to a Potential Ethical Disaster?*, in Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2012 352, 363-364 (Arthur W. Rovine ed., 2013); Ellen E. Deason, *Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review*, 5 Y.B. Arb. & Mediation 219, 242 (2013); Carol A. Ludington, *Med-Arb: If the Parties Agree*, 14(1) TDM (2017); Edna Sussman, *Med-Arb: An Argument for Favoring Ex Parte Communications in the Mediation Phase*, 7(2) W. Arb & Med. R. 421 (2013).

   For a practical example, *see* the *IBM/Fujitsu* arbitration (American Arbitration Association, Commercial Arbitration Case No. 13T-117-0636-85; 15 September 1987 and 29 November 1988), where the parties expressly consented to the arbitrators resorting to other ADR methods, including mediation. For an analysis of the *IBM/Fujitsu* arbitration, *see* Peter, *supra* note 1, at 103-106; Robert H. Mnookin, *Creating Value through Process Design*, 11(1) Journal of Int'l Arb. 125 (1994).

4. Owing to confidentiality, certain facts underpinning the case have been slightly amended by the present author.

5. The names of the parties as well as their countries of incorporation are fictitious in order to preserve confidentiality.

6. Art. 15(8) of the Swiss Rules reads as follows: "[w]ith the agreement of each of the parties, the arbitral tribunal may take steps to facilitate the settlement of the dispute before it. Any such agreement by a party shall constitute a waiver of its right to challenge an arbitrator's impartiality based on the arbitrator's participation and knowledge acquired in taking the agreed steps."

7. *See*, in particular, Kaufmann-Kohler, *supra* note 1, at 204-205; Dilyara Nigmatullina, Combining Mediation and Arbitration in International Commercial Dispute Resolution, 207-208 (2019); Onyema, *supra* note 1, at 421; Alan L. Limbury, *Hybrid Dispute Resolution Processes – Getting the Best while Avoiding the Worst of Both Worlds?*, 14, 15 (Paper delivered at the second Chartered Institute of Arbitrators Mediation Symposium, London 29 October 2009, 2009).

   As to the importance of granting also to the parties the power to opt out of a med/arb process, *see* Ross, *supra* note 3, at 365.

   This opinion is consistent with the General Standard 4(d) of the IBA Guidelines on Conflicts of Interest, as well as Art. 7 of the Centre for Effective Dispute Resolution Rules for the Facilitation and Settlement in International Arbitration, 2009 edition.

Building Sustainability for Global Mediation: Applying Process Efficiency for Economic Growth in Puerto Rico

By David S. Weiss and Jennifer A. McDevitt

Introduction

In September of 2017, Hurricane Maria made landfall on Puerto Rico as a Category 4 storm, devastating the Caribbean island.[1] Striking just weeks after the destructive Hurricane Irma, Hurricane Maria caused the worst natural disaster in the island's recent history and became one of the costliest storms on record for the Atlantic basin and United States.[2] The wrath of Maria ravaged the U.S. territory, leaving millions of residents without electricity, water, communication, shelter, or transportation. Still worse, approximately 3,000 people lost their lives as a result of the hurricane and its aftermath.[3] Since the catastrophe occurred, Puerto Rico and its population have faced overwhelming challenges in rebuilding the economy and infrastructure. The personal stories of struggle and survival are countless, and the narratives of recovery are still being written. Yet, the prolonged effects of the hurricane did not break the Puerto Rican spirit. The continued reconstruction efforts are fueled by the optimism of the people, who serve as an inspiration to be respected and admired.

In this context, the authors have begun a journey of academic scholarship to learn how mediation is perceived by Puerto Rican society. A joint academic research project is currently underway to obtain data demonstrating how members of the Puerto Rican business and legal community view mediation values, such as consensus-building and self-determination for resolving commercial disputes. The prediction is that, if embraced by the people of Puerto Rico, mediation could serve as a vehicle for improving process efficiency for resolving conflicts.[4] Improved process efficiency would, in turn, result in decreased stress and increased economic productivity that would benefit society as a whole.[5] This article explores how improved mediation policy and infrastructure can assist Puerto Rico and further the island's economic development in a post-Hurricane Maria environment.[6]

Espousing Mediation

Simply implementing mediation policy or establishing mediation programs will not necessarily lead to sustainable process efficiency measures: societal and cultural recognition of mediation models are benchmarks for success. Gaining information regarding acceptance of mediation principles requires research sensitive to the interests of stakeholders and their existing social norms and customs. Therefore, the purpose of the research is to understand how members of the Puerto Rican business and legal communities currently perceive the values of mediation.[7] The authors are presently engaged in a project, developed by the Institute for Dispute Resolution at New Jersey City University in partnership with the Institute for Conflict Resolution at the Inter-American University School of Law in Puerto Rico, that seeks to evaluate and measure tolerance for incorporating mediation into both policy and practice.[8]

Mediation, including court-annexed mediation, exists in limited form in Puerto Rico.[9] As a result, this method of alternative dispute resolution (ADR) has not yet gained as much traction as it has in other parts of the world.[10] While the researchers advocate for mediation and hope the population will consider policy and a practice framework that will enable mediation within the commercial sector, the goal is not to impose mediation upon the island. The intention is to enable local stakeholders on the island to embrace the process and subsequently encourage them to discover pathways that will support mediation policy and the benefits of connecting the process to the wider business community when conflict arises, whether it stems from catastrophe or other causes.

Improving Process Efficiency

Conflict may arise unexpectedly and fluctuates in societal importance and intensity. An uncertain variable, conflict requires that there be in place innovative judicial, legislative, and industrial standards to meet the unex-

David Weiss (dweiss@njcu.edu) is a professor and founding director of the Institute for Dispute Resolution (IDR) and The Connecting Bridges and Borders Program at New Jersey City University. He was awarded the 2018 James B. Boskey Award for ADR excellence and contribution to the field. He authored the New Jersey International Arbitration, Conciliation and Mediation Act and has published widely on mediation and trade.

Jennifer McDevitt (jmcdevitt@njcu.edu) is an adjunct professor for the Latin American, Caribbean, & Latino studies and political science programs at New Jersey City University. She holds an M.A. in political science and a Ph.D. in conflict analysis and resolution. She has focused her recent research on conflict in Latin America.

pected needs and enhance process efficiency for business growth. Mediation is a form of process efficiency that can stimulate economic productivity for Puerto Rico when natural disasters or other forces cause conflicts in business and thereby interrupt the flow of business. If accepted by the community and implemented successfully, a mediation model would foster the island's regional and global influence for economic trade and commerce, advancing both domestic and cross-border activity.

The significant delays in processing insurance claims filed post-Maria serve to demonstrate the importance of process efficiency. Though the island continues to rebuild steadfastly, the process has been delayed by inefficiency in managing insurance claims. Over 287,000 insurance claim filings occurred in the aftermath of Hurricane Maria. Over a year after the hurricane struck, at least 11,000 outstanding claims remained. In November of 2018, Governor Ricardo Rossello enacted a series of laws intended to revamp insurance companies' responses to the storm-related complaints. That legislation tasked expert judges with helping resolve appraisal disputes through mediation.[11] In January of 2019, Javier Rivera-Ríos, Commissioner of Insurance, wrote to insurers of property and casualty insurance, outlining the terms of an expedited mediation process intended to resolve efficiently and effectively outstanding insurance claim filings from Hurricanes Irma and Maria.[12] The researchers plan to interview individuals who took advantage of this program in order to gauge their perceptions of the mediation process.

A Flexible and Efficient Model

A review of related literature demonstrates that consensus building has proven successful in the aftermath of disasters in other regions of the world. After the 2007 wildfires in San Diego County, California, for example, a mediation program was launched to manage over 2,000 cases filed by more than 5,000 affected persons against San Diego Gas & Electric. Over 98% of the filings were settled successfully through a cost-effective and flexible mediation program.[13] Insurance mediation programs have had positive results in managing claims filed after other catastrophes, such as Hurricanes Andrew and Katrina, as well. The cost-efficiency and speed associated with ADR initiatives have therefore contributed to the success of the programs that have been implemented in the aftermath of hurricanes and other large-scale disasters.[14]

It is known that conflict and stress often have a direct relationship: when conflict arises, stress levels tend to increase. Stress brings with it many negative consequences, including negative economic outcomes.[15] It may thus be inferred that, in the aftermath of natural disasters, economic conflicts or disputes within and among businesses may lead to an increase in stress levels among all affected parties, which may thereby lead to decreased economic productivity (see Figure 1). Whereas economic hardship negatively impacts businesses, the authors proffer mediation as an efficiency process to decrease stress levels surrounding business conflicts that inevitably emerge as a result of natural catastrophe. Since stress impacts economic capacity, successful mediation could indirectly increase economic productivity (see Figure 2 below), through consensus building and self-determination. In the context of this project, the Puerto Rican population should benefit economically from improved mediation initiatives.

The research contemplated by this article will focus its analysis on how the variables of cost savings, time, and relationship preservation are assessed when a party is deciding between formal and informal processes[16] to resolve conflicts.[17] Business growth demands certainty and predictability, but it also requires efficiency to improve these variables. It is anticipated that mediation will provide a more rational approach than the alternative winner-take-all perspective that is associated with litigation.

Conclusions

The current research underway will ultimately extract a more refined understanding of how commercial actors in Puerto Rico perceive the value of mediation for resolving disputes, both before and after Hurricane Maria. This research, within a broad cross section of the Puerto Rican business community, will further analyze the values of consensus-building and self-determination and how they correlate with improve to permit the adoption of mediation policy with improved process efficiency. Education on the benefits of mediation for resolving disputes on a micro-level may be warranted so that overall increases to economic productivity on a macro-level can be achieved. The data collected should help improve efficiency in the commercial trading system through mediation. Commercial relationships may be enhanced by addressing conflicts and increasing value propositions between stakeholders in a mediation process.

The authors' research findings will further enable judicial decision-makers and legislative policy constituents to ascertain whether mediation can be integrated into the current framework of the Puerto Rican court systems at the same time as they and the private business community develop private dispute resolution platforms. For example, a court-mandated mediation program would expedite the judicial process, which would save time and money for the taxpayers of Puerto Rico. Such a program would facilitate business resolutions and spur business growth supporting commercial trade and commerce, potentially creating a sustainable business mediation hub in Puerto Rico. A successful business mediation program amply efforts to increase international trade. Moreover, a sustainable mediation program supported by necessary infrastructure and rules in Puerto Rico would increase access to justice through the rule of law for the wider Caribbean basin which will improve economic efficiency and prosperity.[18]

(***continued on p. 46)***

NYSBA GALA DINNER

Special Guest of Honor & Recipient of the Gold Medal for Distinguished Service in the Law

ASSOCIATE JUSTICE ELENA KAGAN

Supreme Court of the United States

THE NEW YORK STATE COURT OF APPEALS

and other state court appellate judges will also be honored

THURSDAY, JANUARY THIRTIETH

two thousand and twenty

SIX THIRTY IN THE EVENING

AMERICAN MUSEUM OF NATURAL HISTORY

Central Park West at 79th Street, NYC

FOR MORE INFORMATION, VISIT *nysba.org/galadinner*

NYSBA

For your **dedication**,
For your **commitment**, and
For recognizing the **value** and
relevance of your membership.

As a New York State Bar Association member, your support helps make us the largest voluntary state bar association in the country and gives us credibility to speak as a unified voice on important issues that impact the profession.

Henry M. Greenberg
President

Pamela McDevitt
Executive Director

NYSBA NEW YORK STATE BAR ASSOCIATION

(continued from p. 42)

Figure 1: Consequences of Natural Disaster on Business When Process Efficiency Is Not Present

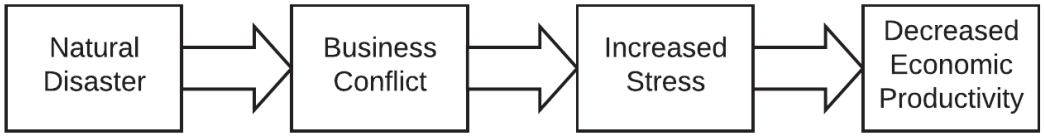
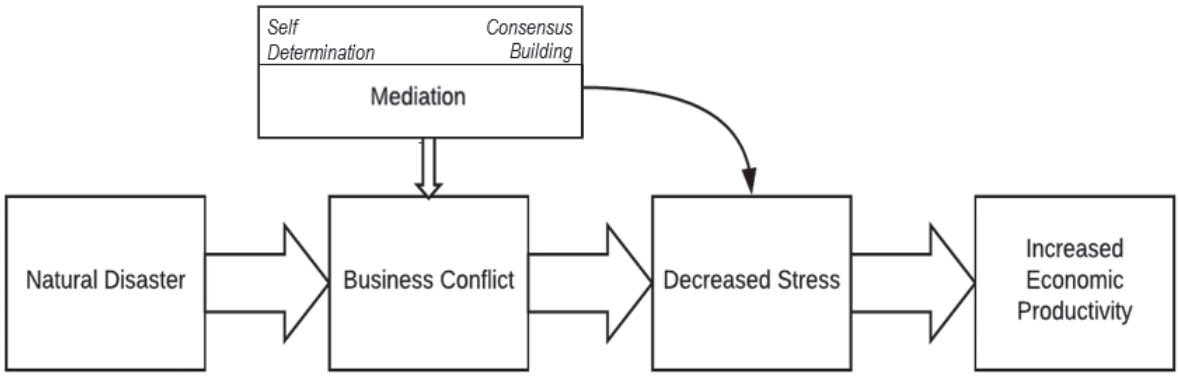


Figure 2: Mediation as a Model for Process Efficiency



Endnotes

1. *See National Hurricane Center Tropical Cyclone Report: Hurricane Maria* https://www.nhc.noaa.gov/data/tcr/AL152017_Maria.pdf.
2. *See Facts + Statistics: Hurricanes*, https://www.iii.org/fact-statistic/facts-statistics-hurricanes.
3. *See* George Washington University. (2018). *Ascertainment of the estimated excess mortality from Hurricane María in Puerto Rico*, https://publichealth.gwu.edu/sites/default/files/downloads/projects/PRstudy/Acertainment%20of%20the%20Estimated%20Excess%20Mortality%20from%20Hurricane%20Maria%20in%20Puerto%20Rico.pdf.
4. For the purposes of this research, the authors rely on the following definition of *process efficiency*: "the capability of human resources to carry out a certain process in the way that ensures minimized consumption of effort and energy. In simple words, it is a situation when a process is implemented in the right way. The purpose is to simplify implementation through getting more results with fewer resources used. Process efficiency lets obtain the greatest savings and performance through minimizing waste and optimizing resource consumption." *See* www.taskmanagementguide.com/glossary/what-is-process-efficiency-.php.
5. As Sturrock (2015) explained, "[b]y finding creative ways to address disputes early and effectively (or even to prevent them from occurring or escalating at all), mediation offers a corresponding potential opportunity to enhance business performance, improve productivity, and reduce opportunity and remedial costs." *See* https://www.mediate.com/articles/SturrockJ35.cfm.
6. Economic efficiency can be created by exploring how "mediation can increase efficiency of bargaining from an economic or strategic perspective". *See Economic Rationales for Mediation* (1994) https://ianayres.yale.edu/sites/default/files/files/Economic%20Rationales%20for%20Mediation(1).pdf.
7. The authors focus on self-determination and consensus building as the central values of mediation together and not separately. Together, parties can utilize both approaches to achieve maximum value to disputes resolution when mediation processes are adopted. For further discussion, *see* https://cardozojcr.com/vol6no2/CAC207.pdf.
8. Applying qualitative and quantitative methods, this project and the research collected will analyze how the constituents of Puerto Rico perceive mediation proceedings to resolve their conflicts in commercial settings. Utilizing phenomenological methods to study the effects of Hurricane Maria, the authors will collect data to ascertain acceptance of mediation mechanisms in business disputes. These mediation modalities include court-annexed programs and commercial mediation.
9. Mediation court-annexed programs are in place on the federal level, and court referral programs operate at the commonwealth level of the judicial system. Past interest in mandatory frameworks have been tested and can continue to be explored.
10. *See* Rule 83J (Court-Annexed Mediation), https://www.prd.uscourts.gov/sites/default/files/documents/94/Local_Rules_amended_as_of_Sept_2_2010_with_TOC.pdf.
11. Coto, D. (2018).,*New Puerto Rico laws govern insurance claims handling Post-Maria.* Claims Journal, https://www.claimsjournal.com/news/southeast/2018/11/30/288065.htm,

12. *See* Ruling Letter No. CN-2019-245-D, http://ocs.gobierno.pr/enocspr/files/CN-2019-245-D_MediationnExpeditedEnglish.pdf.

13. *See* Pardun, John T. (2013), *How ADR can be used to resolve mass disaster and insurance claims*, International In-house Counsel Journal, 6 (23), 1-5, https://www.jamsadr.com/pdf-viewer.aspx?pdf=/files/uploads/documents/articles/pardun-how-adr-can-be-used-to-resolve-mass-disaster-and-insurance-claims-spring-2013.pdf.

14. *See* Volpe, M. (2015), *Post disaster ADR Responses: Promises and challenges*. Fordham Environmental Law Review, 26 (1), 95-132; https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1719&context=elr.

15. See Straks, J. (2006). *Reduce stress and improve outcomes: A conflict management primer for business leaders*, https://www.mediate.com/articles/straksJ1.cfm

16. For the purpose of this research, informal processes refer to mediation, negotiation, and conciliation while formal processes refer to litigation, arbitration, and any other administrative process.

17. In order better understand current attitudes toward mediation among Puerto Rican professionals, the research will employ mixed methods, incorporating surveys and interviews as its primary data collection tools. With the help of chambers of congress and trade industry groups, researchers will secure between 100 and 200 survey responses from members of Puerto Rico's business and legal community.

. Survey questions will measure participants' attitudes toward and perceptions of consensus building regarding both internal and external conflicts. This quantitative component of the investigation will be complemented by qualitative methods.

18. To illustrate how a business focused mediation hub can support economic development and efficiency for Puerto Rico and the Caribbean basin, *see* the Singapore Mediation Center at http://www.mediation.com.sg/.

Belt and Road Initiative Disputes: How and Where Will They Be Resolved?

By Peter Thorp

Introduction

China's Belt and Road Initiative (BRI) is arguably the largest infrastructure and investment project in world history. Launched by China's President Xi Jinping in 2013, the initiative focuses on building connectivity and cooperation via a land-based Silk Road economic "belt," connecting China to Central Asia and Europe, and a maritime Silk Road economic "road," a network of maritime routes connecting Asia, the Indian Ocean, Africa and Europe.

The BRI now encompasses more than 70 countries, covering 65% of the world's population and 40% of global GDP. Chinese authorities estimate over $1 trillion of total BRI investments confirmed to date, many involving key roles for Chinese state-owned enterprises (SOEs) and financed by Chinese banks. China's motivation for the initiative is both economic and political. On the economic side, China is resource-scarce and wants to secure reliable and long-term supplies of the energy and other resources it will need to support its continued economic growth. China also wants to put its enormous foreign currency reserves generated by years of trade surpluses to good use through the financing of infrastructure projects along the strategically important BRI. Politically, the initiative marks China's determination to regain what it sees as its rightful place in the world commensurate with its newfound economic power.

The BRI has captured the attention and imagination of the world but has also seen pushback in a number of BRI countries. Initial enthusiasm has given way in some quarters to fears of Chinese hegemony and concerns about the significant indebtedness the projects may engender. Major BRI infrastructure projects in Sri Lanka, Pakistan and Malaysia have encountered local resistance. This has led to a renegotiation of some BRI contracts and a renewed campaign by the Chinese government to convince its regional partners of the "win-win" nature of the BRI.

For their part, some Chinese SOEs and banks are also concerned that they have been pushed for geopolitical reasons by their government to take on complex and potentially loss-making ventures in risky jurisdictions.

The Potential for Disputes

Despite these myriad challenges, the BRI is likely to continue to grow and expand in some form or other. Reasons include President Xi's determination to make his signature project a success, and the enormous need for infrastructure investment in the countries along the Belt and Road.

And precisely because of those challenges, and the scale and complexity of BRI projects, the BRI is likely to generate a significant number of disputes. How and where a BRI project dispute should be resolved is a question exercising the minds of many potential participants in BRI projects and their lawyers. The first point to consider is whether a dispute arising out of a BRI project is essentially different from any other commercial or infrastructure dispute. In other words, are new tailormade solutions required for the resolution of BRI disputes, or are the range of existing mechanisms already fit for purpose?

"The first point to consider is whether a dispute arising out of a BRI project is essentially different from any other commercial or infrastructure dispute."

Whatever the answer to that question, it is undeniable that the prospect of a flow of BRI disputes has encouraged governments and international dispute resolution institutions alike to come up with new and innovative solutions for the resolution of those disputes. Some of these initiatives will have an impact beyond the BRI and coincide with other ongoing reforms in the realm of international dispute resolution. For example, China has long been concerned that international arbitration has been too much guided by Western legal principles and concerns. China is therefore likely to use the BRI as an opportunity to promote dispute resolution mechanisms that take Chinese legal and cultural norms more into account. China has also expressed its wish that mediation play a larger part in the resolution of BRI disputes, either as a

Peter Thorp (peter@thorparbitrator.com) is a former partner of Allen & Overy LLP, where he was managing partner of the firm's Beijing office from 2004 to 2011. He is now an independent arbitrator based in Paris.

stand-alone solution or in conjunction with other modes such as arbitration.

National Courts, Arbitration, Mediation, or Arb-Med?

Given the highly politicized nature of many BRI projects, it is likely that some disputes will be resolved, in whole or in part, at the government level. There will also be a certain number of investor-state disputes that will be settled through investor-state dispute settlement mechanisms under various bilateral and multilateral investment treaties.

National courts of the host states might be unavoidable for certain types of disputes, for example those concerning land. Still, many investors have legitimate concerns about the reliability and neutrality of the court systems in many BRI countries. There are also concerns about the international enforceability of court judgments. Litigation is therefore unlikely to be the preferred method for resolving BRI disputes.

For a number of reasons, international arbitration is likely to remain the most common means of resolving BRI disputes between commercial parties, including Chinese SOEs acting in a commercial capacity. International arbitration is looked upon favorably by Chinese and non-Chinese parties alike, thanks to its flexibility and neutrality. Most, though not all, of the countries along the Belt and Road are parties to the New York Convention on the mutual recognition and enforcement of international arbitral awards.

An interesting question is to what extent mediation will be used in the resolution of BRI disputes, either on its own or in conjunction with arbitration. There are reports of a concerted effort to encourage mediation clauses in BRI agreements, with provision for arbitration if mediation fails. Mediation may also start to increase in popularity following the launch in August 2019 of the UNCITRAL Convention on the Enforcement of International Settlement Agreements Resulting from Mediation (Singapore Convention). The Singapore Convention is eventually expected to achieve for the enforceability of mediation agreements what the New York Convention has already achieved for the enforcement of international arbitral awards.

Most of the usual international arbitration seats and institutions will get their share of BRI disputes. Hong Kong and Singapore, highly ranked as strong rule of law and arbitration-friendly jurisdictions, are thought to have a certain edge over their rivals. They are both also popular with Chinese parties for reasons of proximity and culture.

Arbitration institutions in both Hong Kong and Singapore have launched initiatives and new rules to position themselves as go-to venues for the resolution of BRI disputes, either by arbitration and mediation or a combination of the two. For example, the Singapore International Arbitration Centre (SIAC) in January 2017 released updated arbitration rules and the new SIAC Investment Arbitration Rules, no doubt with the aim of attracting both commercial and investment claims arising out of BRI disputes. Then in September 2017, the Singapore International Mediation Centre (SIMC) signed a Memorandum of Understanding with the China Chamber of International Commerce Mediation Centre (CCOIC) to promote BRI mediation.

In April 2018, the Hong Kong International Arbitration Centre (HKIAC) established a Belt and Road Advisory Committee and launched an online resource center to support BRI-related business opportunities. The HKIAC has significant experience in resolving disputes between Chinese and BRI-country parties. More generally, the signing in April 2019 by mainland China and Hong Kong of a mutual arrangement on interim measures in aid of arbitral proceedings should give Hong Kong an extra advantage over its competitors for China-related disputes, including those arising out of BRI projects.

The International Chamber of Commerce (ICC) has also been quick to promote itself as the arbitration institution with the most experience and geographical breadth to handle the complex, high-value, multi-party and multi-contract disputes that are likely to arise out of BRI projects. In March 2018, the ICC set up a Belt and Road Commission to develop appropriate dispute resolution procedures for BRI disputes. The ICC has also promoted its mediation services for the rapid and cost-effective resolution of BRI disputes.

Chinese Solutions?

China has taken a number of steps to modernize and internationalize its dispute resolution mechanisms in anticipation of an increase in disputes work flowing from BRI projects. In September 2017, the China International Economic and Trade Arbitration Commission (CIETAC), China's largest international arbitration institution, released its "Arbitration Rules for International Investment Disputes," which CIETAC promoted as being adapted for the resolution of BRI disputes. The rules seek to combine existing features of CIETAC arbitration, including the mixed arbitration-mediation procedure, with best practices in international arbitration. It is unclear whether CIETAC will be seen as a credible alternative to the International Centre for Settlement of Investment Disputes (ICSID) for investor-state BRI disputes. Nevertheless, the new rules might start to appear in future BRI investment contracts, or treaty instruments involving Chinese parties, depending on whether the Chinese state or investor has the greater bargaining power.

Another significant development was the establishment in June 2018 by the PRC Supreme People's Court

(SPC) of the China International Commercial Court (CICC). The CICC has two branches, the Shenzhen Court dealing with disputes arising out of the maritime Road, and the Xi'an Court dealing with disputes arising out of the overland Belt. The stated aim of the CICC courts is to work with international arbitration institutions and mediation institutions to be a "one-stop shop" for the resolution of BRI disputes. At the commencement of the matter, the parties will be asked whether they wish to mediate and/or arbitrate the dispute.

It is uncertain how the CICC procedure will work in practice, and non-Chinese parties in particular have some concerns. For example, since the CICC is a Chinese court under the supervision of the SPC, international judges will not play a role, unlike in other international commercial courts such as the Singapore International Commercial Court or the Dubai International Financial Centre Courts. The establishment by the CICC of an International Commercial Expert Committee to play a consultative role on foreign law issues is unlikely in itself to convince many foreign parties that the CICC is an ideal forum for resolving BRI disputes. Doubts over the international enforceability of CICC judgments will also act as a disincentive for both Chinese and non-Chinese parties to submit their BRI disputes to resolution by the CICC.

Nevertheless, the establishment of the CICC should be seen in the context of various measures taken by China in recent years to internationalize its dispute resolution systems. China signed in September 2017 (although has not yet ratified) the Hague Convention on Choice of Court Agreements, which provides an international framework for the mutual recognition and enforcement of court judgments. Earlier, in 2015, the SPC had issued an opinion on judicial support for the BRI which stated that the PRC courts would take proactive steps to promote enforcement of foreign judgments based on reciprocity, and this spirit has already begun to be felt in the judicial practices of the PRC courts. It is likely that these pre-emptive steps are designed at least in part to encourage courts in countries along the BRI to enforce Chinese court judgments.

Conclusion

The BRI offers new investment and development opportunities in many regions across the globe, but it is not without legal, political and economic risks. Given that the BRI is a Chinese initiative, the method of resolving BRI project disputes will depend to some extent on the position taken by the Chinese party. Chinese SOEs and banks financing the projects may consider that they have the greater bargaining power in that discussion. They might therefore try to insist on dispute resolution in mainland China, although many non-Chinese participants in BRI projects will be reluctant to agree to that.

It is therefore likely that some form of international arbitration in a neutral venue will continue to be the preferred means of resolving most BRI disputes. Chinese SOEs are becoming more familiar and comfortable with international arbitration in venues outside of mainland China, in particular in Hong Kong or Singapore.

There will not be one model BRI dispute resolution clause that will receive universal acceptance. That said, non-Chinese parties to BRI contracts may be open to incorporating into their dispute resolution agreements certain features that are familiar and acceptable to Chinese parties, such as negotiation and mediation, or hybrid processes such as arb-med or arb-med-arb. These concepts are not totally unknown in many Belt and Road jurisdictions and are also gaining more understanding and acceptance in Western countries. We may therefore see the development of hybrid dispute resolution solutions for BRI projects, combining elements from China's legal traditions with more widely accepted international dispute resolution practices.

Variables Affecting Costs in Investment Arbitration: A Look at the Data

By Susan D. Franck

In his *Advice to a Young Tradesman*, Benjamin Franklin articulated the oft-quoted wisdom: "time is money."[1] Yet, the open question is whether this conventional wisdom withstands scientific scrutiny, namely: is it applicable to international arbitration. The question is fundamental, as costs are central to determining whether pursuing a claim (or defense) is economically viable, whether access to justice is available and balanced adjudication is possible, and how the international investment dispute settlement process will evolve. Costs are, therefore, unsurprisingly at the forefront of current debates about reform of ICSID's Arbitration Rules[2] and the recommendations of UNCITRAL Working Group III.[3]

This article looks at a small part of the underlying work in a new book, *Arbitration Costs*,[4] which explores core questions of costs by focusing upon the contentious area of investment treaty arbitration, sometimes referred to as "ISDS." Recognizing that cognitive illusions, or unconscious biases and heuristics, can wreak havoc with common sense and facilitate belief in things that are untrue, in an era of "alternative facts"[5] and crowdsourcing to the "expertise" of the Twitterverse,[6] the research was aimed at testing theory against hard data.

Data for three core arbitration costs are examined in this article. The first two cost elements involve the parties' legal costs—namely the legal fees for counsel, experts, and other related expenses for both: (1) investors and (2) states. The third, and last, cost element involves tribunal costs and expenses, which includes tribunals' direct costs, potential secretaries, institutional costs, and other administrative expenses. After introducing the doctrine and policy background, exploring the psychological framework necessitating data-driven debiasing, and providing a background on the dataset,[7] those three distinct elements were examined in conjunction with over 500 variables in 272 arbitral awards.[8]

Basic Descriptive Costs

Investment treaty arbitration costs are non-trivial and relatively high, particularly the cost of counsel for both investors and states. Specifically, the original 2011 inflation-adjusted average for investors' counsel and related legal expenses was just under U.S.$5 million, which had the buying power of roughly $5.7 million in 2018 terms.[9] This average[10] was similar to analyses of investors' costs analyzed by Commission & Moloo ($5-6 million average)[11] and Hodgson & Campbell ($6 million average).[12] Similarly, for the cost of respondents' counsel and related expenses, the research identified the average 2011-inflation adjusted cost was roughly $4.1 million, which had the buying power of around $4.7 million in 2018 terms.[13] The average was, again, somewhat similar to analyses of states' average legal costs offered by both Commission & Moloo ($4.6-$5.2 million)[14] and Hodgson & Campbell ($4.9 million).[15] By comparison, tribunal costs and expenses were relatively low. The 2011 inflation-adjusted average cost for tribunal related expenses was around $800,000, which translated to just under $1 million in 2018 dollars,[16] which was once again similar to practitioners' analyses that typically identified tribunal expenses were $1 million or lower.[17]

The approximations suggest that, in 2011-adjusted values, the average total arbitration costs per case was around $11 million. Compared with average outcomes, namely the average damage award for all cases (i.e., including cases investors lost and were awarded nothing), parties' combined legal costs were 60% of the average award. For the smaller subset of cases where investors obtained a damage award (i.e., excluding cases investors lost), the average combined costs for both parties' counsel was roughly 20% of the average amount awarded. By contrast, the average tribunal cost was equivalent to approximately 2-5% of the average damage award.

Data on Case Length: From Requests for Arbitration to Final Awards

For the bargain price of roughly $11 million, the average case took roughly 43 months,[18] or 3.5 years, to resolve.[19] Contrary to some assertions that case length has decreased, the data failed to suggest that was reliably the case. Rather, the group of earliest cases (i.e. pre-2006 cases) were reliably *faster* than some of their more recent counterparts, and there was some degree of ebb and flow of in the average (and median) case length over time.[20]

Susan Franck (sfranck@wcl.american.edu) is a professor of law at American University Washington College of Law where she specializes in international investment and dispute settlement. Professor Franck's new book, Arbitration Costs, is the culmination of over a decade of research empirically analyzing international arbitration.

Predicting Costs

The core question then involved: what was the relationship between these variables, namely case length and each distinct arbitration cost. For each type of cost—investors' legal costs, states' legal costs, and tribunal costs and expenses—longer times to resolve disputes were reliably associated with higher legal costs, and decreased case length was reliably associated with decreased costs.[21] The tests for all three costs revealed a strong and reliable correlation between the cost and case length (i.e., the months between a request for arbitration and final award). As a real-world matter, the practical significance of those tests was not trivial. Rather, there was a statistically "large" effect for links between case length and investors' legal costs and tribunal costs and expenses, and a "medium" effect for the link between case length and states' legal costs.[22] Although correlation is not causation, the results suggest that parties, counsel, and policymakers are wise to focus upon the intersection of time and costs. It also underscores, when making more general assertions about cost-drivers, controlling for case length is fundamental, and "stakeholders ignore links between time and costs at their peril."[23]

Yet the temporal link to the different costs exhibited one unusual element. Time, in the form of the case length and the number of months between the arbitration request and the final award, was the *only* variable studied that reliably predicted all three investment treaty arbitration costs.

Other, individual variables predicted some costs—but not others. In other words, what it took to reliably predict the costs of an investment treaty arbitration was remarkably specific. Aside from case length, there was a great deal of fluctuation as to which variables were meaningful cost predictors. Should readers be interested in the full nuance of the variables that were predictive of costs, they are encouraged to review *Arbitration Costs* in detail, exploring the specific relationships (or lack thereof) between costs and aspects like separate opinions, non-disputing parties, institutional rules used, amounts claimed and ultimate case outcomes, energy disputes, and repeat player counsel. It is worthwhile to check our instincts against the data and other basic descriptive information, whether it is the scope of investors' identity,[24] the increase in investment treaty arbitration awards over time,[25] how and why (if at all) tribunals explained their cost assessments,[26] or even raw basic data on the spread of risk in the different cost variables.[27]

Information deriving from scientific principles of reliability, replicability, validity, and transparency provides a useful tool to test intuition and to offer a reality check for strategic dispute settlement choices, although there are inevitable limitations in any research. There will always be more to know and to understand both for clients in search of better choices and for practitioners seeking to offer more informed, strategic advice. In an era of rising tensions about the efficacy of international arbitration and the need to provide dispute settlement that offers a value proposition for its users, consideration of the data is a good place to start.

Endnotes

1. Benjamin Franklin, Advice to a Young Tradesman (1748), *reprinted in* The Oxford Dictionary of Quotations 218 (3d ed. 1979).
2. ICSID is actively engaged in the process of reforming its rules, including its additional facility and expanding alternative forms of dispute settlement including mediation, which resulted in two massive working papers, one in August 2018 and one in March 2019. *See, e.g.,* Int'l Centre for Settlement of Investment Disputes, *ICSID Rules and Regulations Amendment Process*, ICSID.WorldBank.Org, https://bit.ly/2vG1B4o (last visited May 6, 2019); *see also* Am. Soc'y Int'l L., *Unfolding the Working Paper on ICSID Rules Amendment: Interview with Meg Kinnear*, ASIL.Org (Sept. 6, 2018), https://bit.ly/2xvPMPk (last visited May 6, 2019) (discussing potential rule changes).
3. UNCITRAL Working Group III is exploring procedural issues related to Investor-State Dispute Settlement Reform. *See, e.g.,* U.N. Comm'n Int'l Trade L., Report of Working Group III (Investor-State Dispute Settlement Reform) Thirty-sixth session (Vienna, Oct. 29-Nov. 2, 2018), *Possible Reform of Investor-State Dispute Settlement (ISDS), Note by the Secretariat*, UN Doc. A/CN.9/WG.III/WP.149 (Sept. 5, 2018), https://bit.ly/2VeLda6 (last visited May 6, 2019); *see also* Crina Baltag, *An Update on the ISDS Reform: the 37th Session of the UNCITRAL Working Group III Investor-State Dispute Settlement Reform*, Kluwer Arb. Blog (May 2, 2019), https://bit.ly/2Jg7nlj (last visited May 6, 2019) (explaining Working Group III's current efforts).
4. Susan D. Franck, Arbitration Costs: Myths and Realities in Investment Treaty Arbitration (2019).
5. S*ee, e.g.,* S.I. Strong, *Alternative Facts in the Post-Truth Society: Meeting the Challenge*, 165 U. Pa. L. Rev. Online 137 (2017), https://bit.ly/2WzbcFB (last visited May 4, 2019).
6. Tom Nichols, The Death of Expertise: The Campaign against Established Knowledge and Why it Matters 129-33, 160-61 (2018) (exploring the problems of Twitter and other social media outlets in facilitating the false transfer of knowledge and disrupting expertise); *but see* Marshall Shepard, *Why a New Study Says Scientists Should Use Twitter*, Forbes (Nov. 18, 2018), https://bit.ly/2K3H43w (last visited May 6, 2019) (suggesting scientists should increase their presence on social media).
7. *Arbitration Costs* explains in multiple places that the data has inevitable limitations, including its time-bound nature and tribunals' failure to articulate costs fully in all awards. Chapter 3 explains the dataset and Appendix I offers detailed information about coding and analyses. *See also* Appendix IV and V (available online). Chapter 4 explored whether missing data might reflect meaningful differences. It was generally not possible to identify meaningful differences in cases with and without costs data, with a core exception, namely cases rendered before 2006 were *less* likely to contain full information on parties' legal costs as compared to cases rendered later that were more likely to contain more complete information on parties' legal costs. *See* Franck, *supra* note 4, at 138–40 (containing detailed tests in pages of footnotes to test for potential differences in cases with and without costs data).
8. *See Id.* at Appendix 1, at 343 (discussing the scope of variables coded that created over 140,000 distinct pieces of data).
9. *Id.* at 203-04.
10. Averages, however, can be deceptive. Quartile breakdowns, while more complex, better represent the range of potential cost risk. Chapter 6 of *Arbitration Costs* identified that, in 2011-inflation

adjusted figures, the 25th percentile of investors' costs was $1.34 million, the 50th percentile (the median) was $3.14 million, and the 75th percentile was $7.25 million. Commission & Moloo found that, for a dataset of ICSID cases from 2011-2017, investors' median legal cost was $3.6 million. Jeffery Commission & Rahim Moloo, Procedural Issues in International Investment Arbitration 188 (2018). Hodgson & Campbell found, using a larger dataset, that investors' median legal costs were $3.38 million. Matthew Hodgson & Alastair Campbell, *Investment Treaty Arbitration: Cost, Duration and Size of Claims All Show Steady Increase*, AllenOvery.com, (Dec. 14, 2017), https://bit.ly/2NEnWqA (last visited May 6, 2019); Matthew Hodgson & Alastair Campbell, *Damages and Costs in Investment Treaty Arbitration Revisited*, Global Arb. Rev. (Dec. 14, 2017), https://bit.ly/2NOTjPA (last visited May 6, 2019). Unfortunately, there is no evidence that either set of authors adjusted figures for inflation or provided standard deviations to offer a range of potential error.

11. Commission & Moloo, *supra* note 10, at 187-88, 190-91.
12. Hodgson & Campbell, *supra* note 10.
13. Franck, *supra* note 4, at 204-05. In 2011-inflation adjusted figures, the 25th percentile of states' legal costs was just under $1 million, the 50th percentile (the median) was $1.64 million, and the 75th percentile was $4.56 million. Commission & Moloo found that, for ICSID cases from 2011-2017, states' median legal expenses was $3.6 million. Commission & Moloo, *supra* note 10, at 188; *id.* at 190-91 (providing information on respondent costs in UNCITRAL cases but failing to offer median cost). Using a broader range of data focusing on investment treaty cases, Hodgson & Campbell found states' median legal costs were $2.8 million. Hodgson & Campbell, *supra* note 10.
14. Commission & Moloo, *supra* note 10, at 187-88, 190-91.
15. Hodgson & Campbell, *supra* note 10.
16. Franck, *supra* note 4, at 206-07. In 2011-inflation adjusted figures, the 25th percentile of tribunal costs and expenses was $326,566, the 50th percentile (the median) was $602,208, and the 75th percentile was $1,010,039.
17. Commission & Moloo, *supra* note 10, at 188-89, 190-91; Hodgson & Campbell, *supra* note 10.
18. The median case length between the time for filing a request for arbitration and a tribunal rendering a final award was 40 months. Franck, *supra* note 4, at 122.
19. The average case length was roughly similar to findings by practitioners. *See* Commission & Moloo, *supra* note 10, at 194 (finding that ICSID cases took on average 3.63 years to complete and UNCITRAL investment treaty cases took 3.99 years to complete); Hodgson & Campbell, *supra* note 10 (suggesting that, for cases up to the end of 2012, mean case length was around 3.7 years and, for disputes after 2013, mean case length was 4.3 years, but failing to identify total average or standard deviations to ascertain whether variations were statistically meaningful); Anthony Sinclair, *ICSID Arbitration: How Long Does It Take?*, Global Arb. Rev. (Oct. 26, 2009), https://bit.ly/2APfDWI (last visited May 6, 2019) (analyzing a mixed set of ICSID awards, containing both treaty disputes and contract cases under national law to find average case length was 3.63 years).
20. *See* Franck, *supra* note 4, at 123-34 (discussing the ebbs and flows over time and exploring potential differences in case length as a function of arbitration rules, bifurcation, and separate opinions).
21. *Id.* at 136-38.
22. *Id.* at 136-37 (providing bivariate statistical tests and *r*-values to reflect effect sizes of the relationship between variables). Appendix I explains the conventions used by social scientists for using *r*-values to identify the practical significance of test results. In lay terms, a statistical test can identify a reliable group difference but the *size* (or magnitude) of the difference can make the distinction functionally irrelevant (i.e. what is the difference between eating at McDonalds or Burger King), whereas other distinctions can be of an entirely different scale with a material practical significance (i.e. ,what is the difference between eating at McDonalds and a Michelin 3* restaurant).
23. *Id.* at 268.
24. *See Id.* at Chapter 3.
25. *See Id.* at Chapter 4.
26. *See Id.* at Chapter 7.
27. *See, e.g., Id.* at Chapter 6; *see also id.* at 207 (Figure 6.1).

For a review of Susan Franck's book, *Arbitration Costs: Myths and Realities in Investment Treaty*, turn to page 76.

International Arbitration Should Permit the Direct Examination of Witnesses and Experts Not Called for Cross-Examination

By Carolyn B. Lamm, Eckhard R. Hellbeck and Ashwini Velchamy

Fundamental fairness is at the core of the international arbitral system. The arbitral system must provide due process in order to retain its legitimacy, which consequently requires arbitrators to maintain a balance between fairness and efficiency. Parties and clients must feel as though their case has been heard, witnesses must not feel abused, counsel must act within the agreed upon rules, and arbitrators must guard the sanctity of this process.

One area in which this fundamental fairness falls short is in the use of written witness statements and expert reports as substitutes for direct oral testimony. The general practice in international arbitration is to use written witness statements and expert reports as substitutes for direct oral testimony, and allow witnesses and experts to be called by the opposing party solely for cross-examination. This practice compromises the right of the party tendering the witness or expert to present its case—to be heard—in violation of fundamental due process. In order to comport with due process, parties in international arbitration should be permitted to conduct the direct oral examination of witnesses and experts who have not been called for cross-examination by the opposing party. What we have observed is a selective calling of witnesses who are the weakest and/or avoid difficult issues, such as fraud and corruption. The oral hearings thus provide a distorted view to the tribunal of the "non-calling party's" side of the case: that which its opponent wants the tribunal to see. That avoids the importance of certain issues seen only in briefs and limited arguments and impairs the tribunal's ability to assess the credibility of the non-appearing witnesses. Often the non-appearing witnesses are not as much a part of the case.

Use of Written Statements and Reports as a Substitute for Direct Examination of Witnesses and Experts

Direct oral examination in international arbitration is typically either nonexistent or consists of what is called a "confirmation": where the witness or expert merely affirms his or her name and profession and authenticates the statement or report. Occasionally some further explanation is permitted. Witnesses and experts who submit written direct testimony, however, are generally expected to appear if the other party (or the tribunal) wants to cross-examine them. As a result, hearings in international arbitration tend to focus on cross-examination. However, this trend runs contrary to the original purpose of written witness statements, which was to ensure that each party knew what evidence the other party was relying on in advance of the hearing.[1] Indeed, the IBA Rules on the Taking of Evidence in International Arbitration, which are widely recognized as reflecting best practices, generally contemplate the use of both written statements and direct oral testimony,[2] while allowing the parties to agree, or the tribunal to order, that the written witness statement or expert report "shall serve as that witness's direct testimony."[3] In practice, the template used by arbitral institutions for the first procedural order typically provides for such agreement. This places the burden of persuasion on the party that seeks to use oral direct examination, and it does so at the very beginning of the proceeding, when it is difficult if not impossible to predict to what extent oral direct examination may be useful or necessary.

The driver for substituting written statements and reports for direct examination is the desire to achieve greater efficiency. Cost considerations—both time and resources—end up prevailing over the concern that not allowing for oral direct testimony could impede on a party's right to fully present its case.[4] Eliminating direct oral examination at hearings without a doubt reduces their length and saves costs. The advantages to efficiency, however, must be balanced with the requirements of due process and fairness, most importantly the right to be heard.

The Right to Be Heard

A number of principles must be weighed to ensure the quality of evidence used in the tribunal's decision-making:

1. The equality of the parties;
2. Each party's right to a full opportunity to present its case;

Carolyn B. Lamm (clamm@whitecase.com), Eckhard R. Hellbeck (ehellbeck@whitecase.com) and Ashwini Velchamy (ashwini.velchamy@whitecase.com) are, respectively, partner, counsel and summer associate in the Washington, D.C. office of White & Case LLP. The views expressed here are solely their own and should not be attributed to White & Case LLP or any of its clients.

3. Each party's right to confront the opposing party's witnesses and evidence;

4. Each party's right to defend itself; and

5. The ability of the tribunal to manage the case flexibly and with reasonable expediency.

Only allowing parties to call for oral testimony of witnesses or experts for cross-examination compromises the right to be heard, because the opposing party has the power to avoid entire topics or deliberately and strategically call weak witnesses or experts—effectively controlling the narrative of the other side's case at the hearing. Especially where re-direct examination is limited to the topics that are raised in the cross examination, this can easily distort what the tribunal hears. If the opposing side declines to cross-examine any of the other party's main witnesses or experts who address an important issue, the arbitrators' perception of the case and their ruling on that particular issue could be severely impacted—particularly when the rules state that electing not to cross-examine a witness or expert does not mean the evidence the witness or expert brings to the table is uncontested.[5] Such skewing of impressions and perceptions will be difficult to overcome without a party's ability to call its own witnesses and experts, present oral direct examination testimony, and thus tell its side of the story at the hearing.[6]

While the tribunal would still have access to the written witness statements and expert reports, they are not full substitutes for oral testimony for several reasons. First, oral testimony gives arbitrators a chance to assess the credibility of a witness, which would be difficult to assess on paper.[7] It provides the tribunal with an "opportunity to put a human face on that story."[8] While credibility may still be assessed on cross-examination, to the extent the witnesses and experts are called, the inherent adversarial nature of cross-examination would inevitably skew the perception of the witness.[9] Second, only using written statements and reports deprives the tribunal of a chance to question the witnesses or experts. The tribunal does generally have the right to call witnesses and experts on its own for examination, but arbitrators typically leave the calling of witnesses and experts to the parties' lawyers. Particularly with expert witnesses whose written reports include technical or complex aspects of the case, allowing parties to call them for direct examination would aid in ensuring that the tribunal properly understands all aspects of the case at hand.[10] This advantage would also extend to non-expert witnesses when the fact situation is so complex that an ordinary reading of the statement might not sufficiently explain the situation.[11] Third, while written testimony is provided, there is no guarantee that all the arbitrators have thoroughly understood it.[12] Additionally, significant time may have passed between the arbitrator's review of the written testimony and the hearing, and oral direct testimony, even if it covers only the highlights, provides the arbitrators with a refresher to ensure their full understanding of the testimony. In this way, the tribunal also would be able to assess the testimony on cross in the temporal and substantive context of the direct testimony.

It is evident that the oral direct examination of a witness could potentially impact the outcome of a case. Because of the weight given to oral testimony, parties should not be allowed to control entirely which of the opposing party's witnesses or experts are called to give oral testimony at the hearing. The opposing party could choose to only call the weakest witnesses on the other's side to cross examine, which would likely lead to arbitrators assuming that all of the other side's witnesses are just as weak. The opposing party could choose to not call any witnesses dealing with a particular issue in dispute, making it seem as though there is no controversy over that issue. The opposing party could limit its cross examination of a particular witness to only one topic, thus preventing the other side from performing a re-direct examination on anything other than that topic, and effectively changing the value and scope of that witness's testimony. Not only is the possibility of such strategic maneuvering distasteful, but it also results in a due process violation because of the limitation on the parties' right to be heard and present their case. Indeed, in practice it provides a very distorted view of the case. Broad consensus exists that oral testimony is often key to properly assessing evidence and resolving contentious factual issues.

Solution

Because of the imposition on the right to be heard and the inequality of allowing opposing parties to choose which of the other parties' witnesses will be heard at the hearing, parties in international arbitration should be allowed to call witnesses for direct examination as well. Both parties should be authorized to request the appearance of witnesses for direct examination.[13] Fundamentally, the presentation of the witnesses must be balanced and tribunals must use their discretion to ensure that parties and counsel can present their case with the approach that best allows them to present and confront evidence.

In order to balance the concerns of efficiency and costs, the right to call witnesses and experts for direct examination does not need to be unlimited. After hearing the parties, the tribunal in its discretion could limit the number of witnesses and experts to be called for direct examination, as has been done in several recent cases of which the authors are aware.[14] Alternatively, direct examination at the hearing could be limited to cover only the main points or highlights of the written testimony. Indeed, a number of tribunals have allowed parties to conduct brief direct examinations of their witnesses and experts.[15]

An additional option for a tribunal is to order "witness conferencing" or "hot-tubbing" wherein competing

expert witnesses on the same topic are ordered to sit side by side while the tribunal asks them the questions concurrently so that they might engage in discussion and address concerns in parallel.[16] This would alleviate some of the concerns of efficiency as, instead of two entirely separate direct examinations, both experts would be heard together.

Allowing for direct oral testimony does not require a rigid approach. Arbitrators possess the power to tailor their approach to the circumstances of each individual case and weigh them against the competing concern of efficiency. Parties can, in advance of the hearing, give notice of which witnesses they want to direct and cross, subject to the numerical limitations placed by the arbitrators or agreed upon by the parties. If a case's development reveals that one party's case requires a mere reference to a single document, while the other's requires the tribunal to examine multiple circumstances, the tribunal must clearly provide both parties with equal opportunity to call witnesses for direct and cross examination to make sure that both parties' cases are heard.[17] Another situation that would pose unique circumstances is where one party has the burden of proof. Circumstances of disputes vary, and it is the responsibility of the tribunal to ensure that regardless of the circumstances, equal opportunity and the right to be heard are maintained.

Conclusion

The arbitral system must maintain a balance between fairness and efficiency. Permitting parties to determine which of the other parties' witnesses or experts appear before the tribunal and not permitting oral direct examination thwarts that balance by impeding on the parties' right to be heard and present their case. Not only does that encourage tactical maneuvering at the expense of a party's right to present its case, but it has the potential to suppress the discussion of certain issues and silence key witnesses or experts. Fundamentally, if it impairs a party's ability to present its case, not allowing for oral direct examination of witnesses and experts violates due process, without which the international arbitral system loses its legitimacy.

Tribunals have the authority and the ability to alter procedures to guarantee the parties' right to be heard and they ought to take a flexible approach that is tailored to the particular circumstances of each case, weighing the concerns of efficiency against the due process rights of the parties.

Endnotes

1. *See* IBA Rules on the Taking of Evidence in International Arbitration (2010), Preamble ¶ 3 ("[E]ach party shall … be entitled to know, reasonably in advance of any Evidentiary Hearing …, the evidence on which the other Parties rely.").
2. *See* IBA Rules on the Taking of Evidence in International Arbitration (2010), Art. 4(4) (providing for written witness statements); *id*., Art. 5 (1) (providing for written expert reports); id., Art. 8(3) ("With respect to oral testimony at an Evidentiary Hearing: (a) the Claimant shall ordinarily first present the testimony of its witnesses, followed by the Respondent presenting the testimony of its witnesses; (b) following direct testimony, any other Party may question such witness …; (c) thereafter, the Claimant shall ordinarily first present the testimony of its Party-Appointed Experts, followed by the Respondent presenting the testimony of its Party-Appointed Experts.").
3. IBA Rules on the Taking of Evidence in International Arbitration (2010), Art. 8(4).
4. *See*, *e.g*., Michael Molitoris & Amelie Abt, *The Arbirator and the Arbitration Procedure—Oral Hearings and the Taking of Evidence in International Arbitration*, in 2009 Austrian Arb. Y.B. 175, 189-190 (Christian Klausegger *et al*., eds., 2009) (arguing that cost and efficiency considerations rightfully prevail over any concerns about the non-appearance of a witness at a hearing).
5. *See* IBA Rules on the Taking of Evidence in International Arbitration (2010), Art. 4(8) ("If the appearance of a witness has not been requested pursuant to Article 8.1, none of the other Parties shall be deemed to have agreed to the correctness of the content of the Witness Statement").
6. *See* Jeffrey Waincymer, Procedure and Evidence in International Arbitration 915 (2012) ("There may also be psychological implications if witnesses are only subject to cross-examination, particularly where the parties or key officers of the parties are involved. A key witness will often wish to be able to express the story in an inter-personal way and not just in writing. Skilful cross-examination would not allow for such a narrative.").
7. *See* Marinn Carlson, *The Examination and Cross-Examination of Witnesses*, in Arbitration Advocacy in Changing Times 202, 203 (ICCA Congress Series No. 15, Albert Jan van den Berg, ed. 2011) (explaining that while facts can be put on paper, a witness's candor cannot).
8. *Id*.; *see also* Andrea Menaker & Noor Davies, *The Direct Examination of Witnesses and Experts Not Called for Cross-Examination: Balancing Efficiency and Fairness*, 2 BCDR Int'l Arb. Rev. 135, 149 (2105) (equating written witness statements and expert reports with direct oral testimony "erroneously assumes . . . that written statements and oral testimony have the same probative value and will be given equal weight by the tribunal").
9. S*ee* Jeffrey Waincymer, Procedure and Evidence in International Arbitration 914-915 (2012) ("The disadvantage of entirely removing any direct oral presentation of evidence is that an adjudicator forms a view about veracity and expertise based on the way a witness presents. If an adjudicator is only listening to the more adversarial form of cross-examination, an unfairly negative view might be formed. This is particularly so where the witness is speaking in a second language and is at the mercy of highly skilled common law cross-examiners."); *see also* Siegfried H. Elsing & John M. Townsend, *Bridging the Common Law-Civil Law Divide in Arbitration*, 18 Arb. Int'l 59, 63 (2002) ("Arbitrators will commonly, especially if prompted by common law lawyers, allow very abbreviated live direct testimony when the witness appears at the hearing, in order to avoid the tribunal's first live impression of a witness being produced by hostile questioning, but such testimony is normally (except for experts) kept to 15 to 30 minutes.").
10. *See* Jeffrey Waincymer, Procedure and Evidence in International Arbitration 899 (2012) ("Written statements [alone] may … be unhelpful where a more nuanced dialogue with the tribunal will be necessary. Too often written statements make

assertions that need to be explored orally in any event and hence can be of little probative value even if believed.").

11. *See* IBA Working Party, *Commentary on the New IBA Rules of Evidence in International Commercial Arbitration*, Bus. L. Int'l 2000, Issue 2, 14, at 32 ("[D]ocuments will often be easier to understand if explained by live testimony, because the fact situation is often complex.").

12. *See* Jeffrey Waincymer, Procedure and Evidence in International Arbitration 915 (2012) ("Another problem with no evidence in chief is that some busy arbitrators might not have properly read the witness statements. A short oral outline can ensure they better understand the case being made. A tribunal will thus often benefit from hearing some of the key elements orally to allow the witness to relax before cross-examination, become used to the process, and provide an indication of veracity and expertise and the degree to which the witness statement is truly theirs.").

13. *See* Jeffery Commission & Rahim Moloo, Procedural Issues in International Investment Arbitration 246-247 (2018) (proposing a model procedural order for use in investment treaty arbitration that provides for a right to request direct examination in its section 22.7: "In case a Party waives its right to cross-examine a witness or expert who provided a statement, such witness or expert may still be called at the hearing by request of the Tribunal or the other Party; in this event, the Party who had previously waived the right to examine a witness or expert shall be entitled to subsequent examination should that witness or expert be called and examined independently by the Tribunal or the other Party.").

14. In those cases, which are not publicly available, the applicable procedural orders allowed each party to designate up to three of its own witnesses or experts, who were not called for cross-examination, to testify.

15. S*ee Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Proc. Order No. 1 dated Oct. 14, 2016 ¶ 20.5 ("Direct examination is given in the form of Witness Statements and Expert Reports. However, the party presenting the witness or expert may conduct a brief direct examination at the hearing, limited to the content of their corresponding Witness Statement or Expert Report. Any witness called for direct examination may be cross-examined by the other party and questioned by the Tribunal."); *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Proc. Order No. 1 dated Apr. 4, 2017 ¶ 18.5 (same); *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Proc. Order No. 1 dated July 11, 2017 ¶¶ 19.8.1-19.8.3 ("The witness statement of each witness and expert report of each expert shall stand in lieu of the examination by the party producing the witness and expert ("direct examination"), subject to the provisions below and any agreement of the Parties or direction of the Tribunal. The Party presenting the witness or expert may conduct a brief direct examination of a witness or expert, which should be limited to the scope of prior testimony (including any corrections or updating thereof and any testimony responding to matters raised after the date of the witness's or expert's last statement or report). Absent leave from the Tribunal, direct examination of a witness shall not exceed 15 minutes and direct examination of an expert shall not exceed 30 minutes.").

16. *See* IBA Rules on the Taking of Evidence in International Arbitration (2010), Art. 8(3)(f) ("[T]he Arbitral Tribunal, upon request of a Party or on its own motion, may vary this order of proceeding, including the arrangement of testimony by particular issues or in such a manner that witnesses be questioned at the same time and in confrontation with each other (witness conferencing)").

17. *See* Jan Paulsson, *The Timely Arbitrator: Reflections on the Böckstiegel Method*, 22 Arb. Int'l 19, 23-24 (2006) (illustrating that quantitative equality of treatment of the parties will not always result in substantive equality, and advocating for flexibility).

How to "Hot Tub": The Chartered Institute of Arbitrators New Witness Conferencing Guidelines

By Thomas D. Halket

In April of 2019 the Chartered Institute of Arbitrators (CIArb) published its new *Guidelines for Witness Conferencing in International Arbitration* (the "Guidelines").[1] The Guidelines join a series of CIArb guides for international arbitration on topics ranging from interviewing a prospective arbitrator to awarding interest.[2]

Witness conferencing, or hot tubbing as it is more commonly known in the United States, is a procedure that has been used in arbitrations, both international and domestic, for over 20 years.[3] It is reported to have started in Australian courts, has been used for many years by other common law courts outside the United States and is slowly gaining in use in courts here.[4] Indeed, its success in court use likely was a motivating force for its use in arbitration.

Hot tubbing is a procedure that involves the fundamentally simultaneous testimony of two or more witnesses on the same subject or subjects. The witnesses are sworn in and appear before the adjudicator at the same time. Depending on the protocol, they are allowed to interact, even asking each other questions. Traditionally in the United States, its use has been largely confined to expert witnesses.

Notwithstanding its historic use and growing popularity, there has been relatively little guidance on the use of witness conferencing. The CIArb created the Guidelines to respond to this need.[5] The Guidelines expand on the witness conferencing concept itself, provide a partial "checklist" of factors that are helpful in determining whether to witness conference, recommend procedures for conducting conferencing and explain the checklist and procedures with detailed commentary. Although the Guidelines build on existing practice in a commonsense way, they also contain concepts which many, particularly in the United States, may view, at the very least, as innovative.

Perhaps the Guidelines' most unusual aspect is the expansive scope they give to the hot tubbing concept. They allow for hot tubbing not only of expert witnesses but also of fact witnesses.[6] And they allow for protocols that would permit the questioning to be under the control of the witnesses themselves, as well as under the control of the historically much more usual cases of the tribunal or counsel.[7] Although they recognize that witness control of the conference is most suitable for expert witnesses, they do not preclude control by fact witnesses.[8]

The operative part of Guidelines itself is divided into three parts: (i) the checklist, (ii) the standard directions and (iii) the specific directions. As mentioned, it is accompanied by an extensive set of explanatory notes. The checklist deals with a number of the more important factors that can impact a decision on whether and how to hot tub witnesses. The standard directions provide what the Guidelines describe as "a general framework for witness conferencing"[9] in an arbitration and include language that can be used in the first procedural order to set up that framework.The specific directions or protocols are intended to apply after it has been decided to use witness conferencing and there has been some consideration as to its nature. The specific directions are divided into three parts one for tribunal control of the process, one for counsel control and one for witness control. The explanatory material, covering just over half of the Guidelines' length, contain much of the underlying "meat" of the Guidelines.

The Checklist

The Checklist[10] considers issues pertaining to whether to conference witnesses *and* how to do so. The former includes (i) the obvious need for there to be an issue of credibility and conflicting fact or expert testimony, as well as (ii) the possibly less obvious relationship between the witnesses. The "how-to's" include normal pre-hearing preparations (such as expert reports) and logistical considerations (such as the layout of the hearing room and the use of video) as well as considering and addressing any relationship between the witnesses. The explanatory notes elaborate on all of these considerations.[11]

The views expressed in this article are those of the author and not of the Chartered Institute of Arbitrators or Fordham University School of Law.

Thomas D. Halket (thalket@halketchambers.com) is an attorney, chartered arbitrator, and mediator in New York. A fellow of Chartered Institute and the College of Commercial Arbitrators, a member of National Academy of Distinguished Neutrals and on the "Tech List" of Silicon Valley Arbitration and Mediation Center, he has been an arbitrator for over 30 years. He was the 2019 president of the Chartered Institute of Arbitrators and is an adjunct professor at the Fordham University School of Law.

The Guidelines' recognition of the importance of dealing with the relationship between the witnesses is noteworthy. Covering experiential differences—different testimonial experience or cultural circumstances—and actual pre-existing professional or personal associations, the Guidelines observe that these factors, and others, can affect whether witness conferencing is appropriate.[12] For example, the existence of a prior mentor or collegial relationship between two opposing experts may argue against hot tubbing them.[13] As another example, it may be inadvisable to conference older and younger witnesses if they come from a culture where significant deference is given to age.[14]

Another notable concept in the Checklist is the anticipation, more fully set forth in the Explanatory Notes,[15] that two hot-tubbed expert witnesses might prepare a joint expert report. The Explanatory Notes even provide a possible format for such joint report.[16] The proposed format has three textual columns and as many rows as necessary. Each row pertains to a different issue, with the first column setting forth the issue and the remaining two providing the respective positions of the two experts and whether they agreed or disagreed and, if they disagreed, why.

The Standard Directions

If the parties and the tribunal conclude that it is appropriate to hot tub witnesses, the Standard Directions[17] can then be used as template for an order, whether in the first procedural order of later, setting the witness-conferencing general ground rules for the arbitration. The Standard Directions cover a mechanism for the determination of which witnesses will be conferenced, the preparation of a description of the areas of witness agreement or disagreement (which the Standard Directions call the "Schedule") and a stipulated chronology of uncontested facts relating to testimony to be given (which the Standard Directions call the "Chronology") and certain procedures for the conference itself.[18] The Explanatory Notes make clear that Schedules will usually be prepared, in the case of experts, by the witnesses themselves and, in the case of fact witnesses, by the parties.[19] A Schedule prepared by expert witnesses is essentially the joint expert report contemplated by the Checklist.

The Standard Directions specifically provide for the possibility that the witnesses in question may meet and confer in order to prepare either the Schedule or the Chronology. The parties and the tribunal are given the option to allow counsel to participate in these discussions or to prohibit such participation. Importantly, under the Standard Directions these witness discussions are deemed privileged, at least as to their use in the arbitration.

The Specific Directions

The Specific Directions contain more detailed language for the witness-conferencing order. They cover whether or not the witnesses in question are to be sequestered, the administration of oaths, an affirmation of the truth of any written witness statement and various provisions relating to the order of questioning and testimony and specific to whether the conferencing is to be led by the tribunal, the witnesses or counsel.[20]

For example, if the tribunal is to lead the conferencing, the Specific Directions provide first that each witness may present their respective "position," next that the tribunal examine the witnesses on their disagreements and finally that counsel be afforded an opportunity to examine both their own witness and that of the other side.[21] The Explanatory Notes make clear that in this type of witness conferencing (*i.e.*, tribunal led) the second step is the most important.[22] There are analogous provisions for witness-led and counsel-led hot tubbing. In each of those cases, as in the tribunal-led case, the "leaders" are the ones primarily responsible for questioning the witnesses to ascertain areas of agreement and disagreement and the strengths and weaknesses of each witness's positions where they disagree.

Conclusion

There is, and has been for some time, an ongoing debate on how best to achieve arbitration's goal of efficient adjudication of disputes. The organization of the presentation of the evidence has been one of the principal focuses of that debate. At the same time, as disputes become more complex, particularly if they involve technology issues, it can be difficult for tribunals to assess conflicting testimony, whether from experts or fact witnesses. Witness conferencing—hot tubbing—has been proposed to solve both of these concerns.

But witness conferencing is not without difficulties. As the Guidelines themselves indicate, unless the witness conferencing is carefully planned, it can be largely a waste of time. For example, relationship issues between the witnesses to be conferenced can impede their interaction as can poor logistical planning.

By providing the Guidelines, the CIArb establishes a comprehensive roadmap for hot tubbing in arbitration. The Guidelines offer a sound approach to witness conferencing building on common practice. At the same time, the Guidelines innovate by going beyond traditional expert witness hot tubbing, by including such concepts as fact witness hot tubbing, possible witness control of the process and a qualified privilege for witness o witness preparations. Time and use of the Guidelines will be required to determine just how much acceptance these innovations will gain in the arbitral community here in the United States and elsewhere. As thoughtful proposals to aid in the efficient and just resolution of disputes, they deserve consideration.

Endnotes

1. https://www.ciarb.org/resources/guidelines-ethics/international-arbitration/.
2. *Id*.
3. Martin Hunter, *Expert Conferencing and New Methods in International Arbitration 2006: Back to Basics*, ICCA International Arbitration Congress (Albert J. van der Berg, ed., Kluwer Law International, 2007).
4. Jones Day, *Room in American Courts for an Australian Hot Tub?*, (April 2013), https://www.jonesday.com/room_in_american_courts/.
5. The Guidelines 13.
6. *Id.* at 11.
7. *Id.* at 20-23.
8. *Id.* at 57-62.
9. *Id.* at 12.
10. *Id.* at 16-17.
11. *Id.* at 30-33.
12. *Id.*
13. *Id.* at 33.
14. *Id.* at 32.
15. *Id.* at 35-39.
16. *Id.* at 38.
17. *Id.* at 18-19.
18. *Id.*
19. *Id.* at 47.
20. *Id.* at 20-23.
21. *Id.* at 20.
22. *Id.* at 55.

Restoring Faith in the Party-Appointed Expert

By Howard N. Rosen and Gigi D'Souza

Introduction

Experts, being in the role of "neutrals" with the obligation to assist arbitrator(s) in reaching decisions on issues that require special expertise, have come under suspicion as being advocates-in-disguise for the party retaining them, and their reports and testimony in front of arbitral tribunals are frequently met with skepticism.

This article initiates an examination of "quantum" experts, their reports, and their role, picking up from comments pertaining to expert witnesses in the recent *ConocoPhillips v. Venezuela* award;[1] continuing with a discussion of the opposing forces placed on experts, and concluding with our recommendations to further encourage party-appointed experts to act as true neutrals.

Party-Appointed Experts and Tribunal-Appointed Experts

The Two Traditions

The role of party-appointed experts differs considerably between the common law and civil law traditions. In common law jurisdictions, party-appointed experts are the norm. However, for encouraging bias in experts, this adversarial system is sometimes criticized.

Such bias might come about in a variety of ways. First, party-appointed experts are primarily exposed to the evidence and reasoning supporting the case of the party appointing them and may be inclined to adopt the thinking underpinning that case. Second, criticism from opposing experts and cross examination by counsel may encourage witnesses to defend their point of view more strongly than they would under a more consensual approach. Third, it is possible that parties will seek to appoint only experts whose views are most likely to support their case—a process known as "expert shopping"—which may increase the likelihood of a tribunal being presented with extreme or irreconcilable evidence from opposing experts.

In contrast, civil law systems generally allow a greater role for tribunal-appointed experts, who are usually required to be independent of the parties. The appointment of a single expert, in principle, removes the bias allegedly inherent in the adversarial system, and may also tend to reduce costs, all else equal.

The civil law approach is not without its critics. Arbitrators may not be skilled in the selection of appropriate experts for a given issue. A single expert may also be prone to "own theory" bias,[2] and such unrepresentative views might not be exposed without challenges to expert evidence. Finally, parties may also appoint their own experts to review and challenge the evidence of the tribunal-appointed expert, leading to an increase in cost over a system of party-appointed experts alone.

The Best of Both Worlds?

In principle, arbitrators often have the power to appoint their own experts; for instance, under Article 6 of the IBA Rules or the UNCITRAL Model Law, n 1, Art 29. In practice, however, arbitral tribunals have followed the common law model of party-appointed experts.

The IBA Rules require expert witnesses to state their experience and qualifications, set out the facts on which their opinions are based, and describe the method, evidence and information relied upon.[3] The IBA Rules allow a tribunal to order a meeting of experts for the purpose of reaching agreement, where possible, and document areas of agreement and disagreement.[4]

The updated IBA Rules, adopted on 29 May 2010, require experts to describe their instructions and make a statement of their independence from "the Parties, the legal advisors and the Arbitral Tribunal."[5] A party-appointed expert must affirm that the opinions in his or her expert report are "his or her genuine belief."[6] The IBA

Howard Rosen is an expert witness and a managing director at Secretariat International, based in Toronto. He has experience advising on all aspects of business valuations, damages quantification, and corporate finance-related matters. He has acted as a court-appointed administrator and as an arbitrator and is a leading business valuation and damages expert.

Gigi D'Souza is a manager at Secretariat International, based in New York. She is a financial and economic consultant and damages quantification and valuation expert in litigation and international arbitration. She has also assisted with trial preparation for the direct- and cross-examination of quantum expert witnesses.

Rules may be seen as an attempt to achieve the benefits of independence promised by the civil law tradition, but in the context of the adversarial model of party-appointed experts followed in the common law tradition. Suspicions linger, however, as to the extent of their success.

ConocoPhillips v. Venezuela Award

On March 8, 2019, the tribunal in *ConocoPhillips v. Venezuela* issued its award after an arbitration process that lasted almost 12 years.[7] There were several party-appointed quantum (valuation) experts who opined on the disputed issues. The tribunal made reference to the reports and testimony of the expert witnesses on both sides of the arbitration in a less than favorable manner. For instance, the tribunal found that the experts' testimony was ill-founded, stating that "the experts had made various assumptions and assertions that were either wrong, not cross referenced to evidence on the record, or simply not supported by sufficient evidence."[8]

One possible reason for this lack of a sufficiently supported opinion was that "the valuation experts on several occasions insisted that their analysis was limited by the instructions provided by their respective instructing Party."[9]

Similarly, the tribunal stated: "The valuation experts from both sides take the defense of their respective clients in supporting their cost assumptions, not aware of how far away they are from reality."[10]

Clearly, the issue appears to be a lack of independence on the part of the experts, who eschew or simply fail at providing objective evidence as support for their opinion in favor of "advocating" for the positions of their respective clients.

Another issue with the experts cited by the tribunal was a lack of helpfulness on account of confusion created by the experts. For instance, the Tribunal stated: "The division of opinion is such that the comparison of the *numerous and sometimes confusing arguments is difficult to follow, and in large part not useful* […]"[11] (emphasis added).

The result of the foregoing "confusion" was that the tribunal was unable to make use of either party's expert's opinion, stating that instead of being able to rely on the experts' evidence, the tribunal itself had to "make certain adjustments that some experts may consider to be a deviation from economic discipline."[12]

Such action by the tribunal in resolving economic matters is far from ideal, as evidenced when the tribunal states:

> *The Tribunal would have preferred* to be faced with proposals presented clearly by the experts in such a way *that the Tribunal could reach a decision without becoming involved too deeply into the field of economics* which, after all, should be the experts' foremost area of expertise. However, *such a guided choice is impossible* (emphases added).[13]

The Tribunal admonished both parties' experts, stating that

> Serious doubts are permitted given the extreme discrepancies of the results from highly educated professionals who should have a scientific background allowing conclusions coming closer to one another in their elaboration and in their results.[14]

The issues faced by the tribunal were despite certain measures it took to bridge the gap between the experts' positions during the proceedings. One suggestion made by the tribunal to rectify the discrepancies was for the "valuation experts to confer with the aim of narrowing the gaps between their respective positions."[15] Another suggestion made by the tribunal was to have an interactive excel model provided by the experts.[16]

Opposing Forces on the Experts

a) Duty to the Tribunal

Experts owe their priority to the tribunal, to be open, honest, independent, and objective. To be truly impartial from its retaining party, the expert must consider a balance of evidence to provide a neutral opinion in its written report and oral testimony, which is to be based on the facts and documents underpinning such opinion.[17] The expert report "must logically and realistically lead to the conclusions drawn by the expert setting out the assumptions, reasoning, methodology and supporting evidence."[18] Lastly, "he or she should be able to articulate his or her opinions clearly and persuasively, demonstrate how such opinions were reached and, most importantly, not lose sight of what the Tribunal needs to understand."[19]

b) Duty to Counsel

At the early onset of a proceeding, the expert may be involved with providing input for the case strategy in terms of managing the client's expectations.[20] The expert report should highlight points that support the retaining party's position, but not advocate it.[21] Additionally, "the expert must possess the mental agility to withstand the challenging test of cross-examination."[22]

There is a distinct line between independence and assuming the role as the "lawyer's assistant." As well, the expert should refrain from providing any comments regarding the legal merits of the case and must limit him- or herself to the discussion of matters within his or her own area of expertise.

c) Duty to the Client

The majority of experts are professionals and as such, the expectation for delivering their services in an expert capacity require the exercise of reasonable skill and due care as required from professionals. Furthermore, due to the reliance on, and exposure to, confidential client information, the duty to preserve that confidentiality is owed.

The recurring nature of client-specific engagements are common, however, a close personal relationship with a client may been viewed as a potential conflict of interest.

"To be truly impartial from its retaining party, the expert must consider a balance of evidence to provide a neutral opinion in its written report and oral testimony, which is to be based on the facts and documents underpinning such opinion."

d) Duty to the Opposing Expert

It is standard practice for a tribunal to request the experts to meet in advance of evidentiary hearing in an "attempt to reach an agreement on issues within the scope of their expert reports,"[23] as was the case in the *ConocoPhillips v. Venezuela* matter. Another avenue to resolve disparate opinions can be achieved through witness conferencing—"the arrangement of testimony by particular issues or in such a manner that witnesses be questioned at the same time and in confrontation with each other."[24] In either instance, the meeting of the experts should be conducted in a manner of mutual respect, while concurrently allowing for critique on areas of weakness in the opinion of the opposing expert. The appearance of impartiality by both experts should allow for the "lack of fear of changing an opinion if presented with new facts of which he or she was not aware of at the time of writing the report."[25]

Suggestions for the Future

We suggest below three measures that might help to preserve the best features of party-appointed experts while blunting those experts' incentives to take unreasonable, contradictory or partisan positions.

The first of those measures relates to experts' terms of reference. It is our experience that the vast majority of the differences between party-appointed experts arise in consequence of their either having received different instructions or having employed different assumptions.

A useful step would be for experts to meet with the tribunal and review their instructions prior to the preparation of their expert reports. The tribunal could then review those instructions and agree (or order) changes so that the instructions were clear and fitted the purposes of the tribunal. In the extreme, the tribunal could order that both experts receive identical instructions or assumptions, which we shall refer to as "common-basis conclusions," to deprive parties of the opportunity to use instructions to guide their experts' testimony.

In principle, an order to reach common-basis conclusions might be more powerful than existing procedures aimed at narrowing differences between experts, such as meetings of experts (which was unsuccessful in *ConocoPhillips*) or witness conferencing. In our experience, those procedures do not result in a substantive narrowing of the gap if the experts' approaches embody incompatible instructions or assumptions. An order to present one or more sets of common-basis conclusions solves these problems and could be used by a tribunal either before or after a hearing to aid its understanding of the impact of different assumptions or instructions.

The second suggested measure relates to the transparency and feedback provided by way of arbitrators' written awards. In many arbitrations, the proceedings, expert evidence, awards and tribunals' reasoning remain confidential. In those circumstances, a tribunal's disregard for or criticism of an expert's testimony may be known only to a small circle of insiders. Under a veil of confidentiality, a partisan expert might prosper for a considerable period. The diffuse nature of international arbitration may also mean that word travels only slowly between seats of arbitration or between arbitrators.

The best antidotes to expert partisanship, therefore, are transparency, feedback and peer review. The more that arbitrators comment on the merits of experts' work and the more that those comments are published, the greater will be the incentives for experts to remain independent of the parties appointing them. Those incentives will counteract an expert's desire to please, leading to an increase in actual as well as perceived independence. We would therefore recommend that on all awards, public or confidential, tribunals include a summary of their opinions on the experts themselves. This would assist counsel in assessing the usefulness of the expert they had retained and would provide a strong disincentive to those experts that do not understand their role.

The third measure we suggest is for the tribunal to routinely order a joint report of the experts in a summary form which isolates the technical points of the experts, where they agree completely, have some agreement, or disagree completely. It would also identify the approximate effect on the quantum of damages of each position.

Using this summary report, the tribunal can then decide which issues are best brought up in witness conferencing, and determine based on the quality of the evidence, which expert position they prefer.

It is also helpful for the experts to prepare a schedule that informs the tribunal of the approximate impact of the differences between the experts. In some cases, we have prepared a financial model that identifies the issues between the experts and allows the tribunal to select either position proposed by the expert, or any position in between. This provides further latitude to the tribunals as they may not agree with the conclusions of either expert or wish to find an answer based on other findings. As stated previously, the tribunal in *ConocoPhillips v. Venezuela* also recommended such a measure when it stated:"The Tribunal cannot reach conclusions based on simple excel-sheets not accompanied by explanations and incapable of being operated on an interactive mode."[26]

This article has outlined the various factors that influence the behavior of experts and has posited that the best way to increase the perceived independence of party-appointed experts is to increase transparency and disclosure in order to align the interests of experts with those of the tribunal. If tribunals were also encouraged to comment on expert testimony in their awards, experts would receive feedback on their work and be subject to external scrutiny. That feedback and scrutiny will alter experts' incentives and go some way to resolving party-appointed experts' perceived lack of independence.

Endnotes

1. Award in ICSID Case No. ARB/07/30 in the Arbitration Proceeding Between *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V., ConocoPhillips Gulf of Paria B.V. and ConocoPhillips Company v. Bolivarian Republic of Venezuela*, dated March 8, 2019 (herein referred to as the "*ConocoPhillips v. Venezuela* Award" or simply, the "Award").
2. *I.e.*, a tendency to promote an expert's own published views over consensus opinion in their field of expertise.
3. IBA Rules, Article 5.2, 1 June 1999.
4. IBA Rules, Article 5.3, 1 June 1999.
5. IBA Rules, Taking of Evidence in International Arbitration, Article 5.2 (c), 29 May 2010, <http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx> (last accessed 29 May 2019). In the past there had been discussion on OGEMID as to whether an "independent" party-appointed expert is, in effect, a contradiction in terms. In that debate, Mark Kantor noted that the term "independent" (or "impartial" or "neutral") is not unique to the IBA rules as a characterization of the relationship between an expert and the party appointing him or her, but also appears in Article 7 of the ICC rules and elsewhere. Whether one believes the characterization a fair one or not, the drafters of these documents seem to consider, at a minimum, that omission of the term would not be useful.
6. IBA Rules, Taking of Evidence in International Arbitration, Article 5.2 (g), 29 May 2010, <http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx> (last accessed 29 May 2019).
7. The process began in late 2007; *see ConocoPhillips v. Venezuela* Award, par. 1.
8. *ConocoPhillips v. Venezuela* Award, par. 56.
9. *ConocoPhillips v. Venezuela* Award, par. 269.
10. *ConocoPhillips v. Venezuela* Award, par. 615
11. *ConocoPhillips v. Venezuela* Award, par. 831. Further examples of this are seen in paras. 832 and 883.
12. *ConocoPhillips v. Venezuela* Award, par. 884.
13. *ConocoPhillips v. Venezuela* Award, par. 884.
14. *ConocoPhillips v. Venezuela* Award, footnote 650.
15. *ConocoPhillips v. Venezuela* Award, par. 55.
16. See par. 270 of the Award which states "The Tribunal cannot reach conclusions based on simple excel-sheets not accompanied by explanations and incapable of being operated on an interactive mode."
17. *Dulong v. Merrill Lynch Canada Inc*., (2006) ON SC.
18. M. Roth and M. Geistlinger "Practical Aspects of Using Expert Evidence in International Arbitration" Yearbook on International Arbitration Volume II, page 81, available at <http://www.lalive.ch/data/publications/Ehle.pdf> (last accessed 29 May 2019).
19. *Id*., 78.
20. *Id*., 79-80.
21. *Id*., 81.
22. *Id*., 78.
23. *Id*., 82.
24. IBA Rules, Taking of Evidence in International Arbitration, Article 8.3 (f), 29 May 2010, <http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx> (last accessed 29 May 2019).
25. R. Mongeau, "The Expert Status: From a 'Hired Gun' to an Advisor to the Judge," CICBV Eastern Regional Conference, p. 6.
26. *ConocoPhillips v. Venezuela* Award, par. 270.

Expedited Procedure Provisions: A Gimmick or an Answer to International Arbitration's Ills?

By Raphael G. Kaminsky and Hsiao-Jan Juang

Issues with Expedited Procedure Provisions

The efficiency of international arbitration has been the target of complaints about the process for at least a decade. In 2010, the Queen Mary International Arbitration Survey identified the disclosure of documents, the parties' written submissions, the constitution of the tribunal and hearings as the main stages of the arbitral process that caused delay and increased cost in international arbitration.[1] The interviewees agreed that the main causes of delay were within the control of the parties, but they considered that arbitrators and arbitration institutions were best placed to reduce delay.[2]

Cost and delay were also at the epicenter of the 2015 Queen Mary International Arbitration Survey.[3] Interviewees included "lack of speed" among the worst characteristics of international arbitration, and a large majority of respondents were in favor of the introduction of simplified procedures in institutional rules for small claims.[4]

To address this criticism, various arbitral institutions adopted different provisions that could render arbitral process cheaper and speedier. Among others, the International Center for Dispute Resolution (ICDR), the International Court of Arbitration (ICC),the Hong Kong International Arbitration Center (HKIAK), the Stockholm Chamber of Commerce (SCC), and the Singapore International Arbitration Center (SIAC) decided to offer expedited procedures setting boundaries on the length of written submissions, eliminating or discouraging oral hearings, streamlining the selection of arbitrators, limiting the addition of new claims and counterclaims, and shortening the time period for the arbitration proceedings and for awards to be rendered. The expedited rules may be applied automatically for cases ranging in size from $250,000 (ICDR) to $2 million (ICC) subject to certain protective carve-outs.

The United Nations Commission on International Trade Law (UNCITRAL) Working Group II (Dispute Settlement) has undertaken consideration of issues relating to expedited arbitration.[5] In order to inform its work, the Working Group issued a questionnaire on expedited arbitration to arbitral institutions and related organizations worldwide covering a series of essential questions. A comparative analysis of the responses by the 18 institutions that responded as of July 29, 2019 was prepared by the International Council for Commercial Arbitration (ICCA).[6]

One of the questions posed is,"In administering expedited arbitration, does your institution have a role in ensuring due process and fairness, as well as the quality of the award?"[7] The purpose of an arbitration is to get a binding decision that is voluntarily complied with by the unsuccessful party and one that is enforceable before national courts. As such, to avoid the risk of annulment of the award at the place of arbitration and to make it internationally enforceable, the tribunal should not promote expeditiousness to the detriment of party autonomy or due process.

Potential Restriction on Party Autonomy

Arbitration is a form of private justice, founded on the principle of party autonomy that allows parties to determine not only the law governing the merits of the dispute, but also the procedural framework applicable to the arbitral proceedings. This principle is endorsed not only in national laws, but also by international institutions and instruments such as Article V(1)(d) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") and Article 19(1) of the UNCITRAL Model Law on International Commercial Arbitration, which require a balance between party autonomy and institutional control in arbitral proceedings.

Friction between procedural expediency and party autonomy arises in the context of expedited procedures pertaining to the mandatory appointment of a sole arbitrator.

Raphael G. Kaminsky is a partner at Teynier Pic, the first dispute resolution boutique based in Paris, France. He specializes in international arbitration, commercial litigation and ADR. He has experience in both complex domestic and international litigation. He represents clients in domestic and international arbitration, in mediations and conciliations and regularly sits as an arbitrator. Mr. Kaminsky is admitted in Paris and New York.

Hsiao-Jan Juang, Ph.D., has studied and worked in France, China and Taiwan. Her doctoral dissertation "Chinese Foreign Direct Investment Law: A Law in transition" was completed under the joint international supervision of Paris XII University and National Chengchi University.

Various arbitral institutions, such as the ICC,[8] the SIAC,[9] the ICDR[10] and the SCC[11] have opted for the appointment of a sole arbitrator as the default rule in expedited proceedings. This preference for sole arbitrators allows the arbitral institution to override the parties' express agreement as to the number of arbitrators required to resolve the dispute, which raises some concerns when an award rendered under expedited procedure is challenged at the seat or during enforcement proceedings. Such arguments were raised before the Singaporean and the Shanghai courts pertaining to the expedited procedure under the SIAC Rules.

In the case *AQZ v. ARA* brought before the Singaporean High Court in 2015,[12] an award rendered under the 2010 SIAC's expedited procedure provisions[13] was challenged on the ground that the chairman of the SIAC had used the discretionary power vested by the SIAC Rules to appoint a sole arbitrator where the parties had expressly specified a tribunal of three in their arbitration agreement. The Singaporean judge rejected the challenge and took the view that by agreeing to SIAC arbitration, the parties had also agreed to the application of the terms of its expedited procedure, including the appointment of a sole arbitrator by the chairman of the SIAC where the expedited procedure provisions apply.

"Recent case law has illustrated that this 'due process paranoia' is unfounded and unsubstantiated."

This point of view was not shared by Chinese courts. In *Noble Resources,*[14] the parties entered into a sales contract which contained a clause providing for arbitration under the SIAC Rules with a three-member tribunal in Singapore. The claimant commenced SIAC arbitration and applied for the expedited procedure under the 2013 SIAC Rules,[15] whereas the defendant opposed the application of said procedure and insisted that a three-arbitrator tribunal be constituted pursuant to the arbitration agreement.

In the absence of party agreement, the vice chairman of the SIAC appointed a sole arbitrator for the expedited procedure. The defendant refused to participate in the arbitral proceedings and an award was rendered in favor of the claimant. The enforcement of the award was sought before the Shanghai court.

The Shanghai court first emphasized that party autonomy is the foundation of arbitration and then upheld the defendant's position by finding that the expedited procedure under the 2013 SIAC should not be interpreted as allowing the SIAC to override the parties' consent as stated in their agreement. As such, the Shanghai court ruled that the appointment of a sole arbitrator breached the arbitration agreement and that the award should not be enforced under Article V(1)(d) of the New York Convention.

Potential Violation of Due Process

While contact between the parties and the tribunal fosters the trust of the parties in the tribunal,[16] it is also undeniable that hearings are one of the main causes of delay in international arbitration.

Under most expedites procedure provisions, the arbitrator may circumvent the hearing stage of the arbitral process, provided that the process is carried out in accordance with due process considerations. The arbitrator must therefore ensure that the document-based decision does not affect the parties' opportunity to present their case. Failure to provide such opportunity may render the award subject to the risk of being set aside at the seat of the arbitration or refused recognition and enforcement elsewhere.

Article V(1)(b) New York Convention is a common ground upon which to challenge an award, even though awards are rarely set aside or denied enforcement on the basis that the tribunal has infringed on the parties' due process rights. In most jurisdictions, courts typically defer to the arbitrator's discretion when reviewing the procedural decision.

However, parties' willingness to challenge awards for lack or denial of due process has given rise to a trend in international arbitration,[17] which encourages arbitrators to lean towards the side of the protection of due process out of the "paranoia" that their award would otherwise be subsequently challenged. Consequently, arbitrators often prefer granting parties additional time, accepting belated introduction of new claims or defenses, or holding unnecessary long hearings, even if those procedural decisions come at the expense of expediency.

Recent case law has illustrated that this "due process paranoia" is unfounded and unsubstantiated.

In a case brought before the Svea Court of Appeal,[18] the appellant challenged an award rendered under the SCC expedited procedure, maintaining that the award was invalid. In this case, the arbitrator had deemed that, considering the submissions of the parties and the witness statements, it was not necessary to hold a hearing to resolve the dispute. The court judged that, when deciding not to hold a hearing, the arbitrator applied the rules and the applicable law that the parties had agreed upon and found that the decision not to hold a hearing did not contradict the arbitration rules applicable to the proceedings. The due process challenge was therefore dismissed.

The same solution was adopted by the Singaporean High Court in *China Machine New Energy Corp v. Jaguar Energy Guatemala*.[19] In this case, an arbitration clause provided that the arbitration was to be completed within 90 days of the selection of the third arbitrator, which had taken place in March 2014. The parties subsequently amended this requirement and the award was rendered 20 months after the selection of the third arbitrator. The losing party to the arbitration applied to the court to set aside the award on the ground of "procedural dysfunction," arguing that various measures adopted by the tribunal had "significantly undermined" its opportunity to present its case, and that since the arbitration was expedited, the arbitral tribunal bore a "heightened duty […] to police the process." For the Singaporean court, it was clear that the tribunal was seeking to give effect to the parties' agreement to expedited arbitration, whilst doing its utmost to preserve due process. The court held that the tribunal had a responsibility to ensure due process, but it had to do so "within the structure that the parties had placed it in, principally the constraint of time," and rejected the appellant's contention.

Expedited procedures put additional strain on the parties' right to a fair trial and parties might resist enforcement of awards on the basis that they were not able to fully present their case due to the accelerated nature of the proceedings and the tribunal's tendency to simplify the proceedings as much as possible in order to comply with the short delay to render the award. Parties may also be tempted to challenge awards if they consider that their right to equal treatment was infringed upon. It is thus paramount that the tribunal focuses on the protection of these rights during the arbitral proceedings in order to safeguard the enforceability of future awards.

What Can Parties Do to Ensure the Efficiency of Expedited Procedures?

From the start, avoiding delay is "within the control of the parties."[20]

Prior to the constitution of the tribunal and in an ideal world, parties could agree on the arbitral procedure. However, this seems rather unrealistic as parties can rarely anticipate the possibility of a dispute when the contract is entered into.

Once the tribunal is constituted, several measures are more realistically available to the parties in order to ensure the efficiency of the arbitral procedure: First, prior to the case management conference, parties can try and reach agreement on the key procedural steps and features of the proceedings, such as the number of submissions, the extent of document production, the necessity of a hearing, etc. Second, and this is a general principle in international arbitration, parties should cooperate in good faith and respect the procedure that has been set out by the tribunal or agreed upon by the parties. Third, and the most important step of all, parties should choose a pro-arbitration jurisdiction as the seat of arbitration, as these jurisdictions tend to be more familiar with expedited arbitration and are less likely to annul such awards.

What Can Arbitrators Do to Ensure the Efficiency of Expedited Procedures

As the ultimate managers of the arbitration process, tribunals play a crucial role in keeping the procedure on track and should therefore adopt a proactive attitude from the start, while always assessing the compliance of the process with party autonomy and due process. Consequently, even if time is of the essence in an expedited procedure, the tribunal should remain extremely attentive to the parties' position on case management and set a realistic procedural calendar.

At the first case management conference, the tribunal may, if it considers appropriate, decide to limit the number and/or the length of written submissions, *but* only if this limitation does not prevent the parties from fully presenting their case. The same rule applies to the limitation on document production and evidence.

Other than being proactive at the outset, the tribunal should also be flexible throughout the arbitral proceedings, mainly because some procedural issues cannot be properly resolved at the first case management conference and need a better understanding of the case from the tribunal (e.g., admission of new claims or necessity of holding hearings).

As to the necessity of holding a hearing, if both parties request a hearing, it is recommended that the tribunal hold a brief hearing that will minimize the delay and comply with the parties' agreement. Absent such party agreement, the tribunal should assess, on a case by case basis, whether a hearing is indispensable for parties to fully present their case and whether the benefits of a hearing may justify the time and cost incurred.

Finally, the tribunal should try to understand the legal background of each party. One of the characteristics of international arbitration is its international nature: parties and arbitrators are often from different legal cultures and jurisdictions and expectations over how the proceedings should be conducted may differ greatly from one to another (e.g., unlike civil law systems, oral hearings are considered paramount in common law countries. In some countries terms of reference are mandatory, etc.). By understanding each party's legal background, the tribunal can properly manage the expectations of the parties and the proceedings and secure its award from abusive challenges.

Conclusion: Are Expedited Procedure Provisions Necessary or Do We Simply Need More Gutsy Arbitrators?

The need for expedited procedures is a matter of debate among practitioners. Some are adamant that the introduction of expedited procedures is necessary to fix some of international arbitration's ills and that there is a high demand for it. Others contend that the expedited procedures are not as revolutionary as some institutions may claim and that regular arbitration rules may suffice to address the users' concerns.

One ICC case discussed during the World Café of the 2018 Vienna Arbitration days illustrates that the regular arbitration rules can be perfectly sufficient to address some of the users' concerns.[21] In this case, on the first day of the hearing in November 2018, the parties approached the tribunal with a joint request to have the award rendered by the end of the year. That left the tribunal with less than five weeks to (i) deliberate, (ii) draft the award, (iii) submit the award to the ICC Court for scrutiny, (iv) sign the award and (v) notify the award to the parties. With seamless cooperation from the parties, the tribunal, as well as the ICC Secretariat and court, the tribunal managed to deliver the award in time. This case illustrates that the ICC rules may suffice, or at least offer the necessary tools to conduct the arbitral proceedings expeditiously *so long as* all participants cooperate willingly and if the arbitrator is gutsy enough to manage the proceedings firmly and diligently.

At the end of the day, it should be remembered that, for most arbitral institutions, the tribunal can shape the proceedings as it sees fit and it is up to the arbitrators (with the parties' cooperation) to balance speed, cost, quality, party autonomy and due process in order to provide an arbitration that is time-efficient and cost-effective. However, expedited procedure provisions may give arbitrators the extra encouragement needed to avoid certain parties' guerilla tactics and refuse groundless procedural requests so long as (s)he does not fall into the trap of the "due process paranoia."[22]

Endnotes

1. P. Friedland and L. Mistelis, 2010 Queen Mary International Arbitration Survey: Improvements and Innovations in International Arbitration, 2010, p. 32, retrieved from: http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2010_InternationalArbitrationSurveyReport.pdf.
2. *Id.*
3. P. Friedland and L. Mistelis, 2015 Queen Mary International Arbitration Survey: Choices in International Arbitration, 2015, p. 7, retrieved from: http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf.
4. *Id.*
5. Annotated Provisional Agenda for September 23-27 2019, https://undocs.org/en/A/CN.9/WG.II/WP.208.
6. Responses to the UNCITRAL Questionnaire a on Expedited Arbitration (as of 29 July 2019), available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/responses_to_questionnaire_29_july.pdf.
7. *Id*.
8. Article 2(1) Appendix VI of the ICC Rules.
9. Arbitration Rules of the Singapore International Arbitration Centre, 6th Edition, 1 August 2016, Rule 5.2.b.: "the case shall be referred to a sole arbitrator, unless the President determines otherwise."
10. ICDR's International Dispute Resolution Rules and Procedure, 2014, Article E-6 : "A sole arbitrator shall be appointed as follows […]."
11. SCC Rules for Expedited Arbitrations, 2017, Article 17: "The arbitration shall be decided by a sole Arbitrator," retrieved from: https://sccinstitute.com/media/178161/expedited_arbitration_rules_17_eng__web.pdf.
12. M Hwang, A. Chang, "AQZ v ARA [2015] SGHC 49, Supreme Court of Singapore; High Court, Originating Summons No 530 of 2014 and Summons No 3168 of 2014, 13 February," A contribution by the ITA Board Reporters, Kluwer Law International.
13. Arbitration Rules of the Singapore International Arbitration Centre SIAC Rules, 4th Edition, 1 July 2010, Rule 5, retrieved from: http://www.siac.org.sg/images/stories/articles/rules/SIAC_Rules_2010_schedule_of_fees-revised_16Jan2013.pdf.
14. K. Sanger, S. Hu, T. Furlong, "PRC Court refuses to enforce an SIAC award made under Expedited Procedure,"HSF Notes, 22 August 2017, retrieved from: https://hsfnotes.com/arbitration/2017/08/22/prc-court-refuses-to-enforce-an-siac-award-made-under-expedited-procedure/.
15. Arbitration Rules of the Singapore International Arbitration Centre, 5th edition, 1 April 2013, Rule 5, retrieved from: http://www.siac.org.sg/images/stories/articles/rules/SIAC%202013%20Rules_5th%20Edition.pdf.
16. M. Bühler, P. Heitzmann, "The 2017 ICC Expedited Rules: From Softball to Hardball?" Journal of International Arbitration, 2017, vol. 34, issue 2, p.140.
17. A. Bates Jr & Z. Torres-Fowler, "Abuse of due process in international arbitration: is due process paranoia irrational?" American Journal of Construction Arbitration & ADR, Vol.1, N°2, pp. 245-272, spec. p. 246.
18. Svea Court of Appeal, Case N° T6238-10, 24 February 2012, retrieved from https://www.arbitration.sccinstitute.com/Swedish-Arbitration-Portal/Court-of-Appeal/Court-of-Appeal/Court-of-Appeal/d_1767474-judgment-of-the-svea-court-of-appeal-24-february-2012-case-no.-t-6238-10.
19. China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another, Singapore High Court, 26 April 2018, retrieved from https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/180426---os-185-2016---final-pdf.pdf.
20. P. Friedland and L. Mistelis, 2010 Queen Mary International Arbitration Survey: Improvements and Innovations in International Arbitration, 2015, p. 32 retrieved from: http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf.
21. *Id.*
22. R. Alves, "Fast-Track Arbitration: Back to Basics," in C. Gonwalez-Bueno (ed.), *40 under 40 International Arbitration*, 2018, Dykinson, S.L., 2018, p. 186.

Kissing Awake a Sleeping Beauty: The UNIDROIT Principles of International Commercial Contracts 2016

By Roger E. Barton and Eckart J. Brödermann

A Sleeping Beauty: The Power of the UNIDROIT Principles 2016

The UNIDROIT Principles of International Commercial Contracts 2016 ("UNIDROIT Principles") provide a useful tool for international contracting. They are especially helpful when (i) it is impossible to impose the law of one's home jurisdiction, and (ii) a neutral contract regime is needed. Trying to navigate a foreign state law with dozens of unknown rules can feel like a leap in the dark. The UNIDROIT Principles serve to mitigate this uncertainty and risk that threaten international commercial contracts.

The UNIDROIT Principles comprise 211 rules. In ordinary circumstances, who has the time, budget, and energy to check all those helpful and potentially relevant background issues prior to the choice of a neutral state law? Furthermore, state law is designed primarily for a domestic environment with a national focus,[1] while the UNIDROIT Principles have been specifically developed, over a time span of approximately 30 years, for international contracts.

At the May 2019 Primerus association of law firms international conference, a general counsel of a large U.S. international client with automotive business in multiple jurisdictions expressed it best when he stated that he prefers to compromise on the law of Delaware or the law of New York; however, if this is not possible, then the UNIDROIT Principles 2016 are the better choice as compared to an entirely foreign law such as Mexican or German law. Or, one might add, English law which, distinctly from U.S. law, ignores a general principle of good faith.[2] The UNIDROIT Principles provide the perfect alternative plan, although they can sometimes even be the first choice. For example, one of the co-authors of this article uses them, in combination with an arbitration clause, to avoid the application of German law of standard terms.[3]

Developed by the International Institute for the Unification of Private Law ("UNIDROIT"), the UNIDROIT Principles were first released in 1994 and developed further, by adding additional topics, to become in the end the UNIDROIT Principles 2016 (published in 2017). Organized into 11 chapters, they provide in 211 rules an international restatement of general contract law[4] (a quasi-international UCC) and more. With regard to multiple issues, the UNIDROIT Principles contain compromises, often negotiated over a period of several years between experts from all over the world and accepted by the Governing Council of UNIDROIT, which represents 63 member states. The United Nations Commission on International Trade Law (UNCITRAL) has recommended them twice for their intended use in 2007 and 2012.[5] This intended use includes, *inter alia*, (i) the use of the UNIDROIT Principles by legislators when reforming their national contract law[6] (examples include China, Russia, Germany, and France);[7] (ii) the use by parties choosing the applicable law to their contract[8] (best in combination with an arbitration clause[9]); or (iii) the choice of the UNIDROIT Principles 2016 to supplement the Convention on the International Sale of Goods (CISG).[10] Compared to the CISG, the UNIDROIT Principles 2016 cover a much broader spectrum of issues, ranging from formation of contract to limitation periods, assignment of contracts, plurality *of obligors ad obligees*, and a set of default rules regarding multiple issues like place of performance, payment or imputation of payment. This includes many issues for which there is usually no time or budget to discuss during contract negotiations.

The UNIDROIT Principles 2016 have been developed with an international mindset. They include, for instance, rules on foreign currency-set-off (Article 8.2) or the impact of time zones on deadlines (Article 1.12).

In sum, the UNIDROIT Principles 2016 are powerful.

Roger E. Barton is founding partner of Barton LLP (New York) and a member of the Primerus UNIDROIT Principles Committee, established by the international association of Primerus law firms (www.primerus.com).

Eckhart J. Brödermann, a partner at Brödermann Jahn (Hamburg, German, www.german-law.com) and a professor of law at University of Hamburg, has been a member of the New York Bar since 1983. He is a Hamburg Bar Certified Specialist for International Business Law, a member of the Hamburg Bar (since 1990) and of FCIArb (London); a member of the Working Group of the International Bar Association on "UNIDROIT Principles in Practice" and a member of the Primerus UNIDROIT Principles Committee.

The UNIDROIT Principles 2016 are based on a limited number of underlying principles, including freedom of contract/party autonomy, bindingness of contracts (*pacta sunt servanda*), openness to usages, upholding the contract if possible (*favor contractus*), the observance of good faith and fair dealing and avoidance of 'unfairness' which shall guide the settlement of issues "within the scope of these Principles but not expressly settled by them" (Article 1.6 (2)).[11]

The freedom of contract principle in Article 1.1 and 1.5 recognizes the autonomy of the parties to vary the principles as long as this does not violate the principle of good faith and fair dealing (see Article 1.5 in fine). Therefore, bona fide parties are essentially free to regulate specifics in accordance with their habits and standard agreements, leaving the issues which they do not cover (e.g., the foreign currency set-off) to the robust system of default rules of the UNIDROIT Principles. Realistically, for most contracts, it is just unlikely that the involved parties will foresee all of the issues covered by the 211 principles.

The German co-author of this article has been working with the UNIDROIT Principles since 2001 on a regular basis, particularly in situations in which parties from different legal backgrounds—e.g., civil and common law—contract with each other. He first came across the UNIDROIT Principles when the Swiss chairman of an arbitration tribunal suggested them to resolve a battle between English and Swiss law over a contract with conflicting choice of law clauses in different parts of the complex document. He has since used them both for his own contracts and for contracts with clients from common and civil law jurisdictions in many industries (e.g., automotive, construction, cosmetics, health, satellite, and textile). He has used them for a variety of contracts, including cooperation agreements, construction contracts, contracts of sale, distribution contracts, frame agreements, letters of intent, purchase contracts and service contracts. He has used the principles for both small and large contracts, including multiple subcontracts for a project valuing over $1 billion (USD). In standard terms for clients, he tends to use the UNIDROIT Principles by offering (i) German law for German clients if the contract partner is German, and (ii) the UNIDROIT Principles for contract partners from outside Germany unless the contract partners wish to also contract under German law. This approach can easily be adapted to the law of any other jurisdiction, such as New York law. Yet, this kind of agile use of the UNIDROIT Principles for international contracting is still the exception. A recent survey submitted by the International Bar Association to UNIDROIT in September 2018[12] suggests that the UNIDROIT Principles are still not regularly chosen or even considered as the applicable regime even though (i) these principles are usable around the globe, and (ii) both arbitration awards and state court judgments from around the globe have used the UNIDROIT Principles, often even to supplement national laws when they are silent on issues arising in international trade.[13] The beauty of this powerful system of default rules is still sleeping.

Kissing the Beauty Awake

It is time to kiss the beauty awake. With the release of the UNIDROIT Principles 2016 the UNIDROIT Principles have reached a stage of completeness in which they provide often the best choice. They cover all areas of general contract law and thereby many more subjects compared to the initial release of the UNIDROIT Principles 1994 and the Convention on the International Sale of Goods.

Therefore, it is evident that in many international contract situations, not using the UNIDROIT principles requires a deliberate decision. For example, if a U.S.-based company contracts with a company from Spain for a project in Iceland (a scenario recently faced by one of the authors), it just makes sense to operate with truly neutral rules. The same applies if a US general counsel supervises the purchase of goods in Korea by a German, Austrian or English subsidiary, or if a New York client risks losing business by insisting on New York law while a Dutch employer, refusing to enter into the contract under New York law because of the unacceptable level of transaction costs,[14] offers to use the UNIDROIT Principles 2016.

It is submitted that contracting under the UNIDROIT Principles entails only a minimal risk, especially when combining this choice with an arbitration clause since most arbitration regimes will accept such choice of "rules of law" as the contractual regime. A New York lawyer active in international matters should know this. Compared to a leap in the dark of choosing any neutral state law (e.g., the law of Belgium, because it lies somewhere between the US and Germany), it is much more sensible to agree to the UNIDROIT Principles 2016 that have been developed by way of a negotiated international compromise, including input from common and civil law experts. As one commonwealth lawyer practicing in England put it recently:[15]

> Parties that are familiar with English law can construct their agreements in a manner consistent with English law understandings within the ambit of the UNIDROIT Principles. … In the authors' view, in practice, if parties carefully drew up their agreements with the level of specificity common in English law jurisdictions, there would be little scope for any unpredictable application of the good faith principle and little substantive difference whether the UNIDROIT Principles or English law is the governing law. In other words, the UNIDROIT Principles are entirely consistent with and can accommodate the operation of English contract law principles. …. The UNIDROIT

> Principles are a one-stop, streamlined and coherent body of international contract law. This is itself a major attraction of the UNIDROIT Principles, particularly for parties from legal systems unaccustomed to the precedent-based system of the common law. In addition to being a valuable comparative law resource, the Principles provide an effective option for parties seeking a neutral alternative to a national law.

The same is true from a New York perspective:[16]

> UNIDROIT and the U.S. Common Law are more often than not in harmony with one another. Accordingly, it behooves U.S. practitioners to study these principles and to consider drafting international contracts where UNIDROIT is the primary choice of law to govern the agreement.

It is time to wake up the beauty and to integrate its power into the daily international contracting business, at least in all those situations where New York law is not accepted by the contract partner.

Endnotes

1. Bonell, *The Law Governing International Commercial Contracts and the Actual Role of the UNIDROIT Principles*, Unif. L. Rev. 2018, 15, 16-17.
2. Rina See/ Dharshini Prasad, "The UNIDROIT Principles: A Contemporary English Law Perspective," *Hamburg Law Review* 2018/2 (in production), p. 83, 86 and 88-89 (referring, at p. 89, to Interfoto Picture Library Ltd v Stilletto Visual Programmes Ltd [1989] 1 Q.B. 433, 439).
3. Brödermann, *Hamburg Law Review* 2016, p. 21, 26-29.
4. *See generally*, M. Joachim Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts*, 3d ed. Ardsley/New York (2005); and recently, e.g., Bonell (note 1), Unif. L. Rev. 2018, 15, 20-24.
5. Ralf Michaels in: Stefan Vogenauer (ed.), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2nd ed. 2015, Preamble I no. 120 (with a full citation of the UN instrument in note 346).
6. *See* UNIDROIT Principles, Preamble, para. 7 and, e.g., Eckart Brödermann, *UNIDROIT Principles of International Commercial Contracts, An Article-by-Article Commentary*, 2018 (reviewed inter alia by Brenda Horrigan, NYSBA New York Dispute Resolution Lawyer 2018, p. 95; Klaus-Peter Berger, Arbitration International 2018, 469-471; Petra Buttler, (2018) 49 VUWLR 409-412), no. 13 at p. 18-19.
7. *See* previous note.
8. *See* UNIDROIT Principles, Preamble, para. 2 and, e.g., Brödermann, UNIDROIT Principles Commentary (note 8), Preamble no. 3, p. 13.
9. *See* previous note.
10. *See* UNIDROIT Principles, Preamble, para. 5 and, e.g., Brödermann, UNIDROIT Principles Commentary (note 6), Preamble no. 9, p. 16.
11. Bonell, An International Restatement (note 4, chapter 4, pp. 88-172; and e.g. Brödermann, UNIDROIT Principles Commentary (note 1), p. 3, Introduction no. 7.
12. Unpublished, foreseen to be published with Oxford University Press by the IBA Working Group UNIDROIT Principles in Practice (coordinator Willem Calkoen).
13. UNIDROIT Principles, Preamble para. 6; Bonell (note 1), Unif. L. Rev. 2018, 15, 35; Brödermann, UNIDROIT Principles Commentary (note 8), Introduction no. 4, p. 2.
14. Outside the USA, it is not that easy to research New York law without access to LexisNexis or WestLaw, and without any fluency in researching case law.
15. Rina See/ Dharshini Prasad, The UNIDROIT Principles: A Contemporary English Law Perspective, Hamburg Law Review 2018/2, p. 83, 86.
16. Roger Barton, The UNIDROIT Principles of International Commercial Contracts: A High-Level Analysis for the United States' Commercial Practitioner, Hamburg Law Review 2018/2 (in production), p. 77, 81.

A Matter of Interest: A Step-by-Step Methodology to Awarding Compensatory Interest in International Commercial Arbitration

By Robert Wachter and Tim Laske

Introduction

Congratulations! You have prevailed in your international commercial arbitration and won a compensatory damages award for your client. "What about interest on my award?" the client asks you. Faced with the challenges of first establishing liability and damages, interest is not often foremost on your mind; however, whether interest is available to your client, and whether it is calculated on a pre-award, post-award or other basis can be significant to the client, who is seeking just compensation for its financial losses. Importantly, your client may, in some instances, hope to pay your fee from a compensatory award of interest. While generally it is not your client's initial focus at the outset of the case, the arbitral tribunal's calculation of the interest award can ultimately affect how your client views its arbitration victory.[1]

Unfortunately, there are far too many instances of arbitral tribunals taking vastly different approaches on awarding compensatory interest that are, at times, unsupported by the contract's express or implied terms, or by the substantive law at issue. This can often cause consternation with a client expecting an outcome tethered to substantive and procedural laws. Revisiting well-settled international legal principles may be the best way to reorient your client, and a wayward tribunal, to the foundational elements of any interest award.

When a party wins in international arbitration, there are two generally accepted principles apropos of the award of compensatory interest. First, a party is liable to pay for damages caused by its wrongful acts. Second, in addition to the principal amount of the damages award, a party is entitled to pre-award interest on damages as compensation for its loss of use of money.[2] This article focuses on the second principle, perhaps the key to optimizing arbitral interest award outcomes for your client.[3] Specifically, this article discusses how tribunals, and attorneys, should take a step-by-step approach to thoughtfully consider awards of interest based on the source of a tribunal's authority to do so, the limits on that authority, the parties' intent, and the applicable substantive or procedural laws.[4]

1. The Basis of an Arbitral Tribunal's Power to Award Compensatory Interest

The first question to address is whether an arbitral tribunal has authority to award compensatory interest, and if so, the legal basis of that authority. Most arbitration statutes are silent on the power to award interest. The Federal Arbitration Act does not specifically address the issue. The UNCITRAL Model Law, which has been adopted in 80 States and 111 jurisdictions, is also silent on the issue.[5]

In common law jurisdictions, where the award of pre-award interest is typically regarded as a procedural matter, counsel and arbitrators often regard the power to award interest as a matter within the arbitral tribunal's discretion. However, in some legal systems, pre-award interest is regarded as a matter of substantive law, rather than procedural law. In those systems, an aggrieved party may be entitled to interest as a matter of right, at rates specified by statute, and the arbitral tribunal might fail to apply the substantive law properly if it treats the entitlement to interest, or the applicable interest rate, or whether to compound the interest, as discretionary matters. In other legal systems, pre-award interest may be forbidden as against public policy under substantive law. An arbitral tribunal has an obligation to apply the substantive law governing the merits of the parties' dispute. It is therefore essential that the tribunal understand how interest is regarded under the substantive law, before assuming that it has discretionary authority to award compensatory interest as a procedural matter.

Broadly speaking, international arbitral tribunals have largely adopted a consensus view that the tribunal has the power to award pre-award and post-award interest.

Robert Wachter (robert.wachter@leeko.com) is the co-head of International Arbitration and Cross-Border Litigation at Lee & Ko in Seoul, Korea.

Tim Laske (tim.laske@leeko.com) is a senior foreign attorney at Lee & Ko in Seoul, Korea and a certified judge pro tem for the Los Angeles Superior Court.

The views expressed in this article are that of the authors and do not represent the views of any institution with which the authors are affiliated.

However, no standardized view has emerged regarding the proper methodology to determine when to award interest, what rate to apply, what time periods, and whether interest should be simple or compounded. Although many elements of arbitral procedure have become more standardized over the last two decades, the practice of awarding compensatory interest has been "left behind in the march towards uniformity."[6] The result has been a variety of uneven approaches and inconsistent results. In many cases, counsel fail to adequately brief the issue of interest as damages (i.e., pre-award interest as compensation for loss of use of money) and interest on damages (i.e., post-award interest) in their submissions, focusing instead on liability and quantum issues. Interest awards therefore sometimes fail to properly compensate the prevailing party for its loss by ignoring the party's real injury (i.e., the inability to use a substantial sum of money, or other valuable asset, that could have been invested over time).

Reflecting on the actual source of a specific tribunal's authority, rather than presuming broad discretion, can lead to a better and more legally grounded result. A tribunal's authority to grant pre-award interest can derive from several potential sources:[7] (1) the parties' stated intent in their underlying contract, their arbitration agreement, or the arbitration rules they have adopted;[8] (2) the substantive law that the parties have agreed shall apply to the dispute, or which the tribunal has otherwise determined to apply;[9] or (3) the procedural law at the seat of arbitration, which might either expressly or impliedly recognize a tribunal's power to award interest.[10]

2. Did the Parties Agree on Compensatory Interest in the Contract?

The tribunal's starting point should be to determine whether the parties agreed in the contract that the tribunal has authority to award interest. If the parties have agreed on the entitlement to compensatory interest and the calculation methodology in their contract, the tribunal should award interest in accordance with the parties' agreement, provided that the clause is an enforceable provision under the applicable substantive law. For instance, a contract will often contain a "late payment" provision or other clause agreeing to a method to determine interest on overdue amounts.[11] Any clear expression of the parties' intent should be the starting point for the tribunal. This can greatly simplify the tribunal's task when the parties have confirmed the basis of any "right" to interest in their underlying agreement.[12] Therefore, if pre-award interest is claimed as of right under an express term of the contract, under statute or as damages of late payment, and that right is clear from the agreement of the parties, it should be affirmed and calculated in accordance with the parties' express intent.[13]

3. Is the Award of Compensatory Interest Governed by the Substantive Law?

Even if the parties have not addressed the right to interest in the contract, the substantive law might prescribe detailed provisions to guide the arbitral tribunal in calculating pre-award interest. In many civil law jurisdictions, for example, rules concerning interest are regarded as "substantive," i.e., a component of the award of damages.[14] Statutory provisions in many jurisdictions regulate the entitlement to interest, the applicable interest rate, and the periods for which a party may claim interest. As an arbitral tribunal has a duty to apply the applicable substantive law, the tribunal should therefore inquire whether the substantive law provides any guidance on the award of compensatory interest, or how to determine and calculate compensatory interest.

4. Does the Tribunal Have Discretionary Authority to Award Interest?

If the substantive law does not regulate the award of interest, the arbitral tribunal should consider whether it has discretionary authority to award compensatory interest as a matter of procedure. Under common law jurisdictions, such as the United States, the award of interest is often regarded as procedural. Although arbitration statutes typically do not specifically address a tribunal's procedural authority to award interest, it has become common practice for arbitral tribunals to claim the same authority to award interest as the courts at the seat of arbitration.[15] To the extent that these statutes afford courts a degree of discretion in awarding pre-award interest, it has become common for tribunals to claim the same discretion.

In some countries, the law of the arbitral seat may forbid an award of interest on public policy grounds, making the interest award vulnerable to set-aside.[16] In other instances, a tribunal's abuse of its authority to award interest, or serious irregularities in determining interest, might also be grounds for challenge. Some jurisdictions have adopted special legislation implementing interest rates that are not strictly compensatory. In Korea, for example, the National Assembly adopted the Act on Special Cases Concerning Expedition of Legal Proceedings that imposes a 12% rate of interest to incentivize parties to settle their litigation disputes. The special rate is twice as high as the ordinary 6% compensatory rate under the Korean Commercial Code. The higher rate has been applied in some arbitration awards, even though the policy rationale for the special legislation was not compensatory.

Ultimately, arbitral tribunals must consider if there are any rules mandating, or prohibiting, a specific method of calculating pre-award interest. To the extent that a tribunal determines that it has discretionary authority to award interest, and elects to exercise this discretion, the tribunal should remain mindful that the purpose of the interest award is to compensate the aggrieved party.[17]

The award should not be "penal" in nature or designed to deter others from paying later (i.e., the compensatory principle should apply).[18]

Conclusion: A Step-by-Step Methodology to Determine Awards of Compensatory Interest

In sum, the authors recommend the following step-by-step methodology for the award of compensatory interest in international commercial arbitrations:

First, the tribunal, and counsel, should identify the potential sources of a tribunal's authority to issue an interest award, including the underlying contract, the arbitration agreement, the applicable substantive law, and the procedural law of the arbitral seat.[19] At the same time, the tribunal should recognize any limits on the power to award interest under the applicable substantive law.

If the contract empowers the tribunal to award interest, the tribunal should award interest pursuant to the agreed contractual provision, unless this would contravene the applicable substantive law. If the contract does not address the issue, the tribunal should inquire whether the substantive law recognizes the entitlement to interest as a substantive right. If interest is a substantive right, the tribunal should grant an interest award in the manner contemplated by the applicable substantive law, recognizing that the substantive law might limit the scope of discretion and might specify the interest rate,[20] method of calculating interest,[21] and time periods.[22]

Only when the contract and the substantive law do not provide clear guidance should the tribunal consider whether the agreed arbitral rules or the procedural law of the seat give the tribunal discretionary authority to grant pre-award interest. In exercising such discretion, the tribunal should only award interest in an amount and at a rate that properly compensates the aggrieved party for its loss of funds. To the extent the substantive law or procedural rule allows for flexibility, the tribunal should consider whether the final result satisfies the compensatory purpose of an interest award.

Finally, arbitral tribunals should specify in the award whether interest stops accruing as of the date of the award, or whether interest continues to accrue until the date of full payment. Failure to specify post-award interest in the dispositive part of the award may lead to inconsistent results depending on the place of enforcement.

Endnotes

1. *See, e.g.*, *Compania del Desarrolo de Santa Elena v. Costa Rica*, ICSID Case No. ARB/96/1 (Feb. 17, 2000), https://www.italaw.com/sites/default/files/case-documents/italaw6340.pdf (accessed on June 4, 2019) (an arbitral tribunal awarded $4.15 million USD in damages and $11.85 million USD in interest); *see also* John Y. Gotanda & Thierry J. Senechal, *Interest as Damages*, 47 Columbia J. Transnat'l 491, 492 n.2 (2009), http://law.bepress.com/villanovalwps/art107 (accessed on June 4, 2019).
2. The Villanova University School of Law published a working paper on interest as damages that, in part, discussed the four different ways compensatory interest could be calculated to provide additional damages for loss of use of money and advocated for an opportunity cost approach (i.e., rate based on market realities that is compounded on a yearly basis). *See* Gotanda & Senechal, *supra* note 1, at 492, 521.
3. Recent commentary focuses on investment arbitration, including proposals for compound interest awards, proposals to apply rates other than fixed statutory rates, and criticisms of methodologies that undercompensate the prevailing party.
4. The International Commercial Disputes Committee (ICDC) of the New York City Bar Association addressed New York's Civil Practice Law and Rules regarding interest in a detailed report published in 2017 (the "ICDC Report"). *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, http://bit.ly/2tMcyPB (accessed on June 1, 2019). This article is not intended to comment on the report, but it will reference some of the ICDC Report's key discussion points.
5. *See* UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (accessed on June 7, 2019).
6. John Y. Gotanda, *Awarding Interest in International Arbitration*, 90 Am. J. Int'L 40, 40 (1996).
7. 2 Gary B. Born, International Commercial Arbitration 2505 (Kluwar Law International 2nd ed. 2014) (There are several possibilities for the law governing a party's right to interest: (a) the substantive law; (b) the law of the arbitral seat; or (c) international standard.); Chartered Institute of Arbitrators: International Arbitration Practice Guideline 2015/2016, Drafting Arbitral Awards Part II—Interest, at Article 1 (2018) (the "CIArb Practice Guideline"), http://ciarb.org/media/4208/guideline-11-drafting-arbitral-awards-part-ii-interest-2016.pdf (accessed on June 7, 2019); CIArb Practice Guideline 13: Guidelines for Arbitrators on how to approach the making of awards on interest, at 3.1 (2014) (the "CIArb Practice Guideline 13").
8. The ICDC Report emphasized that interest should follow the parties' intent based on the principle that the parties have the freedom to agree to any arbitration terms in the contract. *See* ICDC Report, supra note 4, at 3-4.
9. Pre-award interest is potentially awardable on a variety of legal grounds—applicable substantive law or statutory provisions of national law of the arbitration seat. *See* Born, *supra* note 7 at 2503. Many arbitrators generally look to the substantive law for standards regarding interest. *See* Born, *supra* note 7 at 2505.
10. The institutional rules, however, do not ordinarily address the subject of interest. It is often found that the arbitral tribunal's authority is governed by the law of the arbitral seat. *See* Born, *supra* note 7, at 2504.
11. *Continental Casualty Co v. Argentine Republic*, ICSID Case No. ARB/03/9, at 134-137 (Sep. 5, 2008), https://www.italaw.com/documents/ContinentalCasualtyAward.pdf (accessed on June 7, 2019).
12. *See* ICDC Report, *supra* note 4, at 7-9.

13. *See* CIArb Practice Guideline, *supra* note 7, at Article 1; CIArb Practice Guideline 13, *supra* note 7, at 3.3.

14. *See* Born, *supra* note 7, at 2505.

15. *Id.*

16. There are rare cases where the arbitral seat's laws may contain mandatory prohibitions against interest awards, like in some Middle Eastern states. *See* Born, *supra* note 7, at 2504. By contrast, some countries set a maximum interest rate; for example, Article 2 of the Korean Interest Limitation Act establishes that interest shall not exceed 25% per annum. *See* Act No. 12227, Jan. 14, 2014.

17. The guidance to this general principle can be found in *Kuwait Airway Corp v Kuwait Insurance*, [2000] QB 1735 (Eng.). *See* CIArb Practice Guideline, *supra* note 6, at Article 1.4; CIArb Practice Guideline 13, *supra* note 7, at 4.2.

18. *See* Born, *supra* note 7, at 2508 (citing *Laminoirs-Trefileries-Cableries de Lens, SA v. Southwire Co.*, 484 F. Supp. 1063 (N.D. Ga. 1980) (vacating an award of "penal" interest)); CIArb Practice Guideline, *supra* note 7, at Article 1.5; CIArb Practice Guideline 13, *supra* note 6, at 3.4.

19. *See* ICDC Report, *supra* note 4, at 6.

20. The ICDC Report discusses how New York's statutory interest rate of 9% in breach of contract cases compares to other statutory rates in other jurisdictions, and how the statutory rate does not apply to international arbitration. *See* ICDC Report, *supra* note 4, at 12 fn. 4, 15-22; *see also* CIArb Practice Guideline, supra note 7, at Article 3.

21. *See* CIArb Practice Guideline, *supra* note 7, at Article 4; CIArb Practice Guideline 13, *supra* note 7, at 10.1 and 10.2. In general, simple interest (rather than compound interest) is awarded by arbitral tribunals. *See* Born, *supra* note 7, at 2507. However, some recent commentaries on finance highlight that compound interest is the international standard applied in most time value applications. *See* Gotanda & Senechal, *supra* note 1, at 509. Additionally, the ICDC Report discusses how countries, like England, have discretion to calculate interest, and how economists disagree on simple versus compound interest calculations. *See* ICDC Report, *supra* note 4, at 34-35, 38.

22. See CIArb Practice Guideline for a detailed discussion regarding the periods of pre-award interest (Section 5) and post-award interest (Section 12). *See* CIArb Practice Guideline, *supra* note 7, at Article 2.2; CIArb Practice Guideline 13, *supra* note 6, at 5.1 to 5.2, 12.1 to 12.7. Additionally, the ICDC Report further discusses pre-award and post-award interest. *See* ICDC Report, *supra* note 4, at 5, 40, 41.

Arbitration Costs: Myths and Realities in Investment Treaty Arbitration

Published by Oxford University Press (2019)

By Susan D. Franck

Reviewed by Eckhard R. Hellbeck

Do parties get what they pay for? This is a question many parties ask themselves—and their lawyers—when embarking upon an investment treaty arbitration. Indeed, as Susan Franck points out, expected costs inform parties' dispute resolution choices.[1] A widely held belief exists that arbitration generally should be swifter and cheaper than court litigation. In a recent survey of stakeholders, respondents overwhelmingly indicated that international arbitration was their "preferred method of dispute resolution," but saw costs "as arbitration's worst feature."[2] This illustrates the need for an analysis of arbitration costs using empirical data in order to test these beliefs and perceptions based on scientific evidence. Susan Franck's new book does that and a lot more.

While other studies of arbitration costs have been conducted, this is the first truly scientific analysis of costs in investment treaty arbitration, relying on statistical methodology, including adjustment for inflation and a systematic breakdown of costs components. Recognizing the human factor in dispute resolution, Susan Franck draws not only on hard data but also on insights from cognitive psychology to provide a highly nuanced analysis of cost outcomes as well as suggestions for the future. While the book, spanning approximately 400 pages, brims with statistics and related acronyms, it explains the concepts in plain English, and is well-written and engaging. At the same time, it is an invaluable reference tool that everyone engaged in the study and practice of investment treaty arbitration should have at hand.

As its title indicates, the book focuses in investment treaty arbitration, and thus does not address international commercial arbitration. This makes sense for various reasons. One of them is that the types of disputes that fall within the limited scope of investment treaty arbitration often are so complex that their resolution is neither swift nor cheap. Investment treaties provide substantive and procedural protections to foreign investors and their investments against political risk—not commercial risk. The purpose of treaty-based investment arbitration is to provide a neutral forum for resolution of investment disputes, and to avoid having such disputes decided by the domestic courts of the host state whose very measures are at issue. Establishing jurisdiction in the courts of any other state is difficult, if not impossible, and may be expensive and time-consuming. The 32-year litigation in the U.S. federal courts, including seven appeals, in *McKesson v. Iran* illustrates this point. Following the 1979 revolution in Iran, its government expropriated the interest held by McKesson Corporation ("McKesson") in an Iranian dairy company. McKesson commenced proceedings in the U.S. District Court for the District of Columbia in 1982, claiming compensation for expropriation under the U.S.-Iran Treaty of Amity of 1955. While the Treaty of Amity provides for certain substantive investment protections, including for expropriation, it does not provide for arbitration of investor-state disputes. Ultimately, McKesson was awarded $29.3 million in compensation for expropriation and $29,516 in attorney's fees.[3] McKesson's claim for attorney's fees had amounted to over $13.4 million.[4]

"While other studies of arbitration costs have been conducted, this is the first truly scientific analysis of costs in investment treaty arbitration, relying on statistical methodology . . ."

For investment treaty arbitration, Susan Franck's analysis establishes inflation-adjusted average party legal costs of approximately $5 million for claimants and $4.1 million for state respondents.[5] Of note, when adjusted for inflation, the data does not support the (mis)perception that party legal costs have significantly increased over the years.[6]

Eckhard R. Hellbeck (ehellbeck@whitecase.com) is counsel in the Washington, D.C. office of White & Case LLP. His practice focuses on investor-state arbitration and other international dispute resolution methods under international law.

The views expressed here are the author's alone and should not be attributed to White & Case LLP or any of its clients.

Another interesting finding is that tribunals were more likely to award costs to prevailing claimant investors than to prevailing respondent states.[7]

Susan Franck further identified the following three "significant cost predictors" in investment treaty arbitration:

Energy Disputes: Disputes in the energy sector tend to involve larger claims than disputes in other sectors. They also tend to involve higher party legal costs for respondent states, but not for claimant investors.[8]

Separate Opinions: In cases where an arbitrator issued a separate opinion, either dissenting from or concurring with the majority, the respondent state's party legal costs tended to be higher, but this was not true for the claimant investor's costs.[9] The reasons for this phenomenon are not quite clear, as an arbitrator's preparation of a separate opinion does not by itself affect the parties' legal fees.[10]

Repeat Player Counsel: Only on the claimant investor's side, the data reveals a link between greater counsel experience and higher party legal costs, even accounting for the length of cases.[11] Combined with the separate finding mentioned above of a link between success and party legal costs on the claimant investor's side, this leads to the conclusion that for claimant investors it pays to engage experienced counsel.[12]

To some extent, thus, the data appears to validate the notion that parties get what they pay for. These are but very limited remarks about a book that contains an enormous amount of granular analysis. Printed and online appendices further enhance the book's value by allowing the reader to embark on his or her own research based on the assembled data and with the benefit of having learned to use the proper methodology.This is a valuable addition to the field.

Endnotes

1. Susan D. Franck, Arbitration Costs: Myths and Realities in Investment Treaty Arbitration 182 (2019).
2. Queen Mary University of London, School of International Arbitration & White & Case, 2018 International Arbitration Survey: The Evolution of International Arbitration 5 (2018), https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-19.pdf.
3. *McKesson Corp. v. Islamic Republic of Iran*, 753 F.3d 239, 240 (D.C. Cir. 2014), rehearing denied, 2014 U.S. App. LEXIS 13796 (D.C. Cir., July 18, 2014), rehearing *en banc* denied, 2014 U.S. App. LEXIS 13798 (D.C. Cir., July 18, 2014).
4. *Id*.
5. Susan D. Franck, Arbitration Costs: Myths and Realities in Investment Treaty Arbitration 203-204 (2019).
6. *Id*. at 205-206, 209.
7. *Id*. at 218-219.
8. *Id*. at 279.
9. *Id*. at 281-284.
10. *Id*. at 281.
11. *Id*. at 285-286.
12. *Id*. at 288.

Arbitrating Commercial Disputes in the United States

(Practising Law Institute, 2018)
Edited by David Singer
Reviewed by Deborah Masucci

David Singer has brought together contributors to compile this treatise on arbitrating domestic United States commercial disputes. He brought together practitioners who have a lifetime experience in domestic and international commercial arbitration to share their knowledge for the benefit of the newly initiated. The treatise follows the life cycle of a dispute from considering why to use arbitration, what to consider at each step of the arbitration process, and handling of the award. Who better to lead the project than David Singer, who recently stepped down as a litigation and trial partner at the law firm of Dorsey & Whitney LLP to establish his independent neutral practice?

Singer sets up the treatise with a chapter defining arbitration, its benefits, and the differences between arbitration and litigation. He then describes the historical underpinnings and use of the process from ancient times to the strong support by the British legal system leading to the evolution in U.S. judicial attitudes from opposition to support. Interestingly, he reminds the reader that New York State played an important role in the acceptance of commercial arbitration with the enactment of the first modern arbitration law in 1920. Later in that decade, the Federal Arbitration Act was adopted, establishing the foundation for the enforceability of arbitration agreements. With the adoption of statutory frameworks court attitudes toward arbitration changed from rival to supporter. He recognizes that critics of arbitration now challenge its use in employment, consumer and healthcare areas.

The next chapters in the book explain the statutory framework for arbitration and the interplay between federal and state statutes. These chapters reference U.S. Supreme Court decisions that have shaped views about arbitration and the importance of the parties' preferences as set out in the arbitration agreement. While arbitrability is a threshold decision for the courts, the parties may in their arbitration agreement delegate these decisions to the arbitrator. The concepts described in these chapters are complicated, but the explanation and descriptions written by the contributors boil down the concepts into easily understood explanations.

Lately, a debate has arisen about the meaning of privacy and confidentiality of arbitration. As the contributor explains, privacy has long been viewed as one of the most important parts of arbitration. In the context of business-to-business disputes, privacy and confidentiality are desired to protect the brand and corporate secrets that impact business. The chapter explains the difference between privacy and confidentiality and how a practitioner can maximize the benefits of both.

"Those of us who have been involved in arbitration for decades have observed the breakdown of the discovery process. A process that was intended to be simple and less costly than litigation is now being burdened by techniques and processes borrowed from the courts."

The next eight chapters cover the nuts and bolts of the arbitration process. What rules apply, how do the parties select arbitrators and what are the most important characteristics that should be considered are described. The operation of the American Arbitration Association, JAMS and CPR-administered rules are outlined. The section gives a nod to the role and need for diverse arbitration panels. Selection of diverse arbitrators is an important factor in improving panel judgment and recognizing that arbitration is a private substitute for a public function. The chapters on the preliminary conference and discovery provide practical checklists for approaching each stage. Those of us who have been involved in arbitration for decades have observed the breakdown of the discovery process. A process that was intended to be simple and less costly than litigation is now being burdened by techniques and processes borrowed from the courts. The chapters again explain how you can secure the necessary documentation to aid in an arbitration but manage the cost and efficiency of securing that information. Motion practice is another area that has evolved. Historically this technique was actively discouraged. Today, it is seen as a method to manage the process and ensure that non-meritorious claims are disposed of early, thereby preserving party resources. In 2010, the New York State Bar Association issued guidelines for arbitrators on the conduct of

Deborah Masucci is Immediate Past Chair of the Dispute Resolution Section and chairman of the board of IMI. She is a full-time neutral practicing in the New York metropolitan area.

pre-hearing phase of the arbitration. While the guidelines were issued for international cases, they can be borrowed for domestic arbitration proceedings. Throughout the arbitration process there is a tension between too little and too much information. An arbitration hearing can become an information dump with repetitive irrelevant information forced on the arbitrators. The treatise includes suggestions on how to approach the process. Finally, the all-important award, its contents and issues involving enforcement are laid out.

There are a few other treatises that attempt to deliver the same information that is contained here. This book is easy to read and follow. The process is broken down effectively and references applicable provider rules, case law, and statutes. The information can serve as a starting point to determine how a lawyer can advise clients about the arbitration process. The treatise takes out the mystery but is even-handed about the pitfalls and benefits, leaving the reader to make decisions based on the case at hand.

I recommend the book for law students engaged in an advocacy clinic or the practitioner who is considering arbitration for the first time. Arbitrators would also find the book helpful as they grapple with difficult issues in the course of a proceeding.

Case Summaries

By Al Feliu

Supreme Court Rules Ambiguous Contractual Terms Insufficient Basis for Class Arbitration

The Supreme Court in *Stolt-Nielsen* ruled that agreements that were silent regarding class arbitration would not support compelling such arbitration. The Court now extends that ruling by holding that the FAA "requires more than ambiguity to ensure that the parties actually agreed to arbitrate on a classwide basis." Here, the employee signed an arbitration agreement that provided that "any and all disputes, claims or controversies arising out of or relating to . . . the employment relationship between the parties" was required to be arbitrated. The Ninth Circuit, applying California law, ruled that the agreement was ambiguous with respect to class arbitration and, applying general contract principles holding that any ambiguity is to be read against the drafter, compelled class arbitration. By a 5-4 majority, the Supreme Court reversed. The Court reasoned that "[l]ike silence, ambiguity did not provide a sufficient basis to conclude that parties to an arbitration agreement" agreed to the benefits that come with bilateral arbitration such as expedition, simplicity, and cost savings. The majority emphasized that consent is essential in arbitration "because arbitrators wield only the authority they are given." Class arbitration, according to the majority, lacks the traditional benefits of bilateral arbitration and is likely to create a procedural morass and serious due process concerns. The majority compared the issue here to gateway questions where the Court has consistently held that such questions are presumed to be for the court rather than the arbitrator. Silence or ambiguous terms, the majority reasoned, are insufficient to overcome that presumption. The majority also observed that the otherwise neutral contract principle that ambiguity is to be construed against the drafter did not apply here because arbitration is a matter of consent and that this contract principle by its terms only applies when a court cannot discern the parties' intent. For this reason, the majority concluded that courts "may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis." *Lamps Plus, Inc. v. Varela*, 139 S.Ct. 1407 (U.S.).

Award Vacated on Manifest Disregard Grounds

The arbitration panel awarded damages and pre-award interest in this case. Following a motion to modify the award, the panel issued an amended award reducing the interest by over $2 million based on what it represented to be "a computational error when calculating interest [by] compounding interest . . . ." Upon review, the district court concluded that "the arbitration panel exceeded its powers when it modified the calculation made in the final award that did not contain any evident material miscalculation of figures to conform it to the calculation it 'intend[ed]' to perform that contained substantive changes in the calculation method." The court made clear that the panel's amendment of its final award was more than a modification based on a calculation error. Rather, the

> arbitration panel acknowledged the well-defined, explicit and clearly applicable law prohibiting the arbitration panel from exercising jurisdiction over an issue of law already determined in the final award and raised for the first time after the final award issued, but decided to ignore it and proceeded: (a) to discuss the merits of the substantive argument raised by the claimants; (b) rejected the claimants' legal argument; and (c) reverse its determination made in the final award by subtracting the distribution payments from the principal.

For these reasons, the court concluded that the arbitration panel acted in manifest disregard of the law. *Credit Agricole v. Black Diamond Capital*, No. 18-CV-7620, 2019 WL 1316012 (S.D.N.Y. March 22, 2019). *Cf. Arabian Motors Grp., W.L.L. v. Ford Motor Co.*, 775 Fed App'x 216 (6th Cir. 2019) (manifest disregard claim rejected when the legal issue decided "has not been clearly established by any existing legal principles" and the "arbitrator applied traditional tools of statutory interpretation without the aid of precedent that directly addressed the question"); *Bus. Credit & Capital II LLC v. Neuronexus, Inc.*, No. 1:18-CV-03374 (ALC), 2019 WL 1426609 (S.D.N.Y. Mar. 29, 2019) (manifest disregard challenge based on claim that arbitrator misapplied governing usery laws rejected where arbitrator cited "dozens of appropriate New York cases" supporting his decision).

Settlement Agreement in Mediation Enforced

The parties reached an agreement in a court-annexed mediation. The settlement terms were memorialized in a mediation agreement that listed in summary fashion nine terms and concluded by reciting that the parties have "reached a settlement, the terms of which appear above. A formal settlement agreement will be finalized by July 30, 2018." The parties never agreed on a formal settlement agreement because they could not agree on a cap for fees in the event of a litigation to enforce the parties' agreement. Defendant's motion to enforce the mediation agreement was granted. The court focused on the parties' intent in executing the mediation agreement. The court cited the parties' express acknowledgement that

they "reached a settlement" and informed the court that they had done so. "The text of the Mediation Agreement thus supports the conclusion that the parties understood it to state the material terms of a settlement to which all of them had agreed." The court added that the agreement was reached with counsel and in a court-annexed mediation with a court-appointed mediator. Finally, the court emphasized that "the Mediation Agreement contained no reservation of the right not to be bound in the absence of the contemplated formal settlement agreement, and this factor accordingly weighs in favor of enforcement. There has also been partial performance, at least to the extent that the parties began drafting a final agreement and allow the Court's ADR Administrator to report that the case has settled without correction or comment for nearly seven weeks thereafter." For these reasons, the court ruled that the mediation agreement constituted a binding settlement agreement.
Rivera v. The Crabby Shack, LLC, 17-CV-4738 (SMG) (E.D.N.Y. May 1, 2019).

Remand Ordered Where Arbitrator Failed to Issue Requisite Reasoned Award

The parties requested a reasoned award. Following a hearing, the arbitrator issued an award with reasoning but did not explain why the counterclaims were dismissed. The court, on a motion to vacate, concluded that the award "does not meet the standard for a reasoned award because it contains no rationale for rejecting" respondent's counterclaims. Rather, the court found that the arbitrator in a "conclusory" manner stated that the evidence did not support the counterclaims but did not provide any reason for this finding other than a negative credibility determination with respect to respondent's expert witness relating to damages"Although the arbitrator was not obligated to discuss each piece of evidence presented by [Defendant], he must at least provide some rationale for the rejection of [respondent's] overall argument" for liability. On this basis, the court concluded that the award was not reasoned. The court, however, rejected respondent's request that it vacate the award, a remedy the court concluded must be "strictly limited." Rather, the court determined that "the proper remedy is to remand to the arbitrator for clarification of his findings." The court added that, as the arbitrator exceeded his authority, the award could not be confirmed at this time.
Smarter Tools Inc. v. Chongqing SENCI Imp. & Exp. Trade Co., No. 18-CV-2714 (AJN), 2019 WL 1349527 (S.D.N.Y. Mar. 26, 2019).

Vacatur Based on Refusal to Hear Rebuttal Testimony Denied

An expert witness for claimant testified before a FINRA arbitration panel. Weeks after the expert's testimony was completed, respondent discovered that 30,000 pages of documents arguably contradicting the expert's testimony had not been produced. The panel granted claimant's motion to strike the expert's testimony in full, to draw an adverse inference against claimant, and ordered that respondent's fees for making the motion be paid by claimant. The panel also denied claimant's request to submit rebuttal testimony which was offered contrary to the panel's instructions and belatedly. Following an award in favor of respondent, claimant moved to vacate, arguing among other things that the refusal to hear rebuttal testimony prejudiced its case and the panel was guilty of misconduct in refusing to hear pertinent evidence. The court reviewed the parties' submissions to the panel with respect to this issue, as the panel offered no opinion with respect to its decision and concluded that the panel had "a reasonable basis to exclude the proposed rebuttal testimony." The court noted that the panel gave claimant a fair opportunity to present its case in chief (the hearing lasted 25 days) and accommodated claimant's "11th-hour request" to submit rebuttal testimony. The court also rejected claimant's argument that the panel arbitrarily applied evidentiary rules. The court explained that the panel's decision to apply the Federal Rules of Evidence occurred only after claimant's "attempt to essentially sandbag" respondent and the panel's warning, in its words, that the "full range of sanctions available to the panel may be imposed" for any "additional noncompliance" and in an effort to "stop trial by ambush." The court ruled that none of the panel's rulings rose to "the level of misconduct demonstrating that the procedure was fundamentally unfair, and therefore vacatur is not warranted."
CRT Capital Grp. LLC v. SLS Capital, S.A., No. 18-CV-3986 (VSB), 2019 WL 1437159 (S.D.N.Y. Mar. 31, 2019).

FINRA Arbitration Enjoined

When plaintiff joined MetLife's premium client division in 2002, MetLife was a NASD member and he registered with the NASD. MetLife terminated its NASD membership in 2007. Plaintiff was terminated in 2016 and filed an arbitration raising claims dating back to 2011. MetLife moved for and obtained a preliminary injunction barring plaintiff from pursuing his arbitration. The Second Circuit, in affirming the preliminary injunction, reasoned that the NASD and later the FINRA code could not "reasonably be interpreted to provide for arbitration of [the plaintiff's] claims" because the events at issue occurred years after MetLife terminated its NASD membership. The court found that plaintiff's interpretation that MetLife was still bound to arbitrate his claims would produce "untenable" and "absurd results" that could not have been intended by the parties.
Metropolitan Life Insurance v. Bucsek, *cert. denied*, 140 S. Ct. 256 (2019).

Auto Appraisal Process Constitutes Arbitration Under FAA

The FAA does not define arbitration. An insured disputed the amount that GEICO paid under an insurance policy, and the insured sued. GEICO sought to compel an appraisal as provided for under the applicable insurance policy. The trial court denied the motion, and the Second Circuit affirmed. But in doing so, the court analyzed whether an insurance appraisal process constitutes an "arbitration" under the FAA in determining whether it had appellate jurisdiction. The court made clear that the parties did not need to use the word "arbitration" for an arbitration under the FAA to exist. What is required, according to the court, is a clear manifestation of the parties' intent to submit a dispute to a specified third-party for a binding resolution. The court ruled that the appraisal process qualified as an arbitration under the FAA. "The appraisal provision identifies a category of disputes (disagreements between the parties over 'the amount of loss'), provides for submission of those disputes to specified third parties (namely, two appraisers and the jointly-selected umpire), and makes the resolution by those third parties of the dispute binding (by stating that '[a]n award in writing of any two will determine the amount of the loss')." These facts were sufficient, the court concluded, for the appraisal process to constitute an arbitration under the FAA.
*Milligan v. CCC Information Service*s, 920 F. 3d 146 (2d Cir. 2019).

Employee Bound to Arbitrate Claim Against Non-Signatory Employer

An offer of employment was made to Noye by Kelly Services for work with Johnson & Johnson. Noye signed an employment agreement with J&J's logo on it, and an arbitration agreement bearing Kelly's logo. In the documentation Kelly was identified as the "employer" and J&J the "customer." Kelly obtained a consumer report for Noye and J&J informed Kelly that it "would not be hiring him." Noye brought a class action under the Fair Credit Reporting Act against Kelly and J&J asserting some of the same claims against both. The district court compelled arbitration as to Kelly, but not J&J. On appeal, the Third Circuit vacated and ruled that Noye must arbitrate his claims against J&J as well. The Third Circuit, applying Pennsylvania's alternative equitable estoppel doctrine, noted that the claims raised by Noye against both J&J and Kelly were indistinguishable as they stemmed from the same incidents and invoke the same legal principles.The court pointed out that Noye's FCRA claim resulted from his employment relationship and the arbitration agreement contemplated the arbitration of employment disputes. Also, "Noye alleges concerted and interdependent misconduct by J&J and Kelly, collectively accusing them . . . of failing to provide Noye with proper background check information." For this reason, the court vacated the district court's order denying J&J's motion to compel.
Noye v. Johnson & Johnson Services,765 F. App'x 742 (3d Cir. 2019). *See also Fridman v. Uber Techs., Inc.*, No. 18-CV-02815-HSG, 2019 WL 1385887 (N.D. Cal. Mar. 27, 2019) for related class action filed by non-signatory who was not bound to arbitrate).

Notice of Collective Action Sent to Arbitration Eligible Employees

The court granted conditional certification of a wage and hour case involving the overtime eligibility of Facebook's Client Solutions Managers (CSMs). Over half and as much as 80% of the collective signed arbitration agreements and class action waivers. Facebook argued that notice should not be sent to the CSMs who signed arbitration agreements. The district court here acknowledged that courts were divided as to whether notice of a collective action should be sent to employees who signed arbitration agreements. The court concluded that notice should be sent to those arbitration-eligible employees. The court noted, however, that Facebook was not in a position to move to compel because the sole plaintiff here did not sign an arbitration agreement. In effect, the court reasoned, Facebook would be asking the court to issue an advisory opinion, which it could not and would not do.The court also pointed out that the question of whether arbitration agreements are enforceable is a merits-based decision that was not appropriately addressed at the conditional certification stage. Because two different arbitration agreements were at issue and state law contract principles govern contract formation, the court concluded that it would "determine whether to exclude CSMs who signed arbitration agreements at the conclusion of discovery, when it can properly analyze the validity of any arbitration agreements to which the opt-in plaintiffs may be a party."
Bigger v. Facebook, Inc., 375 F. Supp. 3d 1007 (N.D. Ill. 2019).

Al Feliu, of Feliu Neutral Services, is an arbitrator, mediator, and independent investigator based in New Rochelle, New York. Mr. Feliu is a recent past Chair of the New York State Bar Association's Labor and Employment Law Section and a Fellow of the College of Commercial Arbitrators and of the College of Labor and Employment Lawyers. Mr. Feliu's fourth book, *ADR in Employment Law*, was published by Bloomberg/BNA in 2015 with a supplement published in 2017. These case summaries were originally prepared for the Employment and Commercial Arbitration Panels of the American Arbitration Association.

Welcome New Dispute Resolution Section Members

The following members joined the Section between February 26, 2019 and December 3, 2019:

First District
Lisa S. Aldoroty
Ehsan A. Ali
Mary Elizabeth Bartkus
David L Bressman
Prof. Carol A Buckler
Kayla H. Canasi-Di Scala
Mariam Chubinidzhe
Valentina Coli
Andrew Scott Cota
Lisa M. Denig
S . Gale Dick
Vivian Dole
Justin Carl Donatello
Michael Einbinder
David A. Einhorn
Hon. Carol Feinman
Chris Jon Fladgate
Lourdes Gomez
Gabriella Romanos Abi Habib
Christina G. Hioureas
Hon. Barbara Jaffe
Jesse Wagner Klinger
Inkyung Lee
Justin Patrick Palmer Lee
Silvia Estefania Marroquin
Michael J. Riela
Kelly Ann Ringston
David Rosenberg
Evan Scott Rosenberg
Seyed Mohsen M. Rowhani
Zev N. Safran
Corey M. Shapiro
Edward Turan
Stephen P. Younger

Second District
Jamie Baum
Phil Carneval
Makaira Dorothy-Margaret Casey
Yifeng Chen
Octavia Ewart
Marlene A. Gold
Ekaterina Krasavina
Uriel Kucawca
Mandisa Nickerson
Ingrid Elise Scholze
Tyriek Warren
Daniel K. Wiig

Third District
Shari Gold
Petra H. Maxwell

Fourth District
Loretta Gecewicz LeBar
Gavin A. J. MacFadyen
Debra A. Whitson

Fifth District
Elletta Sangrey Callahan

Sixth District
Rahaf Alshneikat
Julie Paulino Montejo
Tanmayi Sharma

Seventh District
Richard J. Evans
James Hughes
Austin Mann
Emile D. Primeaux

Eighth District
Carly DiRisio Brown
Amine Hafayedh
Alex Jazembok
Zacana Mannins
William D. McGuire
Olivia T. Paulo-Lee
Haochen Sun
Hannah Weierheiser

Ninth District
Betsy G. Desoye
Donna Erez-Navot
Tara C. Fappiano
Marc S. Goldberg
Thomas E. Hommel
Ian M. Kirschner
Thomas J. McDonald
Stephen James Sugrue

Tenth District
Peter A. Bee
Shannon Boettjer
Regina E. Brandow
Anthony Phillip Decapua
Margaret A. Farrell
Lawrence R. Gaissert
Kenneth E. Gillespie
Richard J. Guercio
Carolyn Lander
Josephine M. Lupis
Matthew Asher Marcucci
Jillian Menna
Jacquelyn J. Moran
Matthew Paul Oppen
Alexandra C. Piscitello
Marissa Joy Pullano
Phedeline Tanis
James J. Wrynn

Eleventh District
Batool Taher Banker
Paul Guirguis
Shvonne Hasan
Tobin K. Kandathil
Ashok K. Karmaker
Harold B. Obstfeld
Lanz Romero
Hon. Elizabeth Yablon
Daniel Zolberg

Out of State
Caroline Alves Pires De Aguiar
Shiva Ameli
Morphy Andraws
Melis Asim
Kelly Ann Belnick
Jose Antonio Seechung Bernas
Irina Beschieriu
Paul Javalera Bongco
Alejandro Eduardo Chevalier
Christy Marie Chidiac
Stephanie S. Chow
John William ("Will") Cook
James R. Crane, III
Elizabeth Nan Crowe
Matthew Joseph D'Orsi
Michael Walker Deeds
Monica Effio Tapia
Maria Virginia Feliz Ball
Natalia Filandrianou
Steven Gerber
Shervica M. Gonzalez
Allan J. Goodman
Fred A. Greenberg
Krysta Hartley
Malfridier Helgadoltir
John Dennis Hendricks
Divij Kishore
Christina T. Le
Joanne Wai Teng Leong
Alexander Leventhal
Mo Li
Alexandre Emmanuel Mallet
Kimmo Juhani Mettala
Blanche Marie Isabelle Meynier
Luisa Mockler
Raven Moore
Soyun Oh
Jeremiah Nii-amaa Ollennu
Harry Patel
Shouryendu Ray
Nour Sabbah
Daniel Aaron Spector
Guanjun Sun
Gregory Francis Testa
Mitsukuni Tsunoda
Junchi Zhou

Section Committees and Chairs

The Dispute Resolution Section encourages members to participate in its programs and to contact the Section Officers or Committee Chairs for information.

ADR within Governmental Agencies
Cheryl R. Howard
CUNY School of Law
2 Court Square
Long Island City
New York, NY 11101
howard@law.cuny.edu

Arbitration Moot
Ross J. Kartez
Ruskin Moscou Faltischek PC
1425 RXR Plaza
East Tower, 15th Floor
Uniondale, NY 11556
rkartez@rmfpc.com

John Wilkinson
Fulton, Rowe & Hart
One Rockefeller Plaza
Suite 301
New York, NY 10020
johnhwilkinson@msn.com

CLE and Programming
Joan D. Hogarth
The Law Office of Joan D Hogarth
43 West 43rd Street
New York, NY 10036
jnnhogarth@aol.com

Jacqueline Nolan-Hanley
Fordham Univ. School of Law
140 West 62nd Street
Lincoln Center
New York, NY 10023
jnolanhanley@law.fordham.edu

Diversity
Noah J. Hanft
AcumenADR LLC
16 Madison Square West
Suite 1200
New York, NY 10010
nhanft@acumenadr.com

M. Salman Ravala
Criscione Ravala, LLP
250 Park Avenue
7th Floor
New York, NY 10177
sravala@lawcrt.com

Iyana Y. Titus
Assistant Commissioner, EEO
NYC Parks & Recreation
1234 5th Avenue
New York, NY 10029
iyana.titus@parks.nyc.gov

Domestic Arbitration
Mansi Karol
American Arbitration Association
150 East 42nd St
17th Floor
New York, NY 10017
KarolM@adr.org

Dani Schwartz
Wachtel Missry LLP
885 Second Avenue
47th Floor
New York, NY 10017
DSchwartz@wmllp.com

Education
Jacqueline Nolan-Haley
Fordham Univ. School of Law
140 West 62nd Street
Lincoln Center
New York, NY 10023-7407
jnolanhaley@law.fordham.edu

Ethical Issues and Ethical Standards
Steven Carl Bennett
Scarola Zubatov Schaffzin
1700 Broadway
41st Floor
New York, NY 10019
scb@szslaw@com

Arthur Rene Hollyer
A. Rene Hollyer, Esq.
185 Broad St.
Bloomfield, NJ 07003
arh-esq@hollyerlaw.com

Health Care
Andrew T. Garbarino
Ruskin Moscou Faltischek PC
1425 RXR Plaza
15th Floor East
Uniondale, NY 11556
agarbarino@rmfpc.com

Joan D. Hogarth
The Law Office of Joan D. Hogarth
43 West 43rd Street
New York, NY 10036
jnnhogarth@aol.com

International Dispute Resolution
Rekha Rangachari
New York International Arbitration Center
150 E. 42nd Street
Floor 17
New York, NY 10017
rrangachari@nyiac.org

M. Salman Ravala
Criscione Ravala, LLP
250 Park Avenue
7th Floor
New York, NY 10177
sravala@lawcrt.com

Legislation
Hon. Ariel E. Belen
JAMS
34th Floor
620 8th Avenue
New York, NY 10018-1664
abelen@jamsadr.com

Mark J. Bunim
Case Closure
155 East 44th St.
5th floor
10 Grand Central
New York, NY 10017
bunim@caseclosure.com

Mediation
Leslie Berkoff
Moritt Hock & Hamroff LLP
400 Garden City Plaza
Garden City, NY 11530
lberkoff@moritthock.com

Adam James Halper
33 Columbia Avenue
Hastings on Hudson, NY 10706
adam@newyorkadr.com

Membership
Marcia L. Adelson
61 High Street
Tarrytown, NY 10591
marcia@marciadelsonlaw.com

Mary K. Austin
730 Columbus Ave.
Apt. 6H
New York, NY 10025
mkaustin221@gmail.com

Negotiations
Richard I. Janvey
Diamond McCarthy LLP
295 Madison Avenue
27th Floor
New York, NY 10017
rjanvey@diamondmccarthy.com.

Diane Rosen
Ortoli Rosenstadt LLP
366 Madison Ave.
3rd floor
New York, NY 10017
dr@orlip.legal

Norman Solovay
The Solovay Practice
260 Madison Avenue
15th Floor
New York, NY 10016
nsolovay@solovaypractice.com

New Lawyers and Law Students
Alexander Paul Bachuwa
2 Park Avenue
20th Floor
New York, NY 10016
alex@nomadresolutions.com

Evan Scott Rosenberg
111 John Street
Floor 22
New York, NY 10038
evan.rosenberg@nyedlaw.com

Nominating
Simeon H. Baum
Resolve Mediation Services Inc.
1211 Avenue of the Americas
40th Floor
New York, NY 10036
simeonhb@disputeresolve.com

Stephen A. Hochman
599 Lexington Avenue
Suite 1202
New York, NY 10022
shochman@prodigy.net

Publications
Sherman W. Kahn
Mauriel Kapouytian Woods LLP
15 W. 26th Street, 7th Floor
New York, NY 10010-1033
skahn@mkwllp.com

Laura A. Kaster
Laura A Kaster LLC
84 Heather Lane
Princeton, NJ 08540
laura.kaster@gmail.com

Edna Sussman
SussmanADR LLC
20 Oak Lane
Scarsdale, NY 10583
esussman@sussmanadr.com

Public Relations
Alexander Paul Bachuwa
2 Park Avenue, 20th Floor
New York, NY 10016
alex@nomadresolutions.com

Jeffrey T. Zaino
American Arbitration Association
150 East 42nd St. 17th Floor
New York, NY 10017
zainoj@adr.org

Wills, Trusts, Estates, Guardianship & Elderly
Leona Beane
Mediator, Arbitrator, Trusts, Estates, Guardianship Attorney
233 Broadway
Suite 2340
New York, NY 10279
lbeanelaw@gmail.com

Writing Competition
John Wilkinson
Fulton, Rowe & Hart
One Rockefeller Plaza
Suite 301
New York, NY 10020
johnhwilkinson@msn.com

Accommodations for Persons with Disabilities:
NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact the Bar Center at 518-463-3200.

The *New York Dispute Resolution Lawyer* is distributed to members of the New York State Bar Association's Dispute Resolution Section without charge. The views expressed in articles in this publication represent only the author's viewpoint and not necessarily the views of the Association, the Section or its Officers.

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

NEW YORK STATE BAR ASSOCIATION

American College of Civil Trial Mediators®

Alternative Dispute Resolution Law Student Writing Competition National Championship

$10,000 PRIZE

Sponsored by the Dispute Resolution Section of the New York State Bar Association (NYSBA) and the American College of Civil Trial Mediators (ACCTM).

"It's an incredible feeling to be recognized for all of the hard work and time put into my article. Throughout the entire process, I learned so much about dispute resolution and myself, including my desire to become a mediator one day. What an incredible opportunity!"

— Marsha Levinson, Santa Clara Law School

2019 National Champion

"I hope this competition encourages other law students to pursue research and writing in the field of ADR, an area of law that is ever-evolving, and can certainly benefit from new ideas."

— Rachel Schwartzman, Cardozo Law School

2019 Award for Best NY Paper

The purpose of this competition is to heighten interest in, and competence related to, student writing on the subject of Alternate Dispute Resolution. Aside from the $10,000 cash grand prize, and $1,000 prize for best NY paper, winning entries may be published in NYSBA's New York Dispute Resolution Lawyer publication and/or the American Journal of Mediation. Papers initially prepared for class, journals, etc. are eligible for submission.

Details: There aren't strict page count guidelines, however 15-30 pages, double-spaced is recommended.

Email papers to:
nysbaacctmjournalcontest@gmail.com
(any questions and inquiries can be sent here as well.)

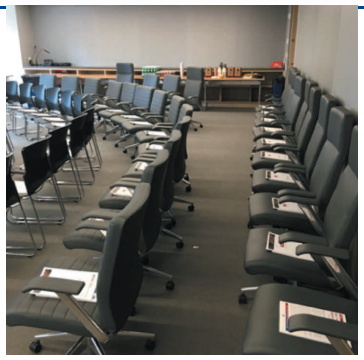
Submission Deadline:
June 1, 2020

NEW YORK STATE BAR ASSOCIATION
DISPUTE RESOLUTION SECTION
One Elk Street, Albany, New York 12207-1002

NYIAC | New York International Arbitration Center

Back Reception

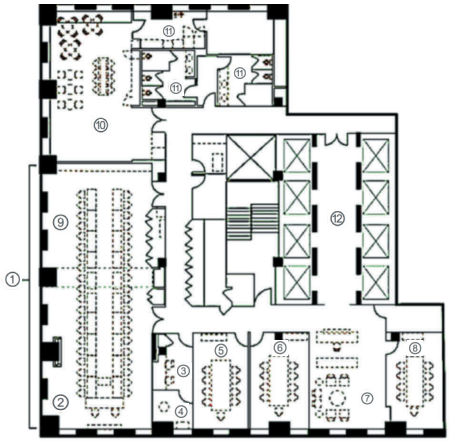

Bryant Park hearing room


Riverside Park event room


The High Line breakout / meeting

Room	Function	Size	Price (daily)
Central Park	Hearing	1590 sq. ft. / 148 m2	$3,200
Bryant Park	Hearing	920sq.ft. / 85m2	$2,250
Riverside Park	Hearing	670sq.ft. / 62m2	$2,150
Union Square	Breakout / meeting	305sq.ft. / 28m2	$750
The High Line	Breakout / meeting	310sq.ft. / 29m2	$750

① Central Park
② Bryant Park
③ Interpretation Booth
④ Private Office
⑤ Union Square
⑥ The High Line
⑦ Reception Lounge
⑧ Washington Square
⑨ Riverside Park
⑩ Cafeteria
⑪ WC
⑫ Elevators



Take a video tour of NYIAC's hearing center at www.nyiac.org.

Ideal Location

NYIAC is centrally located in Midtown Manhattan, steps from Grand Central Station, the Chrysler Building, the United Nations, Bryant Park, and Fifth Avenue. We are also surrounded by several luxury hotels and restaurants.

Modern, Specialized, All-Inclusive Facilities

Our hearing rooms now feature HDMI personal monitors, a large LCD monitor and projection screen, advanced wireless microphones, clear audio/video conferencing, and ample shelving included in the rates. Wifi is available throughout the facility, from which clients can *wirelessly* share and view content. We also offer a translation booth and business center for your print and copy needs.

Personalized Service

At NYIAC, every detail matters. We do all we can to anticipate and address our clients' needs. Enjoy a complimentary selection of coffee, tea, and cold beverages in our café, light snacks in our rooms, and access to high quality catering services.